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TITLE

"THE ANALYSIS OF THE EFFECTIVE CONTROL TEST UNDER THE EUROPEAN COURT OF HUMAN RIGHTS' CASE-LAW"

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INTRODUCTION

Article 1 of the European Convention on Human Rights (hereinafter: Convention or ECHR) states: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in (...) Convention and (...)"*. This clause enshrines the territorial aspect of the Convention and illustrates the European Court of Human Right's (hereinafter: Court of ECtHR or the Court) jurisdiction over "*all matters concerning the interpretation and application of the Convention.".*[1] The Convention prescribes that "*The Court shall declare inadmissible any individual application submitted under Article 34 (...) incompatible with the provisions of the Convention (...)".* It follows from Article 1 that High Contracting Parties are responsible for any violation of the rights and freedoms guaranteed by the Convention committed against individuals under their 'jurisdiction'. The Court stated that: "*The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible (...)*".[2]

The jurisdiction of the ECtHR to examine individual or inter-state complaints concerns questions such as, who is competent to bring a case and against whom (ratione personae), the subject matter of the application (ratione materiae), and the time and place of the alleged violation (ratione temporis and ratione loci).[3] In the present Master's Paper, the compatibility *ratione loci* shall be discussed, which requires the alleged violation of the Convention to have taken place ***within the jurisdiction of the respondent State or in territory effectively controlled by the State***.[4] The analysis of the Court's case-law shows that throughout the years; the Court has expanded the territorial aspect of its jurisdiction.

The present Paper will demonstrate the developments of the Court's case-law on its extraterritorial jurisdiction and the application of the 'effective control' test. The significance of the Paper is the question whether, in the near future, further developments of the Court's

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 32 (1), 4 November 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, Last visited 20 March, 2018.
[2] *Ilascu and Others v. Moldova And Russia,* 48787/99, 311, (ECHR, 2004), available at http://hudoc.echr.coe.int/eng?i=001-61886, Last visited 02 April, 2018.
[3] O'Boyle et. al., *Law of the European Convention on Human Rights,* 81, (3rd ed. 2014).
[4] *Cyprus v. Turkey*, 25781/94, 75-81, (European Court of Human Rights 2001-IV); available at http://hudoc.echr.coe.int/eng?i=001-59454, Last visited 02 April, 2018.

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case-law will expand the Court's margin of appreciation over the territories outside the High Contracting Parties' boundaries. The expansion of the Court's territorial jurisdiction has already in some way resulted in inconsistencies in its case-law. The question is what are the consequences of the expansion of Court's margin of appreciation.

Within Chapter 1, the case-law of the Court on its extraterritorial jurisdiction will be demonstrated. In its early-case law, the Court had tried to refrain from expanding its territorial jurisdiction, whereas now, there are tendencies of delineating from that approach. The present Paper will also analyze the interpretations of extraterritorial jurisdiction and attribution standards by other International Courts. For this reason, the ECtHR's recent cases will be compared with the *Nicaragua v. United States of America case* (hereinafter: Nicaragua case) and *Prosecutor v. D. Tadic case* (hereinafter: Tadic case), the analysis of which will be demonstrated in Chapter 2 of the Paper. An important issue to be discussed in Chapter 2 is whether different interpretations of jurisdiction clauses can lead to fragmentation of Public International Law. Additionally, the possibility of *de facto* control by modern technologies will also be discussed. Chapter 3 will address the possible effects of expanding the Court's margin of appreciation over the High Contracting Parties' boundaries. In this regard, the possible issues of the execution of the Courts judgement will be discussed. Mainly, the execution issues will be studied in the light of the *Cyprus cases*[5] and the *Chiragov and others v. Armenia case*[6] (hereinafter: Chiragov case).

In the Conclusion of the Paper, the analysis of the Court's reasoning concerning its extraterritorial jurisdiction will be finalized and possible solutions for the need for the maintenance of a workable balance between the Convention's regional character, and its universalist aspirations will be suggested.

[5] *Loizidou v. Turkey* (Preliminary Objections), 15318/89, 62 (European Court of Human Rights 1995); *Loizidou v. Turkey (merits),* 15318/89, (European Court of Human Rights, 1996), available at http://hudoc.echr.coe.int/eng?i=001-58007; *Cyprus v. Turkey*, 25781/94, (European Court of Human Rights, 2001), available at http://hudoc.echr.coe.int/eng?i=001-59454.

[6] *Chiragov And Others v. Armenia, 13216*/05, (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 20 March, 2018.

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Chapter 1: The European Court of Human Right's case-law on the 'effective control' test

1. Background information on Article 1 of the Convention

The early draft of the Convention included the wording: "*to all persons residing within their jurisdiction*",[7] which was then thought to be too narrow and restrictive. It was thought that there were enough grounds for extending the benefits of the Convention to everyone within the territories of the signatory States, including those who could not be qualified as residing there in the legal sense of the word.[8] The drafting history indicates that the drafters' intent in replacing "residing in the territory" with "within the jurisdiction" ***was decidedly not to expand the territorial scope of the Convention, but rather its personal scope***. What mattered, and what proved persuasive as far as the drafters were concerned, was that coverage to persons "within the jurisdiction" was more expansive because it covered all persons in the territory, regardless of their formal status as a permanent resident, temporary migrant, or tourist.[9]

The drafting history of the Article 1 is correlated with Article 56 of the Convention. The most common theory preferred by the authors is that Article 56 must be read as both limiting the concept of Article 1 and of enabling its exceptional territorial expansion. Thus, Article 56 operates somewhat like a switch: suppressing application of the Convention to the dependencies unless specifically activated by using an express declaration.[10] When taken together, the drafting history of Article 1 and Article 56, militates against an interpretation that the Convention's geographic scope was initially intended to be expansive; on the contrary, it was conceived as territorially limited. Where no declarations of extension under Article 56 are made, the scope of the Convention ratione loci appears to be strictly limited to the metropolitan territories of the contracting parties. The mentioned is indicated by the fact that under Article 56(1) parties "*may (...) declare (...) that the present Convention shall (...) extend to all or any of the territories for*

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[7] Barbara Miltner, *Revisiting Extraterritoriality after Al-Skeini: The ECHR and its Lessons,* 33, (Michigan Journal of Int. Law) 710 (2012), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.am/&httpsredir=1&article=1016&context=mjil, Last visited 02 April, 2018

[8] *Ibid*

[9] *Ibid*

[10] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*: *Law, Principles, and Policy* 15-16 (Oxford University Press, Oxford 2011).

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whose international relations it is responsible.".[11] What is interesting is that there might likely be a contradiction between Article 1 and Article 56. For example, ECtHR has ruled, that Turkey has control over Northern Cyprus[12] and is responsible for the application of the Convention. Whereas, according to Article 56, UK can choose whether or not to apply the Convention to the Falklands, the Isle of Man or to its other dependencies, where it exercises control.

For a proper analysis of the 'effective control' test and the Convention's extraterritorial application, it is important to state that the Court in its case-law did not fully establish what constitutes 'effective control'. As it will be examined below, in its case-law the Court has addressed to the standards of 'effective control' test, however, there is a lack of clear and unified definition. Judge Gyuluymyan in her dissenting opinion on Chiragov judgement has tried to address to the definition of the effective control and mentioned that: "*The effective control test requires proof of direction and enforcement of conduct by the State. It* ***requires not only material assistance to be provided by the State, but also proof of control over the manner in which such assistance is put to use.".***[13]

2. Developments of ECtHR's case-law on the extraterritorial application of the Convention

The earliest examination of the Convention's potentially extraterritorial application arose in 1965 in relation to a complaint against the Federal Republic of Germany regarding its consular and embassy officials in Morocco. This decision represents the first recognition by the Commission that the Convention may "***in certain respects***" be capable of extraterritorial application. However, at that time, the comment was highly circumscribed: delivered only as obiter dicta; carefully limited to the factual context of diplomatic or consular representatives abroad; and subjected to numerous cautions-"*certain duties (...) which may, in certain circumstances (...) trigger Convention obligations*.".[14] Further, in the Soering case, the Court

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 56, 4 November 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, Last visited 01 April, 2018.

[12] *Loizidou v. Turkey* (Preliminary Objections), 15318/89, 62 (European Court of Human Rights 1995); *Loizidou v. Turkey (merits),* 15318/89, (European Court of Human Rights, 1996), available at http://hudoc.echr.coe.int/eng?i=001-58007; *Cyprus v. Turkey*, 25781/94, (European Court of Human Rights, 2001), available at http://hudoc.echr.coe.int/eng?i=001-59454.

[13] *see* Judge Gyulumyan Dissenting opinion on *Chiragov And Others v. Armenia, 13216*/05, 96, (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 20 March, 2018

[14] Barbara Miltner, *Revisiting Extraterritoriality after Al-Skeini: The ECHR and its Lessons,* 33, (Michigan Journal of Int. Law) 727 (2012), https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.am/&httpsredir=1&article=1016&context=mjil, las visited 02 April, 2018

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stated: *"Article 1 sets a limit, notably territorial, on the reach of the Convention. (...) The Convention does not govern the actions of States not Parties to it, nor does it purport to be a* ***means of requiring the Contracting States to impose Convention standards on other States.".***[15] The mentioned cases are an indication, that at that time the Court was not inclined towards expanding its territorial jurisdiction outside the Parties' borders. However, the following cases, illustrate that now the Court is leaned towards the delineation from that approach.

Loizidou v. Turkey and Cyprus v. Turkey cases (The Cyprus cases)

In both *Loizidou v. Turkey* and *Cyprus v. Turkey* cases the Court specified that an "effective overall control over a territory" could be exercised through a subordinate local administration.[16] Nevertheless, ultimately such control was established not due to the control of the territory by the Turkish Republic of Northern Cyprus (hereinafter: TRNC), but due to the ***significant military presence*** of Turkey in Northern Cyprus and their direct involvement in the occupation of Northern Cyprus and in preventing the applicant from gaining access to her property.[17] The ECtHR indicated in Loizidou: *"It is obvious from the large number of (...) troops engaged in active duties in northern Cyprus (…) that (...) exercises effective overall control over that part of the island"*.[18] The Court established that Turkey's responsibility for the acts of TRNC was engaged, but its level of control over the TRNC was not the decisive factor. The Court based the reasoning of its decision on the grounds of direct control over the territory itself.[19]

The Bankovic case

One of the landmark cases on the matter is the *Banković and Others v. Belgium and 16 Other Contracting States case* (hereinafter: Bankovic case), where the Court accepted that in **exceptional circumstances** the acts of Contracting States performed outside their territory or which produce effects there, may amount to exercise by them of their jurisdiction within the

[15] *Soering V. The United Kingdom*, 14038/88, 86 (European Court of Human Rights 1989) available at http://hudoc.echr.coe.int/eng?i=001-57619, Last visited 01 April, 2018

[16] *Loizidou v. Turkey* (Preliminary Objections), 15318/89, 62 (European Court of Human Rights 1995); *Loizidou v. Turkey (merits),* 15318/89, 52, 56, 62 (European Court of Human Rights, 1996), available at http://hudoc.echr.coe.int/eng?i=001-58007; *Cyprus v. Turkey*, 25781/94, 52 (European Court of Human Rights, 2001), available at http://hudoc.echr.coe.int/eng?i=001-59454.

[17] *Loizidou v. Turkey* (Preliminary Objections), 15318/89 63 (European Court of Human Rights 1995) available at http://hudoc.echr.coe.int/eng?i=001-57920, Last visited 02 April, 2018.

[18] *Loizidou v. Turkey (merits),* 15318/89 56 (European Court of Human Rights, 1996), available at http://hudoc.echr.coe.int/eng?i=001-58007 Last visited 02 April, 2018.

[19] *Ibid*

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meaning of Article 1 of the Convention.[20] However, as the Court did not entirely define the meaning of exceptional circumstances, Bankovic created confusion moving forward. Another significant statement by the ECtHR in Bankovic was in limiting the scope of the extraterritorial applicability only to countries within the boundaries of the European continent. The Court classified the Convention as a "***constitutional instrument of European public order***," and held that its role was to monitor engagements between the Contracting Parties.[21] Essentially, the Court did not believe that the benefits of the Convention should apply to non-Contracting States, stating that: *"In short, the Convention is a multi-lateral treaty operating in an essentially regional context and notably in the* ***legal space (espace juridique) of the Contracting States."***.[22] Hence, the Bankovic case shows that at that time, the Court was not likely prone to expanding its extraterritorial jurisdiction. The notion of espace juridique illustrated the Convention's regional context and the applicability of the Court's jurisdiction within the European countries' boundaries.

Subsequently, the Court has developed a specific case-law on the matter. The Court stated, that where a Contracting State exercises overall control over an area outside its borders, its responsibility extends to acts of the local administration which survives there by virtue of ***its military and other support***.[23] In *Jaloud v. The Netherlands ca*se the Court reaffirmed that for the presence of effective control "***other indicators*** *may also be relevant, such as the extent of (...) military, economic and political support for the local subordinate administration (...)***"**. [24]

The Ilascu case

In *Ilaşcu case*, the Court established the responsibility of the Russian Federation due to several reasons: (1) direct involvement of Russian troops in the detention of the applicants, (2) the handing over of the applicants by the Russian troops to the Transdniestrian authorities and their knowledge of the fate of the applicants, (3) support provided by the Russian authorities to

[20] *Vl. And B. Banković and Others v. Belgium et al.,* 52207/99, 67, (European Court of Human Rights, 2001), available at http://hudoc.echr.coe.int/eng?i=001-22099, Last visited 11 March, 2018.
[21] *Ibid, ¶80.*
[22] *Ibid.*
[23] *Cyprus v. Turkey*, 25781/94, 77 (European Court of Human Rights, 2001), available at http://hudoc.echr.coe.int/eng?i=001-59454, Last visited 11 March, 2018
[24] *Jaloud v. The Netherlands*, 47708/08, ¶ 138-139 (European Court of Human Rights, 2014) available at http://hudoc.echr.coe.int/eng?i=001-148367, Last visited 15 March, 2018

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Transdniestria.[25] The Court stated, that in any event, Transdniestria survived by virtue of the ***military, economic, financial and political support that Russia gave*** it. Consequently, there was a continuous and uninterrupted link of responsibility on the part of Russia for the applicants' fate. The applicants, thus, were within Russia's jurisdiction and its responsibility was engaged with regard to the acts of which they complained. [26]

The Al-Skeini case

Another landmark case on the matter is the *Al-Skeini and Others v. the United Kingdom case* (hereinafter: Al-Skeinii case), where the Court reversed the judgement of Bankovic. In Al-Skeini the Court disagreed with Bankovic's notion of a Conventional legal space ("espace juridique"). While the Court noted that the convention is an "instrument of European public order," and that the Convention applies solely within its "legal space," it also noted that the Convention does not imply that Article 1 jurisdiction can never exist extraterritorially.[27] The Convention may dictate where jurisdiction applies, however, that ***does not necessarily indicate that the absence of extraterritorial jurisdiction, outside of the Council of Europe, cannot exist.*** Consequently, the Court disregarded the espace juridique argument, which, under Bankovic, prohibited the application of the Convention beyond Europe's borders.

In Al-Skeini the Strasbourg Court declared unanimously that the UK exercised jurisdiction based on the authority and control of the British soldiers over the victims.[28] The Court introduced principles for narrowing down and defining the 'authority and control' concept. The personal jurisdiction test was limited to three circumstances: 1) acts of diplomatic and consular agents; 2) the performance by Contracting Parties' agents of 'public powers normally to be exercised' by the territorial State; 3) the 'use of force' outside their territories by officials of a High Contracting Party.[29] The Grand Chamber of the Court accepted that jurisdiction is also triggered

[25] L. Gevorgyan and Y. Kirakosyan, "*Iclaw Study on The Chiragov Case and The Application of The Rules of Attribution By The European Court Of Human Rights*" ¶ 20 (International and Comparative Law Center- Armenia 2015) available at http://www.iclaw.am/files/chiragov.pdf, Last visited 02 April, 2018

[26] *Ilaşcu and Others v. Moldova And Russia,* 48787/99, ¶ 392, (European Court of Human Rights, 2004), available at http://hudoc.echr.coe.int/eng?i=001-61886, Last visited 11 March, 2018

[27] *Al- Skeini and others v. The United Kingdom*, 55721/07, 141-42 (European Court of Human Rights, 2011) available at http://hudoc.echr.coe.int/eng?i=001-105606, Last visited 15 March 2018

[28] *Ibid, ¶ 149*

[29] *Ibid, ¶ 133-137*

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through effective control over an area as a result of lawful or unlawful military action or, when a Contracting Party occupies the territory of another Contracting Party.[30]

The Chiragov case

Further developments of the Court's case-law on the present subject can be inferred from the *Chiragov case*. The Court stated: *"Armenia has a significant and decisive influence over the [Nagorno-Karabakh Republic (NKR)] (...) two entities are highly integrated in virtually all important matters and (...) [NKR's] administration survives by virtue of the* ***military, political, financial and other support*** *given to it by Armenia which,* ***exercises effective control over Nagorno-Karabakh and the surrounding territories*** *(...). The matters complained of come within the jurisdiction of Armenia (...).".* [31] The analysis of Chiragov case shows that military involvement of Armenia in the NKR might have been the ***principal reason*** for dismissing the Respondent Government's argument, however other evidence demonstrating ***political and economic dependence was also important***. From the Court's reasoning in Chiragov case, it can be inferred, that the Court took into account that many prominent Nagorno-Karabakh politicians transferred into high profile roles in Armenia[32] and residents of the NKR can obtain Armenian passports since the NKR is not recognized internationally.[33] However, the ease with which the Court established Armenia's control over NKR is significant. The ECtHR did not base its judgement on fact-finding missions; the witnesses were not heard. The Court based its reasoning mainly on reports by NGOs such as HRW and ICG. According to the dissenting opinion of Judge Pinto de Albuquerque: "*the [Chiragov] case should have been dismissed owing to (...) lack of jurisdiction. Had the Court* taken *more seriously its role in the gathering of evidence, these objections could possibly have been overcome. Then, and only then, the Court would have been in a position to address fully the substantive issues at stake in this case. It did not do so. Those who suffer more from these omissions are precisely the Armenian and Azeri women and men of*

[30] *Ibid, ¶ 138-141*

[31] *Chiragov And Others v. Armenia, 13216*/05, ¶186 (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 20 March, 2018.

[32] *Ibid, ¶ 78.*

[33] *Ibid, ¶ 83.*

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good will who simply want to live in peace in Nagorno-Karabakh and the surrounding districts.".[34]

Moreover, for a proper analysis of the 'effective control' test, the Chiragov case needs to be differentiated from *the Cyprus cases*. Concerning the situation in Cyprus, Security Council Resolution 541 explicitly described the purported secession as "invalid". The Security Council further called upon all States "not to recognize any Cypriot State other than the Republic of Cyprus".[35] The mentioned, nevertheless, has never been the case with the NKR. Hence, in the *Cyprus cases*, the political risks and features were absent. There was no need to define the status of TRNC, as it has already been defined by the mentioned Resolutions. For the determination of Turkey's responsibility, the status of TRN played no role. The situation is, however, entirely different in *Chiragov case*. None of the Security Council resolutions concerning the situation in the NKR[36] has ever gone so far as to question the lawfulness of the declaration of independence of the NKR or called upon all States not to recognize the Nagorno Karabakh Republic. The fact that the negotiations between the countries are still ongoing already suggests that the status of Nagorno Karabagh Republic is still open.

The significance of the present case is that even though the case was brought by individuals, it has a strong interstate dimension due to its politically controversial subject-matter. The Court addressed the political context of the issue, mentioning that: "*No political solution of the conflict has been reached (...) Rather, the hostile rhetoric between the leaders of Armenia and Azerbaijan appear to have intensified; ceasefire breaches are recurrent (...).* ***In these circumstances, it is not realistic that any possible remedy in the unrecognized NKR entity in practice could afford displaced Azerbaijanis effective redress.***"[37]. This decision and the statements might harm the relationships of Armenia and Azerbaijan. As stated by the Former Minister of Foreign Affairs of Armenia, Edward Nalbandian: "*The manipulation of the Judgment*

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[34] *Judge Pinto de Albuquerque opinion on Chiragov And Others v. Armenia, 13216*/05, 51 (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 01 May, 2018.

[35] *UN Security Council, Security Council resolution 541 (1983) [Cyprus], S/RES/541* 1, 2 and 7 *(1983),* available at http://www.refworld.org/docid/3b00f16528.html, Last visited 3 April 2018

[36] *UN Security Council, Security Council resolutions* 822 of 30 April 1993, 853 of 29 July 1993, 874 of 14 October 1993 and 884 of 12 November 1993, all available at http://www.un.org/Docs/scres/1993/scres93.htm, Last visited 03 April, 2018

[37] *Chiragov And Others v. Armenia, 13216*/05, 119 (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 20 March, 2018.

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of the Court can harm the efforts of the Minsk Group Co-chairs aimed at the peaceful resolution of the Nagorno-Karabakh conflict. By this Azerbaijan again tries to shift the negotiation process of the conflict settlement to other formats, mislead the international community, and undermine the efforts of the Co-chair countries."[38]

Subsequently, the Court's reasoning in *Zalyan and others v. Armenia* case (hereinafter: Zalyan case) shows that after the Chiragov judgement the Court takes the fact that Armenia is exercising effective control over the NKR and the surrounding territories as ***an already established fact.***[39]. Judge Sahakyan in her concurring opinion illustrated that Armenia had jurisdiction over the discussed matter in Zalyan case, ***but for a completely different reason, namely the direct involvement of its agents.*** She mentioned the following: "*The case at hand is a clear-cut example of a "State agent authority and control" exception (...). This exception is clearly different and distinguishable from the "effective and overall control over a territory" exception (...) this case deals with the acts of a State on the territory of a non-State-actor or an unrecognized State with which it has, as stated in Chiragov, a "high degree of integration". As such it is distinct both in fact and in law (...), from situations that deal with the acts of a non-State actor existing on a territory with a significant military presence of a Member State ("effective and overall control", as applied in the Cyprus cases).".* [40] The mentioned shows that there is a chance of confusion created by the Court in the application of the standards of 'extraterritorial activities of State agents' and 'effective control over a territory outside the State's boundaries'.

In this regard, the events of Talish in April 2016 are important to mention. Talish is located in the Nagorno Kharabakh and is close to the border between Artsakh and Azerbaijan. In April 2016, Azerbaijani soldiers shot Valera Khalapyan and his wife Razmela to death in their home and then cut off their ears. They also executed Marousya Khalapyan, born in 1924.[41] Now the

[38] Edward Nalbandian, *ECHR Judgement on Chiragov vs. Armenia case contains no assertion about occupation of Azerbaijani territories by Armenia,* available at https://armenpress.am/eng/news/810553/, last visited 30 March 2018

[39] *Zalyan and Others V. Armenia. 36894/04 and 3521/07,* 214 (European Court of Human Rights, 2016) available at http://hudoc.echr.coe.int/eng?i=001-161408, Last visited 20 March, 2018.

[40] *see* Judge Sahakyan Concurring opinion on *Zalyan and Others V. Armenia. 36894/04 and 3521/07* (European Court of Human Rights, 2016) available at http://hudoc.echr.coe.int/eng?i=001-161408, Last visited 20 March, 2018.

[41] *Azerbaijani Soldiers Execute Elderly Armenian Couple in Artsakh; Then Cut Off Their Ears*. Available at http://hetq.am/eng/news/66976/azerbaijani-soldiers-execute-elderly-armenian-couple-in-artsakh-then-cut-off-their-ears.html, Last visited 08 May, 2018

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question is, will the acts of Azerbaijani soldiers be qualified as control by State agent authorities and be enough for the extraterritorial application of the Court's jurisdiction? Inconsistencies over the application of 'effective control' test and 'authority and control' test may sooner or later lead to political controversies between many States, including Azerbaijan and Armenia. A possible solution again can be, the establishment of unified criteria for the implementation of 'effective control' test and a precise definition of its meaning.

Potential consequences of the Chiragov case

The overall picture after the *Chiragov case* is that it confirms the Al-Skeini trend. The ECtHR is becoming progressively generous on threshold questions of its extraterritorial jurisdiction and is more likely to find Article 1 jurisdiction. In conclusion, the potential consequences of Chiragov case might be the following:

Damage the efforts aimed at the peaceful settlement of the conflict.

Put an economic burden on the Republic of Armenia. Significantly, this is the first case, and still many cases are pending against Armenia and Azerbaijan. Indeed, this case might become a precedent for the future cases which will result in an economic burden for Armenia, after their settlements.

Impact on similar issues, such as the Ukraine-Russia dispute concerning the control over the Donbas region; Georgia-Russia dispute concerning the control over South Ossetia and Abkhazia and so on.

Chapter Conclusion

The 'effective control' test used by the Court in its case-law, has developed throughout the time. While in *Bankovic case*, the Court stated that the extraterritorial jurisdiction should be exercised in exceptional circumstances, in recent cases, besides the military control, the Court mentions that other indicators might be relevant in determining the control over a particular region. The analysis of the Court's case-law indicates that over the time, the Court has started to take *'other factors' such as political, military, economic dependence*[42] as grounds for the exercise

[42] *Ilascu and Others v. Moldova And Russia,* 48787/99, (ECHR, 2004), available at http://hudoc.echr.coe.int/eng?i=001-61886; *Jaloud v. The Netherlands*, 47708/08, 138-139 (European Court of Human Rights, 2014) available at http://hudoc.echr.coe.int/eng?i=001-148367; *Chiragov And Others v. Armenia, 13216*/05, 172-187, (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 20 March, 2018.

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of 'effective control' over a foreign State. The Court's intent in *Bankovic case*, to interpret Article 1 in a way to limit the extraterritorial application of the Convention is not applicable today. As mentioned previously, in *Al-skeini* the Court established principles, that can be used for defining the presence of the 'authority and control' test, yet, after the analysis of the present Chapter, the following was concluded:

1) A ***precise definition is absent*** for the meaning of 'effective control', or 'effective overall control' test is absent;
2) There is ***no unified practice*** concerning the applicability of the 'effective control' test;
3) The lack of precise definition of the 'effective control' test may result in ***confusions when applying the 'authority and control' test*** which can lead to political controversies;
4) The Court has the willingness to ***broaden out the meaning of the 'effective control'*** test, and there are tendencies of expanding the Court's extraterritorial jurisdiction.

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Chapter 2: Fragmentation of Public International Law and use of modern technologies and their control.

1. Implementation of the 'control' test by ICJ and ICTY

The European Court of Human Rights on cases concerning the extraterritorial application of the Convention had referred to Public International Law, stating that: "***From the standpoint of public international law****, the words 'within their jurisdiction' in Article 1 of the Convention must be understood to mean that a State's jurisdictional* ***competence is primarily territorial*** *(...). This presumption may be limited in exceptional circumstances (...) [such as] effective control over the territory concerned (...)".*[43] For this purpose, to understand the standpoint of Public International Law on the discussed subject, two cases shall be analyzed: *the Nicaragua case* and *the Tadic case*, first examined by the International Court of Justice (hereinafter also referred to as ICJ) and the second by the International Criminal Tribunal for the Former Yugoslavia (hereinafter also referred to as ICTY).

In Nicaragua case, concerning the control exercised by the USA over Nicaragua, ICJ established a high threshold for the application of the 'control' test. The test applied by the ICJ concerned the relationship between the contras and the Government of US.[44] The main question here was, whether the provided aid could have been sufficient for asserting that the contras were acting on behalf of the US. In the end, however, the International Court of Justice found that notwithstanding the provided aid the contras were an 'independent force'.[45][46] ICJ distinguished that when military aid was ceased contra activity, however, still continued.[47] The International Court of Justice stated that, ***though US support was 'crucial', the contras 'complete dependence' on US aid was not demonstrated***.[48] The 'political leaders of the contra force had been selected, installed and paid by the United States' and participated in the 'organization, training and equipping of the force, the planning of operations, choosing of targets and the

[43] *Ilaşcu and Others v. Moldova And Russia,* 48787/99, 312, (European Court of Human Rights, 2004), available at http://hudoc.echr.coe.int/eng?i=001-61886, Last visited 11 March, 2018.
[44] *Militarv and Puramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgement,* 109 (ICJ Reports 1986) available at http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf, Last visited 01 April, 2018.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid., ¶ 110.*
[48] *Ibid.*

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operational support provided', yet control was not found.[49] The ICJ then applied another test for establishing control with a lower threshold: '***effective control of the military (...) operations in the course of which the (...) violations were committed'***.[50] Hence, the present case shows that the International Court of Justice will use 'complete dependence' when deciding whether a particular activity can be attributed to a state. 'Effective control' will be used when establishing whether, more generally, the actions of a non-state entity can be attributed to the respondent state. Consequently, the test for the control in the *Nicaragua case* was much higher than in the European Court of Human Right's decisions, mainly in the recent cases discussed earlier in Chapter 1 of the present Paper.

The International Criminal Tribunal for the Former Yugoslavia, nevertheless, opposed with the 'control test' implemented in the *Nicaragua* case. It found that for the actions of an agent or a person to be attributed to the state, there should be 'effective control' over that individual. ICTY noted that the degree of control could differ depending on the facts and circumstances of the case.[51] ICTY differentiated between a single individual and a group of people for the presence of the control.[52] In the case of groups, overall control of the state was found sufficient for the attribution to occur. The ICTY found in *Tadic case* that: "*(...)* ***coordinating or helping*** *in the general planning of the (...) military activity was sufficient control (...)*"[53] and relied on ECtHR's *Loizidou v. Turkey case* to justify a much lower threshold of control. The ICTY stated that in Loizidou, 'The European Court of Human Rights 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".[54] What the ECtHR did in the *Loizidou v. Turkey case,* is that it applied the 'overall control' concept, which basically, did not require Turkey's detailed control over the events complained of. The concept used by the Court is a more moderate threshold that the ones used in Public International Law.[55]

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[49] *Ibid., ¶ 112.*
[50] *Ibid., ¶ 115.*
[51] *Prosecutor v. Tadic*, IT-94-1, ¶ 132-136 (ICTY 1997), available at http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf, Last visited 01 April, 2018
[52] *Ibid, ¶ 131, ¶ 137*
[53] *Ibid, ¶ 131*
[54] *Ibid, ¶ 128*
[55] *see* Article 8 of the ILC on State Responsibility: "The conduct of a person or group of persons shall be considered an act of a State under international law if the persons or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.".

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Hence, compared with the ECtHR judgement's, it can be inferred that the International Courts use different standards when dealing with extraterritorial actions and attribution tests. While International Court of Justice has set quite a high threshold for the applicability of the control test, the European Court of Human Rights, in contrast, has lowered the threshold during the developments of its case-law. Additionally, as discussed in Chapter 1 of the Paper, there is no unified practice on the discussed subject in ECtHR's case-law itself. The mentioned was, for example, illustrated in judge Sahakyan's concurring opinion in *Zalyan case*, where she stated that even though Armenia had jurisdiction over the matter, but for a completely different reason than the one established by the Court. Conversely, inconsistencies in Public International Law is capable of creating confusion concerning the extraterritorial application of the International Human Right's treaties.

2. Fragmentation of Public International Law

As mentioned, on cases concerning the extraterritorial application of the Convention the Court had referred to Public International Law, and had indicated that it "***must take into account any relevant rules of international law when examining questions concerning its jurisdiction*** *and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part (...)*".[56] For this purpose, regard should be given to the Yeghishe Kirakosyan's and Levon Gevorgryan's Report concerning the Chiragov case. The authors stated: "*Recourse must be had to the practice and the works of main international bodies in the field – the International Law Commission, responsible for the codification of customary international law, and the International Court of Justice, the leading institution on the international plane dealing with issues of state responsibility. And it is submitted that the interpretation of rules of state responsibility by the European Court must be in line with the interpretation of those rules by the aforesaid institutions*.".[57] Unfortunately, however, as they have shown in their work, in the most recent cases on the matter of extraterritorial jurisdiction through subordinate local administration, the European Court of Human Rights does not seem to follow the standards applied by the ICJ or the International Law

[56] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* 71412/01 & 78166/01, ¶ 122; (European Court of Human Rights 2007) available at http://www.tjsl.edu/slomansonb/3.1_UN_attrib.pdf, last visited 02 April 2018; see also *Vl. And B. Banković and Others v. Belgium et al.,* 52207/99, 57, (European Court of Human Rights, 2001), available at http://hudoc.echr.coe.int/eng?i=001-22099, Last visited 02 April, 2018.

[57] L. Gevorgyan and Y. Kirakosyan, "*Iclaw Study on The Chiragov Case and The Application of The Rules Of Attribution By The European Court Of Human Rights*" ¶ 4 (International and Comparative Law Center- Armenia 2015) available at http://www.iclaw.am/files/chiragov.pdf, Last visited 02 April, 2018

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Commission (hereinafter: ILC) and applies a standard which effectively results in the confusion and, what is even more disturbing, is the fusion of notions of jurisdiction and attribution. Levon Gevorgyan and Yeghishe Kirakosyan tried to prove that while in *Ilaşcu and others v. Moldova and Russia case* and the *Cyprus cases* the line of distinction between extraterritorial jurisdiction (control over territory and/or individuals) and attribution was clearly drawn by the Court, the situation, however, changed drastically in *Catan and Others v. Moldova and Russia case*, since in that case the Court blurred the distinction between these two notions.[58] The fusion of notions of jurisdiction and attribution, as already discussed in the previous chapter of the present Paper, was also evident in the *Zalyan case.*

As discussed in chapter 1 of the Paper, there is no unified practice in Public International Law concerning the extraterritorial application of human rights treaties and the control tests. The International Courts use the following tests when dealing with the extraterritorial actions of States: *"effective overall control"; "effective control" or "overall control"*. The concept of "effective overall control" should not be confused with the notions of "effective control" or "overall control", which are attribution tests used by the ICJ and ICTY respectively. Whilst the concept of "effective overall control", used by the ECtHR, is a jurisdictional test and qualifies the level of control used by the state over territories outside of its boundaries, the notions of "effective control" or "overall control" are attribution tests and refer to the state's control over individuals, groups or entities. [59]

Hence, the following inconsistencies can be a reason for the fragmentation issue. There has been much speculation concerning the differences of extraterritorial application of human rights treaties.[60] Different interpretations of clauses concerning the jurisdiction and the extraterritorial application of International treaties create confusions for both the States and the applicants. In Public International law, there is a strong presumption against a normative conflict. As it was stated by the ILC's report on fragmentation of International law: "*Differing views about the*

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[58] *Ibid*

[59] L. Gevorgyan and Y. Kirakosyan, "*Iclaw Study on The Chiragov Case and The Application of The Rules Of Attribution By The European Court Of Human Rights*" ¶ 4 (International and Comparative Law Center- Armenia 2015) available at http://www.iclaw.am/files/chiragov.pdf, Last visited 02 April, 2018

[60] M Gondek, *The reach of human rights in a globalising world: extraterritorial application of human rights treaties.* pp. 162–168 (Intersentia, Antwerp 2009); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*: *Law, Principles, and Policy* pp. 41–53 (Oxford University Press, Oxford 2011); Lawson R *Life after Bankovic: on the extraterritorial application of the European Convention on Human Rights,* 83–123 (Intersentia, Antwerp 2004).

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content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behavior and to plan their activity accordingly. Second, they put legal subjects in an unequal position vis-à-vis each other. The rights they enjoy depend on which jurisdiction is seized to enforce them.".[61] Therefore, the need to unify the approaches of International Courts when applying the International Human Right's treaties extraterritorially and interpreting the control and attribution tests is evident and is becoming crucial day-by-day.

3. The use of modern technologies and their potential control

As mentioned in the previous Chapter, there is a lack of unified practice in ECtHR's case-law concerning its extraterritorial jurisdiction which raises many questions. One of such questions is whether the control exercised with current modern technological developments can be certified as 'effective control' or 'state agent authority control'. States tend to use modern surveillance devices to control certain events in foreign countries. The legal implications of contemporary surveillance machinery concern mainly the issues that occur in the result of the combination of such devices with armed capabilities. It is hard to say, whether they can be applied under the concept of effective control over a foreign State or even under the territorial principle.

For example, let's assume how drone strikes will fit into the jurisdiction of the Court. The question is whether the control exercised by drones can be considered as control over the whole territory or the persons and consequently be enough for the ECtHR to apply the 'effective control' test. If there is an extraterritorial application, accordingly there will be an array of obligations on the States carrying out the drone attacks. Most probably, soon the use of remote-controlled machinery and drones for different purposes will be standard practice for most of the developed countries. Thus, in the year of 2018, it is appropriate to study how the mentioned devices and machinery may affect the extraterritorial application of human rights treaties. The significance of the raised question can be justified by the UK drone strikes over Syria.[62] What would the Court's reasoning be in that case? Would it consider drone attacks

[61] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682, 52 (2006) available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, last visited 02 April, 2018.

[62] *UK Drone Strike Stats, Summary of UK armed military air operations in Iraq/Syria*, available at https://dronewars.net/uk-drone-strike-list-2/ Last visited 02 April, 2018; *UK Drone Strikes: Peeking behind the curtain* available at https://dronewars.net/2012/02/29/uk-drone-strikes-peaking-behind-the-curtain Last visited 02 April, 2018

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sufficient for the existence of 'effective control' despite that, technically, there was no physical control?

The analysis of the Court's case-law on the matter illustrated that currently, the Court is more inclined towards expanding its extraterritorial jurisdiction, which will have its implications on High Contracting Parties when choosing to use drones or other modern technological devices in the purpose of controlling a situation in foreign states. Even though in *Bankovic case*, the airstrikes were not sufficient for the extraterritorial application, however, more recent cases examined by the Court, show a progressive approach to the discussed matter. An important matter that the Court might take into account is whether the alleged control is exercised by one drone, or there is a use of full surveillance machinery and precision weapons are being used. When comparing to the *Bankovic case*, a question rises, whether there would have been any changes in Court's reasoning had the targeted building and its surroundings been under close-up surveillance for months combined with a finger-on-the-trigger ready strike capability. What would the Bankovic judgment have looked like if the attackers had accurate knowledge of how many people were in the building?

The question is whether the control used by the modern technologies is equal to the physical control exercised by troops, or equal to other types of control (political, economic dependence etc.) mentioned by the Court. There can be no hesitation that the surveillance of areas or individuals by drone technology may in certain respects comprise control. The question centers on the nature and intensity of this control, and how the European Court of Human Rights would view this in the light of its jurisprudence. It is difficult to see why drone technology could not be used to exercise even more effective control over persons or territory than troops on the ground. Stealth and longstanding surveillance may be different from, and yet in some situations more comprehensive than what may be effected by indiscrete, heavily equipped combat troops. [63] On the discussed matter, Legatt J's stated: "*I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being.*"[64]

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[63] Frederik Rosén, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility,* 19 *Journal of Conflict and Security Law* 113–131 (2014), available at https://academic.oup.com/jcsl/article/19/1/113/1095182, Last visited 02, Arpil 2018

[64] UK Human Rights Blog, *Clash of Rights-Does the ECHR apply? available at* https://ukhumanrightsblog.com/2015/09/18/a-clash-of-rights-does-the-echr-apply-in-syria/ last visited 02 April, 2018

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When discussing a case, concerning the shootings executed by Turkish authorities outside their territories, the Court established that "*even though the applicant had sustained her injuries in territory over which Turkey exercised no control,* ***the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries****, had been such that the applicant should be regarded as "within jurisdiction" of Turkey within the meaning of Article 1 of the Convention*.".[65] While the conduct of the Turkish agents took place outside the Turkish territory, (*Solomou case:* the territory of TRNC'[66], *Issak* case*:* UN buffer zone[67]; *Andreou case:* the Greek-Cypriot ceasefire line[68]), Turkey's agents were all still considered to be in the espace juridique. The Court presented the idea that when there is a 'direct and immediate link' between the conduct of State agents and the violation of an individual's human right, that individual is under the jurisdiction of that particular State. A comparable situation was in the *Bankovic case*, which also included the shooting of people. The Court's statement in the *Andreou case* stating that unlike the applicants in Bankovic, Ms Andreou was still inside espace juridique of the European Convention gives rise to an interesting question. Did the Court imply that if Georgia Andreou happened to be outside the espace juridique when she was hit, she would not have been within Turkey's jurisdiction?

Another complicated issue is the recent tensions in Tavush province of RA. In July 2017, the Azerbaijani military opened gunfire at Chinari village located at Armenia's bordering Tavush Province and among many damages Azerbaijani snipers attempted to shoot down an Armenian young man near the village cemetery.[69] Fire from Azerbaijan on villages in the Tavush region of Armenia has also impacted Armenia's wheat fields. Seryozha Alexanyan, the head of the Voskevan village told that due to the shootings, work on the fields was impossible.[70]

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[65] *Andreou v. Turkey, Admissibility Decision,* 45653/99, 3 (c) available at http://hudoc.echr.coe.int/eng?i=001-88068, Last visited 12 May, 2018; *Andreou v. Turkey, Merits,* 45653/99, *25* (European Court of Human Rights 2009), available at http://hudoc.echr.coe.int/eng?i=001-95295, Last visited 12 May, 2018

[66] *Solomou and others v. Turkey*, 36832/97 (European Court of Human Rights, 2008), available at http://hudoc.echr.coe.int/eng?i=001-87144, Last visited 12 May, 2018

[67] *Isaak v. Turkey,* 44587/98 (European Court of Human Rights, 2008) available at http://hudoc.echr.coe.int/eng?i=001-87146, Last visited 12 May, 2018

[68] *Andreou v. Turkey,* 45653/99 (European Court of Human Rights, 2008) available at http://hudoc.echr.coe.int/eng?i=001-95295, Last visited 12 May, 2018

[69] *Armenia's Chinari village suffers great damages amid Azerbaijani gunfire,* available at https://www.panorama.am/en/news/2017/07/22/Armenia-Chinari-village-Azerbaijani-gunfire/1811462, Last visited 09 May, 2018

[70] *Azerbaijani Forces Target Armenia's Wheat Fields in Tavush,* available at http://asbarez.com/165265/azerbaijani-forces-target-armenias-wheat-fields-in-tavush/, Last visited 09 May, 2018

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Accordingly, do the mentioned shootings have the necessary elements to be considered as control over a foreign State territory? Can the military equipment used to open fire from further destinations be defined as equal to the physical presence of troops and other military activities?

The recent cases of the European Court of Human Rights', the *Chiragov case* or *Jaloud v. The Netherlands case*, confirm the general trend in the European Court's case-law towards a more expansive approach to the extraterritorial application of the ECHR. Whether it is a good idea or not, the trend is there, and sooner or later the Court will have to deal with control exercised by modern machinery over different events. Hence, the rapid developments of modern technologies and their wide use might have their impact on the further developments of the Court's case-law. The use of modern machinery cannot be considered only Europe's issue, and the European Court of Human Rights cannot be the only International body to interpret whether by using such machinery States exercise effective control or not. Dissimilar approaches to the interpretation of the 'effective control' test by International Courts, will sooner or later impact on the future cases concerning the use of modern technologies. These different views will expand the discussed fragmentation issue in Public International Law. Hence, the need for the accurate definition of the meaning of 'effective control' test is becoming crucial day-by-day.

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CHAPTER 3: Consequences of expansion of the extraterritorial application of the European Convention on Human Rights

1. Execution of European Court of Human Right's judgments

One of the main consequences that the Court's supposed universalist aspirations might have is the negative impact on the execution of the Court's judgements. Execution of judgements guarantees the performance of the High Contracting Parties' obligations under the Convention. As laid down in Article 46 of the Convention, each state party is required to implement the judgments of the European Court of Human Rights. The High Contracting Parties have undertaken "*to abide by the final judgment of the Court in any case to which they are parties.*".[71] The final judgment is transmitted to the Committee of Ministers, which supervises its execution. [72]

Recent Committee of Minister's statistics shows that, despite some progress, there are still difficulties in ensuring the complete and rapid execution of certain judgments of the Court. According to its 2015 annual report, the Committee of Ministers is increasingly confronted with difficulties related to political or national security considerations or with the situations in areas/regions of "frozen conflict".[73] The 2016 report refers explicitly to four major challenges facing the execution of Court judgments, one of which is ***the absence of a common understanding of the scope of the execution measures required following developments in the Court's case law (in particular concerning interpretation of the concept of the "jurisdiction"***.). [74]

As discussed earlier, in the *Cyprus cases* and *the Chiragov case*, the Court found an exercise of 'effective control' over a territory outside the High Contracting Parties' boundaries. The complex issues regarding the execution of judgements involving an extraterritorial application of the Convention will be thoroughly discussed within this Chapter. For the proper analysis of the *Chiragov case*, the case of Sargsyan against Armenia (hereinafter: Sargsyan case) will be examined.

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[71] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46, 4 November 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, Last visited 03 April, 2018.
[72] *Ibid.*
[73] Mr Pierre-Yves Le Borgn, *The implementation of judgments of the European Court of Human Rights*, 25 (Council of Europe, 2018)
[74] *ibid*

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Immovable Property Commission in Turkey

As a general measure for judgement execution, in Turkey, the Immovable Property Commission (hereinafter: Commission) was set up under the Immovable Property Law (number 67/2005) in accordance with the judgement of the ECtHR in the case of Xenides-Arestis v. Turkey. The purpose of the Commission was to establish an effective domestic remedy for claims relating to abandoned properties in Northern Cyprus after the incidents in 1974.[75] Currently, The European Court of Human Rights finds that Law No. 67/2005 provides an effective remedy and rejects complaints of applicants for non-exhaustion of domestic remedies.[76]

All natural or legal persons claiming rights to movable and immovable properties may bring a claim by way of an application, to the Commission requesting restitution, exchange or compensation for the property. The Commission decides the following:

- restitution of the immovable,
- exchange of the property to the said person,
- payment of compensation,
- where the applicant claims compensation for loss of use and/or non-pecuniary damages in addition to restitution, exchange or compensation in return for immovable property.[77]

Cases of Chiragov against Armenia and Sargsyan against Azerbaijan

Due to the unresolved conflict and the ongoing negotiations between the Republic of Armenia and the Republic of Azerbaijan, there might be issues while executing the Court's judgments concerning the *Chiragov* and *Sargsyan cases*. The latter concerns an Armenian refugee's complaint, who after having been forced to flee from his home in the Shahumyan region of Azerbaijan in 1992 during the conflict over Nagorno-Karabakh, had since been denied the right to return and to have access to and use his property there.[78] It is recalled that the

[75] Immovable Property Commission, available at http://www.tamk.gov.ct.tr/, Last visited 03 April, 2018.
[76] *Ibid.*
[77] *Ibid.*
[78] *Case of Sargsyan v. Azerbaijan,* 40167/06 (European Court of Human Rights, 2015), available at http://hudoc.echr.coe.int/eng?i=001-155662, Last visited 15 April, 2018

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applicants in the discussed two cases were either internally displaced people (IDPs) or refugees - their vulnerability and the obstacles they faced to the enjoyment of their human rights due to displacement were comparable, and ***therefore give rise to comparable positive obligations under the Convention***.[79] The Court has already rejected arbitrary differentiation in the treatment of IDPs and refugees, pointing out the possibility that this could give rise to concerns about discrimination[80].

In both cases, the Court stated the need for establishing a property claims mechanisms. In *Chiragov case*, the Court stated: *"(...) create a mechanism which would allow the applicant, and others in a comparable situation, to have his rights in respect of property and home restored and to obtain compensation for the losses suffered.".*[81] In *Sargsyan case: (...) establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment."*.[82]

However, States[83] might be faced with obstacles, when establishing the mentioned mechanisms and fulfilling their positive obligations. When analyzing, Communication from the NGO (EHRAC) (02/11/2016) in the case of Chiragov against Armenia and Sargsyan against Azerbaijan case (hereinafter: Communication), it can be inferred that the Communication perceives the Pinheiro and Poulsen Principles and the Guiding Principles on Internal Displacement as a mean for executing the judgements. For avoiding different treatment of similarly-situated groups of people, the Communication suggests, developing a memorandum of understanding between Armenia and Azerbaijan, which will define the areas of cooperation. The primary focus of the mentioned Memorandum, according to the Communication should be the facilitation of the contact between the claimants currently under their jurisdiction and the claims mechanism(s) developed by the corresponding respondent State.[84] However, the current

[79] Submission under Rule 9(2) of the Committee of Ministers' Rules, *Sargsyan v Azerbaijan (40167/06) & Chiragov and others v Armenia (13216/05)* ¶ 32, (2016) available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806be515, Last visited 20 April, 2018

[80] *Case of Sargsyan v. Azerbaijan,* 40167/06 ¶ 240 (European Court of Human Rights, 2015), available at http://hudoc.echr.coe.int/eng?i=001-155662, Last visited 15 April, 2018

[81] *Ibid ¶ 272*

[82] *Chiragov And Others v. Armenia, 13216*/05, ¶199, (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 10 April, 2018

[83] *here the Republic of Armenia and the Republic of Azerbaijan*

[84]Submission under Rule 9(2) of the Committee of Ministers' Rules, *Sargsyan v Azerbaijan (40167/06) & Chiragov and others v Armenia (13216/05)* ¶ 11, (2016) available at

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relationship between the countries questions the possibility for a memorandum of understanding. The obligation to execute a legally binding judgement, while having unresolved political issues and continuous shootings will most probably result in non-execution of the judgement and be qualified as non-obedience of the Court's final judgement.

Execution of the Chiragov judgement

The official information on the status of execution of the Chiragov judgement is the following: "*In 2016 (January and November), the Armenian authorities had bilateral consultations with the Secretariat to explore the ways and means to execute the Chiragov judgment. It is at present expected that the authorities will provide information to the Committee, in the form of an action plan. On 2 November 2016, the NGO European Human Rights Advocacy Centre (EHRAC) submitted a communication under Rule 9.2.".*[85] On 7-10 of March 2017, during the 1280th Meeting, concerning the supervision of Chiragov and others v. Armenia case, the following was decided:

"*The Deputies*

1. took note of the information given during the meeting by the Armenian authorities;

2. invited the authorities to present in an action plan the progress in their reflection on the ways and means to execute this judgment;

3. noted the contacts taken in 2016 between the Armenian authorities and the Secretariat, and invited them to continue their cooperation.".[86]

The *Chiragov* judgement raises many questions: such as how should Armenia implement a judgement that touches an unresolved political issue? What mechanisms should there be? How can Armenia guarantee the safety of the refugees/applicants? My argument is that if the control to assess jurisdiction is counted due to some territorial presence when the State has no real control over the violation, it will not help the Court's efficiency. Therefore, without a strong link

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806be515, Last visited 20 April, 2018

[85] Supervision of the execution of the European Court's judgments*, H46-1 Chiragov and Others v. Armenia (Application No. 13216/05)* 1280th meeting, (7-10 March 2017), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806dd2d2, Last visited 14 April, 2018

[86] Supervision of the execution of the European Court's judgments*, H46-1 Chiragov and Others v. Armenia (Application No. 13216/05)* 1280th meeting, (7-10 March 2017), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806fa16f, Last visited 14 April, 2018

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between the Contracting Party and the alleged individual's violation, Armenia could not realistically guarantee or protect any rights or freedoms.

Property claims mechanism in Armenia

When discussing whether it is possible to create a property claims mechanism in Armenia, it should be stated that the mechanism must be "*accessible*". The accessibility of a remedy is a key concern of the Court, in the *Chiragov and Sargsyan cases*. The Court, itself, stressed the infeasibility of travel, let alone return, between territories controlled by the respondent States under current circumstances. For instance, in finding an interference with the applicants' property rights in Chiragov, the Court sets out fundamental obstacles to return.[87] In the Court's view, it is not realistic, let alone possible, in practice for Azerbaijanis to return to these territories. The reason is the continued presence of Armenian and Armenian-backed troops, ceasefire breaches on the Line of Contact, an overall hostile relationship between Armenia and Azerbaijan and no prospect of a political solution yet in sight.[88]

In *Chiragov* the Court stated: "*allowing applicants and others in his situation"* which is intended to ensure that the mechanisms should be open and fully accessible to all persons displaced as a result of the NK conflict. This also includes the years during which the parties have failed to negotiate a peace settlement, and return has remained impossible. This language requires, at a minimum, that both Armenia and Azerbaijan should ensure that their property claims mechanisms are accessible and can be considered as an effective remedy to all prospective claimants. However, the current relationships between Armenia and Azerbaijan do not give many options for the States to execute the Court's judgements properly.

As discussed, above, Turkey has established the Immovable Property Commission, which constitutes an effective remedy. In Chiragov and Sargsyan cases, the possibilities for creating such mechanism should be discussed in the light of political controversy between Armenia and Azerbaijan. The question is, whether such mechanism should be created by tasking existing institutions or be developed as ad hoc bodies.

Even if the mechanisms were established, there still might be issues, when executing the judgement's requirements:

[87] *Chiragov And Others v. Armenia, 13216*/05, ¶ 195, (European Court of Human Rights, 2015) available at http://hudoc.echr.coe.int/eng?i=001-155353, Last visited 10 April, 2018

[88] *Ibid*

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Returning the properties: Giving the properties to the applicants and thousand others would mean neglecting the fact that for more than 20 years the same properties have been inhabited by others. What is also important is the fact that the surrounding territories of NKR are still subject to shootings.[89] Unlike the Cyprus cases, the NKR conflict involves war and shootings, which cannot be ignored. How can Armenia, in such situation, guarantee the return of displaced people, their future safety and avoid violations of Article 2 of the Convention?

Compensation: A reasonable mechanism should be established to count the amount of money to be compensated. The question is, what currency and what rate should be taken into account of?

The exchange of properties: Another option for the execution of judgements in both Sargsyan and Chiragov cases, can be the exchange of properties between the Armenians and Azerbaijanis. However, the political controversies between the two States and the hatred among Armenians and Azerbaijanis towards each other shows that there is no possibility for Armenians to peacefully live in Azerbaijan and respectfully Azerbaijanis in Armenia.

The above-mentioned indicates that, most likely, the establishment of property claims mechanisms cannot be appropriately executed due to the unresolved conflict between Armenia and Azerbaijan. Hence, neither one of the States, can guarantee that they can operate a proper system in their respective countries. Eventually, the Chiragov case shows that the amount of non-obedience can rise when expanding the Court's extraterritorial jurisdiction and, moreover, touching upon an unresolved political issue between two States. Chiragov case is an example, how the expansion of the "effective control" test raises difficulties for the judgement execution. A similar situation was in a recent case, the *case of Catan and others v. the Republic of Moldova and Russian Federation*, where the Court handed down the judgment against the Russian Federation, considering that it had exercised effective control over the "MRT" at the time of the events.[90] The Committee of Ministers has been examining this case since December 2013 and adopted three interim resolutions owing to the lack of progress in implementing this judgment. In

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[89] *see Artsakh Soldier Killed by Azerbaijani Shooting*, available at http://asbarez.com/171572/artsakh-soldier-killed-by-azerbaijani-shooting/, Last visited 14 May, 2018

[90] Case of *Catan and others v. the Republic of Moldova and Russian Federation,* 43370/04, ¶ 122 (European Court of Human Rights, 2012), available at http://hudoc.echr.coe.int/eng?i=001-114082, Last visited 15 April, 2018

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June 2016, the Russian Federation expressed its intention to elaborate on the conclusions of high-level conferences and other events intending to an acceptable response to the Court's judgment.[91] Recalling that intention on the part of the Russian authorities, at the 1280th meeting (DH) in March 2017, the Committee of Ministers urged them to complete their reflections as soon as possible, engage in constructive dialogue and to fully co-operate with the Committee of Ministers and the Secretariat.[92] Hence, this is another judgment that raises complex problems of implementation.

2. Other consequences

Besides the judgement execution issue, the expansion of the Court's extraterritorial jurisdiction might also impact on the following:

1) Resources of the Court

Chapter 1 of the present Paper, illustrated that ECtHR uses 'control entails responsibility' mechanism for the presence of effective control over a certain territory. And the discussed cases showed that the number of examples where state officials operating abroad violate a person's rights tends to increase. To give thousands, if not millions, of people around the world the ability to bring a case against such practices in the Court would drain the Court's already stretched resources to breaking point.

2) Aim and purpose of the Court

Judgement execution, resource constraints are not the only arguments against the expansion of the Court's extraterritorial jurisdiction. Another compelling argument is that the strain on judicial resources might also fundamentally alter the Court's focus. It would convert the Court into an outward-looking entity overloaded with applications claiming extraterritorial jurisdiction at the cost of deepening human rights protections prevailing within signatory states like Turkey and Russia.[93] The Court can hear only so many cases a year, and facilitating a

[91] Mr Pierre-Yves Le Borgn, *The implementation of judgments of the European Court of Human Rights*, 34 (Council of Europe, 2018)
[92] *Ibid*
[93] Barbara Miltner, *Revisiting Extraterritoriality after Al-Skeini: The ECHR and its Lessons,* 1235, (Michigan Journal of Int. Law) 727 (2012)

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revolution in extraterritorial jurisdiction appears likely to trade off with adjudicating and monitoring recurrent human rights abuses within the espace juridique of the Convention.[94]

[94] *Ibid*

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CONCLUSION

Given what has been outlined in the present Paper it should be highlighted that there still exist major gaps in the implementation of the 'effective control' test. If the jurisdiction of the Court is effectively limited to the European territory, the Convention is a primarily regional instrument; if jurisdiction extends to extraterritorial acts by the High Contracting Parties, the Convention is instead a global system for protecting human rights. The analysis of the Court's case-law on the discussed subject showed that ECtHR had gradually expanded its margin of appreciation over the extraterritorial acts of the High Contracting Parties'.

The analysis of the present Paper indicates that though, the main purpose of the Convention is the human rights protection, however, the Court's universalist aspirations resulted in inconsistencies in Public International Law. This was concluded, after the analysis of the interpretations of the 'control' test used by other International Court's, such as ICJ and ICTY.

Lack of the precise definition of 'effective control' test results in fragmentation of Public International Law. The ILC's report on fragmentation of International Law implies, that fragmentation not only threatens the principle of legal security but also puts legal subjects in an unequal position vis-à-vis each other. Furthermore, there is no assessment of what the use of modern technologies will be qualified in the near future. Will the use of modern technologies be considered enough for the presence of 'effective control' test? What will each of the International Court's analysis and final decision be on the use of such technologies? Hence, the need for a precise definition of 'effective control' is becoming vital day-by-day.

In sum, there is yet a need for a clear indication by the Court of what jurisdiction means and a need for establishing a workable guidance to national courts. A guidance mechanism or guiding principles, will have the following outcomes:

> The minimum level of legal certainty can be guaranteed with a precise definition and a workable guidance. Legal uncertainty creates twin risks. States will either under-estimate the jurisdictional space of the Convention and violate human rights which might otherwise be protected, or they will over-estimate the Convention's reach and refrain from actions which are strategically vital. Either way, states are prevented from accurately weighing the legal liabilities related to certain extraterritorial acts, to the detriment of both human rights protection and security.

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Employ a preventive character. Knowing or foreseeing the consequences of their actions, States will avoid committing certain activities.

A precise definition and unified guidance for implementation of ‘effective control test will preclude the formation of different outcomes for the States, only because their cases were heard by different International Courts.

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