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'Hard power 'and the European Convention on Human Rights

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8 Attribution

8.1 Introduction

The questions of jurisdiction and attribution are not always distinct – especially in the type of situation covered by this study.

Nowhere in the Court’s case-law has the distinction been better explained than by Judges Spielmann and Raimondi in their joint concurring opinion in *Jaloud*:

3. The concept of “attribution” is indeed to be distinguished from that of “jurisdiction” as the latter has been interpreted in the Court’s case-law (see, recently, *Hassan v. the United Kingdom* [GC], no. 29750/09, § 74, 16 September 2014, which essentially reproduces the explanations in the *Al-Skeini* judgment (*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 130-141, ECHR 2011). The concept of ‘jurisdiction’ essentially refers to the territorial principle, State agent authority and control, effective control over an area and the Convention legal space.

4. In contrast, the concept of “attribution” essentially concerns the sensitive issue of the “imputability” of internationally wrongful acts. Salmon’s Dictionary has the following entry for the term “attribution”:

“With regard to international-law responsibility, the fact of ascribing to a subject of international law the acts or omissions of individuals or bodies under its effective authority or acting on its behalf”. [Translation]
(*Dictionnaire de droit international public*, edited by Jean Salmon, Preface by Gilbert Guillaume, Brussels, Bruylant, 2001).⁸⁹⁵

8.2 ‘Jurisdiction’ and ‘attribution’ in the logic of the Court

8.2.1 *Relationship to the general law on State responsibility for internationally wrongful acts*

As the Court stated in *Catan* and reiterated in *Jaloud* and *Mozes*, ‘the test for establishing the existence of “jurisdiction” under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law’.⁸⁹⁶

A set of Articles on State Responsibility for Internationally Wrongful Acts were drawn up by the International Law Commission over many years as a codification of existing general international law on the subject of State responsibility and endorsed

⁸⁹⁵ *Jaloud*, joint concurring opinions of Judges Spielmann and Raimondi.

⁸⁹⁶ *Catan*, § 115; *Jaloud*, § 154; *Mozes*, § 102.

as such by the United Nations General Assembly in 2001.⁸⁹⁷ It has since then acquired increasing authority as an expression of customary international law on the subject.⁸⁹⁸

The first and second of these Articles read as follows:

Article 1

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

The logic followed by the Commission and Court, which predates the General Assembly's endorsement of the ILC's Articles, is significantly different.

Article 1 of the ILC's Articles does not identify the state or states, or the other international legal persons, to which international responsibility is owed, but it is clear from the international legal context (and indeed, on a systematic reading, from the Articles as a whole) that these 'persons' must be invested with international legal personality; they accordingly do not include individual human beings or non-governmental organisations.⁸⁹⁹ Consequently, obligations to make reparation for a breach of an obligation may be owed to 'another State, to several States, or to the international community as a whole.'⁹⁰⁰

In contrast, Article 1 of the Convention makes it clear that the obligation to secure the rights and freedoms defined in Section 1 of the Convention and corresponding parts of the Protocols are owed by States to 'everyone within their jurisdiction'. That begs the question who is 'within their jurisdiction'. It is therefore a reasonable corollary that the question whether 'jurisdiction' within the meaning of Article 1 of the Convention exists comes before any question of imputability or attribution.

8.2.2 *The concepts of 'jurisdiction' and 'attribution' in the case-law of the Court*

Thus, in its admissibility decision in *Chrysostomos, Papachrysostomou and Loizidou* the Commission established that the matters complained of came within the jurisdic-

897 A/Res/56/83. The Articles themselves are appended to that Resolution and quoted in Crawford (2013), pp. 712-723.

898 Crawford (2012), p. 540.

899 Crawford (2013), p. 49.

900 Article 33 § 1 of the Articles on State Responsibility for Internationally Wrongful Acts. Part Two of these Articles, which deals with the "content of the international responsibility of a State", is "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State" (see Article 33 § 2 of these Articles).

tion of Turkey.⁹⁰¹ In its report⁹⁰² in *Chrysostomos and Papachrysostomou*, adopted after Mrs Loizidou's case had been disjoined from the other two, the Commission considered the issue of attribution – or to use its expression, 'imputability' – separately in the following terms:

100. The Commission notes in this connection that Turkish armed forces are normally stationed in uninhabited border areas. It appears that, in the inhabited area of Nicosia close to the site of the demonstration, Turkish Cypriot soldiers were on guard on 19 July 1989. Turkish armed forces, if not present in that area, were elsewhere in or near Nicosia (...) and could thus intervene.

101. The Commission further notes that the Turkish Cypriot Security Forces are under the command of a General detached from Turkey (...).

102. In the light of the above elements the Commission, recalling the tactic of disguise pursued in the use of camouflage uniforms by Turkish and Turkish Cypriot soldiers (...) and noting the overall control exercised by Turkey in the border area (...), finds that the applicants' arrest in the border area on 19 July 1989 is imputable to Turkey.

In *Ilaşcu and Others* we find an excellent illustration from contemporary case-law of the Court of how the logic of the Convention bodies works in practice.⁹⁰³

It will be remembered that the complaint concerned the detention of persons in the 'Moldovan Republic of Transdnistria', an unrecognised entity owing its *de facto* independence from Moldova to Russian military and economic support. With regard to Moldova, the Court held:

The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and in-

901 *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, DR 68, p. 216; see also 6.4.1.1 above.

902 Article 31 of the Convention (text of 1950).

903 *Ilaşcu and Others*, § 311. See also *Catan and Others*, §§ 74 and 118-122.

ternational organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.⁹⁰⁴

Thus, Moldovan Article 1 jurisdiction over the entirety of its territory does not cease: Moldova retains both the right and the duty to secure to all those within the territory purportedly belonging to the ‘MRT’ the rights and freedoms defined in Section I of the Convention and the Protocols which it has ratified. With respect to Moldova, the Court considered the case in terms of positive obligations – which were not to be interpreted ‘in such a way as to impose an impossible or disproportionate burden.’⁹⁰⁵ It would obviously have been unreasonable to require Moldova to attempt to dislodge the Russian army from its Transdnestrian territories or even prosecute individual ‘MRT’ officials responsible for the violations eventually found, but Moldova’s efforts to reassert its authority, to secure the applicants’ release – which were successful as regards at least one applicant –, and to guard the applicants’ health by providing medical care in detention were found by the Court to be sufficient. However, Moldova was found responsible for failing to act once these efforts had ceased.⁹⁰⁶

Contrast the position with respect to the Russian Federation:

392. All of the above proves that the “MRT”, set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

393. That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants’ fate, as the Russian Federation’s policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants’ situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.

Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.

Paragraph 392 establishes the Russian Federation’s extraterritorial ‘jurisdiction’ for purposes of Article 1 of the Convention – understood as arising from ‘the fact of ... control, whether it be exercised directly, through its armed forces, or through a

904 *Ilaşcu and Others*, § 333.

905 *Ilaşcu and Others*, § 332.

906 *Ilaşcu and Others*, §§ 339-352.

subordinate local administration⁹⁰⁷ – or, as in this case, both. Next, paragraph 393 establishes attribution to the Russian Federation.

The Court's admissibility decision in *Behrami and Saramati*, to which we will return below,⁹⁰⁸ to all appearances does not fit comfortably into this mould. As we shall see, the Court goes straight to the question of 'attribution' – finding that the matters complained of are attributable to the United Nations – and finally declines to rule separately on Article 1 jurisdiction.⁹⁰⁹ One may wonder however whether it would have served any useful purpose for the Court to go to the trouble of first establishing the Article 1 jurisdiction of France and Norway (presumably in terms of 'State agent authority and control'), only to conclude that the matters complained of were not attributable to them.

It is in the interpretation of attribution that the Court is most likely to draw inspiration from general international law, including in particular the case-law of the International Court of Justice and the work of the International Law Commission, in particular Articles 4 – 8 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.

8.3 Attribution of the exercise of 'hard power' by the Contracting State

8.3.1 Attribution of extraterritorial exercise of 'hard power'

In judgments postdating *Ilaşcu and Others* in which the question of extraterritorial jurisdiction came up, the Court has generally not needed to devote specific attention to the question of attribution. That was because the facts left little room for doubt on that score.

Thus, in *Al-Skeini and Others*, the Court finds a 'jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention' established through the authority and control exercised through its troops, then goes on in the following paragraph to find a 'jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased'.⁹¹⁰ The violations found, it is recalled, were of Article 2 under its procedural head, so that there is no attribution of the actual deaths to the respondent party.

In *Al-Jedda* the respondent Government conceded the jurisdiction point, since the applicant had been detained in a British-run military prison, but tried to evade attribution by arguing that the British troops had been exercising not the sovereign authority of the United Kingdom but the international authority of the Multina-

907 *Ilaşcu and Others*, § 314, citing § 52 of *Loizidou* (merits).

908 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) (GC), nos. 71412/01 and 78166/01, 2 May 2007 ("*Behrami and Saramati*"). See 8.4.5.2.1 below.

909 *Behrami and Saramati*, §§ 151-153.

910 *Al-Skeini*, § 149.

tional Force acting pursuant to the binding decision of the United Nations Security Council. The Court disagreed:

The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multinational Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of member States to contribute personnel. The unified command structure over the Force, established from the start of the invasion by the United States of America and the United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States of America and the United Kingdom, through the CPA which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States of America was requested to report periodically to the Security Council about the activities of the Multinational Force, the United Nations did not, thereby, assume any degree of control over either the Force or any other of the executive functions of the CPA.⁹¹¹

The situation was distinguishable from that in *Behrami and Saramati*:

In the light of the foregoing, the Court agrees with the majority of the House of Lords that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999. The comparison is relevant, since in its decision in *Behrami and Saramati* (...) the Court concluded, *inter alia*, that Mr Saramati's detention was attributable to the United Nations and not to any of the respondent States. It is to be recalled that the international security presence in Kosovo was established by United Nations Security Council Resolution 1244, adopted on 10 June 1999, in which, "determined to resolve the grave humanitarian situation in Kosovo", the Security Council "decide[d] on the deployment in Kosovo, under United Nations auspices, of international civil and security presences". The Security Council therefore authorised "member States and relevant international organisations to establish the international security presence in Kosovo" and directed that there should be "substantial North Atlantic Treaty Organization participation" in the Force, which "must be deployed under unified command and control". In addition, Resolution 1244 authorised the Secretary-General of the United Nations to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo. The United Nations, through a Special Representative appointed by the Secretary-General in consultation with the Security Council, was to control

⁹¹¹ *Al-Jedda*, § 80.

the implementation of the international civil presence and coordinate closely with the international security presence (see *Behrami and Saramati*, cited above, §§ 3, 4 and 41). On 12 June 1999, two days after the Resolution was adopted, the first elements of the NATO-led Kosovo Force (KFOR) entered Kosovo.⁹¹²

In *Hassan* the Court discussed jurisdiction at length, applying *Al-Skeini*, but did not rule separately on attribution.⁹¹³ Again, this was a detention case.

In *Jaloud* the Court established the Article 1 jurisdiction of the Netherlands, dismissing the suggestion that jurisdiction belonged exclusively to the United States and United Kingdom concurrently as ‘occupying powers’ or to the United Kingdom alone as ‘lead nation’ in south-eastern Iraq, the Dutch troops being subordinate to the British commander.⁹¹⁴ It then establishes attribution in the following terms:

The facts giving rise to the applicant’s complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention.⁹¹⁵

– superfluously, in the view of Judges Spielmann and Raimondi whom we quoted at the beginning of this chapter, since in their view it is a ‘non-issue’ given the terms in which the judgment establishes jurisdiction.

8.3.2 Attribution of exercise of ‘hard power’ committed within the territory of a Contracting State

The question of attribution also arises when a Contracting State tolerates on its territory acts contrary to the Convention committed by foreign agents. This was the situation in *El-Masri* and the four *Al Nashiri* and *Abu-Zubaydah* cases.

By 2014, when the first *Al Nashiri* and *Abu-Zubaydah* judgments were delivered, it was settled case-law that a State Party to the Convention must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities. In the Court’s words:

Taking into consideration all the material in its possession (...), the Court finds that there is abundant and coherent circumstantial evidence, which leads inevitably to the following conclusions:

(a) that Poland knew of the nature and purposes of the CIA’s activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition air-

⁹¹² *Behrami and Saramati*, § 83.

⁹¹³ *Hassan*, §§ 74-80.

⁹¹⁴ *Jaloud*, §§ 142-152.

⁹¹⁵ *Jaloud*, § 155.

craft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory;

(b) that, given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention (see also *El-Masri*, cited above, §§ 217-221).

Consequently, Poland was in a position where its responsibility for securing 'to everyone within [its] jurisdiction the rights and freedoms defined ... in [the] Convention' set forth in Article 1 was engaged in respect of the applicant at the material time.⁹¹⁶

This confirms that the Court considers witting toleration by a Convention State of unlawful acts by a non-Convention Government as falling under the direct responsibility of the Convention State – a form of complicity if one will – as is indeed logical.

Similarly, the removal of the applicants from Polish territory engaged the responsibility of Poland under Articles 3, 5 and 6 of the Convention.⁹¹⁷ On the latter point, however, the Court was careful to point out, as it had in *Soering*, that

While the establishment of the sending State's responsibility inevitably involves an assessment of conditions in the destination country against the standards set out in the Convention, there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise.

In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment or other violations of the Convention (...).⁹¹⁸

This applies all the more, one might add, since the responsibility of the sending State flows not from an act which is in itself entirely in conformity with the Convention –

⁹¹⁶ *Al Nashiri v. Poland*, § 442-43; *Husayn (Abu Zubaydah) v. Poland*, § 444-45.

⁹¹⁷ *Al Nashiri v. Poland*, § 454-55; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 454. See also *Abu Zubaydah v. Lithuania*, § 586, and *Al Nashiri v. Romania*, § 601 (same applicants, different respondents).

⁹¹⁸ *Al Nashiri v. Poland*, § 457; *Husayn (Abu Zubaydah) v. Poland*, § 454-55. See also *Abu Zubaydah v. Lithuania*, § 584, and *Al Nashiri v. Romania*, § 598.

in *Soering*, the extradition of a murder suspect to face trial – but from acquiescing in a situation that is illegal *per se*.

The cooperation of European Governments with the CIA rendition programme must rank among the darkest pages of the history of the Contracting States concerned since they joined the Council of Europe family of States. While of course their American allies were chiefly at fault as the active perpetrators, the Contracting States cannot escape attribution: their responsibility under the Convention is engaged, whether by virtue of their active connivance or their tacit consent.⁹¹⁹

Let Senator Marty, whom we met in 6.3 above and who documented all the rendition cases thus far mentioned, have the last word:

This situation is also due to the attitude of those European governments, which abandoned all control over the use of their own infrastructures they unconditionally put at the disposal of the American administration, in the wake of the acceptance of the implementation of Article 5 of the NATO treaty and of the operative measures accepted by the members of the alliance. In this way, the European governments effectively placed themselves in a position of reliance or even dependence on the good will of the American authorities.⁹²⁰

8.4 Involvement of agents other than organs of than the Contracting State

8.4.1 *General international law*

In general international law, the position that a state is responsible for the acts of entities on its behalf is currently codified in Article 8 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, which reads as follows:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Within the terms of this provision two situations may be distinguished. The first is that in which the entity has been *instructed* to perform the acts in question. The second is that in which the entity is under the *direction* or *control* of the state concerned.⁹²¹

The first situation, in which the entity – whatever its nature – has accepted instructions to act in a particular way, will normally give rise to few difficulties. In contrast,

919 *El-Masri*, § 206.

920 Third Marty report, § 14 (footnote references omitted).

921 Crawford (2012), p. 144.

questions may arise as to the degree of direction or control required to deem the entity truly subordinate, and its acts attributable to the state.

The ILC calls it ‘a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.’⁹²² Thus, in *Nicaragua*, the International Court of Justice held the United States accountable for acts of the *contras* ‘only in certain individual instances ... based upon actual participation of and directions given by that State’; a ‘general situation of dependence and support’ would not of itself be sufficient.

In the *Bosnian Genocide* judgment, the International Court of Justice clarified this – and its understanding of the ILC’s Article 8 – as follows:

... it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.⁹²³

It would appear to matter little how the entity in issue sees itself. For example, the *contras* opposing the Sandinista government in Nicaragua, in issue in the Nicaragua case before the International Court of Justice,⁹²⁴ may have aspired to government status, but it would have been clear to them that they never achieved it. In contrast, during the war of 1992-1995 the Republika Srpska, in issue in the *Bosnian Genocide* case,⁹²⁵ saw itself as an independent state, having declared independence in April 1992. So also does the Turkish Republic of Northern Cyprus, cited as an example in the ILC Commentary itself,⁹²⁶ view itself as an independent state, although its statehood is

922 ILC Commentary on the Draft Articles, Article 8, § 5.

923 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007, § 400.

924 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, I.C.J. Reports 1986.

925 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007.

926 ILC Commentary, Article 8, § 5 and footnote 160 (reference to §§ 52 and 56 of *Loizidou (Merits)*).

recognised only by Turkey.⁹²⁷ The entity may even be a commercial company, state-owned or not.⁹²⁸

The ILC Commentary on Article 8 ends with a useful reminder:

Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.⁹²⁹

8.4.2 *Private agents: case-law of the Court*

In its general case-law, the Court has held the use by the State of private agents to engage the State’s responsibility. Thus, it has held in the context of Articles 6 and 8 of the Convention in relation to the use of covert means of criminal investigation, that a Contracting State could not evade its responsibility under the Convention by allowing investigating authorities to relinquish control of events to private agents. For example, in *A. v. France*, it held that the covert use by police officers of a private agent to make a recording of an incriminating statement by a criminal suspect engaged the responsibility of the Contracting State and violated Article 8 of the Convention.⁹³⁰ It reaches similar findings in the cases of *M.M. v. the Netherlands* and *Van Vondel v. the Netherlands*.⁹³¹ In *Allan v. the United Kingdom* it found a violation of Article 6 of the Convention in relation to the use in evidence of a statement made by a remand prisoner to a fellow inmate who had been instructed by the police to obtain from that prisoner a confession.⁹³²

It is submitted that this case-law is relevant to the use of private agents to exercise ‘hard power’ inasmuch as it illustrates that the use of private agents cannot suffice to relieve a Contracting State of its responsibility under the Convention.

8.4.3 *Private military security contractors*

James Crawford calls the use of private military or security corporations hired by the state to engage in certain activities on its behalf ‘a ‘simple example’ of private persons

927 Even to the point of entering into treaties with it, such as the treaty signed in New York on 21 September 2011 delimiting the maritime boundary between their respective continental shelves. Turkish Official Gazette, 12 July 2012, no. 28351.

928 ILC Commentary on the Draft Articles, Article 5, §§ 2 and 6.

929 ILC Commentary on the Draft Articles, Article 5, § 9.

930 *A. v. France*, no. 14838/89, § 36, Series A no. 277-B.

931 *M.M. v. the Netherlands*, no. 39339/98, § 40, 8 April 2003; *Van Vondel v. the Netherlands*, no. 38258/03, § 49, 25 October 2007. The dissenting voices in the two Dutch cases – Judge Palm in *M.M.* and Judge Myjer in *Van Vondel*, commenting on *M.M.* – disagreed with the majority on the interpretation to be given to the facts of that case but not on the principle.

932 *Allan v. the United Kingdom*, no. 48539/99, § 52, ECHR 2002-IX.

or entities acting on the instruction of a State within the meaning of Article 8 of the ILC Articles.⁹³³

Private military security contractors can offer advantages to Contracting States. For example, it may be more economical to outsource certain tasks to outside contractors on a temporary basis rather than create and maintain the required capacity as part of the standing armed forces of the State.⁹³⁴

8.4.3.1 On land

The use of private contractors for tasks that were formerly seen as part of the traditional remit of the military is a phenomenon that has come to public notice only in recent years. For example, it was reported in 2007 that the Netherlands military in Afghanistan relied on private contractors for its catering and the supply of its rations and fuel; that the maintenance of military materiel was left to civilian mechanics; that armed Afghan contractors carried out guard duties around Dutch military bases; and that in training local security forces the Dutch military presence worked closely with a private party contracted by the American government.⁹³⁵

When such private contractors are entrusted with tasks that may entail the use of force, casualties can – and sometimes do – result, witness for example a shooting incident involving an American private military contractor that took place in Baghdad on 16 September 2007 and led to seventeen deaths among the local population.⁹³⁶

Private military and security contractors are bound by the local laws precisely because they are private parties not members of any government's armed forces. In principle, this does not change when they are in the pay of a foreign government, as in Afghanistan or Iraq.

In Iraq, however, the head of the Coalition Provisional Authority, Ambassador L. Paul Bremer III, decreed that private military contractors should be 'immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto', although they remained bound to respect Iraqi laws, including in particular those promulgated by the Coalition Provisional Authority itself.⁹³⁷

933 Crawford (2013), p. 145.

934 AIV (*Adviesraad internationale vraagstukken*, Advisory Council on International Affairs.), *De inhuur van private militaire bedrijven, een kwestie van verantwoordelijkheid* (Employing private military companies, a question of responsibility), December 2007, pp. 12-14.

935 AIV, *De inhuur van private militaire bedrijven, een kwestie van verantwoordelijkheid* (Employing private military companies, a question of responsibility), p. 5.

936 "Blackwater incident: what happened", BBC News, 8 December 2008, <http://news.bbc.co.uk/2/hi/7033332.stm> (accessed 17 April 2017); CBS News, "Blackwater guards found guilty in Baghdad mass shootings", 23 October 2014, <http://www.cbsnews.com/news/blackwater-case-former-guards-convicted-in-baghdad-mass-shootings> (accessed 17 April 2017); The New York Times, "Ex-Blackwater Guards Given Long Terms for Killing Iraqis", 13 April 2015, <https://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html> (accessed 17 April 2017).

937 Coalition provisional authority order number 17 (revised), 27 June 2004, section 4 (3) and (4).

In Afghanistan, the Technical Military Agreement between ISAF/NATO and the interim government of Afghanistan made the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission applicable, *mutatis mutandis*, to the ISAF and supporting personnel – the latter being understood in practice to include private military contractors.⁹³⁸

It was not entirely clear in either case whether the contractors and their staff were subject to the jurisdiction of their sending state or their state of incorporation or nationality (if different).⁹³⁹ In terms of the Convention, however, this distinction would not necessarily be decisive for the question of jurisdiction within the meaning of Article 1 of the Convention, which as we have seen concerns primarily the undertaking of the Contracting State to secure the rights and freedoms defined in the Convention and its Protocols (jurisdiction in terms of duty) rather than the power to legislate and enforce.⁹⁴⁰

As we have seen in paragraph 8.4.2 above, the Court has held in the context of criminal investigations that a Contracting State could not evade its responsibility under the Convention by allowing investigating authorities to relinquish control of events to private agents. Taking the reasoning further, this would mean that a State Party to the Convention that entrusts the use of force or coercive powers to private contractors would continue to be bound by its obligations under, at the very least, Articles 2, 3, 4 and 5. After all, on the ordinary meaning of the words, such contractors would surely be under the Contracting State's 'direction' and 'control'.⁹⁴¹

The point is also made by the Dutch Government's Advisory Council on International Affairs that States retain the monopoly on the use of lawful force, and that consequently the Government remain answerable in law for the use of force on its behalf by private contractors on foreign soil.⁹⁴²

938 David Nauta, *The International Responsibility of NATO and its Personnel during Military Operations: A study on international public law and international criminal law* (diss. Nijmegen 2016), Wolf Legal Publishers, p. 32.

939 For an interpretation of the situation with respect to the Netherlands, see Adviesraad internationale vraagstukken (Advisory Council on International Affairs), *De inhuur van private militaire bedrijven, een kwestie van verantwoordelijkheid* (Employing private military companies, a question of responsibility), December 2007, p. 18.

940 See 5.1 above.

941 *The New Shorter Oxford English Dictionary* (1993 ed.) gives definitions of "direction" including "1. The action or function of directing; guidance, instruction; management. IME. ... 3. An instruction on what to do, how to proceed, or where to go. Usually in *pl.* ..." and of "control" including "1. The act or power of directing or regulating; command, regulating influence. ...".

942 AIV, *De inhuur van private militaire bedrijven, een kwestie van verantwoordelijkheid* (Employing private military companies, a question of responsibility), p. 31. See also Ian M. Ralby, "Private Military Companies and the *Jus and Bellum*", in *The Oxford Handbook of the Use of Force in International Law* (Mark Weller, ed.), p. 1131 at pp. 1145-46.

This means creating an appropriate regulatory framework, accompanied by the necessary supervision and the threat of penal sanctions, to prevent violations of Convention rights and providing access to domestic remedies.⁹⁴³

A joint initiative of the Swiss Federal Government and the International Committee of the Red Cross led to the publication, following consultations with governmental experts from countries including Convention States Parties Austria, France, Germany, Poland, Sweden Switzerland, the United Kingdom and Ukraine, of the 'Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' in September 2008.⁹⁴⁴ As its name implies, it is addressed to states – 'Contracting States', meaning States that make use of private military and security contractors; 'Territorial States', meaning States on whose territory such contractors operate; and 'Home States', meaning States in which such contractors are based – setting out standards for them to establish 'effective oversight and control'. The standards it sets are derived from international humanitarian law and international human rights law. It is not an international treaty – it does not set binding rules – but states and international organisations can join as 'participating' states and organisations. So far, it has been joined by 54 states – including 34 States Parties to the Convention – and three international organisations.⁹⁴⁵

However, thus far it has been largely left to the private military and security sector itself to regulate its conduct. An International Code of Conduct for Private Security Service Providers, concluded on 9 November 2010, invites private security contractors to subscribe to basic human rights standards as regards the use of force, the apprehending and detention of persons, sexual abuse and exploitation, human trafficking and slavery and child labour. Incidents are required to be reported to the 'Competent Authority' – defined as 'any state or intergovernmental organization which has jurisdiction over the activities and/or persons in question'. A public list of

943 See James Cockayne, "Private Military and Security Companies", in *The Oxford Handbook of International Law in Armed Conflict* (Andrew Clapham, Paola Gaeta, eds.), Oxford University Press 2014, p. 625, at pp. 640-643; Helen Duffy, *The War on Terror and the Framework of International Law*, pp. 111-112. See also 2.2.2 and 2.7 above.

944 Montreux Document, https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (accessed on 26 March 2017).

945 All Council of Europe States have joined except Armenia, Andorra, Azerbaijan, Latvia, Malta, Montenegro, Moldova, Romania, Russia, San Marino, Serbia, Slovakia and Turkey. So have the European Union, the OSCE and NATO: <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> (accessed on 26 March 2017). For a critical appraisal of the Montreux Document, see Ralby, pp. 1154 *et seq.*

signatory companies is kept by the Swiss federal government.⁹⁴⁶ The lack of precise government regulation is not without its critics.⁹⁴⁷

In a more recent development, the International Organization for Standardization (ISO) published an industry standard – ISO 18788 – entitled ‘Management system for private security operations – Requirements with guidance for use’ in September 2015. This standard

provides a business and risk management framework for organizations conducting or contracting security operations and related activities and functions while demonstrating:

- a) conduct of professional security operations to meet the requirements of clients and other stakeholders;
- b) accountability to law and respect for human rights;
- c) consistency with voluntary commitments to which it subscribes.⁹⁴⁸

8.4.3.2 At sea

The use of private military and security contractors on board merchant ships to deter, and if necessary repel, attack by pirates deserves to be considered separately.

The argument has been made that States Party to the Convention are obliged to protect those on board ships flying their flag against any known risk of being injured, killed, or taken hostage by pirates. There is support in the Court’s case-law for that position.⁹⁴⁹ The corollary of this view is that any failure of a flag State Government to meet this obligation will accordingly be attributable to the flag State.

The deployment, by the flag state, of its own military forces on board ships flying its flag raises no problems of jurisdiction from a Convention perspective. The flag State has jurisdiction both because it is the flag state⁹⁵⁰ and by dint of its command and control of its armed forces.⁹⁵¹ Some Governments are however baulked by the

946 International Code of Conduct for Private Security Service Providers, 9 November 2010, <https://icoca.ch/en> (English) (accessed on 26 March 2017).

947 Elke Krahnemann, Choice, Voice and exit: Consumer power and the self-regulation of the private security industry, 1 *European Journal of International Security* (2016) pp. 27-48.

948 International Organization for Standardization, <https://www.iso.org/standard/63380.html> (accessed on 27 March 2017).

949 Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, (2011) 22 *EJIL* p. 829 at p. 839; Sofia Galani, *Somali piracy and the human right of seafarers*, (2016) 34 *Netherlands Quarterly of Human Rights* p. 71 at p. 81. See, *inter alia* and *mutatis mutandis*, *Osman v. the United Kingdom*, no. 23452/94, § 116, Reports 1998-VIII, and *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, § 209, ECHR 2011 (Article 2); *Opuz v. Turkey*, no. 33401/02, §§ 130 and 159, ECHR 2009; *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 284 and 319 (Articles 4 and 5); and *Riera Blume v. Spain*, no. 37680/97, §§ 28-35, Reports 1997-VII (Article 5).

950 Article 94 of UNCLOS; see also generally Douglas Guilfoyle, “The Use Of Force Against Pirates”, in *The Oxford Handbook of the Use of Force in International Law* (Mark Weller, ed.), Oxford University Press 2015, p. 1057 at pp. 1067-1071.

951 See above para. 5.5.2.1; see also Guilfoyle at p. 1066.

difficulties of deploying military forces on merchant vessels: the Dutch Minister of Defence, for example, has referred to ‘logistical problems, legal restrictions and risks’ that make such deployment impracticable.⁹⁵²

The International Maritime Organisation (IMO) strongly discourages the carrying and use of firearms for personal protection or protection of a ship, among other reasons because this ‘may encourage attackers to carry firearms thereby escalating an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker’.⁹⁵³

For merchant ships to have any protection at all, if their own crews are unable for whatever reason to ensure their own defence, the remaining alternative is to engage the services of private security providers. IMO, ‘while not endorsing the use of privately contracted armed security personnel’,⁹⁵⁴ offers guidance on the subject. IMO’s circular notes that

... flag State jurisdiction and thus any laws and regulations imposed by the flag State concerning the use of PMSC [private maritime security companies] and PCASP [privately contracted armed security personnel] apply to their ships. Furthermore it is also important to note that port and coastal States’ laws may also apply to such ships.⁹⁵⁵

- which brings us back to the matters discussed in paragraphs 5.3.1 and 5.4.1 above.

8.4.4 *Cyber-attacks as a new problem of attribution*

Cases arising from cyber-attacks have yet to reach the Court. The best a study such as this can do, therefore, is chart some of the likely dangers lurking beneath these uncertain waters.

The Tallinn Manual 2.0, which we have encountered above, states that

Cyber operations conducted by organs of a State, or by persons or entities empowered by domestic law to exercise elements of governmental authority, are attributable to the State.⁹⁵⁶

952 AIV, *Piraterijbestrijding op zee: een herijking van publieke en private verantwoordelijkheden* (Combating piracy at sea: a reassessment of public and private responsibilities), January 2010, p. 28.

953 IMO, “Piracy and armed robbery against ships: Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships”, MSC/Circ.632/Rev.3, 29 May 2002, §§ 45-46.

954 IMO, “Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area” [sc. the waters off Somalia], MSC.1/Circ.1405/Rev.2, 25 May 2012, § 1.1.

955 *ibid.*, § 1.4.

956 Tallinn Manual 2.0, Rule 15 (p. 87).

That is obvious enough. This rule derives directly from Articles 4 and 5 of the International Law Commission's Articles on State Responsibility. The Netherlands Royal Army's Defence Cyber Command and the French ANSSI (*Agence nationale de la sécurité des systèmes d'information*) are part of the defence forces of their respective states and their acts are attributable to the Netherlands and France respectively.⁹⁵⁷ The Estonian Cyber Defence Unit is part of the Estonian Defence League, a volunteer unit with legal status under Estonian public law that coexists with the Estonian Defence Forces within the Estonian Defence Organisation and is placed under the orders of the Commander of the Estonian Defence Forces in wartime; there is little doubt that its acts, too, would be those of the Republic of Estonia.⁹⁵⁸

States may outsource cyber activities to private contractors, or to volunteer organisations without any official status under public law, simply because they lack the resources to set up agencies of their own. Again, there is little doubt that the acts of those contractors or organisations would be attributable to the State – at least as long as they were carried out on the State's behalf. Should those contractors or organisations act *ultra vires* but still generally within the scope of their duties, it would still be necessary for the State to accept attribution. Again, this is nothing novel: we are still within the ordinary rules governing State responsibility for internationally wrongful acts.⁹⁵⁹

However, experience suggests that those who carry out cyber-attacks on the assets and infrastructure of foreign States are likely to disguise their identities, perhaps by creating botnets – networks of robot devices – hacking computers of innocent third parties as 'zombies'. To complicate matters further, the attackers may disguise their identities by impersonating others, perhaps even a foreign government or an international organisation – 'spoofing'.⁹⁶⁰ It may be very difficult to pin responsibility for a cyber-attack on any particular individual, organisation or government.

It is submitted, therefore, that Convention States bear a responsibility for preventing others from carrying out cyber-attacks from within their jurisdiction. The 'duty to establish, maintain, and safeguard international telecommunication infrastructure' identified by the Tallinn Manual 2.0 as its Rule 61⁹⁶¹ does not go far enough. In the same way that the State is required to do all that can be reasonably expected of it to secure the practical and effective exercise of the right to life – and as the WannaCry ransomware attack has demonstrated, human life may well be endangered by cyber-

957 Tallinn Manual 2.0, *ibid.*

958 Tallinn Manual 2.0, *ibid.*; NATO Cooperative Cyber Defence Centre of Excellence, *The Cyber Defence Unit of the Estonian Defence League* (2013), pp. 10–11.

959 Tallinn Manual 2.0, p. 90; see also Rule 17 on p. 94 and ILC Draft Articles 5 and 7 on State Responsibility for Internationally Wrongful Acts; see also Michael N. Schmitt, "The Use of Cyber Fore and International Law", in *The Oxford Handbook of the Use of Force in International Law* (Mark Weller, ed.), Oxford University Press 2015, p. 1110 at p. 1113.

960 Tallinn Manual 2.0, p. 91. Compare *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, 27 June 1986, I.C.J. Reports 1986, § 57.

961 Tallinn Manual 2.0, p. 288.

attacks⁹⁶² – the State is required to put in place an appropriate legislative framework that enables it to take effective preventive or corrective action when the situation so requires. It has long been settled case-law that the failure to provide effective deterrence through criminal law for attacks on basic values protected by the Convention engages the responsibility of the Contracting State.⁹⁶³

The Council of Europe Convention on Cybercrime (also known as the ‘Budapest Convention’)⁹⁶⁴ represents an attempt to create an international framework for this purpose. It defines a number of computer-related crimes, some of them relevant to our discussion (illegal access, Article 2; illegal interception, Article 3; data interference, Article 4; system interference, Article 5; misuse of devices, Article 6) but its focus is on privacy, content (forgery and fraud, child pornography, infringement of intellectual property rights) and civil liability rather than on the prevention or prosecution of hostile acts or physical injury. Its provisions on mutual legal assistance, including exchange of information and extradition, add little that cannot be found in other instruments. Its value has been stated to be mostly symbolic.⁹⁶⁵ Even so, what value it has lies in requiring States party to it to enact legislation criminalising misuse of a type that could lead to attacks of the type here in issue.⁹⁶⁶ Its main weakness is perhaps its very traditional territorial focus on domestic criminal jurisdiction: it enjoins States to establish such jurisdiction only over offences committed within their territory, on board of ships flying their flag and aircraft bearing their registration, or by their nationals if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.⁹⁶⁷ This would appear to leave it to the individual States whether or not also to extend their jurisdiction over foreigners hacking computers from outside the national territory to set up botnets composed of ‘zombies’ that cause harm in third countries.

962 See 6.4.7 above.

963 Among other authorities, *Mastromatteo v. Italy* (GC), no. 37703/97, § 67, ECHR 2002-VIII; *Osman v. the United Kingdom*, § 116; *Opuz v. Turkey*, no. 33401/02, §§ 129-30, ECHR 2009; and *Maiorano and Others v. Italy*, no. 28634/06, § 104, 15 December 2009. Compare also *X and Y v. the Netherlands*, no. 8978/80, § 27, Series A no. 91. See also footnote 949 above.

964 23 November 2001, ETS 185.

965 Nancy E. Macron, “The Council of Europe’s Cyber Crime Treaty: An exercise in Symbolic Legislation”, in *International Journal of Cyber Criminology*, Vol 4 Issue 1&2 (2010), pp. 699-712.

966 Compare for the Netherlands the following Articles of the Dutch Criminal Code (*Wetboek van Strafrecht*): Articles 138ab (hacking another’s computer and/or using it as a “zombie”), 138b (distributed denial of service (DDOS) attack); 317 § 2 (ransomware attack); and 351 (*inter alia*, damaging or destroying cyber infrastructure). Section 5(2)(c)(2°) and (3°) of the Dutch International Crimes Act (*Wet internationale misdrijven*) – which provisions criminalise indiscriminate attacks on the civilian population and attacks on works or installations containing dangerous forces (dams, dykes and nuclear electrical generating stations) if such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population, respectively, are also interesting from this perspective although their applicability is limited to international armed conflict.

967 Budapest Convention, Article 22 § 1.

8.4.5 *International organisations*

8.4.5.1 International organisations in general

International organisations⁹⁶⁸ have existed since the nineteenth century. Governments set them up for purposes of multilateral cooperation, where a network of bilateral arrangements would be impracticable or unwieldy. In recent decades they have proliferated, and the number of international organisations now far outstrips the number of states.

A useful contemporary definition of an international organisation is given by Article 2a of the International Law Commission's 2011 Draft Articles on the Responsibility of International Organizations (hereafter DARIO):⁹⁶⁹

“international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

In addition to international legal personality (recognised, at very least, by its member states), an international organization will enjoy the powers it requires to carry out the tasks and duties with which it is charged by the participating states. These may be particularly far-reaching: some international organisations exercise their authority over individuals and some even intervene in the domestic affairs of their member states.⁹⁷⁰ Within the Council of Europe, the European Court of Human Rights itself provides an example: the Court adopts its own Rules of Court, which are binding on applicant and respondent parties and others (such as witnesses)⁹⁷¹ and of course its judgments are recognised as binding and executable by the Contracting States.⁹⁷²

International organisations enjoy privileges and immunities needed for them to function in independence. These tend to include immunity from domestic jurisdiction and execution; this is necessary in order that domestic courts not rule on the legality of acts of the organisations.⁹⁷³ Detailed and potentially far-reaching immunities are usually the object of separate agreements between the organisation and its host state, often referred to as ‘headquarters agreements’; an example is the headquarters agreement between NATO AFSOUTH (based in Naples, Italy) and the Italian

968 For our purposes, the expression “international organisations” refers to international *intergovernmental* organisations (or IGOs), not non-governmental organisations or NGOs. Note that the International Committee of the Red Cross (ICRC) is an NGO governed by the Swiss Civil Code (see Article 2 of the Statutes of the International Committee of the Red Cross).

969 Crawford (2012), pp. 166-67.

970 Crawford (2012), p. 170.

971 Article 25 (d) of the Convention.

972 Article 46 § 1 of the Convention.

973 Crawford (2012), pp. 174-76.

Republic successfully invoked by NATO in *Markovic and Others*.⁹⁷⁴ Concomitantly, personnel of international organisations also enjoy immunity from domestic jurisdiction and execution, at minimum in respect of official acts.⁹⁷⁵ Similar immunities tend to be recognised to state functionaries accredited to the organisation, such as Government representatives – usually the political decision-makers within such organisations⁹⁷⁶ – and members of parliamentary bodies.⁹⁷⁷

The Court has had occasion to hold, in its general case-law,

... that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.⁹⁷⁸

It is clear, therefore, that Contracting States cannot simply evade their Convention obligations by hiding behind the separate legal personality of international organisations of which they are members.

The above quotation is taken from the *Waite and Kennedy* judgment, which concerned the immunity of the European Space Agency from the domestic jurisdiction of its host states in respect of employment disputes between it and members of its staff. It is therefore natural that the Court should have considered the question whether European Space Agency staff had available to them ‘reasonable alternative means to protect effectively their rights under the Convention’ to be a ‘material factor’.⁹⁷⁹ However, the responsibility of Contracting States concerns not only procedural safeguards but also substantive guarantees.

In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, the Court was called upon to define the interrelation between, on the one hand, the transfer by Contracting States of sovereign powers to international or supranational organisations, and on the other, their responsibility under Article 1 of the Convention for ‘all

974 See 6.4.3.1.2 above. Other examples include the headquarters agreement between ICTY and the Netherlands: see *Galić*, § 23, and that between the Netherlands and the International Criminal Court: see *Djokaba Lambi Longa*, § 41, ECHR 2012. See also Lawson (1999), p. 288.

975 Crawford (2012), pp. 177–78.

976 For example, as members of the North Atlantic Council (Article 9 of the Washington Treaty) or the Committee of Ministers of the Council of Europe (Article 16 of the Statute of the Council of Europe).

977 Crawford (2012), pp. 178–79.

978 *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I.

979 *Waite and Kennedy*, § 68.

acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.’⁹⁸⁰ The dispute was occasioned by a decision of the Irish Government to impound an aircraft owned by the applicant company but leased to Yugoslav Airlines in pursuance of EEC Regulations themselves based on a resolution adopted by the United Nations Security Council under Chapter VII of the United Nations Charter imposing sanctions on the then Federal Republic of Yugoslavia. Here we have an example of ‘economic sanctions’, which, be it recalled, fall within the definition of ‘hard power’ given above no less than kinetic action.⁹⁸¹

The applicant company complained of a violation of its property rights, as protected by Article 1 of Protocol No. 1 to the Convention.⁹⁸²

The Court held as follows:

154. In reconciling both these positions and thereby establishing the extent to which a State’s action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (see *M. & Co. v. the Federal Republic of Germany* (no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138, and *Waite and Kennedy*, § 67, ...). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see, *mutatis mutandis*, *Matthews*, cited above, §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above, p. 145, an approach with which the parties and the European Commission agreed). By “equivalent” the Court means “comparable”; any requirement that the organisation’s protection be “identical” could run counter to the interest of international cooperation pursued (...). However, any such finding of

980 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, § 153, ECHR 2005VI).

981 See 1.2.3 above.

982 *Theory and Practice of the European Convention on Human Rights* (Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, eds.), fifth edn., Intersentia, 2018, pp. 19-20.

equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights (see *Loizidou v. Turkey (preliminary objections)*, judgment of 23 March 1995, Series A no. 310, pp. 27-28, § 75).

The question of equivalence of the protection available arose with respect to the European Economic Community, since its regulation was directly applicable in Ireland; the Security Council Resolution, although admittedly the ultimate justification of the regulation, was not directly applicable as though it were domestic law.⁹⁸³ In the event, the Court was able to find that, at a substantive level, fundamental rights were 'enshrined in the general principles of Community law protected by it, and that the Convention had a "special significance" as a source of such rights', and that at a procedural level, supervision by the domestic courts, coupled with the availability of the preliminary reference procedure.⁹⁸⁴

The Court has since restated the '*Bosphorus* presumption', as the presumption stated in paragraph 156 of the judgment has come to be called, not only with respect to the European Union⁹⁸⁵ but also with respect to other international organisations, including the European Organisation for the Safety of Air Navigation ('Eurocontrol'),⁹⁸⁶ NATO,⁹⁸⁷ the European Patent Office,⁹⁸⁸ the International Olive Oil Council,⁹⁸⁹ the Council of Europe,⁹⁹⁰ and – as we shall now see – the United Nations.

Lawson, writing well before the delivery of the *Bosphorus* judgment, suggested that if States of their own free choice transferred their authority in a certain area to an independent entity – be it an international organisation, a federal unit or an inde-

983 *Bosphorus*, § 145.

984 At the time, Article 177 of the Treaty establishing the European Economic Community (1957); now Article 267 of the Treaty on the Functioning of the European Union.

985 *Inter alia*, *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, ECHR 2009; *Avotiņš v. Latvia* (GC), no. 17502/07, ECHR 2016, and *Lechouritou and Others v. Germany and 26 other member States of the European Union* (dec.), no. 37937/07, 3 April 2012.

986 *Boivin v. 34 member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008.

987 *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009.

988 *Rambus Inc. v. Germany* (dec.), no. 40382/04, 26 June 2009.

989 Now the International Olive Council. *Lopez Cifuentes v. Spain*, no. 18754/06, 7 July 2009.

990 *Beygo v. 46 member States of the Council of Europe* (dec.), no. 36099/06, 16 August 2009.

pendent organ of the State itself – then it should follow from the very freedom of that choice that a State should not be able to hide behind its independence to evade attribution of acts violating its international legal obligations.⁹⁹¹ The logic developed in the *Bosphorus* judgment may at first sight appear to run counter to this argument, in that it sets out the conditions that preclude attribution to the State; but on a second reading, the two are compatible. The link between the two is that the States that are members of an international organisation to which the *Bosphorus* presumption is applicable are found to have transferred to that organisation not only the means to violate the Convention but also legal means, equivalent even if not identical to those required by the Convention, to provide redress.

Lawson also suggests that it will be permissible to attribute all acts of an international organisation to its parent states if (a) the organisation has no international legal personality of its own, or (b) the organisation is set up *mala fide* for a purpose involving evading attribution of internationally wrongful acts of whatever description.⁹⁹² This must be correct.

8.4.5.2 The United Nations

8.4.5.2.1 *Kosovo*

On 9 June 1999 a ‘Military Technical Agreement’ or MTA was signed between the Federal Republic of Yugoslavia (FRY), the Republic of Serbia and ‘KFOR’, the Kosovo Force (whose establishment was in fact to be announced the following day). This agreement provided for the withdrawal from Kosovo of FRY troops and the presence of an international security force following an appropriate UN Security Council Resolution. The Security Council Resolution, which was to be the basis for both KFOR and the civilian administration, United Nations Interim Administration in Kosovo or UNMIK, was adopted the next day.⁹⁹³

Security Council Resolution 1244 of 10 June 1999 provided for KFOR to be established by ‘Member States and relevant international institutions’, ‘under UN auspices’, with ‘substantial NATO participation’ but under ‘unified command and control’. UNMIK was to be deployed under UN auspices; its implementation was to be supervised by a Special Representative to the Secretary General (‘SRSG’) to control its implementation. UNMIK was to coordinate closely with KFOR.

In March 2000 a group of young boys – including two sons of the applicant Behrami – found some cluster bomb units. These were from cluster bombs dropped by NATO aircraft in 1999 during the bombing campaign and had not yet been made safe. The boys played with them. One of them exploded, killing one of Mr Behrami’s sons and maiming the other for life. The Court later found it established that responsibility for clearing up unexploded ordnance belonged with the United Nations

991 Lawson (1999), p. 304.

992 Lawson (1999), p. 341. On the latter point, compare Article 61 of DARIO (which is rather less absolute in its terms).

993 UN Security Council Resolution 1244 of 10 June 1999.

Mine Action Co-ordination Centre or UNMACC, a body subordinate to UNMIK, although KFOR was involved as a 'service provider'.⁹⁹⁴ At the relevant time, France was the 'lead nation' in the part of Kosovo where this unfortunate event took place. Before the Court, Mr Behrami and the surviving son later complained under Article 2 of the Convention that the French KFOR troops had failed to mark or defuse the cluster bomb units, even though their existence and whereabouts had been known.

Mr Saramati was arrested in April 2001 on suspicion of murder and illegal possession of a weapon. Released in June 2001 after the Supreme Court allowed his appeal, he was rearrested in July 2001. Mr Saramati's detention was ordered, and extended by the KFOR Commander ('COMKFOR'), who initially was a Norwegian officer and later a French one. Mr Saramati complained under Article 5 of the Convention that he had been detained extra-judicially.

The Court proceeded on the finding that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining (including the removal of unexploded cluster bomb units) fell within the mandate of UNMIK.⁹⁹⁵

Answering the question whether France and Norway had exercised Article 1 jurisdiction at the relevant time, the Court found that Kosovo had been under the effective control of the 'international presences which exercised the public powers normally exercised by the Government of the FRY'.⁹⁹⁶ The question was therefore 'less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo'.⁹⁹⁷

As regards KFOR, the Court held as follows:

UNSC [United Nations Security Council] Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR. NATO fulfilled its command mission via a chain of command (from the NAC [North Atlantic Council], to SHAPE [Supreme Headquarters Allied Powers Europe], to SACEUR [Supreme Allied Commander Europe], to CIC South [Commander in Chief of Allied Forces Southern Europe]) to COMKFOR, the commander of KFOR. While the MNBs [multinational brigades] were commanded by an officer from a lead TCN [troop contributing nation], the latter was under the direct command of COMKFOR. MNB action was to be taken according to an

994 *Behrami and Saramati*, § 125.

995 *Behrami and Saramati*, § 127.

996 *Behrami and Saramati*, § 70.

997 *Behrami and Saramati*, § 71.

operational plan devised by NATO and operated by COMKFOR in the name of KFOR.⁹⁹⁸

– from which it followed that, since KFOR was exercising lawfully delegated Chapter VII powers of the Security Council, the matters complained of, in so far as blamed on KFOR, were ‘attributable’ to the United Nations.

As regards UNMIK, the Court held that, whether it depended from the Secretary General or the Security Council, it was a subsidiary organ of the United Nations; the failure to make safe the cluster bomb units was therefore, in principle, ‘attributable’ to the United Nations in the same sense.⁹⁹⁹

In so finding the Court took into account the International Law Commission’s Draft Articles on the Responsibility of International Organisations (DARIO).¹⁰⁰⁰ It actually stated in the decision that it was using the expression ‘attribution’ in the same sense as the ILC did in Article 3 of DARIO.¹⁰⁰¹

The next question was whether to apply the presumption developed by the Court in the *Bosphorus* judgment. The presumption was that action taken by a State compliance with obligations flowing from its membership of an international organisation to which it had transferred part of its sovereignty was ‘justified as long as the relevant organisation [was] considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which [could] be considered at least equivalent to that for which the Convention [provided].’¹⁰⁰²

The United Nations was, however, an organisation to which fundamentally different parameters applied. Pursuant to Articles 25 and 103 of the UN Charter, the obligation of the Member States to obey the orders of the Security Council prevailed over ‘any other international agreement.’¹⁰⁰³ Of even greater significance was the ‘imperative nature of the principle [sic] aim’ of the United Nations, namely the maintenance of international peace and security, for which purpose the UNSC was invested with the primary responsibility and the corresponding power to use coercive measures under Chapter VII:¹⁰⁰⁴

998 *Behrami and Saramati*, § 135.

999 *Behrami and Saramati*, §§ 142-43.

1000 Report of the ILC, General Assembly Official Records, 55th session, Supplement No. 10 A/58/10 (2003).

1001 *Behrami and Saramati*, § 121.

1002 *Bosphorus*, § 155.

1003 *Behrami and Saramati*, § 147.

1004 *Behrami and Saramati*, § 148. See also Tobias Lock, “Beyond *Bosphorus*: The European Court of Human Rights’ Case-Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights”, in *Human Rights Law Review* 10:3 (2010), 529-545 at 532.

In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.¹⁰⁰⁵

The cases were moreover clearly distinguishable from *Bosphorus*. The latter case had concerned the seizure of an aircraft, admittedly under an EU regulation that was itself based on a Chapter VII resolution of the Security Council, but nonetheless directly by Irish domestic authorities on Irish territory. In contrast, the acts of KFOR and UNMIK were, as noted, those of the United Nations.¹⁰⁰⁶ Accordingly, since it had no jurisdiction over the United Nations, the Court declared both cases inadmissible *ratione personae*.

The *Behrami and Saramati* precedent has been applied since then in at least two cases decided by a Chamber, one against Greece, the other against Germany. The only feature of these cases worth noting is that in the German case the Serbian Government intervened as a third party under Article 36 of the Convention.¹⁰⁰⁷

8.4.5.2.2 *Cyprus buffer zone*

In *Stephens* the applicant, who was the owner of a house situated in the United Nations-controlled buffer zone in Nicosia, complained of being denied access to it. She was advised by the Property Officer of the United Nations Peacekeeping Force in Cy-

¹⁰⁰⁵ *Behrami and Saramati*, § 149.

¹⁰⁰⁶ *Behrami and Saramati*, § 151.

¹⁰⁰⁷ *Kasumaj v. Greece* (dec.), no. 6974/05, 5 July 2007, and *Gajic v. Germany* (dec.), no. 31446/02, 28 August 2007.

prus (UNFICYP), which had control over the buffer zone, ‘to contact the European Court of Human Rights to discover if it would be feasible to lodge a claim with them.’

Citing *Behrami and Saramati*, the Court noted that UNFICYP was a subsidiary organ of the UN. Its actions and inactions being therefore in principle attributable to the UN, it declared this complaint inadmissible *ratione personae*.¹⁰⁰⁸

8.4.5.2.3 *Iraq*

In its *Al-Jedda* judgment, which we have come across already,¹⁰⁰⁹ the Court defined the interrelation between the Convention and Security Council resolutions in the following terms:

101. Article 103 of the Charter of the United Nations provides that the obligations of the members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom’s obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.

102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms”. Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations”. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend

1008 *Stephens v. Cyprus, Turkey and the United Nations* (dec.), no. 45267/06, 11 December 2008.

1009 See, in particular, 2.4 above.

States to take particular measures which would conflict with their obligations under international human rights law.¹⁰¹⁰

In the particular case, the Court held as follows:

105. The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place member States within the Multinational Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution. ... Internment is listed in US Secretary of State Powell's letter, as an example of the "broad range of tasks" which the Multinational Force stood ready to undertake. In the Court's view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the member States within the Multinational Force. Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the Convention forms part of international law, as the Court has frequently observed (...). In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multinational Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.¹⁰¹¹

The conclusion was that

in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.¹⁰¹²

Milanovic and Hadzi-Vidanovic have understood the Court's refusal in *Al-Jedda* to attribute the acts of American and British armed forces in Iraq to the United Nations as it had attributed the acts of KFOR in *Behrami and Saramati* as a correction of the latter decision. It is not. *Al-Jedda* itself points out that the British and American forces were already in theatre when the Security Council adopted its Resolution 1511; that resolution had not changed anything in their command structure or made them subsidiary to the Security Council as KFOR was. More importantly, the USA and the UK, through the CPA which they had established already at the start of the occupation, continued to exercise the powers of government in Iraq. The USA was requested to report periodically to the Security Council about the activities of the Multina-

1010 *Al-Jedda*, §§ 101-102.

1011 *Al-Jedda*, § 105.

1012 *Al-Jedda*, § 109.

tional Force, but even so the United Nations did not thereby ‘assume any degree of control over either the Force or any other of the executive functions of the CPA’: the Security Council’s request to the USA was just that, a request, not an order.¹⁰¹³

8.4.5.2.4 *Switzerland*

Like *Bosphorus*, the cases of *Nada v. Switzerland* and *Al-Dulimi and Montana Management v. Switzerland* are examples of economic sanctions. They are moreover of importance in that they clarify the interrelation between Security Council resolutions and the Convention.

In *Nada* the applicant was a dual Egyptian and Italian national resident in Campione d’Italia, a small Italian exclave surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano. To travel to the rest of Italy over land he needed to cross Swiss territory.¹⁰¹⁴

In 1999, in response to the bomb attacks by Osama bin Laden and members of his network against the US embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) the previous year, the Security Council of the United Nations adopted, under Chapter VII of the United Nations Charter, Resolution 1267 (1999), providing for sanctions against the Taliban and created a committee to monitor the enforcement of that Resolution (‘the Sanctions Committee’). By Resolution 1333 (2000) of 19 December 2000, the Security Council extended the sanctions regime. It was now also directed against Osama bin Laden and the al-Qaeda organisation, as well as the Taliban’s senior officials and advisers. In both Resolutions 1267 (1999) and 1333 (2000), the Security Council requested the Sanctions Committee to maintain a list, based on information provided by States and regional organisations, of individuals and entities associated with Osama bin Laden and al-Qaeda. The applicant was added to this list on 9 November 2001.

In the meantime, in 2000, the Swiss Federal Council had adopted an ordinance to implement the sanctions regime. By the time of the events in issue, it prohibited entry into and transit through Switzerland for the individuals and entities concerned by the sanctions regime. In October 2003 the Canton of Ticino revoked the applicant’s special border-crossing permit, making it impossible for the applicant to leave Campione d’Italia. This prevented the applicant from obtaining medical treatment and from consulting his lawyers.

The Court took the view that the case concerned the national implementation of United Nations Security Council resolutions. The matters complained of were therefore attributable to Switzerland.¹⁰¹⁵

Deciding whether the travel ban had constituted a violation of Article 8 of the Convention, the Court distinguished the case from *Al-Jedda* in the following terms:

¹⁰¹³ *Al-Jedda*, § 80.

¹⁰¹⁴ There is a ferry service across the lake that joins Campione d’Italia to the opposite shore which is Swiss.

¹⁰¹⁵ *Nada*, §§ 121-22.

... in the present case it observes that, contrary to the situation in *Al-Jedda*, where the wording of the resolution in issue did not specifically mention internment without trial, Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, the above-mentioned presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in that Resolution (see also paragraph 7 of Resolution 1267 (1999), paragraph 70 above, in which the Security Council was even more explicit in setting aside any other international obligations that might be incompatible with the Resolution).

Even so, it emerged that the Security Council resolutions did not prevent the travel ban from being lifted ‘where entry or transit [was] necessary for the fulfilment of a judicial process ...’ and urged States to take restrictive measures ‘where appropriate.’ Taking its cue from the *Kadi I* judgment of the European Court of Justice,¹⁰¹⁶ the Court therefore found that Switzerland had not made full use of what little discretion it had to improve the applicant’s lot.¹⁰¹⁷

In *Al-Dulimi and Montana Management Inc. v. Switzerland* the applicants were identified by the Security Council as the head of finance for the Iraqi secret services under the regime of Saddam Hussein and a Panamanian company managed by him. The sanctions regime to which the applicants were subject were defined by Security Council Resolution 1483 – the same resolution that played such an important role in *Al-Skeini*, *Al-Jedda* and *Al-Saadoon and Mufdhi* – and after the Sanctions Committee set up to supervise the sanctions regime had placed them on the sanctions list (in April 2004), their assets in Switzerland were seized pursuant to an implementing ordinance adopted by the Federal Council. The applicants appealed to the Swiss courts, which verified that the applicants’ names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them, then – citing Article 103 of the Charter of the United Nations and Article 30 § 1 of the Vienna Convention on the Law of Treaties – dismissed their appeals.

Before the Court, the applicants complained of a violation of their right of access to a court, as guaranteed by Article 6 § 1 of the Convention under its civil head.

The Court distinguished the case from *Nada* and *Al-Jedda* in that it did not concern either the essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention, but merely the availability of ‘appropriate judicial supervision’ meeting the standards of Article 6 § 1.¹⁰¹⁸

¹⁰¹⁶ Court of Justice of the European Communities, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (joined cases C-402/05 P and C-415/05 P, 3 September 2008 (“*Kadi I*”).

¹⁰¹⁷ *Nada*, §§ 177-80.

¹⁰¹⁸ *Al-Dulimi and Montana Management Inc. v. Switzerland* (GC), no. 5809/08, §§ 143-44, ECHR 2016.

It continued:

145. The Court notes, moreover, that the inclusion of individuals and entities on the lists of persons subject to the sanctions imposed by the Security Council entails practical interferences that may be extremely serious for the Convention rights of those concerned. Being drawn up by bodies whose role is limited to the individual application of political decisions taken by the Security Council, these lists nevertheless reflect choices of which the consequences for the persons concerned may be so weighty that they cannot be implemented without affording the right to appropriate review, which is all the more indispensable as such lists are usually compiled in circumstances of international crises and are based on information sources which tend not to be conducive to the safeguards required by such measures. In this connection, the Court would emphasise that the object and purpose of the Convention, a human rights treaty protecting individuals on an objective basis (see [*Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 145, ECHR 2010]), require its provisions to be interpreted and applied in a manner which makes its requirements practical and effective (see [*Artico v. Italy*, 13 May 1980, § 33, Series A no. 37]). The Court further observes that, the Convention being a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 75, Series A no. 310, and *Al-Skeini and Others*, cited above, § 141), the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle. Even in the context of interpreting and applying domestic law, where the Court leaves the national authorities very wide discretion, it always does so, expressly or implicitly, subject to a prohibition of arbitrariness (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I, and *Storck v. Germany*, no. 61603/00, § 98, ECHR 2005-V).

146. This will necessarily be true, in the implementation of a Security Council resolution, as regards the listing of persons on whom the impugned measures are imposed, at both UN and national levels. As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.

147. In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention.¹⁰¹⁹

8.4.5.2.5 *Conclusion: Security Council resolutions under Chapter VII of the Charter of the United Nations*

From the *Al-Jedda*, *Nada* and *Al-Dulimi and Montana Management* judgments we can conclude as follows.

Firstly, the obligations assumed by the Contracting States under Article 1 of the Convention do not override Security Council resolutions adopted under Chapter VII of the Charter. Consequently, when the two are in conflict, the latter prevail. There can be no doubt about this: it follows clearly from Article 103 of the Charter, which provision provides that in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. This rule is reinforced by Article 30 § 1 of the Vienna Convention on the Law of Treaties, which makes the hierarchy of treaty obligations set out in the remainder of that Article subordinate to Article 103 of the Charter.¹⁰²⁰

Secondly, there is a presumption that the Security Council does not intend to impose any obligation on member States of the United Nations to breach fundamental principles of human rights. This follows from the very purpose and principles of the United Nations Charter itself. If a United Nations Security Council resolution is ambiguous its terms, the Court must therefore interpret the Security Council resolution so as to reconcile it as far as possible with the Convention. This enabled the Court to hold in *Al-Jedda* that the relevant Security Council resolution did not compel indefinite detention without the possibility of judicial review, and so to find violation of Article 5 of the Convention.

Thirdly, the said presumption is rebuttable – but only to the extent that the Security Council resolution imposes direct obligations to adopt measures incompatible with the rights and freedoms guaranteed by the Convention. Even then, the Contract-

1019 *Al-Dulimi and Montana Management Inc.*, §§ 145-47.

1020 Lawson (1999), p. 148.

ing States must nonetheless make use of what latitude remains to them to secure the rights and freedoms set out in the Convention.

It is only fair to mention that in this matter the way forward was shown already in 2008 by the Court of Justice of the European Communities in *Kadi I*.¹⁰²¹

8.4.5.2.6 *Anti-piracy operations in the Western Indian Ocean*

As we have seen,¹⁰²² the Security Council gave authority to States taking part in anti-piracy operations off the coast of Somalia to act, making use of its powers under Chapter VII of the UN Charter. It did not, however, express this authority in the form of a binding order.

In *Hassan and Others* the respondent Party, France, did not seek to deny jurisdiction on the ground that its acts were attributable to the UN and the Court did not examine the matter of its own motion.¹⁰²³ Now that European naval forces work together as EUNAVFOR [European Union Naval Force] Operation Atalanta, the question may arise at some point whether attribution should not rather be made to the European Union, whether alone – in which case, in present circumstances, Article 1 jurisdiction cannot be an issue¹⁰²⁴ – or together with the Member State concerned.¹⁰²⁵

8.4.5.3 International organisations: the problem of accountability

Wrongful acts of whatever description, even when attributable to international organisations, are necessarily acts or omissions of human beings. In the context of this study, they will often be the acts and omissions of persons exercising functions as State organs placed at the disposal of international organisations to act in the name of the latter. We have seen that attribution to international organisations may enable states to escape responsibility for such acts and omissions, rightly or wrongly. This may leave the wronged individual without any possibility to obtain redress.

The distinct legal personality of international organisations, separate from that of their member states, precludes their being held to account under the Convention in their own right. Likewise, it protects States from being held responsible for acts attributable to the international organisations of which they are members. It will not help applicants to cite as respondents all of the organisation's member States, if these be at the same time parties to the Convention.¹⁰²⁶

1021 See §§ 298-300 of that judgment (footnote 1016 above).

1022 See 6.4.5 above.

1023 Footnote 771 above.

1024 Footnote 618 above.

1025 Tullio Treves and Cesare Pitea, "Piracy, International Law and Human Rights", in *The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law*, vol. XXIV/1, pp. 89-126 at pp. 108-112.

1026 Compare *Boivin v. 34 member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008, and *Beygo v. 46 member States of the Council of Europe* (dec.), no. 36099/06, 16 August 2009. See also Lawson (1999), pp. 189-99.

Thus, in *Markovic and Others* that NATO invoked the immunity of its AF-SOUTH headquarters before the Italian domestic courts – successfully, inasmuch as this caused the applicants to discontinue the proceedings against that organisation; but the Court accepted that it would have availed the applicants nothing to pursue them to their conclusion.¹⁰²⁷

In *Behrami and Saramati* the Court used the term ‘attribution’ in the same way as the ILC did in Article 3 of DARIO.¹⁰²⁸ So it did also in *Berić and Others*.¹⁰²⁹

In *Stichting Mothers of Srebrenica and Others*, the Court noted the existence of a jurisdictional void: a claims commission was supposed to have been set up to hear claims against the United Nations, but it had not. This state of affairs, regrettable though it be, was not imputable to the Netherlands; nor was the Netherlands required by Article 6 of the Convention to step in itself.¹⁰³⁰ Domestic law can allow the State to be held to account, as the Dutch courts did in domestic civil proceedings in the Srebrenica litigation,¹⁰³¹ but their jurisdiction over international organisations is very limited.

Commentators do not like this line of case-law. They tend to see *Stichting Mothers of Srebrenica and Others*, like *Behrami and Saramati*, as endorsement of a tendency on the part of States to use international organisations as a tool to evade accountability.¹⁰³² One pair of authors goes so far as to call the decision ‘lamentable’.¹⁰³³ Yet such is the current state of the law. Unless one takes the view that the law itself is wrong, it is difficult to find that the Court is plainly in error when it applies Article 3 of DARIO in these cases. The situation is little different from that of, for example, a State placing its organs at the disposal of a non-Convention State to whom the acts of the former would be attributable under Article 6 of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts;¹⁰³⁴ in such a case as in the case

1027 See 6.4.3.1.2 above; *Markovic and Others*, § 35.

1028 *Behrami and Saramati*, § 121.

1029 *Berić and Others*, § 28, 18 October 2007.

1030 *Stichting Mothers of Srebrenica*, §§ 162-165.

1031 See 6.5.2.6 above.

1032 Alexander Breitegger, “Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jeddah*,” *International Community Law Review* 11 (2009) 155-183, *passim*; Heike Krieger, “A Credibility Gap: The *Behrami* and *Saramati* Decision of the European Court of Human Rights,” *Journal of International Peacekeeping* 13 (2009) 159-180, *passim*; Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict” (January 20, 2012), *Research Handbook on International Conflict and Security Law*, Nigel White, Christian Henderson, eds., Edward Elgar, 2012. Available at SSRN: <http://ssrn.com/abstract=1988915>, p. 19; Crawford (2013), pp. 199-200; Andrew Drzemczewski, “Human Rights in Europe: An Insider’s Views,” [2017] E.H.R.L.R., issue 2, p. 134 at p. 143; PACE Resolution 1979 (2014), Accountability of international organisations for human rights violations, 31 January 2014, § 3; PACE Recommendation 2037 (2014), 31 January 2014, § 2.

1033 Milanovic and Hadzi-Vidanovic, *loc. cit.*

1034 Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1.

of an international organisation, there would most likely be no access to the Court in Strasbourg in the event that the non-Convention State failed to meet its human rights obligations.¹⁰³⁵

Although *Al-Dulimi and Montana Management Inc.*¹⁰³⁶ must rank as one of the Court's boldest attempts until now to provide judicial guarantees where there are none, critics of the *Behrami and Saramati* and *Stichting Mothers of Srebrenica* decisions can derive little comfort from it. It is one thing to conceive of a remedy limited to testing the arbitrariness of continuing the domestic implementation of a sanctions regime targeting named individuals where such a remedy is not specifically excluded; it is quite another to create a judicial remedy that would allow the United Nations to be judged by domestic courts for the use by the Security Council of its powers under Chapter VII of the United Nations Charter – which would not only override an immunity granted by the world's most basic treaties¹⁰³⁷ but would of necessity involve recognising a substantive right to damages, and under domestic law to boot.

DARIO has been accepted in principle by the United Nations General Assembly,¹⁰³⁸ but unlike the ILC Articles on State responsibility for international wrongful acts, not yet formally endorsed. The Parliamentary Assembly of the Council of Europe has suggested that the Council of Europe itself, 'as an international organisation specialising in human rights', consider how the Draft Articles might apply to it.¹⁰³⁹

There is a real need to make provision for international organisations wielding power to be accountable before independent organs with jurisdictional powers.¹⁰⁴⁰ In Kosovo, this need was recognised: an UNMIK Human Rights Advisory Panel was set up to examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of their human rights.¹⁰⁴¹

Although the creation of the UNMIK Human Rights Advisory Panel was a welcome development, it was not sufficient to solve the problem. It is known, for example, that KFOR military and UNMIK civilian personnel including police took part in human trafficking and forced prostitution, or used brothels staffed by victims of such practices, yet no prosecutions were ever authorised by either the commander of KFOR or national commanders and no immunity was ever waived by the Secretary

1035 Compare *Drozd and Janousek v. France and Spain* (see 5.5.4 above); James Crawford, *State Responsibility: The General Part*, Cambridge University Press 2013, p. 134–35.

1036 See 8.4.5.2.4 above.

1037 Article 105 of the Charter of the United Nations; Article II, section 2 of the Convention on the Privileges and Immunities of the United Nations, 13 February 1946

1038 UNGA Res. 66/100, 9 December 2011, § 3.

1039 PACE Recommendation 2037 (2014), 31 January 2014, § 3.

1040 See also Heike Krieger, 'A Credibility Gap: The *Behrami and Saramati* Decision of the European Court of Human Rights', *Journal of International Peacekeeping* 13 (2009) 159–180, p. 180.

1041 Human Rights Review Panel, Annual Report 2016, p. 45, <http://www.hrrp.eu/docs/HRRP%20Annual%20Report%202016.pdf> (accessed 15 March 2017).

General of the United Nations.¹⁰⁴² Addressing different issues, the presiding member of that Panel, Marek Nowicki, had occasion in its final annual report to

... highlight again with deep regret the general structural problem that exists, namely the lack of implementation of the Panel's opinions, especially with regard to UNMIK paying financial compensation to the complainants, as well as the lack of significant progress of EULEX or Kosovo law enforcement institutions' continuing investigations regarding the Panel's cases related to abductions, disappearances and killings'¹⁰⁴³

– thus reflecting the inadequacy of a merely advisory body as a legal remedy, whether preventive, compensatory or punitive.

In the meantime EULEX has assumed executive powers. The Human Rights Advisory Panel has been replaced by a Human Rights Review Panel set up to

review complaints from any person, other than EULEX Kosovo personnel, claiming to be the victim of a violation of his or her human rights by EULEX Kosovo in the conduct of the executive mandate of EULEX Kosovo.¹⁰⁴⁴

Its creation has been lauded by the Parliamentary Assembly of the Council of Europe¹⁰⁴⁵ even though its terms of reference, or 'accountability concept', remain classified.¹⁰⁴⁶

The two Kosovo panels constitute a step in the right direction, however timid.¹⁰⁴⁷ As matters stand, no other international panels than these two have ever been given a mandate to hold international organisations operating in an executive role in a conflict or post-conflict peacekeeping situation accountable for alleged human rights violations.¹⁰⁴⁸

1042 Nauta, pp. 24-29. The author was told of similar occurrences in Bosnia and Herzegovina during his time there.

1043 Human Rights Advisory Panel, Annual Report 2015-16, pp. i-ii.

1044 Human Rights Review Panel, Annual Report 2016, p. 6, <http://www.hrrp.eu/docs/HRRP%20Annual%20Report%202016.pdf> (accessed 15 March 2017).

1045 PACE Resolution 1979 (2014), Accountability of international organisations for human rights violations, 31 January 2014, § 5.

1046 Human Rights Review Panel, Annual Report 2016, p. 6.

1047 The system has also received lukewarm praise from the Venice Commission in its Opinion on the existing mechanisms to review the compatibility with human rights standards of acts of UNMIK and EULEX in Kosovo, Opinion no. 545 / 2009, CDL-AD(2010)051, 21 December 2010.

1048 Human Rights Review Panel, Annual Report 2016, p. 5

8.5 Subordinate pseudo-states

In the case-law of the Court thus far, there have been two situations of what has been called ‘belligerent occupation’¹⁰⁴⁹ in which the Court has had to consider the value of a judicial remedy offered by a purportedly independent state that was in fact a client entity of one Contracting State set up on the territory of another.

8.5.1 *The ‘Turkish Republic of Northern Cyprus’*

In *Cyprus v. Turkey* the Court was faced with the question whether the remedies offered by the courts of the ‘TRNC’ were to be exhausted in order to comply with then Article 26 of the Convention (now Article 35 § 1). The position of the Turkish Government, as expressed in the proceedings before the Commission (they did not appear before the Court), was that the ‘TRNC’ was ‘an independent State established by the Turkish-Cypriot community in the exercise of its right to self-determination and possessing exclusive control and authority over the territory north of the United Nations buffer-zone’. The Cypriot Government argued strongly that they were not, pointing to the status of the ‘TRNC’ as an entity whose lawfulness was not recognised internationally except by Turkey; it followed that even Turkey did not regard the remedies of the ‘TRNC’ as domestic remedies of its own. Moreover, and submitting that the Turkish occupation of northern Cyprus was unlawful, they argued that the ‘TRNC’s courts were not ‘tribunals established by law’.

The Court, ‘without in any way putting in doubt either the view adopted by the international community regarding the establishment of the “TRNC” (...) or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus’,¹⁰⁵⁰ dismissed both limbs of the Cypriot Government’s arguments. This it did having regard to the ‘Namibia principle’:

In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.¹⁰⁵¹

¹⁰⁴⁹ See 1.2.1 above.

¹⁰⁵⁰ *Cyprus v. Turkey*, § 90.

¹⁰⁵¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *ICJ Reports* 1971, vol. 16, p. 56, § 125

After all,

Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.¹⁰⁵²

Indeed,

It appears ... difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimisation of a regime which is unlawful under international law.¹⁰⁵³

In later judgments, the Court was to accept on this basis the lawfulness of the arrest of a Greek Cypriot by a ‘TRNC’ police officer and the trial of a Greek Cypriot – even its compatibility with Article 6 – by a ‘TRNC’ criminal court, it being implicit that both the arrest and the trial were attributable to Turkey.¹⁰⁵⁴

8.5.2 *The ‘Moldovan Republic of Transdnestria’*

In *Ilaşcu and Others* and again in *Mozer and Others* the Court expressed itself as follows with regard to the court systems of the ‘TRNC’ and the ‘MRT’.¹⁰⁵⁵

In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal “established by law” provided that it forms part of a judicial system operating on a “constitutional and legal basis” reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees (see, *mutatis mutandis*, *Cyprus v. Turkey*, cited above, §§ 231 and 236-237).

In *Ilaşcu and Others*, the Court found that this was not the case:

1052 *Cyprus v. Turkey*, § 96. See also Fortin, pp. 294-95.

1053 *Cyprus v. Turkey*, § 101.

1054 *Foka v. Turkey*, no. 28940/95, § 83, 24 June 2008, and *Protopapa v. Turkey*, no. 16084/90, § 87, 24 February 2009, respectively.

1055 *Ilaşcu and Others*, § 460; *Mozer*, § 141.

The “Supreme Court of the MRT” which passed sentence [of death] on Mr Ilaşcu was set up by an entity which is illegal under international law and has not been recognised by the international community. That “court” belongs to a system which can hardly be said to function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention. That is evidenced by the patently arbitrary nature of the circumstances in which the applicants were tried and convicted, as they described them in an account which has not been disputed by the other parties (...), and as described and analysed by the institutions of the OSCE (...)¹⁰⁵⁶

Thus, it was the dysfunction of the ‘Supreme Court of the MRT’ itself which made it unlawful even by the relatively lenient standards of the *Namibia* principle as interpreted and applied in the ‘TRNC’ cases.

In *Mozer* the Court confirmed this finding in no uncertain terms:

147. In the Court’s view, it is in the first place for the Contracting Party which has effective control over the unrecognised entity at issue to show that its courts “form part of a judicial system operating on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention” (...). As the Court has already established (...), in the case of the “MRT” it is Russia which has such effective control. To date the Russian Government have not submitted to the Court any information on the organisation of the “MRT” courts which would enable it to assess whether they fulfil the above requirement. Nor have they submitted any details of the “MRT” law which served as a basis for the applicant’s detention. Furthermore, the Court notes the scarcity of official sources of information concerning the legal and court system in the “MRT”, a fact which makes it difficult to obtain a clear picture of the applicable laws. Consequently, the Court is not in a position to verify whether the “MRT courts” and their practice fulfil the requirements mentioned above.

148. There is also no basis for assuming that there is a system reflecting a judicial tradition compatible with the Convention in the region, similar to the one in the remainder of the Republic of Moldova (compare and contrast with the situation in Northern Cyprus, referred to in *Cyprus v. Turkey*, cited above, §§ 231 and 237). The division of the Moldovan and “MRT” judicial systems took place in 1990, well before Moldova joined the Council of Europe in 1995. Moreover, Moldovan law was subjected to a thorough analysis when it requested membership of the Council of Europe (see Opinion No. 188 (1995) of the Council of Europe Parliamentary Assembly on the application by Moldova for membership of the Council of Europe), with amendments proposed to ensure compatibility with the Convention, which Moldova finally ratified in 1997. No such analysis was made of the “MRT legal system”, which was thus never part of a system re-

¹⁰⁵⁶ *Ilaşcu and Others*, §§ 436 and 461.

flecting a judicial tradition considered compatible with Convention principles before the split into separate judicial systems occurred in 1990 (...).

149. The Court also considers that the conclusions reached above are reinforced by the circumstances in which the applicant in the present case was arrested and his detention was ordered and extended (see ... above, especially the order for his detention for an undefined period of time and the examination in his absence of the appeal against the decision to extend that detention), as well as by the case-law referred to by the applicant (...) and the various media reports which raise concerns about the independence and quality of the 'MRT courts' (...).¹⁰⁵⁷

8.5.3 *Requirements governing remedies offered by subordinate entities*

We see that the judicial fora existing even in internationally unrecognised entities may satisfy the Court for purposes of Articles 5 and 6 and accordingly also for purposes of Articles 13 and 35 § 1. It is however a requirement that such fora 'reflect a judicial tradition considered compatible with Convention principles' – as in the case of the 'TRNC' but not the 'MRT' – and meet the appropriate substantive standards. The latter requirement is crucial given that the domestic remedies are considered, from the Court's perspective, to be remedies offered by the respondent Party – Turkey or Russia, respectively, in the examples cited.

As in the case of the Dayton agreement setup for Bosnia and Herzegovina however, an important feature of the solution chosen is that it is in accordance with (or at least, not contrary to) general international law – in this case, the advisory opinion of the International Court of Justice in the *Namibia* case legitimises it.

The effect of applying the *Namibia* principle in these situations is not only to ensure that judicial protection is available to all those who find themselves under the control of the authorities of an unrecognised entity, important though that be. It is also that the European Court of Human Rights is not compelled to set itself up as the only recognised forum capable of offering the protection which Article 1 delegates to the Contracting Parties.

8.5.4 *Ad hoc remedy: the 'Turkish Republic of Northern Cyprus'*

As we have seen above, in *Loizidou* (merits) and *Cyprus v. Turkey* the Court set out the principle that the continued failure by the respondent to allow persons displaced from Northern Cyprus to regain access to their immovable property and their homes constituted violations of 1 of Protocol No. 1 and Article 8 of the Convention, respectively. Pursuant to Article 159 of the Constitution of the 'TRNC' – adopted in 1985 – ownership of abandoned properties was vested in the 'TRNC' itself. A procedure was to be set up under which former owners could claim compensation.

In June 2003 the 'Parliament of the TRNC' rather belatedly enacted a law intended to set up such a procedure. Its adequacy as a remedy within the meaning of Article 13 of the Convention was put to the test in a pilot case, *Xenides-Arestis v. Turkey*.

¹⁰⁵⁷ *Mozer*, §§ 147-149.

The Court's finding was brief:

As regards the application of Article 35 § 1 of the Convention to the facts of the present case, the Court notes at the outset that the compensation offered by Law no. 49/2003 in respect of the purported deprivation of the applicant's property is limited to damages concerning pecuniary loss for immovable property. No provision is made for movable property or non-pecuniary damages. Most importantly, however, the terms of compensation do not allow for the possibility of restitution of the property withheld. Thus, although compensation is foreseen, this cannot in the opinion of the Court be considered as a complete system of redress regulating the basic aspect of the interferences complained of (see, *mutatis mutandis*, *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, §§ 19-22, ECHR 2001-I, and *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-60, §§ 34-38).

In addition the Court would make the following observations concerning the purported remedy.

Firstly, the Law does not address the applicant's complaints under Article 8 and 14 of the Convention.

Secondly, the Law is vague as to its temporal application, that is, as whether it has retrospective effect concerning applications filed before its enactment and entry into force; it merely refers to the retrospective assessment of the compensation.

Finally, the composition of the compensation commission raises concerns since, in the light of the evidence submitted by the Cypriot Government, the majority of its members are living in houses owned or built on property owned by Greek Cypriots. In this connection, the Court observes that the respondent Government have not disputed the Cypriot Government's arguments on this matter and have not provided any additional information in their written and oral submissions. Further, the Court suggests that an international composition would enhance the commission's standing and credibility.¹⁰⁵⁸

In its ensuing judgment on the merits, the Court restated its existing case-law and found violations of Articles 1 of Protocol No. 1 and 8 of the Convention, without it being necessary to go separately into the question of Article 14 in conjunction with Article 8. It further held, under Article 46 of the Convention, that Turkey should introduce a remedy that would secure

genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it, in accordance with the principles for the

¹⁰⁵⁸ *Xenides-Arestis v. Turkey* (dec.), no 46347/99, 14 March 2005.

protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005.¹⁰⁵⁹

In the meantime, in 2004, the then Secretary General of the United Nations, Mr Kofi Annan, had presented a plan for the establishment of a United Cyprus Republic ('the UCR'). The intention had been for this republic to include two constituent States: a predominantly Greek Cypriot one in the south, eventually comprising about 71% of the land area of Cyprus, and a predominantly Turkish Cypriot one in the north, comprising about 29% of the land area. Cypriots would be citizens both of the UCR and of the appropriate constituent State. This plan, which came to be known as the 'Annan plan', provided for the settlement of outstanding property claims. Put to referendum on both sides of the border, it failed to pass: although the Turkish Cypriots voted largely in favour, the Greek Cypriot side overwhelmingly voted to reject it.¹⁰⁶⁰

A 'TRNC' law intended to cure the failings identified in *Xenides-Arestis* entered into force on 22 December 2005.¹⁰⁶¹ It provided for an Immovable Property Commission before which all natural and legal persons who could prove title to immovable property as of 20 July 1974 (or who could prove that they were the heirs of such persons), or who could prove that they had owned movable property before 13 February 1975 and had been forced to abandon it due to conditions beyond their own volition, might bring claims. The law provided for a four-year window, which was later extended to six years. This Immovable Property Commission had the power to compel the submission of documents and the appearance of witnesses and its decisions were binding and executable similarly to judgments of a court. The Immovable Property Commission was composed of

a president, a vice-president, and minimum five, maximum seven members, whose qualifications are specified below, shall be established. At least two members of the [Immovable Property] Commission to be appointed shall not be nationals of the Turkish Republic of Northern Cyprus, [the] United Kingdom, Greece, [the] Greek Cypriot Administration or [the] Republic of Turkey. ...

Moreover,

Any persons directly or indirectly deriving any benefit from immovable properties on which rights are claimed by those who had to move from the north of Cyprus in 1974, abandoning their properties, cannot be appointed as members of the [Immovable Property] Commission

1059 *Xenides-Arestis v. Turkey* (merits), no 46347/99, § 40, 22 December 2005.

1060 *Demopoulos and Others*, §§ 8-14.

1061 Law no. 67/2005 for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution, as amended by Laws nos. 59/2006 and 85/2007. See *Demopoulos and Others*, §§ 35-37.

The two foreign members appointed were Mr Hans-Christian Krüger, former Secretary to the European Commission of Human rights and former Deputy Secretary General of the Council of Europe, and Mr Daniel Tarschys, a Swedish academic and politician and former Secretary General of the Council of Europe.

The Immovable Property Commission could order restitution of immovable property or compensation in lieu, or propose an exchange against immovable property held in the territory of the Republic of Cyprus but to which a citizen of the 'TRNC' held title.

An appeal against the decision of the Immovable Property Commission lay to the High Administrative Court of the 'TRNC'; an 'applicant' displeased with the decision of the latter could 'apply to the European Court of Human Rights'.

It was reported in the Court's *Demopoulos and Others* decision that

As of the date of the hearing in November 2009, the number of cases brought before the IPC stood at 433. Of these, 85 had been concluded, the vast majority by means of friendly settlement. Only a handful of decisions not based on a settlement had been issued. In 4 cases, the IPC had ordered restitution and compensation; in 2 cases, exchange of property was agreed; and in 1 case the applicant agreed to restitution on resolution of the Cyprus problem. In more than 70 cases, compensation had been awarded. Some 361,493 square metres of property had been restituted and approximately 47 million euros paid in compensation.¹⁰⁶²

The applicants submitted that the Immovable Property Commission was not a "remedy" to be exhausted for purposes of Article 35 § 1 of the Convention, both because of doubts as to its impartiality and effectiveness and because

... the [Immovable Property Commission] remedy was operated by the authorities of an entity widely resented and distrusted by Greek Cypriots and universally viewed (save in Turkey) as an unlawful occupier. Many property owners felt unable to submit to, or effectively collaborate with, an occupying power in such a way.¹⁰⁶³

The Government of the Republic of Cyprus argued in addition that

... rather than being designed to provide redress for systemic violations and reinforce the effectiveness of the Court, it was an attempt to legitimise [the Turkish Government's] unlawful mass appropriation of Greek Cypriot properties

¹⁰⁶² *loc. cit.*, § 40.

¹⁰⁶³ *Demopoulos and Others*, § 58.

and that customary international law only required the applicants to exhaust Turkish remedies, whereas Turkey insisted that the IPC was a ‘TRNC’ remedy.¹⁰⁶⁴

Addressing the argument that the ‘TRNC’ compensation law was not part of Turkish domestic law, the Court answered as follows:

The Court considers this to be an artificial argument. Turkey has been held responsible for the acts and omissions of the authorities within the “TRNC” entity in numerous cases – otherwise the Court would not have had the competence to examine complaints brought by applicants against the respondent State concerning northern Cyprus. To the extent that any domestic remedy is made available by acts of the “TRNC” authorities or institutions, it may be regarded as a “domestic remedy” or “national” remedy vis-à-vis Turkey for the purposes of Article 35 § 1 (see *Cyprus v. Turkey*, cited above, §§ 101-02). It should also not be overlooked that Law no. 67/2005 and the IPC came into existence as the consequence of the Court holding in the *Xenides-Arestis* case (cited above) that Turkey had to introduce a remedy which secured the effective protection of the rights laid down in Article 1 of Protocol No. 1 in relation to the applicant as well as in respect of all similar applications pending before the Court. Accepting the functional reality of remedies is not tantamount to holding that Turkey wields internationally recognised sovereignty over northern Cyprus.

Answering the argument that argument that requiring exhaustion lent legitimacy to an illegal occupation, the Court reiterated the above-mentioned ‘Namibia principle’:

this, in brief, provides that even if the legitimacy of the administration of a territory is not recognised by the international community, “international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory” (Advisory Opinion of the International Court of Justice in the *Namibia* case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)), *ICJ Reports* 1971, vol. 16, p. 56, § 125).¹⁰⁶⁵

and:

95. Further, the overall control exercised by Turkey over the territory of northern Cyprus entails its responsibility for the policies and actions of the “TRNC” and that those affected by such policies or actions come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention with the consequence that Turkey is accountable for violations of Convention rights which take place

¹⁰⁶⁴ *Demopoulos and Others*, §§ 63 and 64.

¹⁰⁶⁵ *Demopoulos and Others*, § 93.

within that territory and is bound to take positive steps to protect those rights. It would not be consistent with such responsibility under the Convention if the adoption by the authorities of the “TRNC” of civil, administrative or criminal law measures, or their application or enforcement within that territory, were then to be denied any validity or regarded as having no “lawful” basis in terms of the Convention (see *Foka v. Turkey*, no. 28940/95, § 83, 24 June 2008, where arrest for obstruction of the applicant Greek Cypriot by a “TRNC” police officer was found to be lawful, and *Protopapa v. Turkey*, no. 16084/90, § 87, 24 February 2009, where a criminal trial before a “TRNC” court was found to be in accordance with Article 6, there being no ground for finding that these courts were not independent or impartial or that they were politically motivated).

96. In the Court’s view, the key consideration is to avoid a vacuum which operates to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements of their rights. Pending resolution of the international dimensions of the situation, the Court considers it of paramount importance that individuals continue to receive protection of their rights on the ground on a daily basis. The right of individual petition under the Convention is no substitute for a functioning judicial system and framework for the enforcement of criminal and civil law. Even if the applicants are not living as such under the control of the “TRNC”, the Court considers that, if there is an effective remedy available for their complaints provided under the auspices of the respondent Government, the rule of exhaustion applies under Article 35 § 1 of the Convention. As has been consistently emphasised, this conclusion does not in any way put in doubt the view adopted by the international community regarding the establishment of the “TRNC” or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus (see *Foka*, cited above, § 84). The Court maintains its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law.

The *Demopoulos and Others* solution is a remedy created to address a single issue in a single context. That, however, does not make it unique. The same can be said about the ‘*legge Pinto*’ or Pinto law enacted by Italy to provide a remedy for violations of Article 6 § 1 of the Convention caused by the excessive length of domestic civil proceedings.¹⁰⁶⁶

Nor, as we have seen, is it unique in that it approves a legal remedy even though the entity that it to administer it is unrecognised except by the respondent State.

¹⁰⁶⁶ *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX; *Giacometti and 5 others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII.

It is the combination of these two features that makes the *Demopoulos and Others* situation unique: the single-issue remedy administered by an entity whose very existence in law is, at the very least, a bone of contention.

The *Demopoulos* decision has been criticised for allowing *Realpolitik* to triumph over international humanitarian law, in particular the sixth paragraph of Article 49 of the Fourth Geneva Convention that forbids the Occupying Power to ‘deport or transfer parts of its own civilian population into the territory it occupies.’¹⁰⁶⁷ Be that as it may, it offers a solution of sorts – and one that leaves the choice whether to seek compensation in the hands of the acknowledged owners, at that. Admittedly Greek Cypriots might resent going before a ‘TRNC’ body, but people do not necessarily like to go before their own domestic courts either; as the decision noted, those who preferred to hold out for return of their property retained the option of doing nothing and waiting for the occupation to come to an end.¹⁰⁶⁸

8.5.5 *Internationally imposed quasi-indigenous institutions*

8.5.5.1 Western Germany

It is possible to see certain aspects of the occupation regime in Western Germany after World War II as a distant ancestor of the Annex 6 setup in Bosnia and Herzegovina which we will discuss in greater detail below.

The applicants in *X v. Federal Republic of Germany* were German nationals before the Second World War. In 1932 the first applicant emigrated to what was then Palestine. The second applicant emigrated to England in 1936. The applicants had owned property in Wiesbaden, Germany, which was sold; they alleged, however, that the price had been well below market value and reduced still further by the so-called Flight Tax, an exit tax exacted from Jews seeking to flee Nazi persecution.

After the war Wiesbaden was in the American zone of occupation. The American occupying authorities enacted a law that created a presumption that property wrongfully taken ‘for reasons of race, religion, nationality, ideology or political opposition to National Socialism’, or from persons subject to persecution on those grounds, had in effect been confiscated. The presumption was rebuttable if a ‘fair purchase price’ had been paid or if ‘the transaction as such and with its essential terms would have taken place even in the absence of National Socialism’.

After the war the applicants sought monetary compensation through the German courts but were met with a rejection on the ground that the first applicant had already been living outside Germany at the time of the sale (the implication being, presumably, that he had been under no constraint). Ultimately, in 1955, the case ended up in the Supreme Restitution Court, a body originally set up under an arrangement

¹⁰⁶⁷ Aeyal Gross, ‘The Righting of the Law of Occupation’, in *Frontiers of Human Rights: Extraterritoriality and its Challenges* (Collected Courses of the Academy of European Law vol. XXIV/1, pp. 21–54 at p. 43.

¹⁰⁶⁸ *Demopoulos and Others*, § 128.

between the three Western allies (who as we have seen were at that time Occupying Powers in Western Germany) that had later been ratified by the Federal Republic.

Seized of the matter, the Commission came to the conclusion that the Supreme Restitution Court was an international court, subject neither to the jurisdiction of the Federal Republic of Germany nor to its sovereign power or control. True it might be that the Federal Republic of Germany had ratified the Convention before it ratified the arrangement that set up the Supreme Restitution Court, but it had done so shortly before recovering full sovereignty; the international status of the Supreme Restitution Court therefore prevailed.¹⁰⁶⁹

8.5.5.2 Bosnia and Herzegovina¹⁰⁷⁰

Following a NATO-led bombing campaign and the application of intense pressure by major powers (the United States and Russia in particular), the General Framework Agreement on Peace in Bosnia and Herzegovina¹⁰⁷¹ was initialled in Dayton, Ohio (USA) on 21 November 1995. The signatories were the Republic of Bosnia and Herzegovina, as it existed at that time, the Republic of Croatia and the Federal Republic of Yugoslavia (the latter composed of Serbia and Montenegro). The General Framework Agreement will be referred to hereinafter by its more usual appellation, the Dayton Agreement.

Shortly afterwards, on 8 and 9 December 1995, a Peace Implementation Conference was held in London. It resulted in the establishment of a Peace Implementation Council ('PIC'), its Steering Board and a High Representative as the Chair of the Steering Board.¹⁰⁷² While the PIC is composed of all the States, international organisations and agencies which attended the Conference, the Steering Board members are Canada, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom, the United States, the Presidency of the European Union, the European Commission and Turkey (on behalf of the Organisation of the Islamic Conference). The Peace Implementation Council met on several occasions afterwards.

The Dayton Agreement entered into force upon signature on 14 December of the same year. It induced the warring factions to put a grudging end to the active hostilities in Bosnia and Herzegovina and, one may hope, created a basis for lasting peace in the country.

The Dayton Agreement sets up 'Bosnia and Herzegovina' (generally referred to as 'the State'¹⁰⁷³ – the name 'Republic' having come to be associated with one of the

1069 *X v. Germany*, Commission decision of 10 June 1958, no. 235/56, and Jewish Telegraphic Agency, 25 January 1956, <http://www.jta.org/1956/01/25/archive/new-supreme-restitution-court-starts-functioning-in-germany> (retrieved 12 April 2017).

1070 See generally Jessica Simor, "Tackling human rights abuses in Bosnia and Herzegovina: the Convention is up to it, are its institutions?", *E.H.R.L.R.* 1997, 6, 644-662.

1071 UN Document A/50/790 (General Assembly) – S/1995/999 (Security Council).

1072 UN Document S/1995/1029.

1073 The expression "the State" is often used for Bosnia and Herzegovina to disambiguate it from the Federation of Bosnia and Herzegovina, which is one of the two Entities.

former warring factions) as a continuation of the former Republic. The State is composed of two Entities, the Federation of Bosnia and Herzegovina and the Serb Republic (more commonly known as the Republika Srpska). The Federation is not so called because it unites Bosniak and Croat territorial entities (though it is easy to get that impression in practice), but because it is a 'federation' consisting of ten Cantons enjoying considerable autonomy; this federation was born of an earlier attempt at peace-making and nation-building, the Washington Agreement of 1 March 1994 (signed on 18 March 1994).¹⁰⁷⁴

The Agreement itself comprises a brief preamble and eleven articles. Essentially the signatory parties – that is to say Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia – recognise each other's statehood and agree to conduct their relations in accordance with the applicable rules of international law. In addition, they 'welcome and endorse' the more detailed arrangements laid down in twelve Annexes (twelve, that is, taking Annexes 1-A and 1-B separately). The signatories to the Annexes are, in most cases, the State, the Federation of Bosnia and Herzegovina and the Republika Srpska.

We will examine those Annexes that are of interest to our study.

8.5.5.2.1 *Military aspects: Annex 1-A*

Annex 1-A, the 'Agreement on the Military Aspects of the Peace Settlement', the signatories – the State and the two Entities – 'welcome the willingness' of the international community to send a military force. The Security Council was invited to adopt a resolution by which it would authorise Member States or regional organisations and arrangements to establish a multinational military Implementation Force (to be known as 'IFOR') as the successor to UNPROFOR; this force was to be led by NATO though it might include forces from non-NATO states.¹⁰⁷⁵ The Security Council did so, in a Chapter VII resolution, one day after the Dayton Peace Agreement entered into force.¹⁰⁷⁶ IFOR existed for one year, from 20 December 1995 to 20 December 1996.

Appended to Annex 1A were two Appendices, including one, Appendix B, which comprised a status of forces agreement between the State and NATO. This agreement provided that the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission should apply to NATO IFOR personnel. Personnel enjoying privileges and immunities under this Appendix were to respect the laws of the Republic of Bosnia and Herzegovina insofar as it '[was] compatible with the entrusted tasks/mandate'¹⁰⁷⁷ – i.e. the latter took precedence over local laws – and 'under all circumstances and at all times' were 'subject to the

1074 To be found on the web site of the United States Institute of Peace, https://www.usip.org/files/file/resources/collections/peace_agreements/washagree_03011994.pdf (accessed on 1 May 2017).

1075 Article I (1) of Annex 1-A.

1076 S/RES/1031/1995 (15 December 1995), § 14.

1077 *loc. cit.*, § 3.

exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offenses which may be committed by them in the Republic of Bosnia and Herzegovina.¹⁰⁷⁸

On 12 December 1996 the Security Council, again in a Chapter VII resolution, authorised the Stabilization Force (SFOR) to be set up as the legal successor to IFOR, initially for eighteen months.¹⁰⁷⁹ SFOR existed until 2 December 2004 when it was relieved by a European Union Force, known as EUFOR,¹⁰⁸⁰ embarking on its 'Operation Althea'.¹⁰⁸¹ EUFOR is still in theatre, though its strength is now reduced to little more than symbolic levels.

8.5.5.2.2 *Civilian structure*

The post-war legal civilian structure of Bosnia and Herzegovina is based on further Annexes. Three of them are of particular interest here: Annex 4, Annex 6 and Annex 10.

Annex 4

Annex 4 is the Constitution of Bosnia and Herzegovina.¹⁰⁸² It provides, in its first Article, that the Republic of Bosnia and Herzegovina continues its existence as simply 'Bosnia and Herzegovina'. It defines the powers of the Entities, which are all those not expressly reserved to the State, and the composition and powers of the institutions of the State – principally the Presidency, the Parliamentary Assembly, the Council of Ministers, the Constitutional Court and the Central Bank, though reference is made to bodies and organs created under other Annexes including the Human Rights Commission set up by Annex 6 which we shall meet anon.

Bosnia and Herzegovina is to 'ensure the highest level of internationally recognized rights and fundamental freedoms' (Article II (1)). More specifically, Article II (2) provides as follows:

International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

1078 *loc. cit.*, § 7.

1079 S/RES/1088 (1996) of 12 December 1996, § 18.

1080 S/RES/1575 (2004) of 22 November 2004, § 10. The most recent extension of EUFOR's mandate at the time of writing is by S/RES/2315 (2016) of 8 November 2016, § 3.

1081 Named after Althea, the ancient Greek goddess of healing.

1082 See generally Mehmet Semih Gemalmaz, "Constitution, Ombudsperson and Human Rights Chamber in 'Bosnia and Herzegovina', *Netherlands Quarterly of Human Rights*, Vol. 17/3, 277-329, 1999, pp. 277-291.

The Constitutional Court comprises nine members, two appointed by the Republika Srpska and four appointed by the Federation of Bosnia and Herzegovina¹⁰⁸³ (in practice, two Bosniacs and two Croats). The remaining three members, who may not be nationals of Bosnia and Herzegovina or of any neighbouring State (which rules out the former Yugoslav republics Croatia, Montenegro and Serbia), are appointed by the President of the European Court of Human Rights.¹⁰⁸⁴

The Constitutional Court's constitutional jurisdiction, defined in Article VI (3), includes disputes arising under the Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina.

Its appellate jurisdiction is over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

It is also empowered to give what amount to preliminary rulings on

issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

In its various provisions defining the composition of the main political organs (the Parliamentary Assembly, the Presidency) the Annex 4 Constitution recognises only three 'constituent peoples': Serbs (to be elected from the Republika Srpska) and Bosniaks and Croats (to be elected from the Federation of Bosnia and Herzegovina). This is very much in keeping with the character of the Dayton Peace Agreement as an armistice agreement intended to put an end to active hostilities as quickly as may be. It is, however, unfair to all those who are not, or do not wish to identify as, members of one of those ethnic groups – for example, persons of mixed descent (of whom there were large numbers before the war and many remain) and members of other ethnic groups (such as Jews and Roma). This state of affairs has been challenged, even before the European Court of Human Rights, and with success: the Court has found a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 on account of the ineligibility of persons not counted members of the 'constituent peoples' to stand for election to the House of Peoples of Bosnia and Herzegovina (the Lower House of Parliament) and the Presidency,¹⁰⁸⁵ or of the ineligibility of members

1083 Article VI (1) (a).

1084 Article VI (1) (a)-(b).

1085 *Sejdić and Finci v. Bosnia and Herzegovina* (GC), nos. 27996/06 and 34836/06, ECHR 2009 (the applicants are a Rom and a Jew, respectively); *Zornić v. Bosnia and Herzegovina*, no. 3681/06, 15 December 2014 (the applicant does not declare affiliation with any of the "constituent peoples").

of a minority constituent people within one of the Entities,¹⁰⁸⁶ to be elected from that Entity. In the Court's view, whatever the justification for such distinctions might have been at the time when the Annex 4 Constitution was adopted, it no longer existed at the time when the respective judgments were adopted.

The changes required by the Court's judgments have yet to be implemented.¹⁰⁸⁷ The fear is that any changes made to the Constitution will not be limited to this feature alone and that some will propose to amend it further so as to grant the Entities rights even more sweeping than those they enjoy already – even the right to secede, which in the present redaction is excluded.¹⁰⁸⁸ An external or supranational power with the competence to force through changes to the Constitution does not exist: responsibility lies entirely with the institutions of Bosnia and Herzegovina themselves.

The Constitutional Court ruled early on that it did not itself have jurisdiction to change either the Dayton Agreement or the Constitution:

(...) the Constitutional Court is not competent to evaluate the constitutionality of the General Framework Agreement as the Constitutional Court has in fact been established under the Constitution of Bosnia and Herzegovina in order to uphold this Constitution (...) The Constitution of Bosnia and Herzegovina was adopted as Annex IV to the General Framework Agreement for Peace in Bosnia and Herzegovina, and consequently there cannot be a conflict or a possibility for controversy between this Agreement and the Constitution of Bosnia and Herzegovina.¹⁰⁸⁹

It has, however, pointed the way forward:

Elements of a democratic state and society as well as underlying assumptions – pluralism, just procedures, peaceful relations that arise out of the Constitution – must serve as a guideline for further elaboration of the issue of the structure of BiH as a multi-national state. Territorial division (of Entities) must not serve as an instrument of ethnic segregation – on the contrary – it must accommodate ethnic groups by preserving linguistic pluralism and peace in order to contribute to the integration of the state and society as such. Constitutional principle of collective equality of constituent peoples, arising out of designation of Bosniacs, Croats and Serbs as constituent peoples, prohibits any special privileges for one or two constituent peoples, any domination in governmental structures and any ethnic homogenisation by segregation based on territorial separation. Despite the territorial division of BiH by establishment of two Entities, this territorial

1086 *Pilav v. Bosnia and Herzegovina*, no. 41939/07, 9 June 2016.

1087 Committee of Ministers resolutions CM/ResDH(2011)291, 2 December 2011; CM/ResDH(2012)233, 6 December 2012; and CM/ResDH(2013)259, 5 December 2013.

1088 Article III (2) (a) of the Constitution of Bosnia and Herzegovina.

1089 Constitutional Court of Bosnia and Herzegovina, U-7/97, 22 December 1997.

division cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation or the right to maintain results of ethnic cleansing. Designation of Bosniacs, Croats and Serbs as constituent peoples in the Preamble of the Constitution of BiH must be understood as an all-inclusive principle of the Constitution of BiH to which the Entities must fully adhere, pursuant to Article III.3 (b) of the Constitution of BiH.¹⁰⁹⁰

Annex 6

Annex 6, the ‘Agreement on Human Rights’ which we mentioned earlier,¹⁰⁹¹ boldly states, in the first paragraph of its first article, that

The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex.

To ‘assist in honoring their obligations under this Agreement’, or as a cynic might say, to see to it that they all kept their word, the Parties set up a Commission on Human Rights composed of the Office of the Ombudsman and the Human Rights Chamber. Both had the same basic task, which was to consider

(a) alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or

(b) alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex.¹⁰⁹²

– the agreements annexed including, significantly, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions, and the 1966 International Covenant on Civil and Political Rights with both of its Protocols. The Security Council, in the same resolution that authorised SFOR,

1090 Constitutional Court of Bosnia and Herzegovina, U-5/98 (Partial Decision Part 3), 1 July 2000.

1091 See generally Manfred Nowak, “The Human Rights Chamber for Bosnia and Herzegovina adopts its First Judgments”, *Human Rights Law Review* 18 (1997) pp. 529-45; R. Aybay, “A New Institution in the Field: The Human Rights Chamber of Bosnia and Herzegovina”, *Netherlands Quarterly of Human Rights*, Vol. 15/4, 529-558, and for a critical appraisal, Mehmet Semih Gemalmaz, “Constitution, Ombudsperson and Human Rights Chamber in ‘Bosnia and Herzegovina’”, *Netherlands Quarterly of Human Rights*, Vol. 17/3, 277-329, 1999, pp. 291-329.

1092 Article II (2) of Annex 6.

called upon the State and the Parties to the Peace Agreement to cooperate with the Ombudsman and the Chamber.¹⁰⁹³

The Human Rights Ombudsman and the Human Rights Chamber were intended, by Article III of Annex 6, to function as two limbs of a single body, sharing a single Executive Officer to manage their administration and staff. In actual fact the Commission never functioned as a single organisation: early on temperamental differences ensured that the Ombudsman and the Chamber went their separate ways. The first Human Rights Ombudsman, Dr Gret Haller, styled herself Ombudsperson, and it is under this name that her office became known.

In both bodies the international element predominated. The Human Rights Ombudsperson was a foreign national;¹⁰⁹⁴ of the fourteen members of the Chamber, eight were nationals of foreign countries, making the Chamber a hybrid court, and six were Bosnia and Herzegovina nationals appointed by the Entities (four appointed by the Federation of Bosnia and Herzegovina – in practice, two Bosniaks and two Croats – and two appointed by the Republika Srpska).¹⁰⁹⁵

Both the Office of the Ombudsperson and the Human Rights Chamber enjoyed support from the Strasbourg Institutions; in their first years, the Deputy Human Rights Ombudsperson and the head of the legal support staff of the Human Rights Chamber (known as the Registrar) were members of either the Secretariat of the European Commission of Human Rights or the Registry of the European Court of Human Rights, seconded by the Council of Europe.¹⁰⁹⁶ Both bodies had a mixed staff of Bosnia and Herzegovina citizens and foreign nationals, many of the latter seconded, or financed, by the governments of the States of which they were nationals.

The set-up was very much based on that of the European Commission and Court of Human Rights as it existed, at the time, under the European Convention on Human Rights of 1950: the Ombudsman was to investigate alleged violations of the Convention and report on them, forwarding the reports to the High Representative or initiating proceedings in the Human Rights Chamber as the case might require.¹⁰⁹⁷ A difference from the Convention set-up was that the Chamber was to receive cases, not only by referral from the Ombudsperson, but also

1093 S/RES/1088 (1996) of 12 December 1996, § 10.

1094 Article IV (2) of Annex 6.

1095 For a thoughtful discussion of hybrid courts, drawing on the experience of the Human Rights Chamber for Bosnia and Herzegovina in particular, see Elizabeth M. Bruch, “Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens”, 28 *Boston University International Law Journal* 1 (2010). The author was the Human Rights Chamber’s first Executive Officer.

1096 The present author among them. A member of the Registry of the European Court of Human Rights since 1992, he was seconded to the Human Rights Chamber in 1997-98 and again in 2000-2001. The latter secondment was financed by the Government of the Netherlands.

1097 Article V of Annex 6.

directly from any Party or person, non-governmental organization, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing.¹⁰⁹⁸

The system established under Annex 6 was intended to be in existence for only five years after the Agreement entered into force, after which responsibility for its continued operation would pass to the parties unless otherwise agreed. The Ombudsperson became a domestic institution in 2001, after a State law that so provided was signed into force by the High Representative (although for a time the Ombudsperson continued to be a foreign national). Shortly before 14 December 2000, the day on which the five-year period was set to expire, the State and the two Entities – on the prompting of, in particular, the High Representative – reached an agreement that extended the existence of the Human Rights Chamber until the end of 2003.¹⁰⁹⁹

While they were in existence, the Ombudsperson and the Human Rights Chamber were widely considered part of the international structure – as was only natural, considering their funding (which had to come, almost exclusively, from abroad), their predominantly international composition (as well as the proportion of non-Bosnia and Herzegovina nationals among their support staff) and the nature of the substantive law that they applied. Thus it was that in 1998 the Venice Commission, asked to express an opinion on whether the Chamber could be described as ‘any other court’ in Bosnia and Herzegovina, against whose decisions it was possible to appeal to the Constitutional Court, found on account of the Chamber’s ‘quasi-international (*sui generis*) and provisional character’ that it was not.¹¹⁰⁰ The Constitutional Court followed suit: when the Federation of Bosnia and Herzegovina attempted to challenge decisions of the Chamber before the Constitutional Court, the Constitutional Court held that the two jurisdictional bodies functioned in parallel.¹¹⁰¹

In a decision echoing that of the Constitutional Court, the Human Rights Chamber held that it, too, lacked competence to review the decisions of other bodies created by the Dayton Agreement.¹¹⁰²

It is certain that during the years of their existence, the Ombudsperson and Human Rights Chamber enjoyed the confidence of the local population to a greater extent than domestic bodies, the latter being widely seen – so shortly after a bitter sectarian war – as protecting factional interests. In mid-2003 a spokesperson for Amnesty In-

1098 Article VIII of Annex 6.

1099 For more detail, see Buyse (2008), pp. 284-301.

1100 Opinion of the Venice Commission on the admissibility of appeals against the Human Rights Chamber of Bosnia and Herzegovina, CDL-INF (98) 18.

1101 Constitutional Court of Bosnia and Herzegovina, U-7-11/98, 26 February 1999; see also Buyse (2008), p. 283.

1102 Human Rights Chamber for Bosnia and Herzegovina, CH/00/4441, *Merima Sijarić v. Federation of Bosnia and Herzegovina*, 6 June 2000, and CH/99/2327, *Momčilo Knežević v. Republika Srpska*, 11 October 2001; see also Buyse (2008), p. 283.

ternational was able to state that ‘the Chamber [was] acting as a last and possibly only avenue of justice in Bosnia-Herzegovina.’¹¹⁰³

Much of their success, of the Human Rights Chamber especially, came from the latter’s use of its power to order binding provisional measures.¹¹⁰⁴ ‘Ethnic cleansing’, to use a horrid expression coined during the war years, did not cease immediately when the Dayton Agreement entered into force; for some time afterwards local authorities in both Entities sought to consolidate the positions of one or other of the ethnic factions by evicting members of the other factions who had remained within their territories or who had returned to their original homes. The Chamber’s orders for provisional measures, backed up by the executive force of other elements of the international community, helped to put a stop to this. Gradually, as the situation normalised, internally displaced persons who had taken up residence in dwellings abandoned by others and who were unwilling to return to their original homes sought provisional measures that would enable them to remain where they were; these were refused, an important premise of the Dayton peace process being precisely that people should as a rule return to where they had come from.¹¹⁰⁵

In time, after Bosnia and Herzegovina had acceded to the Convention, the question arose whether the Chamber, in particular, was ‘another procedure of international investigation or settlement’ within the meaning of Article 35 § 2 (b) of the Convention. It came up in the *Jeličić* case – the issue being the failure by one of the Entities to enforce a decision of the Human Rights Chamber.

Granted leave to intervene as a third party under Article 36 of the Convention, the Venice Commission submitted an *amicus curiae* opinion stating that proceedings before the Chamber must not be considered ‘international’ within the meaning of Article 35 § 2 (b) of the Convention. They must, on the contrary, be considered ‘domestic’ within the meaning of Article 35 § 1. The International Committee for Human Rights, a human rights NGO registered in Spain with its main office in Sarajevo which also intervened, stressed the transitional character of the Chamber and noted, among other things, that constituent units of Bosnia and Herzegovina were capable of being parties before it.

In its ensuing admissibility decision, the Court held that the Chamber ‘constituted a part, albeit a particular part, of the legal system of Bosnia and Herzegovina’ – a domestic body, not an international one.¹¹⁰⁶ By this time the Chamber was safely defunct and it could no longer hurt its authority to deny its international status.

1103 Amnesty International UK Director Kate Allen, Amnesty International press release of 12 June 2003, ‘Bosnia-Herzegovina: Ashdown’s proposal to abolish Human Rights Chamber leaves citizens unprotected’.

1104 Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (diss. Nijmegen), Intersentia, 2010, pp. 182-188.

1105 Rieter, pp. 508-509.

1106 *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII.

Annex 10

Annex 10, or Agreement on Civilian Implementation of the Peace Settlement, contains a request to the United Nations Security Council for the appointment of a High Representative and defines the mandate of such a functionary.

The powers and duties of the High Representative include coordinating the work of civilian organisations providing aid and reporting on progress in the implementation of the peace agreement. The High Representative is 'the final authority in theatre' regarding interpretation of the Dayton Agreement as regards its civilian aspects. It is specifically provided that the High Representative shall have no authority over the military.

The very day following the entry into force of the Dayton Agreement the Security Council adopted a resolution welcoming the conclusions of the Peace Implementation Conference held in London on 8 and 9 December 1995 (S/1995/1029), and in particular its decision to establish a Peace Implementation Council and its Steering Board and appointed the first High Representative, for whom the ground had been prepared by the Peace Implementation Conference. He was Carl Bildt, former prime minister of Sweden and former co-chairman of the Dayton Peace Conference itself.¹¹⁰⁷

On 10 December 1997, at its main meeting in Bonn, Germany, the Peace Implementation Council adopted a set of conclusions including the following:¹¹⁰⁸

XI. High Representative

1. The Council commends the efforts of the High Representative and his staff in pursuing the implementation of the Peace Agreement. It emphasises the important role of the High Representative in ensuring the creation of conditions for a self-sustaining peace in Bosnia and Herzegovina and his responsibility for co-ordination of the activities of the civilian organisations and agencies in Bosnia and Herzegovina.

The Council reiterates that the Steering Board of the PIC will provide the High Representative with political guidance on peace implementation. It will continue to meet monthly, inviting representatives of relevant international organisations to attend as appropriate.

2. The Council welcomes the High Representative's agreement to continue reporting in accordance with Article II. 1 (f) of Annex 10 to the Peace Agreement.

The Council encourages the High Representative to report regularly on compliance by individual municipalities with the provisions of the Peace Agreement.

The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of

1107 UN Security Council Resolution 1031 of 15 December 1995, para. 26.

1108 UN document S/1997/979.

difficulties by making binding decisions, as he judges necessary, on the following issues:

- a. timing, location and chairmanship of meetings of the common institutions;
- b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;
- c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

The Security Council endorsed these conclusions on 19 December 1997.¹¹⁰⁹

Since then, successive High Representatives have made use of their ‘Bonn powers’, as they are referred to, to impose or strike down legislation, to promote the implementation of decisions of the Human Rights Chamber or other authorities created by the Dayton Agreement when the State and the Entities were conspicuously dragging their feet, and to dismiss civil servants and even elected functionaries found to be obstructing the implementation, the letter or the spirit of the Dayton Agreement.

Thus, between June and December 2004 the then High Representative removed twenty-six individuals from their positions in public authority and political parties and barred them indefinitely from holding any such positions and standing for election thereafter for having obstructed arrests ordered by the ICTY Prosecutor. There being no legal remedy of any description available to them, they applied to the European Court of Human Rights, alleging violations of Articles 6 (under its criminal head), 11 and 13.

The Court declared their complaint inadmissible *ratione personae*, the decisions in issue having been lawfully taken by the High Representative under powers previously and explicitly delegated by the Security Council under Chapter VII of the United Nations Charter. Quoting §§ 146-149 of the *Behrami and Saramati* decision, it came to the conclusion that the same reasoning applied to ‘the acceptance of an international civil administration in its territory by a respondent State’.¹¹¹⁰

1109 UN Security Council 1144 (1997).

1110 *Berić and Others*, §§ 26-30. This is now standing case-law: see *Kalinić and Bilbija v. Bosnia and Herzegovina* (dec.), nos. 45541/04 16587/07, 13 May 2008. See also Tobias Lock, “Beyond *Bosphorus*: The European Court of Human Rights’ Case-Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights”, in *Human Rights Law Review* 10:3 (2010), 529-545 at 532-33.

8.5.5.3 Kosovo

After the Federal Republic of Yugoslavia withdrew its troops from Kosovo and until Kosovo declared independence in 2008, the exercise of civilian jurisdiction was vested by UN Security Council Resolution 1244 (1999) in an interim administration established by the Secretary General of the United Nations.¹¹¹¹ In his report of 12 June 1999 the Secretary General of the United Nations announced the setting up of the United Nations Interim Administration Mission in Kosovo (or UNMIK).¹¹¹² One month later, he announced that UNMIK would be invested with '[a]ll legislative and executive powers, including the administration of the Judiciary'.¹¹¹³ This was in fact done by the very first UNMIK Regulation promulgated by the Special Representative of the Secretary General of the United Nations, in which the Special Representative vested these powers in himself – including the power to 'appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person'.¹¹¹⁴ A later UNMIK Regulation specified the law to be applied, which was, in order of precedence, the UNMIK regulations promulgated by the Special Representative and the law in force in Kosovo on 22 March 1989 (the date on which Kosovo had lost its autonomy within the SFRY).¹¹¹⁵ Moreover, in exercising their functions, all persons undertaking public duties or holding public office in Kosovo were to observe

internationally recognized human rights standards, as reflected in particular in:

- (a) The Universal Declaration on Human Rights of 10 December 1948;
- (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;
- (c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto;
- (d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
- (e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
- (f) The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979;
- (g) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and
- (h) The International Convention on the Rights of the Child of 20 December 1989.¹¹¹⁶

¹¹¹¹ UN Security Council Resolution 1244 (1999) of 10 June 1999, §§ 10 and 11.

¹¹¹² S/1999/672 (Report of the Secretary General pursuant to paragraph 10 of Security Council Resolution 1244 (1999)).

¹¹¹³ S/1999/779 (Interim administration mission in Kosovo), § 35.

¹¹¹⁴ UNMIK Regulation 1999/1, Section 1.

¹¹¹⁵ UNMIK Regulation 1999/24, Section 1(1).

¹¹¹⁶ UNMIK Regulation 1999/24, Section 1(3).

In 2004 the Venice Commission presented an opinion suggesting a Human Rights Court for Kosovo broadly based on the model of the Human Rights Chamber, but with an important difference:

105. Unlike the Human Rights Chamber for Bosnia and Herzegovina, the Human Rights Court for Kosovo should be empowered to accept applications lodged either by individuals or by the Ombudsperson on their behalf, with their agreement, concerning actions and omissions by the international authorities in Kosovo (when reviewing acts or omissions by UNMIK, the Chamber would have to sit in an exclusively international composition) and the agreement should therefore comprise a specific provision concerning the waiving of the immunity of the Special Representative and UNMIK personnel, and possibly also that of NATO. It would be a new phenomenon for a (quasi-) international court to hold jurisdiction over an international organisation to which it does not belong. However, the situation would be the same if the European Court were granted jurisdiction over UNMIK, or possibly KFOR, or for that matter once the European Union or European Community has acceded to the ECHR.¹¹¹⁷

The suggestion was endorsed by the Parliamentary Assembly of the Council of Europe.¹¹¹⁸

UNMIK still exists even after Kosovo's declaration of independence. It 'continues to implement its mandate in a status neutral manner and operate under Security Council resolution 1244 (1999)'.¹¹¹⁹

The 2008 Constitution of Kosovo¹¹²⁰ is largely based on the Comprehensive Proposal for the Kosovo Status Settlement,¹¹²¹ known as the 'Ahtisaari plan',¹¹²² to which it refers. Its Article 152 provides for Kosovo's Constitutional Court to be composed, temporarily, of six members appointed by the President of the Republic (their nationality is not specified) and three members, who shall be non-nationals, appointed by the International Civilian Representative (an official of the European Union), upon consultation with the President of the European Court of Human Rights.¹¹²³

1117 Venice Commission, *Opinion on human rights in Kosovo: Possible establishment of review mechanisms*, CDL-AD (2004)033, 11 October 2004, § 105.

1118 PACE Resolution 1417 (2005), *Protection of Human Rights in Kosovo* (25 January 2005); see also PACE Doc. 10393, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Lloyd.

1119 <https://unmik.unmissions.org/mandate> (accessed 14 May 2017).

1120 <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (accessed 14 May 2017).

1121 S/2007/168/Add.1, 26 March 2007.

1122 Martti Ahtisaari, former President of Finland, United Nations Special Envoy for Kosovo 2005-2007.

1123 Compare Article 6.1 of the Comprehensive Proposal for the Kosovo Status Settlement, fn. 1121 above.

The Court has recognised that the Republic of Serbia exercises no effective control over Kosovo and that consequently applications against Serbia alleging violations of the Convention by the authorities of Kosovo are inadmissible *ratione personae*.¹¹²⁴

Kosovo has not yet been universally recognised as an independent State; among States withholding recognition one finds Council of Europe Members including Serbia (unsurprisingly). The Court has taken to adding a footnote in judgments and decisions concerning Kosovo, stating that ‘All reference to Kosovo, whether to the territory, institutions or population, in this text [should] be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo’.

8.6 Conclusion

Various ways are imaginable in which a Contracting State can seek to evade attribution to it of a violation of the Convention.

Setting up a subordinate pseudo-state has not proved successful in terms of escaping imputability under the Convention. The ‘TRNC’ and the ‘MRT’ are cases in point. That said, the ‘TRNC’ experience shows that a Contracting State may actually acquit itself of its Convention obligations by this means. It is interesting to note a certain ambivalence in this context: although in at least one recent case before the Court the Turkish Government have no longer raised a preliminary objection of inadmissibility *ratione loci*,¹¹²⁵ in Turkish domestic legislation and international legal practice they apparently continue to maintain that the ‘TRNC’ is not an authority subordinate to the Republic of Turkey but a ‘state’ in its own right. At all events, demands of accountability under the Convention and the availability of effective domestic remedies have been found satisfied; thus is Turkey protected in a large measure against admissible applications.

As to the use of private agents, security contractors for example, it is unlikely that a State will escape accountability by mandating activities normally within its remit to them. Nonetheless, provided that proper regulatory and supervisory frameworks are in place and appropriate remedies exist to deal with any problems that may arise under the Convention this solution may be compliant.

International organisations – most notably the United Nations – may be of assistance to Contracting States from the perspective of accountability before the European Court of Human Rights. However, unless provision is made for the international organisation itself to be held to account, the risk is that a jurisdictional vacuum emerges that leaves the victim of a human rights violation without any remedy; this

¹¹²⁴ *Azemi v. Serbia (dec.)*, no. 11209/09, 5 November 2013.

¹¹²⁵ *Joannou v. Turkey*, no. 53240/14, § 61, 12 December 2017; see also the Chamber judgment in *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, § 184, 4 April 2018 (referred to the Grand Chamber).

has been rightly noted. Moreover, as the Dutch experience of litigation in the Srebrenica cases shows, States may yet be held accountable in their own courts under domestic law.

The use of internationally imposed quasi-domestic institutions offers the best prospects of satisfying requirements of accountability while placing responsibility elsewhere. Here we may turn to the lessons learned in Bosnia and Herzegovina.

There remains much to criticise about the Dayton setup for Bosnia and Herzegovina. In particular, it has failed to provide for a viable unitary state. There is still a perceived danger even now that part of the territory – whether the Republika Srpska or a part of the Federation of Bosnia and Herzegovina, if not both – may one day try to take itself out of the State, perhaps to become independent in its own right, perhaps to join a neighbouring state.

Nevertheless, the Dayton Agreement deserves credit for being what it was intended to be: an effective armistice agreement. It put an end to what remains, for the present, the bloodiest conflict on European soil since the Second World War and enabled a return to some semblance of normality. At the same time it made it possible for outside forces including European States to impose their will without themselves being held accountable under the Convention.

We can identify the following relevant features of the arrangement:

Firstly, compliance with general international law throughout. All coercive measures were agreed by the States involved beforehand and given the seal of legality by the Security Council. Failing permission of a local government enjoying international recognition, this is the *conditio sine qua non* for any solution that involves the use or threat of force or otherwise overrides the will of the warring factions if it is to be legal in terms of international law.

Secondly, the assumption of responsibility by quasi-domestic institutions that were not, as such, subordinate to the government or governments of any one or more of the Contracting States. This is the *conditio sine qua non* for the latter to avoid having to assume ‘jurisdiction’ within the meaning of Article 1 of the Convention, whether directly as Parties to the Convention (as in, for example, *Cyprus v. Turkey*, *Ilaşcu and Others* and *Jaloud*) or as ‘occupying powers’ within the meaning of Article 42 of the Hague Regulations (compare *Al-Skeini* and *Al-Jedda*).

A third, and extremely helpful, feature of the Dayton setup is that the substantive human rights standards of the Convention were incorporated in the solution chosen from the outset, even though Bosnia and Herzegovina was not to become a Party in its own right for many years yet. Although this was not in itself determinative for the jurisdiction of the Convention States involved in the rebuilding of post-war Bosnia and Herzegovina, it did enable the emergence of a Convention-based legal order that remains unique among newly-joined Contracting States without a strong indigenous human rights culture. The total number of applications lodged with the Court against Bosnia and Herzegovina, and put before a judicial formation, to date is relatively high – nearly as high as the number lodged against, for example, Austria and Greece, which have been Parties for decades and have more than twice as many

inhabitants – but the number of judgments finding at least one violation compares extremely favourably with both.¹¹²⁶ This attests to the strength of the institutions in place protecting human rights, even as serious problems remain. The centrifugal forces that still threaten to tear the country apart will have to be challenged in the domestic political process; in this respect, the law, even the Convention, can be of but little assistance.

The least satisfactory feature of the Dayton setup is that it ignored the need to hold the international presence itself to account, which as the *Berić* decision demonstrates remains a concern. An attempt was made to apply the lessons learned in neighbouring Kosovo, although with little alacrity; even so, Kosovo leads the way for the present.¹¹²⁷

1126 European Court of Human Rights, Overview 1959-2016, available on the Court's internet web site (accessed 1 May 2017).

1127 See generally Tilmann Altwicker and Nuscha Wiczorek, "Bridging the Security Gap through EU Rule of Law Missions? Rule of Law Administration by EULEX", *Journal of Conflict and Security Law* (2016), Vol. 21 No. 1, 115-133.