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The Paradox of Extraterritoriality at  
the European Court of Human Rights:  
A Global Constitutionalist Approach

Jane M Rooney

A thesis presented for the degree of  
Doctor in Philosophy

Durham Law School  
University of Durham  
September 2016

Jane M Rooney

# The Paradox of Extraterritoriality at the European Court of Human Rights: A Global Constitutionalist Approach

Extraterritoriality at the ECtHR appears to create a paradox. On the one hand, it is limited in space, time, purpose and remedies, through its state membership, individual application process, the terms of the ECHR, and restricted enforcement and influence on general international policy. On the other, it appears to be an indispensable refuge for individuals who are victim to the most flagrant denials of justice happening on a global scale. The ECtHR finds itself an avenue for redress in historical events of global significance such as the NATO bombing and UN administration of Kosovo, the US-UK occupation in Iraq, extraordinary rendition procedures and the interception of migrant boats at sea.

This thesis embraces the paradox of extraterritoriality at the ECtHR. Putting forward a normative framework, the thesis clarifies the nature of extraterritoriality at the ECtHR and investigates the extent to which the ECtHR adopts a single normative frame. Existing theories fail to capture the nature of extraterritoriality in the ECtHR's operation. This thesis offers a global constitutionalist approach to deduce a model for extraterritoriality. Using a normative global constitutionalist frame, in particular democratic accountability and the rule of law, the thesis examines the extent to which the ECtHR adopts such an approach. Translating the requirements of normative global constitutionalism into doctrinal indicators, it examines whether the ECtHR operates within a global constitutionalist frame in extraterritoriality decisions. Alongside this examination, the thesis queries the function and purpose of extraterritoriality and its relationship with other international legal concepts. It questions models that rely on state jurisdiction and attribution to determine their extraterritorial reach, exposing

extraterritoriality as performing a separate function. It ultimately unravels the paradox of extraterritoriality through a global constitutionalist explanation.

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# List of Abbreviations

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AP	Additional Protocol
ASR	Articles on State Responsibility
CPA	Coalition Provisional Authority
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FRY	Former Republic of Yugoslavia
GATT	General Agreement on Tariffs and Trade
IAC	International Armed Conflict
ICDC	Iraqi Civil Defence Corps
ICJ	International Court of Justice
ICL	International Criminal Law
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal of the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMF	International Monetary Fund
MND (SE)	Multinational Division South East
MNF	Multinational Force
MRT	Moldovan Republic of Transdnistria
NATO	North Atlantic Treaty Organisation

NIAC	Non-international armed conflict
NKR	Nagorno-Karabakh Republic
OSPAR	Convention for the Protection of the Marine Environment of the North East Atlantic
POW	Prisoner of War
SFIR	Stabilization Force in Iraq
TRNC	Turkish Republic of Northern Cyprus
UCC	Union Carbide Corporation
UNAMI	United Nations Assistance Mission for Iraq
UNCLOS	United Nations Convention on the law of the Sea
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention on the Law of Treaties
VRS	Bosnian Serb armed forces
WTO	World Trade Organisation

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### **Permanent Court of Arbitration**

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# 1. Introduction

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## 1.1. Introduction

The complexity of the doctrinal and normative challenges arising from the extraterritorial application of the European Convention on Human Rights (ECHR) at the European Court of Human Rights (ECtHR) cannot be understated. Since the decisions of *Al Skeini v United Kingdom* and *Hassan v United Kingdom*, the debate on when and how the ECtHR should protect rights extraterritorially has intensified and dramatically polarised opinion.<sup>1</sup> The extraterritoriality test proposed by *Al Skeini* is considered a victory for accountability in some quarters,<sup>2</sup> and equally an illustration of why extraterritoriality should be precluded in others.<sup>3</sup> Similarly, *Hassan* is praised for situating the ECHR within a global legal system and taking account of competing norms,<sup>4</sup> while others accuse the ECHR of overreach.<sup>5</sup> While discourse on whether those decisions represent improvements or regressions is plentiful, a theoretical and normative analysis of extraterritoriality at the ECtHR is lacking, in comparison. This thesis aims to provide a new global constitutionalist framework to answer what approach the ECtHR should take to extraterritoriality and why.

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<sup>1</sup> *Al Skeini v UK* (2011) 53 EHRR 18; *Hassan v UK* App No 29750/09 (ECtHR, 16 September 2014). See e.g. Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) EJIL 121, 121; Samantha Miko, 'Al Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention on Human Rights' (2013) 35(3) Boston College I Comp L Rev 63, 79; See e.g. Cedric De Koker, 'Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts' (2015) 31(81) Utrecht J I Eur L 90.

<sup>2</sup> Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (n 1) 48.

<sup>3</sup> Richard Ekins et al, 'Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat' (Policy Exchange 2015) 14.

<sup>4</sup> Françoise Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts' (1992) 31 Mil L & L War Rev 117.

<sup>5</sup> Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (OUP 2016) 125.

*Al Skeini* confirms two tests of extraterritoriality: when states exercise ‘effective control over an area’<sup>6</sup> such as in situations of military occupation,<sup>7</sup> or when a state agent exercises ‘authority and control’ over an individual<sup>8</sup> such as when individuals are ‘physical[ly] force[d]’ onto a plane or held in custody.<sup>9</sup> *Hassan* is the most recent significant decision on norm conflicts that arise when the ECHR is applied outside of a state’s territory. In *Hassan*, the ECtHR took into account international humanitarian law (IHL) for deciding the rules on detention in armed conflict.<sup>10</sup> In *Al Skeini*, the ECtHR is praised for having ‘learnt lessons’ from its previous position in *Banković*, which held that the ECHR would apply extraterritoriality only in ‘exceptional’ circumstances.<sup>11</sup> Conversely, the ECtHR’s approach is criticised as still too restrictive, with suggestions for alternative models. Some suggest that if a state is capable of protecting rights abroad it should,<sup>12</sup> or that accountability should be coextensive with control, rather than bifurcated between effective control and state agent authority and control.<sup>13</sup> *Al Skeini* is confronted with considerable backlash from Member States. UK courts and a government-funded think-tank have criticised the decision as too far-

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<sup>6</sup> *Al Skeini* (n 1) para 138.

<sup>7</sup> See e.g. *Loizidou v Turkey* (preliminary objections) (1995) Series A No 122.

<sup>8</sup> *Ibid* para 133.

<sup>9</sup> *Öcalan v Turkey* (2005) 41 EHRR 45 para 93; *Al Skeini* (n 1) para 138.

<sup>10</sup> *Hassan* (n 1).

<sup>11</sup> *Banković v Belgium* (2007) 44 EHRR SE5; Milanovic, ‘Al-Skeini and Al-Jedda in Strasbourg’ (n 1) 48; Judge Loucaides, ‘Determining the Extraterritorial Effect of the ECHR: Facts, Jurisprudence and the Banković case’ (2006) 4 EHRLR 391; Alexander Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the recent jurisprudence of the European Court of Human Rights’ (2003) 14 EJIL 529. For the argument that *Al Skeini* is correctly decided on the grounds that it conforms with the correct meaning of domestic jurisdiction, see Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: why human rights depend on jurisdiction and what jurisdiction amounts to’ (2012) 25(4) LJIL 857.

<sup>12</sup> *Al Skeini* (n 1) Separate Opinion of Judge Bonello, paras 10-11; Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7(1) LEHR 47.

<sup>13</sup> Rick Lawson, ‘Life After Banković: 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* (2004), 84, 86; Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 375-77.

reaching.<sup>14</sup> There is no consensus on the reach of *Al Skeini*, nor on recommendations for a better approach to extraterritoriality.

The reception of *Hassan* has similarly provoked divergent responses. Some argue that the ECHR system is undermined when Article 5 right to liberty and security is watered down through consideration of IHL.<sup>15</sup> IHL should only be taken into account when states derogate from the ECHR in order to preserve the sanctity of the ECHR system.<sup>16</sup> Others argue that only IHL should apply in cases concerning armed conflict at the ECtHR because it strikes the correct balance between humanitarianism and the practical reality of war.<sup>17</sup> Alternatively, there are those that propose that cases concerning armed conflict should be inadmissible to the ECtHR.<sup>18</sup> While still others argue the ECtHR is an indispensable mechanism for enforcement of IHL, even when IHL is interpreted through the lens of the ECHR.<sup>19</sup> The relationship between the question of extraterritoriality, presented in *Al Skeini*, and of competing international legal norms, confronted in *Hassan*, is also contested.<sup>20</sup>

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<sup>14</sup> Richard Ekins et al, 'Clearing the Fog of Law' (n 3) 14; *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843, 96.

<sup>15</sup> William Schabas, 'Lex specialis? Belts and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum' (2007) 40 *Isr L Rev* 592.

<sup>16</sup> Silvia Borelli, 'Jaloud v Netherlands and Hassan v United Kingdom: Time for a principled approach in the application of the ECHR to military action abroad' (2015) 16 *QIL* 25, 27.

<sup>17</sup> Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (OUP 2011) 92.

<sup>18</sup> Ziv Bohrer, 'Human Rights vs Humanitarian Law or rights vs obligations: Reflections following the rulings in Hassan and Jaloud' (2015) 16 *QIL* 5.

<sup>19</sup> Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts' (n 4); Françoise Hampson and Daragh Murray, '“Operationalising” the Relationship Between the Law of Armed Conflict and International Human Rights Law' (*EJIL : talk* ! 11 February 2016) available at <<http://www.ejiltalk.org/author/francoisehampsonanddaraghmurray/>> last accessed 2 April 2016.

<sup>20</sup> For the argument that they are interconnected see, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 209-22. For theories that address extraterritoriality without considering the effect of norm conflicts see: Shany, 'Taking Universality Seriously' (n 12); Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11).

A normative framework is required to recommend and justify an approach to extraterritoriality against which the decisions of *Al Skeini* and *Hassan* can be appraised. The normative framework adopted for this thesis is constitutionalism. A constitutionalist framework is used to (re)conceptualise different issues relating to the Council of Europe system by other commentators. For example, Fiona de Londras proposes that a constitutionalist frame requires the harmonisation of the ECHR with domestic law of Member States,<sup>21</sup> as well as an evolutive interpretation of human rights so that those standards are in keeping with contemporaneous developments.<sup>22</sup> Sadurski Wojciech argues that a constitutionalist approach addresses systemic ECHR violations,<sup>23</sup> while for Luzius Wildhaber and Steven Greer constitutionalisation of the Council of Europe means ensuring efficiency at the ECtHR.<sup>24</sup> This thesis adopts a constitutionalist frame for addressing extraterritoriality at the ECtHR. Unlike the examples above, this thesis transitions discussions of constitutionalism at the ECtHR beyond the domestic and regional level, to the global. A theory of global normative constitutionalism is put forward. Constitutionalism has gained traction in global governance literature as a rich, normative and theoretical discourse, with both explanatory and normative power and potential.<sup>25</sup> As a normative framework it advocates models of governance ranging from the most idealistic to pragmatic, enabling a theory that engages with existing institutions of global governance and recommending ways of moving forward. A global constitutionalist frame can thereby potentially capture the ECtHR's approach to extraterritoriality while providing reasons for a preferred model.

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<sup>21</sup> Fiona de Londras, 'International Human Rights Law and Constitutional Rights: In Favour of Synergy' (2009) 9(2) ICON 307.

<sup>22</sup> Fiona de Londras, 'Dual Functionality and the persistent frailty of the European Court of Human Rights' (2013) EHRLR 38, 40.

<sup>23</sup> Sadurski Wojciech, 'Partnering with Strasbourg: constitutionalism of the European Court of Human Rights, the accession of Central and East European states to the Council of Europe, and the idea of pilot judgments' (2009) 9(3) HRLR 397, 398.

<sup>24</sup> Luzius Wildhaber and Steven Greer, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (2012) 12(4) HRLR 655.

<sup>25</sup> See e.g. Klabbers et al, *The Constitutionalization of International Law* (OUP 2011); Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009).

The global constitutionalist frame must capture the reality that those who are victims to some of the most flagrant denials of justice on a global scale in recent times seek admissibility to a regional human rights court, despite its limited capacities and potential for remedial justice. A constitutionalist frame should help explain why this paradox arises and recommend a model of extraterritoriality based upon our deeper understanding of the ECtHR's operation. Without a convincing normative underpinning, extraterritoriality hangs in the balance. Powerful actors who seek to benefit from accountability vacuums traditionally created by territory could exploit the normativity gap for their own ends, leaving weaker actors who rely on extraterritoriality without a voice and without an avenue to seek justice.



## 1.2. The Paradox of Extraterritoriality

A framework that simultaneously recognises the significance and insignificance of extraterritoriality at the ECtHR requires a global perspective. Victims of atrocities happening on a global scale and of global significance seek admissibility to the ECtHR. When the UK tortured detainees during its occupation of Iraq, or when it failed to carry out effective investigations into alleged illegal killings by British soldiers, the ECtHR provided a forum for contestation and remediation.<sup>26</sup> The ECtHR has considered events concerning the UN Administration of Kosovo,<sup>27</sup> CIA extraordinary rendition procedures, interdictions on the high seas of Libyan and Somalian migrants making their way by boat to Italy, and the enforcement of United Nations Security Council Resolutions (UNSCRs) for individual targeted sanctions.<sup>28</sup> The ECtHR therefore appears to be significant within the global governance system, as it is chosen by victims of some of the worst, globally significant atrocities as a forum to hold the perpetrators of injustice accountable.

Its significance to victims of global atrocities can be contrasted with its relative insignificance as an institution of global governance. The ECtHR is just one permanent court, with a membership of only 47 contracting parties, all based in Europe. It has restricted capacity to enforce judgments or change global law and policy.<sup>29</sup> Its limited mandate is only to enforce the terms of its constitutive treaty: the ECHR. It can merely declare state action illegal according to the ECHR, ensure monetary compensation or further investigation, or failing that, ensure that victims have a voice without finding their cases successful on the merits. Inadequate resources mean that the backlog of cases is increasingly growing, evidencing its inability to deal with accountability demands and questioning its efficiency.<sup>30</sup> The ECtHR mostly hears cases on an

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<sup>26</sup> *Al Skeini* (n 1). See also *Jaloud v Netherlands* (2015) 60 EHRR 29.

<sup>27</sup> *Behrami v France* (2007) 45 EHRR SE10.

<sup>28</sup> See e.g. *El-Masri v Macedonia* (2013) 57 EHRR 25 (extraordinary renditions); *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 (interdictions at sea); *Nada v Switzerland* (2013) 56 EHRR 18 (enforcement of UNSCRs).

<sup>29</sup> Elisabeth L Abdelgawad, 'The Execution of Judgements of the European Court of Human Rights' (Council of Europe Publishing 2008) 62.

<sup>30</sup> The number of pending cases at the ECtHR at the end of 2015 was 65,000: Press conference, Press room, 28 January 2016 Guido Raimondi, President of the European Court of Human Rights, available

individual basis, meaning that justice will only be directly afforded to one victim despite the fact there may be many others who are in the same position and merit compensation or mandated action by the state.

This thesis adopts a global constitutionalist frame as it may have the potential to account for the ECtHR's significance to victims of global atrocity whilst simultaneously recognising its limited institutional value in global governance. A global constitutionalist frame may help to articulate and justify the continuance of the connection between victims of global atrocities and the ECtHR. It may be successful in explaining why the ECtHR is a popular avenue for justice, despite its limitations, whilst answering to those who are sceptical about the link between extraterritorial applicants and the Council of Europe.

The paradox highlights the complexity in articulating the political and legal (in)significance of extraterritoriality at the ECtHR in global governance. The legal (in)significance of the ECHR needs to be addressed. International law regulates the interactions between states and extraterritoriality questions one state's actions on another state's territory thus inevitably triggering the application of international law. External international law may not point to the same legal solution as the ECHR in extraterritoriality decisions. An analysis of how to negotiate competing solutions to the regulation of extraterritorial situations needs to be undertaken. The ECtHR must decide how to interpret the ECHR against competing international legal norms. The ECtHR has interpreted ECHR norms against the peace and security obligations enshrined under Article 24 of the UN Charter,<sup>31</sup> the law of the sea,<sup>32</sup> IHL,<sup>33</sup> and diplomatic assurances.<sup>34</sup> The ECtHR needs to decide whether to ignore or to take into account external international law, and how to manage the relationship between different norms. A global constitutionalist frame should capture and provide guidance

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at <[http://www.echr.coe.int/Documents/Speech\\_20160128\\_Raimondi\\_JY\\_PC\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20160128_Raimondi_JY_PC_ENG.pdf)> last accessed 4 July 2016.

<sup>31</sup> *Behrami* (n 27) paras 148-9.

<sup>32</sup> *Hirsi* (n 28) paras 76-82.

<sup>33</sup> *Hassan* (n 1) paras 96-107.

<sup>34</sup> *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1 paras 186-9.

on how the ECHR is interpreted against external international law in extraterritoriality decisions.

### 1.3. Methodology

This thesis is desk and library based research, involving both doctrinal and theoretical inquiries. Placing equal emphasis on the theoretical and doctrinal questions is central to the novelty of this thesis. Previous important attempts to clarify extraterritoriality at the ECtHR exist on account of the ECtHR's complex and conflicting jurisprudence,<sup>35</sup> but an emerging clarification in *Al Skeini* and *Hassan* means that the investigation must move beyond mere doctrinal analysis. Instead, there must be a focus on the backlash against extraterritoriality, providing strong, theoretically informed justifications for its expansion or limitation. Existing frameworks do not engage in any real inquiry of who relies on extraterritoriality and does not go beyond human rights discourse for conceptualising its worth.<sup>36</sup> Prejudice towards or against the human rights rhetoric more often than not directly correlates with the model of extraterritoriality ultimately presented.

This thesis devotes space to developing an innovative theoretical framework, which cannot so easily be undermined. It responds to the need for greater consideration of the wider normative implications of territorially defined obligations. The innovation is in translating global constitutionalist norms into doctrinal indicators to stipulate what approach the ECtHR should take to extraterritoriality in its jurisprudence. While the analysis does not purport to have developed an entirely original conception of global constitutionalism, the resulting frame against which the ECtHR's jurisprudence is analysed is unique, arrived at through a critical examination of existing global constitutionalist theories. As a result of the focus on normative considerations and the challenge of translating norms into doctrinal indicators, this analysis relies on existing literature on global constitutionalism. There is a critical examination of which global constitutionalist frame is best suited to justify a model of extraterritoriality. The global constitutionalist model adopted in this thesis should take legitimacy and normativity

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<sup>35</sup>Gondek, *The Reach of Human Rights in a Globalising World* (n 13); Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 20); Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill/Martinus Nijhoff 2013).

<sup>36</sup>Besson, 'The Extraterritoriality of the European Convention on Human Rights' (11); Nehal Bhuta, 'The Frontiers of Extraterritoriality – Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016).

seriously.<sup>37</sup> Authoritative and contemporary literature on global constitutionalism abounds, and the main contribution made to that literature in this thesis is the translation of those norms into doctrinal indicators for extraterritoriality at the ECtHR.

The development of the ECtHR's jurisprudence needs investigation in order to appraise the relative significance of the ECtHR's emerging approach against previous models of extraterritoriality. A contemporary practice of the ECtHR is to adjudicate upon cases concerning state action in other states' territories, without explicitly acknowledging there is an extraterritoriality issue. This leads to omissions in doctrinal inquiries which skew the reality of extraterritoriality at the ECtHR. This thesis includes an analysis of all significant extraterritoriality decisions against the doctrinal indicators derived from normative global constitutionalism.

The management of norm conflicts is crucial to a conceptualisation of extraterritoriality. An appraisal of one of the most developed lines of jurisprudence in this area, detention in armed conflict, is best for the application of doctrinal indicators to determine whether the ECtHR is converging towards a global constitutionalist frame. This is in contrast to other norm conflicts that arise from extraterritoriality, in relation to which the ECtHR's approach is not developed, is non-existent or has so many various aspects that a comprehensive analysis of all of the norm conflicts arising in relation to that human right is beyond the scope of this thesis. For example, Article 2 cases relating to the obligation to carry out effective investigations into alleged killings, *non-refoulement* and the use of force. They all pose complex norm conflict problems between the ECHR and various international law instruments. Furthermore, they have either not been addressed by the ECtHR or not developed so as to constitute a line of jurisprudence against which doctrinal indicators can be applied.<sup>38</sup>

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<sup>37</sup> Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 381; Anne Peters, 'Dual Democracy' in Klabbers et al (eds) *The Constitutionalization of International Law* (OUP 2011) 263-342; Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 200-242.

<sup>38</sup> See e.g. Michael Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security J* 31; Gloria Gaggioli and Robert Kolb, 'A Right to Life in Armed Conflict? The Contribution of the European Court of Human Rights' (2007) 37 *Israel YBHR*; Aurel Sari, 'The Juridification of the British Armed Forces and the European Convention on Human Rights: 'Because

The relationship between Article 5 and UNSCRs for their regulation of detention in armed conflict is not addressed here.<sup>39</sup> The interpretation of UNSCRs against ECHR rights arises in many different contexts.<sup>40</sup> The ECtHR puts forward the general solution of a strong presumption that UNSCRs are in conformity with ECHR protection.<sup>41</sup> The relationship between IHL and the ECHR is different. It confronts profound issues relating to the ethos of different special regimes. It mitigates against a one-size-fits-all solution. While norm conflicts between UNSCRs and the ECHR often arise in the domestic context, the IHL/ECHR norm conflict is quintessentially an extraterritorial problem at the ECtHR. The complexity of the relationship between IHL and ECHR has even been put forward as a reason for ceasing extraterritoriality.<sup>42</sup> An evaluation of the relationship between IHL and the ECHR is most suitable for exploring the interconnection between both extraterritoriality and norm conflicts.

Constitutionalism is preferred to other potential frameworks of global governance, including legal pluralism, global administrative law (GAL) and cosmopolitanism. Legal pluralism describes the legal autonomy of institutions, sectoral regimes and states, and supports their autonomy on the grounds that they are best placed to regulate their own specialist regime or governance order.<sup>43</sup> However, it denies the inevitable overlapping of many legal orders, and that there may be abuse of power within those

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It's Judgment that Defeats Us' available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2411070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411070)> last accessed 4 July 2016; *Al-Saadoon v UK* (2010) 51 EHRR 9; Dominic McGoldrick and Sarah Williams, 'Between the Devil and the Deep Blue Sea: Conflicted Thinking in the Al-Saadoon Affair' (2009) 58 ICLQ 689.

<sup>39</sup> See e.g. *Al Jedda v UK* (2011) 53 EHRR 23 para 101.

<sup>40</sup> For scholarship on the ECtHR's approach to interpreting norm conflicts between the ECHR and UNSCR see, for example: Fiona De Londras and Suzanne Kingston, 'Rights, Security, and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe' (2010) 58 Am J Comp L 359; Erika de Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12(4) Chinese JIL 787; Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9(2) HRLR 288; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51(1) Harvard ILJ.

<sup>41</sup> *Al Jedda* (n 39) para 102.

<sup>42</sup> *Serdar Mohammed* (n 14) para 96.

<sup>43</sup> Colleen Shephard, 'Equality Through the Prism of Legal Pluralism' in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer 2013) 135.

governance systems that can only be addressed from outside. In the words of Martti Koskenniemi, legal pluralism's focus on heterogeneity and diversity and an acceptance of their autonomy ceases to pose demands on the world, which runs contrary to the normative intentions of this thesis.<sup>44</sup> Cosmopolitanism strives towards a universalist conception of humanity, based in universal law. Despite the fact that it aims to promote greater accountability of actors,<sup>45</sup> it is a veiled imposition of a hegemonic or imperialist ideology, as it presumes the universality of particular values to which all global actors should subscribe.<sup>46</sup> Normative constitutionalism strikes a balance between heterogeneity and homogeneity by taking seriously the normative claims of different sites of governance, determining who is attached to those sites and accommodating their overlap. GAL seeks accountability but does not place emphasis on legitimacy, arguing that it cannot be achieved at the global level due to the complexity of global governance networks. Instead, procedures and mechanisms should be put in place to enhance accountability of existing institutions that exert law-making or enforcement powers.<sup>47</sup> Constitutionalism is more normatively ambitious than global administrative discourse in its quest for legitimacy and democratic accountability. GAL does not ask why procedural obligations are owed between different actors which is indispensable for even limited accountability to be meaningful.<sup>48</sup> If an institution is accountable to a body of actors upon which that institution's actions has no bearing, the accountability mechanisms are meaningless.

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<sup>44</sup> Martti Koskenniemi, 'Fate of Public International Law: Between Technique and Politics' (2007) 70(1) MLR 1, 23-4.

<sup>45</sup> Stephen J Toope, 'Emerging Patterns of Governance and International Law' in M Byers (ed), *The Role of Law in International Relations and International Law* (OUP 2000) 91, 92.

<sup>46</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 45.

<sup>47</sup> Daniel Esty believes that 'global governance is doomed to illegitimacy' in Daniel C Esty, 'Good Governance at the Supranational Scale: Globalising Administrative Law' (2006) 115 Yale L J 1490, 1562; see, Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 (1) EJIL 1.

<sup>48</sup> Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: on the Accountability of States to Foreign Stakeholders' (2013) 107(2) *AJIL* 295, 300.

Constitutionalism is a framework that can capture both political and legal aspects of governance simultaneously and in connection with one another.<sup>49</sup> The constitutionalist norms of democratic accountability and the rule of law are chosen because they address both the political and legal issues arising from the paradox of extraterritoriality. Analysing democratic accountability in global governance may help in understanding whether the Council of Europe holds any real significance in securing legitimacy in global governance and the extent of that significance. It will also help determine to whom the Council of Europe holds significance whether it be individuals situated in territories of Member States, or outside of the Council of Europe, thus linking to discussions on extraterritoriality. Democratic accountability is potentially a vehicle through which the significance of the Council of Europe to creating a more legitimate global governance system can be explored. This is because democratic accountability is a constitutionalist norm which aims to provide legitimate governance: governance wherein those who are subject to power have some degree of control over the way in which they are governed. An analysis of the requirements of the rule of law in a global context can improve understanding of the ramifications on the international legal environment of the ECtHR's approach to norm conflicts. Considerations of the rule of law can help determine what approach the ECtHR should take to resolving norm conflicts, whether it be ignoring competing international law norms or letting external norms trump the ECHR, or another solution. Whether the resolution of norm conflicts has a bearing on political questions relating to global governance can also be answered through the lens of the rule of law.

The separation of powers embodies the important constitutionalist principle of constraint of powers. The challenges of translating democratic accountability and the rule of law to the international level have been given significant attention in the literature.<sup>50</sup> The complexity of translating the separation of powers to the international

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<sup>49</sup> See e.g. Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157; Martin Loughlin, *The Idea of Public Law* (OUP 2003); O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 37).

<sup>50</sup> See e.g. Anne Peters, 'Compensatory Constitutionalism: Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579; Andreas Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P



level has faced less scrutiny.<sup>51</sup> The aim of the thesis is to provide a normatively rich appraisal of extraterritoriality based on existing global constitutionalist literature, from which doctrinal indicators can be derived. Therefore, it focuses on two core norms upon which there is existing, extensive theorisation, rather than a norm which could benefit from further exploration for its application in the global sphere. Arguably, the separation of powers encapsulates and presupposes the existence of the norms of democratic accountability and the rule of law, building upon an analysis of their normative functions and balancing them with executive power. This thesis does not engage in an analysis of what this balance may entail. Instead, what are considered here are the more rudimentary norms of constitutionalism. This is due to space and emphasis on both legitimacy, defined as ensuring that those governed have some control over the way in which they are governed for which the norm of democratic accountability is particularly apt; and significance of the ECHR in an international legal system, which can be addressed by appraising the rule of law. An additional reason for not focusing on the separation of powers is that it may involve looking beyond the ECtHR to the institutions within the Council of Europe which help to balance executive, judicial, and legislative powers. As the focus of this thesis is on translating constitutionalist norms into doctrinal indicators for appraising extraterritoriality jurisprudence, an analysis of other institutions within the Council of Europe would fall outside the purview of the aim of this thesis.

While the International Court of Justice, International American Court of Human Rights and Human Rights Committee all have made substantial contributions to the case law on the extraterritorial application of human rights, the ECtHR is considered to be the most prolific on this topic, and its jurisprudence the ‘richest and most developed’.<sup>52</sup> This analysis may be useful as a starting point for asking what approach

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Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 69.

<sup>51</sup> For an interesting analysis of the division of powers in global constitutionalism see O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 39) 171-182.

<sup>52</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 20) 4. For interesting scholarship on extraterritoriality at the International Court of Justice see, Ralph Wilde, ‘Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice’s Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties’ (2013) 12(4) *Chinese JIL* 639. For an analysis of extraterritoriality at the Inter-American Court of Human

other international human rights courts should take to extraterritoriality from a global constitutionalist perspective. This thesis confines itself to an analysis of the ECtHR's approach, and presumes that the global constitutionalist approach may suggest something else for other courts, depending upon the criteria it suggests. Many domestic courts have engaged in the extraterritorial application of constitutional rights, such as Canada, the US, and Israel.<sup>53</sup> Those courts take into account the jurisprudence of international human rights courts. While the relationship between constitutional rights, IHRL and the extraterritorial enforcement of those rights is important, it is beyond the scope of this thesis. Rather than taking advantage of the benefits of a comparative analysis, this thesis prioritises a detailed analysis of the ECHR, taking a holistic look at the ECtHR's approach from a perspective that has most potential for unravelling the paradox recognised in this thesis. The global constitutionalist frame developed here could potentially be applied to other IHRLs but their own unique institutional apparatus would need to be considered separately. Furthermore, the global constitutionalist frame may consider other factors in relation to the extraterritorial enforcement of domestic constitutional rights. The analysis is confined to the jurisprudence of the ECtHR because of its significance and the need to devote attention to the development of a new normative framework and model of extraterritoriality that unravels the paradox at the centre of inquiry in this thesis.

#### 1.4. Structure of the Thesis

The first half of the thesis aims to provide a normative frame from which to deduce a model of extraterritoriality at the ECtHR. The second half engages in a doctrinal

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Rights see, Christina M Cerna, 'Out of Bounds? The Approach of the Inter-American system for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law (2006) 6 CHRGJ Working Paper available at <[http://chrgj.org/wpcontent/uploads/2012/07/WPS\\_NYU\\_CHRGJ\\_Cerna\\_Final.pdf](http://chrgj.org/wpcontent/uploads/2012/07/WPS_NYU_CHRGJ_Cerna_Final.pdf)> last accessed 4 July 2016. For extraterritoriality of economic and social rights see, Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084.

<sup>53</sup> See further Fiona de Londras, 'What Human Rights Law Could Do: Lamenting the Lack of an International Human Rights Law Approach in Boumediene and Al Odah' (2008) 41(3) *Isr L Rev* 562; Sarah H Cleveland, 'Embedded International Law and the Constitution Abroad' (2010) 110 *Colum L Rev* 101.

analysis of the ECtHR's approach to extraterritoriality to answer whether it can be captured by the proposed frame. The doctrinal analysis takes place after the theoretical inquiry in order to ensure that the indicators derive from the frame rather than the frame deriving from the jurisprudence, ensuring the authenticity of the inquiry. This structure also prioritises filling the normative gap. The equal emphasis on theory and doctrine enables a thorough theoretical analysis of existing theories as well as a detailed justification for the normative framework put forward, whilst providing a satisfactory appraisal of the complex jurisprudence relating to extraterritoriality and detention in armed conflict.

Chapter 2 evaluates existing normative frameworks at the ECtHR to illustrate the need for a frame that provides a sound theoretical appraisal of political and legal implications of extraterritoriality. It considers whether they are in fact normative, whether they shed light on why individuals outside of the Council of Europe seek admissibility to the ECtHR, and explain the operation of the ECHR within an international legal system. It further asks whether Article 1 of the ECHR can be relied upon to contrive a legitimate model of extraterritoriality. A normative framework that responds to a Post-Westphalian world of increased, unaccounted for transnational activity and a proliferation of actors and institutions, needs to be adopted.

Having established a normative gap, a global constitutionalist model is put forward. Normative global constitutionalism is examined as a legitimate model of global governance in a Post-Westphalian world, which considers both political and legal aspects of extraterritoriality. This chapter focuses on the translation of the norm of democratic accountability into doctrinal indicators of global constitutionalism. It considers whether the Council of Europe system is a nexus for the process of global constitutionalism, whether the ECtHR is a mechanism of democratic accountability, and who participates. The doctrinal indicators of democratic accountability aim to assess whether the ECtHR is moving towards a presumption of extraterritoriality. They are applied to the ECtHR's extraterritoriality jurisprudence in Chapter 5 in order to determine whether global constitutionalism captures the ECtHR's emerging approach.

Following from establishing the doctrinal indicators of democratic accountability, Chapter 4 considers the other core norm constitutionalism under investigation, the rule

of law, its role and function in legitimate governance, and its implications for the management of norm conflicts arising from the extraterritorial application of the ECHR. The function of the rule of law in enhancing accountability of constituted powers by their constituents is examined. The potential role of international courts in both securing and undermining the rule of law is evaluated through the lens of fragmentation. The principle of systemic integration is considered as a global constitutionalist tool for improving clarity and consistency in a fragmented global governance system. As well as the principle of systemic integration, other doctrinal indicators of the rule of law are considered for enhancing the consistency and coherency of the international legal system. Those doctrinal indicators are applied in Chapter 6 to the ECtHR's jurisprudence on detention in extraterritorial armed conflict.

While Chapters 3 and 4 translate the norms of global constitutionalism into doctrinal indicators to provide tangible recommendations for the ECtHR moving forward, Chapters 5 and 6 establish the extent to which those indicators are present in the ECtHR's jurisprudence in order to assess the extent to which the ECtHR's approach to extraterritoriality and norm conflicts conforms with the global constitutionalist frame. An investigation of the ECtHR's extraterritoriality jurisprudence tests for the presence of indicators of a presumption of extraterritoriality, translated from the norm of democratic accountability. This analysis is split into three different time periods: pre-*Banković*, post-*Banković* and post-*Al Skeini*. *Banković* and *Al Skeini* are considered milestone decisions.<sup>54</sup> Post-*Al Skeini* represents the ECtHR's emerging approach, as it is the most recent decision to provide a comprehensive appraisal of the ECtHR's extraterritoriality jurisprudence. The chapter includes an analysis of the ECtHR's significant cases from its inception to contemporary times, against which to apply the doctrinal indicators. This is in order to assess and critique responses to the ECtHR's emerging approach, and whether and how it has changed. Ultimately, it will help answer whether the ECtHR's present approach can be justified as more in conformity with the global constitutionalist frame.

Chapter 6 then assesses whether the ECtHR's approach is in conformity with the second norm of global constitutionalism under investigation: the rule of law. Doctrinal

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<sup>54</sup> See e.g. Anna Cowan, 'A New Watershed? Re-evaluating *Banković* in Light of *Al-Skeini*' (2012) 1(1) CJICL 213.

indicators deriving from that norm are applied to jurisprudence relating to detention in extraterritorial armed conflict. The adoption of the principle of systemic integration, an explicit, clear and consistent narrative, and reasonable interpretation of the law. First, it clarifies the relationship between systemic integration, *lex specialis* and extraterritorial derogations. Then an analysis of the presence of the doctrinal indicators of the rule of law in the ECtHR's jurisprudence on detention in armed conflict is undertaken, comparing the two most prominent cases in this area: *Al Jedda v UK* and *Hassan*. *Hassan* represents the ECtHR's emerging approach as the most recent significant decision on this subject. This chapter aims to answer whether the global constitutionalist model best captures the evolution of the ECtHR's jurisprudence concerning detention in armed conflict, and more broadly, the management of norm conflicts arising from extraterritoriality.

Whether the ECtHR conceptualises the function of extraterritoriality in accordance with a global constitutionalist frame needs to be addressed at the end of the analysis. This is because it poses the most challenging questions in relation to extraterritoriality and the translation of the global constitutionalist frame. Extraterritoriality is considered in this thesis as a set of rules that delimit admissibility of individuals from territories outside the respondent state. Chapter 7 contextualises this understanding of extraterritoriality within the global legal system, comparing and contrasting it with other public international law concepts of jurisdiction and attribution. It then examines the ECtHR's understanding of the function of extraterritoriality in relation to jurisdiction and attribution. While a conception of extraterritoriality based upon jurisdiction gives rise to incoherency in the global legal system, concerns that conflating extraterritoriality and attribution also create inconsistency are abated. This is in order to support the argument that a presumption of extraterritoriality which is required for the operation of the norm of democratic accountability, would not be in violation of the rule of law. Purported norm conflicts between extraterritoriality tests and IHL tests of control are challenged. A connection between increasing extraterritoriality and managing norm conflicts in conformity with both the norm of democratic accountability and rule of law is made. Ultimately, the two strands of the global constitutionalist model are brought together in synergy to elucidate the very nature of extraterritoriality, and provide recommendations to ensure the ECtHR's conformity with this model.

## 1.5. Conclusion

Extraterritoriality's attractiveness and contentiousness as a subject of inquiry arises from its status as the epitome of the legal loophole, which is much more long standing than other contemporary manufactured examples such as the increasing privatisation of state conduct. The exploitation of this legal vacuum undermines the legitimacy of global governance. The global constitutionalist frame should capture the role that the ECtHR plays in incrementally exposing illegitimate behaviour, and suggest criteria for moving forward. This may lead to an understanding of why some of the most flagrant, widespread and systemic denials of justice on a global scale arrive at Strasbourg. Global constitutionalism may help unravel the paradox of why victims of global atrocity seek admissibility to the ECtHR despite its relative inability to change the state of affairs or even to hold states accountable within the global governance system. This frame may point to the relevance of the question of conflicting norms for legitimate global governance and provide solutions for evaluating the relationship between the ECHR and external international norms. Existing theories have left the paradox of extraterritoriality unnoticed and under-theorised, leaving extraterritoriality hanging in the balance, and at the whims of those who have something to lose from its operation. There needs to be a theory that not only speaks to powerful state actors who have enough resources and political influence to exercise power beyond their domestic territories, but also speaks for individuals who turn to the ECtHR for their voices to be heard.

This thesis seeks to conceptualise the Council of Europe and the ECHR within a global governance and international legal system in order to balance the price that powerful actors pay for extraterritoriality against the benefits it provides to those who seek admissibility to the ECtHR. Once the paradox of extraterritoriality is unravelled, and the connection or lack of connection between victims of global atrocities and the Council of Europe understood, a recommendation as to the reach of extraterritoriality can be provided. If extraterritoriality at the ECtHR does not serve the norms of global constitutionalism, then there may be no justification for the connection between the ECtHR and applicants from outside of the Council of Europe. But if extraterritoriality does perform a constitutionalist function, then there may be a reason for sustaining or extending it. Equally, once the relevance of the question of conflicting norms at the

ECtHR to legitimate global governance is articulated, an evaluation of the ECtHR's approach can be undertaken. Whether or not the ECtHR should ignore external law, take it into account, ensure that ECHR prevails or external international law prevails, will be considered in this analysis. This thesis seeks to expose the political and legal (in)significance of extraterritoriality at the ECtHR through a global constitutionalist lens, providing a frame which can then capture its value and recommend ways for moving forward.

## 2. Normative Frameworks of Extraterritoriality

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### 2.1. Introduction

This chapter asks whether existing normative theories conceptualise extraterritoriality at the ECtHR within a global governance context, taking account of both political and legal aspects. It asks whether they capture the paradox of the popularity of a relatively limited court in situations of global atrocity, and whether they consider norm conflicts that arise upon extraterritorial application of the ECHR. Existing accounts that rely on Article 1 of the ECHR for their legitimacy are also questioned in order to ascertain whether there needs to be a move away from reliance on this provision for a model of extraterritoriality.

An examination of existing proposals ascertains whether there is a need for a new normative frame for extraterritoriality. A comparison between Marko Milanovic and Yuval Shany's 'universality' models of extraterritoriality establishes whether they are internally coherent, whether their normative claims are well-founded, and the resulting models of extraterritoriality are arbitrary.<sup>1</sup> Samantha Besson and Nehal Bhuta's human rights theories of extraterritoriality are also analysed.<sup>2</sup> The analysis determines whether they are coherent, whether they consider norm conflicts that arise upon extraterritorial application of the ECHR, and whether they provide a normative framework that sheds light on the (in)significance of extraterritoriality at the ECtHR. A critical analysis of the normative frames determines whether there is a need for an alternative.

Whether or not a new normative frame is required can also be analysed by asking whether a model of extraterritoriality should flow from an interpretation of Article 1

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<sup>1</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2010); Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) LEHR 47.

<sup>2</sup> Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) LJIL 857; Nehal Bhuta, 'The Frontiers of Extraterritoriality – Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016) 1.



of the ECHR, a provision upon which all of the above accounts under consideration rely. In order to answer this question, the normative premise for why extraterritoriality should be based on the wording of a treaty's jurisdiction clause needs to be examined.<sup>3</sup> In this regard, the models of extraterritoriality put forward by Michal Gondek and Milanovic which rely for their legitimacy on an interpretation of the words, 'within their jurisdiction' are evaluated.<sup>4</sup> This is in order to decide whether Gondek and Milanovic's invocation of Article 1 as a justification for their models of extraterritoriality are genuine or contrived. Second, the basis of the legitimacy of a model based upon an interpretation of Article 1 in accordance with the rules of the Vienna Convention on the Law of Treaties 1969 (VCLT) is exposed and questioned.<sup>5</sup> In particular, this section asks whether the normative premise upon which the VCLT operates - a modern secular system of sovereign and equal states wherein the legitimacy of international law depends upon state consent<sup>6</sup> - still accounts for the state of affairs.<sup>7</sup> The deterioration of the order upon which the rules of the VCLT are premised, through globalisation, fragmentation and institutionalisation, is analysed.<sup>8</sup>

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<sup>3</sup> See e.g. *Banković v Belgium* ECHR 2001-XII 333; Besson, 'The Extraterritoriality of Human Rights' (n 2). See also, Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the recent jurisprudence of the ECtHR' (2003) 14 EJIL 529; 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.

<sup>4</sup> Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 29-46; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 10, 30-3, 212-5.

<sup>5</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8ILM 679.

<sup>6</sup> Bardo Fassbender, 'Peace of Westphalia (1648)' *Max Planck Encyclopaedia of Public International Law* (OUP 2011) para 18; Malcolm Shaw, *International Law* (6<sup>th</sup> edn, CUP 2008) 7, 1120.

<sup>7</sup> Fassbender, 'Peace of Westphalia' (n 6) para 18; Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (4<sup>th</sup> ed Knopf New York 1967) 264; Richard Falk, 'The Interplay of Westphalia and Charter Conceptions of the International Legal Order' in Richard Falk and Cyril E Black (eds), *The Future of the International Legal Order Vol 1 Trends and Patterns* (PUP 1969) 43.

<sup>8</sup> Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579; Samantha Besson, 'Theorising the Sources of International Law', in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) 166, 175.

An attempt is made to portray a more accurate picture of global governance in light of these developments. If the international setting can no longer be exclusively explained through the principle of sovereign and equal states, then a model of extraterritoriality based upon an interpretation of Article 1 in conformity with the rules of the VCLT will not be legitimate. An alternative normative premise and doctrinal solution to extraterritoriality will be required.

## 2.2. Existing Normative Frameworks

Whether or not a new normative frame is required can only be assessed by asking whether existing frames have proved unsatisfactory. This section examines whether ‘universality’ models or human rights theories conceptualise extraterritoriality within a satisfactory normative framework. In relation to the universality theories, the focus of analysis will be on whether they are internally coherent, whether universality provides an appropriate normative framework, and whether the resulting models of extraterritoriality are arbitrary. While human rights theories of extraterritoriality are examined for their coherency, greater consideration is given to whether they look at both political and legal aspects of extraterritoriality: the paradox of extraterritoriality and norm conflicts that arise from the extraterritorial application of the ECHR. This section seeks to ascertain whether existing normative frameworks are satisfactory for considering the role of the ECtHR within a global governance system or whether a new normative frame is required.

### 2.2.1. ‘Universality versus effectiveness’ and ‘Special power and legal relationship’

Milanovic’s ‘universality versus effectiveness’ framework proposes that we should aspire towards securing human rights protection universally, but temper our aspirations by considerations of practicality. He posits that universality provides a suitable baseline for the extraterritorial application of the ECHR. This is because ‘[e]very single applicant who demands protection against extraterritorial state actors makes an appeal to universality’.<sup>9</sup> Universality encapsulates the indispensable normative idea that there is ‘no reason why [an] individual should be completely

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<sup>9</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 55.

unprotected against the arbitrary exercise of that power, solely on the basis of his or her location'.<sup>10</sup> Moreover, courts 'act[...] out of universalist aspirations that are deeply embedded in the structure of human rights law'.<sup>11</sup> He concedes that universality is 'hopelessly utopian' and therefore must be balanced against practical considerations.<sup>12</sup> In light of this, he weighs considerations of effectiveness against the universality baseline: flexibility, impact, regime integrity, clarity and predictability.<sup>13</sup> The requirements of effectiveness all pertain to determining the scope and content of rights abroad. Flexibility requires that international law external to the ECHR is taken into account when the ECHR is applied abroad.<sup>14</sup> Impact and regime integrity require that including consideration of external international law does not dilute the requirements of the ECHR.<sup>15</sup> The ECtHR should clarify and ensure predictability of the rules on extraterritoriality and clarify the relationship between ECHR norms and external law.<sup>16</sup>

The reliance on universality may be considered to undermine the internal coherency of Milanovic's theory in four ways. First, despite labelling it as 'hopelessly utopian'<sup>17</sup> and 'unrealistic', universality forms one branch of his principled framework.<sup>18</sup> Second, he qualifies 'universality' with practical considerations, despite the fact that universality, by its very definition, does not submit to such qualifications.<sup>19</sup> Third, the 'effectiveness' branch is meant to act as a constraint on universality. However, 'impact' and 'regime integrity' require that ECHR norms are not diluted by external international law norms. Those criteria appear to be complimentary to, rather than at odds with, universality. This is because universality presupposes the full application

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid 55.

<sup>12</sup> Ibid 56.

<sup>13</sup> Ibid 109-110.

<sup>14</sup> Ibid 112.

<sup>15</sup> Ibid 113-5.

<sup>16</sup> Ibid 115-6.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 56.

<sup>19</sup> Samantha Besson, 'LJIL Symposium: A Response by Samantha Besson' (Opinio Juris 21<sup>st</sup> December 2012) available at <<http://opiniojuris.org/2012/12/21/ljil-symposium-a-response-by-samantha-besson/>> last accessed 2<sup>nd</sup> April 2016.

of a relevant ECHR norm, rather than a weakened version of that right. In this context, they do not act as constraints on the ‘unrealistic’ expectations of universality. Fourth, Milanovic’s justification for relying on universalism, that universalist aspirations are not necessarily embedded in the structure of human rights law, could be challenged.<sup>20</sup> For some, human rights are custom made and dependent for their operation upon application within the state, and have no place outside of it.<sup>21</sup> If universalism is understood as unlimited geographical application of the ECHR then, from a human rights theory perspective, they do not have universalist aspirations.

The normativity of Milanovic’s framework appears uncertain. For him, the ‘effectiveness’ branch of his framework represents non-normative concerns, ensuring that the realities of international relations are taken into account.<sup>22</sup> He therefore implies that normative frameworks are necessarily at odds with practical reality. He argues that Besson’s normative framework for the extraterritorial application of the ECHR is too ‘abstract’:<sup>23</sup> ‘[y]es, there are the obligatory references to Dworkin and Habermas ...but they do not make Besson’s argument any more “normative” or “theoretical”....[I]t is qualitatively no different than what came before’.<sup>24</sup> Arguably, normative frameworks are not necessarily at odds with practical reality, but ideally point to the correct practical solution in a given instance. The empty and amorphous nature of universality coupled with effectiveness, amounts to a handful of practical suggestions for courts in implementing human rights standards and not a normative framework, as Milanovic suggests, leaving it ‘exposed to criticisms of arbitrariness and sub-optimal coverage, similar to those Milanovic himself levels against the current

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<sup>20</sup> For the argument that the universality of human rights calls for unlimited extraterritorial application see: Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’ (1995) 89 AJIL 78, 82.

<sup>21</sup> See e.g. Hannah Arendt, *The Origins of Totalitarianism* (1951) 291-4; Mira Siegelberg, *The Question of Questions: The Problem of Statelessness in International History, 1921-1961* (Doctoral dissertation, Harvard University 2014).

<sup>22</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 55.

<sup>23</sup> Marko Milanovic, ‘LJIL Symposium: A Comment on Samantha Besson’s Article on the Extraterritorial Application of the ECHR’ (Opinio Juris 21<sup>st</sup> December 2012) available at <<http://opiniojuris.org/2012/12/21/ljil-symposium-a-comment-on-samantha-bessons-article-on-the-extraterritorial-application-of-the-echr/>> last accessed 2<sup>nd</sup> April 2016.

<sup>24</sup> Ibid.

ECtHR case law'.<sup>25</sup> Considering the lack of consistency and normativity arising from its reliance on universality and a general ambivalence towards normativity in the first place, Milanovic's framework does not appear to be suitable for clarifying the role of the ECtHR within a global governance system.

The resulting model of extraterritoriality Milanovic derives from this normative frame relies on a distinction between positive and negative obligations.<sup>26</sup> In relation to negative obligations, the ECHR should have universal application, with considerations of effectiveness shaping the scope and content of the ECHR abroad.<sup>27</sup> Therefore, negative obligations to respect human rights are not territorially defined.<sup>28</sup> Positive obligations are divided into two categories: procedural or prophylactic, and positive obligations to secure or ensure human rights protection.<sup>29</sup> Procedural and prophylactic obligations ensure a state's compliance with its negative obligation to respect rights. No jurisdictional threshold applies for procedural and prophylactic obligations according to Milanovic.<sup>30</sup> A jurisdiction threshold is required for substantive positive obligations which require states to take measures to secure the entire ECHR system of human rights protection. Those positive obligations are not divisible meaning that either none of them apply or all substantive positive obligations under the ECHR apply together.<sup>31</sup> De facto effective overall control of areas triggers jurisdiction and requires Member States to secure all positive obligations under the ECHR.

Milanovic's model of extraterritoriality is both counterintuitive and presumes that negative obligations need wider protection than positive obligations. First, it is counterintuitive insofar as it imposes negative obligations on a case-by-case basis but imposes the full range of positive obligations simultaneously, regardless of the circumstances, and regardless of the fact that it may be more difficult, or less expedient,

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<sup>25</sup> Shany, 'Taking Universality Seriously' (n 1) 61-2.

<sup>26</sup> For further analysis of positive and negative obligations see: Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013).

<sup>27</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 211.

<sup>28</sup> Ibid 209-210.

<sup>29</sup> Ibid 212.

<sup>30</sup> Ibid

<sup>31</sup> Ibid.

to *secure* rights protection than to *abstain* from violating rights. Shany argues that the high threshold of the effective overall control test, and the indivisibility of substantive positive obligations, enables states to escape liability altogether: the high threshold ‘releas[es] states from complying with obligations they can carry out just because there are other obligations which they cannot fulfil under certain circumstances’.<sup>32</sup>

Second, the distinction Milanovic makes between negative and positive obligations presumes that one necessarily has a different moral significance to the other. Shany argues that the distinction ‘cuts against the increased acceptance of interdependence (and moral equivalence) of these two sets of obligations’.<sup>33</sup> He critiques Milanovic’s discussion of the *Herbicide* judgment concerning Ecuador and Columbia on the basis of the moral equivalence of positive and negative obligations.<sup>34</sup> Milanovic finds that while Columbia was responsible for spraying operations by its own state agents on Columbian territory that had extraterritorial effect in Ecuador, it was not responsible for the same affects by *private* actors operating within its territory.<sup>35</sup> Shany asks why, considering that there is a moral equivalence between direct and indirect harm, Milanovic makes a distinction between public and private acts.<sup>36</sup> Columbia is capable of stopping the private actors on its own territory and therefore they should.<sup>37</sup> Milanovic’s model does not take into account the accepted moral equivalence of negative and positive obligations, and private and public acts.

Shany puts forward an alternative model of extraterritoriality that takes universality seriously but that attempts to move away from Milanovic’s reliance on the distinctions above. Shany seeks to compose a non-arbitrary model of extraterritoriality based upon

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<sup>32</sup> Ibid 64.

<sup>33</sup> Ibid 62. See e.g. Ida Elizabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Brill 2009) 14.

<sup>34</sup> *Aerial Herbicide Spraying (Ecuador v Colombia)*, General List No 138 [2008] ICJ 28. See Alan Boyle who argues that ‘victims of transboundary pollution fall within the “jurisdiction” of the polluting state’: Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) EJIL 613, 638.

<sup>35</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 218.

<sup>36</sup> Shany, ‘Taking Universality Seriously’ (n 1) 63. For a critique of distinctions made between private and public acts in international law see Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 56-9.

<sup>37</sup> Ibid 63.

normative considerations. He argues that jurisdiction is about whether states have a functional capacity to protect or secure rights.<sup>38</sup> For him, ‘functionalism is universalism’ and ‘states should protect human rights wherever in the world they may operate, whenever they may reasonably do so’.<sup>39</sup> He provides two restraining notions when implementing the functional approach. When there is a lack of special power or legal relationship, jurisdiction is not established.<sup>40</sup> He argues that adopting an unabated functionalist approach may lead to untenable results: ‘just because the US can feed the starving population of North Korea doesn’t mean it should’.<sup>41</sup> Therefore, the potential impact of the act or omission must be direct, significant and foreseeable.<sup>42</sup> Shany introduces his own concept of ‘special legal relations’ that requires the state agent to have a relationship with the individual that renders them ‘particularly well-suited’ to protect that individual.<sup>43</sup> This sounds more like a test of attribution and provides little actual guidance on when a state agent is ‘particularly well-suited’, except that ‘directness, significance and foreseeability’ can help to identify that relationship.

Shany’s model of extraterritoriality can be challenged for its reliance on universality and its lack of clarity. Similar to Milanovic, Shany’s reliance on universality as the normative cornerstone of his theory can be criticised on three grounds. First, he contradicts himself by placing constraints on universality. Second, the amorphous nature of the concept makes it an insubstantial component of his normative theory. Third, universality is not necessarily a fundamental normative precept of human rights.

While Milanovic’s model leads to predictable results when applied to factual circumstances, the application of Shany’s test is less certain. Let us consider whether the US is liable according to Shany’s model, for the extraterritorial activity of the corporation, Union Carbide Corporation (UCC) for which the US is home state,<sup>44</sup> in

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<sup>38</sup> Ibid 66.

<sup>39</sup> Ibid 67.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid 68.

<sup>42</sup> Ibid 69 citing Oren Ben-Naftali and Yuval Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003-2004) 37 *Isr L Rev* 17, 64.

<sup>43</sup> Ibid 69.

<sup>44</sup> The home state is where the headquarters are physically located.

the Bhopal gas leak disaster.<sup>45</sup> 5,200 people died in the Bhopal gas leak disaster in India as a result of deadly gases released from Union Carbide India Limited (UCIL), UCC's Indian subsidiary. It is not certain whether the US is accountable under Shany's model. Presuming the gas leak is attributable to UCC,<sup>46</sup> the test of whether the US' involvement was direct, significant and foreseeable is inconclusive. If the actions are attributable to the US company (and it appears there are reasons to believe they are), then surely they are direct, and the accident caused significant hardship. Shany argues foreseeability is met in the *Herbicide* case, and presumably the same foreseeability exists in relation to a toxic gas leak as it does with spreading toxic herbicides. It is unclear where extraterritoriality ends between the North Korean and Bhopal examples. Shany propounds that the model does not allow the example of the US feeding starving people in North Korea, but does admit of the extraterritorial activities of a home corporation operating through subsidiaries abroad and causing environmental harm that continues to poison water and air supplies in Bhopal today. The application of Milanovic's model to this case is clear: the US would not be liable in either instances. The same clarity is not provided in Shany's model.

Another hypothetical situation, closely linked to the North Korean example, is if the activity of a subsidiary of the Coca-Cola Company prevented a population from having access to a basic amenity, like water.<sup>47</sup> This is significant as it involves deprivation of a basic amenity to a population. It is direct, (presuming actions are attributable to the Coca-Cola Company) as the Coca-Cola Company is headquartered in the US. Deprivation of water appears to be foreseeable, especially considering

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<sup>45</sup> See further, 'Bhopal Gas Tragedy Disaster' (Union Carbide Corporation) available at <<http://www.bhopal.com/>> last accessed 20 July 2016.

<sup>46</sup> The UCC built a subsidiary company in India to run a gas plant there. It owned majority shares in that corporation and provided basic designs for the operation of the gas plant. However, it failed to take any responsibility for the gas leak that took place in its subsidiary; it did not contribute to the clean up of the poisonous gas which was undertaken only by its subsidiary and the Indian Government; and it allegedly continues to withhold valuable information on the poisonous gas compounds which could potentially save lives in the future in areas still affected by the gas leak. See further 'Union Carbide's Disaster' (Bhopal Medical Appeal) available at <<http://bhopal.org/what-happened/union-carbides-disaster/>> last accessed 20 July 2016.

<sup>47</sup> The Coca-Cola Company headquartered in Atlanta, Georgia owns its anchor bottler in North America, Coca-Cola Refreshments.



Shany's belief that the Columbian government should have foreseen that spraying pesticides close to the Ecuadorian border would lead to pollution in Ecuador.<sup>48</sup> The application of his test is unclear and distinguishing the North Korean example from real examples of extraterritorial corporate activity is difficult.

Milanovic, unlike Shany, may consider the significance of the interconnection between extraterritoriality and norm conflicts, but neither framework is satisfactory for conceptualising extraterritoriality at the ECtHR. A frame prefaced upon 'universality' creates problems of consistency. The resulting models of extraterritoriality lead to arbitrary results or are unclear. There needs to be greater normative and theoretical consideration, in order to derive a clear and consistent model of extraterritoriality.

### 2.2.2. Human Rights Theories of Extraterritoriality

Samantha Besson and Nehal Bhuta have both provided normative frameworks for the extraterritoriality based on human rights theory.<sup>49</sup> According to Bhuta, human rights should not apply abroad. For Besson, human rights should apply extraterritorially exceptionally, in conformity with the domestic conception of jurisdiction defined by effective power, overall control and a normative element – reasons for actions. This section asks whether Besson and Bhuta's theories are coherent, whether they address the paradox of extraterritoriality, and whether they consider norm conflicts resulting from extraterritoriality. This is in order to ascertain whether a human rights theory based frame is satisfactory or whether there needs to be a new normative frame.

Bhuta's examination of extraterritoriality is premised on a theory of international legal human rights that takes the legal structure of the system seriously: one which works

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<sup>48</sup> This situation is not as hypothetical as it seems. For an example of a court decision from a regional human rights court on the right to water and sanitation see e.g. Inter-American Court of Human Rights, *Xákmok Kásek v Paraguay* (2010) Series C No 214. Second, there are allegations of the Coca-Cola Company's direct involvement in systemic deprivation of water. See further, AFP, 'Indian officials order Coca-Cola plant to close for using too much water' (*The Guardian*, 18 June 2014) available at <<http://www.theguardian.com/environment/2014/jun/18/indian-officals-coca-cola-plant-water-mehdiganj>> last accessed 1 August 2016.

<sup>49</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 2); Bhuta, 'The Frontiers of Extraterritoriality' (n 2).

through and on the effective legal order of the state.<sup>50</sup> For him, a legal framework for the realisation of human rights depends upon, and is expected to act through, functioning political communities organised as sovereign states.<sup>51</sup> The human rights regime should focus on buttressing state sovereignty through effective international institutions that provide a focal point for developing consensual norms over time.<sup>52</sup> The ECtHR is best understood as constitution-enhancing in respect of the specific political and judicial system of each Member State.<sup>53</sup> The context presupposed by human rights law is the normal relationship between government and governed.<sup>54</sup> Therefore, Bhuta relies on human rights theory for a normative framework of extraterritoriality which entirely precludes extraterritoriality.

He then explains the dangers of applying human rights extraterritorially. He begins by asking what happens when human rights are ‘extended beyond the Westphalian frame – the presupposition of the concrete state legal order – upon which it rests’?<sup>55</sup> Bhuta states there are two options: ‘either the abnormal be transformed to correspond with the presuppositions of the normal type, or that a norm predicated on the normal be made effective by relativizing it to the concrete circumstances of the abnormal’.<sup>56</sup> In other words, there is a choice. On the one hand, one can apply human rights standards as though the state were sovereign and regulate the behaviour of individuals only within the sovereign territory. On the other hand, one can change human rights standards so as to fit the factual circumstances. He provides the example of military occupation abroad ‘where the concrete state order does not obtain but rather a horizontal relationship between a party to a conflict and the population’.<sup>57</sup>

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<sup>50</sup> Bhuta, ‘The Frontiers of Extraterritoriality’ (n 2) 2 citing Allen Buchanan, *The Heart of Human Rights* (OUP 2013).

<sup>51</sup> Ibid citing Arendt, *The Origins of Totalitarianism* (n 21) 291-4.

<sup>52</sup> Ibid citing Siegelberg, *The Question of Questions: The Problem of Statelessness* (21).

<sup>53</sup> Ibid 7 citing Richard Bellamy, ‘The Democratic Legitimacy of International Rights Conventions: Political Constitutionalism and the European Convention on Human Rights (2014) 25 EJIL 1019.

<sup>54</sup> Ibid 9.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 13.

<sup>57</sup> Ibid.

In relation to the first option, he argues that enforcing human rights in occupied territories would require occupying states to exercise more intensive forms of governance, because it would require essentially a policing of the territory.<sup>58</sup> More intensive forms of governance would include the ‘creation and management of a system of courts and prisons, which themselves must comply with human rights norms’.<sup>59</sup> He explains that the wars in Iraq and Afghanistan demonstrate how difficult it is to make institutional changes and highlights the dangers in attempting to do so.<sup>60</sup> ‘Intensif[ying] intervention’ by ensuring the enforcement of the ECHR may bring the ‘idea of human rights into disrepute as mere alibi for continued conflict; it also risks leading to an exaggerated belief in the potential of human rights law to enhance the effectiveness of state-building and nation-building interventions’.<sup>61</sup> He cites a paragraph from Modirzadeh against imposing human rights in an occupied territory:

I do not want an occupying power that has invaded my State to be recognised by the international community as having a “rights-based” relationship with my population. I do not want that State to be in a position to argue that it has to engage in certain institutional changes in order to be able to comply with its human rights obligations back home. I do not want a State that has no relationship to civil society in my country, has no long-term understanding of my population, its history, its religious values, etc., to have a hand in shaping its human rights framework simply by virtue of its choice to invade.<sup>62</sup>

Three main arguments against extraterritoriality of the ECHR are put forward by Bhuta. First, human rights language can be susceptible to manipulation to serve Western state motives. Second, extraterritoriality has the effect of decreasing human rights protection and throws human rights language into disrepute. Third, ECHR norms are diluted when the law on armed conflict is taken into account, leading to a

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<sup>58</sup> Ibid 14.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid citing Naz Modirzadeh ‘The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’ in Raul A “Pete” Pedrozo (ed), *International Law Studies (Blue Book) Series, Vol. 86* (US Naval War College, 2010) 349, 375.

mere bare right of admissibility to the ECtHR, with no successful outcomes for applicants. He questions the utility of a bare right of admissibility.

Bhuta's concern that the language of human rights is susceptible to manipulation is justified. Human rights discourse in armed conflict has been criticised as being susceptible to weaponisation, serving as a means to justify waging wars in other territories.<sup>63</sup> The protection of human rights in foreign territories is used to justify humanitarian intervention abroad, often obscuring the fact that the international community has itself to blame for the humanitarian crisis.<sup>64</sup> Human rights have also been criticised as being part of a hegemonic discourse, enforcing a Western moral code and not taking account of cultural relativism.<sup>65</sup> The human rights discourse is therefore susceptible to manipulation and distortion in a number of ways. Accusations of human rights serving Western imperialism or regime change, which is of particular concern to Bhuta and Modirzadeh, should not be dismissed off hand.

However, there must be consideration of the counter-hegemonic narrative. The counter-hegemonic viewpoint recognises human rights' susceptibility to abuse by powerful actors to legitimise hegemonic practices, but nevertheless insists that human rights are worth preserving and can effectively protect weak actors from powerful actors.<sup>66</sup> The extraterritorial application of human rights at the ECtHR is not an inevitably hegemonic act. The counter-hegemonic role of the ECtHR is evidenced in the ECtHR's extraterritoriality practice in four ways. First of all, individuals voluntarily apply to the ECtHR or to a domestic court under the auspices of the ECHR. This is despite the fact that applications take a long time and do not admit of great

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<sup>63</sup> See e.g. Chase Madar, 'Samantha Power and The Weaponisation of Human Rights' (*Counterpunch*, 6 June 2013) available at <<http://www.counterpunch.org/2013/06/06/samantha-power-and-the-weaponization-of-human-rights-2/>> last accessed 2 June 2016.

<sup>64</sup> Anne Orford, 'Locating the international: Military and Monetary interventions after the Cold War' (1997) 38 *Harvard ILJ* 443, 444.

<sup>65</sup> See e.g. José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, 2014).

<sup>66</sup> Joe Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony' (2014) 27(1) *LJIL* 11. See further: Joe Wills, *The World Turned Upside Down? A Critical Enquiry into the Counter-Hegemonic Potential of Socioeconomic Rights Praxis in Global Civil Society* (Doctoral Dissertation, Leicester University 2014).

financial rewards for either the individuals that bring applications or their lawyers.<sup>67</sup> Second, those applications are met with resistance by states who actively engage in justifying their activities abroad, but are nevertheless often held accountable for, amongst other things, not carrying out effective investigations into allegedly illegal killings<sup>68</sup> and investigations into torture.<sup>69</sup> Third, the ECtHR decides against Member States in extraterritoriality decisions, which evidences that the ECtHR restricts Council of Europe Member State action rather than facilitating Western imperialism abroad. Fourth, the threat of an occupying power slipping into the position of legitimate government in an occupying state would be as much concern to the ECtHR as to those who demand that human rights should not apply abroad on those grounds.<sup>70</sup> The ECtHR adjudicates upon cases where the occupying state has made institutional changes that are not in conformity with the ECHR and citizens of that foreign state seek protection from the negative effects that those institutional changes have on them.<sup>71</sup> While it was outside the ECtHR's power to stop those institutional changes, it answers to individuals that have suffered from human rights abuses as a result of those changes. Therefore, while human rights are susceptible to manipulation, there is much evidence to suggest that the ECtHR plays a counter-hegemonic role in human rights protection.

There needs to be an examination of the justifications of the concern that extraterritoriality tarnishes the reputation of human rights. Although Bhuta claims that extraterritoriality decreases rights enjoyment of Iraqis, he does not provide a full explanation and references Naz Modirzadeh instead.<sup>72</sup> Modirzadeh argues that extraterritoriality will not increase rights enjoyment for two reasons: human rights raise expectations that cannot be met<sup>73</sup> and applying human rights in armed conflict

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<sup>67</sup> See e.g. *Nada v Switzerland* (2013) 56 EHRR 18.

<sup>68</sup> See e.g. *Al Skeini v United Kingdom* (2011) EHRR 18.

<sup>69</sup> See e.g. *R (on the application of Al Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (ADMIN), [2004] All ER (D) 197 (Dec).

<sup>70</sup> See e.g. *Al Jedda v UK* (2011) 53 EHRR 23 paras 42-3.

<sup>71</sup> *Ibid.*

<sup>72</sup> Modirzadeh, 'The Dark Sides of Convergence' (n 62) 373.

<sup>73</sup> *Ibid.* 362.

damages the reputation of human rights language.<sup>74</sup> She argues that the overlap of IHL and IHRL raises expectations that cannot be met:

A civilian who is made aware of the basic (and rather minimal) obligations of the armed forces of an enemy State for her protection clearly understands the purpose of IHL: to ensure that in the very worst imaginable context, she is guaranteed a basic level of protection – not to be directly targeted if she does not participate in hostilities, not to be tortured if she is detained, to have access to basic lifesaving humanitarian relief etc. Not a long-term relationship... The addition of human rights law to this clear and honest (albeit stark) framing of roles and relationships runs the risk of confusing all actors and (more important) raising expectations that can never be met.<sup>75</sup>

Modirzadeh presumes that the civilian has knowledge of the parameters of IHL and IHRL, and the differences of their fundamental premises, and cares about those parameters for the purposes of their own well-being. The truth of this knowledge or consciousness by citizens of the differences between the two regimes may be contestable. It does not logically flow from the disappointment of being protected by IHL rather than IHRL, that IHRL should not be applied.

Modirzadeh also argues that the reputation of human rights is damaged by extraterritoriality because it cannot live up to the promises of human rights in the ‘very ugly business of control by an enemy military...[c]an this be expressed to the civilian population in a way that does not permanently pervert that population’s appreciation for human rights law? [...] Will human rights and human rights discourse suffer lasting damage?’<sup>76</sup> She adds that ‘tremendous resources’ have been spent by the international community on increasing awareness of human rights that may be wasted if human rights language is tarnished.<sup>77</sup> However, it could be argued that the resources spent on advertisement and education in human rights are not so much cancelled out by the disappointed expectations of their actual enforcement by occupying powers, as by the

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<sup>74</sup> Ibid 374.

<sup>75</sup> Ibid 363-4.

<sup>76</sup> Ibid 374.

<sup>77</sup> Ibid.

wars that eviscerated the promise of any of those rights.<sup>78</sup> She continues describing the ‘culture problem’ of human rights enforcement in the Middle East, and that IHL does not experience a ‘culture problem’.<sup>79</sup> This jars with her general concern that ‘human rights law asks that the State with obligations to an individual takes real steps to permanently transform institutions that structurally violate rights’.<sup>80</sup> If this was not the purpose of the ‘tremendous resources’ provided by the international community to states who resisted human rights reform because of cultural differences, then perhaps those resources were wasted before war and before occupation.

Bhuta’s third argument against extraterritoriality, the dilution of the ECHR in armed conflict and individuals left with a bare right of admissibility, also needs to be challenged.<sup>81</sup> If human rights are diluted to the extent that they offer individuals no protection abroad, applicants will be left with a mere ‘bare right’ of admissibility. He questions how important a bare right is: ‘a day in court will be had by very few, and the possibilities of such ‘accountability’ should not be exaggerated’.<sup>82</sup> There is no further investigation as to why a bare right may be considered important to applicants. Again there is evidence to suggest that a bare right is important. Individuals voluntarily bring applications to the ECtHR, despite the fact that cases take years to process and the limited financial reward if a case is successful on the merits. Bhuta does not engage in any analysis of whether ECHR rights are or should be diluted in all circumstances. We need to think of real norm conflicts that arise, and how best to handle them in the circumstances.

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<sup>78</sup> Philip Alston, ‘The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath’ (1992) 13 *Australian YBIL* 107.

<sup>79</sup> Modirzadeh, ‘The Dark Sides of Convergence’ (n 62) 374. While she considers that there may be a cultural problem in enforcing human rights standards in the Middle East, she does not consider that similar problems exist within the territory of the Council of Europe. See e.g. *SAS v France* App No 43835/11 (ECtHR, 1 July 2014). For criticism of this judgment see: Jill Marshall ‘SAS v France: burqa bans and the control of empowerment of identities’ (2015) 15(2) *HRLR* 377. For an alternative critique of human rights discourse in relation to religious freedoms see Matthew Nicholson, ‘Majority rule and human rights: identity and non-identity in SAS v France’ (2016) *Northern Ireland L Q* (forthcoming).

<sup>80</sup> *Ibid* 375.

<sup>81</sup> Bhuta, ‘The Frontiers of Extraterritoriality’ (n 2) 17.

<sup>82</sup> *Ibid* 18 citing Modirzadeh ‘The Dark Sides of Convergence’ (n 62) 349.

An analysis of Bhuta's theory of extraterritoriality evidences that there is a need for innovative ways of looking at human rights as his historical conception of human rights cannot articulate or understand why human rights accountability may be important. Extraterritoriality can be, and is used, as a counter-hegemonic mechanism. There is no evidence to suggest that civilians have the expertise to distinguish between IHL and IHRL. Nor is there evidence that they harbour some kind of loyalty toward the latter, which is thwarted when they are protected by an alternative legal regime. The bare right of admissibility appears to be significant, despite Bhuta's reservations. Individuals, who have suffered much worse grievances than can be covered under the remit of the ECHR, wait years to bring to account state actors in the Council of Europe system. Often the financial reward is minimal and with decisions such as *Banković* and *Hassan*, prominent cases which represent unsuccessful applications, there is every reason to believe that their case will not be successful. And yet applicants keep coming to the ECtHR. A new normative frame should attempt to grasp why this happens and conceptualise it within a theory of governance. The significance of the bare right should not be overlooked as it obviously is valuable for applicants who spend years at the ECtHR with new cases on extraterritoriality and risk not winning their case.

Besson uses a domestic conception of jurisdiction to construct a normative frame for extraterritoriality. She argues that states have duties towards right-holders within their jurisdiction, in line with the wording of Article 1 of the ECHR: "Jurisdiction" qua normative relationships between subjects and authorities actually captures the case of what human rights are about qua normative relationships between right-holders and institutions as duty-bearers'.<sup>83</sup> Without state jurisdiction over individuals, the latter do not have human rights and states have no human rights duties: individuals do not have a "right to have rights".<sup>84</sup> Jurisdiction amounts to both a normative threshold and a practical condition for human rights.<sup>85</sup> Jurisdiction is de facto political and legal authority that is not yet legitimate or justified, but claims to be or is held to be by its subjects.<sup>86</sup> De facto jurisdiction is the effective, overall and normative control,

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<sup>83</sup> Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 2) 860.

<sup>84</sup> Ibid 863 citing Hannah Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (1951) 147.

<sup>85</sup> Ibid 863.

<sup>86</sup> Ibid 865.



whether it be prescriptive, executive or adjudicative.<sup>87</sup> The normative dimension of jurisdiction are the ‘reasons for action on its subjects and the corresponding appeal for compliance’.<sup>88</sup> Any appeals for compliance by an institutional act or omission may be regarded as legal acts or omissions under state jurisdiction. Jurisdiction requires lawfully organised institutions and a constitutional framework in domestic law (and therefore has nothing to do with the legal grounds for the grounds of jurisdiction permitted in international law),<sup>89</sup> whether those institutions then act ultra vires or not.<sup>90</sup> State agents exercise some kind of normative power with a claim to legitimacy, even if that claim ends up not being justified. It does not mean that all state agents necessarily exercise jurisdiction: some are merely using coercion and their acts lack the required normative dimension.<sup>91</sup>

Besson’s analysis is unclear, may give rise to unjust results, and claims that the ECHR will only apply to interdependent stakeholders. It is not clear what in practice distinguishes evidence of ‘reason for action and appeal for compliance’ from mere coercive force.<sup>92</sup> Besson states that the requirement of exercising ‘public powers’ is an indication of ‘reason for action and appeal for compliance’ but does not provide examples of when a state agent does not have a reason for its action and appeal for compliance. This needs further elaboration. She states that military occupation with effective control over a territory need not imply jurisdiction, because it lacks, for instance, the normative element of reason-giving and appeal for compliance, however,

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<sup>87</sup> Ibid citing Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 215.

<sup>88</sup> Ibid.

<sup>89</sup> Chapters 4 and 6 include a further analysis of the public international law conception of jurisdiction in ECtHR judgments and literature.

<sup>90</sup> Ibid.

<sup>91</sup> For a thinner version of Besson’s ‘reason for action and appeal for compliance’ normative dimension, see Lea Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be read as game changers’ (2016) 2 EHRLR 161.

<sup>92</sup> Cedric Ryngaert, ‘LJIL Symposium: Response to Samantha Besson’ (Opinio Juris 21<sup>st</sup> December 2012) available at <<http://opiniojuris.org/2012/12/21/ljil-symposium-response-to-samantha-besson/>> last accessed 4 April 2016.

no clear example is provided.<sup>93</sup> Cedric Ryngaert highlights how Besson's theory could give rise to unjust results: 'presumably normativity is not present when the State carries out extraterritorial targeted killings, as it is raw power, and not accompanied by an appeal for compliance on the part of the targeted individual'.<sup>94</sup> It is also unjust that the effective personal control by troops without any normative appeal besides the use of coercion, fails to trigger the ECHR, according to Besson's theory. According to Besson, aside from situations taking place within the domestic territory and cases of lawful territorial control beyond the state's borders, jurisdiction has to be established in each concrete case by reference to its circumstances. Furthermore, Besson argues that Jurisdiction only covers the control over interdependent stakeholders and not single matters only. However, the ECtHR stated in *Al Skeini* that what was 'decisive' in decisions concerning detention, boats, using 'physical force' on an individual to pull them onto a plain was the personal control over the individual and not the control over a particular space. This appears to undermine Besson's assertion that her normative frame explains the ECtHR's approach to date.

In addition to the above concerns, Besson does not provide any normative guidance on dealing with norm conflicts that arise extraterritorially. She also asserts that 'jurisdiction' in Article 1 of the ECHR means domestic jurisdiction, without engaging in any analysis of the rules of interpretation of the VCLT, and without normatively justifying her reliance on the wording of Article 1. While Besson proposes a less restrictive test of extraterritoriality than Bhuta, its contours are hard to define, and the test is still tied to the territorial state by its reliance on a restricted and unclear conception of domestic jurisdiction.

The universality and human rights normative frameworks do not appear to provide clear, consistent and normatively sound frameworks for extraterritoriality. Milanovic and Shany rely on the amorphous concept of universality. They do not provide theoretical support for their assertion that universality is a fundamental precept of human rights, and many believe that the operation of human rights is bound to the state. They also impose practical constraints on universality, contradicting the

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<sup>93</sup> Besson, 'The Extraterritoriality of Human Rights' (n 2) 876 citing *Al Skeini* (n 68) para 149; Max Schaefer, 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction' (2011) 16 EHRLR 579.

<sup>94</sup> Ryngaert, 'LJIL Symposium: Response to Samantha Besson' (n 92).

meaning of universal application of human rights. While Milanovic's resulting model of extraterritoriality makes arbitrary distinctions between positive and negative obligations as well as private and public actors, Shany's model is vague and difficult to apply to factual circumstances. The inconsistency and lack of normativity in the 'universalist' models make them unsuitable for providing understanding of the ECtHR's significance to both states and individuals in a global governance system. Bhuta and Besson's reliance on human rights theory leads to restrictive models of extraterritoriality. Bhuta insists that the ECHR is either damaging or disappointing to extraterritorial applicants, without surmising why individuals may have an incentive to use the ECtHR. He does not consider the potential counter-hegemonic role of human rights, nor does he consider why a bare right of admissibility may be valuable. Bhuta does, however, acknowledge that extraterritoriality and norm conflicts are inextricably linked. Besson, similar to Bhuta, ties human rights to the domestic state, through the concept of jurisdiction. Human rights theories do not provide the level of abstraction required to understand why individuals apply to the ECHR despite its limitations nor how to conceive of the ECHR in the international legal system. Looking at extraterritoriality from a global perspective may be the level of abstraction required to evaluate the realities of extraterritoriality.

### 2.3. Article 1: Jurisdiction Clause

Article 1 of the ECHR states that High Contracting parties shall secure to everyone 'within their jurisdiction' rights enshrined in the ECHR. The ECtHR, Gondek and Milanovic are amongst those who expressly invoke Article 1 to provide a legitimate model of extraterritoriality, interpreting that provision in accordance with the rules on treaty interpretation set out in the VCLT. Drawing upon the VCLT is a positive step as it contextualises the ECHR within an international legal setting, going beyond the four corners of the ECHR to provide answers on the question of extraterritoriality. This section examines whether a model of extraterritoriality flowing from an interpretation of the VCLT is legitimate. If the normative frame is not sound, it is an indication that an alternative frame is required. First, the section undertakes an examination of whether Gondek and Milanovic's reliance on an interpretation of Article 1 in conformity with the rules of the VCLT is doctrinally sound, genuine or contrived. Second, the legitimacy of a VCLT-based model of extraterritoriality is

challenged. Relying on the VCLT for legitimacy rests on a ‘Westphalian’ understanding of the global legal order. In the wake of the deterioration of the Westphalian model of global governance, state consent alone can no longer provide a legitimate model for extraterritoriality.

Article 31 contains the ‘general rule of interpretation’ and Article 32 provides ‘supplementary means of interpretation’. Article 31(1) states that ‘[a] treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*’.<sup>95</sup> The requirements of ‘good faith’, interpreting the terms according to their ‘ordinary meaning’, in their ‘context’ and in light of their ‘object and purpose’ are generally understood as applying cumulatively to form one single general rule of interpretation.<sup>96</sup> The ‘good faith’ requirement requires that the treaty be interpreted in a way that avoids manifestly absurd or unreasonable results. It precludes an interpretation that would follow the maxim ‘in dubio pro mitius’, a maxim which obliges an interpretation that places fewer curtailments on state sovereignty.<sup>97</sup> The ‘ordinary meaning’ of terms is only the starting point for interpretation and the other elements of Article 31 should be used in conjunction with it, including the object and purpose of the treaty.<sup>98</sup> Article 31(4) provides an exception to the rule that terms of a treaty should be given their ordinary meaning: ‘a special meaning shall be given to a term if it is established that the parties so intended’. Article 31 requires an analysis of the object and purpose of the treaty as a whole and not just one provision.<sup>99</sup>

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<sup>95</sup> [emphasis added].

<sup>96</sup> Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989’ (1991) BYBIL 16-17; Anthony Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> edn CUP 2007) 231; Taslim Olawale Elias, *The Modern Law of Treaties* (Oceana Publications, 1974) 74.

<sup>97</sup> Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (1999) 42 German YBIL 11, 14.

<sup>98</sup> Richard Gardner states that it is a ‘very fleeting starting point’ in Richard Gardner, *Treaty interpretation* (2<sup>nd</sup> edn OUP 2015) 181. Others argue that the ordinary meaning of the text takes primacy over the context, object and purpose of the treaty. See e.g. Aust, *Modern Treaty Law and Practice* (n 96) 234.

<sup>99</sup> Jan Klabbers, ‘Some Problems Regarding the Object and Purpose of Treaties’ (1997) 8 Finnish YBIL 138, 151-55.

Whether or not the treaty should be interpreted in accordance with the agreement made at the time of drafting the treaty or in line with contemporary developments is a matter of much debate.<sup>100</sup> Article 32 states that recourse should be had to secondary material when the methods used in Article 31 leave the meaning ‘ambiguous and obscure’<sup>101</sup> or when they lead to a result which is ‘manifestly absurd or unreasonable’.<sup>102</sup> Preparatory work is listed as only a supplementary means of interpretation.<sup>103</sup> This is significant for whether treaty provisions should be given an interpretation in line with the original intention of the drafters or contemporary interpretation as the weight assigned to the preparatory work is indicative of the weight assigned to the original intentions of the parties in the interpretative process.<sup>104</sup> Anthony Aust argues that the travaux préparatoires is considered only supplementary as it is inconclusive, incomplete and not as reliable as elements which have been incorporated into the treaty itself or into the instruments related to it.<sup>105</sup> Furthermore, Article 31(3) VCLT indicates that the interpretation of a treaty can be modified by the will of all its parties thereby placing importance on the contemporaneous interpretation of treaty provisions.<sup>106</sup> Article 31(3) states that the materials to be ‘taken into account’ include

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<sup>100</sup> For example, Aust argues that treaties should not be interpreted in line with historical intentions in Aust, *Modern Treaty Law and Practice* (96) 234.

<sup>101</sup> Article 32(a) VCLT.

<sup>102</sup> Article 32(b) VCLT. The supplementary materials under Article 32, including travaux préparatoires, are only resorted to in the circumstances it prescribes. However, Stephen M Schwebel argues that good faith requires the interpreting entity to correct the interpretation arrived at by means of Article 31 if it is evident from preparatory work that such meaning is clearly not what the parties meant. See further, Stephen M Schwebel, ‘May Preparatory Work be used to Correct rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?’ in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague, 1996) 541-6.

<sup>103</sup> Aust, *Modern Treaty Law and Practice* (n 96) 244.

<sup>104</sup> Sandra Fredman, ‘Living Trees or Dead Wood: The Interpretative Challenge of the European Convention on Human Rights’ in Nicholas Barber et al, *Lord Sumption and the Limits of the Law* (Hart 2016).

<sup>105</sup> Aust, *Modern Treaty Law and Practice* (n 96) 233, 244. John Collier and Vaughan Lowe state that the travaux préparatoires appears to inevitably be a significant part of a discussion on the interpretation of terms in John Collier and Vaughan Lowe, *The Settlement of Disputes in International law* (OUP 1999) 135.

<sup>106</sup> Klabbbers, ‘Some Problems Regarding the Object and Purpose of Treaties’ (n 99) 92.

subsequent agreements, subsequent practice<sup>107</sup> and relevant rules of international law applicable in relations between parties.<sup>108</sup>

Although human rights treaties follow the rules of interpretation set out in the VCLT, human rights treaties also have their own rules of interpretation. The VCLT is ‘content neutral’ and the subject matter of a treaty is generally not important therefore rules of interpretation established therein are in principle applicable also to human rights treaties.<sup>109</sup> Direct application of the VCLT to most existing human rights treaties is precluded by the rule of non-retroactivity contained in Article 4 VCLT: ‘...the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States’. However, the ICJ has fully recognised the customary law nature of VCLT provisions regarding treaty interpretation and the VCLT rules provide general guidance for human rights treaties.<sup>110</sup>

Lauterpacht and Bethlehem state that the object and purpose of a treaty assumes particular importance in treaties of a humanitarian nature.<sup>111</sup> They cite the ICJ’s statement on the Genocide Convention that since the latter:

safeguards the very existence of certain groups [...and] ‘endorses the most elementary principles of morality...contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d’être* of the convention.’<sup>112</sup>

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<sup>107</sup> Article 31(3)(a) and Article 31(3)(b) VCLT respectively.

<sup>108</sup> Article 31(3)(c) VCLT. Chapters 2, 5 and 6 consider in detail the operation of Article 31(3)(c).

<sup>109</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 4) 36.

<sup>110</sup> *Libya v Chad* ICJ Reports (1994) 6 para 2; *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&p3=4>> accessed 8 January 2015 para 94; Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties’ (n 3) 533-4.

<sup>111</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement’ in Erika Feller et al (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 104.

<sup>112</sup> *Ibid* 105 citing *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Reports 1951, 15, 23.

In *Wemhoff*, the ECtHR used the interpretation that was most appropriate in order to realise the aim and object of the treaty, rather than to restrict to the greatest possible degree the obligations undertaken by Member States.<sup>113</sup> Bernhardt argues that placing emphasis on the object and purpose of human rights treaties often leads to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other.<sup>114</sup> The ECtHR has adopted specific interpretation techniques including an ‘evolutive’ interpretation, which aims to keep abreast of changing attitudes amongst Member States.<sup>115</sup> It balances considerations of domestic, regional and international consensus in its interpretation.<sup>116</sup> It also employs the margin of appreciation, whereby the respondent state is given a degree of discretion in interpreting the terms of the ECHR.<sup>117</sup> The margin of appreciation can be decisive, for example, in ascertaining whether there is a public emergency, justifying a derogation from the ECHR.<sup>118</sup>

Gondek states that ‘[t]he rules set out in Articles 31 to 33 VCLT are...binding rules, which have a normative character, and which any entity interpreting a treaty must comply with if the process of interpretation is to produce legitimate results’.<sup>119</sup> He asks what model of extraterritoriality flows from Article 1, using the VCLT rules of

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<sup>113</sup> *Wemhoff*, Judgment of 27 June 1968 Series A No 7 para 8.

<sup>114</sup> Bernhardt, ‘Evolutive Treaty interpretation’ (n 97) 14.

<sup>115</sup> *Tyrer v UK* (1978) Series A No 26 15-6, para 31: ‘[T]he Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions’. Søren C Prebensen, ‘Evolutive Interpretation of the European Convention of Human Rights’, in Paul Mahoney and others (eds), *Protection des droits de l’homme: la perspective européenne* (Carl Heymanns Verlag 2000) 1126. For criticism of ‘evolutive’ interpretation and its relationship with the VCLT see: Sondre Torp Helmersen, ‘Evolutive Treaty Interpretation: Legality, Semantics and Distinctions’ (2013) 6 (1) *Eur J L Studies* 161.

<sup>116</sup> See e.g. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

<sup>117</sup> See e.g. Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996).

<sup>118</sup> See e.g. *A v Secretary of State for the Home Department* [2005] 2 AC 68 (the *Belmarsh* decision) para 29, per Lord Bingham.

<sup>119</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 4) 30 citing Santiago Torres Bernárdes, ‘Interpretation of Treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties’ in G Hafner et al (eds) *Liber Americorum Professor Seidl-Hohenveldern – in honour of his 80<sup>th</sup> birthday* (The Hague: Kluwe, 1998) 721.

interpretation.<sup>120</sup> Three issues arise in relation to Gondek's use of the VCLT. He does not consider the impact that human rights regimes have on rules of treaty interpretation; he ultimately finds the VCLT rules not of any use in interpreting Article 1; and the final model he suggests is not connected with his analysis of the VCLT.

First, although Gondek recognises that human rights treaties can have an effect on the general rules of treaty interpretation of the VCLT, he chooses to focus on the effect that the VCLT has on human rights treaties.<sup>121</sup> However, this avoids the complexity of the reciprocal relationship between the two regimes. Second, there are no clear results when he applies the rules of treaty interpretation in his analysis. He states that the object and purpose of the treaty as a whole is the 'protection of inherent human rights stemming from the dignity of every individual'.<sup>122</sup> But that a dynamic interpretation, that takes account of changing attitudes on the content of human rights, does not make such changes so as to justify departure from the text of the treaty.<sup>123</sup> In his textual analysis of 'within their jurisdiction', he finds that public international law jurisdiction and Article 1 jurisdiction carry out different functions. So for him, the 'ordinary meaning' of the text has only limited value.<sup>124</sup> In this way, he finds the object and purpose, as well as the text of the treaty, unhelpful in establishing the meaning of Article 1. He further considers the travaux préparatoires as unhelpful because it lacks clarity and a comprehensive analysis of the concept of jurisdiction in human rights treaties.<sup>125</sup> His analysis of subsequent practice is also unsuccessful at providing a meaning for 'within their jurisdiction'. In order to establish whether subsequent practice of states can provide guidance on the interpretation of human rights treaties he investigates whether a coherent pattern arises in relation to decisions of regional and international human rights bodies as well as domestic decisions. He finds no pattern, apart from the fact that domestic courts generally follow decisions of their

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<sup>120</sup> Ibid 30.

<sup>121</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 4) 38.

<sup>122</sup> Ibid 40.

<sup>123</sup> Ibid 46.

<sup>124</sup> Ibid 56.

<sup>125</sup> Ibid 286-7. However, references to jurisdiction clauses in the travaux préparatoires seem to clearly indicate that the ECHR was meant to be applied territorially.



regional counterparts.<sup>126</sup> Despite the fact that he embeds his analysis in the rules of the VCLT, he finds them unhelpful for determining the extraterritorial reach of human rights treaties.

Third, Gondek in the end derives a model of extraterritoriality without relying on the rules of the VCLT. He does not use rules of treaty interpretation to justify his model. The test of jurisdiction he proposes has two parts. First, the person who claims to be within the jurisdiction of a High Contracting Party to the ECHR, must show in respect of a particular act, ‘that the act in question was the result of the exercise of authority by the state concerned’.<sup>127</sup> Second, the obligation to secure ECHR rights to a person applies proportionately to the actions of the state, applying a ‘cause-and-effect’ method.<sup>128</sup>

Milanovic also explicitly relies on Article 1 and the rules of treaty interpretation to establish a legitimate model of extraterritoriality. Milanovic argues that jurisdiction clauses of human rights treaties delineate the territorial scope of application of most human rights treaties.<sup>129</sup> He argues that Article 1 prescribes the framework he puts forward. For him, the text, object and purpose of jurisdiction clauses determine their scope.<sup>130</sup> In ascertaining the meaning of jurisdiction, Milanovic proposes that state practice, especially state treaty-making practice, shows that more than one ordinary meaning of the word ‘jurisdiction’ exists in international law.<sup>131</sup> The treaty practice of states shows that they employ two concepts of jurisdiction: general international law uses this term to delineate municipal legal orders of states and international human rights treaties use the term to refer to a certain kind of power a state exercises over a territory and its inhabitants.<sup>132</sup> Textually, therefore, the jurisdiction clauses of most

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<sup>126</sup> Ibid 290.

<sup>127</sup> Ibid 375 citing Judge Loucaides, Separate Opinions in *Assanidze v Georgia* App No 71503/01 (ECtHR, 8 April 2004) and *Ilascu v Moldova and Russia* ECHR 2004-VII 318.

<sup>128</sup> Ibid 376 citing Hurst Hannum, ‘Remarks’ in C Cerna et al, *Bombing for Peace: Collateral Damage and Human Rights*, American Society of International Law, Proceedings of the Annual Meeting Vol 96 (American Society of International Law, 2002) 95, 100-4; Lawson, ‘Life After Banković’ (n 3).

<sup>129</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 1) 17.

<sup>130</sup> Ibid 10.

<sup>131</sup> Ibid 30.

<sup>132</sup> Ibid 33

human rights treaties are ‘primarily territorial’.<sup>133</sup> He uses this textual reading to justify the ‘control over the territory’ test in *Loizidou v Turkey* which provides that the entire system of ECHR protection applies when a state has control over a territory.<sup>134</sup> Milanovic also reads into Article 1 jurisdiction that the ECHR applies to negative obligations all over the world i.e. that there is no jurisdictional threshold on the application of negative obligations.<sup>135</sup> The positive obligation to secure human rights is contingent on state jurisdiction, but this clause says nothing about negative obligations. The fact that Article 1 says nothing about negative obligations implies there must be a duty to abstain from rights violations all over the world. The obligation to respect human rights (negative obligations) is explicit in individual provisions (for example, Article 3 or Article 2) or can be read into article 1 jurisdiction.<sup>136</sup> He argues there is no inherent contradiction in implying when necessary the negative obligation to respect human rights into relevant treaties.<sup>137</sup>

It is not clear which rules of treaty interpretation Milanovic is employing in arguing that Article 1 jurisdiction is intended to mean that the full panoply of ECHR rights apply when a state has control over a territory. He purports to rely on a textual reading despite stating that the object and purpose of the treaty are also important. In discussing his normative framework he finds that the universal application of human rights is the object and purpose of the ECHR but this does not feature in his interpretation of this aspect of Article 1 jurisdiction. He finds the positive obligation to secure human rights is contingent on state jurisdiction, but that this clause says nothing about negative obligations.<sup>138</sup> For him, the fact that Article 1 says nothing about negative obligations implies there must be a duty to abstain from rights violations all over the world. However, this implication is not obvious. One would expect that a jurisdiction clause would expressly state that a human rights treaty was to apply without any restrictions all over the world in relation to negative obligations. One would also not expect the wording of an obligation ‘to secure within their

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid 212

<sup>135</sup> Ibid 212-5.

<sup>136</sup> Ibid 213.

<sup>137</sup> Ibid 215.

<sup>138</sup> Ibid 212-5.

jurisdiction' to be interpreted as permitting universal application of human rights in relation to negative obligations. Furthermore, the distinction between positive and negative obligations is not sealed, as explained above. This is not a convincing interpretation of Article 1 and it is not founded upon the VCLT's rules of interpretation of the VCLT which are not mentioned in Milanovic's claims about the universal application of negative obligations under the ECHR.

Although Gondek and Milanovic purport to rely on the VCLT to derive a model for extraterritoriality from Article 1, their doctrinal analyses are unsound. Gondek should have considered whether there were special rules of interpretation attached to human rights treaties. The ECtHR often finds its own tools of interpretation, such as consensus and the margin of appreciation, decisive in its decision-making. The object and purpose are given greater importance in human rights treaties than in other treaties. Gondek identifies the inability for each and every one of the rules of treaty interpretation to help provide a clear answer to the question of extraterritoriality, and ultimately abandons those rules. His model of extraterritoriality is not justified according to the rules of the VCLT. Milanovic does not justify why 'within their jurisdiction' should be read as indicating that the ECHR is to apply everywhere in the world in relation to negative obligations. The relationship between state practice and Article 1 is not clearly enunciated, and no literature on subsequent practice has been cited. Aside from perfunctorily stating that Article 1 must be given its ordinary meaning, the VCLT rules appear to have no bearing on his model of extraterritoriality.

## 2.4. Legitimacy and State Consent

This section considers whether the normative foundation of a reliance on an interpretation of Article 1 jurisdiction in accordance with the rules of the VCLT is sound. The governance order that it presupposes is described: a Westphalian global governance system. The connection between this conception of global governance and a reliance on the VCLT for a legitimate approach to extraterritoriality is evaluated. Phenomenon that undermine that conceptualisation are then explored, and an assessment of whether the Westphalian order can account for the state of affairs is undertaken. Ultimately the section aims to discern whether an interpretation of Article 1 in conformity with the VCLT can provide a legitimate model of extraterritoriality or

whether an alternative normative frame that registers a new global governance order needs to be adopted.

The term ‘Peace of Westphalia’ principally denotes the Treaty of Peace between France and the Holy Roman Empire and the Treaty of Peace between the Holy Roman Empire and Sweden, signed on 24 October 1648 in the town of Münster in Westphalia, a territory in the north-west of Germany.<sup>139</sup> ‘Westphalia’ is used by many international lawyers as a shorthand for the modern secular system of sovereign and equal states.<sup>140</sup> This connection is seen as problematic from an historical point of view.<sup>141</sup> However, the ‘common terminology is used here because the Westphalian model has so much entered into common usage, even if it is historically inaccurate’.<sup>142</sup> Furthermore, the model has been criticised as being misrepresentative of the state of affairs as while the legitimacy of the framework theoretically relies on the idea that all states are equal to each other, some states are more equal than others.<sup>143</sup> At the very least, the Westphalian model emphasises that sovereign states are the subjects and objects of the international governance system which they inhabit. Westphalian sovereignty is an ‘institutional arrangement for organising political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures’.<sup>144</sup> While the Westphalian model focuses on the exclusive ‘internal’ power of the state, it also simultaneously has an ‘external’ aspect.<sup>145</sup> The relationship which emerged was one of reciprocity. States agreed to form a society of states with no governing authority other than themselves under the pretext that they

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<sup>139</sup> Fassbender, ‘Peace of Westphalia’ (n 6) para 1; The Peace of Westphalia (adopted 24<sup>th</sup> October 1648).

<sup>140</sup> Ibid para 18; Shaw, *International Law* (n 6) 7, 1120.

<sup>141</sup> Stéphane Beaulac, *The Power of Language in the Making of International Law* (Brill 2004); Stéphane Beaulac, ‘The Westphalian Model in Defining International Law: Challenging the Myth’ (2004) 7 *Australian J L History* 181. For the argument that the Peace of Westphalia enabled some states to exercise untrammelled power over other territories see Leo Gross, ‘The Peace of Westphalia 1644-1948’ (1948) 42 *AJIL* 20, 20.

<sup>142</sup> Stephen Krasner, *Sovereign State: Organised Hypocrisy* (PUP 1999).

<sup>143</sup> See e.g. Eyal Benvenisti and George W Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60(2) *Standard L Rev* 595.

<sup>144</sup> Krasner, *Sovereign State: Organised Hypocrisy* (n 142) 20.

<sup>145</sup> Robert J Walker, *Inside/Outside: International Relations as Political Theory* (CUP 1993).

would respect each other's claim to govern their own individual territories.<sup>146</sup> International law's authority and legitimacy were based upon the premise of *pacta sunt servanda*: states are only bound by the laws they have consented to.<sup>147</sup> Part of the outside dimension of the Westphalian model was that sovereigns made treaties with other sovereigns as a legitimate approach to governing their relationship with one another.<sup>148</sup>

A Westphalian model of the international legal system thereby underpins the idea that the legitimacy of international law derives from state consent. The rules of interpretation founded in the VCLT are based on securing the 'principles of free consent, and of good faith, and the *pacta sunt servanda* rule'.<sup>149</sup> The VCLT clearly adopts a 'consensualist model, as befits a body of doctrine whose roots lie in consensualist conceptions of international law in general'.<sup>150</sup> Milanovic and Gondek sought to secure the legitimacy of their normative and doctrinal frameworks of extraterritoriality by basing them upon a Westphalian conception of an international legal order where the rules of interpretation provided in the VCLT attempt to discover the intentions of states in accordance with the principle of *pacta sunt servanda* and finding state consent. However, 'the idea...that traditional international law is necessarily legitimate and democratically accountable, because it is based on state consent, can no longer be accepted blindly'.<sup>151</sup> In other words, 'state consent can no longer be deemed as the most important source of normativity and legitimacy in

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<sup>146</sup> Phillip Allot, 'Mare Nostrum: A New Law of the Sea' (1992) AJIL 764, 770.

<sup>147</sup> Thomas Hobbes, *Leviathan*, Vol 2 ch 26 ('authority not truth makes law'); Besson, 'Theorising the Sources of International Law' (n 8) 165.

<sup>148</sup> James A Caporaso, 'Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty' (2000) 2(2) Intl Studies Rev 1.

<sup>149</sup> Article 26 VCLT.

<sup>150</sup> Vaughan Lowe, 'The Law of Treaties; or, Should this Book Exist?' in Christian J Tams et al (eds), *Research Handbook on the Law of Treaties* (Elgar 2016) 3. See discussion in Hersch Lauterpacht, *Oppenheim's International Law* (8<sup>th</sup> edn, Vol I, Longmans, 1955) 15-23.

<sup>151</sup> Joost Pauwelyn et al, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' 25(3) (2014) EJIL 733, 748.

international law'.<sup>152</sup> This is because the Westphalian model of the international legal order no longer accounts for the state of affairs:

The “Keynesian-Westphalian frame,” which supposed that questions of the just ordering of social relations— matters of fair representation, fair distribution, fair recognition, and fair treatment — were properly asked and answered only within and, to a lesser extent, between sovereign states with mutually exclusive territories, populations, and governing arrangements, is far less dominant than once it was.<sup>153</sup>

While the Westphalian conception of the international legal order ensured that each state had exclusive control over their domestic affairs, and that international law established a coordinative rather than cooperative regulatory framework, international actors and norms gradually grew to have increasing influence on the regulation of domestic affairs. James Rosenau recounts that under the Westphalian model, ‘legitimate authority was concentrated in the policy-making institutions of states, which interacted with each other on the basis of equality and accepted principles of diplomacy and international law’.<sup>154</sup> Krasner states that ‘[r]egardless of the motivation or the perspicacity of rules, invitations violate Westphalian sovereignty by subjecting internal authority structures to external constraint’.<sup>155</sup> This includes when they make treaties with each other, particularly treaties which encourage internal review by international bodies of domestic activity such as human rights conventions and adjudicatory bodies.<sup>156</sup> Other examples of infringement of Westphalian sovereignty are the directly effective decisions of the European Court of Justice (ECJ) of the

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<sup>152</sup> Besson, ‘Theorising the Sources of International Law’ (n 8): ‘consent is insufficient to ensure the authority and legitimacy of international legal rules’ at 166.

<sup>153</sup> Neil Walker, ‘Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders’ (2008) 6(4) *ICON* 373, 374, citing Nancy Fraser, ‘Reframing Justice in a Globalising World’ in Julie Connolly et al, *Recognition in Politics: Theory, Policy and Practice* (Cambridge Scholars Publishing 2007) 16.

<sup>154</sup> James N Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (PUP 1990) 109.

<sup>155</sup> Krasner, *Sovereign State: Organised Hypocrisy* (n 142) 9.

<sup>156</sup> *Ibid* 31-32.

European Union (EU) and the International Monetary Fund (IMF) conditionality agreements.<sup>157</sup>

Mattias Kumm connects the deterioration of the Westphalian model of the international legal order with growing legitimacy gaps.<sup>158</sup> He explains that the legitimacy of international law came under scrutiny as the consensual model of the international legal order could no longer account for the state of affairs of the international legal system.<sup>159</sup> Broadly, three phenomena appear to have contributed to a change in the ordering of a global legal order from one based upon the equality and sovereignty of states, to one which recognises the substantive nature of international law and diversity of actors in the global sphere: globalisation, fragmentation and institutionalisation. Globalisation refers to the ‘umbrella term used to capture the enormous increase in the flow of people, capital, goods, services, and ideas across national borders’;<sup>160</sup> Fragmentation refers to the ‘expansion and diversification of international law’;<sup>161</sup> and institutionalisation refers to states handing over legislative and executive functions to international organisations.<sup>162</sup>

Although not using this terminology, globalisation, fragmentation and institutionalisation are visible in the examples that Krasner provides for the violation of the Westphalian sovereignty of a state. The proliferation of treaties and adjudicatory mechanisms for enforcing those treaties are explored in greater detail in Chapter 3. For Krasner, this diversification and expansion of law resulting from an invitation by the state to subject themselves to further constraint in the governing of their domestic affairs, is a violation of Westphalian sovereignty. The role that the IMF plays in

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<sup>157</sup> Ibid 22.

<sup>158</sup> Kumm, ‘The Legitimacy of International Law’ (n 8) 909-912.

<sup>159</sup> Ibid 907-8.

<sup>160</sup> Jeffrey L Dunoff and Joel P Trachtman, ‘A Functional Approach to International Constitutionalisation’ in Jeffrey L Dunoff and Joel P Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 5.

<sup>161</sup> International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission UN Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected UN Doc.A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalised by Martti Koskenniemi). See further Chapter 3: Global Constitutionalism and the De-Fragmentation of International Law.

<sup>162</sup> David Kennedy, ‘The Move to Institutions’ (1987) 8 Cardozo L Rev 841, 849.

regulating domestic economies is evidence of the institutionalisation and globalisation of international law.<sup>163</sup> Globalisation, fragmentation and institutionalisation represent a pull back from ‘state-centrism’.<sup>164</sup> They represent a move towards other actors playing a considerable role in a transnational world of activity wherein international legal obligations influence states relations not only with other states, but with other actors and individuals, globally and within their own territories. Parallel observations on the ECJ’s effect on the consensual paradigm of treaty-making has been noted by Lowe:

[t]he [ECJ’s] decision in *Van Gend en Loos*<sup>165</sup> that a provision of the treaty concluded between the member States of the European Economic Community (‘EEC’)<sup>166</sup> created rights for individuals that are directly effective within the national legal orders of member States is a decision that, for all the commonplace status that it has since achieved, was about as radical a departure as can be imagined from the traditional ‘treaty-as-contract’ analysis that the questions would have received had they been put before the [ICJ] at that time.<sup>167</sup>

Globalisation, institutionalisation and fragmentation have resulted in the diversification of the subjects and objects of international law beyond states to non-state actors including individuals, corporations and international organisations. There is a diminishing ability of legitimate authority to reside within the domestic state alone.<sup>168</sup> A ‘legitimacy gap’ arises because there is little correlation between those who makes laws and those who are affected.<sup>169</sup> Benvenisti argues that the ‘technology’

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<sup>163</sup> Krasner, *Sovereign State: Organised Hypocrisy* (n 142) 22.

<sup>164</sup> Susan Marks, ‘State-centrism, International Law, and the Anxieties of Influence’ (2006) 19 LJIL 339.

<sup>165</sup> Case 26/62, *Van Gend & Loos* [1963] ECR 1.

<sup>166</sup> The Treaty Establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 3.

<sup>167</sup> Lowe, ‘The Law of Treaties; or, Should this Book Exist?’ (n 150) 6.

<sup>168</sup> Kumm, ‘The Legitimacy of International Law’ (n 8) 912.

<sup>169</sup> *Ibid* 913; Peters, ‘Compensatory Constitutionalism’ (n 8) 586.



of global governance, which operates through discrete sovereign entities, no longer fits.<sup>170</sup> He recognises that:

[S]ome states regularly shape the life opportunities of persons in faraway states by their daily decisions on economic development, conservation, or health regulation, whereas the foreign citizens thereby affected are unable to participate meaningfully in shaping such measures either directly or by relying on their own governments to effectively protect them. [...]the global space makes it difficult for disparate sovereign states to overcome their differences and to collectively resist powerful third parties. [...]the postcolonial promise of national self-determination remains for them partly, if not largely, unfulfilled.<sup>171</sup>

The VCLT has not proven useful for providing the unequivocal interpretation of Article 1. The exact content and emphasis to be placed on each rule of treaty interpretation can lead to various interpretations. From the examples of Milanovic and Gondek, it appears that the rules can be used (or abandoned) to justify a particular model of extraterritoriality, working backwards, rather than from the VCLT. Neither model appears to derive from a genuine interpretation of Article 1. Gondek abandons the rules and Milanovic asserts, without justification, that ‘within their jurisdiction’ means that negative obligations should be protected all over the world, according to the ordinary meaning of the text. Legitimate governance can no longer exclusively be created within the state. This is because of the unquestionable influence of transnational activity and diversification of actors who exercise power within domestic states. The legitimacy of global governance is no longer a question of state consent. In this context, the authority of *pacta sunt servanda* should be questioned. It is not enough to ask what states intended at the time of drafting, or intend today, and rely solely on the wording of a treaty provision for guidance on a legitimate approach to extraterritoriality. Maybe the Council of Europe, or the people who want to have access to the ECtHR, should have a say in deciding the extraterritorial reach of the

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<sup>170</sup> Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 (2) AJIL 295, 298. See further, Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* (CUP 2002).

<sup>171</sup> *Ibid* 298.

ECHR. Existing theories of extraterritoriality do not provide a satisfactory normative framework to take into account these developments. A new normative framework for extraterritoriality is required.

## 2.5. Conclusion

Existing frameworks fail to provide the clarity, consistency, normative underpinning and global perspective required to capture the paradox of extraterritoriality at the ECtHR. Universality models are inconsistent, unclear and lack normativity. They place practical constraints on the protection of human rights, undermining universality. Furthermore, universality has not been justified as a precept of human rights. Human rights theories do have a normative grounding. However, it is based upon an essentially territorial conception of human rights. While Bhuta thinks that human rights are dangerous or disappointing when applied outside of the territory, Besson advocates that unauthorised, coercive force by state agents should not fall under the ambit of the ECHR. This appears arbitrarily unjust, and could be used as a scapegoat defence of state action in reality. Human rights theories do not provide the level of abstraction required to understand why individuals from outside the Council of Europe, seek admissibility to the ECtHR. The Strasbourg system is taken seriously by both Member States and applicants as a forum where decisions on extraterritorial situations of war, extraordinary rendition and migrants at sea can be made. Bhuta and Milanovic recognise that the questions of extraterritoriality and the interpretation of human rights in armed conflict are interlinked. Shany and Besson may understand that they are connected but do not attempt to offer any guidance. There needs to be an analysis that goes beyond human rights, beyond the ECHR, to help conceptualise a better approach to extraterritoriality.

Using the VCLT to interpret Article 1 of the ECHR does not provide a legitimate approach to extraterritoriality. Milanovic and Gondek's models of extraterritoriality do not genuinely flow from an interpretation of Article 1 in conformity with the VCLT rules on treaty interpretation. More importantly, even if their models did, this would not constitute a legitimate approach to extraterritoriality. A normative frame premised upon Article 1 and the VCLT, relies on a Westphalian understanding of the global governance system. However, in the wake of the phenomena of globalisation, institutionalisation and fragmentation, state consent can no longer provide a legitimate

approach to governance. A model of extraterritoriality based upon Article 1 and the VCLT is not normatively sound, because the Westphalian order which it presupposes no longer exists. A new normative framework which is cognisant of the Post-Westphalian system needs to be adopted. The new framework needs to provide a global perspective, so that it can conceptualise the ECtHR as a mechanism to which individuals retreat in the midst of global atrocities. It needs to provide a normative approach to deciding the relationship between the ECHR and other international legal norms. Both the political and legal questions need to be connected in one holistic theory and complement each other. The existing frameworks examined in this chapter are not satisfactory. A new normative framework that captures the (in)significance of the ECtHR in the face of global atrocity is examined in the next chapter.

## 3. A Global Constitutionalist Approach

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### 3.1. Introduction

This chapter aims to derive a new normative framework that can conceptualise extraterritoriality at the ECtHR within a Post-Westphalian global governance system. A doctrinal model for extraterritoriality is derived through a normative global constitutionalist frame. The first part of the paradox is unravelled. This chapter attempts to discover why victims to global atrocities seek admissibility to the ECtHR despite its limitations and relatively minor role in global governance, through an analysis of the norm of democratic accountability.

Constitutionalism, as developed in the domestic sphere, is examined as a vehicle through which both political and legal aspects of governance may be addressed.<sup>1</sup> This is the first step in assessing whether constitutionalism has the potential to address both the significance of the ECtHR to applicants versus its insignificance in the global setting (political significance of extraterritoriality); as well as the position of ECHR norms when confronted with conflicting external international law standards (legal significance of extraterritoriality). A quest for global constitutionalist theories, that acknowledge and provide reasons for why the interplay between the political and legal is important, is undertaken through an examination of three broad categories: international value systems,<sup>2</sup> societal constitutionalism,<sup>3</sup> and normative

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<sup>1</sup> Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157; Martin Loughlin, *Swords and Scales: An Examination of the Relationship Between Law and Politics* (Hart 2000) 232-3.

<sup>2</sup> Christian Tomuschat, 'Obligations Arising for States without or Against Their Will' (1993-IV) 241 *Rec Des Cours* 195; Bruno Simma, 'From Bilateralism to Community Interest in International Law' 250 *Rec Des Cours* (1994-VI) 245; Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Colum J Transnation'l L* 573; Bardo Fassbender, *The UN Charter as the Constitution of the International Community* (Brill: Nijhoff, 1998); Erika de Wet, 'The International Constitutional Order' (2006) 55(1) *ICLQ* 51.

<sup>3</sup> Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (OUP 2012).

constitutionalism.<sup>4</sup> Which theory takes legitimacy seriously from a critical perspective is also decided, legitimate governance entailing that those who are subjects have some degree of control over the way in which they are governed. Normative global constitutionalism is explored more fully as a theory considered as taking legitimate governance seriously from a critical, political and legal perspective. The challenges and importance of securing the norm of democratic accountability in a multifarious global governance system are addressed in order to evaluate who should benefit from constitutionalism and set the scene for asking whether this norm could be relevant to the Council of Europe.

In investigating how to secure democratic accountability, the chapter examines ways of identifying governance systems in a multifarious global system.<sup>5</sup> The concept of constituency, which captures processes of constitutionalisation through the operation of the norms of constitutionalism, is considered.<sup>6</sup> Extraterritoriality at the ECtHR is conceptualised within the global constitutionalist frame by asking whether the norm of democratic accountability is in operation and who participates in that process. This is assessed by asking whether the Council of Europe forms a nexus for processes of constitutionalism; whether the ECtHR is a mechanism of democratic accountability;<sup>7</sup> and who is participating in the constitutionalist norm's operation. A model of extraterritoriality at the ECtHR is deduced from the global constitutionalist frame.

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<sup>4</sup> Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579; Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 69; Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014).

<sup>5</sup> Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 381; Anne Peters, 'Dual Democracy' in Klabbers et al (eds) *The Constitutionalization of International Law* (OUP 2011) 263-342; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 200-42.

<sup>6</sup> Rosalyn Higgins, *Problems and Process: International Law and How we use it* (OUP 1995) 8; Terry MacDonald and Kate MacDonald 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17(1) EJIL 89; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 225-42.

<sup>7</sup> MacDonald and MacDonald, 'Non-Electoral Accountability in Global Politics' (n 6).

Doctrinal indicators are established for the analysis in Chapter 5 of whether the global constitutionalist frame captures the ECtHR's emerging approach.

## 3.2. A Global Constitutionalist Approach

While other theoretical frameworks of a Post-Westphalian governance system exist, constitutionalism is analysed here as a rich normative and theoretical framework through which to explore complex questions of governance, which draws upon existing institutional structures to provide aspirational goals for governance.<sup>8</sup> This section investigates theories of legal and political constitutionalism, international value based conceptions of global constitutionalism, as well as societal and normative constitutionalism. Drawing upon criticism of those models, which one best helps to solve the legitimacy deficit in a Post-Westphalian system, whilst providing guidance for situating the ECHR within an international legal system, is decided.

### 3.2.1. Constitutionalism

Domestic constitutionalism attempts to create a legitimate framework of governance through placing constraints on the ruling power within a state. There are two conceptions of how constitutionalism achieves this: through political means and by legal means. Political constitutionalism provides that the limits on governmental power should be political through structural constraints and electoral accountability.<sup>9</sup> Legal constitutionalism stipulates that the limits on government should be predominantly legal and enforced through courts.<sup>10</sup> While generally each conception is construed as conflicting, others see them as complementary but simply paradoxical.<sup>11</sup>

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<sup>8</sup> For further information on the reasons for choosing global constitutionalism as a theoretical framework see Chapter 1, Section 1.2.

<sup>9</sup> See e.g. Adam Tomkins, *Our Republican Constitution* (Hart 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

<sup>10</sup> See e.g. Mattius Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1(2) *Eur J L Studies* 153; Mattius Kumm, 'Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review' in Matthias Klatt (ed) *Institutionalised Reasoning: The Legal Philosophy of Robert Alexy* (OUP 2009). For arguments against the idea of that courts should be able to enforce a 'higher law' than that provided by democratic accountability see Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale L J* 1348; Mark Tushnet, 'How different are Waldron's and Fallon's Core Cases for and Against Judicial Review' (2010) 30 *OJLS* 49.

<sup>11</sup> Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007).

Adam Tomkins advocates political constitutionalism which calls for rights to be protected by law and legislation as long as they are politically changeable and controllable through ordinary, politically accountable decision-making in the legislature.<sup>12</sup> Legal constitutionalism proposes that some rights are enforceable by the courts as higher, not ordinary, law and therefore are not changeable by normal political means.<sup>13</sup> Two predominant tensions can be identified between political and legal constitutionalism. First, there is a tension between law - ‘an objective framework of rational principles’<sup>14</sup> on the one hand, and politics - ‘government which seeks to conciliate our disagreements’ – on the other.<sup>15</sup> Second, there is a tension between the judiciary versus democratic legitimacy.<sup>16</sup> Sir John Laws argues that we need a ‘higher-order law’ to be created and enforced by the judiciary to secure democracy and inalienable rights, to protect minority interests against the majority.<sup>17</sup> Laws’ theory of constitutionalism has been criticised on the grounds that it places politics in a legal ‘straitjacket’<sup>18</sup> and has a ‘blithely complacent attitude towards law’.<sup>19</sup> John Griffith is ‘very doubtful about the value of the exercise of telling judges or other legislators that they should look towards the ideals of justice, truth and beauty in their search for the right solution to difficult cases or problems’.<sup>20</sup> He instead opts for a form of

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<sup>12</sup> Adam Tomkins, ‘In Defence of the Political Constitution’ (n 1). Examples of political constitutions include the UK, New Zealand and Israel.

<sup>13</sup> Ibid. An example of legal constitutionalism is in the US.

<sup>14</sup> Martin Loughlin, *Swords and Scales* (n 1) 232-3.

<sup>15</sup> Bernard Crick, *In Defence of Politics* (London: Continuum, 5<sup>th</sup> edn, 2000) 17-8. See further, Jeremy Waldron, *Law and Disagreement* (OUP 1999).

<sup>16</sup> For a more graduated version of versions of political and legal constitutionalism see the red, green and amber light theory in Carol Harlow and Richard Rawlings, *Law and Administration* (CUP, 2<sup>nd</sup> edn 1999) 1-4, Chs 2-4.

<sup>17</sup> Sir John Laws, ‘Law and Democracy’ (1995) PL 72, 85. Mark Elliott also argues for a modified ultra vires theory of legal constitutionalism: Mark Elliott, ‘The Ultra Vires Theory in a Constitutional Setting: Still the Central Principle of Administrative Law’ (1999) 58(1) CLJ 129.

<sup>18</sup> Loughlin, *Swords and Scales* (n 1) 5.

<sup>19</sup> Tomkins, ‘In Defence of the Political Constitution’ (n 1) 162.

<sup>20</sup> John Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 12.



governance that can capture the ‘considerable disagreement about the controversial issues of the day’.<sup>21</sup>

Martin Loughlin challenges the assumption that law and politics should be viewed as competing values in opposition to one another, instead proposing that we see them as complementary or mutually reinforcing. He argues that law can be used to help to rekindle and to nurture a sense of trust in politics.<sup>22</sup> Philip Pettit advocates a republican constitutionalism. He suggests that the freedom which politics invest in us is not a freedom from interference but a freedom from domination.<sup>23</sup> Political freedom is a plural freedom that is to be experienced and enjoyed by others, not despite others. It is not threatened by the political state but one which is constituted by it. Republican constitutionalism does not seek to exclude law or courts from constitutional concerns. Instead, it seeks merely to locate the role of law in a way that facilitates this political relationship.<sup>24</sup> Therefore, a conception of constitutionalism as higher, untouchable law enforced by courts, fails to encapsulate the important fact there are no definitive or divine answers to good governance. There must be a system that can take account of the considerable disagreement on what values should be prioritised and a compromise reached on its varying conceptions. Law and courts are indispensable in moderating this relationship of disagreement and compromise. The fundamental link between democracy and the law must be acknowledged. Law enables stability, foreseeability and a framework by which the people who are governed can judge the standards of those who govern.

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<sup>21</sup> Ibid.

<sup>22</sup> Loughlin, *Swords and Scales* (n 1) 194.

<sup>23</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997). Pettit develops a republican conception of freedom as non-domination, in contrast to the negative liberal conception of freedom as non-interference. For an analysis of different conceptions of republicanism see further Paul A Rahe, *Republicans Ancient and Modern* (Chapel Hill: University of North Carolina Press, 1994).

<sup>24</sup> Ibid.

### 3.2.2. Global Constitutionalism

This section seeks to determine how the domestic constitutionalist debate on political and legal constitutionalism has influenced discourse on global governance.<sup>25</sup> A brief overview of three conceptions of global constitutionalism aims to ascertain which has been influenced by domestic theory emphasising the political and legal components of constitutionalism. A global constitutionalist frame that can potentially account for the political and legal (in)significance of extraterritoriality at ECtHR may have the explanatory and normative power to unravel the paradox and recommend ways for moving forward in a way that acknowledges the tensions at the ECtHR in global governance. While institutional<sup>26</sup> and sectoral constitutionalisation<sup>27</sup> form part of the global constitutionalist debate, this analysis focuses upon theories that are not limited in such a specific way, but rather identify these phenomena alongside other global processes and actors, formulating a more inclusive, abstract and complex framework of global constitutionalism.

### 3.2.3. An International Value System

Legal rules enshrined in the UN Charter and *jus cogens* are amongst those values considered to have a constitutional status. For Bardo Fassbender, the fact that the UN

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<sup>25</sup> Global constitutionalism should not be recognised as entirely unrelated from earlier conceptions of international constitutionalism. However, in understanding the contemporary development of constitutionalist thought at the global level this analysis will begin from late 20<sup>th</sup> century constitutionalist thought, which responded to the phenomena of globalisation, fragmentation and institutionalisation. See e.g. Alfred Verdross, 'Forbidden Treaties in International Law, Comments on Professor Garner's Report on "The Law of Treaties"' (1937) 31 AJIL 571; Alfred Verdross, 'General International Law and the United Nations Charter' (1954) 30(3) Intl Affairs 342; Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 EJIL 33.

<sup>26</sup> See e.g. Geir Ulfstein, 'Institutions and Competences' in Klabbers et al, *The Constitutionalization of International Law* (OUP 2009) 45-80; Jeffrey L Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organisation' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (CUP 2009) 178-205.

<sup>27</sup> See e.g. Barbara Bennett Woodhouse, 'The Constitutionalisation of Children's Rights: Incorporating Emerging Human rights into Constitutional Doctrine' (1999) 2(1) J Constitutional L 1; Marise Cremona et al (eds), *Reflections on the Constitutionalisation of International Economic Law* (Martinus Nijhoff 2014).

Charter is written, is in itself evidence of its constitutional status.<sup>28</sup> This is before considering the substance of the norms it enshrines or membership to the UN Charter. He argues that the UN Charter is the Constitution of the international community<sup>29</sup> and a written constitution is central to constitutionalism as it provides the means of limiting state intrusion on the liberty of individuals and ensures political participation of citizens.<sup>30</sup> The UN Charter should not be considered as a constitution by virtue of the fact that it is written. There are many examples of constitutions that are unwritten such as those in the UK, New Zealand and Israel. Furthermore, Tomuschat argues that written constitutions are particular to the era in which they are created and not a precondition to a constitutionalist order.<sup>31</sup> Others argue that the UN Charter is constitution by virtue of its ‘universal’ membership and agreement to the values it enshrines. Thomas Franck states that the UN Charter is a key connecting factor between different state communities because of its universal State membership and its status as a sectoral constitutional regime for peace and security.<sup>32</sup> Erika De Wet points out that the UN Charter only has state membership, leaving out a number of actors that should be considered as part of the international community.<sup>33</sup>

Christian Tomuschat and De Wet focus on values that are non-contingent and necessarily independent from state or any other actor’s consent. Tomuschat argues that states exist within a system of law that has a fixed set of underlying rules which ‘determines their basic rights and obligations with or without their will.’<sup>34</sup> Tomuschat focuses upon core principles, generally human rights and principles contained within

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<sup>28</sup> Bardo Fassbender, ‘The United Nations Charter as Constitution’ (n 2) 573. See also, Fassbender, *The UN Charter as the Constitution* (n 1). A precursor is Blaine Sloane, ‘The United Nations Charter as a Constitution’ (1989) 1 Pace YBIL 61-126.

<sup>29</sup> Fassbender, ‘The United Nations Charter as Constitution’ (n 2) 529.

<sup>30</sup> *Ibid* 573.

<sup>31</sup> Tomuschat, ‘Obligations Arising for States’ (n 2) 217. The US, France and South Africa are examples of states with constitutions that were put in place after historical revolutions.

<sup>32</sup> Thomas Franck, ‘The Political and Judicial Empires: Must there be Conflict over Conflict-Resolution?’ in Najeeb Al-Naumi and Richard Meese (eds) *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff The Hague 1995) 627.

<sup>33</sup> De Wet, ‘The International Constitutional Order’ (n 2) 54.

<sup>34</sup> Tomuschat, ‘Obligations Arising for States’ (n 2) 211.

peremptory norms.<sup>35</sup> Law may be the binding force holding the values together, but he rejects the idea that an international community could ever be held together simply by law, as community remains central. Similarly, Bruno Simma argues that *Barcelona Traction*<sup>36</sup> and *Tehran Hostages*,<sup>37</sup> as well as peremptory norms under the VCLT evidence a community that puts higher interests at its heart.<sup>38</sup> De Wet propounds that constitutionalism not only requires the existence of a core value system but its effective enforcement also through national, regional and functional (sectoral) constitutional regimes forming building blocks of the international community.<sup>39</sup> Her universal value system is composed of *ius cogens* norms<sup>40</sup> and other *erga omnes* obligations, with the UN Charter enshrining both standards.<sup>41</sup> Proposing a constitutionalist system based upon unassailable fixed values can be met with the charge of legal neo-imperialism and critiqued on the grounds of peremptory norms' very limited and contested nature making them unsuitable for constitutional law.<sup>42</sup> Furthermore, fixed values are bound to fail because they are deeply political, and will inevitably be met with resistance from some of those who are governed under those norms.<sup>43</sup> Therefore, a global governance system based upon fixed values can be critiqued on the grounds that written legal rules alone are not evidence of the existence of a constitution; peremptory norms are limited and contested; and the imposition of fixed values is imperialist, deeply political and bound to fail.

### 3.2.4. Societal Constitutionalism

Gunther Teubner provides a theory of societal constitutionalism, where private actors in many social spheres including art, economics and science, are seen to self-

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<sup>35</sup> Ibid 10; Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harvard ILJ 223, 225.

<sup>36</sup> *Barcelona Traction, Light and Power Company Limited*, (1970) ICJ Reports 32.

<sup>37</sup> *United States, Diplomatic and Consular Staff in Tehran* (1980) ICJ Reports 43.

<sup>38</sup> Simma, 'From Bilateralism to Community Interest' (n 2) 259.

<sup>39</sup> De Wet, 'The International Constitutionalist Order' (n 2) 53.

<sup>40</sup> On *jus cogens* generally see Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006).

<sup>41</sup> De Wet, 'The International Constitutionalist Order' (n 2) 54-64.

<sup>42</sup> Martti Koskenniemi 'International Law in Europe: Between Tradition and Renewal', Florence, 14 June 2004 (Keynote at the Inauguration of the European Society of Law)

<sup>43</sup> Jan Klabbbers, 'Constitutionalism Lite' (2004) Intl Org L Rev 31, 55.

constitutionalise unfettered by the requirements of political constitutionalism. The branching out of regimes is evidence of this self-constitutionalisation process.<sup>44</sup> Niklas Luhmann's general theory of autopoietic social systems<sup>45</sup> is used to construct a sociological theory of societal constitutionalism overcoming 'the obstinate state-and-politics-centricity' of constitutional lawyers and political philosophers.<sup>46</sup> The constitution of society consists of its differentiation, not its political integration. Global societal constitutionalism actually involves the non-political constitutionalisation of global governance in which 'private actors not only participate in the political power processes of global governance, but also establish their own regimes outside of institutionalized politics'.<sup>47</sup> This pluralistic process of global, yet fragmented, self-constitutionalisations makes it theoretically possible to think of constitutionalism as the general societal processes of self-reference of non-state subjects unlimited by concepts of collective identity and shared political destiny.<sup>48</sup>

Teubner reduces the problem of the modern democratic constitutional subject, to 'the area of perturbation where individual consciousness encounters social communication'.<sup>49</sup> This interface of individual consciousness and social communication does not indicate any constitution of the people as a collective with political identity or inter-subjective communicative power.<sup>50</sup> Teubner provides a purely functional definition of the term constitution and understands functionality in its non-political contexts, reducing the constitution to a mere hierarchy of norms and structural coupling between different function systems.<sup>51</sup> The role of law is to regulate

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<sup>44</sup> Teubner, *Constitutional Fragments* (n 3).

<sup>45</sup> Niklas Luhmann, *Law as a Social System* (OUP 2004) 404-12.

<sup>46</sup> Teubner, *Constitutional Fragments* (n 3) 3. For an earlier articulation of the autopoietic conception of a global governance system see Gunther Teubner and Andreas Fischer-Lescano, 'Regime Collisions Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) Michigan JIL 999.

<sup>47</sup> Teubner, *Constitutional Fragments* (n 3) 9.

<sup>48</sup> Jiří Přibáň, 'Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner's Constitutional Fragments and Thornhill's A Sociology of Constitutions' (2012) 39(3) J L and Society 441.

<sup>49</sup> Teubner, *Constitutional Fragments* (n 3) 63.

<sup>50</sup> Přibáň, 'Constitutionalism as Fear of the Political?' (n 48) 449.

<sup>51</sup> Ibid.

how conflicts between those normative systems can be resolved.<sup>52</sup> Individuals exercising some conscious will in the way that they wish to operate, or more precisely in the way they wish not to be compelled to operate, resonates with ideas of fragmentation of the international legal order providing the first signs of constitutionalism.<sup>53</sup> However, it is the arrangements that result from this fragmenting process, the formation of separate systems and political identities, that enable a global governance structure entailing more than just the coordination of different regimes. If legitimacy is taken seriously, a global governance structure should aim to identify who is subscribing to competing sites of authority. There needs to be recognition that no matter how liberated actors are by subscribing to sectoral regimes that have broken off from a central international legal or political regime, the creation of new regimes will always result in a dynamic between those who are governing and those who are governed wherein legitimacy is at stake. In these circumstances, the resulting regimes that form need to be moderated by norms which have legitimacy as their core concern.

### 3.2.5. Normative Constitutionalism

Although translating normative constitutionalism from the domestic to the international level is complex, the question of why and how constitutionalism is an effective method of governance in the domestic state must be taken seriously.<sup>54</sup> Recognising the normative content of constitutionalism, means recognising its political and legal aspects. The political aspect is that a constitutionalist governance system is governed by and for the benefit of a constituent body, while the rule of law

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<sup>52</sup> Although constitutional pluralists do not differentiate according to functions but according to subsystems, they follow a similar course to Teubner's approach by suggesting that legitimate authority can come from a variety of sources and that there is an 'incommensurability of authority claims'. Similar to a law that manages conflicts between the different functional regimes, Neil Walker proposes a 'metaconstitutionalism' which consists of dialogue between constitutional authorities not in order to reach a particular result but in order to familiarise each system with each other and promote cross-fertilisation. See further, Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317, 338, 358. See also Chapter 4, Section 4.4.2.

<sup>53</sup> Aoife O'Donoghue and Colin Murray, 'From Fragmentation to Constitutionalisation in the Global Legal Order' (Working Paper 2016).

<sup>54</sup> Neil Walker, 'Postnational Constitutionalism and the Problem of Translation' in Joseph Weiler and Marlene Wind (eds) *European Constitutionalism Beyond the State* (CUP 2003) 27; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 6.

still forms an important part of the operation of that political system.<sup>55</sup> Loughlin argues that the rule of law, within constitutionalism, is an aspect of a ‘political right’ where the ‘sovereign authority of the state can be recognised’<sup>56</sup> and also observes the importance of the political to the rule of law’s operation.<sup>57</sup> Constitutionalisation changes a governance structure ‘from one where the holders of power are self-regulated to a system encompassing scrutiny at its core’.<sup>58</sup> This is in line with Pettit, when he states that political freedom is a plural freedom that can be experienced and enjoyed by others, not despite others, and is not threatened by the political state but constituted by it.<sup>59</sup> Law and the courts should not be excluded from constitutionalist concerns, but should be located in a way that facilitates political relationships, through providing stability, foreseeability and a framework that the governed can point to in holding governing powers accountable.

Democratic accountability and the rule of law are central in theories of global constitutionalism that take normative constitutionalism seriously. Anne Peters and Mattias Kumm recognise that constitutional norms need to be translated to the international level in order to compensate for the de-constitutionalisation of domestic states.<sup>60</sup> Kumm notes that domestic accountability mechanisms can no longer provide oversight in international law-making, calling into question the legitimacy of international law in the name of democracy and self-government, and requiring adequate participation and accountability in the international legal order.<sup>61</sup> Peters finds that the rule of law is important for the subversion of power in an international governance system that suffers from severe democratic accountability deficits and

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<sup>55</sup> Kumm, ‘The Legitimacy of International Law’ (n 4); Peters, ‘Compensatory Constitutionalism’ (n 4); Walker, ‘The Idea of Constitutional Pluralism’ (n 52); O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4); Paulus, ‘The International Legal System as Constitution’ (n 4).

<sup>56</sup> Loughlin, *The Idea of Public Law* (OUP 2003) 43.

<sup>57</sup> *Ibid* 99-113.

<sup>58</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) referencing Dario Castiglione, ‘The Political Theory of the Constitution’ 1996 44 *Political Studies* 417.

<sup>59</sup> Tomkins, *In Defence of Political Constitutionalism* (n 1).

<sup>60</sup> Peters, ‘Compensatory Constitutionalism’ (n 4); Kumm, ‘The Legitimacy of International Law’ (n 4).

<sup>61</sup> Kumm, ‘The Legitimacy of International Law’ (n 4) 195.

which is at the behest of powerful actors.<sup>62</sup> Similarly, Paulus argues that the rule of law is important for constraining the state and due process of law, in a world where states have a monopoly on force.<sup>63</sup> All those who consider the norms of constitutionalism as crucial to a theory of global constitutionalism express the difficulties of translating democratic accountability to the international level. However, they do not provide any satisfactory answers as to how to conceptualise the complex of legal orders and sites of governance at the global level, the first step towards securing democratic accountability. Theories that are most successful in addressing the challenge of securing democratic accountability in global governance system are those inspired by the political constitution, which aim to provide criteria for identifying the objects and subjects of numerous sites of governance simultaneously.

### 3.3. Democratic Accountability

#### 3.3.1. The Complexity of the Global Governance System.

Within the global legal order there are problems in identifying to whom constitutionalism should apply and to whom it does apply. Besson argues that:

[w]ithout a clear conception of the nature, boundaries, and constituency of the community or communities concerned by international law-making and of the ways in which to link their interests and decisions back to national political communities, however, efforts made to institutionalise global democracy, or at least to develop mechanisms of international accountability are seriously hindered.<sup>64</sup>

Therefore, she acknowledges a problem with institutionalising global democracy for the purposes of law-making when a variety of constituencies are not easily identifiable. Distinguishing constituencies in order to ensure effective instantiation of democratic accountability has been of central significance in discourse on securing global democracy. Some construe individuals in states as the relevant constituent powers and

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<sup>62</sup> Peters, 'Compensatory Constitutionalism' (n 4) 586-7.

<sup>63</sup> Paulus, 'The International Legal System as Constitution' (n 4) 97-8. See further Sir Arthur Watts, 'The International rule of Law' (1993) 36 *German YBIL* 15, 21.

<sup>64</sup> Besson, 'Whose Constitution(s)?' (n 5) 394.



their own domestic states are ‘democratic mediators’.<sup>65</sup> Under this theory, there is an analogy between natural persons and states; the idea of ‘transitive, delegated legitimacy of global governance with states as democratic mediators’.<sup>66</sup> Domestic state governments are the constituted power in a global governance system where states are the main actors, and state consent secures the legitimacy of decisions of international organisations of which they form part.<sup>67</sup> Therefore, global democracy can be achieved through securing democratic accountability at the domestic level.<sup>68</sup> Simply, however, decisions affect a great number of people without regard to the boundaries of nation states, and many tasks cannot be realised at the national level only, such as free trade, climate change and global poverty, and domestic democratic processes do not represent those outside interests.<sup>69</sup> When global decisions are concerned, the democracy of domestic decisions alone is undemocratic when seen from the perspective of the outsider.<sup>70</sup> Besson argues furthermore that the democratisation of states for democratic global governance does not pay sufficient attention to interests of national polities themselves, and does not pay heed to the distinct interest of states.<sup>71</sup> While attempts are made to equate the global constituency with the ‘international community’,<sup>72</sup> this has been subject to much criticism.<sup>73</sup> Conversely, there are those who argue that the global constituent is made up of the

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<sup>65</sup> Peters, ‘Dual Democracy’ (n 5) 271 citing Arthur Watts, ‘The International Rule of Law’ (1993) German YIL 15, 32.

<sup>66</sup> Ibid.

<sup>67</sup> Mortimer Sellers, ‘Republican Principles in International Law’ (1996) 11 Connecticut JIL 403, 413.

<sup>68</sup> See e.g. Thomas Franck, ‘Legitimacy and the Democratic Entitlement’ in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International law* (CUP 2000) 25, 31.

<sup>69</sup> Simma, ‘From Bilateralism to Community Interest’ (n 2) 258; Paulus, ‘The International Legal System as a Constitution’ (n 5) 96.

<sup>70</sup> Paulus, ‘The International Legal System as a Constitution’ (n 4) 97.

<sup>71</sup> Besson, ‘Whose Constitution(s)?’ (n 5) 395.

<sup>72</sup> See e.g. Tomuschat, ‘Obligations Arising for States’ (n 2); de Wet, ‘The International Constitutional Order’ (n 2); Fassbender, ‘The United Nations Charter as Constitution’ (n 2).

<sup>73</sup> Martti Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 EJIL 113, 116; Diane Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’ (1996) 5 Social and Legal Studies 337, 357. See further, O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 271-307.

individual free from the state apparatus.<sup>74</sup> However, this proposition fails to recognise that states are and should be subjects of international law.<sup>75</sup>

The world cannot be constituted as one world constitution with a world human community as a single polity. There must be recognition of the fact that there exists a multitude of constitutional or constitutionalising sites of governance. Many international organisations, like the WTO, EU and the Council of Europe, are purported to have undergone or are undergoing a process of constitutionalisation.<sup>76</sup> Translating a constitutionalist approach to fit the multi-layered international political structure is necessary. There must be a model of constitutionalism which can accommodate multiple and overlapping constituencies, so that the concept of constitutionalism can apply ‘within all legal orders at once so as to produce an encompassing constitutional theory that can explain all of those uses together’.<sup>77</sup> In order to achieve such a concept, there must be consideration of the requirements of democratic accountability, what it wishes to achieve, and how to identify it. Constitutionalist governance systems are man-made and part of the process of identifying them is through seeing constitutionalist norms, such as democratic accountability, in operation, and calling it out for what it is.<sup>78</sup> The concept of

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<sup>74</sup> See e.g. Daniele Archibugi and David Held (eds) *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press 1995).

<sup>75</sup> See e.g. Neil Walker, ‘The Idea of Constitutional Pluralism’ (n 52); Neil Walker, ‘Postnational Constitutionalism’ (n 54) 27; Emmanuelle Jouannet, ‘L’idée de communauté humaine à la croisée des la communauté des États et de la communauté mondiale, (2003) 47 *Archives de Philosophie du droit* 191.

<sup>76</sup> In relation to the WTO see e.g. Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005); Anne Peters et al, ‘The Constitutionalisation of International Trade Law’ in Thomas Cottier and Panagiotis Delimatsis, (eds) *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 69; For the EU see e.g. Joseph Weiler and Marlene Wind (eds) *European Constitutionalism Beyond the State* (CUP 2003); Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006); Steven Greer, Lucius Wildhaber, L, ‘Revisiting the debate about ‘constitutionalizing’ the European Court of Human Rights’ 2012 (12) HRLR 655; Fiona de Londras, ‘International Human Rights Law and Constitutional Rights: In Favour of Synergy’ (2009) 9(2) *Intl Rev Constitutionalism* 307.

<sup>77</sup> Besson, ‘Whose Constitution(s)?’ (n 5) 389.

<sup>78</sup> Walker, ‘The Idea of Constitutional Pluralism’ (n 52) 334.

constituency is useful for constructing a global constitutionalist framework that can explain constitutionalism in overlapping and cross-cutting sites of governance, and for exploring further who decides who forms part of a governance system.

### 3.3.2. Constituency

Theories of constitutionalism which focus on identifying governance systems, ask who should be accountable to whom. There is an understanding that constitutionalisation is a process enabling for a legal order to move away from an ad hoc, decentralised and consent-based system of states, ‘where the holders of power are entirely self-regulated’ to one where the actions of those who exercise power is curtailed through the operation of the constitutionalist norms of the rule of law and democratic accountability.<sup>79</sup> Constituent power holders ‘choose the form and substantive character of the governance system under which they wish to be governed and live co-operatively’.<sup>80</sup> The constituted powers are then granted the authority to make rules and govern according to the chosen governance system. Constituent power is the force that ‘drives constitutional development’.<sup>81</sup> Democratic accountability and the rule of law are norms which sustain the constituent and constituted powers.

O’Donoghue argues that ‘part of the purchase that constitutionalism possesses and an aspect that must be explored is who within global governance ought to gain from its operation’.<sup>82</sup> The requirement of constitutionalist norms to be in operation between a constituency of actors, helps to identify who should be part of the process of constitutionalism. O’Donoghue argues that the constituent power should be identified through a process.<sup>83</sup> She takes her definition from Higgins who states that a ‘process is a series of interconnected actions/functions interacting to establish an ever-evolving definition of a group associated with the operation of governance’.<sup>84</sup> The combination of norms of the rule of law, democracy and separation of powers helps delineate the parameters of the constituency. The underlying rationales for the norms of

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<sup>79</sup> Martin Loughlin ‘What is Constitutionalisation’ in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (OUP 2010) 68.

<sup>80</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 54.

<sup>81</sup> Loughlin, *The Idea of Public Law* (n 56) 99.

<sup>82</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 2.

<sup>83</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 78.

<sup>84</sup> *Ibid* 78 citing Higgins, *Problems and Process* (n 6) 8.

constitutionalism's existence are linked to an identifiable group whose relations are moderated by those norms.<sup>85</sup>

In her discussion of republican constitutionalism, Hannah Arendt states that constitutionalism can 'exist only in public' as a 'tangible, worldly reality, something created by [people] rather than a gift or a capacity'.<sup>86</sup> In the same way, the process of constituency involves identifying a group of actors participating with one another in 'interconnected actions/functions interacting' which evolve into a 'group associated with the operation of governance'. This takes place alongside the idea that they ought to regulate the relationship according to these constitutionalist norms which set the parameters of that relationship.

Three main potential criticisms can be posited against the idea of constituency: that it is vague; it suffers from the same binary as international community; and the idea of constituency is circular. Identifying the constituency through identifying the operation of norms of constitutionalism could be considered vague.<sup>87</sup> However, the 'process functions as the hinge around which the identification of constituent power holder rests, as such constitutional norms are objective and establish the certainty necessary for its operation'.<sup>88</sup> In order to delineate the constituency, one asks whether there is a process of global constitutionalism underway and who is engaging in that process, enabling identification of the constituent power holders.<sup>89</sup> O'Donoghue recognises that constituency maintains some of the binary aspects of international community.<sup>90</sup> Potentially there are subjects within the international legal order that are both outside and within a particular international constituency. But parameters of constituency are fluid and do not have entrenched values or interests like community.<sup>91</sup> Constituency through constitutionalism may be exclusionary to the extent that they do not operate

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<sup>85</sup> Ibid 78-9.

<sup>86</sup> Hannah Arendt, *On Revolution* (Penguin Books 1990) 124. This is in contrast to Teubner who emphasises that private actors can self-constitutionalise by breaking away from existing political processes.

<sup>87</sup> O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 238.

<sup>88</sup> Ibid 79.

<sup>89</sup> Ibid 85.

<sup>90</sup> Ibid 237.

<sup>91</sup> Ibid 240.

properly; however it does not force values upon holders of constituent power. Identifying the constituency could be seen as circular: to be involved in the process, one has to be recognised as such but to be recognised one has to be in the process. However, the process itself is defined by the law, not by the participants. Therefore, in the area of constitutionalisation, the space in which it is operating is defined by constitutionalism's operation.

The complex matter of determining to whom constitutionalism should apply is the first step in providing some form of democratic accountability, a core norm of global constitutionalism. Attempting to find solutions within and through the state underestimates the extent to which individuals situated outside of the state are affected by their decision-making. Furthermore, there are many overlapping interests and governance systems that need to be taken into account so that, while some decisions affect those situated extraterritorially the most, others will affect the inhabitants of the territorial state. There needs to be a way of delineating to whom constitutionalism applies in order to capture the varying sites of governance at once. Constituency is seen as an appropriate alternative to international community, as it does not fall prey to the criticism of creating a binary system where individuals are discriminated against according to whether they believe in the value system propounded by the international community, or want to take measures to ensure that other values are protected or held in higher regard. Constituencies are more flexible and create discursive and political environments rather than a society of fixed rules. The constituent power chooses the form and substance of the governance and where they govern cooperatively, through a process. The operation of constitutionalist norms sustains and defines the constituency. The next section asks whether the constitutionalist norm of democratic accountability is in operation at the Council of Europe, and considers how this helps to conceptualise extraterritoriality within a global constitutionalist frame.

### 3.3.3. Democratic Accountability and the Council of Europe

This section explores the idea of values upon which the operation of the norm of democratic accountability is contingent. The nature of those values and why they necessitate democratic accountability mechanisms is explained. Whether values of this nature are at stake in the Council of Europe is considered in order to answer whether democratic accountability and a constitutionalist frame is relevant to this international

organisation. In addition to discovering when mechanisms of democratic accountability are required, this section ascertains what constitutes the operation of constitutionalist norms and the kinds of spaces in which it can take place. Whether or not the Council of Europe can provide mechanisms of democratic accountability and whether or not it is relevant to the question of extraterritoriality will be addressed.

#### 3.3.4. Democratic Entitlements and the ECHR

Terry and Kate MacDonald demonstrate how a particular relationship between actors can help to identify where the underlying rationale of the norm of democratic accountability is operational.<sup>92</sup> The democratic entitlements of autonomy and equality provide the pivot around which a system of power-holders and affected individuals can be identified. In order for the entitlements of autonomy and equality to give rise to a relationship requiring democratic accountability mechanisms there must be a ‘thin consensus’ on the content of the autonomy and equality from within that constituency. Similarly to the outlook of global constitutionalists, MacDonald and MacDonald state that ‘democratic principles create an imperative for instituting democratic control of any agents of power (state or non-state) that affect a population of individuals to a degree that potentially jeopardises their democratic entitlements’.<sup>93</sup>

Legitimate forms of governance or constituencies need to be delineated in a way that facilitates the normative purpose and function of democratic accountability.<sup>94</sup> In order to determine the constituted power or ‘which political agents must be institutionally required to uphold the autonomy and equality of which populations’ they ask what forms of ‘political impact’ implicate ‘the autonomy and equality of affected individuals’ in such a way that democratic accountability is required.<sup>95</sup> The agents carrying out the political impact form the constituted power whose legitimacy derives from the presence of democratic accountability mechanisms. In order to identify the constituency, it needs to be asked which populations are ‘affected in ways that

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<sup>92</sup> MacDonald and Macdonald, ‘Non-Electoral Accountability in Global Politics’ (n 6). For further detail on the development of this theory of democratic accountability in global politics see: Terry MacDonald, *Global Stakeholder Democracy* (OUP 2008).

<sup>93</sup> Ibid 93.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid 93-4.

implicate their democratic entitlements to autonomy and equality.<sup>96</sup> The democratic entitlements are determined by a ‘thin consensus’ on those constitutive values.<sup>97</sup> MacDonald and MacDonald concede that much contestation exists on the form of the ‘thin consensus’.<sup>98</sup> However, in their analysis of the ‘thin consensus’ existing in relation to the global garment industry, they conclude that ‘economic rights’ or ‘human rights’ are the values agreed upon the northern corporate entities and global south workers.<sup>99</sup> They do not refer to a specific framework which would be more indicative of a consensus, particularly if both constituted and constituent powers were actively participating in that framework. In sum, the norm of democratic accountability is contingent upon the existence of values that are agreed upon within a constituency and significant enough to be labelled democratic entitlements. When those values are implicated in the exercise of power vis-à-vis a victim of that power, those entitlements have the potential to give rise to the operation of the norm of democratic accountability. The norm of democratic accountability is in operation when both the acting power and victim of the violation of democratic entitlements participate in the constituency to ensure democratic accountability.

Rights enshrined under the ECHR are significant enough to be labelled democratic entitlements to autonomy and equality according to MacDonald and MacDonald’s theory. MacDonald and MacDonald consider that ‘economic rights’ or ‘human rights’ are values worthy of having the status of democratic entitlements within the global garment context. The ECHR, as a human rights instrument, and one that holds states accountable for some of the gravest, systemic violations of human rights in the extraterritorial context, should be considered from this perspective as democratic entitlements in relation to their significance.

There is evidence of a thin consensus that the democratic entitlements propounded and protected within the Council of Europe is the ECHR. The ECHR is the constitutive treaty of the Council of Europe. The Council of Europe has 47 Member States as

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<sup>96</sup> Ibid 94.

<sup>97</sup> Ibid 93.

<sup>98</sup> Ibid citing John Rawls, *Political Liberalism* (1996); Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983); Michael Walzer, *Interpretation and Social Criticism* (Harvard University Press 1987).

<sup>99</sup> Ibid 94.

signatories and is made up of executive, legislative and judicial organs whose functions and powers, set out primarily in the Statute for the Council of Europe, are focused on the implementation and execution of the ECHR.<sup>100</sup> The ECtHR is a permanent judicial body within the Council of Europe, an international organisation which administers the ECHR. The Council of Europe includes a Committee of Ministers consisting of foreign ministers and diplomatic representatives from Member State countries and decides upon Council of Europe policy, which includes additional laws that can be used to keep track of the rules that develop under the ECHR. The Parliamentary Assembly consisting of representatives from all over the world including Jordan, Palestine and Morocco, carries out functions such as monitoring the implementation of ECHR compliance across the Council of Europe member states, improving cooperation with other international legal regimes such as the International Criminal Court, and electing judges to the ECtHR. The Congress of Local and Regional Authorities encourages democratic local government, including the provision of elections in Council of Europe states. There is also a Secretary General which forms the head of the international organisation and a Commissioner of Human Rights which brings attention to specific human rights violations. The ECtHR ‘is open to states and individuals regardless of nationality’<sup>101</sup> and aims to interpret and enforce the rights enshrined under the ECHR. The Council of Europe therefore appears to provide a nexus for the operation of a constituency which is concerned with upholding the democratic entitlements promised in the ECHR. Anyone participating in the constituency of the Council of Europe would agree that the ECHR forms the thin consensus on the democratic entitlements for those engaging in that process. ‘Affectedness’, defined by ECHR standards, simultaneously defines and necessitates the norm of democratic accountability. It is left to discover whether there is evidence of participation in the operation of the norm of democratic accountability through the ECtHR.

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<sup>100</sup> The Statute of the Council of Europe (adopted 5 May 1949) European Treaty Series 1/6/7/8/11.

<sup>101</sup> ‘The Council of Europe in Brief: Structure’ available at <<http://www.coe.int/en/web/about-us/structure>> last accessed 20 July 2016.



### 3.3.5. The ECtHR: A Mechanism of Democratic Accountability

This section asks whether there is evidence of participation in the operation of the norm of democratic accountability within the Council of Europe through the ECtHR. Section 3.3.4 confirmed that the Council of Europe provides a nexus where democratic entitlements enshrined in the ECHR are at stake. The next question is whether the ECtHR secures some form of democratic accountability. The model of constituency put forward here is one of process. The constituted power is identified by the ‘political impact’ and the constituents are those that are directly affected by political impacts that implicate their ECHR rights. This is not a static conception of constituency. Its fact-based underpinning, means that constituency is concerned with what is happening to people on a case-by-case basis, and democratic accountability must be secured in relation to factual encounters. The ECtHR appears to be a mechanism through which a process of political impacts directly affecting the ECHR rights of people can be examined: it caters for the process of constituency. This section focuses on asking whether the ECtHR can be considered a mechanism that secures the purposes and functions of democratic accountability so as to articulate the relationship between the issue of extraterritoriality and the operation of this constitutionalist norm.

Whether a court, and in particular an international human rights court, can function as a mechanism of democratic accountability, is a controversial issue. This section calls into question the idea that elections are essential to democratic accountability, examining whether the latter can be achieved through alternative mechanisms whose core purpose and functions mirror those of elections.<sup>102</sup> Ultimately this section assesses whether the ECtHR can be characterised as an institutional mechanism which carries out some of the purposes and functions of elections when it finds constituents admissible, thus establishing it as a forum which secures democratic accountability.

#### 3.3.5.1. Courts and Democratic Accountability

First, it is important to distinguish from judicial review the question of whether the ECtHR can function as a mechanism of democratic accountability. Judicial review is ‘an accountability mechanism, to ensure that the executive power implements legislation loyally, and to protect those affected by relevant decisions’.<sup>103</sup> At the

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<sup>102</sup> MacDonald and MacDonald, ‘Non-Electoral Accountability in Global Politics’ (n 6).

<sup>103</sup> Ulfstein, ‘Institutions and Competences’ (n 26) 64.

domestic level, the question of the extent to which courts should carry out judicial review of executive action and legislation is subject to debate. Jeremy Waldron for example argues that courts should be limited in their judicial review functions because they are democratically unaccountable.<sup>104</sup> On the other hand Annabelle Lever and Aileen Kavanagh argue that judicial review facilitates democratic accountability because it protects individuals from majority rule.<sup>105</sup> In the literature, judicial review carried out by international courts is given consideration in relation to different international organisations, for example the UNSC, including the ICJ and the Court of Justice of the European Union.<sup>106</sup> The broader issues of judicial review or lack thereof in international law is beyond the scope of this study. The limited ability of courts to review law and law-making procedures supports the notion that they are relatively insignificant compared to those powerful actors creating treaties or agreeing the terms of a UNSCR, or constructing customary international law through their own actions in a belief that what they are doing is legal. In a discussion of the ICJ, Gleider Hernández argues that judicial decisions can have a law-creative effect because of their powerful normative role.<sup>107</sup> By applying concretely a legal rule or norm to a

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<sup>104</sup> See e.g. Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale L J 1346.

<sup>105</sup> See e.g. Annabelle Lever, 'Is Judicial Review Undemocratic?' (2009) 7 (4) Perspectives on Politics 897; Aileen Kavanagh, 'Constitutional Review, the Courts and Democratic Scepticism' (2009) 62 CLP 102.

<sup>106</sup> The *Lockerbie* judgment has been interpreted as showing possible signs of judicial review at the ICJ but the decision is inconclusive, and did not proceed to the merits. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (preliminary objections) [1998] ICJ Reports 9; Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10 EJIL 517; Erika de Wet, 'Judicial Review as an Emerging General Principle of law and its Implications for the International Court of Justice' Netherlands Intl L Rev 181. For a discussion of judicial review and international constitutionalism see: Jan Klabbers 'Straddling Law and Politics: Judicial Review in International Law' in Ronald Macdonald and Douglas M Johnston (eds) *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005). For literature on judicial review of UNSCRs at the Court of Justice of the European Union see e.g. Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) EJIL 1015.

<sup>107</sup> For a comprehensive discussion on the legal and normative significance of judicial decisions at the ICJ see: Gleider I Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014).

factual situation in an authoritative fashion, judicial institutions can contribute to the normative content of a legal rule, foreclosing competing interpretations, and influencing future practice. However, those decisions are ultimately non-binding.<sup>108</sup> Therefore, the law-making ability of courts is also contested. If courts were construed as having a significant law-making function then their own democratic legitimacy would need to be addressed, and their relationship with the actors who are affected by their law-making defined and defended.<sup>109</sup> The ECtHR's ability to function as a mechanism of democratic accountability should also, therefore, be distinguished from questions relating to whether international courts should be democratically accountable because of a contended law-developing or law-creating function. This section aims to assess whether international courts can play a role in enabling constituent power participation within a global governance system in which systemic democratic accountability gaps arise.

### 3.3.5.2. Elections

Elections are considered an 'effective means of instituting democratic accountability within states' because of the 'centralised structure' of state's public power and unified democratic 'public'.<sup>110</sup> The prospects of electoral accountability within the decentralised domain of the international legal order is very different.<sup>111</sup> The complexity of an electoral framework required to meet these demands would create serious impediments at a practical level. It would produce a costly and confusing network of electoral processes.<sup>112</sup> Electoral mechanisms do not provide a promising path to achieving democratic accountability in global political spheres.<sup>113</sup> In contrast to assertions made by Robert Dahl, elections are not recognised as having any intrinsic

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For a similar discussion of the normatively significant, but ultimately non-binding nature of ICJ decisions see: Ulfstein, 'Institutions and Competences' (n 26) 64-7.

<sup>108</sup> Ibid.

<sup>109</sup> See e.g. Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple L Rev* 61; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014); Armin von Bogdandy and Ingo Venzke, 'On Democratic Legitimation of International Judicial Law-making' (2011) *German L J* 1341.

<sup>110</sup> MacDonald and MacDonald, 'Non-Electoral Accountability in Global Politics (n 6) 97.

<sup>111</sup> Ibid 98.

<sup>112</sup> Ibid 98.

<sup>113</sup> Ibid 99.

value.<sup>114</sup> Non-electoral alternatives that have more viability are devised in the form of existing mechanisms wherein stakeholders can exert forms of control over public decision-makers.<sup>115</sup>

MacDonald and MacDonald argue that the ‘legitimacy conferred by democratic institutions is derived from their capacity to achieve democratic purposes and perform democratic functions, rather than from any intrinsic value embodied in particular institutional mechanisms themselves’.<sup>116</sup> In order to secure a form of democratic accountability an innovative range of institutional forms is required– often decentralised and non-electoral. The central normative function of electoral accountability is that it ‘gives democratic “publics” a certain degree of political control over actions of constituted powers’.<sup>117</sup> That is, to give ‘members of the public some active political role in defining their own interests, and in dictating by whom and within what constraints public decisions affecting these interests may be made’.<sup>118</sup> The mechanisms through which elections deliver political control to stakeholders can be characterised as instruments of democratic accountability. Democratic accountability is the institutional means of regulating the power relationship between rulers and ruled.

[It is] the institutional process for distributing power between ‘publics’ and those who wield “public power” over them, in such a way as to ensure that the power exercised by public political agents remain subordinate in some significant respects to the power wielded collectively by the “publics”.<sup>119</sup>

Besson corroborates the idea that democratic accountability should be construed as giving some control to constituents: ‘democratic rule...implies endowing those affected by that decision with the most voice; but it also implies listening to them’.<sup>120</sup> Kumm states that ‘the relevant question is not whether a majority has determined the law, but whether there are sufficiently transparent and participatory accountability

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<sup>114</sup> Robert A Dahl, *On Democracy* (Yale University Press 2000).

<sup>115</sup> MacDonald and MacDonald, ‘Non-Electoral Accountability in Global Politics’ (n 6) 100.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid* 101.

<sup>118</sup> *Ibid* 102.

<sup>119</sup> *Ibid* [emphasis added].

<sup>120</sup> Besson, ‘Whose Constitution(s)?’ (n 5) 399.

mechanisms which are responsive to the constituents concerned.<sup>121</sup> The limited control aspired to is ‘potential disempowerment’,<sup>122</sup> which entails questioning the legitimacy of action rather than taking that action for granted as legitimate; a potential for imposing sanctions; and potential for further mandatory action on the part of the authorities.<sup>123</sup>

Mark Bovens’ definition of accountability is in conformity with an understanding of ‘potential disempowerment’. Bovens explains that accountability requires that a mechanism be available to enable all relevant participants to be present and explain and justify conduct.<sup>124</sup> Explaining and justifying conduct should include the possibility of debate, of questions by the forum and answers by the actor, for the actor to explain and justify conduct, and eventually of judgment of the actor by the forum.<sup>125</sup> Victims of rights violations should have a platform to voice their grievances and for the real and reputed perpetrators to account for themselves and to justify or excuse their conduct.<sup>126</sup> Corruption should be detected and prevented, with the potential for appropriate sanctions.<sup>127</sup>

### 3.3.5.3. International Courts as Mechanisms of Democratic Accountability

International courts have been identified as venues of democratic accountability.<sup>128</sup> All accounts understand the legitimacy gaps that exist in the global governance system and against this background attempt to explain how international courts do or potentially can act (albeit in a limited capacity) as mechanisms of democratic

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<sup>121</sup> Kumm, ‘The Legitimacy of International Law’ (n 4) citing Richard B Stewart, ‘Administrative Law in the 21<sup>st</sup> Century’ (2013) 78 NYU L Rev 437.

<sup>122</sup> Ibid 104.

<sup>123</sup> Mark Bovens, ‘Two Concepts of Accountability: Accountability as Virtue and as a Mechanism’ (2010) 33(5) West Eur Politics 946.

<sup>124</sup> Ibid 951.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid 954.

<sup>127</sup> Ibid 952.

<sup>128</sup> Tomkins in the domestic context also stated that courts can serve as mechanisms of democratic accountability: ‘courts [can] offer a vehicle for effective political participation’ in Tomkins, ‘In Defence of the Political Constitution’ (n 1) 174.

accountability. All provide varying and different accounts of how courts should be construed as promoting the democratic values of participation, transparency and accountability.<sup>129</sup> The ECtHR may have potential to provide to constituents political control over constituted actors and the potential for public disempowerment in the form of justifying action as legitimate and providing sanctions or mandatory action in the case of illegitimate action. Bovens states that: '[a]ccountability to legal and administrative forums, such as courts, is an important mechanism to prevent and detect corruption and the abuse of public powers'.<sup>130</sup> The ECtHR can provide a forum where constituent actors can exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegitimate under the ECHR system.

Anne Peters argues that the type of accountability created by courts and tribunals differs in three respects from democratic accountability.<sup>131</sup> First, she argues that accountability through complaints –as opposed to accountability through elections – functions only ex post, not ex ante. Benvenisti appears to presume the same without expressly stating that democratic accountability needs to be ex ante. He speaks of the obligation to provide 'notice' providing examples in international law where international courts have imposed an obligation on states to provide notice of their future actions in order to provide opportunities for relevant stakeholders to respond before any action is taken.<sup>132</sup> Second, claims in judicial proceedings are necessarily rights-based and cannot take into account interests without a legal basis. Third, court hearings concern individual cases and not general policies. For Peters, judicial review is best understood not as an element of democracy but rather as a complement to democratisation.<sup>133</sup> In relation to the argument that democratic accountability should

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<sup>129</sup> Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006-2007) 13 Colum J Eur L 565; Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 (2) AJIL 295, 318-320; Grossman, 'The Normative Legitimacy of International Courts' (n 109).

<sup>130</sup> Bovens, 'Two Concepts of Accountability' (n 123) 955.

<sup>131</sup> Peters, 'Dual Democracy' (n 5) 340.

<sup>132</sup> Benvenisti, 'Sovereigns as Trustees of Humanity' (n 129) 318-320.

<sup>133</sup> Peters, 'Dual Democracy' (n 5) 340.

function *ex ante* and not *ex post*, Hanna Pitkin and Terry MacDonald argue that forms of public control for the purposes of democratic representation can take place prior to execution of a political decision and also subsequent to decisions.<sup>134</sup> MacDonald and MacDonald argue that the exercise of public decision-making power does not need to be conceptualised in terms of discrete decisions taken at specified points in time.<sup>135</sup> Rather, the public decision-making power and process of democratic public control can be conceptualised as a ‘dynamic ongoing process’ and therefore the distinction between prospective and retrospective forms of control is unnecessary.<sup>136</sup>

The second point, namely that claims in judicial proceedings are necessarily rights-based and cannot take into account interests without a legal basis, can be contested on two grounds. First, interests with a legal basis still matter and any attempt to create democratic accountability in a global governance system replete with legitimacy gaps should be exploited. Second, democratic accountability entails having political control over constituted action and where that opportunity is available, whether it be in relation to an institution that invites applications from individuals whose justiciable ECHR rights have allegedly been violated or in a different institution where the interest is not justiciable, it still counts as acting as a mechanism of democratic accountability when it enables constituent powers to exercise public disempowerment in some capacity. In relation to the argument that court hearings concern individual cases and not general policies, the ‘catalyst’ effect of court decisions can mean that they have much broader implications for what constituted actors will do in the future on a systemic level towards a general population.<sup>137</sup> More importantly, an individual case can have broader ramifications for those who are not party to proceedings who see that the legitimacy of systemic state action is contested on the grounds of its legitimacy. Although they may not be constituents of the Council of Europe, the

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<sup>134</sup> Hanna Pitkin, *The Concept of Representation* (University of California Press 1967) Chapters 2 and 3; MacDonald *Global Stakeholder Democracy* (n 93).

<sup>135</sup> MacDonald and MacDonald, ‘Non-Electoral Accountability in Global Politics’ (n 6) 103.

<sup>136</sup> *Ibid.*

<sup>137</sup> Scott and Sturm, ‘Courts as Catalysts’ (n 129) 565. An additional argument that could be made is that although the decisions of the ECtHR are not generally binding, states often accept those decisions as authoritative and adjust their behaviour accordingly.

legitimacy of a general policy of action is contested and therefore the cases cannot be construed as adversarial or a case of considering merely private interests.<sup>138</sup>

Consequently, the ECtHR can provide a forum where constituent actors can exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegal under the ECHR system.

### 3.3.6. Participation in the Norm of Democratic Accountability

The process of the operation of the norm of democratic accountability can be evidenced through the institution of the ECtHR within the Council of Europe for two reasons. First, the ECtHR has the ability to act as a forum to capture and expose political impacts that violate ECHR rights on a case-by-case basis. Second, it is a mechanism that provides limited democratic accountability as it is a forum where constituent actors can exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegal under the ECHR system. The ECtHR therefore provides a platform for revealing who is participating in a process of constituency within the Council of Europe. An analysis of who is participating in that process reveals who are the constituted and constituent powers.

Individuals seeking admissibility to the ECtHR constitute a body of people who are ‘affected, in ways that implicate their democratic entitlements to autonomy and equality, by some responsible power-wielding agent’. The constituents secure the legitimacy of the Member States as rights abiding signatories to the ECHR by holding Member States to account for actions that allegedly are not in conformity with the ECHR. The individuals can be ‘affected, in ways that implicate their democratic entitlements to autonomy and equality’ – democratic entitlements defined by the ECHR within the constituency of the Council of Europe – without proving a rights-violation upon the merits. Individuals seeking admissibility to the ECHR form part of the process of constituency when they meet the substantive admissibility rules.

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<sup>138</sup> Tomkins, ‘In Defence of the Political Constitution’ (n 1) 175.



Substantive admissibility rules require a preliminary evaluation of the factual circumstances giving rise to the application to the ECtHR.<sup>139</sup> Whether an ECHR right is triggered is paramount to determining who can potentially form part of the constituency, and those who come to the Council of Europe and do trigger the ECHR do form part of the constituency. In accordance with the admissibility criteria set out in the ECHR, if the alleged rights violation triggers a right under the ECHR; if there is sufficient evidence; if the rights violation is significant enough to invoke the democratic entitlements under the ECHR; and an individual actually engages with the system through applying to the ECtHR which is a mechanism for democratic accountability; the operation of the norm of democratic accountability is in operation. It is not necessary for the action to be ultimately proven to be legal or illegal under the ECHR for an individual to be a constituent power. If the ECHR is triggered, the democratic entitlements of those individuals are in operation and they can form part of the constituency of the Council of Europe if they so choose.

Article 34 provides that the Court ‘may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols’. Article 35(3) (a) provides that the application will be inadmissible if the case is ‘incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application’.<sup>140</sup> Article 35(3)(b) states that the application will be inadmissible if the applicant has not suffered a significant disadvantage.<sup>141</sup> Looking at these requirements in the context of the analysis of constituency provided above, the constituency is composed of individuals who have been affected in such a way as to trigger the application of one or more of the provisions of the ECHR or its Protocols in

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<sup>139</sup> This is in contrast to the procedural admissibility rules that are bureaucratic, arbitrary criteria. See further, ‘Practical Guide on Admissibility Criteria’ (Council of Europe, 2014) available at <[http://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf)> last accessed 11 June 2016.

<sup>140</sup> For a critique of the ECtHR’s treatment of the manifestly ill-founded criterion see Janneke Gerards, ‘Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning’ (2014) HRLR 1.

<sup>141</sup> For a critique of the criteria of significant disadvantage see Dinah Shelton, ‘Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights’ (2016) 16(2) HRLR 303.

accordance with Article 35(3)(a) of the ECHR. There needs to be sufficient evidence according to Article 35(3)(a) and the ‘autonomy and equality’ limiting affectedness needs to give rise to a significant disadvantage under Article 35(3)(b).

Member States are constituted powers whose exercise of power is justified according to ECHR standards, as signatories to that treaty. When their actions have an impact on individuals which directly affect their enjoyment of the fundamental rights enshrined in the ECHR, then they are democratically accountable to those individuals under the ECHR system. Those individuals are entitled to exercise some form of political control over Member States that implicate their ECHR rights. Constituents are entitled to justification for those actions as legitimate or the imposition of sanctions or mandatory action when the action is found by the ECtHR to be illegitimate action. The fact that Member States do not evade the jurisdiction of the ECtHR when an application from a territory outside the Council of Europe comes to the ECtHR, but rather engage in justifying their activity according to the standards set out in the ECtHR precedent, is evidence of their subscription to the ECHR system. Under this model of constituency, Member States cannot contest who are constituents in relation to their geographical position. Constituents are those who bring enough evidence to allege that they have been directly affected by a Member State’s rights-violating behaviour. As long as the applicants meet the other substantive admissibility criteria, then they are not precluded from the ECtHR based upon location. Member States can push against the constituency in the merits stage. For example, in armed conflict, they can state that part of the ethos of war is to engage in battle. Article 2 right to life cannot extend to create liability for states in all situations of combat, precluding killing in all situations. Member States have their voice heard in determining the contours of the constituency in this way. The fact that Member States push against extraterritorial application is not evidence of their lack of subscription to the system. Their subscription to the substantive terms of the ECHR are all that is relevant to determining whether they engage in constituency. If a Member State decides to leave the Council of Europe, then they no longer form part of the constituency. If Member States refuse to participate in proceedings at the ECtHR relating to extraterritoriality then they do not form part of the operation of the norm of democratic accountability at the Council of Europe, and this signals lack of consensus on who should form part of the constituent

power. If it should happen that a Member State refuses to accept the jurisdiction of the ECtHR in this instance, then the constituent power may have to be redefined.

Further evidence of their participation, is that Member States engage in complex legal arguments in order to defend the legitimacy of their actions even when there is significant financial loss at stake. Furthermore, Member States have pursued the enforcement of decisions relating to extraterritorial applications. For example, carrying out investigations into alleged rights-violations,<sup>142</sup> submitting public apologies in recognition of their rights violations,<sup>143</sup> and compensating victims in the case of rights violations.<sup>144</sup> This is in order to secure the legitimacy of their own power and the system of the Council of Europe which purports to ensure that all Member State behaviour is in conformity with the standards required under the ECHR. This process of constituency has been conceded by both constituted and constituent powers,

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<sup>142</sup> For details of the response taken by the government to *Al Skeini v United Kingdom* (2011) EHRR 18, see: 'Responding to Human Right Judgments, Report to the Joint Committee on Human Rights on the Government Response to human rights judgments 2013-14' (Ministry of Defence, December 2014) 26-7, available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf)> last accessed 11 June 2016. In response to *R (Ali Zaki Mousa(No.2)) v Secretary of State for Defence* [2013] EWHC 2941 (Admin) the government carried out rigorous review of detaining policies in Iraq. For details see: 'Review of systemic issues arising from military operations overseas' (Ministry of Defence, 7 July 2014) available at <<https://www.gov.uk/government/publications/review-of-systemic-issues-arising-from-military-operations-overseas>> last accessed 11 June 2016. See further details on the Baha Mousa Inquiry available at <<http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/>> last accessed 11 June 2016.

<sup>143</sup> Kim Sengupta, 'MoD admits human rights breaches over death of tortured Iraqi civilian' (The Independent, 28 March 2008) available at <<http://www.independent.co.uk/news/uk/politics/mod-admits-human-rights-breaches-over-death-of-tortured-iraqi-civilian-801761.html>> last accessed 11 June 2016; South Scotland, 'Ministry of Defence makes Jason Smith Iraq heat death apology' (BBC News, 24 February 2014) available at <<http://www.bbc.co.uk/news/uk-scotland-south-scotland-26328285>> last accessed 11 June 2016.

<sup>144</sup> Tom Porter, 'UK pays out £27m in compensation to Iraqi and Afghan civilians' (International Business Times, December 24, 2015) available at <<http://www.ibtimes.co.uk/uk-pays-out-27m-compensation-iraqi-afghan-civilians-1534805>> last accessed 11 June 2016.

and is taking place within the Council of Europe, in relation to individuals situated in territories where Member States have a significant impact on interests that are enshrined under the ECHR.

The operation of the norm of democratic accountability is visible at the ECtHR. The Council of Europe forms a nexus where democratic entitlements enshrined under the ECHR are protected and secured by different institutions within the Council of Europe. Any threat or breach of democratic entitlements necessitate forms of democratic accountability. Circumstances where individuals whose democratic entitlements are breached by powerful political actors - that rely for their legitimacy on upholding those democratic entitlements - necessitate forms of democratic accountability. The ECtHR is a mechanism of democratic accountability. It is a forum where constituent actors can exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegal under the ECHR. The norm of democratic accountability is visible at the ECtHR when individuals, whose ECHR rights have been breached by Member States, bring a substantively admissible application to the ECtHR. Their applications need to trigger a right under the ECHR, be supported by evidence and concern a significant rights violation to be admissible. It does not need to be ultimately successful. Member States who engage with the ECHR system by defending their activity in the ECtHR and aim to legitimise their action in accordance with the ECHR are constituted powers. Whether they disagree with the extraterritorial application of the ECHR is irrelevant to consideration of whether they are constituted powers. They subscribe, and aim to base their legitimacy of action, upon the standards prescribed under the ECHR. They have an opportunity to shape and contest the contours of the constituency in the merits, when they argue for a particular interpretation of an ECHR obligation. The constituents equally have a voice at the merits stage in defining the contours of the constituency. Ultimately, that will be decided by an interpretation of the substance and content of the ECHR in the particular circumstances.

### 3.4. Extraterritoriality at the ECtHR

This section asks how the recommendations for strengthening democratic accountability within the Council of Europe can be translated into doctrinal indicators,

distinguishing features in existing extraterritoriality jurisprudence as progressive or regressive from a global constitutionalist perspective. According to a global constitutionalist approach, extraterritoriality rules, rules that provide for the exceptional application of the ECHR outside of the state, is no longer viable for legitimate forms of global governance. In a complex global governance system where ‘some states regularly shape the life opportunities of persons in faraway states by their daily decisions’ and actions,<sup>145</sup> democratic accountability cannot be territorially defined according to the promise of more legitimate forms of governance that underpins normative global constitutionalism. Attempts to secure democratic accountability in global governance need to be at once ambitious and modest. They need to be ambitious in defining the constituent power. The complexities of identifying who is entitled to forms of accountability towards which powerful actors need to be fully considered, especially in an evolving global governance system. Defining the constituent power through fixed territories or values creates binaries in governance which can be exploited by powerful actors to exclude constituents. Identifying the constituent power through a ‘process ... of interconnected actions/functions interacting to establish an ever-evolving definition of a group associated with the operation of governance’<sup>146</sup> is more fitting for the emerging and evolving global governance system, and ensures that binaries are not created. The underlying rationales for the norms of constitutionalism’s existence give substance to those actions and functions, making the task of identifying constituent powers more manageable.<sup>147</sup> Attempts to secure democratic accountability also need to be modest. Because of the complexities of global governance constituencies, identifying any existing mechanisms of even limited democratic accountability is necessary. Those existing mechanisms need to be used and optimised, to ensure the fulfilment of democratic purposes and the non-exclusion of relevant constituents.

Extraterritoriality at the ECtHR functions to delineate the constituency according to geographical location. This is no longer sustainable from a global constitutionalist perspective. The constituent power at the Council of Europe are those whose democratic entitlements, defined by the ECHR, have been violated by Member States,

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<sup>145</sup> Benvenisti, ‘Sovereigns as Trustees of Humanity’ (n 129) 298.

<sup>146</sup> Higgins, *Problems and Process* (n 6) 8.

<sup>147</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 4) 78-9.

and who use the ECHR system as a forum for democratic accountability in relation to those standards. The norm of democratic accountability is in operation at the ECtHR, and it indicates that people situated outside of the Council of Europe form part of that operation. Member States engage in the ECHR process to justify their activity according to ECHR standards, even when applications come from outside of the Council of Europe. Those Member States that participate in this process, form part of the operation of the norm of democratic accountability in relation to extraterritorial individuals, and form part of defining that constituent power. If Member States ignore accusations of ECHR violations, and refuse the ECtHR's jurisdiction, then perhaps the constituent power would have to be redefined. But accepting its jurisdiction and arguing that the ECHR is not extraterritorially applicable has no bearing on the constituent power. They are engaging with the process and seek to legitimise their actions according to the ECHR system. The day that Member States refuse jurisdiction to the ECtHR in instances of torture, illegal killings, prolonged detention abroad, appears entirely removed from the reality of today, where Council of Europe states seek to legitimise their actions according to treaty and other international law obligations.

From a global constitutionalist perspective, delimiting extraterritoriality through arbitrary tests of control is no longer sustainable. There needs to be a presumption against extraterritoriality in the ECtHR's jurisprudence. This means that, all other things being equal - if there is enough evidence, if the rights violation is sufficiently serious, if a right under the ECHR is triggered, if the action can be attributed to the Member State etc – there is a presumption that an application from outside the territory of the Member State is admissible. This thesis has contended that the paradox of extraterritoriality can be captured by a global constitutionalist frame. The global constitutionalist frame recommends a presumption of extraterritoriality. In order to determine whether a presumption of extraterritoriality captures the ECtHR's emerging approach, doctrinal indicators are required to trace the trajectory of the ECtHR's jurisprudence. Three existing doctrinal features of the ECtHR's extraterritoriality jurisprudence indicate a move towards a presumption of extraterritoriality: when the 'jurisdiction' threshold is lowered; when the *espace juridique* principle is no longer applied; and when Article 1 jurisdiction is conflated with attribution. The next section

examines the content of those doctrinal features of the ECtHR's jurisprudence and why they indicate a progression towards a presumption of extraterritoriality.

The 'jurisdiction' threshold refers to how much control is needed in order for the ECHR to apply extraterritorially. If there is a higher degree of control needed to meet the jurisdiction threshold, i.e. to trigger the extraterritorial application of the ECHR, then this indicates a strong presumption against extraterritoriality at the ECtHR. This doctrinal indicator is broken down into five elements. Four of those elements take account of the different ways in which the existing tests of extraterritoriality at the ECtHR, the state agent authority and control and effective control over an area tests, may indicate a presumption of extraterritoriality. Those four elements are when the state agent authority and control test is met in more factual circumstances;<sup>148</sup> when the effective control over the territory test is not applied at the exclusion of the state agent authority and control test;<sup>149</sup> and when spaces over which the effective control over the territory test triggers the ECHR, diversify and apply over smaller spaces.<sup>150</sup> It also includes an additional category where the ECtHR abandons consideration of either test: when Article 1 jurisdiction is not considered in any depth by the ECtHR.<sup>151</sup> All of these instances, which will be explored further in their application to the jurisprudence in Chapter 5, signal a lowering of the jurisdiction threshold as they increase the circumstances where the ECHR is applied extraterritorially, and lower the degree of control exercised by a state required for holding it accountable under the ECHR.

The two other doctrinal indicators, the *espace juridique* principle and conflation of Article 1 jurisdiction with attribution, refer to more specific features of the ECtHR. The *espace juridique* principle refers to the principle that the ECHR only applies

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<sup>148</sup> See e.g. *Issa v Turkey* (2005) 41 EHRR 27; *Al Skeini* (n 142) *Jaloud v Netherlands* App No 47708/08 (ECtHR, November 2014).

<sup>149</sup> See e.g. *Loizidou v Turkey (preliminary objections)* (1995) Series A no 122; *Banković v Belgium* ECHR 2001-XII 333; *Al Skeini* (n 142).

<sup>150</sup> See e.g. *Al-Saadoon v UK* (2010) 51 EHRR 9 para 83; *Medvedyev v France* (2010) 51 EHRR 39 paras 66-7; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.

<sup>151</sup> See e.g. *Nada v Switzerland* (2013) 56 EHRR 18.

within the territory of the Council of Europe.<sup>152</sup> Disallowing the application of the ECHR outside of the Council of Europe runs contrary to the global constitutionalist perspective. A presumption of extraterritoriality is indicated if the ECtHR abandons the *espace juridique* principle or specifically limits its application. The conflation of Article 1 jurisdiction with attribution involves asking whether the ECtHR applies traditional extraterritoriality tests – state agent authority and control and effective control over an area tests - or whether the ECtHR is focusing on the question as to who should be held accountable.<sup>153</sup>

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.<sup>154</sup> 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 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’ or ‘custody’<sup>155</sup> 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 time<sup>156</sup> or whether a particular space, such as a prison or boat constitutes a ‘territory’ for the

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<sup>152</sup> See e.g. *Banković* (n 149) para 80; *Al Skeini* (n 142) para 141; Marko Milanovic, ‘Al Skeini and Al Jedda’ (2012) 23 (1) EJIL 121, 125; Conal Mallory, ‘European Court of Human Rights Al Skeini and Others v United Kingdom (Application No 55721/07) judgment of 7 July 2011’ (2012) 61(1) ICLQ 301, 303.

<sup>153</sup> See e.g. *Loizidou (preliminary objections)* (n 149); *Banković* (n 149); *Ilascu v Moldova and Russia* (2005) 40 EHRR 46; *Catan v Moldova and Russia* (2013) 57 EHRR 4; *Jaloud* (n 148); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Policy and Practice* (OUP 2011) 41-52.

<sup>154</sup> See further: Jane Rooney, ‘The Relationship between Jurisdiction and Attribution after *Jaloud v Netherlands*’ (2015) 62 NILR 407, 408-9.

<sup>155</sup> *Öcalan v Turkey* (2005) 41 EHRR 45 para 93; *Al Skeini* (n 142) para 138.

<sup>156</sup> *Issa v Turkey* (2005) 41 EHRR 27 para 75.



purposes of that test.<sup>157</sup> 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 models of extraterritoriality based on control over an individual or an area are no longer applicable. The location of an individual no longer constitutes a barrier to accountability under the ECtHR.

Those three doctrinal indicators are applied in Chapter 5 to determine whether the ECtHR's jurisprudence is moving towards a presumption of extraterritoriality, and can therefore be captured by the global constitutionalist frame.

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<sup>157</sup> *Medvedyev* (n 150) paras 66-67; *Al-Saadoon* (n 150) para 88.

### 3.5. Conclusion

Global constitutionalism is a ‘tried and tested’ method of domestic governance and a ‘faithful servant of legitimacy’ capable of accounting for - and suggesting ways of filling - legitimacy gaps which have opened up in a Post-Westphalian world. Political constitutionalism calls upon governance to be based on politically changeable and controllable means through ordinary, politically accountable decision-making. Law and politics should not be viewed as competing values in opposition to one another, but as complementary or mutually reinforcing. The political aspect is that a constitutionalist governance system is governed by and for the benefit of a constituent body, while the rule of law still forms an important part of the operation of that political system. A model of constitutionalism which can accommodate multiple and overlapping constituencies is required. A constituency can be identified through a process of interconnected actions/functions interacting, to establish an ever-evolving definition of a group associated with the operation of governance. The combination of norms of the rule of law, democracy and separation of powers identifies the parameters of the constituency. The underlying rationales for the norms of constitutionalism’s existence are linked to an identifiable group whose relations are moderated by those norms.

The operation of the norm of democratic accountability is visible at the ECtHR. The Council of Europe forms a nexus where democratic entitlements enshrined under the ECHR are protected and secured by different institutions within the Council of Europe. The ECtHR is a mechanism of democratic accountability. It is a forum where constituent actors can exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegal under the ECHR. The norm of democratic accountability is visible at the ECtHR when individuals, whose ECHR rights have been breached by Member States, bring a substantively admissible application to the ECtHR. Member States who engage with the ECHR system by defending their activity in the ECtHR and aim to legitimise their action in accordance with the ECHR are constituted powers.

According to a global constitutionalist approach, extraterritoriality rules, rules that provide for the exceptional application of the ECHR outside of the state, are no longer

viable for legitimate forms of global governance. Extraterritoriality at the ECtHR functions to delineate the constituency according to geographical location. From a global constitutionalist perspective delimiting extraterritoriality through arbitrary tests of control is no longer sustainable. This thesis has contended that the paradox of extraterritoriality can only be captured by a global constitutionalist frame. The global constitutionalist frame recommends a presumption against extraterritoriality. Three existing doctrinal features of the ECtHR's extraterritoriality jurisprudence indicate a move towards a presumption against extraterritoriality: when the 'jurisdiction' threshold is lowered; when the *espace juridique* principle is no longer applied; and when Article 1 jurisdiction is conflated with attribution. Those indicators will be applied in Chapter 5 to determine whether the global constitutionalist frame captures the ECtHR's emerging approach to extraterritoriality. Further issues remain present in this constitutionalist approach including the rule of law. The analysis now moves to look at the rule of law: its relationship with the norm of democratic accountability and further guidance on a model for extraterritoriality.

## 4. A Global Constitutionalist Approach: The Rule of Law

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### 4.1. Introduction

This chapter examines the rule of law within a constitutionalist setting in order to assess how the ECtHR should manage norm conflicts arising from the extraterritorial application of the ECHR, and its place within an international legal system.

The rule of law's role in supporting constitutionalism's political function of connecting constituted and constituent powers is examined.<sup>1</sup> This is to ensure that the global constitutionalist frame enables the legal question of norm conflicts to be informed by both political and legal considerations within the constitutionalist setting. The regulation of extraterritoriality and norm conflicts should not be bifurcated, nor should each be considered as respectively political and legal matters. The corroboration of constitutionalist norms breaks down the political/legal dichotomy and enables for matters relating to admissibility and the merits to be dealt with coextensively.

As the focus of this thesis is the ECtHR's ability to conform to a global constitutionalist approach, and as the ECtHR is an international human rights court, this chapter analyses the role that international courts play in upholding the rule of law in global governance, rather than policy-makers, states, or domestic courts. An examination of the phenomenon of fragmentation is indispensable for understanding the role and challenges faced by international courts in global governance. Fragmentation refers to the branching out of various aspects of the international legal regime, gaining some form of quasi-independence and 'self-containment'.<sup>2</sup>

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<sup>1</sup> Christian Tomuschat, 'Obligations Arising for States Without or Against their Will' (1993-IV) 241 Rec Des Cours 219; Martin Loughlin, *Swords and Scales: An Examination of the Relationship Between Law and Politics* (Hart 2000) 232-3; Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 25-31.

<sup>2</sup> Jan Klabbbers, 'Setting the Scene' in Jan Klabbbers et al (eds) *The Constitutionalisation of International Law* (OUP 2009) 11. See further, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study*

International courts form an integral aspect of this global phenomenon. The extent to which the praise and charges against fragmentation are transferrable to the debate on whether international courts potentially strengthen or weaken the rule of law is examined.<sup>3</sup> Those findings may then be relevant to the ECtHR in understanding how the latter can conform with a global constitutionalist frame through its articulation of the relationship between the ECHR and other external, international conflicting standards in extraterritoriality decisions. Global constitutionalist solutions for ensuring international courts strengthen the rule of law, in light of the appraisal of fragmentation, are assessed.<sup>4</sup> In this regard, the principle of systemic integration is evaluated as a tool for enabling courts to uphold the rule of law in global governance including the strengths, weaknesses and ambiguities in its operation.<sup>5</sup> Innovative criteria for addressing purported weaknesses of the principle of systemic integration as a means of supporting the rule of law in global governance are devised.<sup>6</sup> The chapter

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Group of the International Law Commission UN Doc. A/CN.4/L.682 (April 13, 2006), as corrected UN DocA/CN.4/L.682/Corr.1 (August 11, 2006) (finalised by Martti Koskenniemi).

<sup>3</sup> Mattias Kumm, 'International Law in National Courts: the International Rule of Law and the Limits of the Internationalist Model (2003-2004)' 44 *Virginia JIL* 19, 22; Simon Chesterman, 'An International Rule of Law?' (2008) 56 *Am J Comp L* 331, 341-2; Andreas Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 69; Geir Ulfstein, 'The International Judiciary' in Jan Klabbers et al, *The Constitutionalisation of International Law* (OUP 2011) 135-147; Aoife O'Donoghue and Colin Murray, 'From Fragmentation to Constitutionalisation in the Global Legal Order' (Working Paper 2016); Anne Peters, 'Constitutional Fragments: On the Interaction of Constitutionalisation and Fragmentation in International Law' (CGC Working Paper No 2, Centre for Global Constitutionalism, University of St Andrews 2016) available at <<http://cgc.wp.st-andrews.ac.uk/files/2015/04/CGC-Working-Paper-No-2-Constitutional-Fragments.pdf>> last accessed 1 March 2016.

<sup>4</sup> Erika De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *LJIL* 611; Pasquale Vitucci and Maria Chiara Sena, 'The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values' (2009) 20(1) *EJIL* 193; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *MLR* 317; Andreas Fischer-Lescano and Günther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan JIL* 999.

<sup>5</sup> See e.g. ILC Fragmentation Report (n 2) 25-8, 206-44.

<sup>6</sup> Vassilis P Tzevelekos, 'The Use of Article 31(3)(c) VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2009-2010) 31 *Michigan JIL* 621, 632;

ultimately aims to discover the criteria that the rule of law, within a constitutionalist setting, recommends for the ECtHR in managing norm conflicts arising from the extraterritorial application of the ECHR, providing an insight into the significance of the ECHR in the international legal system, without ignoring the politics of norm conflicts.

## 4.2. The Rule of Law

The rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.<sup>7</sup>

There are two main understandings of the rule of law: formal and substantive.<sup>8</sup> A formal conception of the rule of law points to the manner in which the law was made, the clarity of norms and whether those norms are prospective or retrospective.<sup>9</sup> A substantive conception of the rule of law looks to the content of the law and requires that certain rights be protected and embodied in the law in order for a 'rule of law' to exist.<sup>10</sup> An example of a formal conception of the rule of law comes from Joseph Raz who states that laws should be prospective, stable and guided by open, general, and clear rules, an independent judiciary and access to courts.<sup>11</sup> An example of substantive rule of law is provided by Ronald Dworkin who finds that citizens have moral and political rights that ought to be enforced through positive laws.<sup>12</sup>

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Magdalene Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010); Sinead McInerney-Lankford, 'Fragmentation of International law Redux: the Case of Strasbourg' (2012) 32(3) OJLS 609.

<sup>7</sup> Edward P Thompson, *Wings and Hunters. The Origin of the Black Act* (Breviary Stuff Publications 1977) 266.

<sup>8</sup> Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PL 467.

<sup>9</sup> Ibid 467.

<sup>10</sup> Ibid.

<sup>11</sup> Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195.

<sup>12</sup> Ronald Dworkin, *A Matter of Principle* (OUP 1985) 11-32.

These categorisations can be challenged. For example, Nick Barber states that whether a law satisfies the requirement of certainty speaks directly to the substance of the law.<sup>13</sup> A preoccupation with categorising the rule of law as substantive or procedural can lead to overly simplistic results<sup>14</sup> and works upon the presumption that law provides the answers to good governance and the only question remaining is how.<sup>15</sup> It bypasses considerations of whether law operates in isolation from other mutually reinforcing norms of good governance or not, and affirms an antinomy between the operation of law and politics in particular.<sup>16</sup> Chapter 3 examined the importance of political accountability mechanisms through which constituent powers could exercise some form of control over political action in a legitimate system of governance. It also highlighted that law and politics should not be viewed as competing values, but that they can be complementary and mutually reinforcing within a constitutionalist setting.<sup>17</sup> The rule of law needs to nurture a sense of ‘trust’ in politics.<sup>18</sup> Law needs to be located in a way that facilitates the relationship between constituted and constituent powers.<sup>19</sup> Raz argues that the rule of law ‘means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of knowledge’.<sup>20</sup> The requirements of the rule of law within a constitutionalist setting are that constituted power holders’ actions are constrained by law;<sup>21</sup> and second, to ensure that power

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<sup>13</sup> Nick Barber, ‘Must Legalistic Conceptions of the Rule of Law have a Social Dimension?’ (2004) 17 *Ratio Juris* 474, 474-5.

<sup>14</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 2<sup>nd</sup> edn, 2009) 210.

<sup>15</sup> See e.g. Herbert L A Hart, *The Concept of Law* (Clarendon Law Series 3<sup>rd</sup> edn, 2012); John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> edn, OUP 2011).

<sup>16</sup> Adam Tomkins, *Our Republican Constitution* (Hart 2005) 13.

<sup>17</sup> Martin Loughlin, *Swords and Scales* (n 1) 232-3.

<sup>18</sup> *Ibid* 194.

<sup>19</sup> Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22(1) *OJLS* 157, 172.

<sup>20</sup> Raz, *The Authority of law* (n 14) 210 citing Friedrich von Hayek, *The Road to Serfdom* (Routledge 2<sup>nd</sup> edn 2001).

<sup>21</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 31.

exercised through the rule of law is not exercised arbitrarily, requiring the provision of clear and consistent rules.<sup>22</sup>

From a global constitutionalist perspective, legalisation is considered as evidence of an emerging rule of law in global governance.<sup>23</sup> The rule of law is considered a substitute to governance through force whereby law curtails abuses of power<sup>24</sup> and establishes non-violent mechanisms for resolving political disputes. In a constitutional setting the rule of law maintains that ‘law, not power, prevails and underpins other values that follow in the constitutional order, including divisions of power and democratic legitimacy’.<sup>25</sup> The rule of law, alongside democratic accountability, is a link between constituent and constituted power holders.<sup>26</sup> Law focuses on constraining the action of constituted power holders and the exercise of authority is contained within the realms of law.<sup>27</sup> For Tomuschat, ‘a legal community presupposes as a minimum that the relationships between its members be defined by law so that it does not confine itself to a purely factual juxtaposition of the individual actors’.<sup>28</sup> The idea that constituted power should be subjected to law does not deny that some aspects of governance should be independent of the law as it is important that the rules governing both constituted and constituent power can be changed if that is what is wanted by those who form part of the constituency.<sup>29</sup> Following from the Republican constitutionalism espoused Tomkins, an exclusive or predominant reliance on law denies contestation and presupposes that there is an identifiable way of knowing what

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<sup>22</sup> Ibid 25.

<sup>23</sup> Paulus, ‘The International Legal System as Constitution’ (n 3) 99; O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 24; Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures’ (2006) 19(3) LJIL 579, 586. This is echoed in literature that conversely argues that there is a ‘deliberate and gradual disappearance of the rule of law’ and ‘its substitution with the rule of power’ by states who support humanitarian intervention: Mariano J Aznar-Gómez, ‘A Decade of Human Rights Protection by the Un Security Council: A Sketch of Deregulation?’ (2002) EJIL 223, 224.

<sup>24</sup> See e.g. Kumm, ‘International Law in National Courts’ (n 3) 24.

<sup>25</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 27.

<sup>26</sup> Ibid 24.

<sup>27</sup> Ibid 31.

<sup>28</sup> Tomuschat, ‘Obligations Arising for States Without or Against their Will’ (n 1) 219.

<sup>29</sup> Andrea Bianchi, ‘Ad-hocism and the Rule of Law’ (2002) 13 EJIL 263.



everyone does and should want.<sup>30</sup> Law serves an important function in linking constituent with constituted powers, through which the norm of democratic accountability can operate effectively. It constrains power and provides a framework which enables constituents to know the laws through which they are governed and contest constituted power activity according to those laws. According to his understanding of the rule of law, the ECtHR should have a clear line on how it intends to manage norm conflicts arising from extraterritoriality rather than leaving it as ambiguous. A clear approach enables applicants to know on what basis, or whether they ought to at all, bring an application to the ECtHR, whilst ensuring Member States know when they are acting in conformity with their ECHR obligations, and enabling them to defend their actions according to those standards.

Jan Klabbbers states that ‘constitutionalization entails something else than “legalization”’.<sup>31</sup> While legalisation is appropriate for describing the increasing number of treaties and for the creation of courts, ‘a very dense web of obligations and courts is still compatible with a Westphalian, non-constitutional order’.<sup>32</sup> Klabbbers challenges those who believe that law and courts do play a central role in constitutionalisation to articulate their reasons for doing so, as it is not a foregone conclusion. International courts can play a significant role in subjecting constituted power to law. Dicey emphasises the judiciary as a body which can enforce the rule of law and check that executive power is subject to the law<sup>33</sup> and Raz also emphasises that an independent judiciary and access to courts is paramount to the rule of law.<sup>34</sup> In international legal discourse, Henkin contends that most states obey most tenets of international law almost all of the time, without much judicial enforcement.<sup>35</sup> The reasons for general obedience include that states have an interest in being regarded as members of international society in good standing; that they can reap the benefits of

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<sup>30</sup> Tomkins, ‘In Defence of the Political Constitution’ (n 19) 162.

<sup>31</sup> Klabbbers, ‘Setting the Scene’ (n 2) 3.

<sup>32</sup> Ibid.

<sup>33</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 8th edn 1915) 198-9.

<sup>34</sup> Joseph Raz, *Ethics in Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 373-4.

<sup>35</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press 2<sup>nd</sup> edn 1979) 47.

international cooperation; international obligations can at times exert a moral pull on domestic publics; and international law can serve as a bulwark against majoritarianism domestically.<sup>36</sup> However, without accessible accountability mechanisms, there is no means by which to ascertain whether different state actors actually conform with international law standards. This indicates that, contrary to the assertions made by Henkin, the ECtHR may play a role in supporting the rule of law by holding a Member State accountable through contestation, sanctions and mandatory action.

The rule of law requires non-arbitrary exercise of power<sup>37</sup> and that law should not facilitate the arbitrary exercise of power.<sup>38</sup> Constituted power may not be exercised ‘arbitrarily and therefore the law must be prospective, accessible and clear; the law must apply to the [constituted power] with an independent institution such as a judiciary to apply the law in specific cases; and the law must apply equally to all’.<sup>39</sup> Law does not only constrain power but also can act as a source of power. Whether courts can have a minimal role if any in making the production of the law more equitable is improbable.<sup>40</sup> However, courts can clarify the law, creating transparency and access to the law for constituent and constituted power holders.<sup>41</sup> Clarity enables constituents to more effectively challenge constituted powers’ activity according to clearly defined rules.<sup>42</sup> Clear and consistent rules enable the governed to more effectively participate in their own governance, by improving constituents’ ability to challenge state behaviour according to the rules to which the governing power are meant to adhere.<sup>43</sup> Following from this analysis, the ECtHR’s adjudication has some

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<sup>36</sup> See e.g. Harold Hong ju Koh, ‘Why do Nations Obey International Law?’ (1977) 106 Yale L J 2599.

<sup>37</sup> Jeremy Waldron, ‘The Rule of Law in Contemporary Liberal Theory’ (1989) 2 *Ration Juris* 79, 82-84.

<sup>38</sup> See e.g. Arthur L Goodhart, ‘Rule of Law and Absolute Sovereignty’ (1957) 106 *University of Pennsylvania LR* 943, 943.

<sup>39</sup> Chesterman, ‘An International Rule of Law?’ (n 3) 341-2.

<sup>40</sup> For a discussion of the limited law-making capacity that the ICJ accords to itself see, Gleider I Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 85-93, Chapters IV and VI.

<sup>41</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 25.

<sup>42</sup> Christine Overvest and Jonathan Zectlin, ‘Assembling an Experimentalist Regime: Transnational Governance Internations in the Forest Sector’ (2012) 6 *Regulation and Governance* 1, 3.

<sup>43</sup> O’Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 25.

bearing on upholding the rule of law and in relation to managing norm conflicts in extraterritoriality decisions, it should provide some degree of clarity in its approach for mediating the relationship between constituent and constituted powers.

### 4.3. Fragmentation: Enhancing and Undermining the Rule of Law

An engagement with the phenomenon of fragmentation is indispensable for conceptualising the role that an international court, like the ECtHR, plays in strengthening and weakening the rule of law in global governance. This section investigates the relationship of fragmentation with the rule of law and whether it strengthens or weakens the latter. The place of international courts in fragmentation provides further understanding of whether and how the ECtHR can strengthen, weaken or have no effect, on the rule of law in its extraterritoriality decisions.

#### 4.3.1. Fragmentation Enhances the Rule of Law

Fragmentation refers to the branching out of international legal regimes and adjudicatory bodies set up to implement those regimes.<sup>44</sup> In 1918, Francis Pollock argued for a League Covenant ‘whose binding force must depend on the renouncement by every party to it, in some measure, of independent sovereign power, and in particular of the right to be a judge in one’s own cause’.<sup>45</sup> Although states refused to grant the Permanent Court of International Justice compulsory jurisdiction, the League Covenant was a step towards instantiating the ‘coming rule of law’:<sup>46</sup> ‘[a]ll binding promises, great or small, restrain the promisor’s freedom. That, indeed, is the essence of promise’.<sup>47</sup> International organisations and the specialisation of international law have been in existence for some time. However, the phenomena of fragmentation accelerated with the proliferation of courts and organisations after the fall of the communist bloc in 1989. For example, the Rio Conventions and numerous hard and

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<sup>44</sup> Klabbers, ‘Setting the Scene’ (n 2) 11.

<sup>45</sup> Francis Pollock, *The League of Nations and the Coming Rule of Law* (OUP 1928) 5. For more information on the history of international organisations see: Jan Klabbers, *An Introduction to International Organisations Law* (CUP 2015) 16-8.

<sup>46</sup> *Ibid* 3.

<sup>47</sup> Albert F Pollard, *The League of Nations: An Historical argument* (OUP 1918) 6.

soft environmental instruments were adopted in 1992.<sup>48</sup> The United Nations Convention on the law of the Sea (UNCLOS) came into force in 1994, and the Rome Statute of the International Criminal Court in 2002.<sup>49</sup> Membership to existing treaty bodies, such as the International Centre for Settlement of Investment Disputes (ICSID) and the ECHR accelerated during the 1990s.<sup>50</sup> The ECtHR transformed into a permanent Court with direct access for individuals in 1998. The World Trade Organisation (WTO) was founded in 1996. Stefan Talmon labelled the UNSC as a world legislature following a resurgence of activity in the organisation after the events of 9/11, contributing to the fragmentation of general international law.<sup>51</sup> International human rights courts expanded from Europe and the Americas to Asia, the Middle East and Africa.<sup>52</sup>

There is support for the proposition that the proliferation of international courts strengthens the rule of law as it provides greater oversight and enforcement of constituted power activity.<sup>53</sup> The deficiency of the rule of law in international affairs is, in the first place, 'due not to a lack of rules but to a lack of adjudication of those

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<sup>48</sup> Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; 31 ILM 818; United Nations Convention to Combat Desertification (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3; [2000] AJIS 18; 33 ILM 1328; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; 31 ILM 849.

<sup>49</sup> United Nations Convention on the law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; [1994] ATS 31; 21 ILM 1261 (1982); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF183/9.

<sup>50</sup> For example, large numbers of Eastern European and South American states signed up to ICSID in the 1990s. See further, 'Database of ICSID Member States' (ICSID) available at <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>> last accessed 1st March 2016. Many Eastern European states joined the Council of Europe in the 1990s. See further 'Our member States' (Council of Europe) available at <<http://www.coe.int/en/web/about-us/our-member-states>> last accessed 13 July 2016;

<sup>51</sup> Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175.

<sup>52</sup> See e.g. The Arab Charter on Human Rights (entered into force 18 March 2008) 12 IHRR 893 (2005). The Arab Charter is implemented by the Arab Human Rights Committee; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986); The African Court on Human and Peoples' Rights came into being on 25 January 2005.

<sup>53</sup> Chesterman, 'An International Rule of Law?' (n 3) 359. See further William W Bishop, 'The International Rule of law' 59 Michigan LR 553 (1961).

rules'.<sup>54</sup> The rule of law is realised to the extent that states do in fact obey the law and that enforcement of law by both international and national courts can increase the likelihood of state compliance.<sup>55</sup> These statements indicate that the further judicialisation of international law from fragmentation leads to a strengthening of the rule of law. For O'Donoghue and Murray, courts are 'bellwethers' of their respective legal orders. The proliferation of courts represents a move away from protecting interests of states as 'ad hoc consensual forms of dispute settlement' to one where 'constituent and constituted power holders within a system accept adjudication' as a viable method of dispute resolution.<sup>56</sup> In a similar vein, Geir Ulfstein recognises that the plurality of international tribunals has advantages for global governance. First, it enables new tribunals to be established that can represent interests that are otherwise underrepresented. Second, it facilitates examination of similar cases from different angles broadening perspective on a given factual circumstance. When international tribunals take into account decisions of other courts they have a more rounded and informed perspective.<sup>57</sup> Overdvest and Zectlin argue that accountability is increased by the existence of more and 'new opportunities for dissatisfied parties to challenge existing rules'.<sup>58</sup>

While many see fragmentation as a positive development, others are ambivalent, arguing 'we should not exaggerate the phenomenon of fragmentation'.<sup>59</sup> Koskenniemi and Leino consider that anxiety expressed by the ICJ judges has less to do with concerns about the coherence of the international legal order and more to do with the overshadowing of principles of diplomatic law and the ICJ's centralised role in making authoritative decisions on international law.<sup>60</sup> Tomer Brode, in his reading of

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<sup>54</sup> Paulus, 'The International Legal System as a Constitution' (n 3) 99.

<sup>55</sup> Kumm, 'International law in National Courts' (n 3) 22.

<sup>56</sup> O'Donoghue and Murray, 'From Fragmentation to Constitutionalisation' (n 3) 1.

<sup>57</sup> Ulfstein, 'The International Judiciary' (n 3) 141.

<sup>58</sup> Overdvest and Zectlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (n 43) 3.

<sup>59</sup> Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791, 791.

<sup>60</sup> Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553.

Koskenniemi,<sup>61</sup> recognises that insofar as fragmentation arises in response to ‘new technical and functional requirements’ it pushes utopian demands from international law, pushing it to fulfil expectations of its ability to regulate certain interests but he also identifies that fragmentation is something which states ‘do’ in order to further their own ends.<sup>62</sup> Broude argues that the tension between utopian demands and fragmentation as a tool to be used for political ends is what makes it normal: it is no different, no better and no worse than international law: ‘the fragmentation of law is the epiphenomenon of real-world constitutional conflicts, as legal fragmentation is – mediated via autonomous legal regimes – a legal reproduction of collisions between the diverse rationalities within global society’.<sup>63</sup>

The significance of fragmentation should not be entirely overlooked in an attempt not to exaggerate it. While the proliferation of law may be something that states ‘do’ for their own political ends, states’ political actions are checked by courts that administer the legal regimes founded on state consent. Fragmentation may serve as another tool adopted by states to manipulate the global governance system, but it also has effects that strengthen the rule of law. With the proliferation of international courts, there is increased likelihood of enforcement of legal obligations and accountability. Courts defend actors other than states, whose interests would otherwise go underrepresented, thus increasing inclusivity of actors within the global governance system. The ECtHR forms part of this fragmented network that constrains constituted power action and diversifies actors involved in global governance. Fragmentation should be understood as enhancing the rule of law insofar as it provides more forums for contestation of state action by affected actors.

#### 4.3.2. Fragmentation and Law-Application: Undermining the Rule of Law

Fragmentation in law-making should be distinguished from fragmentation in law-application.<sup>64</sup> Anne Peters argues that ‘[t]he political process of developing

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<sup>61</sup> Tomer Broude, ‘Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law’ (2013) 27(2) *Temple Int’l and Comp L J* 279.

<sup>62</sup> *Ibid* 286.

<sup>63</sup> *Ibid* 286-7.

<sup>64</sup> Peters, ‘Constitutional Fragments’ (n 3) 6.

international (treaty) law results in fragmented law, either for lack of political agreement on inter-regime relations, or due to hegemonic interest or powerful law-making states'.<sup>65</sup> Fragmentation can also arise due to negligence. It can arise from a lack of initiative by law-makers to talk to each other and comprehensively regulate a particular issue.<sup>66</sup> Aside from good, bad or no intentions, fragmentation in law-making can arise due to concerns of expediency. A new normative framework may be put in place to regulate a certain set of factual circumstances, but due to the concern of relative expediency, no time is taken to consider how the new rules will conflict with other pre-existing legal frameworks. The present section confines its analysis to fragmentation arising from law-application.<sup>67</sup> It is this fragmentation which is relevant to the question of how to regulate norm conflicts resulting from the extraterritorial application of the ECHR. While the ECtHR can incrementally develop ways of managing norm conflict through law application, a much more wholesale, root-and-branch development is beyond the scope of this thesis.

Fragmentation from law-application can have deleterious effects on the rule of law by creating incoherency and inconsistency in the international legal order. Chesterman has noted that a multitude of decentralised courts creating uncoordinated authoritative decisions could undermine one of the central tenets of the rule of law: clarity.<sup>68</sup> Paulus has stated that '[i]nternationally, the rule of law [is]...permanently threatened by the lack of comprehensive judicialisation'.<sup>69</sup> He finds that the success of international adjudication will depend on an atmosphere of mutual deference and respect between

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<sup>65</sup> Ibid.

<sup>66</sup> See e.g. Harro van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersections of the Climate and Biodiversity Regimes' (2002) 44 *International Law and Politics* 1205.

<sup>67</sup> For further critique of fragmentation arising from the law-making process see Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *LJIL* 1; Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007-2008) 60 *Stanford LR* 595.

<sup>68</sup> Chesterman, 'An International Rule of Law?' (n 3) 359.

<sup>69</sup> Paulus, 'The International Legal System as a Constitution' (n 3) 98.

courts and tribunals.<sup>70</sup> ICJ judges have expressed concerns that the coherency of the international legal system is under threat:

The assumption is that there are discrete subjects, such as ‘international human rights law’ or ‘international law and development’. As a consequence the quality and coherence of international law as a whole are threatened... A further problem arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination...there may be serious conflicts and tensions between the various programmes or principles concerned.<sup>71</sup>

Whilst welcoming the increase in adjudicatory bodies, President Schwebel’s 1999 speech to the General Assembly expressed a concern that there might be ‘substantial conflict among them, and evisceration of the docket of the International Court of Justice [ICJ],’ advising that there should be a facility whereby those courts could apply for an advisory opinion from the ICJ which might be important to the ‘unity of international law’.<sup>72</sup> In 2000 and 2001, Judge Guillaume also expressed concern about forum shopping and a rise in conflicting jurisprudence, also advocating for the ICJ to serve an advisory function to other international tribunals in these circumstances.<sup>73</sup> For Ulfstein ‘[t]he hierarchical order of national courts shall serve the finality, consistency, and implementation of the courts’ decisions, in short the effective constitutional function of the judiciary’.<sup>74</sup> But he recognises that international tribunals are not organised in a hierarchical order. He proposes horizontal integration and/or a vertical international judiciary comparable to national constitutional

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<sup>70</sup> Ibid 99; Anne Marie Slaughter, ‘A Global Community of Courts’ (2007) 44 Harvard ILJ 191.

<sup>71</sup> Ian Brownlie, ‘The Rights of Peoples in Modern International Law’ in James Crawford (ed) *The Rights of Peoples* (Clarendon Press Oxford 1988) 1, 15.

<sup>72</sup> Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 26 October 1999. The speeches of the Presidents of the ICJ since 1993 available at <<http://www.icj-cij.org/icjwww/ipresscom/iprstats/htm>> last accessed 8 January 2015.

<sup>73</sup> Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000; Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001.

<sup>74</sup> Ulfstein, ‘The International Judiciary’ (n 3) 135.



structures with the ICJ at the apex. Other courts could be given the possibility of requesting preliminary rulings from ICJ, comparable to system between national courts and ECJ. He notes that the UN High Commissioner for Human Rights has proposed to replace existing human rights treaty bodies with a unified treaty body or even a World Court of Human Rights.<sup>75</sup> However, he acknowledges that general redesign of the international judicial architecture would probably not receive political support.

Three potential problems of fragmentation include overlapping jurisdictions between different tribunals,<sup>76</sup> conflicts between and inconsistencies in their decisions, and the threat to subject matters that do not have their own judicial institutions.<sup>77</sup> The *MOX Plant* case demonstrates the challenges arising from overlapping jurisdictions of courts and legal regimes.<sup>78</sup> The dispute was between Ireland and the UK on the disposal of radioactive waste from recycling plutonium. Ireland brought a case before the arbitral tribunal on the basis of the Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention). It instituted proceedings before an arbitral tribunal provided in Annex VII to UNCLOS. The question was raised whether Ireland had the competence to bring such a case before an international tribunal under EC law. The arbitral tribunal deferred proceedings until the then ECJ had expressed its opinion.<sup>79</sup> The ECJ found it had exclusive jurisdiction. Ireland had no right to bring a case before dispute settlement mechanisms of UNCLOS.<sup>80</sup> Therefore, this particular decision did lead to a final decision. The OSPAR arbitral tribunal yielded to the

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<sup>75</sup> Geir Ulfstein, 'Do we need World Court of Human Rights?' in Ola Engdahl and Pål Wrange (eds), *Liber Amicorum Ove Bring*, (Martinus Nijhoff Publishers, 2008) 261.

<sup>76</sup> Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Australian YBIL 191.

<sup>77</sup> Ulfstein, 'The International Judiciary' (n 3) 135.

<sup>78</sup> *The MOX Plant Case (Ireland v the United Kingdom)*, (Provisional Measures Order of 3 December 2001), ITLOS Case No 10; *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, Permanent Court of Arbitration, Final Award 2 July 2003; *The MOX Plant Case*, Permanent Court of Arbitration Order No 3, 24 June 2003; Case 459/03, *Commission of the European Communities v Ireland*, Judgment of the Court (Grand Chamber) 30 May 2006.

<sup>79</sup> *The Mox Plant Case (Ireland v the United Kingdom)* (n 79).

<sup>80</sup> *Commission of the European Communities v Ireland* (n 79).

decision of the ICJ. However, it illustrates potential dangers arising from overlapping jurisdictions.

Ulfstein argues that overlapping jurisdictions may lead to forum shopping and no finality to a decision.<sup>81</sup> However, he identifies numerous ways of deciding which forum's decision is decisive and mechanisms which set out in advance means for establishing which forum will decide a case when there are numerous bodies that have jurisdiction over the matter.<sup>82</sup> For example, the relationship between a general and specialised treaty is usually regulated in the rules of the specialised tribunal.<sup>83</sup> Where there are no rules in place to determine which mechanism should be able to make the final decision on proceedings, the principle of *res judicata*,<sup>84</sup> litispendence,<sup>85</sup> and a duty to cooperate<sup>86</sup> can help mitigate overlapping jurisdiction concerns. Where there are no formal mechanisms or rules for deciding which court has jurisdiction other than a court's own applicability rules, there can be informal methods by which one body decides to yield to another's decision.<sup>87</sup> Problems arising from overlapping jurisdictions can therefore be alleviated through the existence of formal regulatory provisions in the treaties themselves, principles of interpretation and doctrines employed by the courts themselves, and informal practice amongst courts, through yielding to other court decisions.

Yuval Shany is concerned that subject matters that do not have their own tribunals promoting their own special interest may be under threat of not being represented properly in special tribunals promoting other interests.<sup>88</sup> Conversely, the benefits for the underrepresented regime of taking into account an external international law in

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<sup>81</sup> Ulfstein, 'The International Judiciary' (n 3) 136.

<sup>82</sup> Ibid 136-9.

<sup>83</sup> See e.g. Article 287 UNCLOS.

<sup>84</sup> Chittharanjan Fleix Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International: The Hague 2003) 200.

<sup>85</sup> Lowe, 'Overlapping Jurisdiction in International Tribunals' (n 76).

<sup>86</sup> Jasper Finke, 'Competing Jurisdiction of International Courts and Tribunals in the Light of the MOX Plant Dispute' (2006) 49 German YBIL 307.

<sup>87</sup> *The Mox Plant Case*, Permanent Court of Arbitration (n 78).

<sup>88</sup> Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20(1) EJIL 73, 83.

any specialist regime dispute have been highlighted. At the WTO for example, in the *Shrimp-Turtle* case, the Panel had defined ‘exhaustible natural resources’ in article XX (g) of GATT so as to include only ‘finite resources such as minerals, rather than biological or renewable resources’. The Appellate Body, on the other hand, found that ‘exhaustible natural resources’ had to be interpreted in view of recent developments which included taking into account a number of different international law such as the 1992 Rio Declaration and Agenda 21, the Biodiversity Convention of 1992, and the United Nations Convention on the Law of the Sea. The Appellate Body found that ‘the generic term ‘natural resources’ in article XX (g) is not ‘static’ in its construct but is rather “by definition evolutionary”’. It reached the interpretation that all natural resources, living and non-living were included.<sup>89</sup> Because of the existence of the WTO forum, protection is afforded to ‘natural resources’ as defined by treaties such as the Biodiversity Convention which may not otherwise have any opportunity to be enforced vis-à-vis two parties to a dispute. Similarly, Françoise Hampson argues that it is beneficial for the enforcement and representation of IHL that it be taken into account in ECtHR decisions in cases concerning armed conflict abroad.<sup>90</sup> Forums that represent particular interests often end up taking into account underrepresented interests or treaties that are not equipped with their own court system of oversight, adjudication, and enforcement. All interests are arguably better represented as a result of the proliferation of international courts.

Conflicting norms of decentralised international courts and legal regimes can potentially undermine the clarity and consistency of international law.<sup>91</sup> The ILC Fragmentation Report concludes that fragmentation does not undermine the clarity and consistency of the international legal system, because international courts use interpretation techniques to overcome problems arising from norm conflicts and competing legal orders.<sup>92</sup> Likewise, Bruno Simma and Rosalyn Higgins argue that

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<sup>89</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R, DSR 1998:VII 2794-2797, paras 127-31.

<sup>90</sup> Françoise Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body’ (2008) 90 (871) *IRRC* 549.

<sup>91</sup> Ulfstein, ‘The International Judiciary’ (n 3) 139.

<sup>92</sup> ILC Fragmentation Report (n 2) 245 para 492.

judges ‘painstakingly’ aim to preserve the unity of international law.<sup>93</sup> While decisions are made and there are attempts to balance conflicting norms against each other, this does not necessarily mean that those decisions are in conformity with the rule of law. The broader implications of those decisions and whether they actually result in clarity and consistency of the international legal order need further consideration. Normative considerations must be evaluated in deciding what is the best approach from a global constitutionalist perspective.

Fragmentation can both weaken and strengthen the rule of law from a global constitutionalist perspective. Fragmentation of the international legal order enhances the rule of law by imposing further legal constraints upon, and enabling judicial oversight of, state and non-state power, through the proliferation of treaties and courts. However, fragmentation can also undermine the clarity and consistency of international law, both through law-making and law-application. In relation to international courts, there are concerns that fragmentation gives rise to forum shopping, conflicting jurisprudence and underrepresentation of interests which are not enforced by their own specialist court system. This section found that problems arising from overlapping jurisdictions can be alleviated through the existence of formal regulatory provisions in treaties themselves, principles of interpretation and doctrines employed by courts, and an informal practice amongst courts yielding to other court decisions. Problems of conflicting jurisprudence and underrepresentation of interests can be limited by specialist regime courts taking into account external international law. The next section addresses ways in which external international law can be to be considered by a court in a way that does not paradoxically undermine either the interest protected by the specialist regime or the interest protected under the external law.

#### 4.4. A Global Constitutional Approach to Fragmentation

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<sup>93</sup> Bruno Simma, ‘Fragmentation in a Positive Light’ 25 Michigan JIL 2003-2004 845, 846; Higgins, ‘A Babel of Judicial Voices?’ (n 59) 795.

If anyone were to propose a pairing of phrases to characterise current developments in international law, the smart money would surely be on constitutionalisation and fragmentation.<sup>94</sup>

Many global constitutionalists attempt to provide methods for overcoming incoherency arising from fragmentation. An analysis of global constitutionalist theories will both illuminate the challenges, as well as point toward solutions, to managing conflicting jurisprudence which can be used by the ECtHR in its extraterritoriality decisions. Global constitutionalists have proposed various methods to assist courts in counteracting the purported incoherence that may arise from conflicting norms and jurisprudence.<sup>95</sup> Johannes van Mulligen argues that '[c]onstitutionalism's anti-fragmentational virtue may indeed be said to represent its prime rationale, impetus, and driving force'.<sup>96</sup> This section explores two main methods of managing norm conflicts. Constitutionalism offers 'hierarchy...or...a set of coordinating mechanisms' in response to incoherency created by fragmentation of the international legal order.<sup>97</sup> This section discusses theories of global constitutionalism that advocate hierarchies based on Article 103 of the UN Charter, *jus cogens* and human rights and the role that courts can play in enforcing those hierarchies. It asks whether an international legal order governed by fixed values is desirable and whether it can effectively solve problems of inconsistency in the international legal order. It then evaluates alternative 'coordinating mechanisms' put forward by theories of constitutional pluralism, social constitutionalisation, and what some refer to as the 'constitutionalist' principle of systemic integration, all of which rely on adjudicatory mechanisms for instantiating those coordinating mechanisms. This section ultimately attempts to suggest a method by which the ECtHR can manage

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<sup>94</sup> Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organisations LR* 31.

<sup>95</sup> Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalism' in Jeffrey L Dunoff and Joel P Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 5, 6; Ignacio De la Rasilla del Moral, 'The Unsolved Riddle of International Constitutionalism' (2010) 12 *International Community LR* 81, 86; Thomas Cottier and Maja Hertig, 'The Prospects of 21<sup>st</sup> Century Constitutionalism' (2003) 7 *Max Planck Yearbook of the United Nations* 261.

<sup>96</sup> Johannes G van Mulligen, 'Global Constitutionalism and the Objective Purport of the International Legal Order' (2011) 24 *LJIL* 277, 284.

<sup>97</sup> Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2013) 251.

norm conflicts arising in its extraterritoriality decisions between the ECHR and external international law.

#### 4.4.1. The UN Charter, jus cogens and human rights

Theories that rely on fixed norms to create an international value system were addressed in Chapter 3 and criticised on the grounds that a constitutionalist system based upon unassailable fixed values is neo-imperialist, those fixed values are very limited and contested in nature, and they are deeply political and therefore bound to fail.<sup>98</sup> This section considers not whether the entire global constitutionalist governance system should be conceived around those values, but whether they can provide guidance on resolving particular norm conflicts that arise before international courts in the context of fragmentation and the rule of law.

The UN Charter is considered to give expression to a hierarchy of norms by global constitutionalists such as Fassbender.<sup>99</sup> Pasquale de Sena and Maria Chiara Vitucci support the argument that international courts should enforce the hierarchy developed in the UN Charter. They observe that a number of different courts implement values inherent in the UN legal order in accordance with George Scelle's theory of relations between legal orders.<sup>100</sup> They translate Scelle's theory of legal relations - which purports to regulate the relationship between international and national law - to understand the relationship between different specialist and regional legal regimes in the international legal order. For them, the UN Charter is the "droit intersocial"... destined naturally to prevail over the legal orders of the societies under it... on account of its being the expression of a broader society (the international society) the legal values of which thus have broader scope'.<sup>101</sup> De Sena and Vitucci find that courts 'act

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<sup>98</sup> Martti Koskenniemi 'International Law in Europe: Between Tradition and Renewal', Florence, 14 June 2004 (Keynote at the Inauguration of the European Society of Law); Klabbers, 'Constitutionalism Lite' (94) 55.

<sup>99</sup> Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia J Transnational L* 577.

<sup>100</sup> De Sena and Vitucci, 'The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values' (n 4). For a reply to Vitucci and Sena see: Gráinne de Búrca, 'The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20(3) *EJIL* 853.

<sup>101</sup> *Ibid* 213 citing George Scelle, 'Règles Générales du droit de la paix' 46 *RC* (1933) IV 331, 351.

on behalf of the UN legal order aiming specifically at facilitating the realization of values stemming from that order'.<sup>102</sup> However, they criticise decisions of the ECtHR<sup>103</sup> and the UK House of Lords<sup>104</sup> that only take into account the collective security action concerns enshrined in the UN Charter, and in particular in Article 103.<sup>105</sup> They argue that human rights interests embodied in the UN Charter should equally be taken into account.<sup>106</sup> The UN Charter is not necessarily a 'droit intersocial' at the ECtHR. The reason why the UN Charter may be considered to have the status of 'droit intersocial' is because of its universal state membership. However, the World Bank has almost universal state membership and it has not been characterised as providing a 'droit intersocial'. Furthermore, as discussed in Chapter 3, states are not representative of the interests of many actors. Furthermore, in reality, few states have the power to accord meaning and content to the UN Charter. The UN Charter should not be destined to prevail over the ECHR offhand because of its wider geographical membership. Furthermore, if a decision does not concern the ECHR and UN Charter, the Scelle approach to norm conflict resolution is no use. There needs to be a more comprehensive tool. Always prioritising an instrument with universal state membership and representing broader society, over one that aims to protect the individual against the broader society, runs contrary to creating a global governance system where powerful actors can be held accountable for illegitimate action against weaker actors.

De Wet criticises the idea that the UN Charter is the sole source of a hierarchy of norms. She argues that the UN Charter cannot be 'the constitution' of the international community because it only has State membership and states are not the only members of the international community.<sup>107</sup> It does serve an important 'linking function' or 'connecting factor' between states of which the international community is

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<sup>102</sup> Ibid 213.

<sup>103</sup> *Behrami v France* (2007) 45 EHRR SE10; *Beric v Bosnia and Herzegovina* (2008) 46 EHRR SE6.

<sup>104</sup> *Al Jedda v UK* (2011) 53 EHRR 23.

<sup>105</sup> De Sena and Vitucci, 'The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values' (n 4) 210, 214-5.

<sup>106</sup> Ibid 216-24.

<sup>107</sup> Erika De Wet, 'The International Constitutional Order' (2006) 55(1) ICLQ 62.

predominantly composed and who remain central to the legislating process.<sup>108</sup> It is a ‘linking function’ and ‘catalyst’ for an international legal order based on hierarchically superior values.<sup>109</sup> However, the international constitutionalist value system comes from outside the UN Charter and does not only comprise of the values enshrined within it. The three layers of an international constitutionalist value system proposed by De Wet are:

The first layer consists of *ius cogens* norms that by definition have *erga omnes* effect. The second layer consists of *erga omnes* norms that have evolved into customary norms, but not yet into *ius cogens* norms. In addition there is a third layer of emerging *erga omnes* norms, i.e. norms whose customary and/or *erga omnes* character are still disputed.<sup>110</sup>

De Wet believes the ECtHR can strengthen the international value system through a ‘spill-over effect’ of its own judgments. When the ECtHR interprets international law in light of human rights standards, it contributes to the enforcement of the layers of *jus cogens* and *erga omnes*.<sup>111</sup> She identifies a number of cases in which the ECtHR finds human rights normatively superior to external international law norms and that this is evidence of a move from securing human rights from *erga omnes* to *jus cogens* norms with the Council of Europe system.<sup>112</sup> The idea that the decisions of a European Court could help to stabilise the international value system could be criticised as a

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<sup>108</sup> Ibid 55.

<sup>109</sup> Ibid 57-9. She argues that Article 1(3) of the UN Charter in combination with Articles 55, 56, 62 and 68 have elevated human rights norms as core elements of the international value system.

<sup>110</sup> Ibid 62. De Wet has since added another layer: obligations under Article 103 of the UN Charter which states that UN Charter obligations prevail over other treaty obligations that states have entered into. See further: Erika De Wet, ‘The Constitutionalization of Public International Law’ in Michel Rosenfeld and Andràs Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1218.

<sup>111</sup> De Wet, ‘The Emergence of International and Regional Value Systems’ (n 4) 613. However, see Erika De Wet and Jure Vidmar, *Hierarchy in International Law* (OUP 2012) and Erika De Wet and Jure Vidmar, ‘Conflicts between international paradigms: Hierarchy versus systemic integration’ (2013) 2(2) *Global Constitutionalism* 196. De Wet and Vidmar argue that ‘courts avoid resolving norm conflicts within a paradigm of hierarchy and instead remain within a paradigm of systemic integration that is aimed at maximizing the accommodation of competing sub-regimes of public international law’.

<sup>112</sup> Ibid 617.



European imperialist approach to the making or enforcement of international law.<sup>113</sup> It also denies the importance of the Inter-American Court of Human Rights, which amongst other things, is a forerunner in rights protection relating to disappearances.<sup>114</sup> No consideration is given to the African Court on Human and Peoples' Rights, which has made significant judgements in relation to assassinations of journalists.<sup>115</sup> She does not justify why the ECtHR is more significant or able than other international human rights courts in creating a spill over effect.

While this analysis is confined to ascertaining whether the UN Charter, *jus cogens* and *erga omnes* can help with the fragmentation problem, it inevitably leads to criticisms related to those put forward in Chapter 3 even when confined to the rule of law and international courts context. Four related criticisms are posited here against the enforcement of fixed values in courts, whether founded within the UN Charter or *jus cogens* and *erga omnes* norms, in an international legal system: it is hegemonic,<sup>116</sup> simplistic, impractical and divorced from reality to enforce fixed values.<sup>117</sup> Enforcing fixed values is hegemonic because it does not allow for contestation of what values are important to people and reduces the complexities of an international legal order down to black and white rules. International law should be seen as a process rather than fixed in time by the norms enshrined under the UN Charter and *jus cogens*. The narrow civil and political focus on *jus cogens* norms should be subject to scrutiny and not taken for granted. Torture, slavery and slave trade, genocide, the prohibition of aggression are amongst those considered to be *jus cogens* norms.<sup>118</sup> Hilary Charlesworth and Christine Chinkin argue that a feminist rethinking of *jus cogens*

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<sup>113</sup> See e.g. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).

<sup>114</sup> *Velásquez Rodríguez* I/A Court HR, Judgment of 29 July 1986, Series C No 4; *Godínez I/A Court HR*, Judgment of 20 July 1989, Series C No 5; *Fairén Garbi and Solís Corcales*, I/A Court HR, Judgment of 15 March 1989.

<sup>115</sup> See e.g. *Zongo v Burkina Faso* App No 013/2011 (ACtHPR, 28 March 2014).

<sup>116</sup> Martti Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (Erik Castrén Institute of International Law and Human Rights, University of Helsinki, 2005) 5.

<sup>117</sup> Paulus, 'The International Legal System as a Constitution' (n 3) 86.

<sup>118</sup> Draft Articles on State Responsibility, Commentary on Article 40 paras 4-6 in Official Records of the General Assembly, 56<sup>th</sup> Session (A/56/10) 238-4; Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn, OUP 2003) 515.

would give prominence to a range of human rights including sexual freedom, food, reproductive rights, freedom from fear of violence and oppression, and peace.<sup>119</sup> Under these circumstances the rule of law can be manipulated into a rule by law once again.<sup>120</sup>

Even if it were desirable to enforce fixed values it is doubtful that it would be possible. Deciding who should compile the list would give rise to practical and theoretical difficulties. From a legitimate governance perspective, the list should be compiled by all stakeholders in order to secure democratic legitimacy. Otherwise, an elite group of people may get to decide, entirely detached from a great number of people who are ultimately affected by that list.<sup>121</sup> A constitution cannot (and should not) solve the value conflicts of the founding principles of a legal order but may provide mechanisms for how to balance them in cases of clash to preserve the unity of international law in spite of the absence of hierarchical order between the increasingly diverse international adjudicatory mechanisms.<sup>122</sup> There needs to be an examination of global constitutionalist theories that recognise the importance of contestation, flexibility, process, and the complexity of a global legal order, but that also insist on clarity and consistency in a fragmented legal order in accordance with the rule of law. Neil Walker's theory of constitutional pluralism,<sup>123</sup> Günther Teubner and Andreas Fischer-Lescano's theory of societal constitutionalism<sup>124</sup> and proponents of the principle of

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<sup>119</sup> Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (1993) 15 HRQ 63.

<sup>120</sup> See e.g. Martti Koskenniemi, "'The Lady Doth Protest Too Much': Kosovo and the Turn to Ethics in International Law' (2002) 65 MLR 159, 160. He questions whether the UN Charter can be a source of legitimate action, calling into question the intervention in Kosovo.

<sup>121</sup> Anne-Marie Slaughter proposes an elitist theory of global governance which similarly proposes that a group of judges and experts in exchanges and conversations with one another get to decide what is best for the rest of the world. See further, Anne-Marie Slaughter, *A New World Order* (PUP 2004).

<sup>122</sup> Paulus, 'The International Legal System as a Constitution' (n 3) 86.

<sup>123</sup> Walker, 'The Idea of Constitutional Pluralism' (n 4). For other theories of constitutional pluralism see: Joseph Weiler, *The Constitution of Europe 'Do the New Clothes have an Emperor?' and Other Essays on European Integration* (CUP 1999); Neil MacCormick, *Questioning Sovereignty? Law, State and Nation in the European Commonwealth* (OUP 1999); Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market LR 351.

<sup>124</sup> Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (n 4). For a theory of societal constitutionalism based upon the principle

systemic integration are examined as potential candidates for managing norm conflicts arising from the extraterritorial application of the ECHR.

#### 4.4.2. Constitutional Pluralism, Societal Constitutionalism and the Principle of Systemic Integration

Neil Walker sets out a number of criteria that are required in order for a constitutionalist system to be so named beyond the state.<sup>125</sup> One is that there needs to be normative coherency.<sup>126</sup> He suggests that ‘constitutionalism should be defined in a sufficiently inclusive and open-ended way as not to militate in favour of some and against other constitutional aspirations, provided those aspirations or claims meet a minimal standard’.<sup>127</sup> He states that this is part of a highly reflexive conception of democracy. He wants to provide adequate representation and reconciliation of diversity of democracy respecting interests. He asserts that a pluralist constitutionalism can achieve this. For Walker, constitutional monism encapsulates ‘the idea that the sole centres or units of constitutional authorities are states’.<sup>128</sup> Conversely:

Constitutional pluralism...recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of international law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchical rather than hierarchical.<sup>129</sup>

Walker recognises three different dimensions to the pluralist claim. First, it serves an explanatory function in recognising multiple sites of constitutional discourse and

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of ‘self-determination’ see Achilles Skordas, “Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance” in *Transnational Constitutionalism* (2007) 207.

<sup>125</sup> Walker, ‘The Idea of Constitutional Pluralism’ (n 4).

<sup>126</sup> *Ibid* 375.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid* 337.

<sup>129</sup> *Ibid*.

authority.<sup>130</sup> Second, it has a normative dimension insofar as it recognises the need for mutual recognition and respect between different constitutional claims.<sup>131</sup> Third, it recognises a ‘different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unit(ies) continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claim can be reconciled’.<sup>132</sup> He recognises that the ‘incommensurability of authority claims’ can never be more than an aspiration because of the ‘resilient distinctiveness and authoritativeness-in-the-last-instance’ of the constitutional units forming part of the multi-constitutional site of governance.<sup>133</sup> The requirement of ‘interpretative autonomy’<sup>134</sup> – the ability to have a last word on interpretation – is tied to constituent texts of the polity: ‘an interpretation of a sectorally or functionally limited text, however expansive, remains an act circumscribed by an acknowledgement of boundaries within the terms set by a particular interpretative community’.<sup>135</sup> Therefore, it is not indeterminately open-ended and it will not subsume every legal issue in the international legal order.

Walker provides a theoretical justification for acknowledging the various claims in the international legal order: that there is a reflexive democratic justification for acknowledging competing values and claims. He also calms fears of overlapping jurisdictional matters by stating that the constituent treaty limits jurisdiction. However, there is no concrete guidance for judges on what to do when norm conflicts arise. Although judges in the ‘constitutional’ courts (who are the final arbiters of the boundaries of the constituencies<sup>136</sup>) are directed to acknowledge competing claims to

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid 338.

<sup>133</sup> Ibid 339.

<sup>134</sup> Ibid 348 citing Theodor Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ (1996) 17 Harvard ILJ 389.

<sup>135</sup> Ibid 349.

<sup>136</sup> Ibid. Also see Neil Walker, ‘Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders’ (2008) 6 (3-4) Int’l J Constitutional L 373. He emphasises the role of judges in shaping the relationship between different sectoral and functional regimes, as well as in shaping the direction of the basic grid, the order-of-orders, underlying the international legal system, such as whether it moves towards further fragmentation, constitutionalisation or pluralisation.

authority, there is no guidance on when to prioritise one claim over another or how to balance them. Acknowledging competing claims of other constitutional sites may form part of a constitutionalist solution which takes normative implications seriously, but it does not represent a complete model for managing norm conflicts. There needs to be further concrete guidance on how to manage the competing authoritative claims.

Support for a fragmented system that represents different values and peoples but recognises the need to coordinate fragmented sites of governance is also seen in the work of Teubner and Fischer-Lescano.<sup>137</sup> They argue that the origins of fragmentation lie in social context rather than law which makes its challenges much more difficult to address.<sup>138</sup> Drawing upon Luhmann, they conceptualise fragmentation as taking place along ‘social sectoral lines’ resulting in collisions between distinct global social sectors.<sup>139</sup> Reducing the problem of fragmentation to norm collisions and as a detraction from the unity of public international law (legal reductionism) is a mistake.<sup>140</sup> Fragmentation must be recognised as originating from an ‘accelerated differentiation of society into autonomous social systems’ that are ‘issue specific’.<sup>141</sup> As a result, the only realistic option to combating fragmentation is to ‘develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments’;<sup>142</sup> a ‘weak compatibility between the fragments’ is all that can be hoped for.<sup>143</sup> What is of interest are ‘the external relations of these global villages; the relationships they maintain with one another and the more general relations with their environment.’<sup>144</sup>

Global functional systems create a sphere for themselves in which they are free to intensify their own rationality without regard to other social systems or,

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<sup>137</sup> Fischer-Lescano and Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (n 4).

<sup>138</sup> Ibid 1045.

<sup>139</sup> Ibid 1000 citing Niklas Luhmann, ‘Die Weltgesellschaft’ (1971) 57 *Archiv für Rechts und Sozialphilosophie* 21.

<sup>140</sup> Ibid 1002.

<sup>141</sup> Ibid 1004, 1006, 1009.

<sup>142</sup> Ibid 1004, 1017.

<sup>143</sup> Ibid 1045.

<sup>144</sup> Ibid 1006.

indeed, regard for their natural or human environment. They do this so long as they can; that is, for as long as it is tolerated by their environments.<sup>145</sup>

Legal regimes are coupled with the independent logic of the social sectors so for example, '[s]tandard contracts within the *lex mercatoria* reflecting the economic rationality of global markets collide with WHO norms that derive from fundamental principles of the health system' or the ban on the use of force has a difficult relationship with international human rights law.<sup>146</sup> The collisions are intense because of the constitutional underpinning of many of these special regimes.<sup>147</sup> Teubner and Fischer Lescano propose that in order to deal with the incompatibility between social sectors a secondary set of 'collision rules' need to be established akin to that used in conflicts law between nation states when deciding which jurisdiction to point to for a given set of legal proceedings.<sup>148</sup> It is not superior courts that provide networking answers between regimes but rather the process of legal decision to legal decision, resembling the precedent tradition, but not necessarily requiring every judgment to be binding.<sup>149</sup> Teubner and Fischer Lescano show that there is a nexus between the conflict between those interests and their manifestation in conflicting legal judgments and therefore provides a solution that operates at the level of law which means that the problem which he ends up addressing is one considering what courts can do in order to help the regimes operate compatibility in a larger system. Teubner and Fischer-Lescano acknowledge the incremental process of developing relationships between regimes that serve their own individual purposes. They also open up this system of coordination beyond constitutionalised structures. It can therefore be distinguished from Walker's analysis that only caters for sites of governance that have fully constitutionalised.

Three issues should be pointed out in relation to Teubner and Fischer-Lescano's solution to managing competing sites of governance. First, no matter whether they boast a particular claim to authority –constitutional or otherwise- regardless of size of

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<sup>145</sup> Ibid citing Niklas Luhmann, 'Die Gesellschaft der Gesellschaft' (1997) 133.

<sup>146</sup> Ibid 1013, 1014.

<sup>147</sup> Ibid 1014.

<sup>148</sup> Ibid 1021-2.

<sup>149</sup> Ibid 1039-40, 1044.

membership, or the importance of the value they protect, each sectoral regime is accorded the same weight. So for example, sports law may have the same relative importance as the regime on state use of force. Although fixed values should be avoided, there may need to be some concession made for valuing a specific regime over another in a given context. Second, Paulus finds it disingenuous to claim that subsystems develop their rules autonomously or “auto-poietically” rather than with regard to general international law, in particular when a closer look reveals that they derive their authority from international sources or state authority and not from some functionalist claim of legitimacy based on an ultimately arbitrary division between different subsystems.<sup>150</sup> Third, although Teubner and Fischer-Lescano believe that conflict rules akin to those in private law may help to mediate the relationship between sectoral regimes, there is no detail provided of their operation in practice. Therefore, similar to Walker, they leave open discussion for more concrete guidance on how to manage norm conflicts. There needs to be further direction on what ‘collision rules’ would entail that can be used as practical criteria for judges in managing norm conflicts arising from the extraterritorial application of the ECHR. A practical tool that can assist judges in mediating the relationship between different regimes is required. The tool should enable incremental development of the relationship between different sectoral orders, preserve the claims of those orders but also conserve the legitimacy of an order that holds completing claims to authority. This tool should also cater for the different sizes and normativity of those claims.

The principle of systemic integration is considered a ‘constitutional principle’ for resolving conflicts between special regimes in the international legal order.<sup>151</sup> This principle requires that a treaty be interpreted by reference to its ‘normative environment’.<sup>152</sup> It refers to a degree of integration between different legal systems by

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<sup>150</sup> Paulus, ‘The International Legal System as a Constitution’ (n 3) 84-5. See further Andreas L Paulus, ‘Comment to Andreas Fischer-Lescano and Gunther Teubner, ‘The Legitimacy of international law and the Role of the State’ (2004) 25 Michigan JIL 1047, 1051.

<sup>151</sup> Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2006) 54(2) ICLQ 280; Anne van Aaken, ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’ (2009) 16(2) Indiana J Global Legal Studies 483; Dunoff and Trachtman, ‘A Functional Approach to International Constitutionalism’ (n 95) 8.

<sup>152</sup> ILC Fragmentation Report (n 2) 208 para 413.

the norms in one system being taken into account in another system. Under this principle, the idea that all legal systems are ‘hermetically sealed’ is challenged.<sup>153</sup> Lars Veillechner states that ‘constitutionalism as an overarching framework does not only call for consistent human rights protection, but, through its rule of law component in its emanation of legal certainty and its principle of legal equality, also requires avoiding conflicting norms as far as possible’.<sup>154</sup> Koskenniemi finds that the use of the principle of systemic integration ‘illustrate[s] the constitutionalist mind set at work’.<sup>155</sup> The constitutionalist mindset requires that specialised rule systems should not be treated as independent from the rest of law: ‘il n’y a pas de hors-droit’.<sup>156</sup> The principle of systemic integration is important for a ‘constitutionalist mindset’ because ‘legal words cannot be separated from the language in which they lead their life. They operate only in the context of other legal words and of a professional grammar about how they are used in relation to each other’.<sup>157</sup> Koskenniemi finds that ‘a practice does exist of “constitutionalising” international relations by constant adjudication between rules and rule-systems, deciding on institutional powers of international bodies, and formulating legal “principles” out of scattered materials’.<sup>158</sup>

Systemic integration is an interpretation technique that requires judges to take into account the normative environment in which the rule being interpreted functions; it is the gap between rule and system.<sup>159</sup> Therefore, it does not deny the international law context from which it was born, unlike Teubner and Fischer-Lescano’s societal constitutionalism. When several norms bear on a single issue they should, to the greatest extent possible, be interpreted so as to give rise to a single set of compatible obligations. Systemic integration ‘emphasises both the “unity of international law” and the sense in which rules should not be considered in isolation of general

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<sup>153</sup> Mads Andeneas and Eirik Bjorge (eds) *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 124.

<sup>154</sup> Lars Veillechner, ‘Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalisation of Law’ (2012) 4 *Goettingen JIL* 599, 621.

<sup>155</sup> *Ibid* citing ILC Fragmentation Report (n 2).

<sup>156</sup> *Ibid* 19.

<sup>157</sup> *Ibid* 20-21

<sup>158</sup> *Ibid* 21.

<sup>159</sup> *Ibid* ILC 208 para 411.



international law'.<sup>160</sup> This unifying interpretation technique follows from the logic that 'you cannot just remove one of its fingers and pretend it is alive. For the finger to work, the whole body must come along'.<sup>161</sup>

The principle of systemic integration is potentially an effective tool for improving coherency and consistency in a global governance system within which there are potentially conflicting claims to authority. Three reasons can be noted for favouring the adoption of this constitutionalist principle. First, while theories of constitutional pluralism and societal constitutionalism justify hypothetical indices that may guide the coordination between different constitutionalised fragments, the principle of systemic integration in its application by courts and problematising by academics provides concrete solutions for managing norm conflicts.<sup>162</sup> This thesis adopts the principle of systemic integration as a tried and tested method for furthering clarity and coherence in the international legal order. Second, the principle of systemic integration does not presuppose that each international legal order operating is constitutionalised. It advocates a much more reciprocal relationship between different legal regimes as well as between legal regimes and international legal orders than that put forward by theories which presuppose a much more adversarial plurality of constitutions. It provides greater flexibility in determining the relative weight to be given to different legal regimes in particular circumstances, as is explained further in Section 4.5. Third, echoing the critique provided by Paulus that autopoietic regimes neglect that they come from international law, systemic integration is particularly suited to determining a specialist regime's relationship within international law. As will be explained below, it is enshrined in treaty and customary international law and not only aims to mediate the relationship between different specialist regimes but also situates sectoral systems within the international legal order from which those regimes were created. This is particularly important when the concept of extraterritoriality is elucidated through comparison with other fundamental concepts of international law such as jurisdiction,

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<sup>160</sup> Philippe Sands, 'Treaty, Custom and the Cross-fertilisation of International Law' (1998) 10 *Yale Human Rights and Development LJ* 3, 8.

<sup>161</sup> Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *Eur J Legal Studies* 1, 10.

<sup>162</sup> See e.g. ILC Fragmentation Report (n 2) and Section 4.5 for an exploration of the extensive adoption by courts of the principle of systemic integration.

state responsibility, and occupation. This thesis does not argue that the principle of systemic integration has or should have a significant part to play in law-creating or law-making. Whether or not this interpretation tool expands the capacity of individuals or other non-state actors such as NGOs to contribute to law-making by their involvement in international adjudication and legal argumentation is not under consideration here. However, what is relevant here is that systemic integration embodies a certain idea of a flexible democracy, akin to the one prescribed by Walker, as it enables a number of interests outside those represented in the constituent treaty of a sectoral regime to be represented. Systemic integration can act as a control for decisions that may significantly influence other areas of peoples' lives than that regulated by the constituent treaty under adjudication.

The principle of systemic integration appears to allow room for contestation, flexibility, process, and caters for the complexity of the global legal order in a way that the other global constitutionalist responses to fragmentation do not. As a tried and tested method of managing norm conflicts, it contextualises special regimes within the global legal order from which they derive, and advocates a reciprocal relationship between regimes. However, there needs to be further consideration of its status, diverse application, ambiguities and potential problems for the rule of law in order to ascertain whether it is a satisfactory global constitutionalist solution for resolving norm conflicts arising from extraterritoriality at the ECtHR.

## 4.5. Article 31(3)(c) and the Principle of Systemic Integration

Un traité ne peut être considéré isolement. Non seulement il est enraciné dans les réalités sociales, mais encore ses dispositions doivent être confrontées avec d'autres norms juridiques avec lesquelles elles peuvent entrer en concurrence.<sup>163</sup>

### 4.5.1. The principle of systemic integration

A clarification of the interpretation technique, including its status and diverse application, as well as the challenges relating to its application, such as ambiguities and concerns that it contributes to incoherency and inconsistency of the international legal order, are addressed here. This is in order to ascertain whether it is a suitable interpretation technique that could be adopted by the ECtHR in securing the rule of law in its extraterritoriality decisions.

Article 31 sets out the rules for treaty interpretation. Article 31(1) and (3) provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. ...
3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.<sup>7</sup>

Hugh Thirlway doubts 'whether this sub-paragraph [would] be of any assistance in the task of treaty interpretation'.<sup>164</sup> Judge Weeramantry, commenting on the vagueness of

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<sup>163</sup> Patrick Daillier et al, *Droit International Public* (LGJD 2009, 8<sup>th</sup> edn) 266. A treaty cannot be considered in isolation. Not only is it embedded in social reality, but also its provisions need to be evaluated against other legal norms with which it can enter into concurrence.

<sup>164</sup> Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960 – 1989: Part Three', (1991) 62 BYIL 3, 58.

Article 31(3)(c) notes in the *Gabčíkovo-Nagymaros Project* case, that this provision ‘scarcely covers [the aspect of intertemporal law] with the degree of clarity requisite to so important a matter’.<sup>165</sup> That the principle of systemic integration enshrined in Article 31(3)(c) is part of customary international law appears now uncontested.<sup>166</sup> This is significantly due to the flowering of case-law wherein several tribunals started basing their judicial reasoning on an application of Article 31(3)(c).

The fact that ‘[l]egal texts only make sense within the context of the system that gives them authority and meaning’ is a central rationale of systemic integration.<sup>167</sup> Xue Hanqin describes the interpretation technique as the ‘master key’ to the house of international law.<sup>168</sup> McLachlan explains the metaphor in the following terms:

Mostly the use of individual keys will suffice to open the door to a particular room. But, in exceptional circumstances, it is necessary to utilise a master-key which permits access to all of the rooms. In the same way, a treaty will normally be capable of interpretation and application according to its own terms and context. But in hard cases, it may be necessary to invoke an express justification for looking outside the four corners of a particular treaty to its

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<sup>165</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment of 25 September 1997, ICJ Rep 1997, 7, Separate Opinion of Vice-President Weeramantry at 114.

<sup>166</sup> See e.g. *Arbitral Award of 31 July 1989 (Guinea-Bissau v Sen)* 1991 ICJ 53, 69-70 (Nov 12); *Certain Questions of Mutual Assistance in Criminal Matters (Djib v Fr)* 2008 ICJ 37 (June 4); Judge Buergenthal considered Article 31(3)(c) as being ‘sound and undisputed in principle as far as treaty interpretation is concerned’ in *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment on Preliminary Objections of 12 December 1996, ICJ Rep. 1996, 803, Separate Opinion of Judge Buergenthal, para 22; McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (n 151) 279; Jean Combacau and Serge Sur, *Droit International Public* (Paris: Montchrestien, 2004) 175; Duncan French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 ICLQ 281.

<sup>167</sup> Iain Scobbie, ‘Some Common Heresies about International Law’ in Malcolm Evans (ed), *International Law* (OUP 2003) 59, 65.

<sup>168</sup> Ms. Xue Hanqin, Ambassador of China to the Netherlands and member of the International Law Commission debates on the Vienna Convention on the Law of Treaties.

place in the broader framework of international law, applying general principles of international law.<sup>169</sup>

Referring to other international law pursuant to Article 31(3) (c) should clarify and assist in giving meaning to the terms used in a treaty, not to change or overrule the meaning of those terms.<sup>170</sup> Often, a court need not make formal reference to Article 31 (3) (c) to indicate that it is applying the principle of systemic integration.<sup>171</sup> Instead, there is a presumption that parties that enter into treaty agreements do not intend to act inconsistently with principles of international law or treaty obligations that they have previously entered into (negative presumption); and when the terms of a treaty do not in itself provide answers to all of the questions arising from a case, the parties are taken ‘to refer to general principles of international law’ (positive presumption).<sup>172</sup> Systemic integration reinforces the idea that whatever the outcome, what matters is that the justification for a particular decision refers back to the wider legal environment and the ‘system’ of international law as a whole.<sup>173</sup> The underlying logic is that no norm is without relevance for others but is part of a legal system and has to be understood in this systemic context: ‘whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact’.<sup>174</sup> The principle of systemic integration is used by many different courts in relation to varying subject matters. In *Esphahanian v Bank Tejarat*, the Iran-US Claims Tribunal expressly invoked Article 31(3)(c) to justify reference to the law of diplomatic protection in order to ascertain whether an applicant of dual nationality could be admissible to the Tribunal.<sup>175</sup> Under Article 5 of the Hague Convention 1930, the Tribunal was to act as a ‘third state’ and apply the concept of dominant nationality to dual nationals, finding the application admissible.<sup>176</sup> In the *Shrimp-Turtle* judgment,

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<sup>169</sup> McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (n 151) 280-1.

<sup>170</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 254, 272.

<sup>171</sup> ILC Fragmentation Report (n 2) 211 para 421.

<sup>172</sup> Ibid 234 para 465.

<sup>173</sup> Ibid 243 para 479.

<sup>174</sup> Ibid 15 para 17.

<sup>175</sup> *Esphahanian v Bank Tejarat* Iran-US CTR vol 2 1983-I, 157.

<sup>176</sup> Convention on Certain Questions Relating to the Conflict of Nationality Law (adopted 12 April 1930, entered into force 1 July 1937) League of Nations, Treaty Series, vol 179, 89, No 4137.

the Appellate Body of the WTO expressly relied on Article 31(3)(c) to interpret ‘exhaustible’ in ‘exhaustible natural resources’ to include all seven recognised species of sea-turtles listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.<sup>177</sup>

The ILC Fragmentation Report sets out a number of interpretation techniques for resolving norm conflicts alongside the principle of systemic integration, including ‘(a) specificity (*lex specialis*); (b) temporality (*lex posterior*), and (c) status (*jus cogens*, obligations *erga omnes* and Article 103 United Nations Charter).’<sup>178</sup> *Jus cogens* and *erga omnes* were considered in Chapter 3 and Section 4.4 while *lex specialis* is discussed in Chapter 6.

*lex posterior derogat legi priori* means that the more recent norm prevails over the older norm’.<sup>179</sup> Article 30(3) states that ‘[w]hen all the parties to the earlier treaty are parties also to the later treaty..., the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty’. The idea behind *lex posterior* is that the will of states may change over time and that new treaties derogating from older ones reflect this ‘new’ will. This underlying rationale holds only when membership of both treaties is identical.<sup>180</sup> This means that the *lex posterior* rule applies to only a limited number of cases of conflict.<sup>181</sup> Yearwood has stated that the *lex posterior* principle is rendered ‘practically ineffective’ because the ‘constant development, application and renewal of treaties make the determination of *ratione temporis* unclear’.<sup>182</sup> That is, it is difficult to know what date determines which expression of the will of a country prevails.<sup>183</sup> A further limitation of the *lex posterior* rule is that it can only apply when the conflicting treaties cover the ‘same subject

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<sup>177</sup> *US-Shrimp Products* (n 89) 2793-2798, paras 126-134.

<sup>178</sup> ILC Fragmentation Report (n 2) 208.

<sup>179</sup> Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Stockholm Environment Institute, 2014) 69.

<sup>180</sup> *Ibid* citing Erich Vranes, *The Principles of Conflict Resolution* (OUP 2009) 56.

<sup>181</sup> *Ibid* citing Rudiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer Science and Business Media 2003) 153-4.

<sup>182</sup> Ronnie RF Yearwood, *The Interaction Between World Trade Organisation (WTO) Law and External International Law* (Routledge 2013) 59.

<sup>183</sup> Pauwelyn, *Conflict of Norms in Public International Law* (n 170) 370-2.

matter’, as laid down in Article 30(3) and (4). For example, Yearwood states that an issue ‘related to trade’ is not the equivalent of covering the ‘same subject matter’:<sup>184</sup> ‘[g]iven the potential overlap of trade with many other areas of international law, it is quickly realised that the practical use of *lex posterior* is limited because everything can be somewhat trade-related in the context of the globalised trading system’.<sup>185</sup> *Lex posterior* can be considered to be unhelpful due to the ambiguities surrounding its application. Interpretation techniques that focus on status or specificity are more useful in providing concrete guidance. The ILC Fragmentation Report advocates that all interpretation techniques form part of an holistic approach to managing norm conflicts under the umbrella of the principle of systemic integration. The relationship between *lex specialis* and the principle of systemic integration in the context of norm conflicts arising from extraterritorial application of the ECtHR is addressed in Chapter 6. What should be taken from this section are three points: systemic integration is a tried and tested interpretation technique used by international courts for mediating the relationship between various types of treaties; it contextualises treaty terms within their normative environment; and is flexible, encapsulating a variety of interpretation techniques used to resolve norm conflicts. The next section focuses on ambiguities relating to systemic integration’s operation.

#### 4.5.2. Relevant Rules; the weight of obligations and inter-temporality.

While the principle of systemic integration is considered a useful device for enhancing the clarity and consistency of the international legal order, ambiguities relating to its application need to be addressed and resolved in order to ensure that systemic integration can provide a satisfactory global constitutionalist solution to incoherency arising from fragmentation. Three issues have been raised in relation to Article 31((3)(c): the rules that should be taken into account; the weight of the obligations to be taken into account; and the issue of inter-temporality.

First, there is ambiguity as to what rules should be taken into account under Article 31(3)(c). While rules pertaining to the factual situation and relevant to regulating the dispute at hand should be taken into account, it is important that an entirely different legal question is not examined to influence the decision. For example, the ICJ was

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<sup>184</sup> Yearwood, *The Interaction Between World Trade Organisation* (n 182) 59.

<sup>185</sup> *Ibid.*

criticised for its reasoning in *Oil Platform*<sup>186</sup> wherein it was accused of using Article 31(3)(c) as a ‘peg on which to hang the whole corpus of international law on the use of force’.<sup>187</sup> President Higgins stated that the ICJ should have regard to the ‘context’ of the treaty which gave jurisdiction to the ICJ which was limited to economic and commercial matters.<sup>188</sup>

Koskenniemi disputes whether it is necessary for all the parties to the treaty being interpreted to also be parties to the treaty relied upon as the external source of international law.<sup>189</sup> The Panel decision in *EC-Biotech Products* may indicate that only agreements to which all WTO members are party can be taken into account under Article 31(3)(c) in the interpretation of WTO agreements.<sup>190</sup> The WTO Appellate Body in *EC-Biotech* states that:

This understanding of the term ‘the parties’ leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members’.<sup>191</sup>

Marisa Martin, Freya Baetens and Panos Merkouris note that the Panel’s choice of words seems to leave open the possibility of a more expansive interpretation.<sup>192</sup> Because the case was not one where the relevant rules were applicable to all the parties

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<sup>186</sup> *Oil Platforms (Merits)* ICJ Reports (2003) paras 41-5; ILM (2003) 1334.

<sup>187</sup> Anthony Aust, *Modern Treaty Law and Practice* (2<sup>nd</sup> edn, CUP 2007) 243.

<sup>188</sup> *Oil Platforms (Merits)* (n 186) para 45. See further, Higgins, ‘A Babel of Judicial Voices?’ (n 59) 800-3; Alex Orakhelashvili, ‘Oil Platforms (Islamic Republic of Iran v United States of America) Merits, Judgment of 6 November 2003’ (2004) ICLQ 753.

<sup>189</sup> ILC Fragmentation Report (n 2) Ibid 237, para 470.

<sup>190</sup> *EC-Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, pp. 299-300, paras. 7.68-7.70.

<sup>191</sup> Ibid para 7.68.

<sup>192</sup> Panos Merkouris, ‘Keep Calm and Call (no, not Batman but ...) Articles 31-32 VCLT: A Comment on Istrefi’s Recent Post on RMT v The UK’ available at <<http://www.ejiltalk.org/keep-calm-and-call-no-not-batman-but-articles-31-32-vclt-a-comment-on-istrefis-recent-post-on-r-m-t-v-the-uk/#more-11079> June 19, 2014>; Marisa Martin, ‘Trade Law Implications of Restricting Participation in the EU Emissions Trading Scheme’ *Georgetown International Environmental LR* 19 (2007), 437-74, 471; Freya Baetens, ‘Mudding the Waters of Treaty Interpretation: Relevant Rules of International Law in the Mox Plant, OSPAR Arbitration and EC-Biotech Case’, (2008) 77 *Nordic JIL* 197-216.



to the dispute, the Appellate Body did not need to ‘take a position on whether in such a situation [they] would be entitled to take the relevant other rules of international law into account’.<sup>193</sup> This indicates that in other cases where the parties to the dispute are all signatories to the external international law, then they may reconsider the rule that all WTO members need to be signatories to the external treaty.

Koskenniemi argues that it is unlikely that the membership to many important multilateral conventions will be the same. The implication of *EC-Biotech Products* decision is that external international law will not be used to interpret the terms of the convention under adjudication. This would have the ‘ironic effect’ that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law.<sup>194</sup> It would also prohibit any use of regional or other particular implementation agreements – including inter se agreements – that may have been concluded under a framework treaty, as interpretative aids to the latter.<sup>195</sup> This would seem contrary to the ethos behind most multilateral treaty-making and the intent of most treaty-makers.<sup>196</sup> Some rules may be treated as customary international law and apply to all members anyway.<sup>197</sup> Furthermore, this interpretation of the *EC-Biotech* decision could mean

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<sup>193</sup> *EC-Biotech Products* (n 190) para 7.72. In the *US-Shrimp* case mentioned above, in interpreting the term ‘exhaustible natural resources’, not *only* were all WTO members *not* parties to the conventions taken into consideration, but not even all the parties to the dispute. Those treaties included UNCLOS; the 1992 Convention on Biological Diversity (n 48); Convention on the Conservation of Migratory Species of Wild Animals (adopted 1979, entered into force 1985) 19 ILM 15. See further *US-Shrimp Products* (n 90) para 130 and FNs 110-3.

<sup>194</sup> Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) 13 EJIL 754, 781.

<sup>195</sup> ILC Fragmentation Report (n 2) 237 para 471.

<sup>196</sup> *Ibid* 238 para 471.

<sup>197</sup> Although see UNCLOS. Much of UNCLOS reflects customary international law, enforceable by and against nations that are not a party to the Convention (like Colombia, Ecuador, Iran, North Korea, Peru, Turkey and the US. However, the US does not recognise Part XI as customary international law and China has begun to push back against states who abide by ‘the customary freedom of navigation afforded to military craft (mainly American) in its exclusive economic zone’. See further, Christopher Mirasola, ‘Why the US Should Ratify UNCLOS: A View from the South and East China Seas’ (Harvard Law School, National Security Journal 15 March 2015) available at <<http://harvardnsj.org/2015/03/why-the-us-should-ratify-unclos-a-view-from-the-south-and-east-china-seas/>> last accessed 10 June 2016; Finian Cullity, ‘War of Law: China in the East and South China Seas’

that no reference would be made to treaties which represent the most important elaboration of the content of international law on a specialist subject matter.<sup>198</sup>

The alternative solution offered by Koskenniemi is that reference to another treaty should be permitted when the parties in dispute are also parties to that other treaty.<sup>199</sup> This may create the possibility of eventually divergent interpretations, but that it would at least reflect party will. The risk of divergence would be mitigated by making the distinction between ‘reciprocal’ or ‘synallagmatic’ treaties (in which case mere ‘divergence’ in interpretation creates no problem) and ‘integral’ or ‘interdependent’ treaties (or treaties concluded *erga omnes partes*) where the use of that other treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted.<sup>200</sup> The extent to which the external treaty is ‘implicitly’ accepted or at least tolerated by the other parties ‘in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the term concerned’ must be taken into account.<sup>201</sup> This is in order to identify a ‘common understanding’ in a particular technical field without necessarily reflecting formal customary law.

As well as the rules that should be taken into account, the weight to be given to the external law is also a point of contention. An approach which gives excessive weight to the normative environment over and above the treaty under adjudication could stifle the legal significance of the latter treaty. The ability to ‘react to new circumstances and to give effect to interests or needs that for one reason or another have been underrepresented in traditional law’ is necessary in processes of law-making. Rather, the significance of the need to ‘take into account’ lies in its performance of a systemic function in the international legal order, linking specialised parts to each other and to universal principles.<sup>202</sup> The question of the weight to be accorded to particular rights and obligations must be argued on a case-by-case basis. The weight to be accorded to

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<<http://www.internationalaffairs.org.au/war-of-law-china-in-the-east-and-south-china-seas/>> last accessed 10 June 2016.

<sup>198</sup> Ibid 238 para 471.

<sup>199</sup> Ibid 238 para 472.

<sup>200</sup> Ibid 238-9 para 472.

<sup>201</sup> Pauwelyn, *Conflict of Norms in Public International Law* (n 170) 257-63.

<sup>202</sup> ILC Fragmentation Report (n 2) 239-40 para 473.

the ECHR and international humanitarian law (IHL) in extraterritorial armed conflict is examined in Chapter 6.

The third issue, intertemporality, concerns whether one takes into account external international law at the time the treaty was concluded (inter-temporal law) or whether you interpret it consistently with contemporary law.<sup>203</sup> Many agree it should be interpreted consistently with contemporary law - at the time the decision is being made.<sup>204</sup> For example, in interpreting a reference in a 1961 treaty relating to the continental shelf, it is necessary to consider not only the Geneva Convention on the Continental Shelf 1958 but also the much more up-to-date provisions on the same subject in UNCLOS.<sup>205</sup>

Koskenniemi rationalises both approaches. Taking account of the law in force at the time of conclusion of the treaty gives us a better understanding of the intentions of the parties.<sup>206</sup> Conversely, legal relationships inevitably change, reflected in the need to take into account the subsequent practice of states. In a similar way, ‘the views of the parties about the meaning and application of the treaty develop in accordance with the passing of time, the accumulation of experience and new information and novel circumstances’.<sup>207</sup> The doctrine of inter-temporal law<sup>208</sup> is essentially a reminder of these two rationales, one pointing to the past as a guide for finding party intent, the

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<sup>203</sup> Aust, *Modern Treaty Law and Practice* (n 187) 244.

<sup>204</sup> Rosalyn Higgins, ‘Some Observations on the Inter-Temporal Rule in International Law’ in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century* (Brill Nijhoff 1996) 173-81; Rosalyn Higgins, ‘Time and the Law: International Perspectives on an Old Problem’ (1997) ICLQ 501-20; McLachlan, ‘The Principle of Systemic Integration’ (n 151).

<sup>205</sup> Ian M Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn Manchester University Press 1984) 138-40; Robert Jennings and Arthur Watts, *Oppenheim’s International Law* (London: Longman 9<sup>th</sup> edn, 1992) 1281. For a discussion of the option between these two methods of interpreting treaty provisions see: Sir Humphrey Waldock, Third report, Yearbook of the International Law Commission, 1964 Vol II draft article 56(1), 8.

<sup>206</sup> ILC Fragmentation Report (n 2) 241 para 476.

<sup>207</sup> *Ibid* 241 para 476.

<sup>208</sup> Judge Huber in the *Island of Palmas* case described the doctrine of intertemporality as the following: ‘...a juridical fact must be appreciated in light of the law contemporary with it and of the law in force at the time when a dispute in regard to it arises or falls to be settled’: *Island of Palmas Case (Netherlands, US)* 2 R Int’l Arb Awards 831, 845.

other pointing to the present for the exact same reason.<sup>209</sup> Koskenniemi lists factors that need to be considered when deciding whether to apply article 31(3)(c) so as to ‘take account’ of those ‘other obligations’ as they existed when the treaty was concluded or present day understandings. For this he looks to the language of the treaty itself for evidence that contemporary law should be taken into account.

When a treaty uses a term which is ‘not static but evolutionary’ then it means that present day law should be taken into account.<sup>210</sup> In the *Aegean Sea Continental Shelf* case, the ICJ applied the presumption according to which a generic term is ‘intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time’<sup>211</sup>. When language must be read against the object and purpose of a treaty, it provides evidence of the fact that the parties have committed themselves to a programme of progressive development. The ICJ in *Gabčíkovo-Nagymaros* stated:

[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them...[in]...the Treaty. These articles do not contain specific obligations of performance but require the parties... to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognised the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law’.<sup>212</sup>

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<sup>209</sup> ILC Fragmentation Report (n 2) 241 para 477.

<sup>210</sup> Jennings and Watts (eds), *Oppenheim’s International Law* (n 205) 1282. One example is the use of the notion of ‘sacred trust of civilization’ as part of the League’s mandates regime. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 31 para 53.

<sup>211</sup> *Aegean Sea Continental Shelf* ICJ Reports (1978) 32.

<sup>212</sup> *Gabčíkovo-Nagymaros Project* (n 165) paras 132-147. For the argument that the decision’s effect and influence on international environmental law is not positive see e.g. Jessica Howley, ‘The *Gabčíkovo Nagymaros* Case: The Influence of the International Court of Justice on the Law of Sustainable Development’ (2009) 2(1) QLSR 1.

When obligations are described in very general terms, they are usually evidence of the fact that the meaning of the terms are meant to evolve over time in accordance with the changing surrounding normative environment. In *Shrimp-Turtle*, the general exceptions in the GATT article XX, in permitting measures ‘necessary to protect human, animal or plant life or health’ or ‘relating to the conservation of exhaustible natural resources’, were intended to adjust to the situation as it develops over time. The preamble of the WTO Agreement, which used the generic term “natural resources” in Article XX(g) was not “static” in its content or reference but was rather “by definition, evolutionary”.<sup>213</sup> Koskenniemi notes that the measures necessary to protect shrimp evolve depending upon the extent to which the survival of the shrimp population is threatened:

Although the broad meaning of article XX may remain the same, its actual content will change over time. In that context, reference to “other rules of international law”, such as multilateral environmental treaties, becomes a form of secondary evidence supporting the enquiry into science and community values and expectations, which the ordinary meaning of the words, and their object and purpose, invites.<sup>214</sup>

Therefore, contemporary interpretation is generally favoured over intertemporal interpretations. The operation of the principle of systemic integration questions the extent to which a court can expand its own jurisdiction to adjudicate upon other international law. If there is an international legal regime that is suitable or significant for regulating the circumstances then it should be taken into account. It is best not to leave interests that do not have their own court system underrepresented. Leaving out consideration of relevant rules of international law also skews international law’s general position on an issue, and gives rise to manipulation of the law. While problems of consistency arise in relation to who is signatory to the external treaty or legal rule, there appears to be a general push towards enabling the external treaty to apply when the parties to a dispute are signatory. This should happen even when not all member

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<sup>213</sup> *US-Shrimp Products Case* (n 89) para 130; Robert Howse, ‘The Appellate Body Rules in the Shrimp Turtle Case: A New legal Base line for the Trade and Environment Debate’ (2002) 27 *Colum J Environmental L* 491.

<sup>214</sup> ILC Fragmentation Report (n 2) 243 para 478.

states of the regime under adjudication are signatories to the external treaty. The regime's rules should reflect the international environment of which it forms part, and that should be accepted by signatories. The weight to be accorded to different obligations needs to be decided on a case by case basis. Chapter 6 analyses how ECHR norms should be balanced against IHL in extraterritorial armed conflict. In terms of inter-temporality, it appears there is growing support for a contemporaneous interpretation of treaties. Having provided some clarity on general ambiguities relating to the operation of systemic integration, the next section addresses concerns that this interpretation tool cannot practically ensure consistency in accordance with the requirements of the rule of law when applied by the ECtHR.

#### 4.6. The ECtHR, the principle of systemic integration and the rule of law

[The] Convention...cannot be interpreted in a vacuum [...and] should so far as possible be interpreted in harmony with other rules of international law of which it forms part.<sup>215</sup>

Criticisms and praise of the ECtHR's use of the principle of systemic integration are presented in this section, as well as suggestions for ensuring that this interpretation technique improves the consistency of international law in accordance with the rule of law. The purpose of this analysis is to reveal criteria for ensuring a global constitutionalist frame for norm conflicts arising from the extraterritorial application of the ECHR.

The ECtHR invokes other rules of international law in its jurisprudence. This practice is undertaken to a variety of different ends. For example, the ECtHR in the decision of *Golder v UK* used Article 31(3) (c) to take into account complementary norms which indicated that international law principles supported and corroborated existing ECHR standards of the right to access to justice, reinforcing the ECHR's telos.<sup>216</sup> The

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<sup>215</sup> *Al Adsani v UK* App No 35763/97 (ECtHR, 21 Nov 2001) para 50.

<sup>216</sup> Tzevelekos, 'The Use of Article 31(3)(c) VCLT in the Case Law of the ECtHR' (n 6) 685, 686. For another relevant example concerning interim measures prescribed under Rule 39 of the Rules of Court see *Mamtkulov & Abdurasulovic v Turkey* App No 46827/99 & 46951/99 (ECtHR 6 Feb 2003); confirmed by the Grand Chamber in *Mamatkulov & Askarov v Turkey* ECtHR 225, 330 (2005).

ECtHR also addresses contradictory norms, both in ways which have been positively and negatively received. An example of a decision with general negative reception is *Al Adsani v UK*.<sup>217</sup> The ECtHR asked whether state immunity could restrict the applicant's right of access to justice under Article 6. The court recalled that '[t]he Convention, including Article 6, [could not] be interpreted in a vacuum...[It] should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State Immunity.'<sup>218</sup> The ECtHR stated that the doctrine of state immunity pursues 'the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.<sup>219</sup> This led to a large restriction on article 3, upheld by *Jones v UK*,<sup>220</sup> since criticised as a serious curtailment of rights protection.<sup>221</sup> An example of a positive decision where the ECtHR takes into account contradictory norms of international law is the decision of *Medvedyev v France*.<sup>222</sup> In that judgment, the ECtHR took into account the UN Narcotics Convention 1988, UNCLOS and diplomatic notes issued by the French authorities to find that the detention at sea was within French jurisdiction and illegal under article 5(1) but that there was no delay in being brought before a court under Article 5(3). The ECtHR's taking into account of international law appears to be met with approval.<sup>223</sup>

There are obstacles to securing clarity and consistency in the international legal order through the adoption of the principle of systemic integration by the ECtHR. One

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<sup>217</sup> *Al Adsani* (n 215).

<sup>218</sup> *Ibid* para 100.

<sup>219</sup> *Ibid* para 99.

<sup>220</sup> *Jones v UK* App Nos 34356/06 and 40528/06 (ECtHR 14 January 2014).

<sup>221</sup> Lorna McGregor, 'Jones v UK: A Disappointing End' (EJIL: talk! 16 January 2014) available at <<http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/>> accessed 10 June 2016; Philippa Webb, 'Jones v UK: The re-integration of State and official immunity?' (EJIL: talk! 14 January 2014) available at <<http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/>> last accessed 10 June 2016.

<sup>222</sup> Positively received here: Douglas Guilfoyle ECHR Rights at Sea: *Medvedyev and others v. France* (EJIL: talk!) April 19, 2010 available at <<http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/>> last accessed 10 June 2016.

<sup>223</sup> See e.g. Stefano Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights' (2011) 22(3) EJIL 829.

criticism is that taking into account other international law standards inevitably means undermining the rights enshrined under the ECHR.<sup>224</sup> However, this does not necessarily need to be the case. There are different ways in which the ECtHR can interpret ECHR norms in light of competing norms which are explored in more detail in Chapter 7. Competing norms can be balanced against one another or can apply to the exclusion of another. But it is important to note two points: it is not inevitable that ECHR rights are undermined when competing norms are considered by the ECtHR. Also, the ECtHR needs to be explicit in providing a clear and consistent narrative on why they made the choices that they did. If, taking the example of *Jones*, they considered another international law norm as normatively superior to a fundamental ECHR right such as article 3 right against torture, they need to explain that, and why they believe it is the case. An explicit narrative on what judges decide, and an explanation as to their decision is required so that constituted and constituent powers can respond to the ECtHR's choices. The decision needs to be fully transparent and available to potential applicants to dispute. Provision of clear reasoning enables 'critique and contestation', an important aspect of fragmentation.<sup>225</sup> Furthermore, it is only then that other international law courts can use or distinguish the standards adopted by the ECtHR. Otherwise, poorly constructed narratives and reasoning at the ECtHR will breed similar results in other international courts.

Another concern is that the ECtHR undermines consistency when it provides different interpretations of external international law standards, that could be construed as completely distorting the standard or the very concept invoked. The requirement articulated above still holds true: there needs to be an explicit, clear and consistent narrative on the choices the ECtHR makes. But further to this, the ECtHR must provide a reasonable interpretation of the international law norm. The reasonableness standard must be high. There should be a discernible consensus amongst key stakeholders that the standard was subjected to an unreasonable interpretation, going beyond mere disagreement about what that standard should be. Key stakeholders should include experts, academics and those that form part of the institution - if there is one- administering the external international law regime. A discernible agreement

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<sup>224</sup> McInerney-Lankford, 'Fragmentation of International Law Redux' (n 6) 626-9.

<sup>225</sup> Peters, 'Constitutional Fragments' (n 3) 42.



that the law is considered incorrect, so as to completely distort the law, or the application of the law to the facts of the decision, must be established for the ECtHR to have provided the external provision with an unreasonable interpretation. If the interpretation of the external standard is not explicit nor reasonable, it is not in conformity with the rule of law. Clarity and consistency cannot be achieved if the interpretation of the external rule or concept distorts its original meaning with no further explanation. However, if there is a reasonable interpretation that is different from a particular understanding of the external standard, that interpretation does not affront the rule of law.

Tzevekov recognises the important role of Article 31(3)(c) as ‘an aperture into and out of the ECHR regime, through which the judges of Strasbourg can observe, consider, and possibly even integrate or modify broader international law’.<sup>226</sup> If the ECtHR evolves its jurisprudence in a way which is in contradiction to the international legal order, ‘any deflection in its interpretation from that order triggers evolution within the international order and, evolution of the international order itself’.<sup>227</sup> Even if Article 31(3)(c) does give rise to a lack of unity in the international legal order ‘nothing excludes that this phenomenon will not be temporary –for a dynamic system such as the international legal order disposes of the means to both reject or integrate any kind of evolution’.<sup>228</sup> What Tzevekov does not say, but which is crucial to enable for a clear and consistent narrative in international law is that the ECtHR should be explicit that it is departing from other interpretations of the conflicting norm and provide a justification for doing so. By providing a clear narrative, constituent and constituted powers can rely on the law for mediating their relationship in conformity with the rule of law in a constitutional setting. This narrative enables an external body administering another legal regime to respond, interact, distinguish or criticise the ECtHR’s approach, enabling their constituency to properly regulate their own relationship effectively.

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<sup>226</sup> Tzevekov, ‘The use of Article 31(3)(c) VCLT in the Case Law of the ECtHR’ (n 6) 690.

<sup>227</sup> Luzius Wildhaber, ‘The European Convention on Human Rights and International Law’ (2007) 56 ICLQ 217230-231.

<sup>228</sup> Tzevekos, ‘The Use of Article 31(3)(c) VCLT in the Case Law of the ECtHR’ (n 6) 689.

Third, there are concerns that the ECtHR does not reciprocally have an effect on international law - it is a unilateral relationship whereby external law only has an effect on the ECtHR system. This is not in keeping with the promise of the principle of systemic integration that the international legal system is truly responsive to decentralised legal developments, special regimes and networks. In other words, some doubt that the ECtHR has a 'symbiotic' relationship with international law.<sup>229</sup> Tzevelkov states that '[i]f evolution is to be inherent to a non-static legal order such as the international one, then the opening – by means of systemic integration – of the ECHR's box towards that order should be equally inherent'.<sup>230</sup> Contrary to these concerns, the ECtHR is known to have an effect on international law rules. For example, the ECHR has had an effect on the law of diplomatic protection.<sup>231</sup> Therefore its relationship with the international legal system is reciprocal rather than unilateral.

The ECtHR invokes rules of international law to corroborate existing ECHR standards as well as to narrow the scope of its application. In order to avoid criticisms of serious, unsubstantiated curtailments of rights protection through the adoption of systemic integration, the ECtHR must provide a clear and consistent narrative on its approach and reasons for its ultimate decision. A reasonable interpretation of external law must also be provided, otherwise using systemic integration will not result in strengthening the rule of law due to the confusion it produces. Constituted and constituent powers need the court to use systemic integration in this way so they have a clear and consistent frame through which to mediate their relationship with one another. Therefore, this section recommends that in its extraterritoriality decisions, the ECtHR should adopt the principle of systemic integration using an explicit narrative on how it balances ECHR standards with external law, providing an informed interpretation of the external standard.

Balancing the unique aims of the ECHR and its subordination to and dependency on general international law remains a perennial challenge for the ECtHR.<sup>232</sup> Each

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<sup>229</sup> Wildhaber, 'The European Convention on Human Rights and International Law' (n 227) 230-231.

<sup>230</sup> Tzevelekos, 'The Use of Article 31(3)(c) VCLT in the Case law of the ECtHR' (n 6) 689.

<sup>231</sup> Sebastien Pesch, 'The Influence of Human Rights on Diplomatic Protection: Reviving an Old Instrument of Public International Law' in Norman Weiss and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) 55.

<sup>232</sup> Forowicz, *The Reception of International Law in the European Court of Human Rights* (n 6) 377.

instance in which the ECtHR attempts to do this relies on an analysis in relation to the specific circumstances of the case. Carrying over the criteria of explicit, clear and consistent narrative, and reasonable interpretation, Chapter 7 includes a detailed analysis of the debate on how the ECHR should protect rights in armed conflict through the principle of systemic integration and *lex specialis*.

#### 4.7. Conclusion

A global constitutionalist approach to managing norm conflicts arising from the extraterritorial application of the ECHR requires the ECtHR to adopt the principle of systemic integration, using a clear and consistent narrative, and reasonable interpretation of the law.

A central norm of global constitutionalism is the rule of law which complements and corroborates the norm of democratic accountability, as it aims to form a link between constituted and constituent powers: a clear framework which mediates their relationship and mechanisms which oversee whether constituted powers act in conformity with the law.

International courts have the ability to strengthen and weaken the rule of law. They form part of a process of fragmentation whereby the proliferation of international adjudicatory bodies has helped strengthen judicial oversight of state compliance with international law obligations, thus strengthening the rule of law. Therefore, the ECtHR is buttressing the rule of law by providing adjudication in extraterritoriality decisions. On the other hand, international courts have the potential to weaken the other arm of the rule of law: a clear and consistent legal framework through which the constituency can mediate its relationship. This can happen through decentralised interpretations of legal norms. Global constitutionalists suggest methods for counteracting inconsistency arising from fragmentation and decentralised decision-making.

Theories of global constitutionalism suggesting alternative methods for ensuring clarity and consistency in the international legal order include those based upon normative hierarchies and coordinative strategies. Normative hierarchies based on the UN Charter, *jus cogens* and human rights are deeply political, inflexible, and say nothing about the relationship between international legal regimes that do not concern those values. Amongst coordinative methods, the principle of systemic integration is

preferred for three reasons. First, the principle of systemic integration is the most theorised and problematized, as well as the most tried and tested, amongst those seeking to find solutions to incoherencies arising from fragmentation. Second, while other constitutionalist theories presuppose a much more adversarial plurality of constitutions, the principle of systemic integration conceives of legal regimes as much more flexible. While there is no doubt that specialist regimes tend to possess bias in protecting their own respective interests, a normative project which attempts to coordinate regimes to ensure consistency should not from the offset embody that bias. Systemic integration is the most effective option for ensuring impartiality. Third, taking into account external law not only mediates the relationship between specialist regimes but helps to articulate that regime's relationship with its foundational, normative background from which it was conceived: general international law.

Two broad criteria were developed for ensuring clarity and consistency in accordance with the rule of law in managing norm conflicts: an explicit, clear and consistent narrative, and a reasonable interpretation of the law. The rule of law requires a clear narrative on how international law is taken into account. If a court's reasoning is clear, other international courts can respond and parties to that decision can engage in effective deliberation. The rule of law thus requires the operation of the principle of systemic integration for managing extraterritorial norm conflicts. In adopting this interpretation technique, the ECtHR must provide an explicit, clear and consistent narrative, as well as a reasonable interpretation of the external international law. A further examination of the operation of the principle of systemic integration in applying the ECHR in armed conflict is pursued in Chapter 6. Having developed a model of extraterritoriality in accordance with democratic accountability and the rule of law, the next two chapters consider whether the global constitutionalist frame fully captures the approach taken by the ECtHR in its extraterritoriality jurisprudence.

## 5. Extraterritoriality at the European Court of Human Rights

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### 5.1. Introduction

This chapter forms the first part of assessing whether the global constitutionalist frame fully captures the emerging approach of the ECtHR in its extraterritoriality jurisprudence. The extent to which the ECtHR is in conformity with the global constitutionalist norm of democratic accountability is examined by ascertaining whether the ECtHR is reversing the presumption against extraterritoriality in its jurisprudence. The model of extraterritoriality deriving from the norm of democratic accountability was translated into three doctrinal indicators which are justified in Chapter 3, Section 3.4 as representing the declining significance of extraterritoriality as a barrier to adjudication. Those are when the ‘jurisdiction’ threshold is lowered; when the *espace juridique* principle is no longer applied; and when Article 1 jurisdiction is conflated with attribution,<sup>1</sup> recalling that attribution asks who is responsible for a particular action, rather than whether ECHR obligations are triggered in the first place. A lower threshold of control, and diversification of situations in which decisions are admissible, mean that more individuals who are affected in ways that limit their autonomy and equality as defined by the ECHR have recourse to democratic accountability at the ECtHR. When the *espace juridique* principle no longer applies, individuals whose ECHR rights are allegedly violated from outside the Council of Europe are no longer barred from admissibility. A conflation of jurisdiction with attribution signals that territory is no longer a delimitation to democratic accountability, in conformity with the global constitutionalist approach of a presumption of extraterritoriality set out in Chapter 3, Section 3.4.

The jurisdiction threshold is lowered when the state agent authority and control test is met in more factual circumstances;<sup>2</sup> when the effective control over the territory test

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<sup>1</sup> See further Chapter 3, Section 3.4.

<sup>2</sup> See e.g. *Issa v Turkey* (2005) 41 EHRR 27; *Al Skeini v United Kingdom* (2011) 53 EHRR 18; *Jaloud v Netherlands* App No 47708/08 (ECtHR, 20th November 2014).

is not applied at the exclusion of the state agent authority and control test;<sup>3</sup> when spaces over which the effective control over the territory test triggers the ECHR, diversify and apply over smaller spaces;<sup>4</sup> and when Article 1 jurisdiction is not considered in any depth by the ECtHR.<sup>5</sup> The *espace juridique* principle refers to the principle that the ECHR only applies within the territory of the Council of Europe.<sup>6</sup> The conflation of Article 1 jurisdiction with attribution involves asking whether the ECtHR applies traditional extraterritoriality tests or whether the ECtHR is focusing on the question as to who should be held accountable.<sup>7</sup> Doctrinal indicators are applied pre-*Banković*, post-*Banković* and post-*Al Skeini* in order to determine whether the global constitutionalist frame captures the ECtHR's emerging approach.<sup>8</sup>

## 5.2. Lowering the Threshold

### 5.2.1. Jurisdiction Tests: Pre-*Banković*

The earliest decisions of the European Commission for Human Rights,<sup>9</sup> consider the actions of 'diplomatic and consular representatives' of the respondent country,

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<sup>3</sup> See e.g. *Loizidou v Turkey (preliminary objections)* (1995) Series A no 122; *Banković v Belgium* ECHR 2001-XII 333; *Al Skeini* (n 2).

<sup>4</sup> See e.g. *Al-Saadoon v UK* (2010) 51 EHRR 9 para 83; *Medvedyev v France* (2010) 51 EHRR 39 paras 66-7; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.

<sup>5</sup> See e.g. *Nada v Switzerland* (2013) 56 EHRR 18; *Soering v UK (1989)* 11 EHRR 439 para 91; *El Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25.

<sup>6</sup> See e.g. *Banković* (n 3) para 80; *Al Skeini* (n 2) para 141; Marko Milanovic, 'Al Skeini and Al Jedda' (2012) 23(1) EJIL 121, 125; Conal Mallory, 'European Court of Human Rights Al Skeini and Others v United Kingdom (Application No 55721/07) judgment of 7 July 2011' (2012) 61(1) ICLQ 301, 303.

<sup>7</sup> See e.g. *Loizidou (preliminary objections)* (n 3); *Banković* (n 3); *Ilascu v Moldova and Russia* (2005) 40 EHRR 46; *Catan v Moldova and Russia* (2013) 57 EHRR 4; *Jaloud* (n 2); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Policy and Practice* (OUP 2011) 41-52; Jane M Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v Netherlands*' (2015) 62(3) NILR 407.

<sup>8</sup> *Banković* (n 3); *Al Skeini* (n 2).

<sup>9</sup> The European Commission of Human Rights is the adjudicatory mechanism of the Council of Europe preceding the creation of the ECtHR but still relevant and cited in the ECtHR's contemporary case law. For a detailed description of the role and progression of the European Commission of Human Rights see Ed Bates, *The Evolution of the European Convention on Human Rights: from its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010).

including *X v Germany*,<sup>10</sup> *X v UK*<sup>11</sup> and *M v Denmark*.<sup>12</sup> The decision of *X v Germany* concerned a German national who brought an action against the German consular authorities for having him expelled from Morocco by the authorities of the latter. While the application failed on evidence, the applicant was found to be within German ‘jurisdiction’ under Article 1 even when ‘domiciled or resident abroad’ because of the duties that the German diplomatic and consular representatives in Morocco had towards the German national.<sup>13</sup> The extraterritoriality test is interpreted as a ‘nationality’ principle entailing that the protection afforded by the ECHR follows its state agents.<sup>14</sup> Similarly, in *X v UK*, the applicant was a UK national taking a case against the British Consul which allegedly failed to intervene when the applicant’s child was taken back to Jordan.<sup>15</sup> She made a claim against the British Consul under Article 8 right to private life for failing to intervene or trying to unite them. The Commission uses a broader test of state agent authority over an individual using ‘diplomatic and consular representatives’ as an example of when that test should be applied: ‘...*authorised agents of a State*, including diplomatic and consular agents bring other persons or property within the jurisdiction of that State to the extent they *exercise authority over such persons or property*. Insofar as they affect such persons or property *by their acts or omissions*, the responsibility of the state is engaged’.<sup>16</sup> Rather than relying on the nationality principle or the fact that the state agents were ‘diplomatic and consular agents’ there was a much broader statement of principle of control over persons and property in relation to both acts and omissions. However, the

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<sup>10</sup> *X v Germany* App No 1611/62, 25 September 1965 (1965) 8 Yearbook of the ECHR 158 (The Hague: Martinus Nijhoff).

<sup>11</sup> *X v UK* App No 7547/76, (Admissibility, ECommHR 15 December 1977) 12 Decisions and Reports (Strasbourg: Council of Europe, 1978) 73.

<sup>12</sup> *M v Denmark* App No 17392/90 (Admissibility, ECommHR, 14 October 1992) 73 Decisions and Reports (Strasbourg: Council of Europe, 1992) 193.

<sup>13</sup> *Ibid* 168.

<sup>14</sup> Rick Lawson, ‘Life After Banković: 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) 90; Karen da Costa, *Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers, Leiden, 2012) 97. The ‘nationality’ principle is a principle applied in determining the extraterritorial application of legislative jurisdiction.

<sup>15</sup> *X v UK* (n 11).

<sup>16</sup> *Ibid* 74 [emphasis added].

application of this broader principle is still limited to the factual circumstances of diplomatic and consular agents. In *M v Denmark*, the Commission invoked the *X v UK* ‘nationality’ principle to establish jurisdiction through the actions of Danish diplomatic and consular representatives in their embassy in East Berlin. In the pre-*Banković* decisions of *Cyprus v Turkey* and *Freda v Italy* the ‘nationality’ principle extended to registered ships and aircraft.<sup>17</sup> The diplomatic and consular representative decisions of extraterritoriality, founded more broadly upon the ‘nationality’ principle represent a prominent category of extraterritoriality.

Other miscellaneous decisions of extraterritoriality were decided pre-*Banković*. The ECtHR applied a ‘state agent authority and control’ test in *Cyprus v Turkey*, the ECtHR held Turkey accountable for systemic violations of rights by the Turkish Republic of Northern Cyprus (TRNC).<sup>18</sup> It found extraterritorial jurisdiction in extradition and expulsion decisions.<sup>19</sup> In *Drozd and Janousek* the ECtHR found that French and Spanish judges presiding in an Andorran court ‘produced effects’ in Andorra and therefore engaged Article 1 jurisdiction.<sup>20</sup> There are other cases which concerned extraterritoriality wherein the Commission did not consider whether the Article 1 jurisdiction threshold had been met.<sup>21</sup> It is questionable whether those decisions represent a statement of principle or merely an *ad hoc* approach to a diverse

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<sup>17</sup> *Cyprus v Turkey* App No 6780/74 and 6950/75, (Admissibility ECommHR, 26 May 1975), 2 Decisions and Reports 125 (Strasbourg: Council of Europe, 1975) 136 para 8; *Freda v Italy* App No 8916/80 (Admissibility ECommHR, 7 October 1980) 21 Decisions and Reports 250 (Strasbourg: Council of Europe 1981) 256 para 3.

<sup>18</sup> The use of a ‘state agent authority and control’ test can be construed as miscellaneous as the ECtHR has since consistently adopted the ‘effective control over the territory’ test in inter-state cases. See e.g. *Cyprus v Turkey* (2002) 35 EHRR 30; *Cyprus v Turkey* (2014) 59 EHRR 16.

<sup>19</sup> *Soering* (n 5) para 91; *Cruz Varas v Sweden* judgment of 20 March 1991, Series A no 201, paras 69 and 70; *Vilvarajah v UK* judgment of 30 October 1991, Series A no 215, para 103. The ECtHR has since not characterised extradition cases as cases concerning ‘extraterritorial jurisdiction’ in *Banković* (n 3) See Section 5.4 below for arguments for and against describing extradition cases as ‘extraterritorial’.

<sup>20</sup> *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745.

<sup>21</sup> *Hess v UK* App No 6231/73 (Admissibility ECommHR, 28 May 1975) 2 Decisions and Reports (Strasbourg: Council of Europe: 1975) 72; *X and Y v Switzerland* App No 7289/75 and 7349 (Admissibility ECommHR, 14 July 1977) 9 Decisions and Reports 57 (Strasbourg: Council of Europe, 1978).



range of factual circumstances. It appears that the Commission generally found decisions admissible under Article 1 jurisdiction in relation to the territorial scope of the ECHR whether by applying the state agent authority and control test, applying a different test to fit the factual circumstances or by simply not seeing the jurisdiction threshold as an issue.

*Loizidou v Turkey (preliminary objections)* provided one of the most significant authorities in the pre-*Banković* period.<sup>22</sup> The applicant complained that the Turkish armed forces had prevented her from returning to Northern Cyprus after its occupation and peacefully enjoying her property under Article 1 Protocol No 1. The test applied by the ECtHR was the following:

...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.<sup>23</sup>

Whether *Loizidou (preliminary objections)*, is indeed an extraterritoriality test or an attribution test is the subject of much debate. The judgment is interpreted in two ways both in the literature and by the ECtHR. First, it is interpreted as meaning that as a result of the control exercised over the territory, the respondent state has 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).<sup>24</sup> Second, the rights violations carried out by the subordinate local administration are attributed to the respondent state because of the control the latter exercises over the

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<sup>22</sup> *Loizidou (preliminary objections)* (n 3).

<sup>23</sup> Ibid para 62.

<sup>24</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 47. Sarah Miller, ‘Revisiting Extraterritorial Jurisdiction: a Territorial Justification for Extraterritorial Jurisdiction under the European Convention’ (2009) EJIL 1123, 1236; 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, ‘Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights’ (2005) 26 Michigan JIL 739.

former (attribution test).<sup>25</sup> Milanovic explains the ‘control over the territory’ test by reference to positive obligations. The positive obligations explanation provides that the respondent state, when it exercises control over the territory, must take positive actions to prevent others from committing rights violations within that territory.<sup>26</sup> He posits that the ECtHR in *Loizidou (preliminary objections)*<sup>27</sup> 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.<sup>28</sup>

It is ambiguous as to which reading the ECtHR subscribes in *Loizidou (preliminary objections)*. The ECtHR states 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...’<sup>29</sup> 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”.<sup>30</sup> In the merits, therefore, it is still ambiguous as to whether the ECtHR applies a control over the territory or attribution test. *Cyprus v Turkey*<sup>31</sup> 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

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<sup>25</sup> Michel Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 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 ECtHR’ (2003) 14 EJIL 529, 545; Monica Hakimi, ‘State Bystander Responsibility’ (2010) 21(2) EJIL 377.

<sup>26</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 46.

<sup>27</sup> *Loizidou (preliminary objections)* (n 3).

<sup>28</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 47.

<sup>29</sup> *Loizidou (preliminary objections)* (n 3) para 46.

<sup>30</sup> *Loizidou v Turkey* (1997) 23 EHRR 513 para 56.

<sup>31</sup> *Cyprus* (n 18) 331.

judges placed emphasis on the ‘effective overall control’ of the territory as enabling Turkey to exercise control over that part of the territory.<sup>32</sup> Turkey was responsible for ‘the acts of the local administration which survive[d] by virtue of Turkish military and other support’.<sup>33</sup>

*Loizidou* and *Cyprus* are therefore both ambiguous in relation to whether they represent a conflation of jurisdiction with attribution. 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, and indicates more fully whether the ECtHR is moving towards convergence and therefore a presumption of extraterritoriality.

For now, it is important to note that *Loizidou* (*preliminary objections*) was innovative pre- *Banković* and expanded extraterritoriality, as it introduced a test different from the state agent authority and control test but not to the exclusion of that test. The effective control test is used as a means of holding Turkey accountable for a number of rights violations over a period of time. This represents a further lowering of the jurisdiction threshold insofar as it aims to expand extraterritorial accountability in space and time. Pre-*Banković*, the ECtHR provides tests to facilitate the finding of the extraterritorial application of the ECHR using a form of the state agent authority and control test, an effective control over the territory test, other miscellaneous tests and overlooking extraterritoriality as an issue. It appears to adopt quite a low threshold for jurisdiction which can only be evaluated by looking at the later periods of jurisprudence.

### 5.2.2. Jurisdiction Tests: Post-Banković

*Banković* concerned airstrikes carried out by the North Atlantic Treaty Organisation (‘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

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<sup>32</sup> Ibid para 77.

<sup>33</sup> Ibid.

1 as was required by the customary rules of treaty interpretation as reflected in Article 31(1) of the Vienna Convention on the Law of Treaties 1969.<sup>34</sup>

The ECtHR provided specific factual incidences in which the ECHR could be applied abroad including extradition or expulsion of a person that gives rise to an issue under Articles 2 and/or 3 and exceptionally under Articles 5 and 6;<sup>35</sup> *Drozd and Janousek* case;<sup>36</sup> and of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.<sup>37</sup> Otherwise, the ECHR would only apply extraterritorially 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’.<sup>38</sup> 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’.<sup>39</sup> A ‘cause-and-effect’ notion of jurisdiction was rejected by the ECtHR, meaning that jurisdiction could not be established through a specific, singular incident of rights-violation abroad. Instead, jurisdiction would only be established when there was a sufficient degree of control as to trigger the entire breadth of the ECHR towards everyone within that territory.<sup>40</sup> In this way rights under the ECHR could not be ‘divided and tailored’.<sup>41</sup> The ECtHR found that the NATO states that bombed the radio television station did not exercise sufficient ‘control over the territory’ to establish Article 1 jurisdiction.<sup>42</sup>

Apart from the exceptional circumstances listed, *Banković* does not acknowledge the application of a state agent authority and control test of jurisdiction because the ECHR

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<sup>34</sup> The public international law conception of jurisdiction is addressed in Chapter 7.

<sup>35</sup> *Banković* (n 3) paras 67-79, 73.

<sup>36</sup> *Ibid* para 69.

<sup>37</sup> *Ibid* para 73

<sup>38</sup> *Ibid* para 74.

<sup>39</sup> *Ibid* para 65.

<sup>40</sup> *Ibid* para 75.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid* para 82.

cannot be ‘divided and tailored’.<sup>43</sup> The test requires a ‘high degree of territorial control’ for jurisdiction to be established.<sup>44</sup> Otherwise, there is no jurisdiction even if a state agent unquestionably violated the ECHR.<sup>45</sup> This higher threshold applies to the exclusion of a state agent authority test. Furthermore, the ECHR applies only in ‘exceptional’ circumstances, thus indicating a presumption against extraterritoriality.<sup>46</sup> The reasons why the ECtHR restricted extraterritoriality in this way is subject to much speculation.<sup>47</sup> Regardless, it is generally accepted that *Banković* significantly curtailed extraterritorial accountability.<sup>48</sup>

Despite *Banković*, succeeding decisions in lower chambers of the ECtHR departed from its reasoning. They applied the state agent authority and control test to new factual circumstances expanding beyond the diplomatic and consular test which consistently marked the Pre-*Banković* period of extraterritoriality, to include situations of shooting. In *Issa v Turkey*, the applicants brought an action under Article 2 right to life claiming that Turkish soldiers had shot their relatives, who were shepherds, in a cave during military operations in northern Iraq aimed at pursuing and eliminating

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<sup>43</sup> Ibid para 75.

<sup>44</sup> Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 24) 1236.

<sup>45</sup> Ibid 1236.

<sup>46</sup> *Banković* (n 3) para 61.

<sup>47</sup> Rick Lawson argues that *Banković* is a mistake and a misreading of the Court’s previous cases rather than an intentional change in direction by the ECtHR. See further Lawson, ‘Life After Banković’ (n 14) 86. Milanovic argues that *Banković* was the result of the ECtHR’s less than transparent weighing of competing policy considerations, and its ultimate desire to come up with a superficial, legalistic rationale that would justify making the extraterritorial application of the ECHR exceptional, in Milanovic, ‘Al-Skeini and Al-Jedda’ (n 6) 123. See further Wilde, ‘Legal “Black Hole”?’ (n 24) 739; Damira Kamchibekova, ‘State Responsibility for Extraterritorial Human Rights Violations’ (2007) 13 Buffalo Human Rts L Rev (2007) 87. See John Cerone, ‘Out of Bounds? Considering the Reach of International Human Rights Law’ Center for Human Rights and Global Justice Working Paper No 5 (2006). Olivier de Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’ (2006) 6 Baltic YBIL 185-247; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 41-52.

<sup>48</sup> But see Samantha Besson who does not see *Banković* as a significant restriction on extraterritoriality but can be interpreted as consistent with its previous and contemporary approach, in Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25(4) LJIL 857, 869.

terrorists.<sup>49</sup> The ECtHR stated that jurisdiction is established when armed forces exercise ‘effective overall control of the area’.<sup>50</sup> However, despite the large number of troops it appeared that Turkish troops had not exercised control over the ‘entire’ area in contrast to the case of *Loizidou*, and had not been there for a sufficient period of time to establish effective control over the territory.<sup>51</sup> The ECtHR found jurisdiction by asking whether the evidence revealed that Turkish forces killed the shepherds.<sup>52</sup> It therefore appears that the ECtHR applied a state agent authority and control test.

A more explicit application of the state agent test applied in factual circumstances similar to *Banković*, establishing jurisdiction under Article 1 in *Pad v Turkey*. *Pad v Turkey* concerned shots fired from a helicopter, killing individuals from Iran on the Turkish border.<sup>53</sup> It was not confirmed whether the Iranian nationals were killed on the Turkish or Iranian side of the border. The ECtHR stated that it was ‘not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicant’s relatives’.<sup>54</sup> The Chamber held that the victims were within Turkish jurisdiction and that a state would be responsible under the ECHR in another territory when it exercised ‘authority and control through its agents operating’.<sup>55</sup> In *Isaak v Turkey*, Turkish Cypriot agents in a UN buffer zone in Northern Cyprus beat an individual to death.<sup>56</sup> The Chamber stated that ‘...even if the acts complained of took place in the neutral UN buffer zone, the ECtHR considers that the deceased was under the authority and/or effective control of the respondent State through its agents’.<sup>57</sup> Similarly, in *Andreou v Turkey* an individual was shot just outside a UN buffer zone by a Turkish or TRNC soldier in close vicinity to the Greek-Cypriot Guard.<sup>58</sup> The Turkish/TRNC agents opened fire on the territory of the TRNC. The ECtHR

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<sup>49</sup> *Issa* (n 2) para 73.

<sup>50</sup> *Ibid* para 74.

<sup>51</sup> *Ibid* para 75.

<sup>52</sup> *Ibid* paras 76-81.

<sup>53</sup> *Pad v Turkey* App no 60167/00 (ECtHR, 28 June 2007).

<sup>54</sup> *Ibid* para 54.

<sup>55</sup> *Ibid* para 53.

<sup>56</sup> *Isaak v Turkey* App No 44587/98 (ECtHR, 28 September 2006).

<sup>57</sup> *Ibid*.

<sup>58</sup> *Andreou v Turkey* App No 45653/99 (ECtHR, 3 June 2008).

stated that in exceptional circumstances jurisdiction would be found when a state ‘produced effects’ in a territory over which it had no control: ‘the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries’ brought the applicant within the jurisdiction of Turkey.

In *Issa, Pad, Isaak* and *Andreou* are examples of cases where the ECtHR adopts the state agent authority and control test in situations of shooting to establish jurisdiction. The shootings can come from the air, from the ground, or from across a border. They can take place in another state’s territory or in an international organisation’s neutral buffer zone. The ECtHR also diverges from the principle that it does not adopt a ‘cause-and-effect’ approach to extraterritoriality. This is especially visible in the wording of *Andreou* where the ECtHR established jurisdiction because the shots fired by Turkish agents were the ‘direct and immediate cause’ of the death. In the same post- *Banković* period, the ECtHR found that ‘directly after being handed over to the Turkish officials by the Kenyan officials [in Nairobi airport], [Öcalan] was under effective Turkish authority and therefore within the ‘jurisdiction’ of that State for the purposes of Art 1 of the Convention’.<sup>59</sup> The applicant was ‘*physically forced* to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey’.<sup>60</sup>

*Banković* significantly limited extraterritoriality to ‘exceptional’ circumstances, applying the effective control test to the exclusion of the state agent authority and control test, and admitting of other limited exceptions to the rule of non-extraterritoriality. However, following *Banković*, the ECtHR expands jurisdiction to cover shootings and physical force, using the state agent authority and control test. Therefore, while *Banković* limited extraterritoriality, decisions that followed quickly began to expand its application again.

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<sup>59</sup> *Öcalan v Turkey* (2005) 41 EHRR 45 para 91.

<sup>60</sup> *Ibid* para 93 [emphasis added]; Miller interprets this decision as giving the ECHR broad extraterritorial scope in the post-Bankovic period. See further Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 24) 1229.

### 5.2.3. Jurisdiction Tests: Post-Al-Skeini

In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.<sup>61</sup>

*Al Skeini v UK* replaced *Banković v Belgium* as the leading Strasbourg authority on the extraterritorial application of the ECHR.<sup>62</sup> *Al Skeini* concerned the US invasion of Iraq in 2003. Major combat operations ended later that year following the displacement of the Ba'ath regime and the USA and the UK became Occupying Powers, setting up the Coalition Provisional Authority (CPA). The case progressed through the UK courts, attracting much academic interest, before reaching the ECtHR.<sup>63</sup> The applicants successfully claimed at the ECtHR that the UK had breached their procedural obligation under Article 2 right to life to carry out an effective investigation into the death by British soldiers of their relatives who were six Iraqi civilians. The first and fourth applicant were shot during a British patrol at night, the second applicant was shot at night during a house raid, the third applicant was shot in crossfire, the fifth applicant was allegedly arrested by British soldiers, beaten up and forced into a river where his body was found and the sixth applicant was killed in custody.<sup>64</sup> The ECtHR noted that in the case of Baha Mousa, the sixth applicant, a full public inquiry had been undertaken and therefore found no violation.<sup>65</sup> The ECtHR described 'jurisdiction' as a threshold criterion and a necessary condition for a Contracting State

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<sup>61</sup> *Al Skeini* Concurring Opinion Judge Bonello (n 2).

<sup>62</sup> Milanovic, 'Al-Skeini and Al Jedda' (n 6) 121; Mallory 'European Court of Human Rights *Al-Skeini* (n 6) 303.

<sup>63</sup> *R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (ADMIN), [2004] All ER (D) 197 (Dec); *R (on the application of Al Skeini and others) v Secretary of State for Defence* [2005] EWCA Civ 1609, [2005] All ER (D) 337 (Dec); *R (on the application of Al Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153; See e.g. Tobias Thienel, 'The ECHR in Iraq' (2008) 6 J Int'l Criminal Justice 115; Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?' (2005) 10 EHRLR 115.

<sup>64</sup> *Al Skeini* (n 2) paras 33-71.

<sup>65</sup> William Gage, *The Report of the Baha Mousa Enquiry* (TSO 2011) <http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/report/index.ht>; Andrew Williams, *A Very British Killing: The Death of Baha Mousa* (Jonathan Cape: 2012).



to be able to be held responsible for acts or omissions imputable to it.<sup>66</sup> It maintained that jurisdictional competence was ‘primarily territorial’ and applied extraterritorially only in ‘exceptional’ circumstances.<sup>67</sup> The ECtHR consolidated two tests of extraterritorial jurisdiction: a ‘state agent authority and control’ test<sup>68</sup> and an ‘effective control over an area’ test.<sup>69</sup> Under the ‘state agent authority and control’ test the ECtHR listed a number of different circumstances for establishing jurisdiction. It included first, the diplomatic and consular cases,<sup>70</sup> second, a ‘public powers’ test, and third, it listed a number of cases where the ‘use of force’ by a state agent could bring someone within the jurisdiction of a state including cases whereby an individual was ‘brought into custody’, citing *Öcalan*, *Issa*, *Al-Saadoon* and *Medvedyev*.<sup>71</sup> It confirmed that under the ‘state agent authority and control’ test ‘Convention rights [could] be “divided and tailored” (compare *Banković and Others*, cited above § 75)’.<sup>72</sup> It also confirmed that the state agent authority and control test and effective control test exist alongside one another rather than to the exclusion of one another.

The second ‘public powers’ category recognised the exercise of extraterritorial jurisdiction by a Contracting State when, ‘through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (see *Banković and Others*, cited above, §71)’ including executive and judicial functions.<sup>73</sup> Under the ‘effective control over an area’ heading, the ECtHR stated that jurisdiction will be found:

[W]hen, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that 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

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<sup>66</sup> *Al Skeini* (n 2) *Ibid* para 130.

<sup>67</sup> *Ibid* para 131.

<sup>68</sup> *Ibid* para 133.

<sup>69</sup> *Ibid* para 138.

<sup>70</sup> *Ibid* para 134 citing *X v Germany* (n 10); *X v UK* (n 11); *M v Denmark* (n 12).

<sup>71</sup> *Ibid* para 136.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* para 135.

directly, through the Contracting State's own armed forces, or through a subordinate local administration.<sup>74</sup>

In applying the law to the facts, the ECtHR first asked whether the UK exercised public powers. Evidence in the correspondence between UK and US Permanent Representatives and the UNSC,<sup>75</sup> CPA legislation,<sup>76</sup> UNSCRs<sup>77</sup> indicated that the UK's security tasks in Al-Basra included 'patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police states'.<sup>78</sup> The ECtHR thereby found that the UK had assumed the exercise of 'public powers normally to be exercised by a sovereign government' from the falling of the Ba'ath regime to the accession of the interim Iraqi government.<sup>79</sup> Its public power function was to maintain security in southeast Iraq. In these 'exceptional circumstances' the UK 'through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations' and therefore established jurisdiction.<sup>80</sup>

Aurel Sari and Martin Scheinin interpret the decision as requiring control over the territory, in the form of military occupation as well as the application of the state agent authority and control test.<sup>81</sup> Most commentators interpret the judgment as requiring the exercise of public powers and control over an individual test.<sup>82</sup> According to this interpretation had the UK not exercised public powers, the personal model of

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<sup>74</sup> Ibid para 138 citing *Loizidou (preliminary objections)* (n 3) *Cyprus v Turkey* (n 18) para 76, *Banković* (n 3) para 70, *Ilascu* (n 7) paras 314-316 and *Loizidou (merits)* (n 30) para 52.

<sup>75</sup> Ibid para 144, 146.

<sup>76</sup> Ibid para 145.

<sup>77</sup> Ibid para 148 citing UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511; UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546.

<sup>78</sup> Ibid para 147.

<sup>79</sup> Ibid para 149.

<sup>80</sup> Ibid.

<sup>81</sup> Aurel Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions?' (2014) 53 *Military L and L War Rev* 287, 296-9; Martin Scheinin, 'Al-Skeini and the elusive parameters of extraterritorial jurisdiction' (2011) 5 *EHRLR* 566, 579.

<sup>82</sup> Milanovic, 'Al-Skeini and Al-Jedda' (n 6) 130; Paolo Ronchi, 'The Borders of Human Rights' (2012) 128 *LQR* 20.

jurisdiction would not have applied. At first sight, this combined test approach – an approach requiring the exercise of public powers and control over the individual – indicates that a high level of control was required in order to make the ECHR applicable under Article 1. However, the substance of public powers is ambiguous and arguably any action by a state agent could be construed as a public power.<sup>83</sup> Importantly, although it clarified a number of grounds upon which jurisdiction could be established, *Al Skeini v UK* did not overrule the finding in *Banković* that Article 1 jurisdiction was ‘primarily territorial’ and exceptional in nature. Anna Cowan finds that *Al Skeini* does not represent a significant departure from *Banković*.<sup>84</sup> First, she states that although *Al Skeini*, unlike *Banković*, does recognise the state agent authority and control test, *Al Skeini* does not condone ‘cherry picking’ i.e. it does not allow states to choose which rights they protect when they have control and does not condone a cause and effect approach to extraterritoriality.<sup>85</sup> Second, she argues that the ‘effective control’ test put forward in *Banković*, is consistent with the two tests of effective control and state agent authority and control put forward by *Al Skeini*:

If the comma is placed after “occupation” [in *Banković*], it reads as if the Court is maintaining the typical distinction between effective control of territory (or the spatial model of jurisdiction) and a situation where the state’s authorities are exercising public powers with the local government’s consent/invitation/acquiescence, which can be interpreted as a formulation of state agent authority exception (or the personal model of jurisdiction).<sup>86</sup>

The main problem with this argument is that there is not a comma after ‘occupation’ in *Banković*. The decision to exclude a comma indicates that the ECtHR meant that occupation and public powers not be distinguished as two tests. Just because a mere

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<sup>83</sup> See e.g. Samantha Miko, ‘*Al-Skeini v. United Kingdom* and Extraterritorial Jurisdiction under the European Convention for Human Rights’ (2013) 35(3) Boston College Intl and Comp L Rev 63, 77; Cedric Ryngaert, ‘LJIL Symposium: Response to Samantha Besson’ (*Opinio Juris* 21 December 2012) available at <<http://opiniojuris.org/2012/12/21/ljil-symposium-response-to-samantha-besson/>> last accessed 13 June 2016.

<sup>84</sup> Anna Cowan, ‘A New Watershed? Re-evaluating *Banković* in Light of *Al Skeini*’ (2012) (1)1 CJICL 213, 213-4.

<sup>85</sup> *Ibid* 222.

<sup>86</sup> *Ibid* 223.

comma would change the meaning to be consistent with *Al Skeini*, does not mean that including a comma would be a simple alteration to the text.<sup>87</sup> Furthermore, the ECtHR found in *Banković* that rights could not be ‘divided or tailored’ which indicates that they were not advocating the application of a ‘state agent authority and control’ test alongside an ‘effective control over an area’ test. Milanovic appears to agree that *Al Skeini* does not represent a significant departure from *Banković*. He maintains that *Al Skeini* is consistent with *Banković*: ‘[w]hile the ability to kill is ‘authority and control’ over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft’.<sup>88</sup> He acknowledges that *Al Skeini* and *Banković* do not account for cases such as *Issa, Pad* and *Isaak*.<sup>89</sup> The NATO bombers exercised sufficient authority and control to meet their target of the RTS in *Banković*. Conall Mallory concludes that although *Al Skeini* is an ‘enhancement and clarification’ of the concept of jurisdiction, ‘it builds on the previous jurisprudence of the Strasbourg bodies rather than radically re-writing [it]’.<sup>90</sup> While the reasoning is not radical, it stands up to *Banković* in making the extraterritorial application of the ECHR abroad less of an exception. Relative to the *Banković* decision, *Al Skeini*, on principle, recognises an expansion of extraterritoriality. However, it also appears to have applied a more restrictive approach than the *Issa, Pad, Andreou, Issaak* and *Öcalan* decisions, because of the introduction of a public powers test.

The post-*Al Skeini* period is marked by debates concerning whether the ECtHR’s approach fits into the traditional extraterritoriality tests of state agent authority and control and effective control over an area that predominantly account for the ECtHR’s approach up until and including *Al Skeini*. It is a matter of contention whether *Jaloud*,<sup>91</sup> which concerns a shootout at a checkpoint, employs a state agent authority and control test, incorporating the requirement of exercising a ‘public power’, or only an

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<sup>87</sup> See e.g. Lynne Truss, *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation* (HarperCollins 2011). Alternatively, there may have been no emphasis placed on the comma at the time of the decision. The comma may as a result have no bearing on the meaning that was adopted.

<sup>88</sup> Milanovic, ‘Al Skeini and Al Jedda’ (n 6) 131.

<sup>89</sup> *Ibid* 131.

<sup>90</sup> Mallory, ‘European Court of Human Rights Al-Skeini’ (n 6) 302.

<sup>91</sup> *Jaloud* (n 1). For a similar factual situation see *Pisari v The Republic of Moldova and Russia* App No 42139/12 (ECtHR, 21 April 2015).

attribution test at the exclusion of tests of extraterritoriality.<sup>92</sup> Furthermore, decisions such as *Catan*, *Chiragov*, *Ivantoc* and *Mozer*, that have a similar factual context to *Ilascu*, are ambiguous in terms of whether an extraterritoriality or attribution test is applied.<sup>93</sup> There appears to be a significant decline in the importance of an extraterritoriality test at the ECtHR. Instead, the ECtHR appears to assume extraterritorial jurisdiction and place emphasis on the merits for deciding the outcome of the case.

#### 5.2.4. Jurisdiction Tests: Conclusion

The ECtHR has progressively lowered the jurisdiction threshold by applying the state agent authority and control test to increasingly different factual circumstances and the effective control over an area test is applied no longer to the exclusion of the former post-*Al Skeini*. Diplomatic and consular cases form a consistent part of the extraterritoriality jurisprudence pre-*Banković*. Anomalous exceptional factual circumstances and the *Loizidou (preliminary objections)* judgment that introduced the effective control over an area test also mark that period. *Banković* limits the scope of extraterritoriality by finding it only in ‘exceptional’ circumstances, and requires enforcement of the entire scope of the ECHR under the ‘effective control over an area’ test, emphasising the high threshold required to meet jurisdiction. It denies a ‘cause-and-effect’ notion of jurisdiction and general application of a ‘state agent authority and control’ test. After this decision, however, *Issa*, *Pad*, *Isaac* and *Andreou*, contradict *Banković* finding that shooting and aerial bombing trigger the application of the ECHR abroad. *Al Skeini* consolidates the ‘state agent and authority and control’ test which was denied in *Banković*. However, the ‘public powers’ requirement arguably limits the scope of extraterritorial jurisdiction. The post-*Al Skeini* period then marks a move away from the simple division between the ‘state agent authority and control’ and ‘effective control over the territory’ tests. The significance of this change needs to be evaluated through another doctrinal indicator of a presumption of

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<sup>92</sup> Jane Rooney, ‘The Relationship Between Jurisdiction and Attribution after *Jaloud v Netherlands*’ (2015) 62(3) NILR 407; Lea Raible ‘The Extraterritoriality of the ECHR: why *Jaloud* and *Pisari* should be Read as Game Changers’ (2016) 2 EHRLR 161.

<sup>93</sup> See further Section 4.3.

extraterritoriality: whether Article 1 jurisdiction is considered at all in the ECtHR's reasoning.

### 5.2.5. 'effective control over the territory' test

*Loizidou (preliminary objections)* and *Banković* required a high level of control over a large part of another state's territory in order to establish jurisdiction. This section considers decisions where the 'geographical model collapses into the personal one [as] it is applied to smaller and smaller areas or even objects' over time.<sup>94</sup> Decisions where the 'effective control over an area' test applied to establish jurisdiction over a prison,<sup>95</sup> a plane<sup>96</sup> and boat<sup>97</sup> over time are evaluated.

*Al-Saadoon v UK* applies the 'effective control over an area' test to the smaller space of a detention facility. In *Al-Saadoon* two Iraqi members of the Ba'ath party were arrested in 2003 in Basra, Iraq, by British forces because they allegedly posed a threat to them.<sup>98</sup> The British forces were occupying powers in Basra at the time. The detainees were transferred from the US detention centre, Camp Bucca, to British run detention facilities where they stayed for over five years, after which time Iraqi authority requested their transfer to Iraqi custody. The applicants brought an application under articles 2 (right to life), 3 (right against torture and inhumane treatment), and 6 (right to a fair trial) and Article 1 of Protocol No 13 (abolition of the death penalty).<sup>99</sup> When dealing with the admissibility issue, the Chamber noted that the UK was an occupying power in Iraq and had two detention facilities on Iraqi

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<sup>94</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 171; For the argument that the control over the territory test and control over an individual test are the same, but that the former is short hand for the latter see Raible, 'The Extraterritoriality of the ECHR' (n 92) 164.

<sup>95</sup> *Al-Saadoon* (n 3).

<sup>96</sup> *Öcalan* (n 50).

<sup>97</sup> *Medvedyev* (n 3); *Hirsi* (n 3).

<sup>98</sup> *Al-Saadoon* (n 3).

<sup>99</sup> UNSCR Res 1790 (18 December 2007) UN Doc S/RES/1790. For their transfer to Iraq authorities on 31 December 2008, the end date of the UNSC mandate authorising British troops to perform security functions in Iraq, as they were likely to be executed for war crimes. For further details on the significance and outcome of this decision see Tobius Thienel, 'Cooperation in Iraq and the ECHR: An Awful Epilogue' (Invisible College, 21 January 2009) available at <http://invisiblecollege weblog.leidenuniv.nl/2009/01/21/cooperation-in-iraq-and-the-echr-an-awful/> last accessed 1 August 2016.

territory as a result of military force. While the exercise of ‘control and authority over the individual’ was initially due to the de facto control of the territory in which the detention facilities were located, the ‘exclusive control and authority over the detention facilities’ were subsequently authorised in law under the CPA Order No 17 (Revised) 24 June 2004. This provision remained in force until midnight on 31 December 2008.<sup>100</sup> The ECtHR concluded on jurisdiction that ‘[g]iven the total and exclusive de facto, and subsequently also de jure, control exercised by the UK authorities over the *premises* in question, the individuals detained there, including the applicants, were within the UK’s jurisdiction ...’.<sup>101</sup> In the merits, the ECtHR stated that ‘the respondent State’s armed forces, having entered Iraq, took active steps to bring the applicants within the UK’s jurisdiction, by arresting them and holding them in British-run detention facilities’.<sup>102</sup>

Another relevant decision considering control over a space was the case of *Medvedyev* concerning jurisdiction established on a ship. Pre- *Banković*, decisions considering jurisdiction on state-owned ships and aircraft applied the ‘nationality’ principle with ‘diplomatic and consular premises’ including state flag ships and planes. Therefore, a victim of a rights violation situated on the respondent state’s plane or boat would trigger jurisdiction under the ECHR.<sup>103</sup> Post-*Banković*, the ECtHR found that jurisdiction could be established when the respondent state committed the violation on board a ship that was not owned by them by asking whether the state exercised control over the ship. In *Medvedyev v France*, the applicants were crew members on a merchant ship flying the Cambodian flag. Believing that the ship was carrying large quantities of drugs and after obtaining permission from Cambodian authorities to do so, French authorities searched the ship and detained those aboard.<sup>104</sup> The ship was then brought to a French port where the applicants were brought before a court. The Grand Chamber reasoned that jurisdiction could not be found under article 1 through ‘instantaneous extraterritorial acts’<sup>105</sup> but could be found in cases ‘involving the

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<sup>100</sup> *Al-Saadoon* (n 3) para 87.

<sup>101</sup> *Ibid* para 88.

<sup>102</sup> *Ibid* para 140.

<sup>103</sup> *Cyprus* (1975) (n 17); *Freda* (n 17).

<sup>104</sup> *Medvedyev* (n 3) paras 66-7.

<sup>105</sup> *Ibid* para 64.

activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State'.<sup>106</sup> It stated that France had jurisdiction under Article 1 because it '... exercised full and exclusive control over the [boat] and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France'.<sup>107</sup> Milanovic states that this is an example of control exercised over an individual.<sup>108</sup> The same question of whether the ECtHR applied a control over an area or control over an individual test arose in the context of another transport vehicle, planes. Carlos Ramirez Sanchez, otherwise known as Carlos the Jackal, fled to Sudan because French and US authorities wanted to arrest him for engaging in terrorist activities. He was handed over to the French agents in an airport in Yugoslavia and flown on a French military plane to Paris where he was tried and convicted. He brought an action under article 5 for his arrest. What mattered to the ECtHR 'was that Carlos was handed to French officers, not that he was put on a French-flagged plane'.<sup>109</sup>

The ECtHR listed a number of cases where the 'use of force' by a state agent could bring someone within the jurisdiction of a state including cases whereby an individual was 'brought into custody' providing the examples of *Öcalan*, *Issa*, *Al-Saadoon*, and *Medvedyev*.<sup>110</sup> It did not consider that jurisdiction was found in those cases 'solely' because of the 'control exercised by the Contracting State over the buildings, aircraft or ship' where each individual was held. What was 'decisive' was the 'exercise of physical power' over the person.<sup>111</sup> Milanovic has argued that the word 'solely' leaves open the possibility of applying the spatial model to these cases rather than an authority and control over the individual model.<sup>112</sup> Either way, conceptualising those decisions as applying over a smaller space has led the ECtHR closer to bridging the gap between the state agent authority and control test and effective control over an

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<sup>106</sup> Ibid para 65.

<sup>107</sup> Ibid para 66.

<sup>108</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 167.

<sup>109</sup> Ibid 165.

<sup>110</sup> *Al Skeini* (n 1) para 136.

<sup>111</sup> Ibid para 137.

<sup>112</sup> Milanovic, 'Al-Skeini and Al-Jedda' (n 6) 128; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 151.



area test. In the post-*Al Skeini* decision of *Hirsi*,<sup>113</sup> the ECtHR finally bridged that gap. The Grand Chamber unanimously found a violation of Article 3, Article 4 of Protocol No. 4 (prohibiting collective expulsion) and a violation of Article 13 (guarantee of a domestic remedy). The applicants had left Libya for Italy on three vessels. When the applicants were within the Maltese Search and Rescue Region of responsibility, they were intercepted by the Italian Revenue Police and Coastguard, transferred onto Italian military ships and sent to Tripoli. In Tripoli, the Italian authorities handed the applicants over to the Libyan authorities. The ECtHR acknowledged that the events had occurred on the high seas on military ships flying the Italian flag and the applicants were transferred onto ships situated within Italian jurisdiction.<sup>114</sup> It stated ‘by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying’ and that the ECtHR has found jurisdiction of a state on a ship flying a state’s flag.<sup>115</sup> But then added that ‘[w]here there is control over another, this is de jure control exercised by the State in question over the individuals concerned’<sup>116</sup> and ‘the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities’.<sup>117</sup> The ECtHR placed emphasis on the fact that ‘the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel’<sup>118</sup> but the control over the individual was decisive.

It appears that the ECtHR uses a state agent authority and control test where it would previously use a control over an area test in decisions concerning vessels or buildings. This represents a complete collapse of the effective control over an area test to the state agent authority and control test of jurisdiction. This lowering of the jurisdiction threshold illustrates that the emerging approach of the ECtHR post-*Al Skeini* is a presumption of extraterritoriality.

### 5.3. Espace juridique

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<sup>113</sup> *Hirsi* (n 3).

<sup>114</sup> *Ibid* para 76.

<sup>115</sup> *Ibid* para 77.

<sup>116</sup> *Ibid* para 77.

<sup>117</sup> *Ibid* para 81.

<sup>118</sup> *Ibid* para 81.

This section considers the *espace juridique* principle in the ECtHR's extraterritoriality jurisprudence, when the ECtHR adopted it and whether it is still in operation now. *Espace juridique* refers to the principle that only individuals situated within the Council of Europe can bring an application to the ECtHR. When the *espace juridique* principle no longer applies, individuals who are directly affected by Member States in a way that contravenes their democratic entitlements as defined by the ECHR rights have recourse to the ECtHR as a forum for democratic accountability.

Pre- *Banković*, decisions such as *X v Germany* and *X v UK* do not acknowledge an *espace juridique* principle. In *X v Germany* the rights violation was carried out in Morocco by German consular authorities and in *X v UK* the British Consul was accountable for failing to have a child returned from Jordan. Although the applicant mother was British and situated in British territory at the time, the decision required the British Consul to act abroad in order to fulfil its ECHR obligations. Neither Morocco nor Jordan are signatories to the ECHR and therefore, the ECHR operated outside of the Council of Europe. The *espace juridique* principle was not applicable pre-*Banković*. In *Issa and Pad* the ECtHR held Turkey accountable for its actions in Iran, and in *Isaak*, a shooting in the neutral UN buffer zone triggered jurisdiction. Therefore, post- *Banković*, the ECtHR does not adhere to the *espace juridique* principle. *Banković* explicitly restricted its application to violations occurring within the ECHR 'legal space'.<sup>119</sup> In *Al Skeini* the ECtHR stated that the ECHR did not purport to govern the actions of States not Parties to it and it did not purport to require the Contracting States to impose ECHR standards on other States.<sup>120</sup> The ECtHR then continued cryptically:

The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human

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<sup>119</sup> Mallory, 'European Court of Human Rights' (n 6) 303. See further, Kerem Altiparmak, 'Banković: An Obstacle to the Application of the European Convention on Human Rights in Iraq?' J Conflict and Security L (2004) 9(2) 213-251; De Schutter, 'Globalisation and Jurisdiction' (n 47) 183; Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties' (n 25) 529; Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40(2) Isr L Rev 503, 503.

<sup>120</sup> *Al Skeini* (n 2) para 141, citing *Soering*, para 86.

rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a “vacuum” of protection with the “legal space of the Convention” (see *Cyprus v Turkey*, cited above, §78, and *Banković and Others*, cited above, §80). However, the importance of establishing the occupying State’s jurisdiction in such cases does not imply, a contrario, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa and Others*; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above).<sup>121</sup>

This passage could be interpreted as finding that the *espace juridique* test still applies for the effective control over an area test but not for the state agent authority and control test. The ECtHR cites effective control over an area decisions in reference to the ‘legal space of the Convention’, and state agent authority and control decisions following the statement that ‘the Court has not in its case law applied any such restrictions’. A closer reading suggests that the ECtHR is trying to articulate a more nuanced position on the legal space of the ECHR. The ECtHR explicitly denies that the *espace juridique* principle ever existed as a restriction. Rather, it is in place to emphasise that there should not be a vacuum of ECHR protection within that space. Milanovic states that *espace juridique* was a red herring or a ‘fishy French phrase’<sup>122</sup> in *Banković* but at least *Al Skeini* confirmed that the doctrine applied for both the personal and the spatial conceptions of jurisdiction.<sup>123</sup> It therefore appears that *Banković* represented an anomalous decision, wherein the *espace juridique* principle applied to restrict protection under the ECHR, rather than to use the legal space of the ECHR as a justification for extraterritorial protection. Otherwise, the ECtHR presumes a presumption of extraterritoriality: the ECHR applies outside the legal space of the Council of Europe.

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<sup>121</sup> Ibid para 142.

<sup>122</sup> Milanovic ‘Al-Skeini and Al-Jedda’ (n 6) 129.

<sup>123</sup> Ibid 131.

## 5.4. Article 1 Jurisdiction and Attribution

Section 3.6.2 in Chapter 3 demonstrated that a conflation of Article 1 jurisdiction with attribution indicated a reversal of the presumption against extraterritoriality because it indicates that the ECtHR has skipped the question of whether the ECHR is triggered and moved onto the question as to who should be held responsible. Whether *Loizidou* (*preliminary objections*), which introduced the effective control over a territory test, is indeed an extraterritoriality test or an attribution test is still ambiguous. Later decisions interpret the *Loizidou* precedent in different ways. This section assesses whether there is a prevailing approach.

Both *Ilascu* and *Catan* concerned rights violations carried out by the Moldovan Republic of Transdnistria (MRT). Following the declaration of the Republic of Moldova in June 1990, the 14<sup>th</sup> Russian Army aided Transdnistrian separatists to set up the MRT in September 1990.<sup>124</sup> 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 ECHR.<sup>125</sup> 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 14<sup>th</sup> Russian Army stationed in Transdnistria fought with and on behalf of the Transdnistrian separatist forces;<sup>126</sup> throughout ‘clashes between the Moldovan authorities and the Transdnistrian separatists, the leaders of the Russian Federation supported the separatist authorities by their political declarations’;<sup>127</sup> Russia had provided the separatists with large quantities of weapons;<sup>128</sup> separatists had seized possession of other weapons unopposed by Russian soldiers.<sup>129</sup> In terms of the present day connections between Russia and the MRT, the ECtHR attached particular importance to the fact that the MRT enjoyed financial support from the Russian

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<sup>124</sup>*Ilascu* (n 7) para 2.

<sup>125</sup>*Ibid.*

<sup>126</sup> *Ibid* para 380.

<sup>127</sup> *Ibid* para 318.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid* para 382.

Federation.<sup>130</sup> The Russian Federation cleared the MRT's debt to it, supplied gas to Transnistria on better financial terms than to Moldova, and state-controlled companies of the Russian Federation entered into commercial relations with companies in the MRT.<sup>131</sup> 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 ECtHR noted that after the ceasefire the 'Russian Federation continued to provide military, political and economic support to the separatist regime..., thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova'.<sup>132</sup> The ECtHR did not use positive obligations 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.<sup>133</sup> 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 provide a positive obligations explanation suggests that the test applied was an attribution test.

In *Catan* the ECtHR went into much greater detail concerning both the historical and contemporary links between Russia and the MRT.<sup>134</sup> It repeated the factors that it had considered crucial in *Ilascu*<sup>135</sup> and also added more specific considerations. For example, it noted that in April 1992, the Russian Army stationed in Transnistria intervened in the conflict allowing the separatists to gain possession of Tighnia.<sup>136</sup> The Russian public corporation Gazprom supplied gas to the region and the MRT paid for only a tiny fraction of the gas consumed.<sup>137</sup> Furthermore, the Russian Government had

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<sup>130</sup> Ibid para 390.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid para 382.

<sup>133</sup> Ibid paras 332-352.

<sup>134</sup> *Catan* (n 7).

<sup>135</sup> Ibid paras 118-20.

<sup>136</sup> Ibid para 118.

<sup>137</sup> Ibid para 120.

spent millions of US dollars every year in the form of humanitarian aid to the population of Transnistria, including the payment of old age pensions, financial assistance to schools, hospitals and prisons.<sup>138</sup> This was even more significant considering the fact that only 20% of the MRT population was economically active.<sup>139</sup> 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*<sup>140</sup> and *Saddam Hussein v Albania*<sup>141</sup> applied a control over the territory test. As described above, *Banković* found jurisdiction 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’.<sup>142</sup> 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’.<sup>143</sup> 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.<sup>144</sup> In this way rights under the ECHR could not be ‘divided and tailored’.<sup>145</sup> 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.<sup>146</sup> Without any thorough analysis of the nature of the control exercised by any of the states over the territory of Iraq, the ECtHR

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<sup>138</sup> Ibid.

<sup>139</sup> Ibid para 93.

<sup>140</sup> *Banković* (n 2).

<sup>141</sup> *Saddam Hussein* (n 137).

<sup>142</sup> *Banković* (n 2) para 74.

<sup>143</sup> Ibid para 65.

<sup>144</sup> Ibid para 75.

<sup>145</sup> Ibid.

<sup>146</sup> *Saddam Hussein* (n 137).

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*.<sup>147</sup>

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 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. Post-*Al Skeini* decisions such as *Chiragov v Armenia* and *Jaloud v Netherlands*.<sup>148</sup> indicate that the ECtHR is increasingly skipping the extraterritoriality question to answer questions of attribution.

*Chiragov v Armenia* concerned the right of displaced persons to access their property after a conflict.<sup>149</sup> The case had similar factual circumstances to *Ilascu* and *Catan* as the ECtHR found that Armenia exercised effective overall control over a separatist entity, the ‘Nagorno-Karabakh Republic’ (NKR), to establish admissibility.<sup>150</sup> The ECtHR decided that the Republic of Armenia had significant and decisive influence over the NKR, in line with the *Ilascu* and *Catan* decisions.<sup>151</sup> Milanovic stated that ‘the overall picture coming from *Chiragov* is that it confirms the post-*Al Skeini* trend that the ECtHR is now likely to find Article 1 jurisdiction’.<sup>152</sup>

The ECtHR in *Jaloud* uses an attribution test to the exclusion of an extraterritoriality test in an *Al Skeini*-type context i.e. establishing jurisdiction through the act of shooting. In *Jaloud*, an unknown car sped through a vehicle checkpoint in South Eastern Iraq.<sup>153</sup> The personnel guarding the checkpoint were members of the Iraqi

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<sup>147</sup> *Ibid.*

<sup>148</sup> The more recent *Pisari v Moldova and Russia* decision confirms the *Jaloud* reasoning.

<sup>149</sup> *Chiragov v Armenia* App No 13216/05 (ECtHR, 16 June 2015).

<sup>150</sup> *Ibid* para 168.

<sup>151</sup> *Ibid* para 186.

<sup>152</sup> Marko Milanovic, ‘The Nagorno-Karabakh Cases’ (EJIL: *talk!* 23 June 2015) available at <<http://www.ejiltalk.org/the-nagorno-karabakh-cases/>> last accessed 13 June 2016.

<sup>153</sup> *Jaloud* (n 1) para 10.

Civil Defence Corps (ICDC). A Dutch Lieutenant, who had been called to the checkpoint by the ICDC due to security fears, fired shots at the car speeding through the checkpoint, killing one passenger.<sup>154</sup> It was not clear whether any of the ICDC had fired shots.<sup>155</sup> Under the same category of ‘jurisdiction’ the ECtHR then addressed to whom actions should be attributed. 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)... 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.<sup>156</sup>

For the ECtHR, 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’.<sup>157</sup> For this 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’.<sup>158</sup> It did not matter that the checkpoint was nominally manned by the ICDC because they were subordinate to the Coalition Forces.<sup>159</sup> Dutch forces were not placed ‘at the disposal’ of, or ‘under the exclusive

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<sup>154</sup> Ibid para 13.

<sup>155</sup> Ibid para 12.

<sup>156</sup> Ibid para 143, 146.

<sup>157</sup> Ibid para 147.

<sup>158</sup> Ibid para 149.

<sup>159</sup> Ibid para 150.



direction or control' of any other State, referring to Article 6 of the ILC Draft Articles on State Responsibility and the *Bosnian Genocide case*.<sup>160</sup>

Under the separate heading of 'attribution', 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 ...'<sup>161</sup> It 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.<sup>162</sup>

Milanovic argues that *Jaloud* uses two different kinds of attribution tests and a jurisdiction test. The attribution tests are attribution of jurisdiction-establishing conduct and attribution of violation establishing conduct.<sup>163</sup> Jurisdiction-establishing conduct is the conduct (act or omission) which gives rise to the control over the territory or control over the individual. Violation-establishing conduct is the act or omission which constitutes the violation of the right. He 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'.<sup>164</sup> For him, 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'.<sup>165</sup> Attribution of the actual alleged violations was then addressed under the separate heading of 'attribution' when the ECtHR stated that '[T]he facts giving rise to the

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<sup>160</sup> Ibid para 153.

<sup>161</sup> Ibid para 154.

<sup>162</sup> Ibid para 155.

<sup>163</sup> Marko Milanovic, 'Jurisdiction, Attribution and Responsibility in *Jaloud*' (EJIL: *talk!* 11 December 2014) <http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>.

<sup>164</sup> Ibid citing para 151.

<sup>165</sup> Ibid citing para 152.

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'.<sup>166</sup>

It is argued here that 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, are responsible for the death of Jaloud. The ECtHR finds that being an occupying power is not determinative of jurisdiction.<sup>167</sup> Nor is executing a decision or an order given by the authority of a foreign State.<sup>168</sup> The fact that the checkpoint is nominally manned by the Iraqi ICDC is not determinative of jurisdiction either.<sup>169</sup> What was important for establishing jurisdiction was that the Netherlands had 'retained full command'.<sup>170</sup> 'Full command' was the test applied which attributed the actions to the Netherlands, and not to the ICDC or the UK and US. This indicates that the ECtHR conflated the question of jurisdiction with attribution, and answered who, out of the different actors concerned, was responsible, rather than whether the ECHR was triggered abroad.

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'.<sup>171</sup> Milanovic believes this statement resolves the issue of jurisdiction. This more closely resembles an attribution test rather than a control over the territory or authority and control over an individual test and no Article 1 jurisdiction case law is cited in support of this ruling. The ECtHR further states that the Netherlands Lieutenant 'exercised its "jurisdiction" within the limits of its SFIR mission'.<sup>172</sup> This corroborates earlier statements that the Netherlands' mandate required the Lieutenant to be in 'full command' of his actions and does not refer to the jurisdiction tests. Although the ECtHR states that the Netherlands 'asserted authority and control' while 'exercising its "jurisdiction" within the limits of its SFIR mission'<sup>173</sup> this appears to

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<sup>166</sup> Ibid citing para 155.

<sup>167</sup> *Jaloud* (n 1) para 142.

<sup>168</sup> Ibid paras 143-149.

<sup>169</sup> Ibid para 150.

<sup>170</sup> Ibid paras 143, 147, 149.

<sup>171</sup> Ibid para 152.

<sup>172</sup> Ibid para 152.

<sup>173</sup> Ibid.

be a rhetorical flourish rather than an assertion that it based its finding of jurisdiction on a ‘state authority and control’ test.

Sari, like Milanovic, maintains that the jurisdiction test is intact. He argues that the ECtHR established jurisdiction from three factors: assumption of authority by the Netherlands over the area, authority over the ICDC at the checkpoint, and the nature of the checkpoint as an instrument for asserting control over persons passing through it.<sup>174</sup> However, the first two factors were arrived at through an attribution analysis, and ‘the nature of the checkpoint as an instrument for asserting control over persons passing through it’ was a factor which Sari had imputed into the judgment rather than a factor explicitly spelled out by the ECtHR. Taken together with the fact that the ‘attribution’ section contained no further analysis, it appears that the ECtHR conflated jurisdiction and attribution.

The ECtHR has progressively missed the ‘extraterritoriality’ question in cases where the line between attribution and jurisdiction is blurred. A conflation of the questions of jurisdiction and attribution happens in decisions concerning separatist regimes and the recent decision of *Jaloud v Netherlands* which entails a factual context similar to *Al Skeini* – jurisdiction established through shooting, but without the public powers requirement. The effective control over an area test can be divided into two sub-tests control over the territory and an attribution test. While *Loizidou (preliminary objections)* is ambiguous about whether it prescribes a control over the territory or attribution test, *Banković* and the *Saddam Hussein* decisions use the control over the territory test.<sup>175</sup> Post- *Banković*, the ECtHR uses an attribution test in *Ilascu*. although it does not acknowledge this. Post-*Al Skeini*, in a similar factual context to *Ilascu* the ECtHR applies an attribution test in *Catan* and *Chiragov*. *Jaloud* is significant insofar as it concerns not separatist regimes, but a shooting by a state agent, and focuses on the question as to whom conduct should be attributed rather than whether the ECHR is triggered in the first place. It appears that the relationship between jurisdiction and attribution tests is becoming more blurred and that the ECtHR increasingly conflates

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<sup>174</sup> Sari, ‘Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*’ (n 81) 300.

<sup>175</sup> *Banković* (n 3); *Saddam Hussein v UK* App No 29750/09 (ECtHR, 16 September 2014).

jurisdiction with attribution. This indicates that the ECtHR is skipping the question as to whether the ECHR is triggered, presuming extraterritoriality, and moving to the question of who, out of a number of different actors, should be held responsible in the circumstances.

## 5.5. Extradition, Extraordinary Rendition and Enforcement of UN Security Council Resolutions

This section considers extradition and extraordinary rendition, whether they can be characterised as concerning extraterritoriality and their role in expanding extraterritoriality of the ECHR. In the Pre-*Banković* period, *Soering* was the first extraterritoriality decision considered by the ECtHR.<sup>176</sup> The case concerned a German national who would face the ‘death row phenomenon’ if extradited to the US for a murder trial. The ECtHR found that it would be a breach of Article 3 if a Contracting Party extradited an individual to another state where the state knew or ought to have known that the individual would face a ‘real risk’ of being subjected to torture or inhumane and degrading treatment.<sup>177</sup> Many commentators argue that the decision does not concern extraterritoriality because the inhuman treatment is the decision of the extraditing state to actually proceed with the extradition, while being aware of the risk that the individual will be subjected to inhuman treatment.<sup>178</sup> In *Banković* the ECtHR stated that *Soering* was an example of jurisdiction ‘not restricted to the national territory’ but concerned the actions of a ‘person while he or she is on its territory,

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<sup>176</sup> *Soering* (n 5).

<sup>177</sup> *Ibid* para 91.

<sup>178</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 9; Gondek, *The Reach of Human Rights in a Globalising World* (n 25) 6; Manfred Nowak, ‘Obligation of States to Prevent and Prohibit Torture in an Extraterritorial Perspective’, in Gibney and Skogley (eds) *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 19; Michael O’Boyle, ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on “Life After Bankovic”’ in Fon Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 125, 126-7. However, there is a recognition that non-refoulement abroad does constitute an extradition. See Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 9.

clearly within its jurisdiction' and does not concern the actual exercise of a State's competence or jurisdiction abroad'.<sup>179</sup>

It is understandable why *Soering* could be construed as non-extraterritorial. A state is held accountable for actions taking place on its own territory. Nevertheless, Miller argues that it is the extraterritorial harm itself that gives rise to the rights-violation because of the prior territorial connection to the extraditing state.<sup>180</sup> Indeed, extradition decisions appear to be more about holding the accommodating and sending state accountable for the violations committed abroad, rather than the sending state's thought process at the time of sending the individual abroad. The ECtHR is filling a vacuum of accountability at a global level, rather than merely within the Council of Europe. Understanding the resulting liability under Article 3 has more to do with what will happen abroad, and a Member State's complicity in that, and less to do with a seemingly benign act of sending someone off to another state for trial. The ECtHR includes extradition on its factsheet for the extra-territorial application of the ECHR.<sup>181</sup> For these reasons, extradition should be thought of as an extraterritoriality decision.

The ECtHR is expanding its extraterritoriality jurisprudence. While many extradition decisions concern the potential violation of Article 3, including risk of the death penalty and prison life sentences, post-*Al Skeini* the *Abu Qatada decision* was a high-profile decision relating to Article 6 right to a fair trial.<sup>182</sup> That decision concerned the extradition of a radical cleric, Abu Qatada to Jordan. The ECtHR found that sending Abu Qatada back to face a trial that did not meet the standards of transparency and procedural fairness required to dispel doubts about risk of ill-treatment would constitute a violation of Article 6 by the UK. This means that the ECtHR expanded its adjudication on extradition to include not only Article 3 violations but also Article 6 violations, thus finding extraterritoriality in more factual circumstances.

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<sup>179</sup> *Banković* (n 3) para 68.

<sup>180</sup> Miller, 'Revisiting Extraterritorial Jurisdiction' (n 24) 1243.

<sup>181</sup> 'Extraterritorial Jurisdiction of States Parties to the European Convention on Human Rights' (Council of Europe, February 2016) available at <[http://www.echr.coe.int/Documents/FS\\_Extra-territorial\\_jurisdiction\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf)> last accessed 13 June 2016.

<sup>182</sup> *Othman (Abu Qatada) v UK* App No 8139/09 (ECtHR, 17 January 2012).

Extraordinary rendition is also considered by the ECtHR. An extraordinary rendition program is ‘a euphemism created to describe the irregular transfers of individuals across borders for the purposes of their detention and interrogation in conditions that constitute multiple violations of human rights, including the right to be free from torture’.<sup>183</sup> It is an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system.<sup>184</sup> There is discrepancy over whether extraordinary rendition is a territorial or extraterritorial matter.<sup>185</sup> Extraordinary rendition decisions appear to be as much about Member States facilitating a global network of disappearances and torture, as it is about the thought process of putting them onto a plane. The ECtHR wants to expand accountability and any complicity states have in those programmes. They should be characterised as extraterritoriality decisions.

In *El Masri v the Former Yugoslav Republic of Macedonia*, Macedonian authorities allegedly, and in secret, arrested, held incommunicado, questioned and ill-treated a Lebanese-born German national.<sup>186</sup> The victim was then handed over at Skopje Airport to CIA agents who then transferred him to Afghanistan, where he was detained and ill-treated for over four months. The ECtHR found Macedonia responsible for putting the applicant into the custody of the US authorities and his transfer to Afghanistan.<sup>187</sup> The ECtHR found that ‘Macedonia was not (only) responsible for the act of handing over El-Masri [at the airport]’,<sup>188</sup> in line with *Soering*, but also

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<sup>183</sup> Romy Grozdonova, ‘The United Kingdom and Diplomatic Assurances: A Minimalist Approach towards the Anti-Torture Norm’ (2015) *I Crim L Rev* 15 517-543. See further Silvia Borelli, ‘Rendition, Torture and Intelligence Cooperation’, in Hans Born et al (eds), *International Intelligence Cooperation and Accountability* (Routledge, London, 2011) 98.

<sup>184</sup> *El Masri* (n 5) paras 218-221.

<sup>185</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 7) 9. The fact of extraterritorial non-refoulement has been acknowledged in the context of extraordinary rendition. See further Margaret L Satterthwaite, ‘Rendered Meaningless: Extraordinary Rendition and the Rule of Law’ (2007) 75 *Geo Wash L Rev* 1333.

<sup>186</sup> *El Masri* (n 5).

<sup>187</sup> *Ibid* para 223.

<sup>188</sup> André Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’ (EJIL: *talk!* 24 December 2012) available at

responsible for violating Article 5 during the entire period of his detention in Kabul,<sup>189</sup> ‘imputing’ the detention to Macedonia.<sup>190</sup> While ‘all of this seems a connection of unfinished and not systemically developed thoughts’<sup>191</sup> it has significance for the jurisdiction question. Macedonia was held directly responsible for the detention of an individual by a different international actor abroad. In *Al Nashiri v Poland*<sup>192</sup> and *Husayn (Abu Zubaydah) v Poland*<sup>193</sup> the ECtHR confirmed that Poland was hosting a CIA black site for torturing detainees despite efforts of Poland and the US to cover up the truth.<sup>194</sup> Similar to *El Masri*, Poland was responsible for its actions and omissions in respect of the applicants’ detention and transfer under Article 8; their transfer to places where they risked torture;<sup>195</sup> and their unfair trial by the US military commission;<sup>196</sup> as well as the threat of being subject to the death penalty in the case of *Al Nashiri*.<sup>197</sup> The fact that they were held responsible for what would happen when they were transferred, including the death penalty, torture and unfair trial, all corroborate the idea that the ECtHR is filling accountability gaps in relation to CIA operations through holding Member States accountable for their complicity.

State involvement in the enforcement of UNSCR obligations in another territory should, from the perspective of traditional Article 1 jurisdiction tests, be scrutinised in terms of whether those decisions meet the relevant jurisdiction thresholds. Instead,

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<<http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>> last accessed 13 June 2016.

<sup>189</sup> *El Masri* (n 5) para 240.

<sup>190</sup> *Ibid* para 235. See *Othman (Abu Qatada)* (n 184) para 233.

<sup>191</sup> Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’ (n 190).

<sup>192</sup> *Al Nashiri v Poland* (2015) 60 EHRR 16.

<sup>193</sup> *Husayn (Abu Zubaydah) v Poland* (2015) 60 EHRR 16

<sup>194</sup> Martin Scheinin, ‘The ECtHR finds the US Guilty of Torture’ (EJIL: *talk!* 28 July 2014) available at <<http://www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/> July 28, 2014> last accessed 13 June 2016.

<sup>195</sup> *Al Nashiri* (n 194) para 454.

<sup>196</sup> *Ibid* para 456.

<sup>197</sup> The 2016 decision of *Nasr and Ghali v Italy* App No 44883/09 (ECtHR, 23 February 2016) concerned the CIA’s extraordinary rendition of an Egyptian national with the participation of Italian authorities. The effective remedy under Article 13 included an obligation on Italy to hold those who undertook the extraordinary rendition responsible and punish them.

UNSCR decisions are routinely accepted as admissible with no real consideration of the jurisdiction question. In *Nada v Switzerland*, the applicant was an Italian and Egyptian national living in Campione d'Italia, a small Italian enclave surrounded by Swiss territory.<sup>198</sup> In 2001, Nada's name was placed on the UNSC list of individuals allegedly linked to al-Qaeda and subjected to sanctions prescribed under UNSCR 1267 (1999) and 1333 (2000).<sup>199</sup> Under the sanctions, Switzerland was obliged to prevent Nada from entering Swiss territory, which effectively restricted him to the small area of Campione d'Italia. Nada claimed a breach of Article 8 and Article 13. The ECtHR found that while the measure was attributable to the Sanctions Committee of the UNSC, the implementation of the sanction was attributable to Switzerland even where the language of a UNSCR left no apparent scope for Swiss discretion in the implementation of the measure.<sup>200</sup> The ECtHR stated that "[j]urisdiction" under Article 1 is a threshold criterion for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of infringement of rights and freedoms set forth in the Convention',<sup>201</sup> citing all of the relevant Article 1 jurisdiction jurisprudence. However, it did not apply this principle to the facts of the case. It did not engage upon an investigation into whether the jurisdiction threshold was met. The 'non-obvious question' of which test of jurisdiction applied was not considered.<sup>202</sup> In *Al Dulimi v Switzerland*, Switzerland was obliged to implement measures to freeze Al-Dulimi's assets, confiscate them and transfer them to the Development Fund for Iraq under UNSCR 1483.<sup>203</sup> The applicant successfully claimed a breach of Article 6 for the Swiss Federal Tribunal's refusal to analyse the merits of Al-Dulimi's complaint and therefore pursued the confiscation of

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<sup>198</sup> *Nada* (n 5).

<sup>199</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333.

<sup>200</sup> *Ibid* para 121. Erika de Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 Chinese JIL 787, 806.

<sup>201</sup> *Ibid* para 118.

<sup>202</sup> Marko Milanovic, 'European Court Decides *Nada v Switzerland*' (EJIL: *talk!* 14 September 2012) available at <<http://www.ejiltalk.org/european-court-decides-nada-v-switzerland/>> last accessed 13 June 2016.

<sup>203</sup> *Al Dulimi v Switzerland* 36 BHRC 58 citing UNSC Res 1483 (22 May 2003) UN Doc S/Res/1483 para 23.



their assets without any procedure complying with Article 6.<sup>204</sup> The Chamber repeated paragraph 118 of *Nada*<sup>205</sup> and proceeded to cite extraterritoriality case law,<sup>206</sup> but it ultimately presumed extraterritorial application without further investigation.<sup>207</sup> Therefore, the jurisdiction question was again skipped over and the main concern of to whom action should be attributed took precedent.

Extradition decisions are extraterritorial in nature. The extraterritorial harm should be the impetus for liability, not the action that takes place within the Member State territory. This is compatible with the ECtHR's ambition to fill the vacuum of accountability. The ECtHR is expanding this line of jurisprudence to CIA extraordinary rendition programmes, taking a bolder stance on holding states complicit in those clandestine operations. Decisions of this ilk have only emerged since 2012. The expansion of circumstances where the ECHR is engaged in holding Member States accountable for what other actors do on other territories indicates an emerging presumption of extraterritoriality in this post-*Al Skeini* era. The ECtHR has also played a role in holding states accountable for the implementation of UNSCRs. The extraterritoriality question largely does not feature in the ECtHR's reasoning, indicating a presumption of extraterritoriality.

## 5.6. Conclusion

The ECtHR has progressively lowered the jurisdiction threshold by applying the state agent and control test to increasingly different factual circumstances, and the effective control over an area test not to the exclusion of the state agent authority and control test post-*Al Skeini*. Diplomatic and consular cases formed a consistent part of the extraterritoriality jurisprudence pre-*Banković*. Anomalous exceptions and the effective control over an area test also originated in this period. *Banković* limited the scope of extraterritoriality to 'exceptional' circumstances, and applied the control over the territory test to the exclusion of the state agent authority and control test. However, the ECtHR very quickly began to fill the accountability gap left open by *Banković*. *Issa, Pad, Isaac* and *Andreou* found that shooting and aerial bombing triggered the

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<sup>204</sup> Ibid para 3.

<sup>205</sup> Ibid para 88.

<sup>206</sup> Ibid para 89.

<sup>207</sup> Ibid para 90.

application of the ECHR. *Al Skeini* consolidated this development by stating that the state agent and authority and control test would indeed establish jurisdiction. Post-*Al Skeini* extraterritoriality jurisprudence began to drift away from the traditional, bifurcated state agent authority and control, and effective control over the territory tests.

Pre-*Banković* the *espace juridique* principle did not apply. Cases were admissible from Jordan and Morocco with no consideration of a Council of Europe territorial space. The *espace juridique* principle was then adopted in the *Banković* decision. Again, the ECtHR quickly changed its course from *Banković* in *Issa, Pad* and *Isaak*. *Al Skeini* may be ambiguous in terms of whether *espace juridique* applies to the effective control test or not, but confirmed that it was dispensed with in relation to state agent authority and control. Post-*Al Skeini*, the trend for ignoring this principle has continued. Extraordinary rendition decisions also concern actions outside the *espace juridique*, such as the US and Afghanistan. Although *Loizidou* (*preliminary objections*) may be ambiguous, in the pre-*Al Skeini* decision of *Ilascu*, the ECtHR skipped the extraterritoriality question to consider attribution. Post-*Al Skeini*, the extraterritoriality jurisprudence skips the extraterritoriality question much more obviously and frequently in decisions such as *Catan*, *Jaloud* and *Chiragov*. Furthermore, extraterritoriality fails to be considered in judgments concerning the implementation of UNSCRs such as *Nada* and *Al-Dulimi* where the Article 1 jurisdiction question is far from obvious.

An emerging presumption of extraterritoriality is visible at the ECtHR, and therefore it appears it is converging towards a global constitutionalist frame in respect of disregarding territorial delimitation of admissibility. The ECtHR enables victims of illegal conduct in armed conflict, on the high seas, extraordinary rendition procedures and UNSCR terrorist sanctions, to exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegal under the ECHR. Whether the ECtHR manages norm conflicts arising from extraterritoriality in conformity with the rule of law is yet to be established.

## 6. Detention in Armed Conflict

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### 6.1. Introduction

This chapter asks whether the ECtHR's evolving method of managing norm conflicts arising from extraterritorial application of the ECHR can be explained from a global constitutionalist standpoint. Following the findings of Chapter 4, the rule of law requires the operation of the principle of systemic integration for managing extraterritorial norm conflicts.<sup>1</sup> In adopting this interpretation technique, the ECtHR must provide an explicit, clear and consistent narrative, as well as a reasonable interpretation of the external international law.<sup>2</sup> This chapter asks whether the adoption of the principle of systemic integration by the ECtHR for determining the rules on detention in extraterritorial armed conflict is in conformity with the rule of law. IHL can be applicable in circumstances concerning armed conflict. The relationship between systemic integration and *lex specialis*, a judicial tool associated with aiding the interpretation of the relationship between IHRL and IHL, is examined.<sup>3</sup> Whether systemic integration and *lex specialis* are incommensurable and whether applying both together can provide a clear and nuanced approach to detention in armed conflict is considered. This chapter also asks whether an extraterritorial derogation is required in order for IHL to apply.<sup>4</sup> A comparison of the ECtHR's reasoning in *Al*

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<sup>1</sup> See further Chapter 4, Section 4.5.

<sup>2</sup> See further Chapter 4, Section 4.6.

<sup>3</sup> See e.g. International Law Commission, *Fragmentation of International Law : Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission UN Doc A/CN.4/L.682* (April 13 2006) as corrected Un Doc/A/CN.4/L.682/Corr.1 (August 11, 2006) (finalised by Martti Koskenniemi) 208 para 412; Joost Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 410; Jean d'Aspremont, 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The European Convention on Human Rights and the UK Human Rights Act* (BRILL Martinus Nijhoff, 2011) 25-6; Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 *Isr L Rev* 17.57.

<sup>4</sup> Campbell McLachlan, *Foreign Relations Law* (CUP 2014); Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016) 68.

*Jedda* and *Hassan* is conducted.<sup>5</sup> This is pursued through applying the requirements of the rule of law articulated in Chapter 4 Section 4.6, that the ECtHR explains the rules it takes into account, and provides reasons for its final decision. The ECtHR also needs to be explicit in how it conceptualises the relationship between systemic integration, *lex specialis*, and extraterritorial derogations.<sup>6</sup> This is in order to determine whether the global constitutionalist model best captures the evolution of the ECtHR's jurisprudence concerning detention in armed conflict.

## 6.2. The Operation of the Principle of Systemic Integration

The principle of systemic integration is a global constitutionalist tool for resolving norm conflicts in global governance. Its relationship with *lex specialis*, an interpretation technique associated defining the relationship between human rights and IHL, needs to be assessed in order to answer how the ECtHR should regulate detention in armed conflict.

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<sup>5</sup> *Al Jedda v UK* (2011) 53 EHRR 23; *Hassan v UK* App No 29750/09 (ECtHR, 16 September 2014).

<sup>6</sup> Jelena Pejic, 'The European Court of Human Rights' *Al Jedda* Judgment: the Oversight of International Humanitarian Law' (2011) 93(883) IRR 837, 843; Gabor Rona, 'Is There a Way out of the Non-International Armed Conflict Detention Dilemma?' (2015) 91 Int'l L Stud 32; Ryan Goodman, 'Authorisation versus Regulation of Detention in Non-International Armed Conflicts' (2015) 91 Int'l L Stud 155; *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369; *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 paras 196-244. See further Jane Rooney, 'A Legal Basis for Non-Arbitrary Detention: *Serdar Mohammed v Secretary of State for Defence*' PL (forthcoming 2016); UN Human Rights Committee, General Comment No 35: Article 9 Liberty and Security of Person, UN Doc CCPR/C/GC/35 (December 16, 2014) available at <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en)> last accessed 13 June 2016. For analysis of *Hassan* see Cedric De Koker, 'Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts' (2015) Utrecht J Int'l & Eur L 90; Aurel Sari and Noelle Quénivet, 'Barking up the Wrong Tree: How Not to Save the British Armed Forces from Legal Defeat' (*Lawfare*, 21 April 2015) available at <[www.lawfareblog.com/2015/04/barking-up-the-wrong-tree-how-not-to-save-the-british-armed-forces-from-legal-defeat/](http://www.lawfareblog.com/2015/04/barking-up-the-wrong-tree-how-not-to-save-the-british-armed-forces-from-legal-defeat/)> last accessed 13 June 2016; Eirik Bjorge, 'What is Living and what is Dead in the European Convention on Human Rights? A Comment on *Hassan v United Kingdom*' (QIL, 12 May 2015) available at <<http://www.qil-qdi.org/what-is-living-and-what-is-dead-in-the-european-convention-on-human-rights-a-comment-on-hassan-v-united-kingdom/>> last accessed 13 June 2016.

This section provides an examination of *lex specialis*, including whether it helps to balance competing norms and/or whether it definitively prioritises one over the other, and how each conception of *lex specialis* affects its relationship with systemic integration.<sup>7</sup> Different constructions of the relationship between IHL and IHRL norms are explained and an assessment of how best to regulate that relationship. This is to set the context for deciding how the ECtHR can best regulate detention in armed conflicts when there are different legal regimes and norms pertaining to the situation.

### 6.2.1. *Lex specialis*, systemic integration and the relationship between IHL and IHRL

De deux Loix, ou de deux Conventions, toutes choses d'ailleurs égales, on doit préférer celle qui est la moins générale, et qui approche le plus de l'affaire dont il s'agit. Parce que ce qui est spécial...il est ordonné plus précisément, & il paroît qu'on l'a voulu plus fortement.<sup>8</sup>

The principle of *lex specialis derogate legi generali* holds that in the event of two conflicting norms the more specialised, or the one that 'approaches nearer to the point in question', applies over the more general rule.<sup>9</sup> 'Special' means a rule with more precisely delimited scope of application. The reasons for letting a more specific norm prevail include because it is more 'effective' or 'precise' and because it 'reflects more closely, precisely and/or strongly the consent or expression of will of the states in question'.<sup>10</sup> The principle of *lex specialis* has operated in many different contexts including between two provisions within a single instrument,<sup>11</sup> between two different

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<sup>7</sup> ILC Fragmentation Report (n 3) 237-43.

<sup>8</sup> Emmerich de Vattel, *Le droit des gens ou principes de la Loi Naturelle, appliqués à la conduite et aux affaires des nations et des Souverains* (2 vols, Londres, 1758), Tome I, Livre II, Ch. XVII, para 316, 511. When there are two laws or two Conventions, all things being equal, one should choose the law that is less general, that is more relevant to the circumstances at hand. Because it is particular, it is considered more precise, and it reflects what was intended more strongly.

<sup>9</sup> Emmerich de Vattel, *The Laws of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nation and Sovereigns*, book II, ch XVII, paras 311, 316 (1793).

<sup>10</sup> Pauwelyn, *Conflict of Norms in Public International Law* (n 3) 387.

<sup>11</sup> See e.g. *Beagle Channel Arbitration (Argentina v Chile)* ILR 52 (1979) 141, paras 36, 38; *Brannigan and McBride v UK* (1993) 17 EHRR 539 para 76.

instruments,<sup>12</sup> in choosing treaty standards over other sources of international law,<sup>13</sup> and between two non-treaty standards.<sup>14</sup> The *lex specialis* standard is prioritised because it is more to the point than a general rule; it is better able to take account of the particular circumstances at hand; and the need to comply is felt more acutely because there is greater clarity and definiteness, creating a ‘harder’ norm.<sup>15</sup>

The ILC Fragmentation Report clarifies two ways in which *lex specialis* functions. First, it operates where the specific and general rule ‘point in the same direction’.<sup>16</sup> In this instance, the specific rule is read and understood within the confines or against the background of the general.<sup>17</sup> Second, *lex specialis* is applicable where there are two legal provisions that are both valid and applicable, are in no express hierarchical relationship, and provide *incompatible* direction on how to deal with the same set of facts. In this instance *lex specialis* is modification, overruling or a setting aside of the latter.<sup>18</sup> There is a split between those who define this interpretation technique as only operating when the law points in the same direction on the one hand,<sup>19</sup> and those who believe it only operates to override one obligation when two obligations point in opposite directions, on the other.<sup>20</sup>

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<sup>12</sup> *Mavrommatis Palestine Concessions case*, PCIJ Series A No 2 (1924) 31 wherein the 1922 Mandate for Palestine was *lex specialis* to the 1923 Protocol XII of the Treaty of Lausanne for deciding the PCIJ’s jurisdiction; While *lex specialis* has been applied at the WTO in determining the relationship between covered treaties, there have been no cases of *lex specialis* references between a WTO and non-WTO treaty. See ILC Fragmentation Report (n 3) 43 para 75 FN 87.

<sup>13</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) ICJ Reports 1986 137, para 274: In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.

<sup>14</sup> *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (Merits) ICJ Reports 1960 44.

<sup>15</sup> ILC Fragmentation Report (n 3) 36 para 60.

<sup>16</sup> *Ibid* 49 para 88, 50 para 91.

<sup>17</sup> *Ibid* 35 para 56.

<sup>18</sup> *Ibid* 35 para 57.

<sup>19</sup> Anja Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System’ (2005) 74(1) *Nordic Journal of International Law* 46.

<sup>20</sup> Françoise Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body’ (2008) 90 (871) *IRRC* 549, 558-562.

The question of whether *lex specialis* operates in order to clarify or define more precisely a particular rule, or whether it prioritises one norm at the exclusion of another is often equated with the question of whether it operates as a harmonising tool in operation with the principle of systemic integration or as a tool of prioritisation operating outside of the latter.<sup>21</sup> However, those two questions should not be conflated. Joost Pauwelyn makes a distinction between apparent conflicts and genuine conflicts. Apparent conflicts arise when two norms appear to point in different directions but can be resolved through harmonisation.<sup>22</sup> Genuine conflicts are when two norms cannot be harmonised and one norm needs to be prioritised over the other.<sup>23</sup> Prioritisation rules include *lex posterior*, conflict clauses in treaties, Article 103 UN Charter and rules of *jus cogens*.<sup>24</sup> He labels the harmonisation of apparently conflicting norms as ‘avoiding’ norm conflicts; and prioritising one norm over the other as ‘resolving’ norm conflicts.<sup>25</sup> For Martti Koskenniemi, conflict resolution and interpretation are indistinguishable from each other.<sup>26</sup> Interpretation does not intervene unless there is a conflict. Rules appear to be compatible or in conflict as a result of interpretation.<sup>27</sup> Therefore, norms are not inherently apparent or genuine, according to Koskenniemi, and the techniques of norm conflict avoidance and resolution are synonymous with each other. Rules of harmonisation, including prioritisation, should be used to resolve the norm conflict:

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<sup>21</sup> Marko Milanovic, ‘A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’ (2009) 14(3) J Conflict and Security L 459, 465-470.

<sup>22</sup> Pauwelyn, *Conflict of Norms in Public International Law* (n 3) 272. Harmonisation is the ‘overarching objective on the way towards enhanced coherence of the international legal system’: Nele Matz Luck, ‘Harmonisation, Systemic Integration, and ‘Mutual Supportiveness’ (2006) 17 Finnish YBIL 39, 42.

<sup>23</sup> Ibid.

<sup>24</sup> Milanovic, ‘A Norm Conflict Perspective’ (n 21) 466.

<sup>25</sup> There is a third type of conflict distinguished from apparent and genuine conflicts: unresolvable conflicts. Unresolvable conflicts are conflicts whereby it is impossible to resolve the norm conflict for political reasons: adopting the traditional methods of resolving conflicts would give rise to a politically contested result which courts would not want to be put in the position of deciding. This is addressed further below.

<sup>26</sup> ILC Fragmentation Report (n 3) *ibid* 208 para 412.

<sup>27</sup> Ibid.

Sometimes it may be useful to stress the conflicting nature of two rules or sets of rules so as to point to the need for legislative intervention. Often, however, it seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared ‘systemic’ objective. Whichever way one goes, the process of reasoning follows well-worn legal pathways: references to normal meaning, party will, legitimate expectations, good faith, and subsequent practice as well as the ‘object and purpose’ and principle of effectiveness. If a definite priority (rather than a complete exclusion of norm for the sake of another) must be established, this may be achieved through *lex specialis*, *lex posterior* and *jus cogens*/obligations *erga omnes* and Article 103 UN Charter.<sup>28</sup>

The set aside norm remains ‘in the background’, continuing to influence the interpretation and application of the norm to which priority has been given.<sup>29</sup> The ‘principle of systemic integration is the process *surveyed all along this report* whereby international obligations are interpreted by reference to their normative environment (system)’.<sup>30</sup> Koskenniemi argues that *lex specialis*, *lex posterior* and rules in relation to status are implicit in the operation of Article 31(3)(c) and not separate from the processes of interpretation. Those interpretation techniques do not ‘predetermine’ what it means to ‘confront’ a norm or how they may ‘enter into “concurrence”’ with one another. This must be left to the interpreter.<sup>31</sup> Koskenniemi therefore advocates that *lex specialis* operates within a process of systemic integration, a position that will be adopted here. Regardless of whether it is operating as a harmonising tool or prioritising one norm over another, it is still part of the process of systemic integration. *Lex specialis* is not an alternative to systemic integration but instead is a tool used within that process to balance competing norms.

Negative implications associated with the operation of *lex specialis* and systemic integration are responded to when their relationship is conceived of in this way. For example, *lex specialis* is accused of being overly simplistic when it is considered as

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid 206 para 411.

<sup>30</sup> Ibid 208 para 413.

<sup>31</sup> Ibid 211 para 419.



an interpretation technique that only trumps one regime or one norm over another due to specificity or the character of a treaty, without further scrutiny of whether it amounts to a fair or legally sound result in the circumstances. Adopting the ILC Fragmentation Report approach means that *lex specialis* is just one tool that forms part of a wider process of systemic integration, and can be used in a more nuanced and flexible way. Likewise, in relation to the concern expressed in Chapter 4 Section 4.6 that taking into account international law necessarily undermines the provisions of the ECHR, if the ECHR provides more specific or relevant standards pertaining to the case at hand, *lex specialis* may operate to ensure that the ECHR norm is upheld. *Lex specialis* can also be used as a means of interpreting one particular aspect of a right in relation to another competing body of law when operating within the process of systemic integration, again ensuring opportunities are available in the future for providing a different and nuanced interpretation of a different factual circumstance. Systemic integration, lexically, can encapsulate many different interpretation techniques that taken separately provide clear guidance on norm conflicts, but taken together can provide a much more sophisticated artillery of tools for negotiating different norm conflicts. The certainty arising from the specific interpretation techniques married with their coexistence under the umbrella of systemic integration provides an appropriate balance between certainty and flexibility.

The ICJ's use of *lex specialis* in interpreting the relationship between IHL and IHRL in the *Nuclear Weapons* advisory opinion<sup>32</sup> and the *Wall* opinion<sup>33</sup> has been the subject of much debate. The four different positions can be summarised as follows: *lex specialis* operates so that IHL displaces IHRL as a body of law in armed conflict; it functions on a norm by norm basis, and IHRL may operate as the more special law depending on the circumstances; that this rule of interpretation enables one norm to be interpreted against the other; and that it has no significance in determining the relationship between IHL and IHRL but rather, that a much more loose harmonising process not contingent upon *lex specialis* is applicable. Decisions of the ICJ are evaluated to see how it manages the relationship between norms and whether its approach should be reconsidered.

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<sup>32</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Reports 226.

<sup>33</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) ICJ Reports 136.

In the Advisory Opinion of *Nuclear Weapons*, opponents of the legality of nuclear weapons argued that the threat or use of nuclear weapons would be a violation of Article 6 of the ICCPR, which protects the right to life.<sup>34</sup> The proponents of legality of the use and threat of nuclear weapons argued that the ICCPR made no mention of war or weapons; that it was not envisaged as an instrument for regulating the legality of nuclear weapons; and that IHRL only applied in peacetime whereas IHL applied in hostilities.<sup>35</sup> The ICJ found that the ICCPR did not cease in time of war, except by operation of Article 4 of the Covenant in which case ‘certain provisions may be derogated from in a time of national emergency.’<sup>36</sup> No derogation from the respect for right to life was permitted under Article 4 ICCPR:

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>37</sup>

*Nuclear Weapons* was the first pronouncement by an international court that IHRL continued to apply in times of armed conflict.<sup>38</sup> However, there was no consensus on what the opinion meant for the relationship between IHRL and IHL. Michael Dennis claims that *Nuclear Weapons* advocated unqualified supremacy of IHL over IHRL.<sup>39</sup> The ILC Fragmentation Report appears to adopt a similar reading of this opinion as it states that IHL was the *lex specialis* in this instance because ‘the rule itself identifies the conditions in which it is to apply, namely the presence of an “armed conflict”’.<sup>40</sup> It could be inferred from the ILC Fragmentation Report that *Nuclear Weapons* intended for IHL to displace IHRL as a body of law in armed conflict. However, the

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<sup>34</sup> ILC Fragmentation Report (n 3) 239, para 24. Article 6(1) states: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 240 para 25.

<sup>37</sup> Ibid.

<sup>38</sup> Theodore Meron, ‘The Humanisation of Humanitarian Law’ 94 AJIL (2000) 239, 240.

<sup>39</sup> Michael Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 AJIL 119, 139, 141.

<sup>40</sup> ILC Fragmentation Report (n 3) 57 para 104.

better reading is that the ICJ focused on the relationship between specific IHL and IHRL norms,<sup>41</sup> rather than the relationship between one body of law vis-à-vis another. The ICJ made specific statements relating to the right to life, leaving open the evaluation between IHL and IHRL norms in different circumstances.

Louise Doswald-Beck considers that it was solely in the context of the right to life that IHL operated as a *lex specialis*, prioritising IHL over IHRL, but that given another issue the *lex specialis* could be IHRL.<sup>42</sup> She uses the example of IHRL prevailing over IHL in relation to judicial guarantees whereas she provides the example of targeted killings as an issue in which IHL would prevail.<sup>43</sup> Pauwelyn, argues that the ICJ used *lex specialis* as a tool of interpretation. While IHL interpreted the right to life without dismissing IHRL: the *lex specialis* and the *lex generalis* could be applied side by side, the former playing the greater role of the two.<sup>44</sup> What is being set aside does not vanish, but only the specific aspect that is under assessment: ‘arbitrariness’. Orna Ben-Naftali and Yuval Shany agree with this interpretation insofar as *lex specialis* was used as a tool of interpretation, interpreting one norm in light of another norm. They state that the purposes and principles underlying IHL and IHRL are the same and could help to influence each other on a spectrum.<sup>45</sup> Nancie Prud’homme and Dale Stephens interpret the decision as stating that *lex specialis* is not used to give priority to one discipline ‘in total exclusion of the other’ and that IHL and IHRL are seen as complementary to one another, with IHRL influencing IHL as much as IHL influenced IHRL.<sup>46</sup> It is not certain whether they see the actual operation of the *lex specialis* principle in *Nuclear Weapons*.

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<sup>41</sup> Heike Krieger, ‘A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’ (2006) 11 J Conflict and Security L 265.

<sup>42</sup> Louise Doswald-Beck, ‘International Humanitarian Law and the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’ (1997) 316 IRRC 35.

<sup>43</sup> Nancie Prud’homme, ‘Lex Specialis: Oversimplifying a more Complex and Multi-faceted Relationship?’ (2007) 40(2) Isr L Rev 356, 374.

<sup>44</sup> Pauwelyn, *Conflict of Norms in Public International Law* (n 3) 410.

<sup>45</sup> Ben-Naftali and Shany, ‘Living in Denial’ (n 3) 57.

<sup>46</sup> Prud’homme, ‘Lex Specialis: Oversimplifying a more Complex and Multi-faceted Relationship?’ (n 43) 375; Dale Stephens, ‘Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case’ 4 Yale HR and Dev L J 1, 5.

The interpretation of *Nuclear Weapons* put forward by Pauwelyn, Ben Naftali and Shany while preferable, was not the one put forward by the ICJ. The former conceive of *lex specialis* as operating within a process of systemic integration, with the former serving to offer a more specific interpretation of a rule or ensuring that one norm is set aside in the specific circumstances. This is in line with the ILC Fragmentation Report's understanding of the relationship between those two interpretative tools. In contrast is the understanding of *lex specialis* put forward by the ICJ, as a tool for prioritisation rather than nuanced interpretation in the specific circumstances. *Lex specialis* is an interpretation aid within a broader process of systemic integration, rather than a tool for hard and fast prioritisation. The ICJ closed off possibilities in mediating the relationship between IHRL and IHL. It did not consider whether, even in relation to the norm of the right to life, whether IHRL jurisprudence may have more detailed criteria to deal with an effective investigation into an alleged illegal killing, for example.

The *Wall* advisory opinion raised the question of the relationship between IHL and IHRL again. The ICJ stated:

As regards the relationship between [IHL] and [IHRL], there are thus three possible situations: some rights may be exclusively matters of [IHL]; others may be exclusively matters of [IHRL]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely [IHRL] and, as *lex specialis*, [IHL].<sup>47</sup>

Prud'homme argues that the ICJ 'appeared to be promoting the complementarity of [IHL] and [IHRL] suggesting that in some situations only one discipline will apply exclusively and in other circumstances both branches will apply concomitantly'.<sup>48</sup> However, she notes the fact that IHL was in the end labelled as the *lex specialis*.<sup>49</sup> Jean d'Aspremont argues that in both cases the ICJ adopted a 'conciliatory' approach to

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<sup>47</sup> *Construction of a Wall* (n 33) para 106.

<sup>48</sup> Prud'homme 'Lex specialis: Oversimplifying a more Complex and multi-faceted relationship?' (n 43) 377.

<sup>49</sup> *Ibid.*

IHL and IHRL.<sup>50</sup> The principle of *lex specialis* was used not to solve a conflict of norms, but to elect which rules should constitute the primary interpretative standard in the application of the principle of systemic integration.<sup>51</sup> The ICJ, by endorsing an interpretation that reconciled them, stopped short of finding a conflict of norms which would have called for the application of a conflict of norms-solving mechanism.<sup>52</sup> IHL constituted the standard of reference for conciliatory interpretation.<sup>53</sup> Therefore, d'Aspremont finds that *lex specialis* operated within a process of systemic integration, used to interpret one norm in light of the other, with IHL as the *lex specialis*. It is a compelling argument to say that the ICJ in *Wall* chose IHL as the *lex specialis* for interpreting IHRL norms in all circumstances and that d'Aspremont's interpretation of the *Wall* case is a correct one.

There is some support for the argument that IHL, operating as the *lex specialis* of the process of systemic integration but as a separate principle within it nonetheless, is a good approach. IHL is the *lex specialis*, and therefore the Court interprets applicable IHRL in light of IHL leading to systemic integration of IHRL and IHL. D'Aspremont states a few reasons why IHL should always be *lex specialis* in the systemic integration of the two concepts in armed conflict. First, if IHRL were to be elected the central interpretative yardstick for systemic integration of IHRL and IHL, this would render IHL totally irrelevant.<sup>54</sup> However, this is not necessarily the case. As much as IHRL evolves as it takes into account other legal regimes, IHL must evolve in relation to other laws and different ways in which stakeholders feel legal regimes should interact. A 'humanisation' of IHL law could take place through consistent behaviour and belief by state actions that such a change had taken place through customary international law.<sup>55</sup> Furthermore, IHRL can provide more detail on certain procedures that were not contemplated by IHL such as judicial guarantees as argued by Doswald-Beck and also Prud'homme. D'Aspremont's second argument in favour of electing IHL as the *lex*

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<sup>50</sup> D'Aspremont, 'Articulating International Human Rights and International Humanitarian Law' (n 3) 25-6.

<sup>51</sup> *Ibid* 26, 28.

<sup>52</sup> *Ibid* 28.

<sup>53</sup> *Ibid* 29.

<sup>54</sup> *Ibid* 31.

<sup>55</sup> *Ibid*.

*specialis* every time in armed conflict is that conducting systemic integration along the lines drawn by IHRL would give rise to regulations that do not correspond with the reality of armed conflicts or situations of hostilities where states generally feel less constrained in their use of coercive means.<sup>56</sup> While the rules on killing and detention provided by IHL are particularly appropriate to situations of armed conflict there are certain scenarios in which IHRL provide more specific criteria, or a more developed line of jurisprudence and judicial reasoning, such as in relation to judicial guarantees.

D'Aspremont also criticises the indeterminacy of using *lex specialis* to enable either IHRL or IHL to be elected as the *lex specialis* within a process of systemic integration. However, there is much support for the proposition that international law is indeterminate in its very nature and that this is important for the continued operation and development of international law.<sup>57</sup> Conversely, there are those who argue that the *lex specialis* principle serves no purpose within the principle of systemic integration and that the principle of systemic integration can and should operate without *lex specialis*. One criticism is that with no hierarchy and no logical relations between the legal framework and norms, it is impossible to identify what is general and specific.<sup>58</sup> Second, 'the vagueness of the *lex specialis* principle generates serious reservations as to its ability to stand as a sound theoretical model that clarifies the co-existence of the two disciplines and articulates their interplay'.<sup>59</sup> Third, as Jörg Kammerhofer puts it: '[i]s 'special' 'true' and 'general' 'false'?'<sup>60</sup> In other words, does the fact that there is a more precise rule make it a 'better' rule than the more general standard? Choosing a specific rule over a more general rule may not always give rise to the most just result.

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<sup>56</sup> Ibid 32.

<sup>57</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006). This point is addressed further in Section 7.4.2.

<sup>58</sup> Ibid; ILC Fragmentation Report (n 3) 60 para 111; Prud'homme, 'Lex specialis: Oversimplifying a more Complex and multi-faceted relationship?' (n 43) 382.

<sup>59</sup> Prud'homme, 'Lex specialis: Oversimplifying a more Complex and multi-faceted relationship?' (n 43) 381.

<sup>60</sup> Jörg kammerhofer, 'Unearthing Structural Uncertainty through Neo-Kelsenian Consistency: Conflicts of Norms in International Law' 7 (2005) European Society of International Law Research Forum Paper available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1535942](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535942)> last accessed 12 October 2015.

However, the principle of *lex specialis* can serve some utility in justifying the choice of one norm over another. For example, in relation to the specific and unique circumstances of armed conflict, it is important that allowance is made for certain acts that are essential to the very nature of armed conflict such as detention for removing from the battlefield, and enabling state agents to kill other individuals intentionally. Applying *lex specialis* makes sense here, because it recognises that the particular, unique circumstances involve the application of a rule that is more fitting for those circumstances. It provides a well-known legal technique to justify electing one law over another because of its greater specificity and relevance. In relation to the criticism of the application of the *lex specialis* principle being vague, the alternative which is put forward by those commentators that are convinced of the utility of *lex specialis* is the principle of systemic integration, which is much more vague and substance-less than the principle of *lex specialis*.

The criticism of vagueness cannot, in and of itself, justify not finding any utility in the principle of *lex specialis* when the alternative is a much more vague and complex principle. Furthermore, in relation to the truth or falseness of a rule, such a dichotomy cannot be stated to be synonymous with special and general. As has already been pointed out, the general and special rule need not be mutually exclusive but point in the same direction to one another, with one rule clarifying the application of the other.<sup>61</sup> In this instance, *lex specialis* does not claim to be providing a true meaning instead of a false one, but rather a clarification of the general rule.

Françoise Hampson has argued that *lex specialis* is designed to deal with vertical relationships between general and specific regimes contrary to Anja Lindroos.<sup>62</sup> She states that IHL and IHRL involve a horizontal collision between two regimes, where one is not a more specific form of the other.<sup>63</sup> However, firstly, it is best not to conceive of the *lex specialis* principle operating as between regimes but as between norms. Secondly, in relation to certain norms IHL or IHRL can provide better or more

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<sup>61</sup> Indeed, Anja Lindroos states that this is the only occasion on which *lex specialis* can operate. See further, Lindroos, 'Addressing Norm Conflicts' (n 19).

<sup>62</sup> Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law' (n 20) 558-562.

<sup>63</sup> Ibid.

up-to-date guidance on the regulation of a particular issue. Many recognise the complementarity of these regimes.<sup>64</sup> Françoise Hampson and Noam Lubell recognise their complementarity in the *Hassan* Amicus Curiae brief where they stipulate how IHRL can aid in clarifying and developing IHL rules, and IHL rules can aid in developing and applying IHRL in armed conflict.<sup>65</sup>

Prud'homme puts forward three criteria for deciding norm conflicts between different regimes:<sup>66</sup> the type of conflict, the type of protected person and the type of right.<sup>67</sup> Whether the conflict is international or non-international; whether the person is a civilian or a member of the armed forces; and whether the right is derogable will influence which body of law is applicable in a given circumstance, and how that law is applied.<sup>68</sup> Although this is a rudimentary scheme, it can be used as a platform for developing the relationship between IHL and IHRL in armed conflict.

Hampson and Lubell have appeared to adopt a similar scheme and developed further criteria for the parallel application of IHL and IHRL, applying them along a spectrum.<sup>69</sup> In addition to the type of armed conflict being relevant, the degree of intensity of a non-international armed conflict may be relevant<sup>70</sup> and whether the armed conflict is proactive or reactive.<sup>71</sup> Although Hampson and Lubell too see the *lex specialis* principle as an outdated one which has no role to play in a process of systemic integration, one criterion they include is whether there exists already a

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<sup>64</sup> See for example, Doswald-Beck, 'International Humanitarian Law and the International Court of Justice' (n 42).

<sup>65</sup> Françoise Hampson and Noam Lubell, 'Amicus Curiae Brief – *Hassan v UK*, 29750/09' (October 2013) 3 available at <<http://repository.essex.ac.uk/9690/1/hampson-lubell-amicus-ecthr-oct-2013.pdf>> last accessed 13 January 2016.

<sup>66</sup> Prud'homme calls this a process of 'harmonisation' which has nothing to do with *lex specialis*. However, it is submitted here that by stating that one regime's rule is more relevant than another according to different factors, she is implicitly invoking *lex specialis* as a rule of interpretation.

<sup>67</sup> Prud'homme, 'Lex specialis: Oversimplifying a more Complex and Multi-faceted Relationship?' (n 43) 391.

<sup>68</sup> Ibid.

<sup>69</sup> Hampson and Lubell, 'Amicus Curiae Brief' (n 65) 9.

<sup>70</sup> Ibid 9.

<sup>71</sup> A relevant distinction in human rights law: *McCann v UK* (1996) 21 EHRR 97; *Ergi v Turkey* (2001) 32 EHRR 18.



specific provision in one of those bodies of law regulating a particular situation and whether it is treaty or customary law.<sup>72</sup> The fact that they point this out as a specific criterion to be taken into consideration is explicit evidence of the fact that they have not abandoned *lex specialis* entirely. As an example of how these different criteria may be used together to determine the rules on detention in armed conflict, they suggest that whether someone should be interned in armed conflict should be determined by rules closer on the spectrum to IHL, because of the relevance of status of the individual.<sup>73</sup> In the middle of the spectrum between IHL and IHRL one should determine ‘periodicity of review, procedural rights, rights to information and to legal advice and rights of communication’.<sup>74</sup> Physical and psychological damage should be determined by IHRL, because it is a non-derogable right.<sup>75</sup> The Amicus Curiae brief therefore recommends the operation of *lex specialis* within a process of systemic integration which places more emphasis on IHRL or IHL depending upon which law can provide more authority or detail on the specific issue.

Instead of stating that IHL necessarily overrides IHRL when it applies, the ECtHR should adopt a much more nuanced approach in order to be in line with a global constitutionalist approach. *Lex specialis* operates to harmonise two conflicting norms - and does not determine the relationship of one *regime* vis-à-vis another - within a process of systemic integration by both interpreting one norm in light of the other depending upon which norm is more specific, and also by prioritising one norm over the other. Applying this understanding of *lex specialis* as operating within the principle of systemic integration to the relationship between IHL and IHRL, depending upon which body of law places most emphasis on a particular issue, an IHL rule will be interpreted in light of an IHRL rule; an IHRL rule will be interpreted in light of an IHL rule; or one rule will be prioritised over the other.

### 6.2.2. Extraterritorial Derogations

Whether or not an extraterritorial derogation under Article 15 should be required for *lex specialis* to operate in situations of detention in armed conflict is a matter of much

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<sup>72</sup> Hampson and Lubell, ‘Amicus Curiae Brief’ (n 65) 9.

<sup>73</sup> Ibid 19 para 54.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

speculation.<sup>76</sup> Those who argue that a derogation is required argue that Article 5 does not admit of any further exceptions to liberty than are explicitly stated in the provision. Article 5 (1) (a)-(f) provides an exhaustive list of non-arbitrary detention in peacetime<sup>77</sup> which prohibits internment.<sup>78</sup> Because of this exhaustive list it is thought that Article 5 does not leave any room to be interpreted in light of IHL and allow further exceptions to the rule against detention.<sup>79</sup> This is in contrast to Article 9(1) of the ICCPR which appears to leave space for interpretation and allow that provision to be interpreted in light of IHL.<sup>80</sup> A derogation under Article 15 is required in order for Article 5 to admit of further exceptions to the rule against detention under the ECHR.<sup>81</sup>

Milanovic argues that using *lex specialis* to interpret exceptions into Article 5 without a derogation would be ‘judicial vandalism’.<sup>82</sup> For him, ‘*lex specialis*...must operate within the permissible bounds of interpretation’.<sup>83</sup> He provides an example of unresolvable rules in connection to judicial review of lawfulness of detention.<sup>84</sup> Article 5(4) of the ECHR requires a review of the lawfulness of detention. However, Article 5 of the Third Geneva Convention relating to the detention of POWs<sup>85</sup> and Article 43(1) of the Fourth Geneva Convention relating to civilians,<sup>86</sup> does not require such judicial review. For Milanovic, this is an unresolvable conflict when you do not

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<sup>76</sup> Milanovic, ‘A Norm Conflict Perspective’ (n 21) 475; Lawrence Hill-Cawthorne, ‘Humanitarian Law, Human Rights Law and the bi-furcation of Armed Conflict’ (2015) ICLQ 293, 324-325; McLachlan, *Foreign Relations Law* (n 4) 334; Aurel Sari, ‘Derogations from the European Convention on Human Rights in Deployed Operations’ Written Evidence to the House of Commons Defence Committee (4 December 2013) para 14.

<sup>77</sup> *Winterwerp v Netherlands* (1979) 2 EHRR 387 para 39.

<sup>78</sup> *Lawless v Ireland* (no 3) (1979-80) 1 EHRR 15.

<sup>79</sup> *Serdar* (HC) (n 6) para 279.

<sup>80</sup> Milanovic, ‘A Norm Conflict Perspective’ (n 21) 474-5.

<sup>81</sup> *Ibid*

<sup>82</sup> *Ibid* 475.

<sup>83</sup> *Ibid* 476.

<sup>84</sup> *Ibid* 477.

<sup>85</sup> Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

<sup>86</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

issue a derogation. However, this entire argument is based on how far you can stretch an interpretation of a certain provision to mean a particular thing, or how far you can read in exceptions to a rule. This strikes at the core of fundamental debates on formalism and the determinacy or indeterminacy of international law.<sup>87</sup> Milanovic does not consider fundamental issues relating to the determinacy and indeterminacy of law. He presumes that Article 5 of the Third Geneva Convention cannot be read to include a judicial review procedure without further investigation. Koskenniemi argues that international law is radically indeterminate<sup>88</sup> and it is in this context that there needs to be a flexible approach to norm conflict resolution.<sup>89</sup> While there are many arguments in favour of the determinacy of law, Milanovic does not provide any analysis of what is a permissible interpretation to support his statement, and Koskenniemi's analysis is persuasive.<sup>90</sup> According to Koskenniemi, international lawyers oscillate between verifying law's content by reference to the concrete behaviour, will and interest of States (apology) and the need of normative standards and application of law regardless of state behaviour, will or interest (utopia).<sup>91</sup> From his perspective this is beneficial because while state action should not be unfettered and solely according to their own will, nor should law enter into a fixed morality. The vacillation between those two purposes means that objective international legal argumentation is not fully achievable, and law is indeterminate. He demonstrates this legal argument across a range of empirical examples in judicial reasoning, thus producing a convincing account, against which Milanovic provides no rebuttal.

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<sup>87</sup> See e.g. Koskenniemi, *From Apology to Utopia* (n 57); Jason Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project' (2006) German LJ 1045. Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008); Jean d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (OUP, 2011).

<sup>88</sup> Koskenniemi, *From Apology to Utopia* (n 57).

<sup>89</sup> ILC Fragmentation Report (n 3).

<sup>90</sup> For a defence of the determinate nature of law see: d'Aspremont, *Formalism and the Sources of International Law* (n 87). Furthermore, the ECtHR does find that Article 5 can be interpreted without a derogation in its case law and there do not appear to be signs of judicial vandalism, but instead a well-reasoned judgment on how the circumstances of armed conflict will influence the interpretation of Article 5 in those circumstances.

<sup>91</sup> Koskenniemi, *From Apology to Utopia* (n 57) 58, 219.

Campbell McLachlan argues it is politically unjustified for occupying powers to issue a derogation. Under Article 15, in order for a derogation to be applicable there must be a ‘public emergency threatening the life of the nation’ and the measures taken to address that emergency must be ‘strictly required by the exigencies of the situation’. While the state is afforded a large margin of appreciation or degree of discretion for determining whether there exists an emergency, greater scrutiny is given as to whether the measures are strictly required by the exigencies of the situation.<sup>92</sup> Given that a derogation only arises in ‘an exceptional situation of crisis or emergency’,<sup>93</sup> McLachlan argues that a derogation should not apply if the state has ‘elected’ to take part in military operations abroad.<sup>94</sup> The question of whether an extraterritorial derogation is possible remains unanswered. There is little judicial support for an interpretation of Article 15 that prescribes extraterritorial derogations. The state is afforded a wide margin of appreciation in determining the scope of ‘public emergency’,<sup>95</sup> but ‘life of the nation’ is given a much more limited interpretation and it is doubted that this expands abroad.<sup>96</sup> Sometimes it is confined to a smaller geographical area,<sup>97</sup> within the state but its definition has not exceeded the territorial boundaries of a state. In conclusion, it is not necessary to derogate in order for article 5 to be interpreted in light of the requirements of IHL. The ECtHR can engage in a process of systemic integration without a derogation, and from thus a global constitutionalist perspective.

### 6.3. Al Jedda

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<sup>92</sup> See e.g. *A v UK* App No 3455/05 (ECtHR, 19 February 2009).

<sup>93</sup> *Lawless v Ireland* (n 78) para 28.

<sup>94</sup> McLachlan, *Foreign Relations Law* (n 4) 334.

<sup>95</sup> See e.g. *A v UK* (n 92). For a critique of the wide margin of appreciation accorded to states in determining ‘public emergency’ see: Alan Greene, ‘Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights’ (2011) 12(10) *German LJ* 1764.

<sup>96</sup> For the argument that there is judicial support that ‘life of the nation’ can be interpreted as encompassing beyond a state’s borders see: Marko Milanovic, ‘Extraterritorial Derogations’ (n 4) 68-73.

<sup>97</sup> *Sakik v Turkey* (1998) 26 EHRR 662

This section examines whether the ECtHR provided an explicit, clear and consistent narrative, and a reasonable interpretation of the relevant international law in *Al Jedda*. The ECtHR's interpretation of the relationship between IHL and IHRL is analysed. An investigation of whether the ECtHR's interpretation of IHL constituted a misrepresentation of IHL rules on detention is undertaken. Third, the ECtHR's outcome is assessed by analysing what a reasonable interpretation of IHL entails.

*Al Jedda* concerned an individual with dual Iraqi and British nationality resident in the UK who, on a visit to Iraq, was arrested on suspicion of posing a security threat and brought to a detention facility in Basra run by the UK where he was interned in September 2004 until 30 December 2007.<sup>98</sup> He challenged his detention in UK courts, stating that the detention was in violation of Article 5 of the ECHR.<sup>99</sup> Al Jedda argued that there was a violation of Article 5 because the exhaustive list of grounds of permissible detention in Article 5(1) did not include internment or preventive detention where there was no intention to bring criminal charges within a reasonable time.<sup>100</sup> The government argued that although Al Jedda's detention was not listed under Article 5, there was no violation of Article 5(1) because the UK's duties under that provision were displaced by the obligations created by UNSCR 1546; as a result of the operation of Article 103 of the UN Charter, which provides that UN Charter obligations prevail over other international agreements in the event of conflict, the obligations under the UNSCR 1546 prevailed over those under the ECHR.<sup>101</sup>

The ECtHR found no conflict between the UK's obligations under UNSCR 1546 and its obligations under Article 5(1) and therefore did not need to consider whether the

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<sup>98</sup> *Al Jedda* (n 5) paras 9-11.

<sup>99</sup> *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332; [2008] 2 WLR 31 *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758; [2011] QB 773; [2011] 2 WLR 225. Both the Divisional Court in its judgment of 12 August 2005 and the Court of Appeal in its judgment of 29 March 2006 unanimously held that United Nations Security Council Resolution 1546 explicitly authorised the Multinational Force to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

<sup>100</sup> *Al Jedda* (n 5) para 100, citing *Lawless* (n 78) paras 13-14; *Ireland v UK* (1978) 2 EHRR 25 para 196; *Guzzardi v Italy* (1980) 3 EHRR 333; *Jecius v Lithuania*, (2002) 35 EHRR 16 paras 47-52.

<sup>101</sup> *Ibid* para 87; UNSCR 1546 (2004) S/Res/1546 (2004).

former displaced the latter pursuant to Article 103 of the UN Charter.<sup>102</sup> No conflict was established because UNSCR 1546 had for its purpose the ‘maintenance of international peace and security’ under Article 1(1), and ‘respect for human rights’ under Article 1(3). The ECtHR found a presumption that the UNSC did not intend to impose any obligations that breached human rights. If there was ‘any ambiguity’ in the terms of the UNSCR, the ECtHR had to interpret the UNSCR to be in harmony with the ECHR. The UNSCR would only be interpreted as conflicting with human rights standards where there was ‘clear and explicit language’ provided in the UNSCR for doing so.<sup>103</sup> While the *Al Jeddah* decision evidently raises questions about the approach taken by the ECtHR to norm conflicts between the ECHR and UNSCRs, this chapter will focus on the ECtHR’s treatment of IHL.<sup>104</sup>

The ECtHR converged with a global constitutionalist approach insofar as it took IHL into account. However, it did not expressly reference Article 31(3)(c) which is contrary to the requirement of an explicit, clear and consistent narrative. Having reasoned that IHL did not apply, the ECtHR concluded that ‘where the provisions of Article 5(1) *were not displaced* and none of the grounds for detention set out in subparagraphs (a) to (f) applied, the Court finds that the applicant’s detention constituted a violation of Article 5(1) of the Convention’.<sup>105</sup> The ECtHR presumed that if IHL did regulate *Al Jeddah*’s detention, that it would displace the limited prescribed circumstances for detention under Article 5. However, this is not necessarily the case.

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<sup>102</sup> *Ibid* para 101.

<sup>103</sup> *Ibid*. The ECtHR found that the language in para 10 of UNSCR 1511, stating that the MNF ‘shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq’ (para 103), did not unambiguously indicate that the Security Council intended Member States within the MNF to use ‘indefinite internment without charge and without judicial guarantees’ (para 105).

<sup>104</sup> For scholarship on the ECtHR’s approach to interpreting norm conflicts between the ECHR and UNSCR see, for example: Fiona De Londras and Suzanne Kingston, ‘Rights, Security, and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe’ (2010) 58 *Am J Comp L* 359; Erika de Wet, ‘From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions’ (2013) 12(4) *Chinese JIL* 787; Katja S Ziegler, ‘Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights’ (2009) 9(2) *HRLR* 288; Gráinne de Búrca, ‘The European Court of Justice and the International Legal Order After Kadi’ (2010) 51(1) *Harvard J Int’l L* 1.

<sup>105</sup> *Al Jeddah* (n 5) para 110 [emphasis added].

*lex specialis* can place more or less emphasis on IHRL and IHL depending upon which law is more suited to regulating the issue. The ECtHR misconceived of the relationship between IHL and IHRL within a process of systemic integration.

The ECtHR addressed three issues concerning the rules on IHL. It considered whether IHL imposed an ‘obligation’ of detention; whether IHL imposed ‘indefinite detention’ and it made the determination that internment was a ‘measure of last resort’ in IHL.

In considering whether IHL provided a legal basis for detention in an IAC, the ECtHR firstly rejected the Government’s argument that UNSCR 1546 authorised the continued operation of the IHL “obligation” to use internment for the protection of inhabitants in the occupied territory at the end of occupation by the Multinational Forces in 30 June 2004.<sup>106</sup> The ECtHR then asserted:

However, even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the CPA to the interim government of Iraq, the position under [IHL] which had previously been applied, *the Court does not find it established that [IHL] places an obligation on an Occupying Power to use indefinite internment without trial.*<sup>107</sup>

The ECtHR erred in asking whether IHL imposed an obligation on the state to detain. Rather it should have asked whether IHL had authorised the detention.<sup>108</sup> The ECtHR reasoned that Article 43 of the Hague Regulations requires an Occupying Power to take ‘all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. The ECtHR claimed that this obligation was interpreted by the ICJ in

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<sup>106</sup> Ibid para 107. It did not explain or justify further the underlying implication that IHL did not continue to apply in and of itself outside of occupation and relied on an alternative legal basis. This is addressed further in Section 7.3. Baroness Hale in the House of Lords decision had found that IHL was not applicable because the UK was no longer in belligerent occupation: *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007, para 128.

<sup>107</sup> Ibid para 107 [emphasis added].

<sup>108</sup> Pejic, ‘Al-Jedda judgment’ (n 6) 847.

*Congo*<sup>109</sup> as including a duty to protect ‘inhabitants of the occupied territory from violence, including violence by third parties’ but it did not impose an obligation on the Occupying Power to use internment.<sup>110</sup> It acknowledged that Uganda, as an Occupying Power, was under a duty to secure respect for IHRL rules including the ICCPR. There was no legal obligation on the UK to ‘place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge’.<sup>111</sup>

Determining whether there is a legal basis for a certain activity is not synonymous with imposing an obligation but rather with determining whether a certain activity is authorised. At this juncture, the ECtHR should have considered whether the internment was authorised rather than obliged.<sup>112</sup> Hampson and Lubell state that the ECtHR in *Al Jedda* ‘was not looking at IHL in its own right but as a source of possible rules which could be read into a Security Council resolution’.<sup>113</sup> However, while the ECtHR did aim to establish whether IHL could be read into the UNSCR it also made a separate statement about IHL in its own right as demonstrated at paragraph 107 quoted above, that IHL did not impose an obligation on states.

Furthermore, Pejic points out that determining whether IHL imposes an ‘obligation’ for internment on Occupying Powers represents a misunderstanding of this body of law.<sup>114</sup> Under IHL states can intern individuals if they wish to for security reasons. Article 4 of the Third Geneva Convention states that a prisoner of war (POW) is a combatant captured in an international armed conflict.<sup>115</sup> Article 43(2) of Additional Protocol 1 provides that a combatant is a member of the armed forces who has ‘the

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<sup>109</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports 116, para 178.

<sup>110</sup> *Al Jedda* (n 5) para 107.

<sup>111</sup> *Ibid* para 109.

<sup>112</sup> Lord Bingham in the House of Lords had stated that Articles 43, 41, 42 and 78 of the Fourth Geneva Convention had required an occupying power to protect the safety of the public obliging the occupying power to detain a person who posed a threat to the safety of the public or the occupying power. *Al Jedda* (UKHL) (n 105) para 178.

<sup>113</sup> Hampson and Lubell, ‘Amicus Curiae Brief’ (n 65).

<sup>114</sup> Pejic, ‘Al-Jedda Judgment’ (n 6).

<sup>115</sup> Third Geneva Convention (n 85) Article 4.



right to participate directly in hostilities’,<sup>116</sup> which means that they can use force against other direct participants in hostilities. It is in this context that Article 21 of the Third Geneva Convention authorises a detaining state to ‘subject [POWS] to internment’.<sup>117</sup> In contrast to POWs, civilians can only be interned when they participate directly in hostilities<sup>118</sup> or pose a security threat to the detaining power.<sup>119</sup> Pejic finds that behaviour, such as that in *Al Jeddah*, can meet the threshold of posing a serious security threat to the detaining power.<sup>120</sup> Pejic points out, however, that states are also free *not* to intern if they feel this would be more advantageous in succeeding in the armed conflict, for example for logistical reasons or in order to ‘foster trust’.<sup>121</sup> Lord Carswell in the House of Lords acknowledged that Article 42 and 78 of the Fourth Geneva Convention permitted rather than obliged detention of individuals for imperative reasons of security.<sup>122</sup> Therefore, IHL creating an obligation to intern is at odds with the purpose of IHL as enabling states to determine whether they think it would be beneficial to intern an individual or not.

Second, contrary to the ECtHR’s implication that IHL imposed ‘indefinite detention without charge’,<sup>123</sup> Pejic notes that Article 132 of the Fourth Geneva Convention and Article 75(3) of Additional Protocol No. 1 provide that internment must end as soon as the reasons justifying it cease to exist.<sup>124</sup> In relation to POWs, the detaining state

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<sup>116</sup> Additional Protocol I (AP I), Art 43 (2).

<sup>117</sup> Third Geneva Convention (n 85) Article 21.

<sup>118</sup> AP I, Art. 51(1); see further, Nils Melzer, ‘ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL’, ICRC, Geneva, 2009, available at <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 13 January 2016.

<sup>119</sup> A distinction is made between the threshold for permitting detention on occupied territory and on the territory of the detaining power under the Fourth Geneva Convention (n 86). Article 78 concerns occupied territory. A civilian can be detained for ‘imperative reasons of security under this provision’. Article 42(1) concerns detention on the detaining power’s territory and states that detention of civilians is permitted if it is “absolutely necessary” for security purposes.

<sup>120</sup> Pejic, ‘Al-Jedda Judgment’ (n 6) 845.

<sup>121</sup> Ibid 847.

<sup>122</sup> *Al Jeddah* (UKHL) (n 99) para 130. However he did state that the UK should have as much power to detain the applicant as if he was not a protected person as long as proper procedural safeguards were in place (paras 130-6).

<sup>123</sup> *Al Jeddah* (n 5) para 109.

<sup>124</sup> Pejic, ‘Al-Jedda Judgment’ (n 6) 848.

does not have to provide review of the lawfulness of the detention for as long as the active hostilities are ongoing because enemy combatant status denotes that person as a security threat. If the status of the captured individual as a POW is under question, however, that person is protected by Article 5 of the Third Geneva Convention until his or her status has been determined by a competent tribunal.<sup>125</sup> A civilian interned in an international armed conflict ‘has the right to submit a request for review of the decision on internment (to challenge it), the review must be expeditiously conducted<sup>126</sup> either by a court or an administrative board, and periodic review is thereafter to be automatic, at least on a six-monthly basis’.<sup>127</sup> Civilian internment must cease as soon as the reasons that necessitated it no longer exist,<sup>128</sup> or in any event, ‘as soon as possible after the close of hostilities’.<sup>129</sup>

The ECtHR stated that for civilians, Articles 27, 41 and 78 provide that internment – and assigned residence – was a ‘measure of last resort’ under IHL.<sup>130</sup> This assertion has been criticised.<sup>131</sup> As was already seen, for POWs, internment is part and parcel of the rules of armed conflict. As a result of Article 43(2) of Additional Protocol 1 which states that a combatant can use force against other direct participants in hostilities, Article 21 of the Third Geneva Convention authorises a detaining state to ‘subject [POWS] to internment’.<sup>132</sup> States can detain POWs in order to remove them from the conflict if they constitute a ‘security threat’. For civilians, the language of the Fourth Geneva Convention<sup>133</sup> indicates that internment is the most ‘severe’ measure of control that a state can apply, not a measure of last resort.

The ECtHR therefore misrepresented the rules of IHL in four ways. The ECtHR incorrectly asked whether IHL imposed an ‘obligation’ of detention rather than asking whether IHL authorised it; the ECtHR stated that IHL imposed ‘indefinite detention’;

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<sup>125</sup> Third Geneva Convention (n 85) Article 5.

<sup>126</sup> Fourth Geneva Convention (n 86) Articles 41 and 78.

<sup>127</sup> Jean Pictet (ed), *Geneva Convention IV, Commentary*, (ICRC, Geneva, 1958) 367.

<sup>128</sup> Fourth Geneva Convention (n 86), Article 132; AP I, Art. 75(3).

<sup>129</sup> *Ibid* Articles 46 and 133(1).

<sup>130</sup> *Al-Jedda* (n 5) para 107.

<sup>131</sup> Pejic, ‘Al-Jedda Judgment’ (n 6) 849.

<sup>132</sup> Third Geneva Convention (n 85) Article 21.

<sup>133</sup> Fourth Geneva Convention (n 86) Articles 41 and 78.

the ECtHR found that internment was a ‘measure of last resort’ in IHL; and the ECtHR failed to acknowledge the distinct treatment of prisoners of war and civilians under IHL. The next section examines the ECtHR’s treatment of the relationship between IHRL and IHL, and whether the ECtHR arrived at the wrong outcome as a result of misrepresenting the rules of IHL.

Pejic argues that the ECtHR was wrong in deciding that IHL did not provide a legal basis for detention because the ECtHR misrepresented the rules of IHL.<sup>134</sup> If IHL had provided a legal basis for detention, then she presumes that IHL would have regulated detention in *Al Jeddah*, and the detention would have been permissible under IHL. An examination of whether IHL should have regulated the circumstances in *Al Jeddah*, leading to a different result, is next undertaken. This includes an analysis of a reasonable interpretation of IHL rules and their application to the facts of the case. The purpose of this section is to expose the deficiencies in the ECtHR’s reasoning and how those shortcomings lead to misguided criticism of the final outcome.

The first step in the analysis should have been to determine whether *Al Jeddah* concerned an international (IAC)<sup>135</sup> or non-international armed conflict (NIAC).<sup>136</sup> IAC rules are extensive whereas NIAC rules are not.<sup>137</sup> Occupation of Iraq began on 1 May 2003 at the end of combat operations when the Coalition Provisional Authority was set up to function as an interim government of Iraq.<sup>138</sup> Occupation began in May

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<sup>134</sup> Pejic, ‘Al-Jeddah Judgment’ (n 6).

<sup>135</sup> Common Article 2; See Further ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’ ICRC Opinion Paper, March 2008 available at <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 21 July 2016. IHL treaty law also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.

<sup>136</sup> Common Article 3; See Further ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’ (n 135). IHL treaty law also establishes a distinction between NIACs in the meaning of common Article 3 of the Geneva Conventions of 1949 and NIACs falling within the definition provided in Art. 1 of Additional Protocol II.

<sup>137</sup> The Fourth and Third Geneva Conventions provide rules on IACs. Common Article 3 is the only provision of the Geneva Conventions explicitly applicable to NIACs with Additional Protocol II.

<sup>138</sup> CPA Regulation No 1, 16 May 2003, CPA/REG/16 May 2003/01.

2003 when combat operations ended.<sup>139</sup> Common article 2 states that “The Convention shall also apply to all cases of partial or total occupation...”<sup>140</sup> IHL therefore remained applicable during the occupation. However, the occupation ended in June 2004 when the CPA handed over its authority to the interim Iraqi Government. In August 2004, the International Committee of the Red Cross published a document stating that pursuant to UNSCR 1546 stating the end of the foreign occupation, it ‘no longer consider[ed] the situation in Iraq to be that of an international armed conflict between the US-led coalition and the state of Iraq and covered by the Geneva Conventions of 1949’.<sup>141</sup> Instead:

[the] hostilities in Iraq between armed fighters on one hand opposing the Multinational Force (MNF-I) and/or the newly established authorities on the other, amount to a non-international armed conflict. This means that all parties including MNF-I are bound by Article 3 common to the four Geneva Conventions, and by customary rules applicable to non-international armed conflicts.<sup>142</sup>

Lawrence Hill-Cawthorne notes that Al Jedda was interned in October 2004, when the occupation had ended and the conflict in Iraq was of a non-international character.<sup>143</sup>

The next step is to determine whether this has a bearing on whether IHL or IHRL is applicable. The question as to whether IHL provides a legal basis for detention in a non-international armed conflict has been the subject of much debate.<sup>144</sup> Art 43(2) Additional Protocol I in IACS explicitly authorizes combatants to engage in hostilities

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<sup>139</sup> President Bush Announces Major Combat Operations in Iraq Have Ended (The White House, May 1, 2003) available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>> accessed 13 January 2016.

<sup>140</sup> Fourth Geneva Convention (n 86) Article 3 (2).

<sup>141</sup> ‘Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority’ available at <<https://www.icrc.org/eng/resources/documents/misc/63kkj8.htm>> accessed 13 January 2016.

<sup>142</sup> Ibid. See also UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546.

<sup>143</sup> Lawrence Hill-Cawthorne, ‘The Copenhagen Principles on the Handling of Detainees’ (2013) J Conflict and Security L 1, 14.

<sup>144</sup> Especially recently in UK domestic court cases concerning detention in Afghanistan: *Serdar (High Court)* (n 4); *Serdar (CA)* (n 6); See further Rooney, ‘A Legal Basis for Non-Arbitrary Detention’ (n 6).

in IACs and Art 21(1) Geneva Convention III provides explicit authority to intern combatants Arts 27(4), 42-3 and 78 Geneva Convention IV provides explicit authority to intern civilians. Conversely, IHL is silent on all of these issues in relation to NIACs, only regulating certain aspects of them. Those who argue that IHL does provide a legal basis for detention in NIACs argue, first, that the absence of a positive prohibition of non-arbitrary detention in IHL indicates that it does provide authority for detention.<sup>145</sup> Those who do not find this is the case state that although states are accorded a wide freedom of action in international law ‘the freedom [has to be] derived from a legal right and not from an assertion of unlimited will’.<sup>146</sup> Second, it has been argued that there is implicit authority to detain in a NIAC derived from treaty law, specifically Article 3 common to the four Geneva Conventions (Common Article 3) and the 1977 Additional Protocol II to the Conventions (APII).

Additionally, some have considered that protections and express references to ‘detention’ in Common Article 3 and in APII Articles 2, 4(1), 5(1) and (2) and (6) to those ‘deprived of their liberty or whose liberty has been restricted for reasons related to the conflict’ and to ‘detention’ and ‘internment’, are evidence of an inherent power to detain.<sup>147</sup> Contrarily, the ICRC has provided that: ‘in the absence of specific provisions in Common Article 3 and [APII], additional authority related to the grounds for internment and the process to be followed needs to be obtained, in keeping with the principle of legality’.<sup>148</sup> In the absence of explicit reference to the power to detain in Common Article 3 and APII, it was necessary to provide another legal basis for detention. As there are so many different types of NIACs, further regulation and investigation of the implications of enabling IHL to provide a legal basis for internment in relation to all of them is required before confirming it in the particular situation before the ECtHR.<sup>149</sup> Furthermore, states have explicitly rejected an implied

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<sup>145</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, (ICRC, CUP: 2005), Rule 99: “Arbitrary deprivation of liberty is prohibited”.

<sup>146</sup> Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, (9<sup>th</sup> edn, OUP 1992) 12.

<sup>147</sup> See *Serdar* (CA) (n 6) para 200.

<sup>148</sup> ICRC, ‘Internment in Armed Conflict: Basic Rules and Challenges’ (Opinion Paper, November 14) 8 available at <<https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>> accessed 13 June 2016.

<sup>149</sup> See *Serdar* (CA) (n 6) para 215.

power to detain in Common Article 3 and APII because under the principles of equality, equivalence and reciprocity insurgents would have been entitled to detain captured members of the government's army.<sup>150</sup> No legal basis under IHL for internment in NIACs is found for customary international law as the relevant state practice and opinion juris is not established.<sup>151</sup>

Although IHL does not provide a legal basis, IHL can still regulate detention in a NIAC.<sup>152</sup> Just because a body of law is not a legal authority for a particular rule does not necessarily mean that it cannot be involved in the regulation of that act. Hill-Cawthorne and Dapo Akande acknowledge the ability of a legal regime to regulate a practice while nevertheless failing to provide legal authority for it.<sup>153</sup> Ryan Goodman gives an example: '[IHRL] restricts the grounds upon which a State may detain an individual', however, 'as a body of law, does not provide the source of authority to detain'.<sup>154</sup> Principles and guidelines recommended for regulating detention in non-international armed conflict include guidelines which provide a detailed and thoughtful analysis of the relationship between IHL, IHRL and the law of domestic states as applied in a NIAC.<sup>155</sup> For example, Gabor Rona recommends the principles and guidelines developed in the Chatham House Initiative<sup>156</sup> as a good 'starting point' for establishing agreement by enough states on a 'uniform list of "floor" requirements' for detention in a NIAC.<sup>157</sup> It states that probably the only permissible ground for

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<sup>150</sup> Ibid paras 216, 178-181.

<sup>151</sup> Ibid paras 220-241.

<sup>152</sup> Both the High Court and Court of Appeal found that because IHL did not provide a legal basis for detention in non-international armed conflicts, that it could not regulate non-international armed conflicts: paras 123, 166 and 281.

<sup>153</sup> Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?' (EJIL: *talk!* 7 May 2014) available at <<http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>> accessed 13 June 2016.

<sup>154</sup> Goodman, 'Authorization versus Regulation' (n 6) 159.

<sup>155</sup> Els Debuf, 'Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict', (2009) 91 IRRC 859, 860.

<sup>156</sup> Rona, 'Is There a Way Out' (n 6); Debuf, 'Expert Meeting on Procedural Safeguards for Security Detention' (n 155).

<sup>157</sup> Ibid 58.

detention would be for ‘imperative reasons of security’<sup>158</sup> and proffers concrete examples of where internment would be prohibited including for obtaining intelligence, where the person is used as a ‘bargaining chip’, and as a method of punishment.<sup>159</sup> Therefore, IHL can still regulate non-international armed conflicts despite the fact that it may not provide a legal basis for them.

Although IHL did not provide a legal basis for detention in *Al Jeddah*, IHL could have operated to regulate detention in *Al Jeddah* if it was found there was another legal basis for detention under a UNSCR or domestic law. In *Al Jeddah*, the UK government had claimed that UNSCR 1546 had the effect of preserving the rights and obligations (including those relating to internment) that had applied to the UK and the US as occupying powers in Iraq.<sup>160</sup> Brian J Bill concurs that UNSCR 1546 authorised or provided a legal basis for internment for imperative reasons of security.<sup>161</sup> Although the authorisation was not in the actual resolution, it nevertheless included the authorisation ‘through [an] internal chain of references’.<sup>162</sup> This ‘internal chain of references’ refers to para 10 of UNSCR 1546 as well as two letters annexed to UNSCR 1546.<sup>163</sup> UNSCR 1546.

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<sup>158</sup> Debuf, ‘Expert Meeting on Procedural Safeguards for Security Detention’ (n 155) 864-5.

<sup>159</sup> Ibid 865.

<sup>160</sup> Brian J Bill, ‘Detention Operations in Iraq: A View from the Ground’ Int’l L Studies Vol 86 Raul A. “Pete” Pedrozo (ed) *The War in Iraq: A Legal Analysis*, 411; Hill-Cawthorne, ‘The Copenhagen Principles on the Handling of Detainees’ (n 143).

<sup>161</sup> Bill, ‘Detention Operations in Iraq: A View from the Ground’ (n 160) 420.

<sup>162</sup> Ibid 416; Hill Cawthorne, ‘The Copenhagen Principles on the Handling of Detainees’ (n 143) 495.

<sup>163</sup> Para 10 of UNSCR states that where the Security Council: ‘[d]ecides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks...’ The first letter from Prime Minister of the Interim Government of Iraq, Dr Allawi, states: ‘We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from the Secretary of State Colin Powell to the President of the United Nations Security Council’. The letter from Secretary Powell states: ‘[T]he MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq’s political future through violence. This will include combat

The ECtHR found that the language in para 10 of UNSCR 1511, stating that the MNF “shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq”,<sup>164</sup> did not unambiguously indicate that the Security Council intended Member States within the MNF to use ‘indefinite internment without charge and without judicial guarantees’.<sup>165</sup> It acknowledged that ‘internment’ was listed in the US Secretary of State Colin Powell’s letter as an example of the tasks which the MNF would undertake. However, according to the ECtHR, the UNSCR left the choice of maintenance of security and stability to member States. Furthermore, the UNSCR stipulated that the forces had to act in accordance with international law and therefore, ‘[i]n the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the MNF to contribute towards the maintenance of security in Iraq while complying with obligations under IHRL’.<sup>166</sup> Additionally, the UN Secretary-General and UN Assistance Mission for Iraq (UNAMI) objected to the use of internment by the MNF.<sup>167</sup>

Based upon the above analysis it appears that IHL did not provide a legal basis for detention and did not regulate detention in the circumstances of *Al Jeddah*. It was classified as a NIAC and IHL does not provide a legal basis for detention in a NIAC. However, IHL can regulate detention in a NIAC when there is another legal basis for detention available. It is questionable that the UNSCR provided a legal basis for detention and therefore Article 5, in its unqualified form, regulated detention. The analysis undertaken by the ECtHR was deficient insofar as it addressed none of these issues, leaving it open to criticism.

#### 6.4. Hassan

In discussing the *Hassan* judgment, this section considers whether the ECtHR took into account relevant international law in accordance with the principle of systemic

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operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraqi security’.

<sup>164</sup> *Al Jeddah* (n 5) para 103.

<sup>165</sup> *Al Jeddah* (n 5) para 105.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid* para 106.



integration, whether there was a nuanced interpretation of the relationship between IHL and IHRL; and whether the treatment of that relationship was justified in an explicitly clear and consistent narrative, with a reasonable interpretation of the law. Its approach to extraterritorial derogations is also examined. The ECtHR's treatment of these issues is compared with *Al Jedda* to demonstrate that its later approach is more in conformity with a global constitutionalist frame.

In *Hassan*, the applicant lived in Basrah, Iraq, and was a prominent member of the Ba'ath Party and Al-Quds Army, the army of the Ba'ath Party.<sup>168</sup> The UK was an occupying party in Basrah where he lived and started arresting high ranking members of the Ba'ath Party. Hassan went into hiding and left his brother, Tarek Resaan Hassan and cousin to protect the family home.<sup>169</sup> When UK forces came to arrest the applicant, they found Tarek Hassan armed at the house, arrested him and took him to Camp Bucca.<sup>170</sup> Although Camp Bucca was a US facility, the UK continued to detain individuals there, and controlled the detention and interrogation of prisoners in the compound for its Joint Forward Interrogation Team.<sup>171</sup> The applicant alleged that his brother's capture by UK forces and detention in Camp Bucca gave rise to breaches of his rights under Article 5(1), (2), (3), and (4).<sup>172</sup> The ECtHR found that Article 1 jurisdiction was established under the 'state agent authority and control test' because of the physical power and control exercised over Tarek Hassan from his arrest until he got off the bus that took him from the Camp.<sup>173</sup>

The ECtHR acknowledged the four Geneva Conventions were applicable regardless of whether the situation in South East Iraq in late April and early May 2003 was one of occupation or active IAC.<sup>174</sup> It then gave consideration to the types of armed conflict and applicable law. The ECtHR stated that Article 31(3)(c) required the ECHR to be interpreted in harmony with other rules of international law of which it formed part, including the Third and Fourth Geneva Conventions which were designed to

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<sup>168</sup> *Hassan* (n 5).

<sup>169</sup> *Ibid* para 10.

<sup>170</sup> *Ibid* para 11, 14.

<sup>171</sup> *Ibid* para 15.

<sup>172</sup> *Ibid* para 65.

<sup>173</sup> *Ibid* para 79.

<sup>174</sup> *Ibid* para 108

protect captured combatants and civilians who posed a security threat.<sup>175</sup> Therefore, the principle of systemic integration was explicitly included in the ECtHR's reasoning, unlike in *Al Jedda*, in accordance with the requirements of the rule of law, clarity and consistency. In terms of its interpretation of the relationship between IHRL and IHL, the ECtHR stated that in an IAC, the 'safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of IHL'.<sup>176</sup> Koker commends the reasoning of the ECtHR for explicitly setting forward its opinion on the relationship between IHL and IHRL in relation to both substantive and procedural requirements of detention and for relying explicitly on the principle of systemic integration.<sup>177</sup> This was a more nuanced approach to the relationship between IHL and IHRL than that provided in *Al Jedda*, and more in keeping with the ILC Fragmentation Report's assessment of the relationship between *lex specialis* and systemic integration, which recommends their co-application to be tailored to the specific circumstances of the case.

In determining the relationship between IHL and IHRL, the ECtHR found that rather than trying to read one of the grounds for detention listed under Article 5(1) as providing for internment, Article 5 could be interpreted as including internment as provided for by the Third and Fourth Geneva Conventions. It '[did] not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions [was] congruent with any of the categories set out in subparas (a) to (f)'.<sup>178</sup> Security internment was not the same as suspicion of having committed an offence or risk of the commission of a criminal offence under Article 5(1)(c). This was because combatants, detained as POWs, enjoyed combatant privilege which allowed them to participate in hostilities without incurring criminal sanctions.<sup>179</sup>

The ECtHR found that in circumstances where Tarek Hassan was found by British Troops, armed on the roof of his brother's house, where other weapons and documents of a military intelligence value were retrieved, 'the UK authorities had reason to

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<sup>175</sup> Ibid para 102.

<sup>176</sup> Ibid para 104.

<sup>177</sup> Koker, 'Hassan v United Kingdom' (n 6).

<sup>178</sup> *Hassan* (n 5) para 97.

<sup>179</sup> Ibid.

believe that he might either be a person who could be detained as a POW or whose internment was necessary for imperative reasons of security both of which provide legitimate grounds for capture and detention.<sup>180</sup> Internment in peacetime does not fall within the scheme of deprivation of liberty under Article 5 without a derogation.<sup>181</sup> However, the ECtHR found that internment of POWS and detention of civilians who pose a threat to security were accepted features of IHL and Article 5 could be interpreted as permitting exercise of such broad powers. It continued:

As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under IHL must be “lawful” to preclude a violation of Article 5(1) therefore a detention must comply with rules of IHL and, most importantly, that it should be in keeping with the fundamental purpose of Article 5(1), which is to protect the individual from arbitrariness.<sup>182</sup>

The Strasbourg court confirmed in *Hassan* that it was possible to provide grounds for non-arbitrary detention outside of the exhaustive list without derogating. This is in conformity with a global constitutionalist frame which does not require a derogation for IHL to be taken into account. The rule of law requires adoption of the principle of systemic integration, confirmed as an effective tool of interpretation. The ECHR system will therefore not be undermined by taking into account external international law but systemic integration will bolster the rule of law in global governance of which the Council of Europe forms part. A derogation is not required due to the global constitutionalist technique of systemic integration which aims to strengthen the global governance, not undermine its constituent parts. The ECtHR found that whether a derogation should be required should be determined by examining the ‘consistent practice’ of states, in accordance with Article 31(3)(b) VCLT.<sup>183</sup> The consistent practice of states was not to derogate from obligations under Article 5 in order to detain

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<sup>180</sup> Ibid para 109 citing Articles 4A and 21 Third Geneva Convention (n 85); Arts 42 and 78 Fourth Geneva Convention (n 86).

<sup>181</sup> See e.g. *Brannigan* (n 11); *A v UK* (n 92).

<sup>182</sup> Ibid para 105, citing *Kurt v Turkey* (1999) 27 EHRR 373 para 122, *El Masri v Macedonia* (2013) 57 EHRR 25 para 230; *Saadi v UK* (2008) 47 EHRR 17 paras 67-74, ECHR 2008, and the cases cited therein).

<sup>183</sup> Ibid para 101.

persons on the basis of the Third and Fourth Geneva Conventions during IACs.<sup>184</sup> While this aspect of the decision has been criticised for a misapplication of Article 31(3) (b), the decision that a derogation is not required for IHL to apply has garnered support.<sup>185</sup>

The ECtHR found that Article 5(2) which obligates the state to inform the detainee promptly of the reasons for his arrest, and Article 5 (4) which obligates the state to take proceedings to determine the lawfulness of the detention speedily by a court, had to be interpreted in a manner which takes into account the context and applicable rules of IHL.<sup>186</sup> The ECtHR noted that Articles 43 and 78 of the Fourth Geneva Convention stated that internment ‘shall be subject to periodical review, if possible every six months, by a competent body’.<sup>187</sup> Whilst it may not have been ‘practicable’ for the legality of detention to be determined by an independent ‘Court’ under Article 5(4), the ‘competent body’ in Article 5(4) ‘should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness’.<sup>188</sup> The first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under IHL is released without undue delay. This is an explicit and detailed appraisal of the law. The ECtHR interprets Article 5(4) in light of the requirements of IHL, striking a reasonable balance between each legal regimes’ rules, complementing each of their concerns. This is in keeping with the approach put forward by Hampson and Lubell in their Amicus Curiae brief for *Hassan*, who advocate placing more or less emphasis on IHRL or IHL depending upon which law can provide more authority or detail, or reflect contemporary understanding of how circumstances should be regulated. Under their model, ‘periodicity of review, procedural rights and rights to information’ fall in the middle of the spectrum between

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<sup>184</sup> Ibid paras 101, 103.

<sup>185</sup> Sari and Quénivet, ‘Barking up the Wrong Tree’ (n 6); Bjorge, ‘What is living and what is Dead’ (n 6).

<sup>186</sup> *Hassan* (n 5) para 106.

<sup>187</sup> Ibid para 106.

<sup>188</sup> Ibid.

IHL and IHRL.<sup>189</sup> The ECtHR appears to have tried to reach a middle ground in its reasoning.

The clarity and reasonable interpretation of the law is an improvement upon the comparatively weak, inexplicit, and misrepresentative reasoning of *Al Jedda*. The informed and improved appraisal of international law is in conformity with the rule of law as the former confusion elicited by *Al Jedda* is erased. Rather than debates concerning blatant and unreasonable misunderstandings of the external legal regime, there is a more sophisticated conversation on how best to balance the two regimes in relation to the particular scenario at hand. The ECtHR's approach is clear and explicit so that constituent and constituted powers have a clear legal framework: they know the reasons behind the decision and can defend themselves according to that reasoning. Applicants have a better idea of knowing whether their case will be successful, thus enabling them to make a more informed decision about applying in the first place. International courts and relevant stakeholders can respond to the reasoning, offering further guidance and deliberation on how best to strike the balance between the regime in this factual scenario and others.

In relation to Article 5 (4) which obligates the state to take proceedings to determine the lawfulness of the detention speedily by a court, the ECtHR found that almost immediately following his admission to Camp Bucca, Tarek Hassan was subject to a screening process in the form of two interviews by US and UK military intelligence officers. This led to Hassan's clearance for release since the officers established he was a civilian who did not pose a threat to security.<sup>190</sup> The Court also found that evidence points to his having been physically released from Camp shortly thereafter.<sup>191</sup> In relation to the Article 5(2) obligation to inform the detainee promptly of the reasons for his detention, the ECtHR stated that '[i]t would appear from the context and questions Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him'.<sup>192</sup> Because he was released within a few days of being brought to the Camp it was unnecessary for the

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<sup>189</sup> Hampson and Lubell, 'Amicus Curiae Brief' (n 65) 19 para 54.

<sup>190</sup> *Hassan* (n 5) para 109.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

ECtHR to examine whether the screening process was an adequate safeguard to protect against arbitrary detention.<sup>193</sup> There were therefore no violations of Arts 5(1), (2), (3), and (4).<sup>194</sup>

*Hassan* represents an approach adopted by the ECtHR that is more in conformity with a global constitutionalist approach than that put forward by *Al Jedda*. This is because of its explicit reliance on the principle of systemic integration, no requirement of derogation, its nuanced examination of the relationship between IHL and IHRL in conformity with the recommendations provided by the University of Essex Amicus Curiae Brief; its reasonable interpretation of rules of IHL and clear and consistent narrative justifying the outcome in the decision. The global constitutionalist norm of the rule of law captures the ECtHR's emerging approach to norm conflicts arising from extraterritorial application of the ECHR.

## 6.5. Conclusion

This chapter argued that the global constitutionalist frame captures the ECtHR's emerging approach to norm conflicts arising from the extraterritorial application of the ECHR. The approach adopted by the ECtHR in *Hassan* was much more in conformity with the rule of law from a global constitutionalist perspective than in *Al Jedda*. In order to be in conformity with the rule of law, the ECtHR needs to provide a clear and explicit narrative, and reasonable interpretation of the law. *Lex specialis* operates within a process of systemic integration so that the relationship between IHL and IHRL can be decided on a case by case basis in relation to the specific aspect of the norms under adjudication. Emphasis should be placed on IHRL or IHL depending upon which law can provide more authority or detail. Extraterritorial derogations are not required in order for IHL to be taken into account in the ECtHR's reasoning because systemic integration is a means of bolstering, not undermining, individual regimes from a global constitutionalist perspective, wherein all special regimes form part of one larger international legal system. In *Al Jedda*, the ECtHR did not expressly invoke the principle of systemic integration; did not provide a nuanced appraisal of the relationship between IHL and IHRL; and did not provide a reasonable

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<sup>193</sup> Ibid para 110.

<sup>194</sup> Ibid para 111.

interpretation of the rules on IHL. The ECtHR did not consider whether IHL applied outside occupation as a legal basis for, or means for regulating, detention and what this would factor for the application of IHRL. As a result, the outcome of the decision was subject to undue criticism, undermining the ultimate result.

On the other hand, in *Hassan* the ECtHR engaged in an analysis of whether the case concerned an IAC or NIAC; whether IHL was applicable; provided a reasonable appraisal of the rules of IHL; and justified its outcome according to its understanding of the relationship between IHL and IHRL in the circumstances. *Hassan* is in conformity with a global constitutionalist frame. The ECtHR increasingly supports the rule of law by using the principle of systemic integration and providing an explicit, clear and consistent narrative, with a reasonable interpretation of the law regulating detention in armed conflict. The ECtHR found that Hassan's detention was not 'arbitrary' as the internment of POWS and detention of civilians who posed a threat to security were accepted features of IHL. Furthermore, the requirement of a 'court' under Article 5 (4) could instead be a 'competent' body in conformity with Articles 43 and 78 of the Fourth Geneva Convention. The applicant was told of the charges against him shortly after the detention which satisfied the requirement of 'promptly' under Article 5(2), which were interpreted in light of the Articles 43 and 78. An explicit and clear frame of reference was provided in *Hassan*, with a reasonable interpretation of the external law (IHL), and reasons provided for the balance established in reference to the facts of that case. The clear frame enables constituent and constituted powers to mediate their relationship with one another in accordance with the rule of law. The clarity of reasoning enables other stakeholders and international courts to respond and engage, whether they are in agreement with the decision, feel it is particular to the ECtHR system, or whether they believe a different standard should be adopted. The decision helps to position the ECHR within an international legal system, defining the significance of its standards against, in this case, IHL rules on procedural and substantive matters relating to detention. The ECtHR's rules are significant for regulating judicial review procedures, but may not have as much of a bearing on establishing the legal grounds for security detention in armed conflict.

While the ECtHR's emerging approach to extraterritoriality and detention in armed conflict converges with the global constitutionalist frame, it remains to be answered

whether this frame captures the conceptualisation of extraterritoriality adopted by the ECtHR. The ECtHR's perception of the function of extraterritoriality in relation to other concepts of international law implicates both the norm of democratic accountability and the rule of law.



# 7. The Function of Extraterritoriality

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## 7.1. Introduction

Chapter 7 queries the ECtHR's conceptualisation of the function of extraterritoriality and recommends ways for ensuring a clear and consistent narrative and reasonable interpretation of international law in accordance with the rule of law. Whether the ECtHR's understanding of the relationship between on the one hand, extraterritoriality, and the international law concepts of state jurisdiction<sup>1</sup> and attribution<sup>2</sup> on the other, is reasonable and consistent is assessed. Considering that the norm of democratic accountability recommends a presumption of extraterritoriality, this chapter asks whether skipping the extraterritoriality question in order to address attribution undermines the coherency of the international legal system. The concern that the application of the ECtHR's effective control test in armed conflict is inconsistent with Article 42 of the Hague Regulations, and results in an unavoidable violation of Article 43, is addressed.<sup>3</sup> There is consideration of whether the effective control test's

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<sup>1</sup> James Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 456; Ian Brownlie, *Principles of Public International Law* (OUP 2003) 297; Michael Akehurst, 'Jurisdiction in International Law' 46 (1972-1973) BYBIL 145; Roger O'Keefe, 'Universality Jurisdiction: Clarifying the Basic Concept' (2004) 2 JICJ 735; *SS Lotus Case* (1927) PCIJ Ser A No 10, 92.

<sup>2</sup> ILC, 'Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session' (12 December 2001) UN Doc A/56/10; ILC, Yearbook of the International Law Commission 1970 vol II (ILC Articles on State Responsibility); James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002); James Crawford, *State Responsibility: the General Part* (CUP 2013); James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010); *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); *Prosecutor v Tadić*, IT-94-1, Trial Chamber, Judgment, 7 May 1997; *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Judgment, 15 July 1999.

<sup>3</sup> Adam Roberts, 'What is Military Occupation?' (1934) 55 BYBIL 249; Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009); Eyal Benvenisti, *The International Law of Occupation* (PUP 2004);

condition, that the full panoply of ECHR obligations apply, conflicts with Article 43's requirement that the laws of an occupied state remain intact. Finally, the chapter addresses whether the concept of extraterritoriality is utilised by the ECtHR in its emerging approach as a barrier to engaging with complex norm conflicts in opposition to a global constitutionalist frame. Ultimately, the aim is to ascertain whether a presumption of extraterritoriality, which promotes democratic accountability, in line with a global constitutionalist frame, can enhance the rule of law, by creating clarity and consistency in the global legal system.

## 7.2. Article 1 Jurisdiction and Public International Law Jurisdiction

*Banković v Belgium* concerned the bombing of a Radio Television Station in Belgrade by NATO.<sup>4</sup> In order to determine the 'ordinary meaning' of jurisdiction under Article 1, as was required by Article 31(3) of the VCLT, the ECtHR interpreted 'within its jurisdiction' in light of the 'relevant rules of international law applicable in the relations between the parties' in accordance with Article 31(3)(c) of the VCLT.<sup>5</sup> The ECHR could not be 'interpreted and applied in a vacuum'; and the ECHR should be read in harmony with other principles of international law;<sup>6</sup> whilst being mindful of the fact that the ECHR had a special character as a human rights treaty.<sup>7</sup> The ECtHR found that the ordinary meaning of jurisdiction from the standpoint of public international law was that the jurisdictional competence of a State was 'primarily territorial'.<sup>8</sup>

The ECtHR continued:

While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive

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<sup>4</sup> See further Chapter 5.

<sup>5</sup> *Banković v Belgium* ECHR 2001-XII 333, paras 55, 57.

<sup>6</sup> *Ibid* citing *Al-Adsani v UK* (2002) 34 EHRR 273, para 60.

<sup>7</sup> *Ibid* para 57, *Loizidou v Turkey* (1997) 23 EHRR 513, paras 43 and 52.

<sup>8</sup> *Ibid* para 59.

personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.<sup>9</sup>

...

The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.<sup>10</sup>

The ECtHR then proceeded to set out specific factual incidences in which the ECHR could be applied abroad,<sup>11</sup> and the effective control of the territory test.<sup>12</sup> A state would be held responsible under the entire breadth of the ECHR towards everyone within that territory over which it had the control when jurisdiction was established through the effective control of the territory test.<sup>13</sup> In this way rights under the ECHR could not be ‘divided and tailored’.<sup>14</sup> 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.

Martti Koskenniemi sees *Banković* as evidence of the ECtHR acknowledging the international normative environment within which it is operating rather than acting as a self-contained regime. For him, this is a positive development towards counteracting inconsistencies in international law.<sup>15</sup> Angelika Nußberger explains that reliance on the public international law conception of jurisdiction meant that the ECHR’s

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid para 61.

<sup>11</sup> Ibid paras 67-79, 73.

<sup>12</sup> Ibid para 74: ‘it has done so when the respondent State, 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, exercises all or some of the public powers normally to be exercised by that Government’.

<sup>13</sup> Ibid para 75.

<sup>14</sup> Ibid.

<sup>15</sup> International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission UN Doc. A/CN.4/L.682 (April 13, 2006), as corrected UN Doc A/CN.4/L.682/Corr.1 (August 11, 2006) (finalised by Martti Koskenniemi) 86-7 para 163-4.

territorial scope would be decided on a state by state basis, establishing each state's 'jurisdiction'. She contrasts this reading of Article 1 with a dependence on the rules of the VCLT to determine the ECtHR's territorial scope.<sup>16</sup> While it is a positive development that the ECtHR expressly invokes Article 31(3)(c) to take into account international law, it does not appear that extraterritoriality serves the same function as jurisdiction. If the two concepts are entirely incongruent, it does not constitute a reasonable interpretation of international law to base the ECtHR's approach to extraterritoriality on a public international law conception of jurisdiction.

According to James Crawford, jurisdiction in international law 'is an aspect of sovereignty: it refers to a state's competence under international law to regulate the conduct of natural and juridical persons'.<sup>17</sup> A state's jurisdiction is an emanation or aspect of its sovereignty and right to regulate its own public order. Limitations on jurisdiction flow from the equal sovereignty of other states.<sup>18</sup> 'Jurisdiction' describes a number of distinct powers: legislative jurisdiction, enforcement jurisdiction and adjudicatory jurisdiction.<sup>19</sup> Legislative jurisdiction refers to the ability of a state to determine the laws that apply to an individual; enforcement jurisdiction refers to the ability of the state to enforce its laws in a given situation for example by imprisoning someone; and adjudicatory jurisdiction refers to the ability of a state to determine whether an entity has acted in conformity with the laws in force.<sup>20</sup>

Marko Milanovic argues that the ECtHR in *Banković* did not expressly indicate whether the ECtHR was referring to legislative, adjudicative, or executive jurisdiction.<sup>21</sup> The suggested bases of jurisdiction provided by the ECtHR are all examples of legislative jurisdiction.<sup>22</sup> The nationality enables a state's law to apply to

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<sup>16</sup> Angelika Nußberger, 'The Concept of 'Jurisdiction' in the Jurisprudence of the European Court of Human Rights' (2012) 65 CLP 241-68.

<sup>17</sup> Crawford, *Brownlie's Principles of Public International Law* (n 1) 456.

<sup>18</sup> Brownlie, *Principles of Public International Law* (n 1) 297.

<sup>19</sup> Akehurst, 'Jurisdiction in International Law' (n 1); O'Keefe, 'Universality Jurisdiction: Clarifying the Basic Concept' (n 1) 736.

<sup>20</sup> Crawford, *Brownlie's Principles of Public International Law* (n 1) 457-486.

<sup>21</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Practice and Policy* (OUP 2011) 26-7.

<sup>22</sup> *Ibid.* See Crawford, *Brownlie's Principles of Public International Law* (n 1) 457- 466.

its nationals abroad.<sup>23</sup> According to the flag, diplomatic and consular relations principle a state's law applies to a ship flying its flag, and in diplomatic and consular premises.<sup>24</sup> A state can prohibit conduct which directly harms its nationals in limited circumstances under the passive personality principle,<sup>25</sup> and apply its laws to punish those who may wish to harm a state's vital interest under the protective principle.<sup>26</sup> A state can apply its criminal laws to an individual who is considered a threat to the international community as a whole in accordance with the universality principle.<sup>27</sup>

However, extraterritoriality at the ECtHR does not aim to ascertain when a state can exercise power over an individual. It aims to determine, in light of the fact that a state does exercise power (legislative, adjudicative or executive) over an individual – regardless of whether it is legal or illegal – whether that state has obligations under the ECHR in those circumstances. For Michal Gondek, jurisdiction in human rights treaties does not serve 'to determine the legality of the exercise of state power, but to determine the applicability of a human rights treaty to a given state conduct'.<sup>28</sup> The application of human rights treaties is not restricted to situations where exercise of jurisdiction is legal under the international law of jurisdiction: 'a person may in certain circumstances be within the jurisdiction of a state party to a human rights treaty when he or she is outside state territory and an act of state affecting such a person would not pass a test of what is legal under international law of jurisdiction'.<sup>29</sup> Furthermore, he points out the unjust results of conflating jurisdiction under human rights treaties with the public international law conception as the illegality of the exercise of jurisdiction over a person who was, for example, abducted should not prevent the applicability of human rights treaties.<sup>30</sup> It is rather the attempt to exercise state authority and the fact of control over the person concerned, whether legal or illegal under international law,

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<sup>23</sup> *SS Lotus Case* (n 1) 92 (Judge Moore); Crawford, *Brownlie's Principles of Public International Law* (n 1) 459-460.

<sup>24</sup> Crawford, *Brownlie's Principles of Public International Law* (n 1) 464.

<sup>25</sup> *Ibid* 461-2.

<sup>26</sup> *Ibid* 462-4; *SS Lotus Case* (n 1) 23.

<sup>27</sup> O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (n 1).

<sup>28</sup> *Ibid*.

<sup>29</sup> Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 56-7.

<sup>30</sup> *Ibid* citing *López Burgos v Uruguay*, Case No 52/79, Un Doc A/36/40, 176, HRC 29 July 1981.

that brings that person within the jurisdiction of the state party and thereby triggers the ECHR.<sup>31</sup>

Extraterritoriality is not synonymous with enforcement jurisdiction.<sup>32</sup> A state cannot exercise its enforcement jurisdiction in another territory unless it has the other state's consent.<sup>33</sup> Milanovic distinguishes the function of extraterritoriality from enforcement jurisdiction. The control over the territory test and control over an individual test rely on factual circumstances in order to be established. With regard to the control over the victim ground of Article 1 jurisdiction, the actions of a state agent who is violating the rights of an individual abroad cannot be conflated with the state exercising its enforcement jurisdiction. Enforcement jurisdiction involves enforcing a legal rule, which already exists – not 'naked power'.<sup>34</sup> With regard to the control over the territory test, the ECtHR has held that Article 1 jurisdiction can be established when a state exercises a 'public power' such as a legislative, enforcement or adjudicatory function abroad – one of the functions, which is normally exercised by government. However, Article 1 jurisdiction is not established by the exercise of a public function per se, but rather because of the control over the territory or over a victim that that public power entails.<sup>35</sup>

Article 1 jurisdiction does not serve the function of legislative or enforcement jurisdiction. The ECtHR cannot evolve the meaning of the public international law concept of jurisdiction according to the principle of systemic integration in order to make the latter useful for defining the scope of extraterritoriality.<sup>36</sup> This would

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<sup>31</sup> Ibid; Michal Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the age of Globalisation?' (2005) 52 NILR 349, 364.

<sup>32</sup> Sarah H Cleveland, 'Embedded International Law and the Constitution Abroad' (2010) 110(2) *Colum L Rev* 225.

<sup>33</sup> O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (n 1) 740.

<sup>34</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 21) 29.

<sup>35</sup> It is 'axiomatic' that private acts should not, in principle be attributable to the state: Rosalyn Higgins, *Problems and Process: International Law and How we Use It* (OUP 1995) 153. The distinction between public and private is criticised for ignoring the symbiotic dependency between the two in Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in Carole Pateman (ed), *The Disorder of Women: Democracy, Feminism and Political Theory* (SUP 1990) 118.

<sup>36</sup> Robert J Currie and Hugh M Kindred, 'Flux and Fragmentation in the International Law of State Jurisdiction: The Synecdochal Example of Canada's Domestic Court Conflicts over Accountability for

probably entail a type of ‘reflexive’ jurisdiction which would not only ascertain when a state could exercise power but when a state could be held responsible for its exercise of power. If this definition of jurisdiction was to be adopted then the lexical significance of ‘jurisdiction’ would be lost, especially in relation to its relationship with sovereignty. Furthermore, the idea of the principle of systemic integration is to take into account ‘relevant’ law, not to contort irrelevant law. The ECtHR must avoid ruling by law instead of following the rule of law.

Systemic integration of the public international law conception of jurisdiction leads to conceptual confusion as the function of extraterritoriality differs from the latter, which is therefore not international law ‘relevant to’ Article 1 jurisdiction under the ECHR. The failure of the ECtHR to overrule this aspect of *Banković v Belgium* wherein the ECtHR first invoked the public international law conception of jurisdiction does not conform with a global constitutionalist approach.

### 7.3. Article 1 Jurisdiction and State Responsibility

In Chapter 5 it was demonstrated that the ECtHR does at times conflate the jurisdiction test with attribution.<sup>37</sup> The section contends that the ECtHR has not interpreted Article 1 jurisdiction clearly and consistently with international law on state responsibility in decisions where it conflates Article 1 jurisdiction with attribution. The ECtHR has failed to explicitly acknowledge that in some decisions it does conflate Article 1 jurisdiction with attribution, does not explicitly take into account the other ‘relevant rules’ of attribution under the law on state responsibility, and fails to distinguish and justify its own approach.

Gondek and Milanovic argue that it is methodologically unsound under the Articles on State Responsibility (ASR)<sup>38</sup> to conflate jurisdiction with attribution.<sup>39</sup> First it is necessary to address misleading criticisms against the ECtHR’s conflation of

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International Human Rights Violations’ in Ole Kristian Fauchald and André Nollkaemper, (eds) *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012).

<sup>37</sup> See Section 5.3.

<sup>38</sup> ILC, ‘Articles on State Responsibility’ (n 2).

<sup>39</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 29) 164-8; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 21) 51-2.

jurisdiction with attribution. Gondek states that it is not methodologically correct to conflate attribution and jurisdiction under human rights treaties.<sup>40</sup> He considers that the rules on state responsibility deal only with ascertaining 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.<sup>41</sup> 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’.<sup>42</sup> Primary rules define the content of the international legal obligation breached.<sup>43</sup> 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’.<sup>44</sup>

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)).<sup>45</sup> Both Gondek and Milanovic state that jurisdiction under Article 1 of the ECHR establishes whether there has been a breach of obligations as jurisdiction establishes to whom substantive obligations are owed, therefore falling under Article 2(b) of ASR.<sup>46</sup> 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

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<sup>40</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 29) 164.

<sup>41</sup> Ibid 163 citing ILC, Yearbook of the International Law Commission 1970 vol II 306 para 66 (c).

<sup>42</sup> Ibid 164 citing Crawford, *The International Law Commission’s Articles on State Responsibility* (n 2) 74.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> 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.’

<sup>46</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 29) 168; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 21) 273.



the treaty'.<sup>47</sup> She cites *Nicaragua*, *Bosnian Genocide*, and *Namibia* which use tests of state responsibility and attribution to elucidate the concept of jurisdiction in international human rights treaties.<sup>48</sup> 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. Olivier De Schutter argues that the question of jurisdiction under international human rights treaties 'precedes' the two questions in Article 2.<sup>49</sup> Jurisdiction is the preliminary threshold question before consideration of state responsibility.<sup>50</sup>

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 conclusive of the definition or the 'content' of an ECHR obligation.<sup>51</sup> Extraterritoriality establishes whether the ECHR is in operation at all when a state acts 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. Overall, there appears to be 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.<sup>52</sup> In any case, Article 2 does not conclusively preclude 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

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<sup>47</sup> Cleveland, 'Embedded International Law and the Constitution Abroad' (n 32) 233.

<sup>48</sup> Ibid 233-4 citing *Nicaragua* (n 2) paras 105-115; *Bosnian Genocide Case* (n 2) paras 391- 406; *Namibia* (n 2).

<sup>49</sup> Olivier De Schutter, 'Globalisation and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic YBIL* 185, 189.

<sup>50</sup> Ibid 190.

<sup>51</sup> ILC, Yearbook of the International Law Commission 1970 vol II 306 para 66 (c).

<sup>52</sup> See ILC, Articles on State Responsibility (n 2) 34-6; Crawford, *State Responsibility: the General Part* (CUP 2013); Crawford et al (eds), *The Law of International Responsibility* (n 2).

<sup>52</sup>See ILC, Articles on State Responsibility (n 2) 34.

the proposition that jurisdiction and state responsibility carry out the same function establishing whether legal obligations under a treaty arise in the first place.<sup>53</sup>

Another misleading criticism is that a conflation of attribution and Article 1 jurisdiction leads to conflicts with standards of attribution under the law of state responsibility prescribed by the ICJ and in the ASR.<sup>54</sup> This concern has arisen specifically in the context of states' relationships with separatist groups in other countries, such as in relation to the TRNC and MRT decisions. *Nicaragua*, *Bosnian Genocide Case*,<sup>55</sup> *Tadić*,<sup>56</sup> and *Loizidou v Turkey* as well as specific articles of the ASR are relevant to this debate.<sup>57</sup>

Article 4(1) ASR states that conduct of a state's own organs is always attributable to states.<sup>58</sup> Furthermore, acts by a non-state actor performed under the 'direction, instigation or control of state organs' can also be attributed to the state.<sup>59</sup> 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,<sup>60</sup> 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.

In *Nicaragua* the ICJ sets out two tests for attributing the actions of a non-state entity to a state, a non-state entity being one which is not a de jure organ of the state. The first test requires the establishment of control over the particular conduct in question (complete dependence) and the second necessitates control over the entity (effective control).<sup>61</sup> The ICJ considered whether the US could be held responsible for violations

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<sup>53</sup> Cleveland, 'Embedded International Law and the Constitution Abroad' (n 59) 233.

<sup>54</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 4) 43-4.

<sup>55</sup> *Nicaragua* (n 2); *Bosnian Genocide Case* (n 2).

<sup>56</sup> *Tadić* (Trial Chamber (n 2); *Tadić* (Appeals Chamber) (n 2).

<sup>57</sup> *Loizidou* (preliminary objections) (n 62); *Loizidou* (merits) (n 70).

<sup>58</sup> ILC, Articles on State Responsibility (n 2) 40.

<sup>59</sup> Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 91.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Nicaragua* (n 2) paras 105-115; *Bosnian Genocide Case* (n 2) paras 391-406; Marko Milanovic, 'State Responsibility for Genocide' (2006) 17(3) EJIL 553, 576. For those who interpret the *Nicaragua* test as one test see: Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ

of 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.<sup>62</sup> The ICJ found that apart from the aid that was provided to the contras they were otherwise an ‘independent force’.<sup>63</sup> In answering 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,<sup>64</sup> the ICJ noted that when military aid was ceased contra activity continued.<sup>65</sup> Therefore, although US support was ‘crucial’ to the contras’ conduct, their ‘complete dependence’ on US aid was not demonstrated.<sup>66</sup> Although there was one stage where US support was crucial this was not evidenced in relation to the majority of acts that were carried out.<sup>67</sup> Sufficient control was not found despite the fact that ‘political leaders of the contra force had been selected, installed and paid by the [US]’ 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’.<sup>68</sup> The conclusion was that there was not sufficient evidence to determine the US’s involvement, and it was not clearly demonstrated that the contras had ‘no real autonomy’.<sup>69</sup>

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’.<sup>70</sup> Sufficient control could be established if the US could be found to have exercised general ‘effective control’ of the military and paramilitary operations.

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Judgment on Genocide in Bosnia’ (2007) 18(4) EJIL 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 Virginia JIL 41.

<sup>62</sup> *Nicaragua* (n 2) para 109.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* para 110.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid* para 111.

<sup>68</sup> *Ibid* para 112.

<sup>69</sup> *Ibid* paras 114-15.

<sup>70</sup> *Ibid* para 115.

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*.<sup>71</sup>

At the ICTY, the Trial Chamber in *Tadić* chose to determine whether there existed a state of IAC by asking whether forces of Bosnian Serbs had remained agents of FRY after the withdrawal of Yugoslav troops from Bosnia in May 1992.<sup>72</sup> It used the law of state responsibility and the tests of control laid down in *Nicaragua* in order to determine whether there was an IAC. The Appeals 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 latter 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.<sup>73</sup> A single, private individual would need specific instructions from the state for their actions to be attributable to the state but for a group, the state would need to exercise a different standard of control.<sup>74</sup> It was sufficient for the group to be under the overall control of the state for attribution to be established. 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.<sup>75</sup> The Appeals 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 necessary to ascertain whether the Turkish authorities had exercised “detailed” control over the specific “policies and actions” of the authorities of the “TRNC”’.<sup>76</sup>

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

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<sup>71</sup> *Ilascu v Moldova and Russia* (2005) 40 EHRR 46; *Catan v Moldova and Russia* (2013) 57 EHRR 4.

<sup>72</sup> *Tadić* (Trial Chamber) (n 2).

<sup>73</sup> *Tadić* (Appeals Chamber) (n 2) paras 132-36.

<sup>74</sup> *Ibid* paras 131, 137.

<sup>75</sup> *Ibid* para 131.

<sup>76</sup> *Ibid* para 128.

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.<sup>77</sup> In the *Bosnian Genocide* case, the ICJ rejected the test in *Tadić*.<sup>78</sup> In *Bosnian Genocide*, 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 the 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,<sup>79</sup> 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*.<sup>80</sup> It did so because the *Nicaragua* test coincided with the standards required by the ILC in Article 8 ASR.<sup>81</sup> 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;<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> International law on state responsibility does not require a lower standard of control for attributing the actions of a non-state actor to a state. The ICJ and ILC’s rejection of *Tadić* does not 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

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<sup>77</sup> Crawford, *The International Law Commission’s Articles on State Responsibility* (n 2) 112.

<sup>78</sup> *Bosnian Genocide Case* (n 2).

<sup>79</sup> *Ibid* paras 386-394.

<sup>80</sup> *Nicaragua* (n 2) paras 105-15.

<sup>81</sup> *Bosnian Genocide Case* (n 2) para 398.

<sup>82</sup> *Nicaragua* (n 2) paras 103-5.

<sup>83</sup> *Bosnian Genocide Case* (n 2) para 406.

<sup>84</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 21) 43- 51.

dictating general rules on state responsibility – then that would be permissible.<sup>85</sup> It must be examined whether a lower standard of control for attribution in the human rights context is permissible under international law.

The ILC Fragmentation Report acknowledges that in conditions of ‘social complexity’ it is ‘pointless to insist on formal unity’ of international law.<sup>86</sup> However, it also recognises the tension that exists between different rules and standards in international law and attempts to suggest means of resolving those tensions by using techniques of judicial interpretation.<sup>87</sup> The Report considers the different tests of attribution prescribed in *Nicaragua* and *Tadić*.<sup>88</sup> It notes two potential types of problems arising from this particular norm conflict. First, legal subjects may no longer be able to predict the standard which applies to them and to plan around those standards. Second, it potentially puts legal subjects in an unequal position in relation to each other because their rights, rather than depending on a coherent legal framework, depend upon which court has jurisdiction to hear the case or which forum is chosen by those party to the case.<sup>89</sup> The two possible solutions it posits for solving this kind of conflict are first, that states adopt a new law that settles the conflict, or second, that institutions coordinate the conflict in the future.<sup>90</sup>

Two methods for coordinating conflicting norms provided by the ILC Fragmentation Report 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 of the ICJ and ASR under *lex specialis* and by virtue of its ‘regionalist’ character. Recalling from Chapter 6 that principle of *lex specialis*

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<sup>85</sup> Cassese, ‘The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (n 61) 651.

<sup>86</sup> Ibid 15 para 16.

<sup>87</sup> Ibid 15 para 18.

<sup>88</sup> 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’.

<sup>89</sup> Ibid 32 para 52.

<sup>90</sup> Ibid 33 para 53.

*derogate legi generali* means that special law derogates from general law,<sup>91</sup> *lex specialis* can provide an ‘elaboration, updating or technical specification’ of the general standard of a particular rule.<sup>92</sup> The ILC Commentary to Article 55 of the ASR states that ‘[t]hese articles [including Article 8] 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’.<sup>93</sup> The articles have a ‘residual character’ in relation to the special rules.<sup>94</sup> 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 ILC Fragmentation Report recognises ‘regionalism’ as the ‘pursuit of geographical exceptions to universal international rules’.<sup>95</sup> Certain rules are only binding on states that are members of a particular region.<sup>96</sup> It could be argued that the ECHR is an instrument of ‘European public order’ in which a unique set of standards applies 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.<sup>97</sup> 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.

Chapter 5 demonstrated that the ECtHR increasingly conflates extraterritoriality with attribution. The conflation is in conformity with a global constitutionalist frame because it indicates a presumption of extraterritoriality. While the conflation is in conformity with democratic accountability, it may not be in conformity with the rule of law, giving rise to a lack of clarity and consistency in the international legal order. This section argues conflating attribution with extraterritoriality does not give rise to

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<sup>91</sup> Ibid 34 para 56.

<sup>92</sup> Ibid 35 para 56.

<sup>93</sup> ILC, Articles on State Responsibility (n 2) 140.

<sup>94</sup> Ibid 139.

<sup>95</sup> ILC Fragmentation Report (n 15) 108, para 211.

<sup>96</sup> Ibid.

<sup>97</sup> *Banković* (n 5) para 80.

lack of clarity for two reasons. First, Article 2 provides no direction on extraterritoriality and therefore does not support or contradict a reading of extraterritoriality that conflates the latter with attribution. Second, the resulting test of attribution by the ECtHR does not need to be in conformity with the ICJ or ASR tests, which consider different factual circumstances and apply different legal standards. The ECtHR can adopt a less stringent test of attribution. However, in order to be in conformity with the rule of law, the ECtHR must provide a reasonable interpretation of the law and explicitly justify distinguishing its approach from the ICJ and ASR. It is only through providing a clear and consistent narrative that constituent and constituted powers have a clear legal framework to point to and contest each other's actions. Furthermore, it is the only means by which other international courts can apprehend the approach of the ECtHR. The ECtHR needs to maintain an explicit narrative on why it departs from general standards of international law, giving other international courts an opportunity to respond, contest the ECtHR's approach or distinguish their own.

#### 7.4. Article 1 Jurisdiction: 'effective control' and the Law of Occupation

There are two concerns relating to the relationship between the ECtHR's effective control test and Articles 42 and 43 of the Hague Regulations. First, that the threshold of control under Article 42 and the ECHR require different degrees of control, and give rise to inconsistencies. Second, that the application of the ECtHR's effective control test in armed conflict results in an unavoidable violation of Article 43. This section examines whether these concerns are a red herring and whether the status of the effective control test in the ECtHR's emerging approach diminishes the chances of conflict. It shows that the rule of law is not threatened by unavoidable norm conflicts arising out of the parallel application of the ECtHR's effective control test and Articles 42 and 43 of the Hague Regulations.

Article 42 states that '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'.<sup>98</sup> Common Article

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<sup>98</sup> Hague Regulations IV Article 42; Common Article 2 to the Geneva Conventions.



2 to the Geneva Conventions provides for the application of IHL ‘to all cases of partial or total occupation of the territory’.<sup>99</sup> The factual circumstances required to establish occupation under Article 42 and Article 2 are a matter of contestation.<sup>100</sup> Much scholarship exists on the relationship between the ECHR’s effective control test and the control required to establish belligerent occupation.<sup>101</sup> Whereas the Article 1 ECHR threshold triggers the ECHR, Article 42 initiates different duties and rights under the Geneva Conventions.<sup>102</sup> The exact degree of control over the territory required in both contexts is contested.<sup>103</sup> In its previous jurisprudence, the ECtHR has tended to avoid any explicit statement about the relationship between the Article 1 ‘effective control’ test and belligerent occupation. That is, up until recently when it explicitly said there was no relationship between the two.<sup>104</sup>

Wilde believes that a comparison between the territorial control test in the law of occupation and under Article 1 is important because: ‘the interplay between the approaches taken in each area of law on the question of what type of control is required *mediates* the extent to which the fields of activity covered by the two areas of law overlap’.<sup>105</sup> The ability of this comparison to ‘mediate’ the two areas of law is never explained. He acknowledges that ‘a situation of territorial control by a foreign state might trigger that state’s obligations in the law of occupation, but might not also

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<sup>99</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art 2, 12<sup>th</sup> August 1949, 75 UNTS 287, 6 UST 3516.

<sup>100</sup> Roberts, ‘What is Military Occupation?’ (n 3) 3; Yoram Dinstein, *The International Law of Belligerent Occupation* (n 3); Benvenisti, *The international Law of Occupation* (n 3) 3-6;

<sup>101</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art 2, 12<sup>th</sup> August 1949, 75 UNTS 287, 6 UST 3516.

<sup>102</sup> Hague Regulation IV, Article 46; Geneva Convention IV Article 27; Good Practices (GP) I, Arts 48 ff; Geneva Convention IV, Art 27 GP I, Art. 75; Hague Regulation IV, Art 46 Geneva Convention IV, Arts 13, 27, 33 & 34. The inhabitants of an occupied territory cannot renounce their rights either: Geneva Convention IV, Arts. 8 & 47.

<sup>103</sup> For examples of contestation of the exact degree of control required to establish belligerent occupation, particularly in relation to the distinction between occupation and invasion see: Dinstein, *The International Law of Belligerent Occupation* (n 3) 38; Daniel Thürer, ‘Current Challenges to the Law of Occupation’, Speech delivered at 6<sup>th</sup> Bruges Colloquium, Oct 20-21.

<sup>104</sup> *Jaloud v Netherlands* App no 47708/08 (ECtHR, 20 November 2014).

<sup>105</sup> Ralph Wilde, ‘Triggering State Obligations Extraterritoriality: The Spatial Test in Certain Human Rights Treaties’ (2007) 40(2) *Isr L Rev* 503 [emphasis added].

trigger its obligations in human rights law'.<sup>106</sup> He also acknowledges the ambiguities established in determining the law of occupation, particularly recognising the ambiguity over whether 'occupation' merely requires an invasion, or requires the invading party to 'be in a position to substitute its own authority for that of the government of the territory'.<sup>107</sup> While it is true that the debates on territorial control in the occupation debates 'echo' the debates on territorial control under the ECHR, he does not make clear the purpose of his inquiry. It is not clear whether he thinks that each test can help to clarify the other, whether he recommends that they adopt the same test, or whether it is merely descriptive, pointing out differences to no further end. It appears that the latter is what we are left with as he concludes, 'taken together they demonstrate that the law in this area is as highly contested as it is underdeveloped'.<sup>108</sup> Although it is interesting to compare the Article 1 effective control test and the law of occupation, there is no relationship between the two, there is no reason why they should be in conformity with one another, and no problem arises if they apply in parallel, with different thresholds of control.

There is a concern that the application of the ECtHR's effective control test in armed conflict results in an unavoidable violation of Article 43. Article 43 states that the occupant 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. The relationship between belligerent occupation and the Article 1 effective control test was most hotly contested during the course of *Al Skeini* making its way through UK domestic courts.<sup>109</sup> The ECtHR was yet to confirm the existence of the state agent authority and control test as a firm test of jurisdiction in the context of Article 2 right to life in the military context.<sup>110</sup> Therefore, in the domestic courts, *Banković* was the precedent at large, which required that when a state exercised 'effective control' over the territory, they had to secure the entire range of Convention rights to the entire population over which it had control in the foreign

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<sup>106</sup> Ibid 504.

<sup>107</sup> Ibid 511 citing Thürer, 'Current Challenges to the Law of Occupation' (n 102).

<sup>108</sup> Ibid 526.

<sup>109</sup> *R (on the application of Al Skeini and others) v Secretary of State for Defence* [2005] EWCA Civ 1609, [2005] All ER (D) 337 (Dec). Lord Justice Sedley para 196.

<sup>110</sup> *Al Skeini v United Kingdom* (2011) 53 EHRR 18 para 133.

territory.<sup>111</sup> This could mean that the UK in Iraq theoretically would have had to ensure the right to marry<sup>112</sup> or the right to free elections<sup>113</sup> if it exercised control over the territory. In the context of military intervention abroad, the question arose in the UK domestic courts as to whether belligerent occupation constituted one of the circumstances under which effective control would be established under Article 1 jurisdiction, with all of the legal consequences which would flow. It was in this context that the Court of Appeal and House of Lords found that the two tests of control did not bear any relationship towards one another. In the Court of Appeal decision of *Al Skeini*, Lord Justice Sedley stated that ‘[n]o doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality of guarantees vouchsafed by Art. 14’.<sup>114</sup> He continued:

In my judgment it is quite impossible to hold that the UK, although an Occupying Power for the purposes of the Hague Regulations and [the] Geneva IV [Convention], was in effective control of Basra City for the purposes of [the European Court’s] jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Banković* judgment, to secure to everyone in Basra City the rights and freedoms guaranteed by the [Convention]. One only has to state that proposition to see how utterly unreal it is...[A]s an Occupying Power it was bound to respect the laws in force in Iraq unless absolutely prevented (see Article 43 of the Hague Regulations).<sup>115</sup>

In the House of Lords decision in *Al Skeini*, Lord Brown invoked Article 43 of the Hague Regulations which states that the occupant ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. He continued:

[T]he occupants’ obligation is to respect ‘the laws in force’, not to introduce laws and the means to enforce them (for example, courts and a justice system)

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<sup>111</sup> *Banković* (n 5) para 65.

<sup>112</sup> Article 12 ECHR.

<sup>113</sup> Article 3, Protocol 1.

<sup>114</sup> *Al Skeini* (CA) (n 109) Lord Justice Sedley para 196.

<sup>115</sup> *R (on the application of Al Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153, para 124.

such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.<sup>116</sup>

Lord Brown found it was impossible to impose the ECHR, on the grounds that enforcing the entire panoply of rights required under the ECHR would require breaching Article 43 of the Hague Regulations and introducing and enforcing laws without respect for the laws in the country.

Milanovic states that this situation gives rise to an unresolvable norm conflict.<sup>117</sup> He paints a hypothetical picture of the UK becoming a belligerent occupant of a territory that is governed by Sharia Law which has as part of its Penal Code stoning as a punishment for adultery.<sup>118</sup> Milanovic assumes that belligerent occupation triggers the ECHR under the effective control test, and that stoning would be at odds with, for example, Article 3 ECHR. He states that this gives rise to a norm conflict: Article 3 requires the state to reform the Penal Code but Article 43 of the Hague Regulations prevents it from changing the law of the territorial state. Furthermore, Article 3 conflicts with Article 64 GC IV which stipulates that: '[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention'. He finds that in both instances one of the two obligations would have to be read down to resolve the norm conflict.<sup>119</sup> He acknowledges that Article 43 is more susceptible to being read down because it only prohibits the occupant from altering the domestic law of the occupied territory unless it is 'absolutely prevented' from doing so. Preventing punishment by stoning under Article 3 could be considered as 'absolutely prevent[ing]' the occupying power from not changing the law.<sup>120</sup> He states that on the other hand,

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<sup>116</sup> *Al Skeini* (HL) (n 115) para 129.

<sup>117</sup> Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2009) 14(3) *J Conflict and Security L* 459, 480.

<sup>118</sup> *Ibid* 480.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* 481 citing Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *EJIL* 661, 676; Tobias Thienel, 'The ECHR in Iraq. The Judgment of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*' (2008) 6 *JICJ* 115, 126-7.

Article 64 can only be read down forcibly, because it is less malleable and must be kept in force unless there is a security threat or it hampers the application of GC IV. For him, stoning for adultery is not a security threat or a hampering of the application of the GC IV and Article 64 remains in force. He insists that Article 3 inherently cannot be read down under the ECHR. Therefore, an unresolvable norm conflict arises.

Three arguments can be raised against the supposition that an unresolvable norm conflict arises. First, it was never confirmed whether the ECHR's effective control over the territory test was synonymous with belligerent occupation. Any decisions that were made in relation to the two seem to indicate that Article 1 effective control requires more control than belligerent occupation.<sup>121</sup> Second, in relation to Milanovic's discomfort with watering down the requirements of Article 3, one norm can unceremoniously trump another if reasons are set out by the ECtHR.<sup>122</sup> The same applies in this situation.<sup>123</sup> The ECtHR's effective control test was never used to get rid of the death penalty in Iraq. It is rarely used to impose the entire panoply of rights protection on a state acting abroad,<sup>124</sup> and is most often used in inter-state cases where there are systemic violations of many of the ECHR rights.<sup>125</sup>

The ECtHR's emerging approach to the effective control test diminishes chances of conflict. *Al Skeini* confirms two tests of control for establishing jurisdiction: effective control over a territory and state agent authority and control over an individual.<sup>126</sup> The only cases cited in *Al Skeini* in support of the effective control over a territory category were the 'attribution' effective control cases including *Loizidou v Turkey, Cyprus v*

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<sup>121</sup> *Al Skeini* (HL) (n 115).

<sup>122</sup> However, arguably article 64 could be read down to avoid the norm conflict: stoning for adultery could be read as a security threat or impeding the enforcement of GC IV and therefore Article 64 would condone the changing of Sharia Law.

<sup>123</sup> For example, the ECHR could insist that Sharia Law be changed in order to prevent against inhumane and degrading treatment in the circumstances.

<sup>124</sup> On the other hand, in relation to the 'attribution' effective control test, when the actions of a separatist state in another territory are attributed to the respondent state, this does trigger the application of the ECHR. This is separate from the effective control over a territory cases. See the distinction in Chapter 5.

<sup>125</sup> See e.g. *Georgia v Russia (no 1)* (dec) (30 June 2009) 52 EHRR SE14.

<sup>126</sup> *Al Skeini* (n 110) paras 133, 138.

*Turkey and Ilascu v Moldova and Russia*.<sup>127</sup> Furthermore, the state agent authority and control test supplied the rationale for a multitude of factual scenarios including control over boats, aircraft, buildings and, shooting by British military personnel in the course of security patrols established jurisdiction. The positive obligations rationale of effective control over a territory test adopted in *Banković*, is not explicitly mentioned in *Al Skeini*. *Al Skeini* appears to dismiss *Banković*'s interpretation of the test, that requires a state to secure the entire breadth of the ECHR when acting abroad. It seems to have diminished in significance as a test of extraterritoriality. Instead, the state agent authority and control test now seems to cover many circumstances arising in the extraterritorial context. This limits chances of conflict between the effective control test and Article 43. Although the effective control test continues to be used in inter-state cases, it has less significance in the individual application context.<sup>128</sup>

Since the *Al Skeini* decision, the EHCR's effective control test is not used in the military context, including in the cases of *Hassan* and *Jaloud* where the state agent authority and control test has been applied.<sup>129</sup> The ECtHR has traditionally been ambiguous in relation to its understanding of the relationship between the Article 1 effective control test and belligerent occupation. In *Al Skeini*, in finding Article 1 jurisdiction for the use of force against individuals, the ECtHR stated that the CPA was 'to exercise powers of government temporarily'<sup>130</sup> and that the CPA provided security in Iraq including the maintenance of civil law and order.<sup>131</sup> It continued:

[F]ollowing the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government... In these exceptional circumstances, the Court considers that the United Kingdom...exercised authority and control over individuals killed in the

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<sup>127</sup> Paragraph 70 from *Banković* which merely provides the reasoning of *Loizidou* and *Cyprus v Turkey* without further comment.

<sup>128</sup> See e.g. *Georgia v Russia* (n 125).

<sup>129</sup> *Hassan v UK* App No 2970/09 (ECtHR, 16 September 2014); *Jaloud* (n 104).

<sup>130</sup> *Al Skeini* (n 115) para 144.

<sup>131</sup> *Ibid* para 145-8.

course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom.<sup>132</sup>

This passage could be interpreted as saying that the UK's occupation was necessary for establishing jurisdiction alongside the state authority and control test in this instance. However, *Jaloud v Netherlands* put the ambiguity of the relationship between UK occupation and jurisdiction to rest. In *Jaloud*, the ECtHR stated that the effective control test had nothing to do with the law of occupation.<sup>133</sup> In that case, the Government had argued that the Netherlands was not an 'occupying power' under IHL and that the US and UK were 'occupying powers' under UNSCR 1483.<sup>134</sup> The UK which was a third party to the decision, argued that *Jaloud* should be distinguished from *Al Skeini* by stating that: 'in the latter case the [UK] was recognised as an 'occupying power' within the meaning of Article 42 of the Hague Rules and therefore had the attendant duty under Article 43 to exercise the powers normally belonging to the State'.<sup>135</sup> The ECtHR decided, 'the status of 'occupying power' within the meaning of Article 42 of the Hague Regulations, [was] not per se determinative' and there was no need 'to have recourse to it in finding that the responsibility of Turkey was engaged in respect of events in northern Cyprus'.<sup>136</sup>

It added that, UNSCR 1438, 'while reaffirming "the sovereignty and territorial integrity of Iraq"' ...called upon "all concerned", regardless of Occupying Power status, to "comply fully with... the Geneva Conventions of 1949 and the Hague Regulations of 1907".<sup>137</sup>

There is no mention of the 'effective control over the territory' test. The fact that there was an occupation was useful in the *Al Skeini* case which concerned the 'state agent authority and control' test. It constituted important background information for assessing the context in which the British soldiers carried out the use of force in that case. In *Jaloud*, the ECtHR was concerned with attributing action rather than

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<sup>132</sup> Ibid para 149.

<sup>133</sup> *Al Skeini* (n 115) para 144.

<sup>134</sup> Ibid para 133.

<sup>135</sup> Ibid para 140.

<sup>136</sup> Ibid para 142.

<sup>137</sup> Ibid para 144.

determining whether Article 1 jurisdiction was established. In this case, occupation was not used to determine whether the Netherlands had met the state agent authority and control test. The ECtHR referred to UNSCR 1438 to show that the Article 1 jurisdiction test was entirely separate from belligerent occupation. This is all due to the fact that the ‘state agent authority and control’ test which divides and tailors rights, is the approach predominantly taken by the ECtHR in the military intervention context. The ‘effective control over the territory’ test which requires that a state secure all rights under the ECHR all of the time when it has control over a territory is less prevalent.

Conflicts between the effective control over the territory test and Article 43 are unlikely to arise if the principle of systemic integration is in operation because relevant law, external to the ECHR, should be taken into account. This includes the domestic law of extraterritorial state and IHL. No cases to date give rise to a conflict between Article 43 and the effective control test. Furthermore, the effective control test is becoming less prevalent in Article 1 jurisdiction, arising predominantly in inter-state cases, and addressing systemic violations of numerous ECHR rights. No conflict therefore arises between the ECHR and Article 43, and it should not constitute a rule of law justification for limiting admissibility to the ECtHR.

## 7.5. Article 1 Jurisdiction as a Barrier to Norm Conflict Resolution

Using the Article 1 threshold to avoid the resolution of norm conflicts runs counter to global constitutionalism. The ECtHR is increasingly turning against this approach. Vassilis Tzevelekos argues that the ECtHR in *Banković* interprets ‘jurisdiction’ as having only ‘exceptional’ extraterritorial application *in order to* avoid adjudicating upon circumstances which involved complex norm conflicts.<sup>138</sup> One could also argue it is unintentionally avoiding resolution of the ‘norm conflict’ issues. In the interests of the defragmentation of international law, the ECtHR should not set up a procedural barrier to adjudicating and enforcing the rights it was given the responsibility to

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<sup>138</sup> Vassilis P Tzevelekos, ‘The use of Article 31(3)(c) VCLT in the Case law of the ECtHR: An effective anti-fragmentation tool or a selective loophole for the reinforcement of human rights teleology? Between Evolution and Systemic Integration’ (2009-2010) 31 Michigan JIL 621, 627.



enforce. The ECtHR should seek to expressly situate the ECHR within the global legal system.

Tzevelekos argues that in *Banković*, the ECtHR was mainly attempting to justify its own ‘volonté’ to abstain artfully from exercising jurisdiction over an extremely technical and highly politicised case.<sup>139</sup> In *Banković* the ECtHR ‘skilfully avoided shedding light’ on the issue of state responsibility for human rights violations committed by international organisations by playing the ‘extraterritoriality game’.<sup>140</sup> Milanovic similarly acknowledges that the *Banković* decision enabled the ECtHR to not have to engage in complex political questions which entailed the application of other international law.<sup>141</sup> Koskenniemi and Leino similarly recognise *Banković* as a case which enabled the ECtHR to abstain from resolving complex questions of norm conflicts.

However, the ECtHR has since lowered the jurisdiction threshold and enabled questions of complex norm conflicts to be adjudicated upon. Tzevelekos acknowledges that jurisdiction is not an obstacle to deciding upon complex questions of attribution in the *Behrami* case, representing a departure from the *Banković* decision.<sup>142</sup> Although the way in which the ECtHR took into account international law in that case has been criticised,<sup>143</sup> it nonetheless took the first step in engaging with the wider normative environment to determine to whom actions should be attributed and did not use jurisdiction as a barrier to deciding such questions. The *Al Skeini* case, which confirmed a state agent authority and control test and a control over the territory

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<sup>139</sup> Ibid 674.

<sup>140</sup> Ibid.

<sup>141</sup> Milanovic, ‘A Norm Conflict Perspective’ (n 117) 3.

<sup>142</sup> Cite Tzevelekos, The use of Article 31(3)(c) VCLT in the Case law of the ECtHR (n 138) 675-677 citing *Behrami v France* (2007) 45 EHRR SE 85.

<sup>143</sup> Marko Milanovic and Tatjana Papić, ‘As bad as it gets: the European Court of Human Rights’s *Behrami* and *Saramati* decision and general international law’ (2009) ICLQ 267; Kjetil Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test (2008) 19(3) EJIL 509; Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’ (2008) 8 HRLR 151; Heike Krieger, ‘A Credibility Gap: The *Behrami* and *Saramati* Decision of the European Court of Human Rights’ (2009) 13 J 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.

test<sup>144</sup> paved the way for the ECtHR to engage in further norm conflict resolution. As illustrated in *Hassan*, the ECtHR looks at the resolution of norm conflicts between the ECHR and IHL.<sup>145</sup> *Banković*'s high threshold for jurisdiction created a barrier to engaging in such norm conflict questions. The lowering of the jurisdiction threshold means that those questions of norm conflict are addressed. This indicates that the ECtHR is increasingly willing to adjudicate upon cases that involve complex norm conflicts and contribute to supporting the rule of law by resolving potential incoherencies in the international legal system.

This approach demonstrates convergence with both the global constitutionalist norm of democratic accountability and the rule of law. As the ECtHR lowers its jurisdiction threshold, it moves towards a presumption of extraterritoriality, which in turn decreases the obstacles constituent powers face in accessing the ECtHR to challenge constituted power action. As the ECtHR moves towards a presumption of extraterritoriality, it adjudicates upon the merits, resolving norm conflicts, explicitly positioning the ECHR within the global legal system and enhancing the rule of law. Therefore, the two branches of constitutionalism reinforce each other, converging the ECtHR's approach with that advocated by a global constitutionalist frame.

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<sup>144</sup> *Al Skeini* (n 115) paras 133, 138.

<sup>145</sup> *Hassan* (n 129).

## 7.6. Conclusion

The ECtHR does not interpret Article 1 jurisdiction clearly and consistently with the public international law conception of jurisdiction.<sup>146</sup> In order to ensure clarity and consistency, the ECtHR should stop purporting to rely on jurisdiction when it does not - and cannot - because of the unrelated functions of the rules of extraterritoriality and state jurisdiction.<sup>147</sup> A conflation of extraterritoriality and attribution is an indicator of the presumption of extraterritoriality and therefore supports the norm of democratic accountability, allowing constituent powers to challenge constituted powers. Conflating article 1 jurisdiction and attribution is in and of itself not a threat to the coherency of the international legal system. What is a threat, is the ECtHR's reluctance to explicitly state when it conflates the two concepts. Providing a different standard of attribution than that prescribed by the ASR and ICJ judgments does not undermine the unity of the international legal system as long as the ECtHR provides a clear and explicit narrative of what it is doing and why. The ECtHR needs to acknowledge when it conflates jurisdiction and attribution; acknowledge the ASR and ICJ judgements; and justify distinguishing its approach using established interpretation techniques. This is so that the constituency of the Council of Europe knows what law regulates the constituency. Furthermore, international actors and other adjudicatory mechanisms providing a different interpretation of those standards can identify, criticise, adopt or distinguish the standard applied by the ECtHR.

No conflict arises between the ECHR and Article 42 Hague Regulations from the legal consequences of the 'effective control over the territory' test. The threat of imposing all of the obligations in relation to everyone on the state acting abroad has never materialised and never will if the principle of systemic integration is put into operation. Furthermore, it is doubtful that the effective control over an area test is used outside the context of inter-state cases where systematic and expansive rights-violations are

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<sup>146</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 29) 56; Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction' (2010) 20(4) EJIL 1223, 123; Marko Milanovic, *The Extraterritorial Application of Human Rights Treaties* (OUP 2011) 26. See further, Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 411.

<sup>147</sup> Gondek, *The Reach of Human Rights in a Globalising World* (n 29) 56.

carried out. In relation to the Article 1 jurisdiction threshold being used as a barrier to resolving norm conflicts, there is evidence to suggest that the ECtHR has done this in the past, for example in *Banković*. However, the ECtHR is progressively displaying a willingness to engage in complex and contentious norm conflicts between IHRL and IHL, rather than avoiding their adjudication. This means that the ECtHR will more likely presume extraterritoriality in conformity with the norm of democratic accountability and engage in norm conflicts which is an important aspect of upholding the rule of law in global governance. The ECtHR needs to be explicit about the function of extraterritoriality in order to conform with the global constitutionalist frame. It needs to distinguish extraterritoriality from jurisdiction and attribution, and recognise when it conflates extraterritoriality with attribution. The ECtHR's willingness to lower the threshold and engage in norm conflict resolution represents a convergence with the global constitutionalist frame. A presumption of extraterritoriality is therefore not only in conformity with democratic accountability, but also the rule of law. The ECtHR needs to explicitly clarify the concept of extraterritoriality, but otherwise its approach can be captured by its convergence with the global constitutionalist frame.

## 8. Conclusion

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This thesis asked what approach the ECtHR should take to extraterritoriality from a global constitutionalist perspective. A global constitutionalist frame was chosen as a result of its potential ability to contextualise extraterritoriality at the ECtHR within a complex global governance system, enabling for its political and legal (in)significance – the paradox of extraterritoriality - to be articulated. The thesis sought to provide a normative frame for extraterritoriality that situated it within a global context. The global context, rather than regional or domestic frame, was adopted because this perspective was considered as potentially fruitful for answering crucial questions. In particular, from this context it could be discovered why victims of global atrocity apply to a regional human rights court, of limited state membership, restricted capacity, criticised for its inefficiency and unable to have a significant influence on policies relating to the treatment of that individual. A normative framework could then capture the reason why victims apply despite the ECtHR's limitations, and ensure that the value of the ECtHR is understood and emboldened. The legal significance of the ECHR in an international legal system was also questioned. The thesis sought to elucidate the ECHR's legal significance. From a global governance perspective, this was not only for the benefit of states bound by the system and who sought admissibility to the ECtHR. International organisations and courts administering other specialist regimes within the international legal order could also benefit from the clarification of the relationship between specialist regimes, so as to ensure clarity and consistency in the international legal order as a whole, and create deliberation between each network.

Existing theories of extraterritoriality cannot account for the paradox of extraterritoriality. Those who place emphasis on the universality of human rights whilst simultaneously imposing restraints on their application, produce a contradiction in terms. Furthermore, they provide no rigorous theoretical justification for their reliance upon universality. Those that do provide a normative basis for a model of extraterritoriality rely on the historical condition of human rights as essentially territorially bound. When they provide reflection on the de-territorialised nature of global governance, they do not consider exploiting the human rights discourse to provide a response to extraterritorial exertions of power. Rather their re-imagination of human rights in a de-territorialised world is one of hegemony and imperialistic

endeavours. A higher level of abstraction is required to understand the ECtHR as a liberal, counter-hegemonic means of counteracting some of the most flagrant denials of justice that arise from the de-territorialisation of power and the persistent territorialisation of accountability.

This thesis turns to a global constitutionalist frame for a theoretical underpinning of extraterritoriality and to relate the poignancy of arbitrary delineations of accountability based upon territory in a changing global context. The global constitutionalist frame responds to phenomena that form hallmarks of the deterioration of the Westphalian legal order including globalisation, institutionalisation and fragmentation. This frame eschews the idea states are the only actors that get to decide who is included in governance systems in a Post-Westphalian world. Especially in governance orders specifically designed for the protection of other actors, such as individuals protected by the Council of Europe system. From a global constitutionalist perspective, an interpretation of Article 1 of the ECHR in accordance with the rules of the VCLT cannot provide a normatively sound approach to extraterritoriality Post-Westphalia. Global constitutionalism is a theoretical avenue through which to assess legitimate forms of governance. A consensual understanding of the international legal order is left behind, and a principled approach to a multifarious and diverse global governance system is created. The central principle of this system is that it is governed by and for the benefit of a constituent body. The combination of norms of the rule of law and democracy identifies the parameters of the constituency.

Applying the global constitutionalist perspective to the Council of Europe, delimiting admissibility to the ECtHR through geographical location and arbitrary tests of control is no longer sustainable. Instead, individuals who are directly affected in ways that implicate the ECHR and Member States of the ECHR who defend their actions in accordance with this legal framework, form part of the constituency of the Council of Europe. The norm of democratic accountability is in operation when constituent powers exercise political control over constituted powers at the ECtHR, in the form of compelling justifications for the latter's actions, with the potential for sanctions and mandatory action. Therefore, the norm of democratic accountability translates into a presumption of extraterritoriality as a doctrinal indicator of a global constitutionalist frame at the ECtHR, which overcomes the geographical delimitation of admissibility.

The rule of law corroborates and complements the norm of democratic accountability, providing an explicit, clear and consistent legal framework which links constituent and constituted powers. Through this legal framework, constituents can challenge constituted power action and the latter can defend itself against allegations of violations of the law. As part of a process of fragmentation, the ECtHR strengthens the rule of law, by contributing to an increase in constraints on constituted power through legal adjudication, accountability, sanctions and mandated action. The global constitutionalist response to the inconsistencies and lack of clarity that arise from fragmentation is to adopt the principle of systemic integration. This judicial interpretation technique not only serves a coordinative function between legal regimes, but also situates the ECHR within its global legal context. The ECtHR can contribute to a reciprocal dialogue with other international courts in providing authoritative interpretations of the law. In order to ensure the reflexivity of this process, the ECtHR needs to be explicit in relation to its interpretation and application of external international law. It cannot provide an interpretation which is so at odds with common understandings of that international law norm or concept, that it leads to incontrovertible inconsistencies in the global legal order. Instead there needs to be a reasonable interpretation, enabling international adjudicatory bodies to take into account, adopt or distinguish the decision made by the former court. The global constitutionalist frame thereby requires a presumption of extraterritoriality, the adoption of the principle of systemic integration and an explicit, clear and consistent narrative, as well as a reasonable interpretation of the law for resolving norm conflicts arising from extraterritorial application of the ECHR.

The ECtHR's emerging approach to extraterritoriality can be captured by a global constitutionalist frame, with further clarification needed in its conceptualisation of the function of extraterritoriality. A convergence with the global constitutionalist frame through an emerging presumption of extraterritoriality is visible at the ECtHR in three ways. First, the multifarious ways in which the state agent authority and control test and effective control over the territory test are used to establish jurisdiction indicate a lowering of the jurisdiction threshold. The ECtHR's increasing creativeness with those two tests evidences control over a territory being diminished from a test requiring something akin to occupation, and not fulfilled through activities such as bombing a territory, to a test establishing jurisdiction through control over a boat. The state agent

authority and control test had humble beginnings in diplomatic and consular cases, but has expanded to shots fired by a soldier, or being pulled onto a plane. It has also contributed to the diminishing influence of the test requiring the higher threshold, the effective control test, lowering the jurisdiction threshold further. Second, the presumption of extraterritoriality is evidenced through the increasing conflation of Article 1 jurisdiction with attribution, representing an effective skipping of the extraterritoriality question. The ECtHR has expanded the conflation of these two concepts from the factual scenario of attributing ECHR violations of a separatist regime to an extraterritorial state, to cases seeking to ascertain to whom a shot fired by a single soldier should be attributed in the context of a multi-national military operation during a transitional period of belligerent occupation. The focus on who carries the burden of responsibility, rather than whether sufficient control is exercised by the respondent state to establish jurisdiction in the first place, means that a concept of extraterritoriality is becoming less pertinent in the ECtHR's reasoning. Third, the ECtHR increasingly does not rely on the traditional extraterritoriality tests at all in cases which deal with state action abroad, representing a fully formed presumption of extraterritoriality. The extraterritorial effect of decisions relating to extraordinary rendition and extradition are undeniable. The ECtHR enables victims of illegal conduct in armed conflict, on the high seas, extraordinary rendition procedures and UNSCR terrorist sanctions, to exercise political control in the form of compelling justifications for constituted power action in accordance with the legal framework of the Council of Europe, and with the potential for sanctions and mandatory action when the action is found to be illegal under the ECHR.

The ECtHR's emerging approach to managing norm conflicts arising from the extraterritorial application of the ECHR converges with a global constitutionalist frame. The ECtHR's analysis of detention in armed conflict in *Al Jedda*, misconceived of IHL obligations, failing to ask whether IHL authorised detention, falsely stating that it imposed indefinite detention and that detention was a measure of last resort under IHL, and failing to distinguish between POWs and civilians. It also failed to recognise that *Al Jedda* concerned a NIAC and that IHL could not authorise detention in these circumstances anyway. While the result reached in that decision was accurate according to a proper assessment of the law, the ECtHR undermined its own reasoning by not providing a reasonable interpretation of the relevant rules. It incorrectly



assumed that IHL prevailed over the ECHR. They can influence each other just as much as one norm can trump the other. Their relationship with one another must be conceived on a case by case basis according to which legal regime provides the most authoritative or detailed guidance on a specific issue.

In contrast, the ECtHR did converge with a global constitutionalist approach in *Hassan*. It interpreted the substantive and procedural requirements of Article 5 by taking into account IHL to conclude that the individual posed a sufficient threat to be detained in the first place as a POW or civilian that constituted a security threat. Furthermore, a competent body would suffice to carry out a review of the individual's detention and the ECtHR thought he had been informed promptly of the case brought against him because of the two interviews he faced when he entered the detaining facility. While someone may disagree with this finding, the balance that the ECtHR made between IHL and ECHR norms, or the outcome reached, the ECtHR provided an explicit explanation of its reasoning to which applicants in the future and international courts engaging with the reasoning of the ECtHR, can respond.

The ECtHR's conception of extraterritoriality does not fully conform with the global constitutionalist frame. The ECtHR's reliance on the public international law conception of jurisdiction serves to obfuscate rather than elucidate the function of extraterritoriality. Extraterritoriality at the ECtHR does not aim to ascertain when a state can exercise power in another territory, but to provide some parallel mechanism of accountability when the state has already engaged in any legal or illegal activity abroad which has affected specific people. While the ECtHR conflates Article 1 jurisdiction with attribution, which is a doctrinal indicator of the presumption of extraterritoriality, it has no self-awareness that it does so. One of the reasons for this is because it does not articulate the function of extraterritoriality which is an arbitrary delimitation of accountability based solely upon geographical location, having nothing to do with to whom an action should be attributed. The ECtHR needs to explicitly acknowledge when it conflates those two concepts. It also needs to acknowledge international law standards of attribution and distinguish its approach, as well as justify the standards it applies. There is no international law obligation on the ECtHR, and it is not crucial for the incoherency of the international legal order, that the ECtHR adopt the same rules of attribution established by the ICJ, the ASR or the ICTY. The ECtHR does have to contribute to improving the clarity and consistency of a

decentralised, reflexive, changing narrative on the authoritative interpretation of international law standards and concepts so as to strengthen the rule of law.

In terms of the two outstanding issues, no conflict arises in relation to Articles 42 and 43 of the Hague Regulations and the ECHR. The threat of requiring states to secure the entire panoply of ECHR rights to everyone in a foreign territory has never materialised and never will if the principle of systemic integration is put into operation. Furthermore, it is doubtful that the ‘effective control over an area’ test will be used in cases other than inter-state cases where systematic and expansive rights-violations are carried out. There is evidence to suggest that the ECtHR has used Article 1 jurisdiction as a barrier to resolving norm conflicts. For example many commentators note that this was one of the functions of the high threshold in *Banković*. As the ECtHR presumes extraterritoriality, it increasingly engages in complex and contentious norm conflicts between IHRL and IHL, rather than avoiding their adjudication. Again, this is necessary for the stability of the rule of law in relation to both accountability of constituted power action and the provision of a clear legal framework through which constituted and constituent powers can regulate their relationship in accordance with the rule of law.

The global constitutionalist frame has helped to unravel the paradox of extraterritoriality as it captures and aims to strengthen the value in the extraterritoriality at the ECtHR, despite its limitations, as well as to articulate the importance of the ECHR when applied in situations where other international law is relevant. Extraterritoriality at the ECtHR is important to victims of global atrocity because of the disparity of power between actors, and the inability of victims to hold powerful states accountable for actions that severely curtail their autonomy and equality in ways spanning way beyond the remit of the ECHR. The ECtHR forms a necessary accountability link between those actors where before there was a vacuum. This accountability vacuum existed despite the fact of a palpable and damaging relationship between victims and Council of Europe Member States in the latter’s exertion of power beyond its territory. The ECtHR is a forum of democratic accountability. Victims of global atrocities can question the respondent state on their conformity with ECHR obligations, impose sanctions on states or seek mandatory action in relation to the rights violation, perhaps even receive compensation. In this way, victims exercise a form of retroactive control over the Member State’s actions.

A global constitutionalist frame recognises the worth of the ECtHR to victims of global atrocities despite its limited capacity and seeks to set aside arbitrary barriers for admissibility to the ECtHR, thus recommending a presumption of extraterritoriality.

A global constitutionalist frame seeks to define the legal status of the ECHR in situations where other international legal standards pertain to the situation. This frame recognises the worth in articulating the ECHR's position in the international legal system, both to its own constituency and other constituencies elsewhere within the global governance system. The solution provided is both concrete and flexible. The principle of systemic integration embodies various interpretation techniques that recommend concrete solutions to norm conflicts. Taken together, a much more nuanced approach is provided by systemic integration. The ECHR can be prioritised by the ECtHR over a conflicting international law norm when it provides a justification for its decision. In this way, other special regimes and stakeholders can respond to the ECtHR's interpretation. The ECtHR has a significant role to play in shaping the way in which rules apply to particular factual circumstances but it is limited insofar as it must provide a reasonable interpretation of external law and reasons for the way in which it balances norms. This is so that a clear legal framework is in place for its own constituency. The rule of law is a norm upon which the other norms of constitutionalism are reliant, and therefore it is in the ECtHR's interest to adopt the global constitutionalist recommendations proposed.

The global constitutionalist approach to extraterritoriality is not as utopian as it first appears. The ECtHR has progressively made extraterritoriality the norm rather than the exception. This needs to be highlighted in response to the concern that a presumption of extraterritoriality may be untenable. Both constituted and constituent powers already engage in the process of global constitutionalisation within the Council of Europe in cases concerning extraordinary rendition, armed conflict and interdictions on the high seas. Extraterritoriality's significance as an issue of contestation is becoming almost obsolete. So the question as to what happens next must begin on the understanding that the ECtHR is already operating on a presumption of extraterritoriality.

The presumption of extraterritoriality can be rebutted. Rules on how to rebut the presumption should be developed. This is related to the question of whether the

applicant meets the substantive admissibility criteria but could also relate to judicially developed admissibility criteria such as attribution,<sup>1</sup> and other more contemporary tools of accountability in international law, such as causation<sup>2</sup> and reasonableness.<sup>3</sup> This should not undermine the core normative justification for a presumption of extraterritoriality, that territory can no longer function as an arbitrary delineation of accountability. Rules for rebuttal actually cement the presumption, refocusing efforts towards thinking of why states should not be held responsible, rather than why they should.

While a presumption of extraterritoriality is an advancement in securing democratic accountability in global governance, there needs to be recognition of the fact that other mechanisms have failed at providing some form of relief or justice to individual applicants. There needs to be an exploration of the mechanisms in place that constitute the first port of call for applicants to the ECtHR. The ECtHR's decisions do mandate respondent states to make specific amendments to their internal investigatory procedures in relation to, for example, the alleged illegal killing of individuals in armed conflict, to improve autonomy of decision-making from the chain of command, and transparency. But there needs to be analysis of those mechanisms divorced from ECHR standards, specifically looking at the oversight that they provide on military activity and why they are insufficient for individuals seeking admissibility to the ECtHR.

Time will reveal what challenges are in store for the ECtHR in defining the ECHR in armed conflict. IHL permits the intentional death of collateral innocent civilians on the battlefield whereas the ECHR only allows a violation of the right to life in limited circumstances. Although a significant decision relating to bombing has not made its way to the ECtHR since *Banković*, the emerging presumption of extraterritoriality could be instrumental in ensuring admissibility of this type of case. This could mean that, under the question of extraterritoriality, cases concerning drone warfare would

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<sup>1</sup> See e.g. Larson, Kjetil M Larsen, Attribution of Conduct in Peace Operations: The Ultimate Authority and Control Test' (2008) 19(3) EJIL 509.

<sup>2</sup> Ilias Plakokefalos, Causation in the law of State Responsibility and the Problem of Overdetermination: In Search of Clarity (2015) 26(2) EJIL 471.

<sup>3</sup> Cedric Ryngaert, *Jurisdiction: Towards a Reasonableness Test* (CUP 2013).

be admissible. Contemporary multinational use of force is marked by aerial bombings because of the reluctance to risk the lives of soldiers, and make war unpalatable for parliamentarians, who have surreptitiously positioned themselves as bellwethers of legitimate warfare, at least in the UK. The presumption of extraterritoriality may mean that those decisions are admissible. The ECtHR may be in a position to condemn illegal acts under IHL, for example, the intentional bombing of a hospital or a school. A global constitutionalist frame requires the ECtHR to adjudicate upon these circumstances in the global governance system in which it finds itself.

This analysis would benefit from an appraisal of the relationship between the ECHR and other international tribunals for systematising the relationship between different forums. The ECtHR's popularity is most definitely directly linked to the lack of appropriate accountability mechanisms in place for meeting the disproportionate violation of fundamental freedoms and human rights. However, there needs to be an inquiry of whether there are other features of the ECtHR, in comparison with other international tribunals, that make it more palatable. This could be in relation to the efficiency of other international tribunals, the lack of knowledge on the part of legal representation of alternative mechanisms for dealing with such issues, the lack of familiarity with a certain international adjudicatory mechanism, or the rhetorical value of a statement from the ECtHR. International courts need to not only work together in creating clarity and consistency in the international legal system for the rule of law, but also provide a coordinated response to the lack of accountability in a global governance system for supporting the norm of democratic accountability. This means that an ECHR lawyer needs to engage with the IHL or international criminal law scholar not only in relation to questions concerning the substance of the legal norms pertaining to those regimes, but also institutional arrangements.

One purpose of this thesis has been to provide a global constitutionalist framework that recognises that the ECtHR's extraterritorial popularity is symptomatic of an uneven governance system, where powerful actors confidently extend their influence to foreign territories for their own ends, whether it be to exploit resources, or to pursue a misguided project of regime change, or for humanitarian endeavours. Changing that legal frame lies outside of analysis of how the ECtHR can optimise its global constitutionalist potential, but that does not mean that international dispute settlement should not be self-conscious of the uneven foundations upon which they have been

placed. This is not to say that the time spent on courts would be better spent on changing that foundation, devoid of the distraction of courts. However, there needs to be an evaluation of what role courts can play in changing the foundation upon which it rests. This is not merely the legal foundation. The law-making capacity or potential of courts is not addressed in this thesis because it raises questions of legitimacy and democratic accountability which are not easily defensible, need rigorous consideration, and caution. Recognition of the background governance system could embolden courts to push the limits of their authoritative interpretations, to make a more coordinated effort in creating a global judiciary that does create a powerful force in protecting weaker actors against the more powerful, and to dispense with archaic delimitations of accountability such as territory. This could be explored through the global constitutionalist norm of the separation of powers from the theoretical perspective, and ways of increasing cooperation and interconnectivity between courts on a practical level.

In the face of new technology which not only eludes traditional paradigms of international law such as territory or state actors, but takes on an ethereal quality which at first brush appears to be beyond regulation, such as drone warfare, cyber warfare and 3D printers, there needs to be a movement, once and for all, which presumes extraterritorial accountability. Attribution, causation, and articulating the substantive damage that ensues from new technological developments in the context of global warfare, for example, should be the focus of attention of those who seek to fill legal loopholes in global governance. Ascertaining whose autonomy and equality is directly affected by these developments and identifying constituencies for which they form part in order to enhance mechanisms of democratic accountability should be a central focus. A presumption of extraterritorial accountability is the first step in filling legitimacy gaps in the global governance system, but many other legal vacuums wait beyond the periphery of this issue, which are as amenable to exploitation by powerful actors who wish to serve their own ends as extraterritoriality once was. Consolidating extraterritorial accountability is important for moving forward. This can be done through performing an acceptance of this norm, skipping the question of extraterritoriality, and asking the other big questions.

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