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Deposited in DRO:

03 November 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Rooney, Jane (2015) 'The relationship between jurisdiction and attribution after *Jaloud v. Netherlands.*', *Netherlands international law review.*, 62 (3). pp. 407-428.

Further information on publisher's website:

<http://dx.doi.org/10.1007/s40802-015-0041-y>

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The Relationship between Jurisdiction and Attribution after *Jaloud v Netherlands**

Abstract

This paper argues that the European Court of Human Rights (ECtHR) in *Jaloud v Netherlands* adopted an attribution test in order to establish jurisdiction under Article 1 of the European Convention on Human Rights. It argues that this would not be the first time that the ECtHR has adopted an attribution test in order to establish Article 1 jurisdiction. Furthermore, the paper challenges the proposition that the ECtHR's adoption of an attribution test to establish jurisdiction is methodologically unsound and not in conformity with international law. It proposes moving beyond this debate and considering the real challenges that an attribution test of Article 1 jurisdiction poses for the future.

Key words: *Jaloud v Netherlands*; Extraterritoriality; State Responsibility; Fragmentation of International Law; Military Intervention.

1. Introduction

The relationship between jurisdiction and attribution in the European Court of Human Rights' (ECtHR) approach to the extraterritorial application of the European Convention on Human Rights (ECHR) has been the subject of much speculation.¹ Article 1 of the ECHR provides that a state must secure to everyone 'within its jurisdiction' rights under the ECHR. The ECtHR has interpreted Article 1 as providing grounds for when a state's obligations under the

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¹ Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 162-8; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011) 41-53; Rick Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 85-88.

ECtHR extends outside of its territory. *Al Skeini v United Kingdom* confirmed that a state will have extraterritorial jurisdiction when a state exercises control over a territory² or when a state exercises authority and control over an individual.³ However, there is much speculation as to whether an attribution test for establishing Article 1 jurisdiction also exists in the ECtHR's jurisprudence.

The decision of *Jaloud v Netherlands* has recently provoked renewed interest in the question.⁴ Various interpretations of the ECtHR's approach in articulating the relationship between attribution and jurisdiction have been put forward. One interpretation is that the ECtHR has kept separate the question of jurisdiction from attribution: an attribution test precedes the jurisdiction question and another attribution test succeeds the jurisdiction question.⁵ Another interpretation of *Jaloud v Netherlands* is that while the ECtHR has ensured that the jurisdiction test remains separate from a test of attribution, the preceding and succeeding attribution tests have been conflated.⁶ This paper seeks to identify the approach the ECtHR took in *Jaloud v Netherlands*. It also seeks to revisit and challenge some of the propositions made regarding the relationship between Article 1 jurisdiction and attribution. It proposes that the ECtHR conflated the concepts of jurisdiction and attribution in *Jaloud v Netherlands*. Furthermore, it demonstrates that the ECtHR has adopted an attribution test to establish jurisdiction under Article 1 in previous decisions. Finally, it challenges the idea that the adoption of an attribution test as a test of jurisdiction by the ECtHR would be methodologically unsound and contrary to international law on state responsibility.

An 'attribution' test determines *who* should be held responsible for a rights violation rather than *whether* a state's obligations are engaged extraterritorially in the first place. An attribution test is normally applied when a variety of actors are involved in the relevant events and it is not obvious which actors in the context should be held responsible for a rights violation. In this context, an attribution test may be applied to the exclusion of the application of the two traditional jurisdiction tests confirmed in *Al Skeini*: control over an individual and

² *Al Skeini v United Kingdom* (2011) 53 EHRR 18 para 138.

³ *Ibid* para 138.

⁴ *Jaloud v Netherlands* App no 47708/08 (ECtHR, 20 November 2014).

⁵ Marko Milanovic, 'Jurisdiction, Attribution and Responsibility in *Jaloud*' (EJIL: *Talk!* 11 December 2014) <<http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>>.

⁶ Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?' (2014) 53(2) *Mil L & L War Rev* 288, 289.

control over a territory. Unlike the state agent authority and control test, an attribution test does not aim to establish whether the state agent exercised a particular kind of control over the individual such as ‘physical force’⁷ or ‘custody’⁸ in order to trigger the application of the ECHR extraterritorially. Unlike the control over a territory test, an attribution test does not aim to establish whether there is sufficient military presence for a sufficient period of time⁹ to establish jurisdiction or whether a particular space, such as a prison or boat constitutes a ‘territory’ for the purposes of that test.¹⁰ Distinguishing an attribution test from a jurisdiction test when interpreting the ECtHR’s jurisprudence can be a matter of emphasis. The main difference in emphasis is that an attribution test is concerned with determining *who* should be held responsible rather than *whether* the ECHR is applicable abroad. In this way, an attribution test signals a lack of concern by the ECtHR that the actions took place abroad. The arbitrary delimitation on the extraterritorial application of the ECHR provided by the two jurisdiction tests confirmed in *Al Skeini* is no longer applicable. That territory does not constitute a barrier to accountability under the ECtHR in cases where an attribution test is applied instead of the traditional jurisdiction tests, may account for the lack of acknowledgment of conflation of attribution with jurisdiction by the ECtHR.

Firstly, this paper will provide an analysis of the reasoning in *Jaloud v Netherlands*. It attempts to de-mystify the ECtHR’s judgment, putting forward an interpretation of the ECtHR’s reasoning that provides that the ECtHR conflated the concepts of jurisdiction and attribution. Secondly, the paper argues that *Jaloud* is not the first case in which the ECtHR has adopted an attribution test to establish jurisdiction under Article 1. It will be argued that an attribution test was used to determine whether a state had jurisdiction in relation to the ‘effective control’ test. It illustrates that there were two sub-tests of ‘effective control’ applied by the ECtHR: a ‘control over the territory’ test, and an ‘attribution’ test. This proposition is in contrast to the assertion that there was mere conceptual confusion between the two concepts in the ECtHR’s case law.¹¹ The ‘control over the territory’ sub-test provides that Article 1 jurisdiction will be established when a state exercises control over a territory, and

⁷ *Öcalan v Turkey* App No 46221/99 (ECtHR, 12 May 2005), para 93.

⁸ *Al Skeini* (n 2) para 136.

⁹ *Issa v Turkey* App No 31821/96 ECHR [2004] 16 Nov 2004, para 75.

¹⁰ See e.g. *Medvedyev v France* App No 3394/03 (ECtHR, 29 March 2010) paras 66-67; *Al-Saadoon v UK* App No 61498/08 Chamber (Admissibility decision) 30 June 2009, para 88.

¹¹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 41.

the ‘attribution’ sub-test provides that it will be established when the state exercises a degree of control over entities carrying out the rights-violation. The precise nature and standard of control in each instance will be explored in an analysis of the relevant cases. In its application of the ‘attribution’ sub-test the ECtHR failed to acknowledge that it conflated jurisdiction and attribution. However, this does not preclude the argument that the ECtHR does in fact apply an attribution test to establish jurisdiction in these circumstances: commentators openly acknowledge that the ECtHR’s cognisance of its own practices in relation to its treatment of jurisdiction and attribution is not indicative of its actual approach.¹²

Thirdly, the paper challenges the proposition that the ECtHR’s adoption of an attribution test to establish Article 1 jurisdiction would be methodologically unsound and not in conformity with international law on state responsibility. It has been argued, firstly, that the conceptual framework of Article 2 of the International Law Commission’s (ILC) Articles on State Responsibility (ASR)¹³ indicates that attribution and Article 1 jurisdiction are separate questions;¹⁴ and secondly, in cases where the ECtHR purportedly adopts an attribution test to establish jurisdiction, those attribution tests are not in conformity with the attribution test prescribed by the ASR and case law of the International Court of Justice (ICJ).¹⁵ It will be argued in response to the first proposition that the conceptual framework of the ASR appears to have nothing to say about the relationship between jurisdiction under international human rights treaties and attribution under the law of state responsibility, and therefore does not offer any methodological guidance on the relationship between the two concepts. In response to the second proposition it will be argued that the ECtHR, in conformity with international law, could justify a different attribution test to that stipulated by the ICJ and the ASR.

Jaloud v Netherlands has provided a new opportunity to clarify the relationship between Article 1 jurisdiction and attribution in the ECtHR’s extraterritoriality case law, and to revisit arguments for and against the availability of an attribution test to establish jurisdiction. This

¹² Milanovic, ‘Jurisdiction, Attribution and State Responsibility’ (n 5); Sari, ‘Untangling Extra-territorial Jurisdiction from International Responsibility’ (n 6) 293.

¹³ ILC, ‘Report of the International Law Commission on the Work of its 53rd Session’ (12 December 2001) UN Doc A/56/10.

¹⁴ Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 165-8; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 51-2.

¹⁵ Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 168; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 43-4.

paper seeks to illustrate the fact that the ECtHR has in fact used an attribution test to establish jurisdiction in previous cases. It then seeks to evaluate whether this is desirable or not. It addresses and answers old challenges against an attribution test for establishing Article 1 jurisdiction, with the intention of allowing the real concerns relating to conflating attribution and jurisdiction to come to the fore.

2. Jaloud v Netherlands

2.1 The Facts and ECtHR's Assessment

In *Jaloud v Netherlands*, an unknown car approached a vehicle checkpoint in South Eastern Iraq.¹⁶ From inside the car shots were fired at the personnel guarding the checkpoint, all of them members of the Iraqi Civil Defence Corps (ICDC). The guards returned fire. No one was hit and the car drove off.¹⁷ The checkpoint commander called on a patrol of six Netherlands soldiers led by a Lieutenant.¹⁸ Another car approached the checkpoint at speed, hitting one of the barrels which formed part of the checkpoint. Shots were fired at the car by the Netherlands Lieutenant. It was not clear whether any of the ICDC had fired shots.¹⁹ The applicant's son, Azhar Sabah Jaloud, who was in the car at the time had died from the gunshots fired.²⁰ The applicant brought a case to the ECtHR claiming that the Netherlands had breached the procedural duty under Article 2 right to life to carry out an effective and independent investigation into the death of his son. The ECtHR found that the Netherlands had jurisdiction under Article 1 and that, despite allowances made for the difficult circumstances under which they were undertaking their work, the Netherlands failed to provide an effective investigation under Article 2.²¹

The Netherlands argued that the events complained of did not fall within the 'jurisdiction' of the Netherlands within the meaning of Article 1 of the ECHR as it was not an 'occupying

¹⁶ *Jaloud* (n 4) para 10.

¹⁷ *Ibid.*

¹⁸ *Ibid* para 11.

¹⁹ *Ibid* para 12.

²⁰ *Ibid* para 13.

²¹ *Ibid* paras 226-8.

power’ under International Humanitarian Law and that only the US and UK were occupying powers by United Nations Security Council Resolution 1483.²² Furthermore, they had not assumed any public powers normally to be exercised by a sovereign government.²³ Instead the Netherlands’ contingent was under the ‘operational control of the commander of the Multinational Division, South East (MND (SE))’, a UK officer.²⁴ The Netherlands distinguished the present case from *Al Skeini v United Kingdom*,²⁵ wherein the UK had jurisdiction because the deaths had occurred as a result of actions of UK soldiers in the course of security operations whereas the death of Azhar Sabah Jaloud had occurred at a checkpoint manned by the ICDC. Although Netherlands personnel were present, there did not exist a ‘hierarchical relationship’ such that the Netherlands was responsible for what happened.²⁶ Finally, the Netherlands argued that they should not be found to have exercised effective control over the checkpoint as this geographical area was so small that it would mean there would be no meaningful difference between the ‘control over a territory’ and ‘control over an individual’ tests of jurisdiction.

The applicant argued that the Netherlands had jurisdiction as, through their servicemen over which they officially exercised full command,²⁷ it exercised public powers including enforcement of the Coalition Provisional Authority’s authority and a security role.²⁸ The Netherlands was exercising this public power when they were overseeing the ICDC at the checkpoint.²⁹ The Netherlands also had jurisdiction by virtue of its effective military control over the area and additionally by virtue of the fact that it was an ‘occupying power’ within the meaning of Article 42 of the Hague Rules.³⁰ Furthermore, the Netherlands had authority and control of the checkpoint including the Iraqi personnel manning it, and had carried out the investigation into Jaloud’s death.³¹ Finally, the Netherlands Minister of Defence in his

²² Ibid paras 112-13.

²³ Ibid para 114.

²⁴ Ibid para 115.

²⁵ *Al Skeini* (n 2).

²⁶ *Jaloud* (n 4) para 117.

²⁷ Ibid para 130.

²⁸ Ibid para 128.

²⁹ Ibid para 129.

³⁰ Ibid para 131-2.

³¹ Ibid para 135.

letter to Parliament of 18 June 2007 had endorsed the conclusion of the report of the Van den Berg Committee that the ECHR applied to Netherlands troops in Iraq.³²

Under the question of ‘jurisdiction’ the ECtHR recited its own case law on Article 1 jurisdiction including *Al Skeini*³³ which asserts the two main categories of Article 1 jurisdiction: effective control over a territory and state agent authority and control.³⁴ It found that whether a state was the ‘occupying power’ was not determinative of Article 1 jurisdiction.³⁵ Under the same category of ‘jurisdiction’ the ECtHR then addressed to whom actions should be attributed. Agreeing with the applicants, the ECtHR stated that the respondent state was:

...not divested of its “jurisdiction”, within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of the MND (SE), a United Kingdom officer. The Court notes that the Netherlands retained “full command” over its military personnel, as the Ministers of Foreign Affairs and of Defence pointed out in their letter to Parliament (see para 57 above).³⁶

The ECtHR continued to answer to whom action should be attributed under the ‘jurisdiction’ heading:

The practical elaboration of the multinational force was shaped by a network of Memoranda of Understanding defining the interrelations between the various armed contingents present in Iraq. The letter sent to the Lower House of Parliament on 6 June 2003 by the Ministers of Foreign Affairs and Defence (see paragraph 57 above) emphasises that the Netherlands Government retained full command over the Netherlands contingent in Iraq.³⁷

It concluded that it appeared from the relevant sources that the drawing up of distinct rules on the use of force ‘remained the reserved domain of individual sending states’.³⁸ For this

³² Ibid Para 136.

³³ Ibid para 139.

³⁴ Ibid. The ECtHR referred to *Al Skeini* (n 2) paras 130-139.

³⁵ Ibid para 142.

³⁶ Ibid para 143.

³⁷ Ibid para 146.

³⁸ Ibid para 147.

reason, the ‘Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingents there’.³⁹ It did not matter that the checkpoint was nominally manned by the ICDC because they were subordinate to the Coalition Forces.⁴⁰ The Netherlands was not placed “at the disposal” of, or “under the exclusive direction or control” of any other State, referring to Article 6 of the ILC Draft Articles on State Responsibility and the *Bosnian Genocide* case.⁴¹

Under the separate heading of ‘attribution’, and following the above analysis, the ECtHR stated that “‘jurisdiction” under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility of an internationally wrongful act under general international law (see *Catan*, cited above, para 115).”⁴² It invoked *Al Skeini* to state that the Convention rights could be ‘divided and tailored’⁴³ and concluded its analysis of attribution by stating that:

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.⁴⁴

The ECtHR proceeded to adjudicate upon whether there had been a breach of the investigative duty under Article 2. The ECtHR found that the Netherlands had carried out an independent investigation.⁴⁵ However, the Netherlands had failed to carry out an effective investigation because important information had been withheld from judicial authorities and the applicant; no precautions had been taken to prevent the accused Lieutenant from ‘colluding’ with other witnesses before he was questioned; the autopsy was not carried out to the standard required; and important material evidence, including the bullet fragments taken from the victim’s body, were mislaid.⁴⁶

³⁹ Ibid para 149.

⁴⁰ Ibid para 150.

⁴¹ Ibid para 153.

⁴² Ibid para 154.

⁴³ Ibid.

⁴⁴ Ibid para 155.

⁴⁵ Ibid para 196.

⁴⁶ Ibid para 227.

2.2 A Conflation of Jurisdiction and Attribution

Marko Milanovic argues that *Jaloud* confirms the already existing approach of the ECtHR entailing two different kinds of attribution tests related but separate from the concept of jurisdiction: one preceding the application of the jurisdiction test (attribution of jurisdiction-establishing conduct) and one following the application of the jurisdiction test (attribution of violation-establishing conduct).⁴⁷ Jurisdiction-establishing conduct is the conduct (act or omission) which gives rise to the control over the territory or control over the individual, the two tests for establishing jurisdiction. Violation-establishing conduct is the act or omission which gives rise to the violation of the right. The preceding attribution test establishes who carried out the jurisdiction-establishing conduct and the succeeding attribution test establishes who carried out the violation.

Milanovic argues that the ECtHR resolved the attribution of jurisdiction question when it found that the Netherlands troops were not placed ““at the disposal” of any foreign power”;⁴⁸ the ECtHR addressed the separate ‘jurisdiction’ question when it stated that ‘the respondent Party exercised its ‘jurisdiction’ within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint’;⁴⁹ attribution of the actual alleged violations was addressed under the separate heading of ‘attribution’ when the ECtHR stated that ‘[T]he facts giving rise to the applicant’s complaints derive[d] from alleged acts and omissions of Netherlands’ and were therefore capable of giving rise to the responsibility of the Netherlands’.⁵⁰

However, it is difficult to see how this reading can withstand scrutiny. The ‘jurisdiction’ section (from paras 140-151 at the very least) is concerned with demonstrating that the Netherlands, rather than the occupying powers (the US and UK) or the IDRC manning the checkpoint, should be held responsible for the death of Azhar Sabah Jaloud. The ECtHR states that being an occupying power is not determinative of jurisdiction;⁵¹ executing a decision or an order given by the authority of a foreign State is not determinative of

⁴⁷ Milanovic, ‘Jurisdiction, Attribution and Responsibility in *Jaloud*’ (n 5).

⁴⁸ Ibid citing para 151.

⁴⁹ Ibid citing para 152.

⁵⁰ Ibid citing para 155.

⁵¹ *Jaloud* (n 4) para 142.

jurisdiction;⁵² and the fact that the checkpoint is nominally manned by the Iraqi ICDC is not determinative of jurisdiction.⁵³ What was important for establishing jurisdiction was that the Netherlands had ‘retained full command’.⁵⁴ ‘Full command’ was the test that the ECtHR applied which attributed the actions to the Netherlands, and not to the ICDC or the UK and US.

In terms of para 152, which Milanovic believes to be a paragraph separately resolving the question of Article 1 jurisdiction, the ECtHR states that Jaloud was killed while ‘passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army Officer’. This more closely resembles an attribution test rather than a control over the territory or authority and control over an individual test as the statement aims to establish *which* actor had the requisite control over the checkpoint rather than aiming to determine whether the *type* of control exercised over the individual was sufficient to establish jurisdiction over that individual. Furthermore, no Article 1 jurisdiction case law was cited in support of either test. The ECtHR further states that it ‘exercised its “jurisdiction” within the limits of its SFIR mission’.⁵⁵ Again, this sentence appears to be corroborating earlier statements that it was within the Netherlands’ mandate to be in ‘full command’ of the events at the checkpoint. Although the ECtHR states that the Netherlands ‘asserted authority and control’ while ‘exercising its “jurisdiction” within the limits of its SFIR mission’⁵⁶ this appears to be a rhetorical flourish rather than an assertion that it based its finding of jurisdiction on a ‘state agent authority and control’ test.

It does not appear that the ‘attribution’ section separately establishes whether there has been attribution of wrongful conduct, separate from the questions of both attributing jurisdiction and establishing jurisdiction, as is asserted by both Milanovic and Aurel Sari.⁵⁷ There is no further analysis of whether any other actions should be attributed to the Netherlands, only the assertion that the ECtHR does not conflate jurisdiction with attribution.⁵⁸ Aurel Sari, like Milanovic, maintains that this section indicates a separate test for attributing wrongful

⁵² Ibid paras 143-149.

⁵³ Ibid para 150.

⁵⁴ Ibid paras 143, 147, 149.

⁵⁵ Ibid para 152.

⁵⁶ Ibid.

⁵⁷ Sari, ‘Untangling Extra-territorial Jurisdiction from International Responsibility’ (n 6) 292-3.

⁵⁸ *Jaloud* (n 4) para 154.

conduct. However, he argues that the ‘full command’ test - that was appropriately used to determine attribution of jurisdiction - was inappropriately applied in the ‘attribution’ section to determine attribution of wrongful conduct instead of the law of state responsibility.⁵⁹ He argues that the ‘full command’ test was applied by default in determining the attribution of wrongful conduct because of the lack of any further analysis under this section.⁶⁰ This paper argues that there was no further analysis because the ECtHR had already answered to whom the wrongful conduct should be attributed under the jurisdiction heading. Sari argues that the ECtHR determined Article 1 jurisdiction separately from determining attribution of jurisdiction and attribution of the wrongful conduct. He argues that the ECtHR established jurisdiction from three factors: assumption of authority by the Netherlands over the area, authority over the ICRD at the checkpoint, and the nature of the checkpoint as an instrument for asserting control over persons passing through it.⁶¹ However, the first two factors were arrived at through an attribution analysis. Furthermore, the checkpoint was not identified as a particular space which could constitute ‘territory’ for the purposes of the control over the territory test or as a method of control for exercising state agent authority and control over individuals. Rather, the point of emphasis was on *which* actor exercised control over the checkpoint where the shooting took place.

It appears that the ECtHR applied one test, one attribution test establishing to whom the rights-violating conduct should be attributed in the particular context, rather than three tests, before moving to the adjudication of the substantive right.

3. Two Distinct sub-tests of ‘effective control’

Does the conflation of attribution and Article 1 jurisdiction represent a new approach by the ECtHR? It will be argued here that this is not the first time that the ECtHR has conflated and denied conflating a test of attribution with Article 1 jurisdiction. It will be illustrated that the ECtHR has conflated attribution and Article 1 jurisdiction in the context of the ‘effective control’ test first articulated in *Loizidou v Turkey (preliminary objections)*.⁶² This case arose in the context of Turkish military operations in northern Cyprus in July and August 1974

⁵⁹ Sari, ‘Untangling Extra-territorial Jurisdiction from International Responsibility’ (n 6) 303.

⁶⁰ Ibid 305.

⁶¹ Ibid 300.

⁶² *Loizidou v Turkey (preliminary objections)* (1995) Series A no 122.

which led to the subsequent division of Cyprus and to the establishment of a separatist regime, the Turkish Republic of Northern Cyprus (TRNC). In *Loizidou*, the applicant complained that the Turkish armed forces had prevented her from returning to northern Cyprus after the occupation and peacefully enjoying her property in the occupied area. In order to determine whether Turkey had obligations under the ECHR with respect to the applicant, the ECtHR found that:

...the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.⁶³

This test was interpreted in two ways both in the literature and in the case law that followed. One interpretation was that as a result of the control exercised by the respondent state over the territory, the respondent state had obligations under the ECHR towards everyone within that territory both to protect rights and to prevent rights violations by other individuals (the ‘control over the territory’ test).⁶⁴ Another interpretation was that the rights violations carried out by the subordinate local administration could be attributed to the respondent state because of the control the respondent state exercised over the subordinate local administration (attribution test).⁶⁵ Milanovic explains the ‘control over the territory’ test by reference to positive obligations. The positive obligations explanation provides that the respondent state,

⁶³ Ibid para 62.

⁶⁴ Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 1) 47. Sarah Miller, ‘Revisiting extraterritorial jurisdiction: a territorial justification for extraterritorial jurisdiction under the European Convention’ (2009) EJIL 1123; Antonio Cassese, ‘The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18(4) EJIL 649, 659 see footnote 17; Ralph Wilde, ‘The “legal space” or “espace juridique” of the European Convention on Human Rights: is it relevant to extraterritorial state action?’ (2005) EHRLR 115.

⁶⁵ Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 164. ‘Stefan Talmon, ‘The responsibility of outside powers for acts of secessionist entities’ (2009) ICLQ 493, 508; Yael Ronen, ‘Non-recognition, jurisdiction and the TRNC before the European Court of Human Rights’, (2003) CLJ 535. *Cyprus v Turkey* has been recognised as advocating an attribution test in order to establish Article 1 jurisdiction: Alexander Orakhelashvili, ‘Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights’ (2003) EJIL 545; Monica Hakimi, ‘State bystander responsibility’ (2010) EJIL 377.

when it exercises control over the territory, must take positive actions to prevent others from committing rights violations within that territory.⁶⁶ Milanovic posits that the ECtHR in *Loizidou (preliminary objections)*⁶⁷ established that Turkey, by virtue of its effective overall control over northern Cyprus, had a positive obligation to prevent human rights violations, regardless of by whom they were committed.⁶⁸

It is ambiguous as to which reading was applied by the ECtHR to the facts of *Loizidou (preliminary objections)* itself. After citing the effective control test above, the ECtHR stated that ‘the applicant’s loss of her property stemmed from the occupation of the northern part of Cyprus by Turkish troops and the establishment of the TRNC...’⁶⁹ This statement could be interpreted as suggesting that it was the Turkish occupation of the territory (control over the territory) *or* Turkey’s establishment of the TRNC (attribution test) that was decisive for establishing jurisdiction. On an adjudication of the merits in *Loizidou* it was obvious from the ‘large number of troops’ in Northern Cyprus that Turkey exercised ‘effective overall control’ thus entailing ‘detailed control over the policies and actions of the authorities’ of the “TRNC”.⁷⁰ In the merits, therefore, it was still ambiguous as to whether the ECtHR applied a control over the territory or attribution test. *Cyprus v Turkey*⁷¹ is also ambiguous. What was decisive in that case was whether ‘Turkey actually exercised detailed control over the policies and actions of the authorities of the “TRNC”’ but the judges placed emphasis on the ‘effective overall control’ of the territory as enabling Turkey to exercise control over that part of the territory.⁷² Turkey was responsible for ‘the acts of the local administration which survive[d] by virtue of Turkish military and other support’.⁷³

In subsequent cases the *Loizidou* test is interpreted by the ECtHR as either a respondent’s control over the territory test or as an attribution test. In *Ilascu v Moldova and Russia*⁷⁴ and *Catan v Moldova and Russia*⁷⁵ the ECtHR appears to have adopted an attribution test and in,

⁶⁶ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 46.

⁶⁷ *Loizidou (preliminary objections)* (n 58).

⁶⁸ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 47.

⁶⁹ *Loizidou (preliminary objections)* (n 58) para 46.

⁷⁰ *Loizidou v Turkey* ECHR 1996-IV 26, para 56.

⁷¹ *Cyprus v Turkey* ECHR 2001-IV 331.

⁷² *Ibid* para 77.

⁷³ *Ibid*.

⁷⁴ *Ilascu v Moldova and Russia* ECHR 2004-VII 318.

⁷⁵ *Catan v Moldova and Russia* IHRL 1923 (ECHR 2012)

for example, *Banković v Belgium*⁷⁶ and *Saddam Hussein v Albania*⁷⁷ the ECtHR applied the control over the territory test.

Both *Ilascu* and *Catan* concerned rights violations carried out by the Moldovan Republic of Transdniestria. Following the declaration of the Republic of Moldova in June 1990, the 14th Army aided Transdniestrian separatists to set up the Moldovan Republic of Transdniestria in September 1990.⁷⁸ In *Ilascu*, Russia was found to have violated Article 3 (right against torture and inhumane and degrading treatment and punishment) and Article 5 (right to liberty and security) with regards to all of the applicants concerned from the date of its ratification of the Convention.⁷⁹ The judgment was focused predominantly upon establishing links between Russia and the MRT itself which included its historical links: during the Moldovan conflict in 1991-1992, forces of the 14th Army stationed in Transdniestria fought with and on behalf of the Transdniestrian separatist forces;⁸⁰ throughout ‘clashes between the Moldovan authorities and the Transdniestrian separatists, the leaders of the Russian Federation supported the separatist authorities by their political declarations’;⁸¹ Russia had provided the separatists with large quantities of weapons;⁸² separatists had seized possession of other weapons unopposed by Russian soldiers.⁸³ In terms of the present day connections between Russia and the MRT, the Court attached particular importance to the fact that the MRT enjoyed financial support from the Russian Federation.⁸⁴ The Russian Federation cleared the MRT’s debt to it, supplied gas to Transdniestria on better financial terms than to Moldova, and state-controlled companies of the Russian Federation entered into commercial relations with companies in the MRT.⁸⁵ The fact that Russia helped to install the MRT with military aid, and enabled its survival with financial aid, were crucial to holding Russia responsible for the acts of the MRT. The point of emphasis was whether there was sufficient control or influence exercised by Russia over the MRT rather than sufficient control over the territory. The Court noted that

⁷⁶ *Banković v Belgium* ECHR 2001-XII 333.

⁷⁷ *Saddam Hussein v Albania* App no. 23276/04 (ECtHR, 14 March 2006).

⁷⁸ *Ilascu* (n 74) para 2.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* para 380.

⁸¹ *Ibid* para 318.

⁸² *Ibid.*

⁸³ *Ibid* para 382.

⁸⁴ *Ibid* para 390.

⁸⁵ *Ibid.*

after the ceasefire the ‘Russian Federation continued to provide military, political and economic support to the separatist regime (see paragraphs 111 - 61 above), thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova’.⁸⁶ The ECtHR did not use a positive obligations explanation to explain Russia’s extraterritorial obligations under the ECHR despite the fact that it used positive obligations to explain the obligations of Moldova—the territorial state on which the separatist regime was situated.⁸⁷ If the ECtHR had intended to use a positive obligations explanation in relation to Russia’s extraterritorial obligations, it had created an opening for doing so. The fact that it did not is further evidence for suggesting that an attribution test was applied in this case.

In *Catan* the ECtHR went into much greater detail concerning both the historical and contemporary links between Russia and the MRT.⁸⁸ It repeated the factors that it had considered crucial in *Ilascu*⁸⁹ and also added more specific considerations. For example, it noted that in April 1992, the Russian Army stationed in Transdniestria intervened in the conflict allowing the separatists to gain possession of Tighnia.⁹⁰ The Russian public corporation Gazprom supplied gas to the region and the MRT paid for only a tiny fraction of the gas consumed.⁹¹ Furthermore, the Russian Government had spent millions of US dollars every year in the form of humanitarian aid to the population of Transdniestria, including the payment of old age pensions, financial assistance to schools, hospitals and prisons.⁹² This was even more significant considering the fact that only 20% of the MRT population was economically active.⁹³ It appears the ECtHR attempted to demonstrate the control and influence that Russia had on the MRT in order to attribute the actions of the MRT to Russia.

In contrast to *Ilascu* and *Catan* which appeared to apply an attribution test, the cases of *Banković v Belgium*⁹⁴ and *Saddam Hussein v Albania*⁹⁵ applied a control over the territory test. *Banković* concerned airstrikes carried out by the North Atlantic Treaty Organisation

⁸⁶ Ibid para 382.

⁸⁷ Ibid paras 332-352.

⁸⁸ *Catan* (n 75).

⁸⁹ Ibid paras 118-20.

⁹⁰ Ibid para 118.

⁹¹ Ibid para 120.

⁹² Ibid.

⁹³ Ibid para 93.

⁹⁴ *Banković* (n 76).

⁹⁵ *Saddam Hussein* (n 77).

(‘NATO’) on the territory of the Federal Republic of Yugoslavia during the conflict in Kosovo between Serbian and Kosovar Albanian forces during 1998 and 1999. A Radio Televizije Srbije (‘RTS’) building was hit by a missile launched from a NATO forces’ aircraft. The ECtHR invoked the public international law definition of jurisdiction in order to determine the ‘ordinary meaning’ of jurisdiction within Article 1 as was required by the customary rules of treaty interpretation reflected in Article 31(1) of the Vienna Convention on the Law of Treaties 1969. Aside from specific factual incidences in which the ECHR could be applied abroad,⁹⁶ the ECtHR provided that the ECHR would apply extraterritorially only in ‘exceptional’ circumstances, when ‘through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory’ the respondent state ‘exercises all or some of the public powers normally to be exercised by that Government’.⁹⁷

In applying this test, the ECtHR expressly asserted that ‘the scope of Article 1...is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system’.⁹⁸ It rejected a ‘cause-and-effect’ notion of jurisdiction meaning that it rejected the idea that a state could be held responsible for a specific, singular incident of rights-violation abroad, but would rather be held responsible under the entire breadth of the ECHR towards everyone within that territory.⁹⁹ In this way rights under the ECHR could not be ‘divided and tailored’.¹⁰⁰ The ECtHR found in that case that the NATO states carrying out the bombing did not exercise sufficient ‘control over the territory’ to establish Article 1 jurisdiction because there had been no military occupation and no exercise of public powers.

Saddam Hussein v Albania also adopted the ‘control of the territory’ test.¹⁰¹ The *Hussein* case arose as a result of the invasion by the US and UK in Iraq. The former President of Iraq, Saddam Hussein complained that as a result of his ‘arrest, detention, handover and ongoing trial’ the states involved were in violation of Article 2 (right to life), Article 3 (right against torture and inhumane and degrading treatment), Article 5 (right to liberty and security) and

⁹⁶ *Banković* (n 76) paras 67-79, 73.

⁹⁷ *Ibid* para 74.

⁹⁸ *Ibid* para 65.

⁹⁹ *Ibid* para 75.

¹⁰⁰ *Ibid*.

¹⁰¹ *Saddam Hussein* (n 77).

Article 6 right to a fair trial, as well as Article 1 of the 6th and 13th Protocols. Without any thorough analysis of the nature of the control exercised by any of the states over the territory of Iraq, the ECtHR concluded that Hussein had not demonstrated that any of the states had ‘control of the territory where the alleged violations took place’ citing *Loizidou v Turkey* and *Cyprus v Turkey*.¹⁰²

It appears that the test in *Loizidou (preliminary objections)* is ambiguous and can be interpreted to mean an attribution or control over the territory test: perhaps Turkey had responsibility under the ECHR in Northern Cyprus because of its control over the TRNC or because of its control over the territory in Northern Cyprus. However, it is clear in *Ilascu* and *Catan* that the ECtHR focused on establishing a control link between the respondent state and the separatist regime, the MRT, rather than control over the territory; and *Banković* and *Hussein* both explicitly applied the control over the territory approach.

4. Unsound Methodology and Conflicts with International Law

4.1 Unsound Methodology

It has been argued that attribution should not be conflated with Article 1 jurisdiction because the law of state responsibility is a separate issue from jurisdiction under international human rights treaties.¹⁰³ Gondek states that it is not methodologically correct to conflate attribution and jurisdiction under human rights treaties.¹⁰⁴ He finds that the rules of state responsibility deal only with determining whether an ‘obligation has been violated and what should be the consequences of the violation’, rather than with ‘defining the rule and the content of the obligation it imposes’, citing the ILC Rapporteur Roberto Ago.¹⁰⁵ Rules of state responsibility are ‘secondary’ providing ‘the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences flowing therefrom’.¹⁰⁶ Primary rules define the content of the international

¹⁰² Ibid.

¹⁰³ Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 165-8; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 51-2;

¹⁰⁴ Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 164.

¹⁰⁵ Ibid 163 citing ILC, *Yearbook of the International Law Commission 1970* vol II 306 para 66 (c).

¹⁰⁶ Ibid 164 citing James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 74

legal obligation breached.¹⁰⁷ Gondek distinguishes state responsibility from jurisdiction: ‘[t]he issue whether a person is within the jurisdiction of a state within the meaning of human rights treaties is not a question of attributability of an act to a state, which belongs to secondary rules of state responsibility.’¹⁰⁸

Article 2 states that there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the state under international law (Article 2(a)) and constitutes a breach of an international obligation of the State (Article 2(b)).¹⁰⁹ Both Gondek¹¹⁰ and Milanovic¹¹¹ provide that jurisdiction under Article 1 of the ECHR establishes whether there has been a breach of obligations as they determine to whom substantive obligations are owed, therefore falling under Article 2(b) of ASR. Sarah H Cleveland, however, argues that jurisdiction in international human rights treaties is closely linked to the international law concept of state responsibility: ‘it is the exercise of jurisdiction that gives rise to legal obligations under the treaty’.¹¹² She cites tests of state responsibility and attribution applied in ICJ case law which determine whether treaty obligations arise to elucidate the concept of jurisdiction in international human rights treaties.¹¹³ Olivier De Schutter argues that the question of jurisdiction under international human rights treaties ‘precedes’ the two questions in Article 2.¹¹⁴ It is the preliminary threshold question before any questions of state responsibility.¹¹⁵

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Article 2 states: ‘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.’

¹¹⁰ Gondek, *The Reach of Human Rights in a Globalising World* (n 1) 168.

¹¹¹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 273.

¹¹² Sarah H Cleveland, ‘Embedded International Law and the Constitution Abroad’, (2010) Vol 110(2) *Colum L Rev* 225, 233.

¹¹³ Ibid 233-4 citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, Judgment of 27 June 1986 paras 105-115. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 paras 391- 406; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 16 (June 21).

¹¹⁴ Olivier De Schutter, ‘Globalisation and Jurisdiction: Lessons from the European Convention on Human Rights’ (2006) 6 *Baltic YB Int’l L* 185, 189.

Contrary to Gondek and Milanovic, jurisdiction does not appear to be determinative of whether an action or omission ‘constitutes a breach of an international obligation of the state’ and is not determinative of the definition or the ‘content’ of an ECHR obligation.¹¹⁶ It establishes whether the ECHR is in operation at all when the state is acting abroad. The content of an ECHR obligation and whether there has been a breach of a right under the ECHR is determined by an adjudication upon the merits. Cleveland acknowledges that jurisdiction is a separate question from establishing whether there has been a breach of an international obligation. The function of jurisdiction – establishing whether a treaty obligation is in operation at all - is much more closely aligned to state responsibility. What is important to acknowledge is that there is no consensus on what Article 2 of the ASR has to say about the relationship between jurisdiction and state responsibility. The lack of consensus on the interpretation of Article 2 may be evidence of the fact that Article 2 does not have anything to say about that relationship.¹¹⁷ In any case, it cannot be conclusively said that Article 2 precludes a conflation of attribution and jurisdiction under international human rights treaties. Therefore, it is not necessarily an unsound methodology to conflate attribution and jurisdiction under international law. There is even support for the proposition that jurisdiction and state responsibility carry out the same function of determining whether legal obligations under a treaty arise in the first place.¹¹⁸

4.2 Conflicts with International Law

In addition to the conceptual debate on the relationship between jurisdiction and state responsibility, there is concern that a conflation of attribution and Article 1 jurisdiction would unavoidably conflict with standards of attribution under the law of state responsibility prescribed by the ICJ and in the ASR.¹¹⁹ This has been put forward as a reason for denying conflation of attribution and Article 1 jurisdiction. This concern has arisen specifically in the context of states’ relationships with separatist groups in other countries, such as in relation to

¹¹⁵ Ibid 190.

¹¹⁶ ILC, Yearbook of the International Law Commission 1970 vol II 306 para 66 (c).

¹¹⁷ See ILC, Articles on State Responsibility (n 13) 34-6; James Crawford, *State Responsibility: the General Part* (CUP 2013); James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010).

¹¹⁷ See ILC, Articles on State Responsibility (n 13) 34.

¹¹⁸ Cleveland, ‘Embedded International Law and the Constitution Abroad’ (n 112) 233.

¹¹⁹ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 43-4.

the TRNC and MRT decisions. The same concern has not arisen in the context of multinational military operations. The ECtHR has adopted attribution tests that are contrary to those prescribed under the ASR and ‘Draft articles on the Responsibility of International Organisations’ in the context of multi-national military operations.¹²⁰ However, these concerns have never been put forward as a reason for denying the conflation of attribution with Article 1 jurisdiction. This section addresses a very particular debate that arose in relation to two ICJ decisions, *Nicaragua* and the *Bosnian Genocide Case*;¹²¹ one International Criminal Tribunal of the Former Yugoslavia (ICTY) decision, *Tadić*;¹²² and *Loizidou v Turkey*.¹²³ It challenges the argument that these cases and relevant articles of the ASR demonstrate that attribution cannot be conflated with Article 1 jurisdiction in ECtHR jurisprudence.

The ASR provides the starting point for understanding attribution in international law. Article 4(1) ASR provides that conduct of a state’s own organs is always attributable to states.¹²⁴ Furthermore, acts by a non-state actor performed under the ‘direction, instigation or control of state organs’ can also be attributed to the state.¹²⁵ Attributing the actions of a non-state entity to a state does not merely arise from a factual causal link between those actions and the state,¹²⁶ but rather is determined by further provisions in the ASR and also in the adjudication of cases brought before relevant international courts. *Nicaragua*, the *Bosnian Genocide Case* and *Tadić* all provide guidance on how attribution should be understood under international law.

¹²⁰ ILC, ‘Report of the International Law Commission on the Work of its 63rd Session’ (2011) UN Doc A/66/10; ILC, Yearbook of the International Law Commission, 2011 vol II Part Two. See further: Kjetil Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test (2008) Vol 19(3) EJIL 509; Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’ 8 Human Rights Law Review (2008) 151; Heike Krieger, ‘A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights’ (2009) 13 Journal of International Peacekeeping 159; Caitlin A Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision (2009-2010) 42 NYU J Int’l L & Pol 501.

¹²¹ *Nicaragua* (n 113); *Bosnian Genocide* (n 113).

¹²² *Prosecutor v Tadić*, IT-94-1, Trial Chamber, Judgment, 7 May 1997; *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Judgment, 15 July 1999.

¹²³ *Loizidou (preliminary objections)* (n 62); *Loizidou (merits)* (n 70).

¹²⁴ ILC, Articles on State Responsibility (n 13) 40.

¹²⁵ Crawford, *The International Law Commission’s Articles on State Responsibility* (n 106) 91.

¹²⁶ *Ibid.*

In *Nicaragua* the ICJ set out two tests for attributing the actions of a non-state entity - which was not a de jure organ of the state - to a state: a test requiring the establishment of control over the particular conduct in question (complete dependence) and a test requiring the establishment of control over the entity (effective control).¹²⁷ The ICJ aimed to ascertain whether the US could be held responsible for violations of International Humanitarian Law (IHL) carried out by contras in Nicaragua. The test applied was whether the relationship between the contras and the US Government was ‘so much one of dependence on the one side and control on the other’ that the contras should be equated with an organ of the state for legal purposes.¹²⁸ The ICJ found that apart from the aid that was provided to the contras they were otherwise an “independent force”.¹²⁹ The ICJ asked itself whether the provision of aid by the US to the contras was sufficient for declaring the contras to be acting on behalf of the US.¹³⁰ It noted that when military aid was ceased contra activity continued.¹³¹ Therefore, although US support was ‘crucial’ to the contra’s conduct, their ‘complete dependence’ on US aid was not demonstrated.¹³² Although there was one stage where US support was crucial this was not demonstrated in relation to the majority of acts that were carried out.¹³³ Sufficient control was not found despite the fact that ‘political leaders of the contra force had been selected, installed and paid by the United States’ and despite their participation in the ‘organization, training and equipping of the force, the planning of operations, choosing of targets and the operational support provided’.¹³⁴ The ICJ concluded that it did not have sufficient evidence to determine the US’s involvement, and did not think that it had been clearly demonstrated that the contras had ‘no real autonomy’.¹³⁵

¹²⁷ *Nicaragua* (n 113) paras 105-115; *Genocide Case* (n 113) paras 391-406; Marko Milanovic, ‘State Responsibility for Genocide’ (2006) 17(3) EJIL (2006) 553, 576. For those that interpret the *Nicaragua* test as one test see: Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (n 64) 652; Theodor Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout’ (1998) 92 *AJIL* 236; Alison Elizabeth Chase, ‘Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism’, (2004) 45 *Va. J Int’l L* 41.

¹²⁸ *Nicaragua* (n 113) para 109.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid* para 110.

¹³² *Ibid.*

¹³³ *Ibid* para 111.

¹³⁴ *Ibid* para 112.

¹³⁵ *Ibid* paras 114-15.

The ICJ then applied another test with a lower threshold of control: ‘effective control of the military or paramilitary operations in the course of which the alleged violations were committed’.¹³⁶ Sufficient control could be established if the US could be found to have exercised general ‘effective control’ of the military and paramilitary operations. Therefore, *Nicaragua* indicates that the ICJ will apply a test of ‘complete dependence’ when establishing whether a particular activity can be attributed to the respondent state, and a test of ‘effective control’ when establishing whether, more generally, the actions of a non-state entity can be attributed to the respondent state. Therefore, the standard of control required for attribution in *Nicaragua* was much higher than in the ECtHR decisions in *Ilascu* or *Catan*.¹³⁷

At the ICTY, the Trial Chamber in *Tadić* chose to determine whether there existed a state of international armed conflict by asking whether forces of Bosnian Serbs had remained agents of FRY after the withdrawal of Yugoslav troops from Bosnia in May 1992.¹³⁸ It used the law of state responsibility and the tests of control laid down in *Nicaragua* in order to determine whether there was an international armed conflict. The Appeal Chamber of the ICTY disagreed with the test of control adopted in *Nicaragua*. It found that in order for the actions of an individual to be attributed to the state, the state had to exercise ‘effective control’ over that individual, but it asserted that the degree of control could vary according to the factual circumstances of each case.¹³⁹ A single, private individual would need specific instructions from the state for their actions to be attributable to the state but a group would require a different standard of control for their actions to be attributed to the state.¹⁴⁰ It was sufficient for the group to be under the overall control of the state for attribution to occur. The Appeals Chamber found in *Tadić* that the state coordinating or helping in the general planning of the non-state actor’s military activity was sufficient control for attribution of conduct to the respondent state.¹⁴¹ The Appeal Chamber relied on *Loizidou* to justify a much lower threshold of control required for the attribution test, stating that in that case the ‘Court did not find it

¹³⁶ Ibid para 115.

¹³⁷ *Ilascu* (n 74); *Catan* (n 75).

¹³⁸ *Tadić* (Trial Chamber) (n 122).

¹³⁹ *Tadić* (Appeals Chamber) (n 122) paras 132-36.

¹⁴⁰ Ibid paras 131, 137.

¹⁴¹ Ibid para 131.

necessary to ascertain whether the Turkish authorities had exercised “detailed” control over the specific “policies and actions” of the authorities of the “TRNC”¹⁴².

Article 8 ASR adopted the *Nicaragua* test as the test of attribution of conduct of non-state entities to a state. It attributed to a state conduct by persons or groups of persons acting ‘on the instructions’, or ‘under the direction’ or ‘under the control’ of the state. The Commentary to Article 8 distinguished *Tadić* from *Nicaragua* by stating that the question in *Tadić* was concerned with applicable rules of international law rather than state responsibility.¹⁴³ In the *Bosnian Genocide* case, the ICJ rejected the test in *Tadić*.¹⁴⁴ In that case the ICJ had to determine whether acts of genocide carried out at Srebrenica in the former Yugoslavia (FRY) by Bosnian Serb armed forces (VRS) were attributable to FRY. Having established that members of VRS were not de jure organs of FRY and could not be likened to organs of the FRY because they did not have ‘complete dependence’ on it,¹⁴⁵ it then considered whether the VRS could be considered as a de facto organ of FRY. The ICJ applied the ‘effective control’ test from *Nicaragua*.¹⁴⁶ It did so because the *Nicaragua* test coincided with the standards required by the ILC in Article 8 ASR.¹⁴⁷ Similar to the Commentary for Article 8, the ICJ rejected *Tadić* firstly because it did not apply the test to a situation which concerned state responsibility but rather in order to determine whether the conflict was international or not;¹⁴⁸ and secondly, it broadened the scope of state responsibility because it went beyond the standards set out by the ILC in Article 8 of the ARS.¹⁴⁹

The ICJ and ILC’s explicit rejection of *Tadić*’s adoption of an attribution test based on *Loizidou* has been stated as evidence of the fact that the ECtHR’s Article 1 jurisprudence cannot be interpreted as employing an attribution test because it would not be in conformity with international law.¹⁵⁰ International law on state responsibility does not admit of a lower standard of control for attributing the actions of a non-state actor to a state. But does the ICJ

¹⁴² Ibid para 128.

¹⁴³ Crawford, *The International Law Commission’s Articles on State Responsibility* (n 106) 112.

¹⁴⁴ *Bosnian Genocide Case* (n 113).

¹⁴⁵ Ibid paras 386-394.

¹⁴⁶ *Nicaragua* (n 113) paras 105-15.

¹⁴⁷ *Bosnian Genocide Case* (n 113) para 398.

¹⁴⁸ *Nicaragua* (n 113) paras 103-5.

¹⁴⁹ *Bosnian Genocide Case* (n 113) para 406.

¹⁵⁰ Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 43- 51.

and ILC's rejection of *Tadić* necessarily entail a rejection of a lower standard of control for attribution in all other circumstances? Cassese has argued that if the ICTY had stated that it was applying a test in order to establish whether the armed conflict was an international one – and not necessarily dictating general rules on state responsibility – then that would be permissible.¹⁵¹ Would a lower standard of control for attribution in the human rights context ever be permissible under international law?

The ILC prepared a report on the fragmentation of international law entitled 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (the 'Fragmentation Report') with Martti Koskenniemi as Chairman.¹⁵² The Fragmentation Report sought to determine whether the emergence of new "self-contained regimes" such as human rights regimes, trade regimes, environmental regimes as well as other geographically or functionally limited treaty regimes 'created problems of coherence in international law'.¹⁵³ It acknowledged that in conditions of 'social complexity' it was 'pointless to insist on formal unity' of international law.¹⁵⁴ However, it also recognised the tension that existed between different rules and standards in international law and attempted to suggest means of resolving those tensions by using techniques of judicial interpretation.¹⁵⁵

The Fragmentation Report considered the different tests of attribution prescribed in *Nicaragua* and *Tadić*.¹⁵⁶ It found that two types of problems arose from this kind of norm conflict: legal subjects would no longer be able to predict the standard which would be applied to them and to plan around those standards; and it would put legal subjects in an unequal position in relation to each other because their rights, rather than depending on a

¹⁵¹ Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (n 64) 651.

¹⁵² ILC 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682 <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>.

¹⁵³ Ibid 14, para 15.

¹⁵⁴ Ibid 15, para 16.

¹⁵⁵ Ibid 15, para 18.

¹⁵⁶ Ibid 32, para 50. The Fragmentation Report did concede in footnote 52 that '[t]his need not be the only - nor indeed the correct - interpretation of the contrast between the two cases. As some commentators have suggested, the cases can also be distinguished from each other on the basis of their facts. In this case, there would be no normative conflict'.

coherent legal framework, would depend upon which court had jurisdiction to hear the case or which forum was chosen by those party to the case.¹⁵⁷ The two possible solutions it posited for solving this kind of conflict was firstly, by states adopting a new law that settled the conflict, or secondly, by institutions coordinating the conflict in the future.¹⁵⁸

The Fragmentation Report provides a number of methods for coordinating conflicting norms. Two methods may be of significance for the ECtHR's adoption of a different attribution test to that prescribed by general international law. The ECtHR could distinguish its approach from that prescribed by general international law under *lex specialis* and by virtue of its 'regionalist' character. The principle of *lex specialis derogate legi generali* provides special law derogates from general law and is one of the interpretation techniques recommended by the Fragmentation Report for justifying diverging standards from general international law.¹⁵⁹ *Lex specialis* can provide an 'elaboration, updating or technical specification' of the general standard of a particular rule.¹⁶⁰ *Lex specialis* operates upon the principle that 'special rules are better able to take account of particular circumstances'.¹⁶¹ The ILC Commentary to Article 55 of the ASR states that '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law'.¹⁶² The articles have a 'residual character' in relation to the special rules.¹⁶³ The ECtHR could therefore argue that it is operating with a lower standard of control for attributing action of a non-state entity to a state in order to improve human rights protection.

The Fragmentation Report recognises "regionalism" as the 'pursuit of geographical exceptions to universal international rules'.¹⁶⁴ Certain rules are only binding on states that are members of a particular region.¹⁶⁵ It could be argued that the ECHR was an instrument of

¹⁵⁷ Ibid 32, para 52.

¹⁵⁸ Ibid 33, para 53.

¹⁵⁹ Ibid 34, para 56.

¹⁶⁰ Ibid 35, para 56.

¹⁶¹ Ibid 36, para 60.

¹⁶² ILC, Articles on State Responsibility (n 13) 140.

¹⁶³ Ibid 139.

¹⁶⁴ ILC, 'Fragmentation Report' (n 152) 108, para 211.

¹⁶⁵ Ibid.

‘European public order’ in which a unique set of standards applied because of the regional character of the ECHR, thus justifying a lower standard of control for establishing attribution than that required under general international law.¹⁶⁶ It follows that the ECtHR is not necessarily prohibited under international law from taking a different approach to the ICJ in the *Bosnian Genocide* Case and to Article 8 ASR, so long as the ECtHR explicitly distinguishes and justifies its own approach using established techniques of interpretation.

5. Conclusion

The ECtHR explicitly accepts two tests for the extraterritorial application of the ECHR under Article 1 of the ECHR: the control over an individual test and the control over a territory test. The ECtHR in *Jaloud v Netherlands* could be interpreted as adopting a different test of jurisdiction under Article 1: an attribution test. It has been argued here that this would not be the first time that the ECtHR has adopted an attribution test in order to establish Article 1 jurisdiction. In *Ilascu* and *Catan* the ECtHR relied on attributing the actions of the MRT to Russia in order to hold Russia responsible for the rights violations committed by the MRT. Furthermore, this approach does not give rise to an insurmountable conflict with international law. Article 2 of the ASR does not necessarily preclude the conflation of attribution and Article 1 jurisdiction. Whether it provides any guidance on the relationship between jurisdiction and attribution in international human rights treaties is inconclusive. Furthermore, the fact that the standard of control required under international law for attributing the actions of non-state entities to states is higher than in the ECtHR’s jurisprudence is not, in and of itself, a reason for denying conflation of attribution with jurisdiction. One way in which the ECtHR can justify its distinct practice is by reference to its character as a regional international human rights treaty. If Article 1 jurisdiction is conflated with attribution, then it signals a move towards the diminishing significance of territory as a barrier to accountability under the ECHR. The arbitrary tests for determining when the ECHR is applicable abroad - the control over an individual or control over a territory tests – are overlooked, and the question becomes: *who* should be held responsible?

¹⁶⁶ *Banković* (n 76) para 80.