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Interpretative trends and standards of proof of fact for the attribution to the state of individual conduct in the recent jurisprudence of international courts

Tendencias interpretativas y estándares de prueba de hecho para la atribución al estado de conducta individual en la jurisprudencia reciente de los tribunales internacionales

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Resumen || El presente trabajo se concentra en el análisis de nuevas tendencias interpretativas con respecto al estándar de prueba para la atribución al estado de conducta inequívoca de responsabilidad a través de la jurisprudencia internacional en comparación con varios tribunales de varios estatutos y diferentes atribuciones que permanecen siempre bajo el mismo nivel de castigo por responsabilidad internacional.

Palabras Claves || TEDH - conducta individual de responsabilidad – TPIY – CIT - jurisprudencia internacional.

Abstract || The present work is concentrated on the analysis of new interpretive trends with regard to the standard of proof for the attribution to the state of unequivocal conduct of liability through international jurisprudence in comparison with various courts of various statutes and different attributions that remain always under the same level of punishment for international responsibility.

Keywords || ECHR – EctHR - individual conduct of liability – ICTY – ILC - international jurisprudence.

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1. Introduction

In the last twenty years, the theme of attribution of state responsibility for individual conduct has known one of the most compelling moments in its history. There are many challenges to legal operators in attributing conduct to the state, not only from the new types of offenses-think of cybernetic ones-but also from classic scenarios such as armed conflicts. Just think of the Israeli-Palestinian conflict, or the self-proclaimed Islamic state to understand that new challenges test the rules on attribution. If the subject was of different interpretations and clashes especially between the International Court of Justice (ICJ) and the International Criminal Courts, what Simma has defined as the dialogue des sourdes[1] has for some years been a new interlocutor in the European Court of Human Rights (ECtHR). While working in the framework of the European Convention on Human Rights (ECHR), ECtHR has found itself growing in number with the need to analyze attribution profiles in interstate causes as much as in individual appeals. The present paper aims to analyze the most recent interpretative tendencies of ECtHR starting from Sargsyan[2] and Chicago[3] cases in the Nagorno-Karabakh region, in comparison with the last practice on the attribution of ICJ. Regarding the latter however, it will not be enough to refer to Croatia v. Serbia of 2015 case, or to Bosnia v. Serbia-Montenegro case of 2007, but we will have to return to Nicaragua v. USA sentence by ICJ on attribution matter. The point that will be supported is that ECtHR determines the imputability of the conduct without really trying it. The attribution is rather "deduced" starting from a generic finding on the exercise of jurisdiction. This method can be shared if one considers that the court does not look so much at the attribution, but at the violation of the positive obligations placed on states parties by ECHR. However, if this position is adopted, the jurisdiction must be verified on the basis of concrete elements. In other words, the interpretative tendency of the court is very pragmatic but can be appreciated if, from a legal point of view, it remains based on clear evidence and provided that ECtHR clarifies when it condemns a state for violation of its positive obligations. At the other extreme, ICJ runs the risk of consolidating its jurisprudence on the assignment of conduct for serious international wrongdoing on the basis of a mixed interpretation of typical standards of public and criminal law.

2. Attribution and international courts, some definitions

Given the complexity of the theme, it is best to start with some references. For the attribution of conduct to the state, we mean "the fact of ascribing the subject to international law (...)"[4]. What are the implications for the judges? Conduct attribution involves a sometimes-

[1]B. SIMMA, Universality of international law from the perspective of a practitioner, in European Journal of International Law, 20, 2009, pp. 280ss.
[2]Sargsyan v. Azerbaijan of 16 June 2015. For further details see: A. VAN AAKEN, I. MOTOC, The ECHR and general international law, Oxford University Press, Oxford, 2018, pp. 194ss. T. RODENHÄUSER, Organizing rebellion: non-state armed groups under international humanitarian law, human rights and international criminal law, Oxford University Press, Oxford, 2018.
[3]ECtHR, Chicago and others v. Armenia of 16 June 2015.
[4]J. SALMON, Dictionnaire du droit international public, ed. Bruylant, Bruxelles 2001, pp. 588ss.

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complex interpretive exercise. In the case of a de jure body, attribution is easier for the judge, although he must in any case verify the corresponding internal regulations. For the individual who is not an organ within the meaning of internal law, the judge must simultaneously interpret the facts and establish beyond what threshold the state was actually controlling the contested acts. The key to this exercise is therefore effectiveness. However, international courts often oscillate in identifying in what cases a state behavior is actually decisive in guiding individual actions. This phenomenon has become more visible since other courts in addition to ICJ have dealt with attribution, because the criteria used by the Court of Hague have been reinterpreted or questioned. The consolidated method in international jurisprudence derives from the combined reading of Articles Project[5] elaborated by the International Law Commission (ILC) in 2001 and ICJ jurisprudence[6], with a focus on Nicaragua v. USA[7], Bosnia v. Serbia-Montenegro[8] and Croatia v. Serbia[9] cases. In general, the beating heart of conduct attribution is in determining the link between state and individual's act regardless of whether these acts fit into the context of an international armed conflict or not. Articles Project highlights how the attribution rules revolve around two pillars[10]: conduct attribution of a de jure organ ex art. 4[11] or acts attribution of an individual or a group pursuant to art. 8[12]. Articles Project with respect to art. 8 indicates three possibilities for attribution: 1) education; 2) direction; 3) control. In the case of education, the attribution refers to the moment in which a decision is made, while the other two hypotheses are necessarily carried out with the execution of the act[13]. It is interesting to note that ILC refers to individuals "acting on instructions of, or under the direction or state control"[14]. The focus of the law therefore seems to be not so much group act, but of state forces to which the conduct must be attributed[15].

[5]Report of the International Law Commission to the General Assembly on the Work of its Fifty-Third Session, in Yearbook of International Law Commission, 2001, vol. 2, adopted from the General Assembly of 28 January 2002, GA/RES/58/63, UN Dov. A/587589.

[6]G. NOLTE, Treaties and subsequent practice, Oxford University Press, Oxford, 2013. D. LIAKOPOULOS, Complicity of States in the international illicit, ed. Maklu, Antwerp, Portland, 2020.

[7]ICJ, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), sentence of 17 June 1986. R. KOLB, Theory of international law, Hart Publishing, Oxford & Oregon, Portland, 2016.

[8]ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia-Montenegro), sentence of 26 February 2007. R. KOLB, Theory of international law, op. cit.,

[9]ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Croatia v. Serbia), sentence of 15 February 2015. R. KOLB, Theory of international law, op. cit.,

[10]This observation is valid with respect to the theme of this contribution. The authoritiveness of the Article Project is not only based on the determination of the de jure organ, but also, for example, on the definition of ultra vires behavior by the organ or on responsibility for activities carried out by the insurrectional movements ex. art. 10.

[11]Project of article, n. 4: "The conduct of any state organ shall be considered an act of the state under international law, whether that organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the state, and-whatever its character as an organ of the central government or of a territorial unit of the state. An organ includes any person or entity which has that status in accordance with the internal law of the state".

[12]Project of articles, art. 8: "The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on instructions of, or under the direction or control of, that state carrying out the conduct".

[13]L. CAMERON, V. CHETAIL, Privatizing war: private military and security companies under public international law, Oxford University Press, Oxford, 2013, 205-208. T.D. GILL, D. FLECK, The handbook of the international law of military operations, Oxford University Press, Oxford, 2015.

[14]G. NOLTE, Treaties and subsequent practice, op. cit.,

[15]A.J.J. DE HOOGH, Articles 4 and 8 of the 2001 ILC articles on State responsibility, in British Yearbook of International Law, 2001, pp. 278ss. L. CAMERON, V. CHETAIL, Privatizing war: private military and security companies under public

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Precisely ICJ elaborating Nicaragua test[16] has consecrated state approach.

3. International Court of Justice to facts test

ICJ's approach to attribution issues can be summarized by a direct reference to Bosnia v. Serbia case[17]. It is in this dispute that ICJ introduces its current model of interpretation towards conduct attribution, being able to rely both on ILC draft articles adopted 6 years earlier and on its own jurisprudence in Nicaragua v. USA and Congo v. Uganda cases[18]. First ICJ assesses whether the documents being judged were carried out by organs of the respondent state, bodies that are therefore the armed wing of the state. In the event that it is not shown that, these are de jure organs, the court checks whether the agents are individuals who acted under the instructions or the direct control of the third state[19].

In particular, in Bosnia v. Serbia case ICJ was to establish the relationship between Serbia and Bosnian Serb armed group of the Republic of Srprska. Bosnia argued that there was sufficient evidence of funding, coordination between military and statements by Serb officials that Belgrade controlled Bosnian Serb forces. According to ICJ, on the other hand, Republic of Srprska forces enjoyed a too high degree of autonomy, which could lead one to think they were not under the direction and effective control of Serbia[20]. In rejecting Bosnia's claims, court reiterated first that conduct attribution of non-organ individual to state must be considered exceptional[21]. In any case, the complete dependence on the state in question must be proven on the basis of Nicaragua test[22].

4. The relationship between dependence and potential control in Nicaragua test

In Nicaragua v. USA sentence the issue of attribution to ICJ concerned the activities of contras paramilitary group and the alleged support provided to them by the United States in order to destabilize the regime in Nicaragua. The Nicaragua test consists of two parts, allowing ICJ to identify two categories of individuals to whom state acts can be imputed, if they are not de jure organs. The first group includes those agents that are totally dependent on the third state, i.e. paid, equipped and operating according to state directives. The second group, on the other, includes those who, despite the fact that there is evidence of cooperation or financing from the third state, retain a certain degree of autonomy. This is the case with the paramilitary group of

international law, op. cit., 162ss. Y. DINSTEIN, War, aggression and self-defense, Cambridge University Press, Cambridge, 2017. G. NOLTE, Treaties and subsequent practice, op. cit.,

[16]Project of articles, op. cit., pp. 47-48.

[17]ICJ, Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia- Herzegovina v. Serbia-Montenegro), sentence of 19 June 2007.

[18]ICJ, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), sentence of 19 December 2005, para. 160.

[19]ICJ, Bosnia v. Serbia, op. cit. cit., reaffirmed the obiter from the case: Nicaragua v. USA, al para. 384: «it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent (...)".

[20]ICJ, Bosnia v. Serbia, 471.

[21]ICJ, Nicaragua v. USA, 390-392.

[22]ICJ, Bosnia v. Serbia, 471: "It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres".

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contras. In Nicaragua v. USA, ICJ establishes that the United States by training the contras have violated the customary prohibition of use of force, thereby incurring international responsibility. In paragraph 292, ICJ considers that the United States "by those acts of intervention referred to in subparagraph (3) here of (arming and training of the contras) which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another state". As argued in doctrine, the text suggests that ICJ acts attributes to the United States to prove its responsibility internationally are those made by the American officers in providing arms and training the contras[23]. Accepting this interpretation, however, conduct attribution to the state is uncertain. This is even truer given the clarity with which ICJ supports the non-attribution of acts for violations of international humanitarian law. Such violations committed by the contras are not attributable to the United States because for those specific acts there is not sufficient evidence to establish effective control. In other words, ICJ has no evidence that each of those violations was ordered by the United States, or that they forced the contras to complete them. The ratio decidendi of the court seems to be guided by a specific cause-effect link: dependence generates potential control. The greater the degree of dependence, the greater the control and responsibility. In other words, in the case of effective control, the heart of the decision is not to establish whether you are dealing with a de jure or de facto body, but whether the third state through its organs has guided and directed institution activities.

5. Effective control and test standard in Bosnia v. Serbia and Croatia v. Serbia

As already introduced, ICJ in Bosnia v. Serbia confirms the authoritativeness of Nicaraguan test in 2007 and in Croatia v. Serbia in 2015. In both sentences, Nicaragua test is preferred over the approach adopted by Chambers Appeal of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Tadić[24]. The latter jurisdiction had in fact

[23]The French version of par. 292 confirms this interpretation, placing the accent on the activity of US officials "(...) ainsi que par les actes d'intervention impliquant l'emploi de la force visés au sous-paragraphe (3) ci-dessus, ont, à l'encontre de la République du Nicaragua, violé l'obligation que leur impose le droit international coutumier de ne pas recourir à la force contre un autre Etat (...)".

[24]ICTY, Chamber Appelas, Prosecutor v. Tadić, case n. IT-94-1-A, sentence of 15 July 1999. M.W. BADAR, The concept of mens rea in international criminal law. The case for a unified approach, Hart Publishing, Oxford & Oregon, Portland, 2013. J. PEAY, Mental incapacity and criminal liability: Redrawing the fault lines? in International Journal of Law and Psychiatry, 42, 2015, pp. 4ss. M.E. BADAR, The mental element in the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective, in Criminal Law Forum, 19 (3), 2008, pp. 477ss. According to the above author: "(...) a number of theories have emerged in criminal law to distinguish between dolus eventualis and advertent negligence, among others, consent or approval theory (die Billigungs-oder Einwilligungtheorie), indifference theory (die Gleichgültigkeitstheorie), possibility theory (die Vorstellungs-oder Möglichkeitstheorie), probability theory (die Wahrscheinlichkeitstheorie), combination theory (Kombinationstheorien) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory (...)". D. LIAKOPOULOS, Rough justice: Anatomy and interpretation in the exclusion of individual criminal liability in international criminal justice, in Revista do Curso de Direito do UNIFOR, 10(1), 2019, pp. 154ss. R.S. CLARK, The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences, in Criminal Law Forum, 12, 2001, pp. 296ss. R. CRYER, H. FRIMAN, D. ROBINSON, E. WILMSHURST, An introduction to international criminal law and procedure, Cambridge University Press, Cambridge, 2010. A. ESER, Mental elements-Mistake of fact and mistake of law, in A. CASSESE, P. GAETA, G.R.W.D JONES (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, Oxford, 2002, pp. 890ss. A.G. GIL, Mens rea in

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considered that the acts of organized armed groups-such as the Bosnian Serbs-could be attributed to the state if it exercises an overall control over such groups. The overall control test was not meant to replace the effective control of ICJ, nor to be applied only in the verification of the international nature or not of an armed conflict[25]. This is particularly noticeable by the fact that the Chambers Appeal of ICTY refers to two different types of tests. On the one hand, (i) in the case of acts performed by individuals engaged by the state to perform specific violations, effective control is required for each action[26]. On the other, (ii) for actions carried out by military or paramilitary groups that have their own structure, according to Chamber it would be inappropriate to believe that each action can be directed by a third state[27]. This is where overall control comes into play. This is a standard that is satisfied in the presence of a general control, which still requires funding, training and coordination tests of military activity, but allows greater room for maneuver. The Chamber Appeals therefore does not dispute the ICJ method; rather it makes a distinction in the areas of application, on the one hand the effective control for the individual individuals, on the other the overall control for the armed groups[28].

co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments against punishment for excesses committed by the agent or the co-perpetrator, in International Criminal Law Review, 14, 2014, pp. 87ss. K.J. HELLER, The Rome Statute of the International Criminal Court, in K.J. HELLER, D. DUBBER (eds.), The handbook of comparative criminal law, Stanford Law Books, Stanford, 2011, pp. 597ss. S. PORRO, Risk and mental element: An analysis of national and international law on core crimes, ed. Nomos, Baden-Baden, 2014. K.M.F. KEITH, The mens rea of superior responsibility as developed by ICTY jurisprudence, in Leiden Journal of International Law, 14, 2001, pp. 618ss. P.H. ROBINSON, J.A. GRALL, Element analysis in defining criminal liability: The model penal code and beyond, in Stanford Law Review, 35, 1983, pp. 685ss. D. FLECK, The law of non-international armed conflict, in D. FLECK (eds.), The Handbook of International humanitarian law, Oxford University Press, Oxford, 2013, pp. 581-610. E. WILMSHURTS (eds.), International law and the classification of conflicts, Oxford University Press, Oxford, 2012. D. LIAKOPOULOS, The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence, ed. Maklu, Antwerp, Portland, 2019.

[25]In Tadić case, the juridical question that TPI Appeals Chamber for the former Yugoslavia finds itself resolving is primarily of jurisdiction. The Chamber of First Instance considered that Tadić was not responsible for serious violations of the four Geneva Conventions ex art. 2 of the ICC Statute because this article was not applicable to internal conflicts such as the Bosnian Serb conflict. The Prosecutor appealing the decision had challenged the internal nature of the conflict. In this context, the rules of general international law concerning state responsibility were emphasized ad adiuvandum in interpreting when an armed movement belongs to a third state so as to make the nature of the international conflict as established in art. 4 (A) (2) of the III Geneva Convention. See in argument: A. CASSESE, The Nicaragua and Tadić test revisited in light of the ICJ judgment on genocide in Bosnia, in European Journal of International Law, 18 (4), 2007, pp. 649-668.

[26]ICTY, Prosecutoe v. Tadić, op. cit., par. 141.

[27]ICTY, Prosecutor v. Tadić, op. cit., para. 131-137.

[28]The International Criminal Court (ICC) in the Lubanga case has also applied the test in other international proceedings, in particular. See ICC, Pre-Trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, case no. ICC-01/04-01/06, 2007, para. 208-211; CPI, Trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, cause n. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 2012, par. 551. For further details see: T.R. LIEFLÁNDER, The Lubanga judgment of the ICC: More than just the first step? in Cambridge Journal of International and Comparative Law, 2012, pp. 191–212. G.J. KNOOPS, Defenses in contemporary international criminal law, Transnational Publishers, 2001, pp. 97ss. J. GEERT, J. KNOOPS, Defenses in contemporary international law, The Martinus Nijhoff, The Hague, 2008, pp. 7ss. V. EPPS, L. GRAHAM, Examples and explanations for international law, Wolters Kluwer Law, Alphen aan den Rijn, 2014. E.R. FIDELL, E.L. HILLMAN, D.H. SULLIVAN, Military justice: Cases and materials, Lexis Nexis, New York, 2012. J.D. OHLIN, Targeting and the concept of intent, in Cornell Law Faculty Publications, paper 774, 2013, pp. 84ss. T. WEIGEND, Intent, mistake of law, and co-perpetration in the Lubanga Decision on the confirmation of charges, in Journal of International Criminal Justice, 8, 2008, pp. 476ss. G. WERLE, F. JESSBERGER, Principles of international criminal law, Oxford University Press, Oxford, 2014. G. WERLE, F. JESSBERGER, Unless otherwise provided: Article 30 of the ICC Statute and the mental element of crimes under international criminal law, in Journal of International Criminal Justice, 3, 2005, pp. 37ss. K. AMBOS, Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung, Duncker and Humblot, Berlin, 2002. J. CROWE, K. WESTON-SCHEUBER, Principles of international humanitarian law, Edward Elgar Publishers, 2013, pp. 149ss. P. WEBB, International judicial interpretation and fragmentation,

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In the judgments of 2007 and 2015, we can see an increase in the standard used in Nicaragua v. US, stiffening the positions of the court. Two elements are highlighted: 1) the restrictive interpretation of the Nicaragua test; 2) the use of typical criminal law standards to verify the subjective element of the state crime of genocide. On the first point, despite bearing the Nicaraguan test letter, ICJ refers only to groups or bodies that act in complete dependence on the third state[29]. In this sense, the method seen above-dependence generates potential control-it is applied in an even more restrictive way. The court in fact does not distinguish between the hypotheses of totally dependent agents and that retain a large degree of autonomy as it had in 1986[30]. The issue of attribution is dealt with in a limited way in 2015. The court does not consider it necessary to rule further on conduct attribution since the objective element of the genocide has not been verified[31]. Terms"serbs" and "serbian forces" are both used in the sentence without prejudice to the attribution of malicious behavior to the state[32]. As regards the standard of proof, ICJ refers to "(...) fully conclusive evidence"[33]. The level of certainty required is beyond reasonable doubt, typical terminology of criminal law. In particular, the court uses this standard of criminal law typical of the verification of individual mens trial to determine the existence of offense. In Croatia v. Serbia, the court did not explicitly mention the standard, but this is deducible from its approach[34]. ICJ in fact believes that dolus specialist of the genocide is determined when the probative elements "could only

Oxford University Press, Oxford, 2013, pp. 140ss. M. WELLER, The oxford handbook of the use of force in international law, Oxford University Press, Oxford, 2015, pp. 724ss. C. NYSTEN, S. CASEY-MASLEN, A. GOLDEN BERSAGEL, Nuclear weapons under international law, Cambridge University Press, Cambridge, 2014.

[29]ICJ, Bosnia v. Serbia, op. cit., para. 392: "(...) provided that in fact the persons, groups or entities act in "complete dependence" on state, of which they are ultimately merely the instrument (...)".

[30]S. TALMON, The responsibility of outside powers for acts of secessionist entities, in International and Comparative Law Quarterly, 58, 2009, pp. 498ss. S. NTUBE NGANG, The position of witnesses before the International Criminal Court, ed. Brill, The Hague, 2015.

[31]ICJ, Croatia v. Serbia, op. cit., parr. 441-442.

[32]ICJ, Croatia v. Serbia, op. cit., par. 104.

[33]ICJ, Bosnia v. Serbia, op. cit., para. 208: "claims against a state involving charges of exceptional gravity must be proved by evidence that is fully conclusive. The court requires that it be fully convinced that allegations made in the proceedings […] have been clearly established. The same standard applies to the proof of attribution for such acts (...)".

[34]S. SCHACKELFORD, Holding States accountable for the ultimate human rights abuses: a review of the ICJ's Bosnian genocide case, in Human Rights Brief, 2007. See art. 1 of Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS, pag. 277. P. BEHRENS, R. HENNAM, Elements of genocide, ed. Routledge, London & New York, 2013, pp. 194ss. Y. BEIGBEDER, International Criminal Tribunals, ed. Palgrave, London, 2011. R.S. SÁNCHEZ REVERTE, Referencia al crimen de genocidio aprocimation genocide crime, in Revista de Estudios Jurídicos, 16, 2016. M.J. KELLY, The debate or genocide in Darfur, Sudan, in University of California, Davis Journal of International Law & Policy, 19 (1), 2012, pp. 208ss. C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, in Genocide Studies and Prevention: An International Journal, 9 (1), 2016, pp. 80ss. R. MAISSON, Justice Pènale Internationale, ed. PUF, Paris, 2017. D.S. BETTWY, The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law? in Notre Dame Journal of International and Comparative Law, 1 (1), 2011, pp. 102ss. H. BLAISE NGAMENI, La diffusion du droit international pènal dans les ordres juridiques africaines, ed. L'Harmattan, Paris, 2017. K. CALVO-GOLLER, La procèdure et la jurisprudence de la Cour pènale Internationale, ed. Lextenso, Paris, 2012. M.A. DRUMBL, Rule of law amid lawlessness: Counseling the accused in Rwanda's domestic genocide trials, in Columbia Human Rights Law Review, 29, 1998. H. ALONSO, Current trends on modes of liability for genocide, crimes against humanity and war crimes, in C. STAHN, L. VAN DEN HERIK (eds.), Future perspectives on international criminal justice, T.M.C. Asser press, The Hague, 2010, pp. 522-524. S. MANACORDA, C. MELONI, Indirect perpetration versus Joint Criminal Enterprise: Concurring approaches in the practice of international criminal law?, in Journal of International Criminal Justice, 9 (1), 2011, pp. 165ss. A. CASSESE, The nexus requirement for war crimes, in Journal of International Criminal Justice, 10, 2012. B. DON TAYLOR III, Crimes against humanity in the Former Yugoslavia, in R. BELLELLI (eds.), International criminal justice. Law and practice from the Rome Statute to its review, ed. Ashgate Publishing, Farnham, 2010, pp. 285-294.

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point to the existence of such intent"[35]. The standard of proof used is therefore a mixed standard, which refers to criminal law but which applies to state responsibility of an illicit fact.

By virtue of the genocidal act gravity, it is not surprising to adopt such a criterion. However, the use of criminal jurisdiction standard complicates the development of ICJ argumentation, because on the one hand it does not make it possible to distinguish between civil, public or state. On the other, it is almost impossible to prove the illicit genocide. Faced with this rigor, ECtHR seems to be completely different.

6. ECtHR between jurisdiction and attribution

The attribution to a state of para-state" or separatist organizations conduct is not a new matter for the court of Strasbourg. Since the late nineties of the last century with the creation of Northern Cyprus, ECtHR has indeed had to deal frequently with institutions such as Transnistria, South Ossetia and Nagorno-Karabakh. The presence of separatist bodies in the territory of a state party to the Convention places the court in addresses legal issues related both to the status of these entities and to their relationship with third states. Two judgments were made in June 2015 concerning the violation of property rights as protected by article 1 of the first Protocol[36] to ECHR in the Nagorno-Karabakh region[37]. Chicago et al. v. Armenia, Sargsyan, and others v. Azerbaijan cases were treated by the court simultaneously because the territorial link was the same. However, here we will focus on Chicago, where the profiles of conduct attribution of private

[35]ICJ, Croatia v. Serbia cit., para. 148.

[36]First Additional Protocol which entry into force on 18 March 1954. For further details see: B. RAINEY, W. WICKS, C. OVEY, Jacobs, White and Ovey: The European Convention on Human Rights, Oxford University Press, Oxford, 2017. J.P. COSTA, La Cour européenne des droits de l'homme. Des juges pour la libertè, ed. Dalloz, Paris, 2017. F. TIMMERMANS, Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights, in M. VAN ROOSMALEN and others, (eds.), Liber amicorum Pieter Van Dijk, Intersentia, Antwerp, Oxford, 2013, pp. 225ss. D. HARRIS, M. O'BOYLE, C. WARBRICK, Law of the European Convention on Human rights, Oxford University Press, Oxford, 2014, pp. 372ss. A. SEIBERT-FOHR, M.E. VILLIGER, Judgments of the European Convention of Human Rights. Effects and implementation, ed. Nomos, Baden-Baden, 2017.

[37]The Nagorno-Karabakh region is one of the most disputed in the entire Caucasus since the late nineteenth century. Currently, the most interesting legal profiles with respect to Nagorno-Karabakh concern the proclaimed independence of Azerbaijan, which we should not discuss here. However, a brief historical note is necessary. The Nagorno-Karabakh region has always been a transit ground and, therefore, ethnically mixed. At the end of the nineteenth century, the Russian domination on the territory favors the Armenian presence on the one hand and on the other foments the intolerance of Azerbaijan, which does not enjoy a privileged treatment on the part of Russians and does not have a fully efficient central apparatus. The first independents ambitions date back to 1918, the period of October revolution during which Russia concentrated on internal problems partially lost control over the Caucasian area. The decision of the Russian central government in 1920 to include Nagorno-Karabakh in the territory of Azerbaijan, definitively sanctioned by USSR Constitution, represents the turning point in the history of the region. The claims by Armenia continue and take hold in 1988, thanks to the moment of confusion within the Soviet power. Thus began a civil war in the disputed territory between Armenia and Azerbaijan that culminates in the declaration of independence of Nagorno-Karabakh in 1994. The Republic of Nagorno-Karabakh is self-proclaimed in compliance with the combined law of the Secession and the Constitution of the Soviet Union. Leaving aside the issues related to the conformity of secession with current domestic law, the creation of Nagorno would probably not have occurred without the Armenian support, given the size of the region and the strength of the movement. Nagorno-Karabakh was not recognized by most members of the international community, and the diplomatic dispute between Armenia and Azerbaijan was mediated by OSCE and the Group of Minsk, without however having produced results. In 2007, the three Representatives of the USA, France and Russia Group proposed a series of Basic Principles for the settlement of the dispute. Among the proposals, the restoration of Azeri control over the territory of Nagorno in exchange for granting an interim status to the Nagorno-Karabakh entity until the final decision to be taken with a referendum. No formal agreement based on these principles has yet been signed. See: H. KRUGER, V. WALTER, Self-determination and secession in international law, Oxford University Press, Oxford, 2014, pp. 214-220.

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individuals to the state are more detailed[38].

The case arises from the application of six Azerbaijani citizens who complain about the violation by Armenia of art. 1 of the First Additional Protocol and of art. 8 of ECHR. According to the applicants, Armenia occupying the district of Lachin would have prevented them from regaining possession of the abandoned properties due to the outbreak of the Nagorno-Karabakh conflict in 1992. Hence, the applicants complain that the damage was not compensated[39]. Alongside the primary violation, the violation of articles 13-lack of effective remedies-and 14-discrimination on an ethnic and religious basis is outlined. ECtHR has welcomed Chicago and others allegations considering that Armenia had no reason to deny the applicants access to the properties located in Lachin without providing a fair satisfaction in return.

ECHR violations are part of a situation typical of international law, such as the conflict between state agencies and armed groups or, more generally, conflicts over disputed territories. Although ECtHR is faced with a question of public international law tout court[40], operating within ECHR, it must first verify that at the time of the infringement there was exercise of defendant state jurisdiction in the territory in question, pursuant to art. 1 of the Convention[41]. This is an essential preliminary verification, since it serves as a basis for the assessment of any breach of positive or negative obligations. As already mentioned, in fact, in the framework of the protection of human rights, ECHR requires states parties to refrain from engaging in behaviors that may generate an infringement, or to act to protect individuals under their jurisdiction from violations.

7. Effective control of the separatist body as proof of jurisdiction exercise

According to the appellants, the exercise of Armenian jurisdiction over Lachin derives (i) from state direct control and support towards Nagorno-Karabakh forces, or alternatively, (ii) from the exercise of authority of part of the Armenian forces present in the territory of Nagorno. Already here, we introduce a fundamental theme to understand the jurisprudence of the court with respect to separatist bodies, i.e. the link between attribution and jurisdiction. Starting from the jurisdiction, the central point of the appeal of Chicago et al. it is the

[38]The main distinction between two judgments concerns the status of territories in which the violations took place. In Chicago, the area of reference is the Lachin, a strip of Azeri land that separates the country from Armenia, but controlled by the secessionist body Nagorno-Karabakh. In Sarsygan, however, the complaints relate to properties in the district of Gulistan, an area almost deserted after the clashes of 1992-1994. It is, in fact, a border territory between Azerbaijan and Nagorno, probably mined and with armed groups stationed on the borderline. For the first time, the court has to deal with a territory where it is not only unclear whether the authorities of the respondent state have effective access, but above all, where individuals do not live. In this sense, see the concurring opinion of Ziemele judge in Sarsygan v. Azerbaijan, in particular on the concepts of limited liability and presumption of jurisdiction under the ECHR on para. 2-5. for further details see: C. GRABENWARTER, European Convention on human rights: ECHR, C.H. Beck, München, 2014.

[39]Chicago and others v. Armenia cit., par. 1-25. Specifically, the applicants claimed that their Azeri-Kurdish mixed ancestors had lived in Lachin for hundreds of years. In May 1992, with the outbreak of the conflict in Nagorno, they had been forced to take refuge in Baku. Since then, the presence of Armenian armed forces had prevented them from returning home.

[40]ECtHR, Behrami and Beherami v. France and Saramati v. France, Germany v. Norway of 31 May 2007, para. 122. Bankovic and others v. Belgium of 12 December 2001, para. 57. F. MARCHADIER, Convention européenne des droit de l'homme et des libertès fondamentales, in Revue Critique de Droit International Privè, 193 (4), 2014, pp. 679-694.

[41]S. TALMON, The responsibility of outside powers for acts of secessionist entities, op. cit., pp. 493-512.

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extraterritorial application of ECHR, as consolidated in particular in Al-Skeini et al. v. GB[42], Ilascu and others v. Moldova and Russia[43] and Catan and others v. Moldova and Russia[44] cases.

The term jurisdiction ex. art. 1 of the Convention must be interpreted first of all in a territorial sense. Progressively, however, the court has elaborated some exceptions to this interpretation, both in cases where the violations took place in disputed territories and in the event of war occupation[45]. When ECtHR enters the merits in Chicago, it immediately dismisses the hypothesis of the exercise of authority by Armenian officials directly on the territory[46]. On the other, it is the question of having to prove effective control in order to establish the responsibility of Armenia for the violation of ECHR[47]. In this sense, ECtHR already anticipates the setting of its argument, suggesting that it will oscillate between jurisdiction and attribution. As proof of this interpretation, reference can be made to Jaloud v. the Netherlands case[48]: although ECtHR does not dwell on the point in the device, in attribution and jurisdiction sentence are clearly defined different institutes[49], contra Chicago.

In determining jurisdiction exercise, ECtHR does not consider it necessary to ascertain exactly how many Armenian soldiers are present in Nagorno-Karabakh[50], despite this being the subject of contention between the parties. Leveraging on the report of International Crisis Group[51] that testify the Armenian military presence and funding for Nagorno territory management activities, as well as on the presence of former Armenian officials among the political figures in Nagorno-Karabakh[52], ECtHR concludes that NKR and its administration survive by virtue of the military, political, financial and other support[53]. Referring only to the exercise of a "domination over the territory"[54] ECtHR avoids deploying on the side of war occupation or control over a subordinate authority. This, according to Gyulumyan judge, is the primary fault of the sentence. Not distinguishing the type of control exercised on the territory prevents ECtHR from developing a well-argued ratio decidendi[55]. It is also true; however, that

[42]ECtHR, Al Skeini e al. v. GB, 7 July 2011, para. 149-150.
[43]ECtHR, Ilascu and others v. Moldavia and Russia, 8 July 2004.
[44]ECtHR, Catan and others v. Moldavia and Russia, 19 October 2012.
[45]In this sense, see the case: ECtHR, Loizidou v. Turkey, (preliminary objections) of 23 March 1995, par. 62. Loizidou v. Turkey, (merits) of 18 December 1996, par. 52. Cyprus v. Turkey of 4 July 2001, par. 76; Bankoviće and others v. Belgium, op. cit., par. 70. Ilaşcu, op. cit., par. 314-316. Al-Skeini v. United Kingdom, op. cit., par. 138. C. TEITGEN COLLY, La Convention européenne des droits de l'homme: 60 ans et après? ed. LGDJ, Paris, 2013.
[46]ECtHR, Chicago, op. cit., para. 169: "The court first considers that the situation pertaining in Nagorno-Karabakh is not one of Armenian state agents exercising authority and control over individuals abroad".
[47]ECtHR, Chicago, op. cit., "the issue to be determined on the facts of the case is whether the Republic of Armenia exercised and continues to exercise effective control over the mentioned territories and as a result may be held responsible for the alleged violations (...)".
[48]ECtHR, Jaloud v. The Netherlands of 20 November 2014.
[49]ECtHR, Jaloud v. The Netherlands, op. cit., par. 154: "the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law". For further details: J.M. ROONEY, The relationship between attribution and jurisdiction after Jaloud v. Netherlands, in Netherlands International Law Review, 62, (3), 2015, pp. 407.
[50]ECtHR, Chicago, op. cit., par. 180.
[51]International Crisis Group (ICG), Report, Nagorno-Karabakh: Viewing the Conflict from the Ground, 14 September 2005, 9-10.
[52]ECtHR, Chicago, op. cit., par. 181: "integration of the two entities is further shown by the number of politicians who have assumed the highest offices in Armenia after previously having held similar positions in the NK Republic".
[53]ECtHR, Chicago. op. cit., par. 186.
[54]ECtHR, Chicago, op. cit., par. 168.
[55]Chicago, op. cit, and the dissenting opinion of judge: Gyulumyan, par. 50: "The fundamental problem lies in the Court's failure to distinguish situations where the control over the territory is established through "a subordinate local

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more than one element in the sentence seems to suggest the presence of a subordinate local administration. The court also mentions other sources of financial support for Nagorno-Karabakh, such as those from the United States or the Armenian diaspora[56]. In this sense, it cannot be understood that the Azerbaijani region has been annexed or placed under occupation. The court refers to Nagorno-Karabakh as an institution, a contracting party to 1994 Cooperation Agreement with Armenia. Therefore, it seems that Nagorno has a fair degree of autonomy; otherwise, ECtHR could have limited itself to talking about groups armed or separatist movements[57]. Moreover, since the ruling on Cyprus Nord[58] ECtHR had not excluded that in addition to the occupation of war there could be other situations such as to justify the exercise of effective control over the territory, indicating explicitly the presence of a subordinate administrative authority[59]. However, precisely because it is talking about a subordinate authority it is necessary to prove the attribution.

8. Test standards and attribution in Chicago and others v. Armenia

The need to establish what kind of control a third state exercises over a non-state body was set for the first time following the creation of North Cyprus. In Loizidou, ECtHR described the Turkish control in terms of an effective authority that gave an effective overall control[60]. Leaning on the extensive evidence of Turkish occupation, as well as on the Security Council resolutions[61], which demanded not to recognize the illegitimate occupation of North Cyprus, the attribution to Turkey of Turkish Cypriot acts was proven[62]. In Chicago, however, Armenia status is not comparable to that of Turkey. Specifically, one could say that there are elements such as the massive deployment of armed forces, which suggest that the creation of Nagorno-Karabakh took place in 1992 with the indispensable support of Armenia. However, it is very difficult to establish the importance of maintaining this support over time, with the progressive strengthening of Nagorno-Karabakh forces. Above all, the non-position taken by the international community weighs heavily. There are no binding documents that go beyond the observation of a high

administration" from situations where control is established through "the contracting state's own armed forces". And this is not simply a difference in fact; it is a difference in law, since both situations are concerned with different rules of attribution (...)".

[56]Chicago, op. cit., par. 185.

[57]In the dissenting opinion, judge disputes the fact that by not indicating the degree of control, the court leaves ample room for maneuver to oscillate between the application of articles 4 and 8 of the Article Project. However, on closer inspection, the court does not go so far. With due caution, it can be said that if the court defines Nagorno as an entity and not an Armenian armed wing, it leaves room at least implicitly for the application of the only art. 8.

[58]ECtHR, Loizidou v. Turkey, (preliminary objections), op. cit., par. 62. Loizidou v. Turkey, (merits), op. cit., par. 52.

[59]If this interpretation is accepted, however, it is not clear why the Court has included in the part of the law the four Geneva conventions and the Hague conventions, an element which adds strength to the thesis of the relative ambiguity of the sentence on the subject.

[60]ECtHR, Loizidou v. Turkey (merits), op. cit., par. 52-56; Cyprus v. Turkey, op. cit., par. 77. A variant of the effective overall control was proposed in Issa et al. v. Turkey, where the Court referred to the control of the Turkish mission in northern Iraq used the formula "temporary effective overall control". See also: Issa and others v. Turkey of 16 November 2004, par. 74.

[61]Resolutions of Security Council, n. 541(1983) of 18 November 1983, par. 1-2 and 7 and n. 550(1984) of 11 May 1984.

[62]Support for the Court's findings in Loizidou v. Turkey we find it also in the Commentary to the Project of articles of the ILC cit., Regarding the application of the art. 8. pp. 48.

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Armenian presence on the territory. The Security Council resolutions do not directly refer to the Armenian occupation, as is noted by the fact that the withdrawal of troops is requested through the generic "demands the withdrawal of all occupying forces"[63].

In Chicago, the court gives extensive weight to the report of Human Rights Watch[64], statements of Armenian officers and military cooperation agreement signed by Armenia and Nagorno in 1994. The use of reports by non-governmental organizations and declarations is not an established practice in the jurisprudence of Strasbourg: in Loizidou as in Ilascu, the court considered it necessary to base itself on the work of the committees of inquiry[65]. Pursuant to art. 38 of ECHR, ECtHR can proceed to the examination of witnesses or organize the same inquiries. The committees of inquiry are a rather rare practice: by virtue of the role of last resort of the court, it is not surprising that this jurisdiction is refractory to the organization of inquiry committees[66]. However, in the event that there are substantial divergences concerning the reconstruction of facts, the court proceeds to set up a commission, both in the admissibility decision and during the procedure. In Ilascu, the delegation of four judges who had interviewed numerous witnesses in Moldova had provided considerable support for the elaboration of Court's device[67]. Hence, in Chicago and others, Armenia had requested to provide more information through a commission of inquiry[68], but the court held that it was not necessary[69]. By contrast, ICJ in Nicaragua v. USA had outlined a very scrupulous test evaluation model. The model gave particular relevance to disinterested statements by representatives regarding criticisms of their own state, while little weight is given to the testimony of military officers[70]. It must be said, however, that court's scrupulousness was strengthened by the fact that US support on the activities of contras was widely proven[71].

ECtHR's approach to the military agreement between Armenia and Nagorno-Karabakh is of particular interest compared to documents. The text seems to suggest far more than an

[63]Security Council of UN, Resolution n. 822 (1993) of 30 April 1993, operative 1. Council of Security, Resolution n. 853 (1993) of 29 July 1993, operative 8: "(...) urges the government of the Republic of Armenia for the Nagorno Karabakh of resolution 822". To have a more direct stance against Armenia one must look at the General Assembly resolution A/RES/62/243 of 14 March 2008, operative 2: "demands the immediate (...) withdrawal of all Armenian forces from all occupied territories of the Republic of Azerbaijan (...)".

[64]Human Rights Watch, Report, Seven Years of Conflict on Nagorno-Karabakh, 8 December 2004.

[65]On the point v. the Dissenting Opinion of Judge Gyulumyan, par. 43. The judge notes in particular how the art. 19 of the Convention puts to the Court the duty to "ensure the observance of the engagements undertaken by the High Contracting parties". The Court, in other words, would have been asked in this case in relation to the legal obligation to set up a commission of inquiry, above all to be able to express itself on the merits of the case.

[66]P. LEACH, Taking a case to the European Court of Human Rights, Oxford University Press, Oxford, 2011, pp. 55ss. See also the case: Klaas v. Germany of 22 September 1993, par. 29. A. AUST, Handbook of international law, Cambridge University Press, Cambridge, 2010, pp. 230ss.

[67]Press Release of 18 March 2003 concerning Ilascu v. Moldova and Russia.

[68]Chicago cit., Grand Chamber Hearing, 22 January 2014.

[69]To be honest, however, it is good to note that the decision to open a fact-finding mission is also influenced by temporal reasons. In Tanli v. Turkey, the Court, considering that it had been too long since the deeds of judgment had been carried out, did not consider it useful to proceed with its own investigation. ECtHR, Tanli v. Turkey of 10 April 2001, par. 7.

[70]P. REICHLER, The impact of the Nicaragua case on matters of evidence and fact-finding, in Leiden Journal of International Law, 25 (1), 2012, pp. 152ss. E. SOBENES ORREGON, B. SAMSON, Nicaragua before the International Court of Justice: impacts on international law, ed. Springer, Berlin, 2014.

[71]The US Congress, for example, had specifically legislated on the financing of paramilitary groups in Nicaragua. Nicaragua v. USA cit., Par. 152.

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involvement. In the argument of the court, one of the supporting elements is art. 4 of the agreement[72], which provides for the right of the armed forces of the two contracting parties to carry out part of the military service in one of the two countries. However, to note is also art. 5 (1), according to which if Nagorno soldiers in training in Armenia commit crimes, they will be tried under Nagorno-Karabakh jurisdiction. Exercising jurisdiction is perhaps the most striking proof of effectivity on a territory[73]. If he pursued this line, however, ECtHR would probably have to admit the ability to exercise the jurisdiction of Nagorno-Karabakh, going against its own ruling because if it is Nagorno to exercise jurisdiction, it cannot be Armenia. Hence, Court's view on the status of Nagorno-Karabakh is deducible from the interpretation of the agreement. ECtHR does not claim that Nagorno-Karabakh and Armenia are a single body, but finds its own interpretation. He believes that Nagorno-Karabakh militias are more than just a rebel movement inside Azerbaijan, but the court nevertheless claims that NKR forces could not have operated without Armenian support. From here, the judgment can pass to attribution issues.

9. A deductive approach to conduct attribution

With respect to conduct attribution, the court stands on the defensive by stating that the material at its disposal does not allow it to know precisely what the composition of the armed forces in Nagorno-Karabakh is. This does not however prevent it from determining the Armenian responsibility for the violations committed in Lachin. However, we do not directly find any reference to act attribution[74]. Rather, the court seems to infer that the alleged violations are to be attributed to Armenia. Consider effective control as a matter of fact[75] and create the link between jurisdiction and violation in par. 186, when he claims that Nagorno-Karabakh and Armenia are highly integrated[76]. From here, the attribution vanishes from the arguments. One might think that in reality the court does not need to argue about attribution, because it determines Armenia responsibility for violation of its positive obligations. In this sense, however, the court should have better grounded its verification of the exercise of jurisdiction. Although in Chicago appears clearer, the less stringent approach to jurisdiction could be glimpsed already in Ilascu and especially in Catan.

10. Ilascu and others v. Moldova and Russia

In Ilascu, legal issues related to attribution are not dealt directly and in detail. The court has at its disposal

[72]ECtHR, Chiragov, op. cit., par. 74-75.
[73]M.G. KOHEN, Possession contestèe et suvrerainetè territorial, Genève, 1997, pp. 191-212.
[74]The terms "attribution" or "imputability" are in fact almost absent, not only in Chicago but also in the recent jurisprudence of the court. In Catan, for example, the term attribution is used only when the ruling contains ICJ jurisprudence applicable to the present case, para. 76.
[75]ECtHR, Chicago, op. cit., par. 107.
[76]ECtHR, Chicago, op. cit., par. 186 "the two entities are highly integrated in virtually all important matters and that this situation persists to this day (...) Armenia, consequently, exercises effective control over Nagorno Karabakh and the surrounding territories, including the district of Lachin (...)".

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multiple probative elements that demonstrate Russian control to express itself in a less in-depth way from the theoretical point of view. Russia's responsibility for acts in Transnistria is verified on the "decisive influence" standard[77] and as overall control over an area outside its national territory. Although it is an evaluation standard that recalls that ICTY is focused on the overall control of the third state on the armed movement, the court refers scrupulously to the activities to which Russian agents themselves participated. In fact, for its argument, the court has clear evidence of Russian participation and command over the violations committed during the detention of the applicants[78]. In this sense, if the attribution profiles are clearer, the court does not allow to understand whether the acts of separatists in Transnistria are also attributed to Russia or if the focus is only on Russian activities[79].

11. Exercise of jurisdiction and attribution from Catan to Chicago

In Catan, ambiguity reproduces, but the evidence is not as clear as in Ilascu. First, the court states that jurisdiction and attribution are two different institutions[80], but Russia's responsibility is proven on the Ilascu model. Catan indeed opens the way to Chicago to the extent that the two pronunciations share some elements. The first is the temporal connection. The court has to do with violations occurring in a temporal space different from that of Loizidou or Ilascu. In fact, it is not a question of events that occurred at the time of the birth of an institution or in an armed conflict between central government and separatist groups. The reference period in Catan is after the formation of Transnistria, just like the period of time in which the appellants in Chicago complain about ECHR violations. With the passage of time and the establishment of a paramilitary group in a given territory, it is likely that the support of the third state decreases, or in any case assumes different traits that require the scrupulous test of individual act attribution to the third state. In this context, the verification of jurisdiction only on the basis of some NGO reports and official statements is incomplete.

The second common element concerns the burden of proof. In Chicago the court seems to define a probative standard that revolves around expressions like "it could not be expected" or "it is hardly conceivable" that Nagorno-Karabakh-an entity with a population of less than 150000 ethnic Armenians-was able, without the substantial military support of Armenia, to set up a defense force in early 1992"[81]. Court interlocutor seems to be more the defendant, who has the burden of subverting a predictable result,

[77]ECtHR, Ilascu and others v. Moldavia and Russia, op. cit., par. 392.
[78]ECtHR, Ilascu and others v. Moldavia and Russia, op. cit., par. 393.
[79]ECtHR, Ilascu and others v. Moldavia and Russia, op. cit., par 385: "In the Court's opinion, all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime". ECtHR, Costello-Roberts v. United Kingdom of 25 March 1993, par. 23-28.
[80]ECtHR, Catan and others v. Moldavia and Russia, op. cit. par. 115: "the test for establishing the existence of «jurisdiction» under Article 1 of the Convention has never been equated with the test for establishing a state's responsibility for an internationally wrongful act under international law (...)".
[81]ECtHR, Catan and others v. Moldavia and Russia, op. cit.

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so to speak. This suggests a reversal of the onus probabandi, which brings to trial in Catan, when the court upheld its position against Russia stating that it had failed to prove that jurisdiction conditions for extraterritorial exercise had changed after Ilascu[82].

Hence, if we want to find a precedent in court attitude in Chicago, this seems to be above all Catan.

12. Concluding remarks

Based on what has been highlighted so far, multiple reflections are possible. A first general note concerns the impact of very different jurisprudential lines on the fragmentation of law. The tendencies of ICJ and ECtHR seem to consolidate each one in its own dimension and become rigid. This certainly does not favor the uniform interpretation of law[83]. Regarding ICJ, the adoption of penalties in the field of state crime of genocide leaves perplexing. If on the one hand it is a shareable choice given the available information of the Court on the conflict in Ex-Yugoslavia and given the gravity of the offense, there remains a line of interpretation that threatens to weaken the applicability of 1948 Convention. In fact, it is important not only the goal of preventing but also of punishing. Intersecting two individual and state liability-criminal regimes-does not appear to be the purpose of ECHR.

ECtHR approach is more pragmatic, but it can be to the detriment of sound legal arguments. One might think that the court tries to fill the void created by the lack of agreement on the disputed territory, on the one hand, and on the other, the possible normative vacuum[84] in the system of protection of human rights established by ECHR. Would you then face a lex specialist on attribution in ECHR, where the level of control recalls the overall control test elaborated by ICTY-and the attribution is deducted[85]?

One could say yes, with the necessary caution, however. In general, ECtHR seems to us to be acceptable, especially in terms of protecting the individual. If anything, it is a question of refining the method of scrutiny. Defining control in a variable way-from effective to overall, to decisive influence-can also be seen in a positive sense. Although generally accepted, the Nicaragua test has always been elaborated within a specific situation. Therefore, one could consider whether a single test is useful to judges, given that the existence of a certain degree of control depends on the specificity of each case[86]. ECtHR adopts a method of mixed scrutiny, which weaves

[82]ECtHR, Catan and others v. Moldavia and Russia, op. cit., par. 149-150.

[83]L. LINDROOS, Addressing norm conflicts in a fragmented legal system: the doctrine of lex specialist, in Netherlands International Law Journal, 52 (1), 2005, pp. 27-66. G. CONWAY, The limits of legal reasoning and the European Court of Justice, Cambridge University Press, Cambridge, 2012, pp. 156ss. V. JEUTNER, Irresolvable norm conflicts in international legal dilemma, Oxford University Press, Oxford, 2017. N. WALKER Intimations of global law, Cambridge University Press, Cambridge, 2014, pp. 66ss.

[84]Cyprus v. Turkey, op. cit., par. 78. Critics on this point in the partially absent and dissenting opinions are both Judge I. Ziemele, in par. 11, which Judge A. Gyulumyan in par. 58-59.

[85]A. BERKES, The Nagorno-Karabakh cases before the European Court of Human Rights: Pending cases and certain forecasts on jurisdiction and State responsibility, in The Military Law and Law of War Review, 2013, pp. 415ss. A. VAN AAKEN, I. MOTOC, The ECHR and general international law, op. cit.,

[86]This argument was proposed, for example, by the vice president of ICJ Al-Khasawneh in Bosnia v. Serbia, noting that there are not only different degrees of control but that the Bosnian Serbian group presented one "unity of goals, unity of ethnicity and a common ideology, such that the effective control over non-state actor would not be necessary". ICJ, Bosnia v. Serbia cit., dissenting opinion of Judge: Al-Khasawneh, par. 37.

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overall control and evidence of jurisdiction. This is because it is faced with entities with a frozen legal status, against which the international community is unable to take a common position. The ultimate goal does not seem to be to derogate from the existing regime or to create a specific procedure, but to respond to a vacuum of the international system itself in individual's interest. As pointed out by Ziemele, there is no doubt that court's aim to provide compensation to those who forcibly had to abandon their possessions is shareable[87]. It is extremely understandable that this right must also prevail in the face of a stalled international community. Moreover, the Articles Project did not remain blind to the existence of bodies seeking to control disputed territories. Article 10 establishes that an insurrectionary movement once it has become a state is itself responsible for the conduct of its individuals. Paragraph 3, however, does not affect conduct attribution to a third state, governed by the combined provisions of articles from 4 to 9, which must be interpreted and applied according to the established jurisprudence[88].

In Jaloud, Raimondi and Spielman judges in their competing opinion considered the attribution of a non-issue[89]. Such a consideration seems risky: establishing jurisdiction does not imply that any act suspected of constituting a violation of the Convention is attributable to the state in question. The attribution is a relevant legal issue in any case before the court, because the states act because of individuals. A more flexible approach can be accepted if the court focuses on states obligations to protect individuals under their jurisdiction from violations. In other words, two hypotheses are found: on one side (i) the issue of attribution is not raised because, being the suspect a de jure organ, there is no need for further proof. On the other, (ii) one might think that in the context of a treaty on the protection of human rights, positive obligations do not make the precise attribution of the necessary act[90]. In this last case, however, the proof of jurisdiction becomes fundamental. The high integration between two bodies on the basis of generic findings and in a very broad period such as the existence of Nagorno-Karabakh is not sufficient. We need clearer references, perhaps from specific committees of inquiry, that protect the court from the criticism of uncertain arguments and excessive activism in similar cases that will arise, such as Georgia v. Russia or Ukraine v. Russia.

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[87]ECtHR, Chicago, op. cit, dissenting opinion of judge: I. Ziemele, par. 1.

[88]Project of articles, op. cit., art. 10: "1. The conduct of an insurrectional movement, which becomes the new Government of a state, shall be considered an act of that state under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration, shall be considered an act of the new state under international law. 3. This article is without prejudice to the attribution to a state of any conduct, however related to that of the movement concerned, which is to be considered an act of that state by virtue of articles 4 to 9 (...)".

[89]ECtHR, Jaloud v. Netherlands, op. cit., dissenting opinion of D. Spielman e G. Raimondi, par. 7.

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