

**EUROPEAN COURT OF HUMAN RIGHTS**

**Application No. 42410/15**

**UKRAINE**

**-V-**

**RUSSIA**

**(IV)**

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**WRITTEN COMMENTS SUBMITTED BY THE MCGILL CENTRE FOR HUMAN RIGHTS AND LEGAL PLURALISM PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULE 44 § 3 OF THE RULES OF THE COURT**

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## INTRODUCTION

1. These comments are submitted by the McGill Centre for Human Rights and Legal Pluralism ('the Intervener'), pursuant to Art. 36 § 2 of the European Convention on Human Rights ('the Convention') following the leave granted by the President of the Court in accordance with Rule 44 § 3 of the Rules of the Court by letter dated 16 November 2016.

2. The McGill Centre for Human Rights and Legal Pluralism was formed in 2005 and its mission includes to advance innovative research on human rights and the role of law in a legally plural world; to enrich the nexus of scholarship and teaching by engaging undergraduate and graduate students in human rights research projects, human rights internships, international clerkships and advanced scholarship; and to communicate research results and provide a forum for the exchange of ideas through scholarly publications, public conferences, seminars, and workshops. These submissions were prepared under the direction of Professor René Provost (of the Québec Bar), founding Director of the McGill Centre for Human Rights and Legal Pluralism, by a team composed of Kuzivakwashe Charamba, Amélia Couture, Maryam Lefebvre d'Hellencourt, Isabelle Jacovella Rémillard, and Frédérique St-Jean.

3. The present submission addresses: (1) the test for establishing State jurisdiction, (2) the test for attribution of action or omission by non-State actors as conduct of the State, and (3) the general obligation to secure human rights and freedoms.

4. More specifically, the Intervener will demonstrate that State jurisdiction should be established when the State has the capacity, through the exercise of control or authority, to fulfil effectively its human rights obligations in relation to the person or territory in question. These obligations should be modulated according to the State's degree of control or authority.

5. As regards attribution, the Intervener maintains that conduct carried out by non-State actors should be regarded in law as the conduct of a State only insofar as (1) the State exercised overall control over the non-State actors, or (2) the particular conduct could not have been carried out without the support of the State and that it was foreseeable that such a support would lead to human rights violations.

6. Finally, the Intervener will establish the existence of a general duty for States to secure human rights and freedoms to everyone within their jurisdiction. Such a duty will be assessed under a due diligence standard, taking into account the circumstances of the case. In the context of an extra-territorial application of the Convention, the extent of the State's authority and control should influence the scope of the duty and the means to fulfil it.

### I. STATE JURISDICTION

7. Under Article 1, the Convention is applicable to "everyone within [the] jurisdiction" of High Contracting Parties. In *Bankovic*, the Court adopted a narrow interpretation to the concept of jurisdiction, holding that the exercise of extra-territorial jurisdiction is exceptional, limited to situations in which States exercise "all or some of the public powers normally to be exercised by that Government."<sup>1</sup> Since then, the Court has gradually moved towards a more flexible approach to State jurisdiction, one that favours a wider protection of human rights recognising an increasing number of exceptions to the territorial principle enshrined in Article 1. These *ad hoc* adjustments to the *Bankovic* position aimed to reflect the circumstances of individual cases, but they have deprived the Court's jurisprudence on State jurisdiction of certainty and coherence. The Court should clarify its stance by adopting a single comprehensive principle. States should be taken to have jurisdiction over territories and individuals when it falls within their power or capacity, through the exercise of effective control or authority, to secure human rights in relation to that person or the population living in that territory.

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<sup>1</sup> *Bankovic and Others v Belgium and Others*, No 52207/99, [2001] ECHR 890, 44 EHRR SE5, at para 71 [*Bankovic*].

The scope of the duty to secure human rights should, however, be modulated according to the actual degree of effective control or authority exercised by the State in the given circumstances.

8. Although jurisdiction under Article 1 is primarily territorial, an increasing number of circumstances give rise to the exercise of jurisdiction by a State party outside of its own territorial boundaries.<sup>2</sup> Thus far, jurisdiction has been considered established by the Court when a State, as a consequence of lawful or unlawful military action, exercises effective control over a territory, and when, “through the consent, invitation or acquiescence of the Government of that territory, it exercises public powers normally to be exercised by that [G]overnment.”<sup>3</sup> Once one of these thresholds is met, the State becomes responsible to fulfil the entire range of Convention obligations.<sup>4</sup> In addition to these exceptions, the personal model has been added to the possible situations in which jurisdiction is recognised by the Court.<sup>5</sup> A State now also has jurisdiction when its agents exercise “authority and control” over the individual victim of the alleged violations of human rights.<sup>6</sup> In those circumstances, the State is only bound to secure the rights relevant to the individual’s circumstances.<sup>7</sup> In those cases, the “all-or-nothing” approach of *Bankovic* has been relaxed to allow the Convention’s obligations to be “divided and tailored” in correlation to the circumstances.<sup>8</sup>

9. This progressive move away from a strict approach has brought a degree of uncertainty and ambiguity to the concept of jurisdiction under the Convention. In *Al-Skeini*, for example, it is unclear whether jurisdiction was found based on the “public powers” exception or based on the “authority and control over individuals” exception, since the Court mentions both in the same breath.<sup>9</sup> Similarly, in *Jaloud*, the Court mentions both the fact that the Netherlands exercised authority and control over persons passing through the checkpoint and the fact that Dutch troops assumed responsibility for providing security in the region to justify its findings.<sup>10</sup> The various exceptions have been inconsistently blended together by the Court, thus complicating their application by domestic courts.<sup>11</sup> When discussing jurisdiction, Lord Rodger, in the House of Lords decision in *Al-Skeini*, lamented that:

[The] judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.<sup>12</sup>

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<sup>2</sup> *Ibid* at paras 61-67; *Al-Skeini and Others v The United Kingdom*, No 55721/07, [2011] ECHR 1093, 53 EHRR 18, at paras 131-32 [*Al-Skeini*].

<sup>3</sup> *Bankovic*, *supra* note 1 at para 71; *Ilaşcu and Others v Moldova and Russia*, No 48787/99, [2004] ECHR 318, 40 EHRR 46 at para 315 [*Ilaşcu*]; *Al-Skeini*, *supra* note 2 at paras 133, 135, 138-40.

<sup>4</sup> *Cyprus v Turkey*, No 25781/94 [2001] ECHR 331, 35 EHRR 30, at para 77 [*Cyprus v Turkey*]; see also *Bankovic*, *supra* note 1 at para 70.

<sup>5</sup> *Issa And Others v Turkey*, [2004] ECHR 629, (2005) 41 EHRR 27, at para 71 [*Issa*]; *Ocalan v Turkey*, No 46221/99, [2003] ECHR 125, 37 EHRR 10 at para 91 [*Ocalan*]; *Al-Saadoon and Mufdhi v the United Kingdom*, No 61498/08 [2010] ECHR 285, (2010) 51 EHRR 9 [*Al-Saadoon*]; see also *Al-Skeini*, *supra* note 2 at paras 136-37, *Hassan v The United Kingdom* [GC], No 29750/09, [2014] ECHR 1162, at paras 76-80 [*Hassan*].

<sup>6</sup> *Al-Skeini*, *supra* note 2 at paras 136-37.

<sup>7</sup> *Ibid* at para 137.

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

<sup>9</sup> *Ibid* at para 149.

<sup>10</sup> *Jaloud v Netherlands*, No 47708/08, [2014] ECHR 1403, at paras 149-52 [*Jaloud*].

<sup>11</sup> See e.g. *Al-Saadoon & Ors v Secretary of State for Defence* [2016] EWCA Civ 819 (UK Court of Appeals). See also *Al-Skeini and Others v Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 AC 153 [*Al-Skeini*, UKHL]; *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence*, [2005] EWCA Civ 1609, [2006] AC 46, [2007] QB 140 [*Al-Skeini & Ors*]; *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence*, [2004] EWHC 2911, [2005] UKHRR 427, [2005] HRLR 3.

<sup>12</sup> *Al-Skeini*, UKHL, *supra* note 11 at para 67 [Lord Roger].

10. The Court's rigid approach has also created contradictions within the jurisprudence. The findings in the admissibility decision in *Pad* seem irreconcilable with the findings in *Bankovic*.<sup>13</sup> The opening of fire by Turkish forces from a helicopter on individuals allegedly on Iranian territory and the launch of missiles by NATO forces both involve the same type of limited assertion of power through the use of force, and are therefore arguably indistinguishable. The standard for "authority and control over individuals" has been bent to a point where it seems that the simple perpetration of a violation has been deemed sufficient to justify finding of jurisdiction. In *Andreou*, "the opening of fire on the crowd from close range" was sufficient "authority and control" by the Turkish authorities to reach the threshold of extra-territorial jurisdiction.<sup>14</sup> Similarly, in *Isaak*, beating by police officers, taking place in the UN buffer zone, has been considered to constitute "authority and/or effective control" of the individual through its agents.<sup>15</sup>

11. These inconsistencies and difficulties arise from the strict technical approach adopted by the Court. Dissenting judges of the Court have repeatedly underlined the difficulties that stem from such an approach.<sup>16</sup> Scholars also agree that the Court should construe the concept in a clearer and more consistent fashion.<sup>17</sup> This case provides an opportunity for the Court to move away from a rigid approach with increasing exceptions in favour of a comprehensive and transparent standard that will enhance coherence and clarity. A modulated approach reflecting the degree of control or authority exercised by a State is consistent with the progressive evolution of the Court's jurisprudence over the past decade. As detailed below, such a modulated approach reflects the Court's current jurisprudence as well as the trend taken by other regional and international bodies such as the International Court of Justice, the Human Rights Committee and the African Commission on Human and Peoples' Rights.

12. In its decisions, the Court already has been modulating the scope of duties in light of the degree of control or authority exercised by State agents. In cases where authority and control is limited to the exercise of temporary physical strength over a group or an individual, States' obligations are limited to refraining from arbitrarily depriving a person of her life and to investigate such death.<sup>18</sup> When the State exercises wider effective control, notably through custody, the scope of the obligations is broader and includes refraining from imposing degrading treatment and respecting due process of law.<sup>19</sup> The scope of the obligations is even wider when a State exercises effective overall control over a region both militarily and administratively. This was the case in *Catan* where, because of the importance of its political and military support to the "Moldovan Republic of Transdniestria", Russia was held responsible for the violation of the applicants' right to education by local authorities.<sup>20</sup> Similarly, in *Chiragov*, the Court found that Armenia had a decisive influence over the "Nagorno-Karabakh Republic", and was therefore required to guarantee property rights and respect private and

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<sup>13</sup> *Pad and Others v Turkey* (dec), No 60167/00 (28 June 2008) [*Pad*].

<sup>14</sup> *Andreou v Turkey*, No 45653/99 [2009] ECHR 1663 [*Andreou*]. See also *Solomou and Others v Turkey*, No 36832/97, [2008] ECHR 552 [*Solomou*] in which an individual who climbed a pole was shot in the same set of events.

<sup>15</sup> *Isaak v Turkey* (dec), No 44587/98 [2008] ECHR 553 at 21 [*Isaak*].

<sup>16</sup> *Assanidze v Georgia*, No 71503/01, [2004] ECHR 140, (2004) 39 EHRR 32 at 52; *Ilaşcu*, *supra* note 3 at paras 139-42; *Al-Skeini*, *supra* note 2 at 78 [Bonello]; *Jaloud*, *supra* note 10 at 86.

<sup>17</sup> Alastair Stewart, "Back to the Drawing Board: *Al-Skeini v. UK* and the Extraterritorial Application of the European Convention on Human Rights" [2011] 4 UCL Hum Rts Rev 110; Misa Zgonec-Rozej, Amnesty International Secretariat, "Case Comment: *Al-Skeini v United Kingdom*", [2012] 106 Am J Int'l L 131 at 137; Marko Milanovic, "Al-Sekini and Al-Jedda in Strasbourg", [2012] 23:1 Eur J Int L 120; Marek Szyldo, "Extra-Territorial Application of the European Convention on Human Rights after *Al-Skeini* and *Al-Jedda*", [2012] 12 Intl Crim Law Rev 271; Michel Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, (Antwerp/Oxford/Portland: Intersentia, 2009) at 190-91, 225-26; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011); R Lawson, "Really out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR", in Antoine Buyse (ed), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Portland: Intersentia, 2011) at 57.

<sup>18</sup> See e.g. *Pad*, *supra* note 13; *Isaak*, *supra* note 15; *Andreou*, *supra* note 14; *Solomou*, *supra* note 14.

<sup>19</sup> See e.g. *Ocalan*, *supra* note 5; *Al-Saadoon*, *supra* note 5; *Hassan*, *supra* note 5.

<sup>20</sup> *Catan and Others v Moldova and Russia*, No 43370/04 18454/06 8252/05, [2012] ECHR 1827, 57 EHRR 4 [*Catan*].

family lives.<sup>21</sup> *A contrario*, when a State has limited control over its own national territory, it has been found to have jurisdiction, but only limited obligations to take “diplomatic, economic, judicial or other measures that it is in its power to take.”<sup>22</sup> Thus, the Court already modulates the duties imposed depending on the degree and scope of control exercised by the State, although it seems more willing to reduce obligations of a State having lost control over part of its territory than to impose only partial obligations to a State that has effective overall, but not total, control over the territory of another State. The Intervener submits that there is no basis to define obligations less flexibly in one case than in the other.

13. A flexible approach to extra-territorial jurisdiction is consistent with the positions taken by other international bodies. The African Commission on Human and Peoples’ Rights stated in its General Comment No 3 that, “[a] State shall respect the right to life of individuals outside its territory.”<sup>23</sup> Significantly, the African Commission considered that the nature of this obligation depends on the extent to which the State has jurisdiction or otherwise exercises effective authority, power, or control over the victim or the territory.<sup>24</sup> Other international bodies have gone even further in recognising a general principle for States to respect human rights outside their national boundaries. The International Court of Justice expressed in very general terms that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”<sup>25</sup> The Human Rights Committee consistently has adopted the position that human rights instruments do apply to State actions outside of its territory, both in its views on individual petitions and in its general comments.<sup>26</sup> Thus the Committee, in General Comment 31, takes the position that a State party must respect and ensure the rights laid down in the International Covenant on Civil and Political Rights to “anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”<sup>27</sup>

14. This factual and circumstantial approach reflects the global nature of human rights. It will increase predictability as States will know that exercising authority or control outside of their national territory will come with the responsibility to respect human rights. Endorsing the statement made by the Human Rights Committee in *Lopez v. Uruguay*, the Court stated in *Isaak* that “article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”<sup>28</sup>

15. A modulated approach will ensure that States are held to a fair and realistic standard in regard to circumstances and their capacity to secure human rights. It echoes Lord Justice Sedley’s comment in *Al-Skeini* that:

[I]t is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing... the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force.<sup>29</sup>

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<sup>21</sup> *Chiragov and Others v Armenia*, No 13216/05, [2015] ECHR 587 [*Chiragov*]; *Mozer v the Republic of Moldova and Russia*, No 11138/10, 23 February 2016 at para 147 [*Mozer*].

<sup>22</sup> *Ilaşcu*, *supra* note 3 at para 331; see also *Catan*, *supra* note 20 at para 109; *Mozer*, *supra* note 21 at para 153.

<sup>23</sup> African Commission on Human and Peoples Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, 18 November 2015, 57th Ordinary Sess, at para 14.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 111; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at para 216.

<sup>26</sup> *Lopez Burgos v Uruguay*, Communication No R.12/52, Supp No 40, UN Doc A/36/40 (1981) 176 [*Lopez*]; *Celiberti de Casariego v Uruguay*, Communication No 56/1979, UN Doc CCPR/C/OP/1 (1984) 92.

<sup>27</sup> UN Human Rights Committee, *General comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, at para 10 [General Comment No 31].

<sup>28</sup> *Isaak*, *supra* note 15 at para 20; *Issa*, *supra* note 5 at para 71, citing *Lopez*, *supra* note 26.

<sup>29</sup> *Al-Skeini & Ors*, *supra* note 11 at para 197.

16. The Intervener submits that a modulated approach reaches an adequate balance between individual rights and State interests. It avoids situations of ‘legal vacuum’ that could arise where no single State exercises sufficient control to reach the ‘effective control’ threshold, notably in situations where a non-State actor independently exercises control over an area. In situations where two States exercise a certain level of control, both States will have the obligations to respect and protect human rights to the extent of their capacity.

## II. STATE RESPONSIBILITY: ATTRIBUTION OF CONDUCT

17. The fact that the Convention is applicable pursuant to Article 1 because a person falls under the jurisdiction of a State Party does not necessarily lead to conclude that a denial of protected rights or freedoms amounts to a violation by that State. The wrongful conduct must first be attributable to the State in order to establish State responsibility.<sup>30</sup> The attribution test determines whether the acts or omissions of a person or group of persons should be regarded, in law, as the conduct of a particular State. Alternatively, a violation may be found if the State failed to fulfil a positive obligation to secure human rights (as more fully analysed in section III). The test establishing State responsibility thus constitutes a separate inquiry from the establishment of State jurisdiction examined in section I.<sup>31</sup>

18. In response to repeated arguments advanced by respondent States in a number of cases, the Court has insisted on the distinct nature of the issue of attribution and that of jurisdiction. To a large extent, the Court has directed its attention to articulating the criteria for jurisdiction, all the while acknowledging that this may include “the assertion of authority and control by that State’s agents over an individual or individuals.”<sup>32</sup> This in turn begs the question of how to define who is a State agent, calling for the application of rules of attribution under the rules of State responsibility. In some cases like *Bankovic* and *Al-Skeini*, the impugned acts were carried out by the members of the respondent State’s military whose status as *de jure* State agents was not disputed. In other cases like *Cyprus v. Turkey*, *Chiragov* and *Muradyan*, the Court did find that entities that were not necessarily *de jure* State agents were fully integrated in or totally dependent upon the respondent State. However, there floats a haze in the judgments as to whether this goes to attribution or jurisdiction, or both.<sup>33</sup> In fact, it seems to correspond to a situation of complete dependence where these entities ought to be considered *de facto* State organs, as explained by the International Court of Justice in the *Case Concerning the Application of the Genocide Convention* in relation to Article 4 of the ILC Articles on State Responsibility.<sup>34</sup>

19. This existing test, however, fails to encompass situations where, for example, the control originates from more than one State, or where a State does not control a non-State actor to the point of total dependence so that it becomes a *de facto* State agent. This is the situation addressed in Article 8 of the ILC Articles on State Responsibility, whereby a State is held internationally responsible for acts carried out by persons or entities under its control. The notion of control has been defined by the International Court of Justice as “effective control”, a concept significantly more demanding than the “overall effective control” devised by the Court to determine jurisdiction under Article 1 of the Convention.<sup>35</sup> This difference aligns with the Court’s repeated statements that the issues of

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<sup>30</sup> International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supp No 10, UN Doc A/56/10, article 2: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; [...]”.

<sup>31</sup> See notably *Catan*, *supra* note 20 at para 115; *Jaloud*, *supra* note 10 at para 154; *Chiragov*, *supra* note 21 at 86 (dissenting opinion); *Mozer*, *supra* note 21 at para 102.

<sup>32</sup> *Mozer*, *supra* note 21 at para 101; *Al-Skeini*, *supra* note 2, at paras 136, 149; *Catan*, *supra* note 20 at para 114.

<sup>33</sup> *Cyprus v Turkey*, *supra* note 4 at para 77; *Chiragov*, *supra* note 21 at paras 169-86; *Muradyan v Armenia*, No 11275/07, 24 November 2016 at paras 125-26.

<sup>34</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at para 393 [Case concerning the Application of the Genocide Convention]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] ICJ Rep 14 at para 109.

<sup>35</sup> *Case concerning the Application of the Genocide Convention*, *supra* note 34 at paras 398-400.

jurisdiction and attribution are distinct, such that a conclusion on jurisdiction does not entail the same for attribution. The Court's reasoning as to attribution in cases like *Catan*, *Jaloud* and *Mozer* is difficult to decipher. The Intervener suggests that the present case provides an opportunity for the Court to clarify its position regarding attribution in a manner consistent with that of a number of human rights bodies.<sup>36</sup>

20. As described below, a trend in the Court's recent jurisprudence suggests an alternative standard which departs from the notion of agency and is rather grounded in effective control reflecting (1) a State's support of non-State actors, and (2) knowledge of the wrongdoing. Such a standard is necessary to address the accountability gap, but must be narrowly defined so as to strike an appropriate balance between the protection of victims' rights and the fundamental principles of State sovereignty and international responsibility.

21. This standard consists of two elements. First, there must be significant support from the State to the non-State actor so as to give it effective control. This support can be financial, economic, military or political,<sup>37</sup> or constitute cooperation and complicity in the preparation or execution of the wrongful conduct.<sup>38</sup> In *Ilaşcu*, *Catan* and *Mozer*, for example, the Court held that the State's responsibility was engaged for "the unlawful acts committed by [the separatists group]" because of "the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting."<sup>39</sup> A more accurate formulation would have linked the State's support to control over the authors of the wrongful conduct. The Inter-American Court of Human Rights likewise considered the legal consequences of this kind of support in its recent jurisprudence. In particular, it found that Colombia was responsible "for the violations committed by paramilitary groups, [because they] have acted with the *support, acquiescence, involvement, and cooperation* of State security forces."<sup>40</sup> Similarly, the African Commission on Human and Peoples' Rights found that Nigeria had violated its African Charter's obligations by "*facilitat[ing]* the destruction of the Ogoniland" by private actors.<sup>41</sup>

22. The second element consists of knowledge of the wrongdoing, namely that the State knew or ought to have known that the support it gave to the non-State actor would or could foreseeably result in human rights violations. This requirement has previously been employed by the Court in the context of secret detentions and renditions in *El-Masri v. Macedonia* (2012), *Al-Nashiri v. Poland* (2014) and *Husayn (Abu Zubaydah) v. Poland* (2014).<sup>42</sup> It was also used by the Inter-American Court in the *Case of the Ituango Massacres* (2006) in which it was found that Colombia was responsible because it collaborated with the paramilitary groups while being "*fully aware* of the terrorist activities perpetrated by these [groups]."<sup>43</sup>

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<sup>36</sup> See e.g. the jurisprudence of the Inter-American Court of Human Rights (*Case of the Rochela Massacre v Colombia* (2007), Judgment of May 11, 2007, Inter-Am Ct HR (Ser C) No 163 [*Rochela*]; *Case of the Ituango Massacres* (2006), Judgment of July 1, 2006, Inter-Am Ct HR (Ser C) No 148 [*Ituango*]; *Case of the Mapiripán Massacre* (2005), Judgment of September 15, 2005, Inter-Am Ct HR (Ser C) No 134 [*Mapiripán*]; *Case of the 19 Tradesmen* (2004), Judgment of July 5, 2004, Inter-Am Ct HR (Ser C) No 109 [*19 Tradesmen*]); see also the jurisprudence of the African Commission on Human and Peoples' Rights (*Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria)* Case No ACHPR/COMM/A044/1 [*Ogoni Case*]).

<sup>37</sup> *Ilaşcu*, *supra* note 3 at paras 382, 392; *Chiragov*, *supra* note 21 at para 171; *Catan*, *supra* note 20 at para 106.

<sup>38</sup> *Ilaşcu*, *supra* note 3 at para 385; see also *El-Masri v the former Yugoslav Republic of Macedonia*, No 39630/09, [2012] ECHR 2067, 57 EHRR 25, at para 176 [*El-Masri*]; *Al-Nashiri v Poland*, No 28761/11, [2014] ECHR 833, 60 EHRR 16, at paras 442, 517 [*Al-Nashiri*].

<sup>39</sup> *Ilaşcu*, *supra* note 3 at para 382; *Catan*, *supra* note 20 at para 111; *Mozer*, *supra* note 21 at para 111.

<sup>40</sup> *Rochela*, *supra* note 36 at para 78 (citing *Ituango*, *supra* note 36 at paras 125.1, 125.25, 133; *Mapiripán*, *supra* note 36 at paras 121-23; *19 Tradesmen*, *supra* note 36 at paras 84.b), 115, 134-35, 137-38 (our emphasis)).

<sup>41</sup> *Ogoni Case*, *supra* note 36 at para 58.

<sup>42</sup> *El-Masri*, *supra* note 38 at paras 176, 198; *Al-Nashiri*, *supra* note 38 at paras 440, 442, 517; *Husayn (Abu Zubaydah) v Poland*, No 7511/13, [2014] ECHR at para 442, (2015) 60 EHRR 16.

<sup>43</sup> *Ituango*, *supra* note 36 at para 133 (our emphasis).

23. The first element of the proposed standard ensures that States will not escape responsibility through support for non-State actors, while the second element of knowledge or foreseeability ensures that the conduct of non-State actors will not be unreasonably attributed to Contracting States. It is clear that attribution based on agency or control covers a limited set of denials of human rights; critically, it is completed by the State's positive obligation to secure human rights even against conduct that cannot be attributed to the State, in favour of individuals under its jurisdiction on national territory or beyond.

### III. POSITIVE OBLIGATIONS TO SECURE HUMAN RIGHTS

24. Even if the wrongful conduct cannot be attributed to the State, responsibility for human rights violations may be found for failure to secure various Convention rights. Indeed, under this duty, States must not only refrain from violating the Convention, but they must also take positive actions to ensure respect for those rights and freedoms to everyone within their jurisdiction.<sup>44</sup> This positive obligation follows jurisdiction and, as such, applies territorially and extraterritorially.

#### A) Art. 1 of the Convention implies a general duty for States to secure all Convention rights to everyone within their jurisdiction

25. In *Storck v. Germany*, the Court articulated clearly how State responsibility can be triggered for failure to respect positive obligations under the Convention. It stated that “the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction.”<sup>45</sup> The Court has derived positive obligations from Article 1 and various substantive Articles of the Convention, favouring a piecemeal approach to the development of positive obligations. Thus far, the Court has refrained from formulating a general positive obligation to ensure respect for all human rights. This approach is directly referred to in *Storck*:

the Court has expressly found that Art. 2 [...], Art. 3 [...] and Art. 8 of the Convention [...] enjoin the State not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or private parties.<sup>46</sup>

26. The formulation of a generalized approach would substantially improve the foreseeability, coherence and scope of the Convention's regime.<sup>47</sup>

27. The Court should embrace the approach taken by various international and regional bodies in which a general duty to secure human rights have been laid out. The Inter-American Court of Human Rights, in *Velasquez-Rodriguez v. Honduras* (1988), was the first human rights body to flesh out the content of the State obligation “to ‘ensure’ the free and full exercise of the rights recognised by the [American Convention on Human Rights] to every person subject to its jurisdiction.”<sup>48</sup> More specifically, the Court derived from this obligation a general duty for States to protect individuals

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<sup>44</sup> See e.g. *Ilaşcu*, *supra* note 3.

<sup>45</sup> *Storck v Germany*, No 61603/00, [2005] ECHR 406, at para 74, 43 EHRR 96 at para 101.

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

<sup>47</sup> Many scholars have stressed the need for the development of such a comprehensive framework. See e.g. Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (New York: Routledge, 2012) at 4-5; Matthias Klatt, “Positive obligations under the European Convention on Human Rights” (2011) 71 ZaöRV 691 at 693; Hugh Tomlinson, “Positive Obligations under the European Convention on Human Rights” (2012) Matrix Chambers at 11; Laurens Lavrysen, “The scope of rights and the scope of obligations: positive obligations” in Eva Brems & J H Gerards, eds, *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights* (Cambridge: Cambridge University Press, 2013) 162 at 163.

<sup>48</sup> *Case of Velasquez Rodriguez v Honduras* (1988), Inter-Am Ct HR (Ser C) No 4 at para 166 [*Velasquez Rodriguez*].



against human right violations by non-State actors, which includes *preventing, investigating and punishing* any violation of the rights recognised by the Convention.<sup>49</sup>

28. The Inter-American Court's approach was later adopted by UN Human Rights bodies. Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women was interpreted by the CEDAW committee in 1992 as including a duty on States to act with due diligence to *prevent* violations of rights or to *investigate* and *punish* acts of violence.<sup>50</sup> In 2004, the UN Human Rights Committee interpreted the nature of general obligations imposed on States parties to the International Covenant on Civil and Political Rights. It expressly laid out that the obligation to respect and ensure Covenant rights to all individuals subject to their jurisdiction under Article 2 includes the triptych of obligations to respect, protect and fulfil human rights.<sup>51</sup> Likewise, the African Commission on Human and Peoples' Rights developed a comprehensive approach to the duty to secure human rights. In the *Ogoni* case, the African Commission held that, by adhering to a human rights regime, States agree to be bound by a generalized, holistic, and comprehensive human rights framework, corresponding to a duty to *respect, protect, promote, and fulfil* these rights.<sup>52</sup> In particular, the obligation to *protect* human rights requires States to "take measures to protect beneficiaries of the protected rights against political, economic and social interferences [...] so that individuals will be able to freely realize their rights and freedoms."<sup>53</sup> The obligation to *fulfil* "is more of a positive expectation on the part of the State to move its machinery towards the actual realization of the rights."<sup>54</sup>

29. The Court's piecemeal approach to recognising positive obligations to secure human rights and freedoms therefore stands in isolation from international and regional trends. It indeed appears clear from such tendency that a holistic, comprehensive human rights regime imposing on States the triptych of obligations to respect, protect, and fulfil all rights is necessary to effectively secure human rights to everyone. The Intervener invites the Court to move in this direction to encourage States to adopt corresponding comprehensive approaches to securing human rights.

30. Such a development under the Convention would amount to a natural evolution from the Court's recent jurisprudence. In fact, in *Opuz v. Turkey*, the Court referenced the general duty to ensure human rights protection as laid out by the Inter-American Court of Human Rights in *Velasquez-Rodriguez* when looking at relevant international materials.<sup>55</sup> Yet, when it came to analysing the facts of the case under the Convention, the Court examined Turkey's positive obligations to safeguard the right to life and to take measures to ensure that individuals are not subject to ill-treatment, under Articles 2 and 3 of the Convention specifically.<sup>56</sup> The Court never explicitly justified the apparent discrepancy between its approach and the international trend it referred to. In *Ilaşcu*, without developing such a general framework, the Court recognised that "article 1 of the Convention include[s] [...] positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory."<sup>57</sup> Moreover, the European Convention on preventing and combating violence against women and domestic violence explicitly includes a general positive framework. Article 5 stipulates that "parties shall take the necessary legislative and other measures to exercise due diligence to *prevent, investigate, punish and provide reparation* for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors."<sup>58</sup> This duty to secure human rights, articulating one facet of the State's obligation to secure rights and freedoms under Article 1 of the

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<sup>49</sup> *Ibid* (our emphasis).

<sup>50</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against Women*, UNCEDAWOR, 11th Sess (1992).

<sup>51</sup> General Comment No 31, *supra* note 27 at paras 3-8.

<sup>52</sup> *Ogoni Case*, *supra* note 36 at para 44.

<sup>53</sup> *Ibid* at para 46.

<sup>54</sup> *Ibid* at para 47.

<sup>55</sup> *Opuz v Turkey*, No 33401/02, [2009] III ECHR 107 at para 84.

<sup>56</sup> *Ibid* at paras 118, 128, 154, 159.

<sup>57</sup> *Ilaşcu*, *supra* note 3 at para 313.

<sup>58</sup> Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, art 5.

Convention, is applicable to everyone under the State's jurisdiction. There is no basis in the Convention to exclude non-territorial jurisdiction from the ambit of this duty, although the substance of the duty ought to be modulated to reflect the degree of effective overall control exercised by the State, whether on its own territory or beyond. This approach naturally grows from the Court's analysis of the duties of a State in relation to conduct taken in a part of national territory it does not control but over which it maintains jurisdiction.<sup>59</sup>

31. *Ukraine v. Russia (IV)* therefore provides an opportunity for the Court to articulate a comprehensive definition of and approach to positive obligations under the Convention. This would offer greater coherence and predictability in holding States accountable.

#### B) State action should be examined following a standard of due diligence

32. In light of the proposed approach to State jurisdiction, the extent of the State's authority or control should influence the scope of its positive obligations, and thus the means required to discharge them. States will therefore only be accountable for failure to take the measures which are deemed reasonable given their actual level of effective authority or control.

33. This approach flows from the Court's jurisprudence. Indeed, the Court already assesses State responsibility under a contextual due diligence standard. To assess whether States have discharged their positive obligations, the Court examines whether they have taken reasonable steps to secure those rights depending on the circumstances.<sup>60</sup> The Court evaluates whether the means selected were appropriate and sufficient in that specific context.<sup>61</sup>

34. States are granted an important margin of appreciation in selecting the appropriate measures. Under that doctrine, the Court gives deference to means selected by States. The Court stated clearly in *Powell and Rayner v. UK* that national authorities were the best suited to assess what were the most appropriate policies to adopt in a difficult social or technical sphere, and should be given a margin of appreciation when determining the steps necessary to ensure compliance with the Convention.<sup>62</sup>

35. Furthermore, the Court already takes into account specific circumstances of the case when delineating the scope of duties under the Convention. For instance, in the context of internal disturbances or armed conflict, States cannot reasonably be expected to have the same capacity to act. Thus, the Court considered in *Al-Skeini* the means required to safeguard the right to life, and held that all reasonable steps had to be taken even in difficult security conditions.<sup>63</sup> The Court considered the context, namely, that of the UK as an occupying power in a foreign and hostile region in the immediate aftermath of invasion and war, and found that conducting an independent investigation could reasonably be expected, although its form could be adjusted to reflect the circumstances.<sup>64</sup> The Inter-American Court of Human Rights likewise upheld in various cases the importance of examining a State's actions in context.<sup>65</sup> A general modulated duty, therefore, is in line with both the international trend and the current approach of the Court.

36. Moreover, upon making this contextual assessment, the Court already tempers duties according to States' degree of authority or control, implicitly following the proposed modulated approach. In *Catan*, for instance, Russia exercised some degree of control over Transnistria through economic and

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<sup>59</sup> *Ilaşcu*, *supra* note 3 at paras 348-52; *Catan*, *supra* note 20 at paras 109, 147; *Mozer*, *supra* note 21 at paras 99, 153.

<sup>60</sup> *Ilaşcu*, *supra* note 3 at paras 333-34.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Powell and Rayner v the United Kingdom* (1990), 72 ECHR (Ser A) at para 41, 12 EHRR 335.

<sup>63</sup> *Al-Skeini*, *supra* note 2 at para 164.

<sup>64</sup> *Ibid* at paras 164-65.

<sup>65</sup> See e.g. *Maria da Penha Maia Fernandes v Brazil* (2001), Inter-Am Ct HR No 54/01; *Case of González et la 'Cotton Field' v Mexico* (2009), Inter-Am Ct HR (Ser C) No 205; *Velasquez Rodriguez*, *supra* note 48 at para 175.

military support and therefore was responsible for violations of the victims' rights to education.<sup>66</sup> In several recent cases, the Court imposed on two States concurrent obligations in a similar situation, therefore showing openness to depart from an all-or-nothing approach to State responsibility.<sup>67</sup> In such complex situations, the Court has to require the two States to resort to means which are reasonable in light of their concurrent effective authority or control.

37. As such, the Court appears open to contextual modulation of positive obligations. In *Ukraine v. Russia (IV)*, the Court may be called to consider a situation where two States have concurrent jurisdiction over persons or territory. With a general duty imposed on States to secure human rights to everyone within their jurisdiction, it will be clear that both States must take reasonable steps to do so.

## CONCLUSION

38. *Ukraine v. Russia (IV)* offers an opportunity for the Court to clarify its approach on attribution and State jurisdiction. The Intervener respectfully submits that jurisdiction should arise when it falls within the power or capacity of the State, through the exercise of effective overall control or authority, to secure human rights to individuals or a population living on a territory. Furthermore, the Court should recognise a two-pronged alternative standard of attribution based on a State's support of non-State actors, and knowledge of the wrongdoing. This test, which clarifies the scope of attribution, should be applied narrowly to ensure a fair balance between the protection of victims' rights and respect towards State sovereignty. The scope of the corresponding obligations should be modulated according to the actual degree of effective control or authority exercised.

39. *Ukraine v. Russia (IV)* is also an occasion for the Court to embrace the approach taken by international and regional bodies, and formally recognise a general duty for States to ensure respect of human rights for everyone within their jurisdiction. That is, the duty to secure human rights implies duties to respect, protect, and fulfil all rights guaranteed under the Convention. A State's authority or control will in turn determine the scope of positive obligations, and thus the means required to discharge them.



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<sup>66</sup> *Catan*, *supra* note 20 at para 150.

<sup>67</sup> See e.g. *Chiragov*, *supra* note 21; *İlasçu*, *supra* note 3; *Catan*, *supra* note 20.