jurisdiction of the Georgian Republic', and it moreover insisted that 'Georgian law was duly applied in the [Ajarian Autonomous Republic] and that, apart from the present case, with its strong political overtones, there was no problem of judicial cooperation between the central authorities and the local Ajarian authorities' (paras. 133–4 of the judgment). The Court took the view that the events complained of by the applicant fell under the 'jurisdiction' of the Georgian State:

European Court of Human Rights (GC), *Assanidze* v. *Georgia* (Appl. No. 71503/01) judgment of 8 April 2004, at paras. 139–42:

139. The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption.

140. In that connection, the Court notes, firstly, that Georgia has ratified the Convention for the whole of its territory. Furthermore, it is common ground that the Ajarian Autonomous Republic has no separatist aspirations and that no other State exercises effective overall control there (see, by converse implication, *Ilascu, Lesco, Ivantoc and Petrov-Popa* v. *Moldova and the Russian Federation* [GC], No. 48787/99, decision of 4 July 2001; and *Loizidou* v. *Turkey* (preliminary objections) [judgment of 23 March 1995, Series A No. 310]). On ratifying the Convention, Georgia did not make any specific reservation under Article 57 of the Convention with regard to the Ajarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory. Such a reservation would in any event have been ineffective, as the case law precludes territorial exclusions (*Matthews* v. *United Kingdom* [GC], No. 24833/94, ECHR 1999-I, §29) other than in the instance referred to in Article 56 §1 of the Convention (dependent territories).

141. Unlike the American Convention on Human Rights of 22 November 1969 (Article 28), the European Convention does not contain a 'federal clause' limiting the obligations of the federal State for events occurring on the territory of the states forming part of the federation. Moreover, since Georgia is not a federal State, the Ajarian Autonomous Republic is not part of a federation. It forms an entity which – like others (the Autonomous Republic of Abkhazia and, before 1991, the Autonomous District of South Ossetia) – must have an autonomous status ..., which is a different matter. Besides, even if an implied federal clause similar in content to that of Article 28 of the American Convention were found to exist in the European Convention (which is impossible in practice), it could not be construed as releasing the federal State from all responsibility, since it requires the federal State to 'immediately take suitable measures, in accordance with its constitution ..., to the end that the [states forming part of the federation] may adopt appropriate provisions for the fulfillment of [the] Convention'.

142. Thus, the presumption referred to in paragraph 139 above is seen to be correct. Indeed, for reasons of legal policy – the need to maintain equality between the State Parties and to ensure the effectiveness of the Convention – it could not be otherwise. But for the presumption, the applicability of the Convention could be selectively restricted to parts only of the territory of certain State Parties, thus rendering the notion of effective human-rights protection underpinning the entire Convention meaningless while, at the same time, allowing discrimination between the State Parties, that is to say beween those which accepted the application of the Convention over the whole of their territory and those which did not.

Box 2.1. **The 'federal clause' of the American Convention on Human Rights and the implementation of human rights instruments in States with a federal structure**

In the *Assanidze* v. *Georgia* judgment of 8 April 2004, the European Court of Human Rights refers to Article 28 of the American Convention on Human Rights (ACHR), which states in its relevant part (Art. 28 §3 is omitted):

Article 28. Federal Clause

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

This 'federal clause' was inserted into the ACHR at the insistence of the US delegation to the San Jose Conference. The United States saw this clause as a means to ensure that the implementation of the ACHR would remain compatible with the existing allocation of competences between the Union and the States. As the US delegation explained to the Secretary of State following the Conference, the federal clause would ensure that the ACHR 'does not obligate the US Government to *exercise* jurisdiction over subject matter over which it would not exercise authority in the absence of the Convention. The US is merely obligated to take suitable measures to the end that state and local authorities may adopt provisions for the fulfillment of this Convention. Suitable measures could consist of recommendations to the states, for example. The determination of what measures are suitable is a matter of internal decision. The Convention does not require enactment of legislation bringing new subject matter within the federal ambit' (*Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, 9–22 November 1969*, Department of State, 1970, at p. 37). The United States were guided by a similar intent when, upon ratifying the ICCPR, they included the following 'understanding', which in practice should be treated as a reservation:

Reservations, understandings, and declarations entered by the United States upon ratifying the International Covenant on Civil and Political Rights (8 June 1992):

That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

However, neither the federal clause inserted into the ACHR nor, for that matter, the 'understanding' appended to the ratification by the United States of the ICCPR, may affect the law of international responsibility, that clearly attributes to the State itself (represented by the central

government) any acts or omissions of the constituent entities, without it being allowable for the central government to invoke the allocation of competences under the domestic legislation to limit the scope of its international obligations. This is the position overwhelmingly defended in legal opinion (see, e.g. H. Gross Espiell, 'La Convention américaine et la Convention européenne des droits de l'homme – Analyse comparative', *Recueil des cours*, VI, 218 (1989), at 383–7; T. Buergenthal, 'El Sistema Interamericano para la Protección de los Derechos Humanos', *Anuario Juridico Interamericano 1981*, (Washington: OAS, 1982), 127–8):

Inter-American Court of Human Rights, Case of *Garrido and Baigorria* v. *Argentina*, judgment of 27 August 1998 (Reparations and Costs), Series C No. 39, paras. 45–6:

45. Argentina invoked the federal clause or made reference to the federal structure of the State on three different occasions in this dispute. First, when the merits of the matter were being examined, the State argued that, by virtue of the federal clause, any responsibility in the instant case was imputable to the Province of Mendoza, not to the State. Argentina then backed away from this argument and expressly acknowledged its international responsibility at the hearing of February 1, 1996. The State invoked the federal clause a second time when negotiating the May 31, 1996 reparations agreement. At the time, the Province of Mendoza was party to the agreement, not the Argentine Republic, even though the latter had already acknowledged its international responsibility. The Court, however, held that the agreement did not constitute an agreement between the parties since it was not signed by the Argentine Republic, which was the party in the case. Finally, at the January 20, 1998 hearing, Argentina argued that it would have difficulties adopting certain measures given the federal structure of the State.

46. When a federal state's constituent units have jurisdiction over human rights matters, Article 28 of the Convention makes provision for said federal state becoming a party to the Convention. However, from the time of its approval and ratification of the Convention, Argentina has conducted itself as if the federal State had jurisdiction over human rights matters. Hence, it can hardly argue the contrary now, as this would imply a breach of the principle of estoppel. As for the 'difficulties' invoked by the State at the January 20, 1998 hearing, the Court should note that the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation (*cf.* arbitral award of July 26. VII. 1875 in the *Montijo* case, La Pradelle-Politis, *Recueil des arbitrages internationaux*, Paris, 1954, t. III, p. 675; decision of the France-Mexico Mixed Claims Commission of 7.VI.1929 in the *Hyacinthe Pellat* case, *UN Report of International Arbitral Awards*, vol. V, p. 536).

As noted by Hennebel, although this interpretation does not seem in conformity with the intent guiding the insertion of Article 28 in the ACHR, it nevertheless avoids two major difficulties: it ensures that the bodies of the Inter-American human rights system do not have to decide whether the federal government or State or local governments are competent, under the allocation of competences provided for in the domestic constitutional system, for taking the measures required for the implementation of the Convention; and it ensures that the State will not be allowed to invoke its domestic constitution in order to limit the scope of its international responsibility (L. Hennebel, *La Convention américaine des droits de l'homme. Mécanismes de*

protection et étendue des droits et libertés (Brussels: Bruylant, 2007), p. 107; see also, for a general study of the implementation of the ACHR by States with a federal structure, A. E. Dulitzky, 'La Convención Americana sobre Derechos Humanos y los Estados Federales: algunas reflexiones', in V. Bazán (ed.), *Defensa de la Constitución. Garantismo y controles. Libro en reconocimiento al Dr German J. Bidart Campos* (Buenos Aires: Ediar, 2003), p. 157). The approach of the Inter-American Court of Human Rights is, of course, consistent with the requirements of international law. As recalled by the Committee on the Rights of the Child:

Committee on the Rights of the Child, General Comment No. 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6) (CRC/GC/2003/5, 27 November 2003):
[Decentralization, federalization and delegation]
[D]ecentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party's Government to fulfil its obligations to all children within its jurisdiction, regardless of the State structure.
The Committee reiterates that in all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the territories under its jurisdiction. In any process of devolution, States parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention. The Governments of States parties must retain powers to require full compliance with the Convention by devolved administrations or local authorities and must establish permanent monitoring mechanisms to ensure that the Convention is respected and applied for all children within its jurisdiction without discrimination. Further, there must be safeguards to ensure that decentralization or devolution does not lead to discrimination in the enjoyment of rights by children in different regions.

The Inter-American Commission and Court of Human Rights have been confronted with situations where the State claimed that it was unable effectively to control more or less substantial portions of the national territory, and that it should therefore not be held responsible for the failure to protect human rights in those areas. In the case of the *Ituango Massacres* v. *Colombia* (judgment of 1 July 2006, Series C, No. 148), the Government presented testimony according to which the territory in which the massacres – carried out by paramilitaries – had taken place could not be effectively controlled by the local army battalion, due to its excessive area (para. 111, c)). The Court did not make any findings of fact on this point, but considered proven that 'paramilitary groups perpetrated successive armed incursions, murdering defenseless civilians' and that the 'State's responsibility for these acts, which occurred in the context of a pattern of similar massacres, arises from the acts of omission, acquiescence and collaboration by members of the law enforcement bodies based in this municipality' (para. 132).

The Inter-American Commission, under its broader mandate to monitor the situation of human rights in the Americas (see chapter 11, section 2.1.), has regularly included

a section in its annual reports on the situation of human rights in selected countries. This is carried out as a follow-up activity on previous special reports on the situation of human rights in a given country, assessing compliance with recommendations. Four criteria are used by the Commission to determine which countries are to be the object of this reporting: (i) the lack of fair and regular elections in the country; (ii) the adoption of emergency powers and the suspension of rights; (iii) the existence of serious accusations that the State is engaged in mass and gross violations of human rights; and (iv) the fact that a State is in a transition phase, moving from any of the above situations. In its consideration of the situation of human rights in Colombia, the Commission was confronted with the fact that the Colombian State did not exercise full *de facto* control over parts of its territory or over all the actors in the internal armed conflict:

Inter-American Commission of Human Rights, Annual Report 1996, OEA/Ser.L/V/II.95, Doc. 7 rev., 14 March 1997

CHAPTER V
HUMAN RIGHTS DEVELOPMENTS IN THE REGION
COLOMBIA

VII. Paramilitaries

46. The Commission has received credible information from individuals and organizations in the private and public sectors indicating that elements of the Colombian armed forces support and collaborate with the paramilitary groups in carrying out their abusive activities ... The Commission considers to be extremely important the information indicating that state agents participate in the activities of the paramilitaries. That information will be carefully analyzed by the Commission.

47. Nor has the Colombian State acted adequately to control the paramilitary groups. A cloak of impunity has almost completely protected those groups and the members of the security forces allegedly involved with them. The problems described in relation to the military justice system and the excessively broad interpretation of the crimes which should be heard in that system contribute to the problem ...

VIII. The activities of irregular armed groups

53. The extremely difficult conditions caused by the various guerrilla movements in Colombia continued in 1996. These groups committed numerous violent acts, many of which constitute violations of humanitarian law norms applicable to the internal armed conflict in Colombia. These acts included killings outside of armed conflict, kidnapping for ransom, indiscriminate use of land mines and oil pipeline bombings. Guerrillas often carried out extrajudicial executions and other abuses against civilians on the grounds that their victims were either informants for the military or collaborators of the paramilitary groups. The two largest guerrilla groups, the Armed Revolutionary Forces of Colombia ('FARC') and the National Liberation Army ('ELN'), commanded an estimated 10,000 to 15,000 guerrillas organized in various fronts ...

55. Although the Commission does not have the competence under the American Convention to address individual cases alleging violations of rights protected in the Convention which do not involve State responsibility, the Commission has repeatedly condemned the abuses committed by the guerrilla groups in Colombia ...

XII. Conclusions

80. The Commission fully comprehends that Colombia faces extremely difficult circumstances at this time and that the State of Colombia is not directly responsible for all of the harm caused to its citizens. However, the State of Colombia is responsible for human rights abuses committed by its agents using their position of authority, even when those agents act outside the sphere of their authority or violate internal law, as well as for comparable acts committed by private persons which are tolerated or acquiesced in by the State. The Commission also notes that the State may also incur international responsibility for the illicit acts of private individuals or groups when the State fails to adopt the necessary measures to prevent the acts and/or where it fails to properly investigate and sanction those responsible for committing the acts and to provide adequate compensation to the victims ...

XIII. Recommendations

83. The Colombian State should take all appropriate measures to ensure that the right to life and other fundamental guarantees of all of its citizens are respected. The State should take actions to prevent its agents from committing abuses and should provide for training of its agents in the proper observance of the norms relating to human rights and humanitarian law. In addition, the Commission calls on the State to combat, dismantle and disarm all paramilitary and other proscribed self-defense groups. Finally, the State should investigate and sanction all persons responsible for committing violations of rights.

The position of irregular armed groups was discussed further in the third report on the situation of Human Rights in Colombia:

Inter-American Commission of Human Rights, Report on the Human Rights Situation in Colombia of 26 February 1999 (OEA/ Ser.L/V/II.102, Doc. 9 rev. 1), chapter IV, 'Violence and Violations of International Human Rights and Humanitarian Law'

B. Legal framework for the analysis

1. Role and competence of the Commission

3. Under the individual petition procedure set forth in its Statute and the American Convention on Human Rights, the Commission's jurisdiction extends only to situations where the international responsibility of a member State is at issue. Thus, the IACHR is authorized to receive, investigate and decide cases lodged against member States for the acts or omissions of their agents and organs that allegedly violate the human rights guaranteed in the American Convention or the American Declaration of the Rights and Duties of Man (the 'Declaration'). The Commission's jurisdiction also encompasses cases of transgressions of these same rights by private persons or groups who are, in effect, State agents or when such transgressions by private actors are acquiesced in, tolerated, or condoned by the State.

4. The Commission as well as the Court have also consistently pointed out that the State has a duty under the American Convention and the Declaration to prevent and to investigate acts of violence committed by private parties and to prosecute and punish the perpetrators accordingly.

The Commission thus may process individual cases alleging the failure of a State to comply with this duty. At the same time, the Commission recognizes that in situations of civil strife the State cannot always prevent, much less be held responsible for, the harm to individuals and destruction of private property occasioned by the hostile acts of its armed opponents.

5. As noted in its two previous country reports on Colombia, OAS member States opted deliberately not to give the Commission jurisdiction to investigate or hear individual complaints concerning illicit acts of private persons or groups for which the State is not internationally responsible. If it were to act on such complaints, the Commission would be in flagrant breach of its mandate, and, by according these persons or groups the same treatment and status that a State receives as a party to a complaint, it would infringe the sovereign rights and prerogatives of the State concerned ...

8. The Commission has been equally clear that when organized private groups take up arms to overthrow an elected government, the State has a right under domestic and international law to use legal and appropriate military force to put down such insurrection in order to defend its citizenry and the constitutional order. However, during such situations of internal hostilities, the Commission has received from Colombia and other OAS member States numerous complaints alleging serious violations of the fundamental rights guaranteed in the American Convention and Declaration arising out of the conduct of military operations by State security forces and its other agents.

2.2. Questions for discussion: 'jurisdiction' and the scope of the obligation to protect human rights

1. According to Article 50 of the International Covenant on Civil and Political Rights, the provisions of the Covenant 'shall extend to all parts of federal States without any limitations or exceptions' (on the circumstances of the introduction of this rule, see M. Sorensen, 'Federal States and the International Protection of Human Rights', *American Journal of International Law*, 46 (1952), 207). Does this lead to an approach fundamentally different from that of the American Convention on Human Rights, taking into account the 'federal clause' inserted into this instrument?
2. The examples of guerillas or paramilitary groups, sometimes occupying part of the national territory, and which the Government alleges it is unable to control, illustrates the continuity between (1) the question of 'jurisdiction' and the relationship of 'jurisdiction' to national territory, and (2) the question of the scope of the obligation of the State to exercise due diligence in seeking to protect the human rights of individuals under its jurisdiction (on this obligation, see chapter 4). Are these different framings interchangeable? Is it the same thing to assert that a State's jurisdiction does not extend to situations which are outside its control (for instance, when a secessionist government is established, or when a guerilla controls part of the territory), and to assert that a State is unable effectively to protect human rights in certain situations, for example because its military cannot be present all over a large territory, or because of budgetary constraints? If not, where exactly does the difference reside between these two arguments?

2 EXTRATERRITORIAL OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

This section examines whether there are situations in which a State may be under an obligation to comply with human rights outside its national territory. Three scenarios are distinguished. In the first scenario, a State exercises executive powers outside its borders, by sending State agents abroad, either with the assent of the territorially sovereign State, or without such assent (section 2.1.). In the second scenario, a State may be able to influence situations located outside its national territory, for instance by adopting extraterritorial legislation or by empowering its courts to hear claims related to such situations: the question arises whether there are circumstances in which an obligation may be imposed on the State to take such action, in order to discharge a duty to protect human rights (section 2.2.). Finally, in the third scenario, one State is asked to assist another State, or the efforts of the international community, in improving the situation of human rights elsewhere, particularly where a lack of budgetary resources or the absence of technology transfers create an obstacle to development (section 2.3.). In a very broad meaning of the expression, all three scenarios raise the question of whether or not international human rights entail 'extraterritorial' obligations. But depending on the scenario we explore, the answers will differ markedly.

2.1 The responsibility of States for the activities of State agents operating outside the national borders

A State may be found responsible for the acts of its agents, which are in violation of its international obligations. This rule of attribution has prevailed, in general, over a narrow understanding of the applicability *ratione loci* of the human rights treaties, which would restrict their application to the national territory of the State concerned.

Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, adopted on 29 March 2004 (2,187th meeting), para. 10:

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 ... (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

This position had first been announced by the Human Rights Committee in the twin cases of *Lopez Burgos* v. *Uruguay* (Communication No. 52/1979 (final views 29 July 1981 (thirteenth session)), at para. 12.3, and of *Celeberti de Casariego* v. *Uruguay* (Communication No. 56/1979 (final views of 29 July 1981 (thirteenth session)), at para. 10.3. In the first of these cases, Mr Lopez Burgos, a trade-union leader in Uruguay, had been detained between December 1974 and May 1975 before being forced into exile by the harassment of the Uruguayan authorities. He was accepted as a refugee in Argentina in September 1975. On 13 July 1976, according to the communication, he was kidnapped in Buenos Aires by members of the 'Uruguayan security and intelligence forces' who were aided by Argentine para-military groups, and was secretly detained in Buenos Aires for about two weeks. Together with several other Uruguayan nationals, he was then illegally and clandestinely transported to Uruguay, where he was detained incommunicado by the special security forces at a secret prison for three months. During his detention of approximately four months both in Argentina and Uruguay, he was continuously subjected to physical and mental torture and other cruel, inhuman or degrading treatment.

Human Rights Committee, *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No. 52/79 (6 June 1979), Supp. No. 40 (A/36/40) at 176 (1981) (final views of 29 July 1981):

12.1 The Human Rights Committee ... observes that although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ('... individuals subject to its jurisdiction ...') or by virtue of article 2 (1) of the Covenant ('... individuals within its territory and subject to its jurisdiction ...') from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

12.2 The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.

12.3 Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5(1) of the Covenant: '1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

The same position is adopted within the Inter-American human rights system. Two instances deserve particular mention in this regard. In the *Haitian Interdiction* case (*Case 10.675* v. *United States*, Reports No. 28/93 (decision on admissibility) of 13 October 1993 and 51/96 (decision on the merits) of 13 March 1997), the Inter-American Commission was confronted by the US policy of intercepting Haitian boat people in the high seas and returning them to Haiti. One of the crucial issues regarding the legality of the interdiction was whether or not fundamental rights obligations – including due process, non-discrimination and the right to seek asylum – applied to persons prior to their effective entry into the territory of the United States. On 21 June 1993, the US Supreme Court had ruled, in the case of *Sale, Acting Commissioner, Immigration and Naturalization Service, et al.* v. *Haitian Centers Council, INC., et. al.* (509 U.S. 155 (1993)) that neither US law nor Article 33 of the 1951 Geneva Convention on the Status of Refugees prevented the Government from returning refugees interdicted by the US Navy beyond the territorial waters of the United States. In the merits phase, the Inter-American Commission of Human Rights expressed its disagreement with the Supreme Court's ruling that the non-refoulement provision of the Geneva Convention had no extraterritorial effects (para. 157). Moreover it concluded that by interdicting the asylum-seekers in high seas, the United States had denied them the possibility of seeking asylum in other foreign countries.

Inter-American Commission of Human Rights, *Case 10.675* v. *United States (Haitian Interdiction case)*, Report No 51/96 of 13 March 1997:

151. It is convenient to begin with an analysis of Article XXVII of the American Declaration. Article XXVII of the American Declaration is entitled 'Right of Asylum'. This Article outlines two criteria which are cumulative and both of which must be satisfied in order for the right to exist. The first criterion is that the right to seek and receive asylum on foreign territory must be in 'accordance with the laws of each country', that is the country in which asylum is sought. The second criterion is that the right to seek asylum in foreign territory must be 'in accordance with international agreements'.

152. The *travaux préparatoires* show that the first draft in the Article did not have the phrase 'in accordance with the laws of each country'. That phrase was added in the Sixth Session of the Sixth Commission's of the Inter-American Juridical Committee at the Ninth International Conference of American States in Bogota in 1948, and discussed in the Seventh Session of the Sixth Commission, to preserve the states sovereignty in questions of asylum.

153. The effect of the dual cumulative criteria in Article XXVII is that if the right is established in international but not in domestic law, it is not a right which is recognized by Article XXVII of the Declaration ...

155. The Commission will now address the question of the application of the two criteria and will deal first with the criterion of conformity with 'international agreements'. The relevant international agreement is the Convention Relating to the Status of Refugees 1951 and the 1967 Protocol Relating to the Status of Refugees to which the United States is a party. The Convention establishes certain criteria for the qualification of a person as a 'refugee'. The Commission believes that international law has developed to a level at which there is recognition of a right

of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the Convention.

156. An important provision of the 1951 Convention is Article 33(1) which provides that: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' The Supreme Court of the United States, in the case of *Sale, Acting Commissioner, Immigration and Naturalization Service, et al.* v. *Haitian Centers Council, INC., et al.*, No. 92–344, decided June 21, 1993, construed this provision as not being applicable in a situation where a person is returned from the high seas to the territory from which he or she fled. Specifically, the Supreme Court held that the principle of non-refoulement in Article 33 did not apply to the Haitians interdicted on the high seas and not in the United States' territory.

157. The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its *amicus curiae* brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.

158. However, the finding by the Commission that the United States Government has breached its treaty obligations in respect of Article 33 does not resolve the issue as to whether the United States Government is in breach of Article XXVII of the American Declaration because the cumulative effect of the dual criteria in that Article is that, for the right to seek and receive asylum in foreign territory to exist, it must not only be in accordance with international agreements, but in accordance with the domestic laws of the country in which refuge is sought.

159. After several judicial hearings in respect of the Haitian boat people the United States' domestic law in this matter was finally settled by the Supreme Court in the case of *Sale, Acting Commissioner, Immigration and Naturalization Service, et al.* v. *Haitian Centers Council, INC., et al.*, No. 92–344, decided June 21, 1993. In its reply of January 19, 1995, to the Commission's specific question on the meaning of the phrase 'in accordance with the laws of each country', the United States Government stated that: '... United States law on the question of the "right to asylum" of Haitians is perfectly clear: Haitians interdicted by the United States at sea are not entitled to enter the United States or to avoid repatriation to Haiti, even if they are refugees under the standards of the 1951 Refugee Convention or the standards of US law.' ...

161. The Commission has also noted that the petitioners ... in response to the Commission's question on the meaning of Article XXVII stated that: 'Even if it is true, as the United States Supreme Court decided, that the President possesses inherent constitutional authority to turn back from the United States Government's gates any alien, such a power does not authorize the interdiction and summary return of refugees who are far from, and by no means necessarily heading to the United States. The United States Government's interdiction program had the effect of prohibiting the Haitians from gaining entry into The Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven. It has never been established how many of the interdicted Haitians were headed for the United States. The Justice Department's own Office of Legal Counsel stated in 1981, "experience suggests that" only "two thirds of the [Haitian] vessels are headed toward the United States" ...'

162. It is noted that Article XXVII provides for a right to seek and receive asylum in 'foreign territory'. A question however arises, whether the action of the United States in interdicting Haitians on the high seas is not in breach of their right under Article XXVII of the American Declaration to seek and receive asylum in some foreign territory other than the United States.

This statement from the petitioners has not been contested or contradicted by the United States. The Commission has noted that subsequent to the coup ousting President Aristide from office on September 30, 1991, during the interdiction period, Hatian refugees exercised their right to seek and receive asylum in other foreign territories, such as the Dominican Republic, Jamaica, Bahamas, Cuba, (provided asylum to 3,851 Haitians during 1992) Venezuela, Suriname, Honduras, the Turks and Caico Islands and other Latin American countries.

163. The Commission finds that the United States summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as 'refugees'. The Commission also finds that the dual criteria test of the right to 'seek' and 'receive' asylum as provided by Articles XXVII in 'foreign territory' (in accordance with the laws of each country and with international agreements) of the American Declaration has been satisfied. Therefore, the Commission finds that the United States breached Article XXVII of the American Declaration.

The second case followed the invasion of Grenada by US troops. In *Coard* v. *United States*, the Inter-American Commission on Human Rights was concerned with a case in which citizens of Grenada complained that they had been illegally detained and mistreated by the US forces who invaded the island. The Commission held that the United States was exercising extra-territorial jurisdiction for the purposes of the American Declaration of the Rights and Duties of Man (when read alongside Article 1 of the American Convention on Human Rights which contains positive obligations on the part of States Parties to all persons 'subject to their jurisdiction'). It said:

Inter-American Commission of Human Rights, *Coard* v. *United States*, Report No 109/9 of 29 September 1999 (DC 215–6):

37. While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – 'without distinction as to race, nationality, creed or sex'. Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a State's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one State, but subject to the control of another State – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.

In effect, this position equates the question of whether an individual is under the jurisdiction of the State with the question of attribution: an individual may be said to be under the jurisdiction of the State, in this view, to the extent that this individual has been directly affected by the act or the omission of the State. But others would see the question of 'jurisdiction' as defining the scope of the State's obligations, and thus as having to be treated as distinct from the question of attribution, as part of the broader inquiry as to whether the State has breached its international obligation. According to this second view, whether or not the alleged victim of the violation was under the jurisdiction of the defending State when the violation was committed thus precedes the two questions which Article 2 of the International Law Commission's Articles on State Responsibility defines as the two constituent elements of an internationally wrongful act of a State, i.e. first, whether the measure complained of (an act or an omission) may be attributed to that State and second, whether that measure constitutes a breach of an international obligation of that State. In this view, far from being a substitute for a particular situation falling under the 'jurisdiction' of the State, the question of imputability only is raised at a second stage, after it has been determined that the event occurred under that State's 'jurisdiction'. 'Jurisdiction' and 'imputability' therefore appear as separate and independent conditions for the existence of State responsibility.

While cases such as *Lopez Burgos* or *Coard* seem to point towards the first view, this understanding has sometimes been challenged. Consider the two following cases by the European Court of Human Rights:

European Court of Human Rights (GC), *Bankovic and others* v. Bel*gium and 16 Other States* (Appl. No. 52207/99), decision (inadmissibility) of 12 December 2001, paras. 54–81:

[The applicants were victims or family members of victims of the bombing by the NATO forces of the Serbian Radio and Television (RTS) buildings in Belgrade, on 23 April 1999, as part of the air strikes campaign launched on 24 March 1999 against former Yugoslavia (Operation Allied Force). They invoke the following provisions of the Convention: Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy). As regards the question of whether the victims were under the 'jurisdiction' of the defending States for the purposes of Article 1 of the European Convention on Human Rights, they argued that 'the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised'. The Court disagreed:]

54. The Court notes that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States ('the extra-territorial act'). It considers that the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States (*Drozd and Janousek* v. *France and Spain*, judgment of 26 June 1992, Series A No. 240, §91, the ... *Loizidou* judgments (*preliminary objections* and *merits*) [of 23 March 1995 and 18 December 1996], at §64 and §56 respectively, and the *Cyprus* v. *Turkey* judgment of 10 May 2001... at §80).

(a) The applicable rules of interpretation

55. The Court recalls that the Convention must be interpreted in the light of the rules set out in the Vienna Convention 1969 (*Golder* v. *United Kingdom* judgment of 21 February 1975, Series A No. 18, §29).

56. It will, therefore, seek to ascertain the ordinary meaning to be given to the phrase 'within their jurisdiction' in its context and in the light of the object and purpose of the Convention (Article 31 §1 of the Vienna Convention 1969 and, amongst other authorities, *Johnston and others* v. *Ireland*, judgment of 18 December 1986, Series A No. 112, §51). The Court will also consider 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' (Article 31 §3(b) of the Vienna Convention 1969 and the above-cited *Loizidou* judgment (*preliminary objections*), at §73).

57. Moreover, Article 31 §3(c) indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty (*Loizidou* judgment (*merits*) [of 18 December 1996], at §§43 and 52). The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani* v. *United Kingdom*, [GC], [judgment of 21 November 2001] No. 35763/97, §60 ...).

58. It is further recalled that the *travaux préparatoires* can also be consulted with a view to confirming any meaning resulting from the application of Article 31 of the Vienna Convention 1969 or to determining the meaning when the interpretation under Article 31 of the Vienna Convention 1969 leaves the meaning 'ambiguous or obscure' or leads to a result which is 'manifestly absurd or unreasonable' (Article 32) ...

(b) The meaning of the words 'within their jurisdiction'

59. As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (Mann, 'The Doctrine of Jurisdiction in International Law', RdC, 1964, Vol. 1; Mann, 'The Doctrine of Jurisdiction in International Law, Twenty Years Later', RdC, 1984, Vol. 1; Bernhardt, *Encyclopaedia of Public International Law*, Edition 1997, Vol. 3, pp. 55–59 'Jurisdiction of States' and Edition 1995, Vol. 2, pp. 337–343 'Extra-territorial Effects of Administrative, Judicial and Legislative Acts'; Oppenheim's *International Law*, 9th Edition 1992 (Jennings and Watts), Vol. 1, §137; P. M. Dupuy, *Droit International Public*, 4th Edition 1998, p. 61; and Brownlie, *Principles of International Law*, 5th Edition 1998, pp. 287, 301 and 312–314).

60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence (Higgins, *Problems and Process* (1994), at p. 73; and Nguyen Quoc Dinh, *Droit International Public*, 6th Edition 1999 (Daillier and Pellet), p. 500). In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence,

unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (Bernhardt, cited above, Vol. 3 at p. 59 and Vol. 2 at pp. 338–340; Oppenheim, cited above, at §137; P. M. Dupuy, cited above, at pp. 64–65; Brownlie, cited above, at p. 313; Cassese, *International Law*, 2001, p. 89; and, most recently, the *Report on the Preferential Treatment of National Minorities by their Kin-States* adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19–20 October 2001).

61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case (see, *mutatis mutandis* and in general, Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, *Extraterritorial Criminal Jurisdiction*, Report published in 1990, at pp. 8–30).

62. The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (*inter alia*, in the Gulf, in Bosnia and Herzegovina and in the FRY [Federal Republic of Yugoslavia]), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention. The existing derogations were lodged by Turkey and the United Kingdom in respect of certain internal conflicts (in south-east Turkey and Northern Ireland, respectively) and the Court does not find any basis upon which to accept the applicants' suggestion that Article 15 covers all 'war' and 'public emergency' situations generally, whether obtaining inside or outside the territory of the Contracting State. Indeed, Article 15 itself is to be read subject to the 'jurisdiction' limitation enumerated in Article 1 of the Convention.

63. Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words 'all persons residing within their territories' with a reference to persons 'within their jurisdiction' with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States ...

64. It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case law. The Court has applied that approach not only to the Convention's substantive provisions (for example, the *Soering* judgment cited above, at §102 [Eur. Ct. H.R., *Soering* v. *United Kingdom* judgment of 7 July 1989 (see below, section 3.1. of this chapter)]; the *Dudgeon* v. *United Kingdom* judgment of 22 October 1981, Series A No. 45; the *X, Y and Z* v. *United Kingdom* judgment of 22 April 1997, *Reports* 1997–II; *V.* v. *United Kingdom* [GC], No. 24888/94, §72, E.C.H.R. 1999–IX; and *Matthews* v. *United Kingdom* [GC], No. 24833/94, §39, E.C.H.R. 1999–I) but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs (the above-cited *Loizidou* judgment (*preliminary objections*), at §71). The Court concluded in the latter judgment that former Articles 25 and 46 of the Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously to the extent that, even if it had been established that the

restrictions at issue [to the territorial scope of applicability of the European Convention on Human Rights stipulated in a reservation made by Turkey] were considered permissible under Articles 25 and 46 when the Convention was adopted by a minority of the then Contracting Parties, such evidence 'could not be decisive'.

65. However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou case (*preliminary objections*), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 'solely' in accordance with the *travaux préparatoires* or finding those *travaux* 'decisive'; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).

66. Accordingly, and as the Court stated in the *Soering* case: 'Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, 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.'

(c) Extra-territorial acts recognised as constituting an exercise of jurisdiction

67. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.

68. Reference has been made in the Court's case law, as an example of jurisdiction 'not restricted to the national territory' of the respondent State (the *Loizidou* judgment (*preliminary objections*), at §62), to situations where the extradition or expulsion of a person by a Contracting State may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and or 6) and hence engage the responsibility of that State under the Convention (the above-cited *Soering* case, at §91, *Cruz Varas and others* v. *Sweden* judgment of 20 March 1991, Series A No. 201, §§69 and 70, and the *Vilvarajah and others* v. *United Kingdom* judgment of 30 October 1991, Series A No. 215, §103).

However, the Court notes that liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad (see also, the above-cited *Al-Adsani* judgment, at §39).

69. In addition, a further example noted at paragraph 62 of the *Loizidou* judgment (*preliminary objections*) was the *Drozd and Janousek* case where, citing a number of admissibility decisions by the Commission, the Court accepted that the responsibility of Contracting Parties (France and Spain) could, in principle, be engaged because of acts of their authorities (judges) which produced effects or were performed outside their own territory (*Drozd and Janousek* judgment of 26 June 1992 [see para. 54 above], at §91). In that case, the impugned acts could not, in the circumstances, be attributed to the respondent States because the judges in question

were not acting in their capacity as French or Spanish judges and as the Andorran courts functioned independently of the respondent States.

70. Moreover, in that first *Loizidou* judgment (*preliminary objections*), the Court found that, bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party was capable of being engaged when as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory. The obligation to secure, in such an area, the Convention rights and freedoms was found to derive from the fact of such control whether it was exercised directly, through the respondent State's armed forces, or through a subordinate local administration. The Court concluded that the acts of which the applicant complained were capable of falling within Turkish jurisdiction within the meaning of Article 1 of the Convention.

On the merits, the Court found that it was not necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the 'Turkish Republic of Northern Cyprus' ('TRNC'). It was obvious from the large number of troops engaged in active duties in northern Cyprus that Turkey's army exercised 'effective overall control over that part of the island'. Such control, according to the relevant test and in the circumstances of the case, was found to entail the responsibility of Turkey for the policies and actions of the 'TRNC'. The Court concluded that those affected by such policies or actions therefore came within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Turkey's obligation to secure the rights and freedoms set out in the Convention was found therefore to extend to northern Cyprus.

In its subsequent *Cyprus* v. *Turkey* judgment [of 10 May 2001], the Court added that since Turkey had such 'effective control', its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey's 'jurisdiction' under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus.

71. In sum, the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

72. In line with this approach, the Court has recently found that the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extra-territorial jurisdiction (*McElhinney* v. *Ireland and United Kingdom* (dec.), No. 31253/96, p. 7, 9 February 2000, unpublished). The Court said: 'In so far as the applicant complains under Article 6 ... about the stance taken by the Government of the United Kingdom in the Irish proceedings, the Court does not consider it necessary to address in the abstract the question of whether the actions of a Government as a litigant before the courts of another Contracting State can engage their responsibility under Article 6 ... The Court considers that, in the particular circumstances of the case, the fact that the United Kingdom Government raised the defence of sovereign immunity before the Irish courts, where the applicant had decided to sue, does not suffice to bring him within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention.'

73. Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or

consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.

(d) Were the present applicants therefore capable of coming within the 'jurisdiction' of the respondent States?

74. The applicants maintain that the bombing of RTS by the respondent States constitutes yet a further example of an extra-territorial act which can be accommodated by the notion of 'jurisdiction' in Article 1 of the Convention, and are thereby proposing a further specification of the ordinary meaning of the term 'jurisdiction' in Article 1 of the Convention. The Court must be satisfied that equally exceptional circumstances exist in the present case which could amount to the extra-territorial exercise of jurisdiction by a Contracting State.

75. In the first place, the applicants suggest a specific application of the 'effective control' criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a 'cause-and-effect' notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to 'jurisdiction'. Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in Section I of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words 'within their jurisdiction' in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949.

Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State.

76. Secondly, the applicants' alternative suggestion is that the limited scope of the airspace control only circumscribed the scope of the respondent States' positive obligation to protect the applicants and did not exclude it. The Court finds this to be essentially the same argument as their principal proposition and rejects it for the same reasons.

77. Thirdly, the applicants make a further alternative argument in favour of the respondent States' jurisdiction based on a comparison with the *Soering* case (cited above). The Court does not find this convincing given the fundamental differences between that case and the present as already noted at paragraph 68 above.

78. Fourthly, the Court does not find it necessary to pronounce on the specific meaning to be attributed in various contexts to the allegedly similar jurisdiction provisions in the international instruments to which the applicants refer because it is not convinced by the applicants' specific submissions in these respects (see §48 above). It notes that Article 2 of the American Declaration on the Rights and Duties of Man 1948 referred to in the above-cited *Coard* Report of the Inter-American Commission of Human Rights (§23 above), contains no explicit limitation of jurisdiction. In addition, and as to Article 2 §1 the CCPR 1966 (§26 above), as early as 1950 the drafters had definitively and specifically confined its territorial scope and it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only) displaces in any way the territorial jurisdiction expressly conferred by that Article of the CCPR 1966 or explains the precise meaning of 'jurisdiction' in Article 1 of its Optional Protocol 1966 (§27 above). While the text of Article 1 of the American Convention on Human Rights 1978 (§24 above) contains a jurisdiction condition similar to Article 1 of the European Convention, no relevant case law on the former provision was cited before this Court by the applicants.

79. Fifthly and more generally, the applicants maintain that any failure to accept that they fell within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection.

80. The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties (the *Loizidou* judgment (*preliminary objections*), [of 23 March 1995] at §93). It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system.

It is true that, in its above-cited *Cyprus* v. *Turkey* judgment (at §78), the Court was conscious of the need to avoid 'a regrettable vacuum in the system of human-rights protection' in northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's 'effective control' of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention [Article 56 para. 1 enables a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations that State is responsible], in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was

not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

81. Finally, the applicants relied, in particular, on the admissibility decisions of the Court in the above-cited *Issa* and *Öcalan* cases. It is true that the Court has declared both of these cases admissible and that they include certain complaints about alleged actions by Turkish agents outside Turkish territory. However, in neither of those cases was the issue of jurisdiction raised by the respondent Government or addressed in the admissibility decisions and in any event the merits of those cases remain to be decided. Similarly, no jurisdiction objection is recorded in the decision leading to the inadmissibility of the *Xhavara* case to which the applicants also referred (cited above); at any rate, the applicants do not dispute the Governments' evidence about the sharing by prior written agreement of jurisdiction between Albania and Italy. The *Ilascu* case, also referred to by the applicants, [see below, section 2.2.] concerns allegations that Russian forces control part of the territory of Moldova, an issue to be decided definitively on the merits of that case. Accordingly, these cases do not provide any support for the applicants' interpretation of the jurisdiction of Contracting States within the meaning of Article 1 of the Convention.

A later case, *Issa and others* v. *Turkey*, implicitly overrules *Bankovic* insofar as this latter decision seemed to imply that a State party to the Convention could not be held responsible for the consequences of acts going beyond the jurisdiction it might legitimately exercise under public international law, unless it occupies foreign territory where it exercises *de facto* governmental powers.

European Court of Human Rights (2nd sect.), *Issa and others* v. *Turkey* (Appl. No. 31821/96), judgment of 16 November 2004, paras. 71–5:

[Six Iraqi nationals, acting on their own behalf and on behalf of deceased relatives, alleged the unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995.]

71. [Under the principles established in the case law of the Court,] a State may ... be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State ... Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

[The Court considered, however, that the conditions for the applicants' relatives to be under the 'jurisdiction' of Turkey in this sense were not satisfied. It distinguished the situation in *Issa* from that in *Loizidou*:]

75. ... [N]otwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in northern

> Cyprus in the *Loizidou* v. *Turkey* and *Cyprus* v. *Turkey* cases ... In the latter cases, the Court found that the respondent Government's armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case ... but with the difference that the troops in northern Cyprus were present over a very much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.

This, however, did not necessarily exclude the imputability to Turkey of the acts complained of in *Issa and others*. Indeed, the Court proceeded to examine whether the allegation that the Turkish troops could be held responsible for the abductions and killings of the Iraqi shepherds whose relatives had brought the application before the Court could be proven. The Turkish troops not exercising a *de facto* control over the northern part of Iraq comparable to that exercised by Turkey on the northern part of the Island of Cyprus, such an imputability could not be presumed. It had to be verified whether at the relevant time Turkish troops conducted operations in the area where the killings took place, or whether other elements could be seen as evidence that those killings could be attributed to them. The Court arrived at the conclusion that 'it has not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question, and, more precisely, ... where, according to the applicants' statements, the victims were at that time'; therefore 'the Court is not satisfied that the applicants' relatives were within the "jurisdiction" of the respondent State for the purposes of Article 1 of the Convention' (paras. 81–2).

The relationship between *Bankovic* and *Issa* formed a central aspect of the judgment delivered on 14 December 2004 by the English High Court of Justice (Divisional Court), when it examined the claims of relatives of Iraqi citizens who had died in Iraq at a time and within geographical areas where the United Kingdom was recognized as an occupying power. Five claimants were killed in incidents with British troops. A sixth applicant died while in the custody of British troops in a military prison. The claimants alleged violations of Article 2 of the Convention, which guarantees the right to life, and – in the case of the sixth applicant – of Article 3, which prohibits torture and inhuman or degrading treatment, as they considered that the deaths had not led to effective enquiries. Both these provisions were made applicable before British courts by virtue of the Human Rights Act 1998. The High Court concluded that the 'jurisdiction' of the United Kingdom did not extend to the total territory occupied by the British armed forces in Iraq, even though that territory may be said to be under its effective control. It based itself mainly on *Bankovic*, which it considered the leading authority on the interpretation of Article 1 ECHR after an extensive review of the case law of the European Court of Human Rights. It arrived at the following conclusions:

High Court of Justice (Divisional Court) (United Kingdom), *R. (on the Application of Mazin Jumaa Gatteh Al Skeini and others)* v. *Secretary of State for Defence* [2004] EWHC 2911 (Admin), [2004] W.L.R. 1401:

269. [Article 1] jurisdiction does not extend to a broad, world-wide extra-territorial personal jurisdiction arising from the exercise of authority by party states' agents anywhere in the world, but only to an extra-territorial jurisdiction which is exceptional and limited and to be found in specific cases recognised in international law ...

270. [Such instances] are ones where, albeit the alleged violation of Convention standards takes place outside the home territory of the respondent state, it occurs by reason of the exercise of state authority in or from a location which has a form of discrete quasi-territorial quality, or where the state agent's presence in a foreign state is consented to by that state and protected by international law: such as diplomatic or consular premises, or vessels or aircraft registered in the respondent state. Such a rationalisation could also encompass courts located in a foreign state but, by international treaty, manned by the respondent state's judges acting as such.

[The claims of the first five claimants failed on that basis. However, the Court did recognize that the situation of the sixth claimant, Mr Mousa, warranted a different conclusion. Its reasoning is summarized in the following passage:]

281. It follows [from the analysis of the case law of the European Commission and Court of Human Rights] that, since Iraq is not within the regional sphere of the Convention, the complaints before us do not fall within the article 1 jurisdiction of the United Kingdom under the heading of the extra-territorial doctrine of the 'effective control of an area' exception as found in the cases of northern Cyprus and Moldova.

282. That conclusion makes it unnecessary for us to consider Mr Greenwood's subsidiary submission [as counsel to the United Kingdom Government] that, even if that doctrine could apply in theory to Iraq, and despite the United Kingdom being recognised as an occupying power for the purposes of the Hague Regulations and Fourth Geneva Convention, nevertheless it did not have such control of the relevant provinces where the deaths complained about took place as to amount to 'effective control' of that area within the meaning of that doctrine. Mr Greenwood contrasts the total military and civil control in northern Cyprus and secessionist MRT with the dangerous and volatile situation in Basra and Maysan provinces, where the British (among other national forces of the coalition) were relatively few in number, and where civil government remained in the hands of the Iraqi authorities under the aegis of the US dominated CPA (Coalition Provisional Authority). In this connection we remind ourselves that UN Security Council resolution 1483 of 22 May 2003 *inter alia* reaffirmed the sovereignty and territorial integrity of Iraq, recognised the role of the CPA and of the USA and the UK as 'occupying powers under unified command' and looked forward to the formation of an Iraqi Interim Administration; that on 13 July 2003 the Iraqi Governing Council was formed, which was recognised by UN Security Council resolution 1500 of 14 August 2003; and that UN Security Council resolution 1511 of 16 October 2003, acting under chapter VII of the UN Charter, determined that the Iraqi Governing Council embodied the sovereignty of the state of Iraq during the transitional period.

283. We also remind ourselves that the status of northern Cyprus and MRT as being within the effective control of Turkey and Russia respectively was ultimately decided by the Court only after a full consideration of the facts on the merits of those respective cases and in circumstances where, upon a consideration of those facts, such effective control was plainly established (see,

for instance, *Loizidou* v. *Turkey* (1997) at para 56, cited in *Bankovic* at para 70, and *Ilascu* v. *Moldova and Russia* at paras 379–394). It is therefore perhaps fortunate that, on the view we have taken as to the principle involved in the matter of this exceptional doctrine, it has not been necessary at this preliminary stage to attempt to resolve this factual issue. If it was only a question of whether, on the materials presented to us, and on the assumption that the case of Iraq was like the cases of northern Cyprus and of MRT, these complaints were capable of falling within the jurisdiction of the United Kingdom, we could perhaps conclude that they were. But a definitive decision is something different.

284. There remains the question whether the deaths with which we are concerned can come within the other recognised exception as resulting from the extra-territorial activity of state agents. On the view which we have taken of this exception as narrowly based, not extending to a broad personal extra-territorial jurisdiction, we conclude that it is necessary to consider the first five claimants and the sixth claimant separately. This was not the way in which Mr Singh [counsel for the claimants] argued the matter: indeed, in answer to a specific question from the court as to whether he made any distinction, even on an alternative basis, between the first five and the sixth claimants, he assured the court that he did not. Even so, it seems to us that we are nevertheless obliged to give separate consideration to these respective cases. This is because, on our analysis of the jurisprudence, the case of deaths as a result of military operations in the field, such as those complained of by the first five claimants, selected as reflecting various broadly representative examples of such misfortunes, do not seem to us to come within any possible variation of the examples of acts by state authorities in or from embassies, consulates, vessels, aircraft, (or, we would suggest, courts or prisons) to which the authorities repeatedly refer.

285. In such circumstances it seems to us that to broaden the exception currently under discussion into one which extends extra-territorial jurisdiction to the situations concerned in the case of the first five claimants would be illegitimate in two respects: it would drive a coach and horses through the narrow exceptions illustrated by such limited examples, and it would side-step the limitations we have found to exist under the broader (albeit still exceptional) doctrine of 'effective control of an area'. Although article 2 claims are of course a matter of particular and heightened concern, if jurisdiction existed in these five cases, there would be nothing to stop jurisdiction arising, or potentially arising, across the whole range of rights and freedoms protected by the Convention.

286. The sixth case of Mr Baha Mousa, however, as it seems to us, is different. He was not just a victim, under however unfortunate circumstances, of military operations. He was not, as we understand the matter, a prisoner of war. He was, *prima facie* at any rate, a civilian employee. He was arrested by British forces on suspicion of involvement with weapons hidden in the hotel where he worked as a receptionist, on suspicion therefore of involvement in terrorism. He was taken into custody in a British military base. There he met his death, it is alleged by beatings at the hands of his prison guards. The death certificate referred to 'cardio respiratory arrest: asphyxia'.

287. In the circumstances the burden lies on the British military prison authorities to explain how he came to lose his life while in British custody. It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess* v. *United*

Kingdom, a prison [*Hess* v. *United Kingdom* ((1975) 2 *Decisions and Reports* 72) concerned the detention of Rudolf Hess, the Nazi war criminal then held under a sentence of life imprisonment, handed down at Nuremberg, in the allied military prison in Spandau. That prison was under the control of the four allied powers, the United States, France, the United Kingdom and the USSR, but was located in the British sector of (West) Berlin. It would seem that it was only the veto of the USSR which prevented the release of Hess, who since October 1966 had been the sole remaining Nazi prisoner in Spandau. The Commission ruled the application inadmissible *ratione personae* on the ground (*inter alia*) that, since the prison was under the joint responsibility of the four powers, and not of the United Kingdom alone, its administration did not come 'within the jurisdiction' of the United Kingdom for the purposes of Article 1. It would seem, however, that if the prison had been in the United Kingdom's sole administration, then jurisdiction might have been established. See further on this case this chapter, below, section 4.1.]. We can see no reason in international law considerations, nor in principle, why in such circumstances the United Kingdom should not be answerable to a complaint, otherwise admissible, brought under articles 2 and/or 3 of the Convention.

288. We would therefore hold that the first five cases do not fall within the jurisdiction of the United Kingdom or the scope of the Convention for the purposes of its article 1, but that that of Mr Mousa does.

The judgment of the High Court of Justice went on to decide that the inadequacies in the enquiries which took place following the death of Mr Mousa justify a finding of a violation of the procedural requirements of Articles 2 and 3 of the Convention. This judgment was substantially affirmed, on appeal, by the Court of Appeal (Civil Division), in a judgment of 21 December 2005 reproduced below. The leading judgment by Lord Justice Brooke distinguishes between two grounds on which the ECHR can be applied extra-territorially: one is when a State party to the Convention is in effective control of a portion of the territory of another State party (ECA, effective control of an area); another is when 'an agent of a contracting state exercises authority through the activities of its diplomatic or consular agents abroad or on board craft and vessels registered in or flying the flag of the state, [in which case] that state is similarly obliged to secure those rights and freedoms to persons affected by that exercise of authority', what is referred to as 'State agent authority' (SAA) (para. 48). Lord Justice Brooke finds that 'Mr Mousa came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops' (para. 108). In contrast, none of the five other applicants was 'under the control and authority of British troops at the time when they were killed' (para. 110), therefore the 'State agent authority' doctrine is inapplicable to them, and the ECHR would only be applicable if the ECA doctrine could apply, i.e. if the United Kingdom were 'in effective control of the area in which [the complainant] is situated with the consent, invitation or acquiescence of the host state or in circumstances that amount to a military occupation' (para. 111). The conditions are not present for the Convention to apply extra-territorially on this basis, however:

Court of Appeal (Civil Division), *R. (on the Application of Mazin Mumaa Galteh Al-Skeini and others)* v. *Secretary of State for Defence* [2005] EWCA Civ 1609 (leading judgment by Lord Justice Brooke):

124. In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented (see Article 43 of the Hague Regulations ...). It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways ...

125. It would indeed have been contrary to the Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves. To build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR at the very time when the IGC had been formed, with CPA [Coalition Provisional Authority] encouragement, as a step towards the formation by the people of Iraq of an internationally recognized representative Government ..., would have run right against the grain of the Coalition's policies.

126. And it is in any event very much open to question whether an effort by an occupying power in a predominantly Muslim country to inculcate what the ECtHR has described (in *Golder* v. *UK* (1975) 1 E.H.R.R. 524 at para 34) as 'the common spiritual heritage of the member states of the country of Europe' during its temporary sojourn in that country would have been consistent with the Coalition's goal, which was to transfer responsibility to representative Iraqi authorities as early as possible ...

127. In the interests of completeness, I should make it clear that I reject the arguments by the claimants to the effect that occupation for the purposes of the Hague Regulations must necessarily be equated with effective control of the occupied area for ECHR purposes. Mr Rabinder Singh [counsel for the appellants] referred to passages in Oppenheim, *International Law*, Vol 2 (1952) at paras 166, 169 and 170 which set out the obligations of an occupying power in wide and general terms. It is a feature of Strasbourg jurisprudence that the Court will examine the facts of each particular case to see if the requisite control is in fact exercised (see *Loizidou* v. *Turkey* (Preliminary Objections) at [62] ...), and the status of the British military forces in Basrah City was markedly different from that featured in the text on which Mr Singh relies.

128. Mr Singh suggests that the consequences of the Secretary of State's argument would be that a state could send a sufficiency of troops to an occupied area, whether within the European region or beyond it, to assert the rights of belligerent occupation but avoid otherwise applicable human rights standards by reducing to a minimum the number of troops. If the territory in question is within the European region, its citizens will enjoy the rights and protections afforded by the ECHR, and it will be a question of fact in each case as to which state is responsible for their violation. If the territory in question is outside the European region, this conclusion is an inevitable consequence of the fact that there is not yet in place an enforceable human rights convention covering the whole world. And although the protections afforded to civilian populations under humanitarian treaties are not nearly so valuable as those afforded by the ECHR, it would be facile to suggest that they do not exist at all.

In a judgment of 13 June 2007, delivered on the crossed appeals of both parties to the litigation, the House of Lords took the view – based on its interpretation of the Human Rights Act (HRA) 1998, and without prejudice of the extra-territorial applicability of the European Convention on Human Rights – that the protection of the HRA does not extend beyond the territory of the United Kingdom:

House of Lords (United Kingdom), *Al-Skeini and others (Respondents)* v. *Secretary of State for Defence (Appellant), Al-Skeini and others (Appellants)* v. *Secretary of State for Defence (Respondent)* (consolidated Appeals) [2007] UKHL 26, lead judgment by Lord Bingham of Cornhill:

24. ... It cannot of course be supposed that in 1997–1998 Parliament foresaw the prospect of British forces being engaged in peacekeeping duties in Iraq. But there can be relatively few, if any, years between 1953 and 1997 in which British forces were not engaged in hostilities or peacekeeping activities in some part of the world, and it must have been appreciated that such involvement would recur. This makes it the more unlikely, in my opinion, that Parliament could, without any express provision to that effect, have intended to rebut the presumption of territorial application so as to authorise the bringing of claims, under the Act, based on the conduct of British forces outside the UK and outside any other contracting state. Differing from the courts below, I regard the statutory presumption of territorial application as a strong one, which has not been rebutted.

2.3. Questions for discussion: applying human rights instruments to State agents acting abroad

1. When, in 1981, the Human Rights Committee adopted its decision in the *Lopez Burgos* case, it explained that it would be unacceptable to 'permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.

   Lopez Burgos is not isolated, illustrating the fear thus expressed by the Committee. Since the forcible abduction of Adolf Eichmann from Argentina in order to ensure that he would be tried in Israel under the Nazi Collaborators (Punishment) Law adopted by the State of Israel, international law offers a number of examples in which States' secret services have been acting on foreign territory, whether with or without the consent of the territorially competent State (on the *Eichmann* case, see *Attorney General of the Government of Israel* v. *Adolf Eichmann*, District Court of Jerusalem (1961), reprinted in 36 I.L.R. 18, at 26 (judgment of 11 December 1961); *Attorney General of Israel* v. *Eichmann*, Israel Supreme Court (1962), reprinted in 36 I.L.R. 28; and the comments by C. Oliver, *American Journal of International Law*, 56, No. 3 (July 1962), 805–45; and J. Fawcett, 'The *Eichmann* Case', *British Yearbook of International Law*, 38 (1962), 181). For instance, in *Ramirez Sanchez* v. *France*, the European Commission of Human Rights considered that the terrorist 'Carlos' abducted from Sudan and surrendered to the French authorities, was 'under the authority, and therefore the jurisdiction', of France upon the moment of his surrender,

for the purposes of the applicability of Article 5 ECHR which guarantees the right to liberty and security, even though this authority was exercised in a foreign country (European Commission on Human Rights, *Illich Sanchez Ramirez* v. *France*, 24 June 1996 (inadmissibility decision), No. 28780/95). In the case of *Öçalan* v. *Turkey*, the applicant, the leader in exile of the Workers' Party of Kurdistan (PKK), had been brought by the Kenyan authorities to an aircraft in the international transit area of Nairobi Airport, in which Turkish officials were waiting for him, and from where he was brought to Turkey in order to face trial. The European Court of Human Rights considered that, in such a situation, a person brought under the effective authority of officials of a State party to the Convention is 'within the jurisdiction' of that State for the purposes of Article 1 of the Convention: it distinguished *Bankovic* by emphasizing that, in *Öçalan*, 'the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey' (Eur. Ct. H.R. (GC), *Öçalan* v. *Turkey* (Appl. No. 46221/99), 12 May 2005, para. 91).

Similarly, cases such as *Xhavara and others* v. *Albania and Italy* presented to the European Court of Human Rights, following the deaths of a number of Albanians seeking to enter Italy illegally by boat, after that boat was intercepted and sank (Eur. Ct. H.R., *Xhavara and others* v. *Albania and Italy*, Appl. No. 39473/98 (inadmissibility decision of 11 January 2001)), or the '*Prague Airport*' case presented to the UK House of Lords (*R.* v. *Immigration Officer at Prague Airport and another (Respondents), ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55: see chapter 7, section 2.1.), present certain analogies to the *Haitian Interdiction* case, showing that such a case is not entirely exceptional. On the other hand however, it may be argued that, when a State acts extra-territorially, it usually faces the limit to its powers that stem from the obligation to respect the sovereignty of the territorially competent State: situations such as the clandestine activities of secret services without the consent of the territorial State or acts on high seas are exceptions. Could it be argued therefore that, save in such exceptional circumstances, the human rights of individuals should be defined by the obligations of the State on whose territory they are located, rather than by those of the State under the 'effective control' of the agents of which they find themselves? Would such a solution be workable? Would it better respect the sovereignty of the territorially competent State?

2. In the *Al-Skeini* litigation, the UK Court of Appeal presents 'effective control of an area' (ECA) and 'State agent authority' (SAA) as two separate grounds on which the extra-territorial applicability of the European Convention on Human Rights could be based. Is this approach convincing? Should such doctrines function in an all-or-nothing fashion – the Convention being applicable either in full, or being applicable not at all – or should the scope of obligations imposed on the States parties be made to depend on the *degree* of control exercised?
3. In *Al-Skeini*, the lower courts in the United Kingdom restricted the scope of the ECA doctrine to the territories which are part of the Council of Europe, and they restricted the SAA doctrine to situations where State agents exercise authority lawfully on the territory of a State other than their own, rather than in violation of international law. Both these restrictions are intended to defer to the decision of the European Court of Human Rights in *Bankovic*. But are they justified? Should they be removed? What would be the consequences of removing these restrictions?

2.2 The obligation of States to protect human rights beyond the national territory

The previous section examined whether States are under an obligation to respect their human rights obligations when acting through their agents outside their national territory. This question was answered in the affirmative, although the precise conditions which must be fulfilled in order for any situation to be considered to be under the 'jurisdiction' of the State concerned remain somewhat contested. In this section, we examine whether States may have a duty to protect human rights outside their national territory. The focus thus shifts from enforcement extra-territorial jurisdiction – agents of the executive acting abroad – to prescriptive and adjudicative extra-territorial jurisdiction: the question is, indeed, whether States should adopt legislation with extra-territorial effect, or allow their national courts to hear claims about situations occurring abroad, in order to discharge their obligation to protect human rights abroad. In practice, prescriptive and adjudicative extra-territorial jurisdiction often go hand in hand: when States adopt legislation with an extra-territorial scope of application, they generally allow their domestic courts to adjudicate on claims based on that legislation.

The contemporary, mainstream view is that there exists no general obligation imposed on States, under international human rights law, to exercise extra-territorial jurisdiction (understood here as a combination of adjudicative and prescriptive jurisdiction) in order to contribute to the protection and promotion of internationally recognized human rights outside their national territory. In principle, the international responsibility of a State may not be engaged by the conduct of actors not belonging to the State apparatus unless they are in fact acting under the instructions of, or under the direction or control of, that State in carrying out the conduct (see further on this chapter 4). However, the private-public distinction on which this rule of attribution is based is mooted (though not contradicted) by the imposition under international human rights law of positive obligations on States, since such obligations imply that the State must accept responsibility not only for the acts its organs have adopted, but also for the omissions of these organs, where such omissions result in an insufficient protection of private persons whose rights or freedoms are violated by the acts of other non-State actors. Yet, such positive obligations hitherto have been affirmed only in situations falling under the 'jurisdiction' of the State, i.e. in situations on which the State exercises effective control: outside the national territory, it is not presumed that the State exercises such control, and only in exceptional circumstances will it be considered that the power its organs exercise on persons or property located abroad amounts to that state having 'jurisdiction' in a sense which would justify the extension of the positive obligations derived from any international human rights instruments binding upon the State. Thus, in the current state of development of international law, a clear obligation for States to control private actors operating outside their national territory, in order to ensure that these actors will not violate the human rights of others, has not crystallized yet. This is the case even as regards those private actors

having the nationality of the State concerned, and whose behaviour therefore a State may decisively influence and on whom it may impose certain obligations in conformity with international law.

Yet, in a number of general comments, the Committee on Economic, Social and Cultural Rights took the view that the States parties to the International Covenant on Economic, Social and Cultural Rights should respect the enjoyment of the rights stipulated in the Covenant in other countries, *inter alia*, by preventing third parties from violating the right in other countries, 'if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law' (General Comment No. 14 (2000), *The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 39; General Comment No. 15 (2002), *The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/2002/11 (26 November 2002), para. 31). This position is supported by an emerging scholarship insisting that the extra-territorial obligations imposed under the ICESCR entail, at a minimum, that States parties should refrain from the adoption of measures that could negatively affect the enjoyment of such rights abroad, and that they should control the activities of private actors, particularly transnational corporations which they recognize as having their 'nationality', in order to ensure that such corporations do not violate these rights, directly or indirectly, in foreign jurisdictions (see W. Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step', *Netherlands Quarterly of Human Rights*, 21, No. 3, 2003, 423–62 at 445–6; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on Its Development* (Oxford University Press, 1995), at pp. 147–50; S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerp-Oxford: Intersentia-Hart, 2006), esp. chapter 3, 'Extraterritorial Human Rights Obligations'; M. Sepúlveda, 'Obligations of "International Assistance and Co-operation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights,* 24, No. 2 (2006), 271–303 at 282; see also *The Right to Food*, Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights Resolution 2002/25, E/CN.4/2003/54 (10 January 2003), para. 29).

The arguments in favour of imposing extra-territorial obligations to protect human rights are based on the interpretation of Articles 55 and 56 of the UN Charter and on the wording of the International Covenant on Economic, Social and Cultural Rights itself: not only is the Covenant not explicitly restricted in its territorial scope of application, it also refers to 'international assistance and co-operation' for the realization of economic, social and cultural rights, thereby pointing to the need for international solidarity in the realization of these rights. But this position is based, in addition, on three considerations.

First, the imposition of extra-territorial obligations to protect on the home States of private actors, may be seen as a necessary complement to the extension of the rights

of these actors under international law, particularly through multilateral, regional or bilateral free trade or investment agreements. For instance, M. Sornarajah argues that 'developed States owe a duty of control to the international community and do in fact have the means of legal control over the conduct abroad of multinational corporations', and he sees the imposition of such an obligation as the logical counterpart of the extensive protections afforded to foreign investors under both general international law and conventional international law (M. Sornarajah, *The International Law on Foreign Investment*, second edn (Cambridge University Press, 2004), chapter 4, esp. p. 169). Consider also the summary of the problem offered in 2008 by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, in his 2008 Report to the Human Rights Council:

***Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/8/5, 7 April 2008), paras. 34–5:**

34. To attract foreign investment, host States offer protection through bilateral investment treaties and host government agreements. They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to States' duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.

35. This imbalance creates potential difficulties for all types of countries. Agreements between host governments and companies sometimes include promises to 'freeze' the existing regulatory regime for the project's duration, which can be a half-century for major infrastructure and extractive industries projects. During the investment's lifetime, even social and environmental regulatory changes that are applied equally to domestic companies can be challenged by foreign investors claiming exemption or compensation.

In order to make up for this imbalance, the home States of private actors operating transnationally may have to contribute to policing the activities of these actors, in order for the obligations imposed on them in the State in which they operate to be truly effective. Mr El Hadji Guissé, a Special Rapporteur of the UN Commission on Human Rights, has remarked that '[t]he violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective' (*The Realization of Economic, Social*

and Cultural Rights, Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights), prepared by Mr El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission Resolution 1996/24, E/CN.4/Sub.2/1997/8, 27 June 1997, para. 131).

Second, the imposition of an obligation to protect human rights beyond national borders may be seen as one specific manifestation of a broader duty of States not to allow their territory to be used by private actors in order to cause damage to another State. In his dissenting opinion to the Advisory Opinion of the International Court of Justice on the *Legality of Threat or Use of Nuclear Weapons*, Judge Weeramantry referred in these terms to the principle that 'damage must not be caused to other nations':

International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, 240, dissenting opinion of Judge Weeramantry:

[This principle] is well entrenched in international law and goes as far back as the *Trail Smelter* case *(Reports of International Arbitral Awards,* 1938, Vol. III, p. 1905) and perhaps beyond (see also *Corfu Channel, Merits, Judgment,* I.C.J. Reports 1949, p. 4). This basic principle, that no nation is entitled by its own activities to cause damage to the environment of any other nation, appears as Principle 2 of the Rio Declaration on the Environment, 1992: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' *(Report of the United Nations Conference on Environment and Development* (AICONF. 151/26/Rev. I), Vol. 1, Ann. 1, p. 3.). Other international instruments that embody this principle are the Stockholm Declaration on the Human Environment (1972, Principle 21) and the 1986 Noumea Convention, Article 4(6) of which States: 'Nothing in this Convention shall affect the sovereign right of States to exploit, develop and manage their own natural resources pursuant to their own policies, taking into account their duty to protect and preserve the environment. Each Party shall ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction.' (Hohmann, *Basic Documents of International Environmental Law*, vol. 2 (1992), p. 1063.)

Judge Weeramantry considered that the claim to which the Court was confronted in that case – according to New Zealand, nuclear tests should be prohibited where this could risk having an impact on that country's population – should be decided 'in the context of such a deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law'. There is nothing that prohibits extending this principle, beyond environmental law, to human rights law. On the contrary, the Committee on Economic, Social and Cultural Rights mentioned, in the context of the right to water, that '[a]ny activities undertaken within the State party's

jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction' (General Comment No. 15 (2002), *The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* UN Doc. E/C.12/2002/11 (26 November 2002), paras. 31 and 35–6).

Third, apart from the human rights obligations directly imposed on the home State of private actors operating across borders, there is a need to take into account the human rights obligations of the State in which these private actors operate, and the correlative obligation of the home State, under general international law, not to create obstacles to the fulfillment of these obligations. Consider, for instance, the wording chosen by the Committee on Economic, Social and Cultural Rights when it adopted a general comment on the relationship between economic sanctions and respect for economic, social and cultural rights. The core message of that General Comment was that States imposing sanctions should not lead to jeopardizing the economic, social and cultural rights of the population in the targeted State, since this would constitute a violation of their obligations under the International Covenant on Economic, Social and Cultural Rights and, indeed, since the Universal Declaration on Human Rights may be considered as binding under general international law, whether or not the States concerned have ratified the Covenant:

Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights* (E/1998/22), para. 51:

While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China [which in fact ratified the ICESCR on 27 June 2001, thus after the adoption of the General Comment] and the United States) have yet to ratify it. Most of the non–permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means …' When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near–universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.

The notion that an obligation would be 'doubly' incumbent upon a State may be a source of confusion. On its face, the use of this expression would seem to betray a certain hesitation among the members of the Committee about whether the obligations of the States adopting sanctions have their source in the international undertakings of those States, or

instead in the rights recognized to the population in the targeted State. The reality, however, is that it can be both, and both at the same time. Of course, all that matters, where sanctions adopted by one State have an impact on the population of another State, are the obligations of the first State under international law, which may or may not include the obligation not to violate the rights of populations outside its borders. And the General Comment clearly implies not only that a State party to the ICESCR is under an obligation not to violate the rights stipulated in the Covenant in other countries, but also that such an obligation could be violated by that State voting in favour of adopting or upholding economic sanctions which have a severe impact on the realization of economic and social rights in the targeted country. But this does not mean that the obligations of the targeted State towards its own population are irrelevant to the determination of the question whether or not the State adopting sanctions has violated its own obligations. For, *in addition*, States parties to the ICESCR may be violating their international obligations by coercing other States into violating their own obligations under either the Covenant or under other rules of international law. This is what Article 18 of the International Law Commission's 2001 articles on Responsibility of States for internationally wrongful acts refers to under the heading 'Coercion of another State': 'A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act.'

However important these arguments in favour of the recognition of extra-territorial obligations to protect, the attitude of human rights bodies remains cautious. The Committee on Economic, Social and Cultural Rights has been the most explicit in stating its expectation that States parties to the Covenant on Economic, Social and Cultural Rights should control private actors whose behaviour they may influence. In 2007 the Committee on the Elimination of Racial Discrimination called on Canada to 'take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable' (Concluding Observations/Comments: Canada, CERD/C/CAN/CO/18 (25 May 2007), para. 17). But judicial bodies have been far less open to claims that States would be in violation of their human rights obligations by not exercising due diligence control over the behaviour of private actors operating beyond their national territory. One exception, albeit in very specific circumstances, is the case of *Ilascu and others* v. *Moldova and Russia* presented to the European Court of Human Rights:

European Court of Human Rights (GC), *Ilascu and others* v. *Moldova and Russia* (Appl. No. 48787/99), judgment of 8 July 2004, paras. 311–18:

[The 'Moldavian Republic of Transdniestria' is a region of Moldova which proclaimed its independence in 1991 but is not recognized by the international community. It has been

consistently supported, first by the USSR when the Republic of Moldova proclaimed its independence in August 1991, and later by the Federation of Russia, the successor State to the USSR; indeed, the Fourteenth Army of the USSR, previously deployed in Moldova with its headquarters in Chisinau, had retreated from most of Moldova but remained present in Transdniestria, and actively co-operated with the separatists since. After the end of the conflict between Moldova and the separatist republic in 1991–2, senior officers of the former Fourteenth Army participated in public life in Transdniestria, and soldiers of the former Fourteenth Army took part in the elections in Transdniestria, military parades of the Transdniestrian forces and other public events. Strong links, both economic and legal – for instance in the field of judicial co-operation – were established between the Moldavian Republic of Transdniestria and the Federation of Russia. The four applicants, Moldovan nationals who were arrested in June 1992 and had been condemned by a Transdniestrian court to imprisonment terms or, in the case of Mr Ilascu, to death, alleged in particular that the court which had convicted them was not competent for the purposes of Article 6 of the Convention, that they had not had a fair trial, that their detention in Transdniestria was not lawful, in breach of Article 5, and that their conditions of detention contravened Articles 3 and 8 of the Convention. The applicants argued that the Moldovan authorities were responsible under the Convention for the alleged violations, since they had not taken any appropriate steps to put an end to them. They further asserted that the Russian Federation shared responsibility since the territory of Transdniestria was and is under *de facto* Russian control on account of the Russian troops and military equipment stationed there, and because of the support allegedly given to the separatist regime by the Russian Federation.]

311. It follows from Article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their 'jurisdiction'.

The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

312. The Court refers to its case law to the effect that the concept of 'jurisdiction' for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law (see *Gentilhomme, Schaff-Benhadji and Zerouki* v. *France*, judgment of 14 May 2002, §20; *Banković and others* v. *Belgium and 16 Other Contracting States* (dec.), No. 52207/99, §§59–61, ECHR 2001–XII; and *Assanidze* v. *Georgia,* ECHR 2004– ..., §137).

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 (see the *Banković* decision, cited above, §59*)*, but also that jurisdiction is presumed to be exercised normally throughout the State's territory.

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned (see *Loizidou* v. *Turkey* (*Preliminary Objections*) judgment of 23 March 1995, Series A No. 310, and *Cyprus* v. *Turkey* [GC], No. 25781/94, ECHR 2001–IV, §§76–80, as cited in the above-mentioned *Banković* decision, §§70–71), acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.

313. In order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of limiting the effective exercise of a

State's authority over its territory, and on the other the State's own conduct. The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (see, among other authorities, *Z.* v. *United Kingdom* [GC], No. 29392/95, §73, ECHR 2001–V).

Those obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.

314. Moreover, the Court observes that, although in the *Banković* case it emphasised the preponderance of the territorial principle in the application of the Convention (decision cited above, §80), it also acknowledged that the concept of 'jurisdiction' within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties (see *Loizidou* v. *Turkey* (*Merits*), judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996–VI, pp. 2234–2235, §52).

The Court has 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 meaning of Article 1 of the Convention.

According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration (*ibid.*).

315. It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned (*ibid.*, pp. 2235–2236, §56).

316. Where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support (see *Cyprus* v. *Turkey* [GC], cited above, §77).

317. A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction. Thus, with reference to extradition to a non-Contracting State, the Court has held that a Contracting State would be acting in a manner incompatible with the underlying values of the Convention, 'that common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, if it were knowingly to hand over a fugitive to another State where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment (see *Soering* v. *United Kingdom*, judgment of 7 July 1989, Series A No. 161, p. 35, §§88–91 [see below, section 3.1. of this chapter]).

318. In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention (see *Cyprus* v. *Turkey,* cited above, §81). That is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community.

Applying those principles to the facts of the case, the Court arrived at the conclusion that the Moldavian Republic of Transdniestria, 'set up in 1991–1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, *or at the very least under the decisive influence*, of the Russian Federation, and in any event that *it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation*', and that therefore the applicants must be considered to come within the 'jurisdiction' of the Russian Federation for the purposes of Article 1 of the Convention (see paras. 391–4).

Box 2.2. The example of the US Alien Torts Claims Act

Perhaps the most spectacular example of the exercise of extraterritorial jurisdiction in protection of human rights is the revival since 1980 of the Alien Tort Claims Act (ATCA) in the United States. This statute has allowed foreign victims of serious human rights abuses committed by any person over which the US federal courts can exercise personal jurisdiction – including corporations having sufficiently close links to the United States, either because they are incorported in the United States, or because they have a continuous business relationship to the United States – to seek damages before the United States federal courts.

The Alien Tort Claims Act, a part of the First Judiciary Act 1789, provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. (28 U.S.C. §1350). For almost two centuries, this clause remained confined to relatively marginal situations. It was first revived in a case involving a Paraguayan police officer, alleged to have tortured a Paraguayan national in his home country, but found by the family of the victim to be on US territory: the Second Circuit Court accepted that it could exercise jurisdiction, on the basis that 'deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights' (*Filartiga* v. *Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)). The ATCA has since been relied upon in a large number of cases related to human rights claims (see, e.g. *Tel-Oren* v. *Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774 (D.C. Cir. 1984); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *Xuncax* v. *Gramajo*, 886 F.Supp 162 (D Mass, 1995); *Kadic* v. *Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)), including some cases concerning corporations as defendants (see in particular *John Doe I* v. *Unocal Corp.*, 395 F.3d 932, 945–946 (9th Cir. 2002) (complicity of Unocal, a California-based oil company, with human rights abuses committed by the Burmese military)). When, in 2004, the US Supreme Court was provided a first opportunity to influence this development and to examine the exact scope of the powers conferred upon US federal courts by the Alien Tort Claims Act, it took the view that, when confronted with such suits, the federal courts should 'require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [violation of safe conducts, infringement of the rights

of ambassadors, and piracy]' which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004)). This significantly narrows down the potential of the ATCA which, in the future, shall only offer a potential remedy to victims of the most serious violations of human rights.

2.4. Questions for discussion: the scope of the extra-territorial obligation to protect human rights

1. Once it is agreed that human rights obligations extending beyond States' national territory may be imposed, is there any reason in principle to accept such an extension where State agents are acting on foreign territory, but to deny it where prescriptive or adjudicative extraterritoriality is concerned – i.e. where the claim is that the legislator should adopt extra-territorial regulations, or that the courts should have the power to adjudicate claims about situations arising outside the national territory? Which arguments could justify thus limiting the scope of extra-territorial human rights obligations?
2. May the reluctance of courts to imposing obligations to protect human rights beyond national borders be explained by a perception that the exercise of prescriptive or adjudicative extra-territoriality constitutes a threat to the sovereignty of the foreign State? For a State to assert jurisdiction over certain situations located outside its national territory, there must be a reasonable link between the State and the situation concerned. It has been argued, however, that 'one potentially crucial factor to be weighed into the test of reasonableness is that the exercise of extraterritorial jurisdiction in order to contribute to the protection of human rights in the host State of the foreign investment does not fall under the category of forms of extraterritorial jurisdiction which primarily benefit the State thus extending the reach of its national laws. Rather, ... extraterritorial jurisdiction exercised in order to contribute to the protection of internationally recognized human rights belongs to the category of forms of extraterritorial jurisdiction which may be justified in the name of international solidarity: whatever the reasons are for the territorial State not effectively protecting human rights, the exercise of extraterritorial jurisdiction by other States, in particular the home State of the multinational enterprise, in order to ensure such a protection, may be seen as a means to facilitate the compliance of the host State with its international obligations under the international law of human rights. This distinction between the two broadly defined justifications for extraterritorial jurisdiction is essential ... In contrast with situations where States exercise extraterritorial juridiction in order to promote their own, sovereign interests, where extraterritorial jurisdiction promotes solidarity between States, it should be considered as valid in principle, although as a matter of course any risks of conflict with the territorial State should be avoided to the fullest extent possible even is such cases' (O. De Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations', background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3–4 November 2006 within the mandate of the Special Representative to the

UN Secretary-General on the issue of human rights and transnational corporations and other enterprises). How relevant is that distinction?

3. How real is the risk that, under the guise of complying with extra-territorial obligations to protect human rights, States will in fact be tempted to enforce their policy preferences, for instance imposing economic sanctions on States whose policies they dislike, and for reasons therefore unconnected with a genuine concern for human rights protection abroad? Consider for instance the measures adopted by the United States targeting persons doing business in Cuba. In 1996, as part of a broader campaign to seek international sanctions against the Castro Government in Cuba, and to encourage a transition government leading to a democratically elected government in Cuba, the United States adopted the Cuban Liberty and Democratic Solidarity (Libertad) Act, better known as the Helms-Burton Act. One provision of the Act allows US nationals who have been expropriated following the 1959 revolution to seek damages against any natural or legal person having 'trafficked' such 'confiscated property'; another provision orders the Secretary of State to deny any visa to individuals found to have trafficked confiscated property, as well as to any 'corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national' (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Codified in Title 22, Sections 6021–91 of the US Code) P.L. 104–14). The Helms-Burton Act has largely been denounced as an illegitimate exercise by the United States of its extra-territorial jurisdiction, to the extent that sanctions were threatened also against non-US citizens and companies for doing business in Cuba (see A. F. Löwenfeld, 'Congress and Cuba: the Helms-Burton Act', *American Journal of International Law*, 90 (1996), 419–34, and the rejoinder to this critique by B. M. Clagett, 'Title III of the Helms-Burton Act is Consistent with International Law', *American Journal of International Law*, 90 (1996), 434–40; A. Reinisch, 'A Few Public International Law Comments on the "Cuban Liberty and Democratic Solidarity (Libertad) Act" of 1996', *European Journal of International Law*, 7, No. 4 (1996), 55). Based on this example, is there a risk that the development of extra-territorial obligations to protect human rights will encourage instances of instrumentalization of human rights by States? Compare the Helms-Burton Act with the Alien Tort Claims Act (see box 2.2.). What substantially differentiates the two legislations from one another?

2.3 The obligation of international assistance and co-operation

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that the States parties to the Covenant undertake to 'take steps, individually *and through international assistance and co-operation*, especially economic and technical', to the maximum of their available resources, 'with a view to achieving progressively the full realization of the rights' recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in Article 11(1) of the Covenant, according to which 'States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'. Under

Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which 'may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant'. Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action 'includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned'.

The preparatory works show that, in adopting these provisions relating to international assistance and co-operation, the drafters of the International Covenant on Economic, Social and Cultural Rights did not wish to impose an obligation on any State to provide such assistance or co-operation at any specified level (Ph. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 9 (1987), 156 at 186–92). However, this is not to say that the reference made in Article 2(1) of the Covenant to international assistance and co-operation produces no useful effect. Taking as its departure point both Article 56 of the UN Charter, which imposes on all the Members of the United Nations to 'take joint and separate action in co-operation with the Organisation', *inter alia*, in order to achieve universal respect for, and observance of, human rights and fundamental freedoms for all, and paragraph 34 of the Vienna Declaration and Programme of Action adopted at the Vienna World Conference on Human Rights of 14–25 June 1993 – which refers to the '[i]ncreased efforts [which] should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms' (UN Doc. A/CONF.157/23, 12 July 1993), the UN Committee on Economic, Social and Cultural Rights has identified certain obligations the States parties to the Covenant owe to populations under the jurisdiction of other States:

Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/1999/5, para. 38:

States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to co-operate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability. The role of the World Food Programme (WFP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), and increasingly that of UNICEF and FAO is of particular importance in this respect and should be strengthened. Priority in food aid should be given to the most vulnerable populations.

Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, para. 39:

Depending on the availability of resources, States [in particular States in a position to assist developing countries in fulfilling their core and other obligations under the Covenant] should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.

The monitoring of States under the ICESCR could constitute an opportunity to identify the needs of that State in terms of development co-operation, or of other forms of co-operation from other States – bilaterally or through international agencies – on the basis of an assessment of the factors which impede the full realization of economic and social rights on the territory of the State concerned. The potential of the Covenant remains significantly underdeveloped in this respect, however, as already noted by the Committee on Economic, Social and Cultural Rights in 1990:

Committee on Economic, Social, and Cultural Rights, General Comment No. 2, *International Technical Assistance Measures (Art. 22 of the Covenant)* (1990) (E/1990/23):

1. Article 22 of the Covenant establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matters arising out of reports submitted under the Covenant 'which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the ... Covenant'. While the primary responsibility under article 22 is vested in the Council, it is clearly appropriate for the Committee on Economic, Social and Cultural Rights to play an active role in advising and assisting the Council in this regard.
2. Recommendations in accordance with article 22 may be made to any 'organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance'. The Committee considers that this provision should be interpreted so as to include virtually all United Nations organs and agencies involved in any aspect of international development co-operation. It would therefore be appropriate for recommendations in accordance with article 22 to be addressed, *inter alia*, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women, other bodies such as UNDP, UNICEF and CDP, agencies such as the World Bank and IMF, and any of the other specialized agencies such as ILO, FAO, UNESCO and WHO.
3. Article 22 could lead either to recommendations of a general policy nature or to more narrowly focused recommendations relating to a specific situation. In the former context, the principal role of the Committee would seem to be to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international

development cooperation activities undertaken by, or with the assistance of, the United Nations and its agencies ...

4. As a preliminary practical matter, the Committee notes that its own endeavours would be assisted, and the relevant agencies would also be better informed, if they were to take a greater interest in the work of the Committee. While recognizing that such an interest can be demonstrated in a variety of ways, the Committee observes that attendance by representatives of the appropriate United Nations bodies at its first four sessions has, with the notable exceptions of ILO, UNESCO and WHO, been very low. Similarly, pertinent materials and written information had been received from only a very limited number of agencies. The Committee considers that a deeper understanding of the relevance of economic, social and cultural rights in the context of international development co-operation activities would be considerably facilitated through greater interaction between the Committee and the appropriate agencies. At the very least, the day of general discussion on a specific issue, which the Committee undertakes at each of its sessions, provides an ideal context in which a potentially productive exchange of views can be undertaken.
5. On the broader issues of the promotion of respect for human rights in the context of development activities, the Committee has so far seen only rather limited evidence of specific efforts by United Nations bodies. It notes with satisfaction in this regard the initiative taken jointly by the Centre for Human Rights and UNDP in writing to United Nations Resident Representatives and other field-based officials, inviting their 'suggestions and advice, in particular with respect to possible forms of co-operation in ongoing projects [identified] as having a human rights dimension or in new ones in response to a specific Government's request'. The Committee has also been informed of long-standing efforts undertaken by ILO to link its own human rights and other international labour standards to its technical co-operation activities.
6. With respect to such activities, two general principles are important. The first is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights.
7. The second principle of general relevance is that development co-operation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.

8. Despite the importance of seeking to integrate human rights concerns into development activities, it is true that proposals for such integration can too easily remain at a level of generality. Thus, in an effort to encourage the operationalization of the principle contained in article 22 of the Covenant, the Committee wishes to draw attention to the following specific measures which merit consideration by the relevant bodies:
   (a) As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular ...;
   (b) Consideration should be given by United Nations agencies to the proposal, made by the Secretary-General in a report of 1979 ['The international dimensions of the right to development as a human right in relation with other human rights based on international co-operation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs' (E/CN.4/1334, para. 314)] that a 'human rights impact statement' be required to be prepared in connection with all major development co-operation activities;
   (c) The training or briefing given to project and other personnel employed by United Nations agencies should include a component dealing with human rights standards and principles;
   (d) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.
9. A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as 'adjustment with a human face' or as promoting 'the human dimension of development' requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international co-operation. In many situations, this might point to the need for major debt relief initiatives.
10. Finally, the Committee wishes to draw attention to the important opportunity provided to States parties, in accordance with article 22 of the Covenant, to identify in their reports any particular needs they might have for technical assistance or development co-operation.

This General Comment is grounded, for the most part, on the need to seize the process of State reporting to the Committee on Economic, Social and Cultural Rights as an opportunity for the identification of the needs of technical assistance and development co-operation. This idea is also central to the establishment of the Universal Periodic Review, as will be seen in chapter 10. But two other ideas are also put forward in the General Comment. One is that development and human rights should be mutually supportive, strengthening each other rather than competing against one another, or even worse – undermining each other. Another idea is that there may be a need to crystallize into a legal obligation imposed on developed countries, the assistance needs of developing countries. Both ideas are also present in the following paragraphs of the General Comment adopted by the Committee on the Rights of the Child on the general measures of implementation of the Convention on the Rights of the Child:

Committee on the Rights of the Child, General Comment No. 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6) (CRC/GC/2003/5, 27 November 2003), paras. 60–4:

60. Article 4 emphasizes that implementation of the Convention is a co-operative exercise for the States of the world. This article and others in the Convention highlight the need for international co-operation. The Charter of the United Nations (Arts. 55 and 56) identifies the overall purposes of international economic and social co-operation, and members pledge themselves under the Charter 'to take joint and separate action in co-operation with the Organisation' to achieve these purposes. In the United Nations Millennium Declaration and at other global meetings, including the United Nations General Assembly special session on children, States have pledged themselves, in particular, to international co-operation to eliminate poverty.

61. The Committee advises States parties that the Convention should form the framework for international development assistance related directly or indirectly to children and that programmes of donor States should be rights-based. The Committee urges States to meet internationally agreed targets, including the United Nations target for international development assistance of 0.7 per cent of gross domestic product. This goal was reiterated along with other targets in the Monterrey Consensus, arising from the 2002 International Conference on Financing for Development. The Committee encourages States parties that receive international aid and assistance to allocate a substantive part of that aid specifically to children. The Committee expects States parties to be able to identify on a yearly basis the amount and proportion of international support earmarked for the implementation of children's rights.

62. The Committee endorses the aims of the 20/20 initiative, to achieve universal access to basic social services of good quality on a sustainable basis, as a shared responsibility of developing and donor States. The Committee notes that international meetings held to review progress have concluded that many States are going to have difficulty meeting fundamental economic and social rights unless additional resources are allocated and efficiency in resource allocation is increased. The Committee takes note of and encourages efforts being made to reduce poverty in the most heavily indebted countries through the Poverty Reduction Strategy Paper (PRSP). As the central, country-led strategy for achieving the millennium development goals, PRSPs must include a strong focus on children's rights. The Committee urges Governments,

donors and civil society to ensure that children are a prominent priority in the development of PRSPs and sectorwide approaches to development (SWAps). Both PRSPs and SWAps should reflect children's rights principles, with a holistic, child-centred approach recognizing children as holders of rights and the incorporation of development goals and objectives which are relevant to children.

63. The Committee encourages States to provide and to use, as appropriate, technical assistance in the process of implementing the Convention. The United Nations Children's Fund (UNICEF), the Office of the High Commissioner for Human Rights (OHCHR) and other United Nations and United Nations–related agencies can provide technical assistance with many aspects of implementation. States parties are encouraged to identify their interest in technical assistance in their reports under the Convention.

64. In their promotion of international co-operation and technical assistance, all United Nations and United Nations-related agencies should be guided by the Convention and should mainstream children's rights throughout their activities. They should seek to ensure within their influence that international co-operation is targeted at supporting States to fulfil their obligations under the Convention. Similarly the World Bank Group, the International Monetary Fund and World Trade Organisation should ensure that their activities related to international co-operation and economic development give primary consideration to the best interests of children and promote full implementation of the Convention.

2.4 Human rights and development

Both the idea that human rights and development should be mutually supportive and the idea that there may exist an obligation of mutual assistance and co-operation, as a correlative to a right to development, have made considerable progress in the 1980s and throughout the 1990s. On the one hand, the notion of development has been redefined, particularly under the influence of the economist Amartya K. Sen and of the founder of the Human Development Reports of the United Nations Development Programme, Mahbubul Haq, in order to overcome the risk of development and human rights growing increasingly apart from each other. The construction of development and human rights as mutually supportive remains incomplete, however, as illustrated by the debate on the relationship of the Millennium Development Goals to human rights. On the other hand, attempts have been made to give concrete content to the 'right to development' proclaimed in 1986 by the United Nations General Assembly, but which remains insufficiently operational. This section briefly addresses these questions. While the relationship with the question of 'jurisdiction' as usually understood – i.e. the scope of the human rights obligations imposed on States, particularly the geographical scope – may seem tenuous, this section does ask whether there exists a 'global responsibility' for human rights, and what the implications are of seeing development co-operation as a means of realizing human rights (for useful collections of essays related to this issue, see P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual*

Reinforcement (Oxford University Press, 2005); B. Andreassen and S. Marks (eds.), *Development as a Human Right* (Cambridge, Mass.: Harvard University Press, 2006); for contributions linking the issue of extraterritorial obligations to development, see M. E. Salomon, *Global Responsibility for Human Rights* (Oxford University Press, 2007) and M. E. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty – Bearers* (Mortsel, Belgium: Intersentia, 2007)).

Amartya K. Sen, *Development as Freedom* (New York: Alfred A. Knopf, 1999), pp. 18–19 and 36–8:

There are two distinct reasons for the crucial importance of individual freedom in the concept of development, related respectively to *evaluation* and *effectiveness*. First, in the normative approach used here, substantive individual freedoms are taken to be critical. The success of a society is to be evaluated, in this view, primarily by the substantive freedoms that the members of that society enjoy. This evaluative position differs from the informational focus of more traditional normative approaches, which focus on other variables, such as utility, or procedural liberty, or real income ... The second reason for taking substantive freedom to be so crucial is that freedom is not only the basis of the evaluation of success and failure, but it is also a principal determinant of individual initiative and social effectiveness. Greater freedom enhances the ability of people to help themselves and also to influence the world, and these matters are central to the process of development ... In this approach, expansion of freedom is viewed as both (1) the *primary end* and (2) the *principal means* of development. They can be called respectively the 'constitutive role' and the 'instrumental role' of freedom in development. The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on. In this constitutive perspective, development involves expansion of these and other basic freedoms ... The instrumental role of freedom concerns the way different kinds of rights, opportunities, and entitlements contribute to the expansion of human freedom in general, and thus to promoting development ... The effectiveness of freedom as an instrument lies in the fact that different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of other types ... [Instrumental freedoms such as (1) political freedoms, (2) economic facilities, (3) social opportunities, (4) transparency guarantees, and (5) protective security] tend to contribute to the general capability of a person to live more freely, but they also serve to complement one another. While development analysis must, on the one hand, be concerned with the objectives and aims that make the instrumental freedoms consequentially important, it must also take note of the empirical linkages that tie the distinct types of freedom together, strengthening their joint importance. Indeed, these connections are central to a fuller understanding of the instrumental role of freedom. The claim that freedom is not only the primary objcctive of development but also its principal means relates particularly to these linkages.

The view of development promoted by Sen challenged the dominant use of economic growth, measured through the level of GDP per capita, as a proxy for development. This view influenced the introduction in 1990, by the United Nations Development Programme (UNDP), of the human development index (HDI) as an alternative means of evaluating development. The UNDP selected three basic dimensions of development to be the main focus of its analysis of development: longevity, as a proxy for health; adult literacy, and later mean years of school enrollment, as proxies for education and learning; and per capita income, or 'command over resources needed for a decent living'. The HDI, an indicator combining these three components, relied on a multidimensional definition of development, redefined as 'a process of enlarging people's choices'. The 1990 Human Development Report established that broader scope of choice was only available to people who could lead long and healthy lives, acquire knowledge and have 'access to resources needed for a decent standard of living'. Income was an inappropriate yardstick for development for three main reasons: first, information on average income did not reveal the composition of wealth or its beneficiaries; second, people 'often value achievements that do not show up at all, or not immediately, in higher measured income or growth figures'; and finally, there was no automatic empirical link between income growth and the expansion of choice (i.e. there are high-income countries which afford relatively low levels of choice – as expressed in longevity, or level of education – and, conversely, there are low-income countries in which choices are relatively broad). Therefore, 'development must ... be more than just the expansion of income and wealth. Its focus must be people' (UNDP, *Human Development Report 1990* (Oxford University Press, 1990), pp. 9–10).

Although this represented an important advance in comparison to definitions of development that equate it with economic growth, the link between development and human rights remained implicit in this new measure of development. In contrast, such a link is explicit in the Declaration on the Right to Development adopted in 1986 by the UN General Assembly:

Declaration on the Right to Development (adopted by General Assembly Resolution 41/128 of 4 December 1986):

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights, ...

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, *inter alia*, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic,

social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

The Declaration on the right to development sees development as a process through which all human rights and fundamental freedoms can be fully realized. In practice, however, development agencies have been slow at recognizing the operational character of human rights – i.e. the positive contribution human rights could make to guiding their activities and the process of development itself. A new and significant attempt was

made by the UNDP in the 2000 Human Development Report, which explored at length the relationship between human rights and human development. The report emphasized in particular how human rights could reinforce and support human development in two ways: first, by guiding the process of development towards the realization of human rights, in line with the 1986 Declaration on the Right to Development; and second, by reconceptualizing human needs as rights, thus transforming the relationship between governments and populations to one between duty-bearers and rights-holders. Indeed, whereas human development goals were valued both as useful as means of development in an instrumental perspective and as desirable for their own sake as ends of development, they still remained short of being considered entitlements from a *legal* perspective. This, the 2000 Human Development Report saw as a missed opportunity. The notion that realizing certain development goals is a *duty* rather than an *option* modifies both the nature of the goal, and the allocation of responsibility among social actors (state, corporations, civil society and individuals). Human rights provide a new analytical tool: capability deprivation, often a multi-causal phenomenon, when seen through the lens of human rights, can be analysed in terms of attribution of responsibility. By affirming that a development goal is an entitlement, human rights language empowers actors to make claims against duty-bearers and forces them to act against all types of capability-constraining obstacles, from lack of resources to discriminatory social practices. Moreover, a human rights approach to development calls for an analysis of both the ends and the *process* of development, and particularly sets limits to, or otherwise guides, the policies that can be carried out in the pursuit of development goals. The principles of accountability, participation, non-discrimination, and empowerment, are particularly relevant in this regard. A final contribution of a human rights approach to development thinking is that human rights assessment focuses not only on progress made so far in the fulfillment of rights, but also on the 'extent to which the gains are socially protected against potential threats': they constitute safeguards against the risk of policy reversals (UNDP, *Human Development Report 2000* (Oxford University Press, 2000), p. 23).

These considerations also played a central role in the discussion concerning the relationship between the Millennium Development Goals (MDGs) and human rights. The MDGs were derived from the Millennium Declaration adopted by the UN General Assembly in September 2000, at a World Summit attended by 147 heads of State or government. The eight MDGs relate to (1) the eradication of extreme poverty and hunger; (2) the achievement of universal primary education; (3) the promotion of gender equality and the empowerment of women; (4) the reduction of child mortality; (5) the improvement of maternal health; (6) combating HIV/AIDS, malaria, and other diseases; (7) environmental sustainability; and (8) the establishment of a global partnership for development. Eighteen time-bound targets and forty-eight indicators have been agreed upon in order to improve monitoring of progress towards the achievement of these goals, and a series of institutional initiatives, including the development of national MDG reports in each developing country, have been taken in order to ensure that progress is made towards fulfilling these objectives. Although Millennium Human Rights Goals have also been agreed upon, they have attracted far less attention, they are less operational, and they have not been the