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Freeing Soering*: The ECHR, State Complicity in Torture and Jurisdiction*

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Abstract

Over the last 10 years, there have been numerous cases of ECHR-state party complicity in torture carried out by foreign states. Some of these cases have been entirely extraterritorial – that is, the victim was never within the territory of the complicit state. Applying the orthodox rules of attribution in international law and the current understanding of jurisdiction under Article 1 of the ECHR, these cases of extraterritorial complicity appear not to lead to the responsibility of the complicit state under the Convention. This is an unprincipled gap in the protections provided by the Convention. This article argues (i) that this unprincipled gap may be overcome by re-imagining the rule in Soering *as a preventive complicity rule and extending it to other forms of complicity in torture and (ii) that such a re-imagination is supported by principles deeply embedded in the case law of the European Court of Human Rights. For these reasons, an expansive interpretation of Article 1 of the ECHR to capture cases of state complicity in extraterritorial torture would be justified.*

1 Introduction

Imagine that the security services of a foreign state are seeking to arrest and detain a dissident. The foreign state, which is not party to the European Convention on Human Rights (ECHR), routinely tortures detainees. Knowing that the United Kingdom (UK) has deep intelligence links within its territory, the foreign state requests information on the whereabouts of the dissident. The UK provides a detailed file, which enables the foreign state to make the arrest. The dissident is tortured.[1]

We are clearly dealing with state complicity – the UK facilitated acts of torture carried out by a foreign state. But we are dealing with state complicity with a particular geographical twist – the victim is never within the territory of the complicit state. These may be termed extraterritorial complicity cases.

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1 See generally Joint Committee on Human Rights, UK Parliament, 'Allegations of UK Complicity in Torture', HL Paper 152 HC 230 (2008–2009).

This article addresses the applicability of the ECHR to these cases of extraterritorial complicity. As preliminaries, the section that follows makes three claims. First, despite the recent decisions of the European Court of Human Rights (ECtHR) in *El-Masri*, *Al Nashiri* and *Husayn*, there is little chance that the conduct of the foreign state can be attributed to the complicit state.[2] For this reason, the conduct at issue in these instances of extraterritorial complicity remains the complicit state's own conduct. Second, existing interpretations of Article 1 of the ECHR would deny that the victim of the foreign state's acts of torture fall within the complicit state's jurisdiction. No claim would lie against the UK in Strasbourg for its complicity in torture. Third, this jurisdictional bar constitutes an unprincipled gap in the protections provided by the Convention.

These three preliminary claims provide the baselines for the article's central argument. The central argument is that this jurisdictional bar can be overcome by re-imagining and extending the rule entrenched in the Convention system by the foundational case of *Soering*.[3] The extension suggested is not an extension of the *non-refoulement* obligation in *Soering* from Article 3 of the ECHR to other articles of the Convention, as was the case in *Othman*.[4] Rather, *Soering* is re-imagined as a preventive complicity rule and extended to include other forms of complicity in torture.

To support its central argument as a matter of law, this article draws together five strands of reasoning. These concern certain interpretive doctrines laid down by the ECtHR; the nature of the principal rights violation by the foreign state; the fact that the proposed interpretation would align states' obligations under the Convention with their obligations under customary international law; the applicability of the underlying rationale of *Soering* to our cases of extraterritorial complicity; and the consistency of an expansive interpretation with ideas that have underpinned the recent development of Article 1 jurisdiction in ordinary extraterritoriality cases. Together, these five strands show that an extension of jurisdiction in the present situation would be consistent with principles and ideas deeply embedded in the case law of the Court.

This argument resonates beyond the specifics of the imagined case. Examples abound of Council of Europe state complicity in foreign human rights abuses committed during the war of terrorism.[5] Some of these cases involve victims never physically within the territory of the complicit state. States might share intelligence, sell equipment used in interrogations or provide technical support, in each case facilitating an act of torture

[2] ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012; ECtHR, *Al Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, Appl. no. 7511/13, Judgment of 24 July 2014. All ECtHR decisions are available online at http://hudoc.echr.coe.int/.

[3] ECtHR, *Soering v. The United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.

[4] ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Appl. no. 8139/09, Judgment of 17 January 2012. See also *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64. On this development, see Michaelsen, 'The Renaissance of Non-Refoulement? The *Othman (Abu Qatada)* Decision of the European Court of Human Rights', 61 *International and Comparative Law Quarterly* (*ICLQ*) (2012) 750.

[5] See, e.g., UN Human Rights Council (UNHRC), Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/HRC10/3, 4 February 2009; UNHRC, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, UN Doc. A/HRC/13/42, 19 February 2010.

without the victim ever setting foot on the state's own territory. State complicity in torture of this kind should be seen to give rise to responsibility under Article 3 of the ECHR.

2 Preliminary Claims

A *Attribution*

Before turning to the central argument, this section makes three preliminary claims. The first concerns attribution. Here, it is helpful to start with the fundamentals in the law of state responsibility. A state commits an internationally wrongful act where conduct (i) is attributable to the state and (ii) constitutes a breach of its international obligations.[6] International tribunals, including the ECtHR, sometimes confuse the two stages.[7] Nonetheless, they are distinct.

In the extraterritorial complicity cases under discussion, the conduct of the agents of the complicit state is obviously attributable to the complicit state. This is by ordinary operation of the rule attributing the conduct of its own organs to the state.[8] The conduct in question is the sharing of intelligence that enables the capture of the dissident, the sale of equipment used in the torture, the provision of information that drives the interrogation, or whatever the case may be.

A second question is whether the conduct of the foreign state might also be attributable to the complicit state. Under the ordinary rules of attribution in international law, the straightforward answer is no. Taking the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) as orthodoxy, there is no chance of attribution under any of the rules set out in Chapter II.[9] Likewise, these cases of complicity fall short of the requirements of direction and control by one state over the conduct of another state under Article 17 of ARSIWA and coercion under Article 18 of ARSIWA.

However, there is evidence that the ECtHR has been willing to look outside the orthodox rules of attribution set out by the ILC.[10] *El-Masri* concerned Macedonia's participation in a range of abuses predominantly committed by agents of the USA against Khaled El-Masri, a German citizen.[11] In part, Macedonia's responsibility under Article 3 of the ECHR was founded on the attributable acts of its own agents – ill treatment after the arrest and removal of the applicant to US authorities.[12] However, the

6 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001, Art. 2.

7 See M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at 43–51; Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations', 14 *ILSA Journal of International and Comparative Law* (2007–2008) 525.

8 ARSIWA, *supra* note 6, Art. 4.

9 *Ibid.*, Arts 4–11.

10 See A. Nollkaemper, The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?, 24 December 2012, available at www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/ (last visited 1 February 2015).

11 *El-Masri*, *supra* note 2.

12 See *El-Masri*, *supra* note 2, paras 200–204, with respect to the ill treatment by Macedonian agents, and paras 215–222, with respect to the claimant's removal.

Court also addressed Macedonia's responsibility for acts of torture committed by US agents at Skopje airport. In this respect, it held that:

> the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.[13]

This is an explicit assertion that territorial state complicity in acts of torture by agents of a foreign state is sufficient to attribute the conduct of those agents to the complicit state. This approach was repeated in the cases of *Al Nashiri* and *Husayn*.[14]

Whatever the merits of this approach, it seems of little use in our situations of extraterritorial complicity.[15] In all three cases, the application of an exceptional attributional rule appears to turn on the presence of the claimant within the territory of the respondent state. Where the potential claimant is wholly within the territory of the foreign state – as specified in our situation – this exceptional attributional approach is inapplicable. There is little chance that the conduct of the foreign state can be attributed to the complicit state.

B *Jurisdiction*

That the conduct of the foreign state cannot be attributed to the complicit state is not the end of the matter. Of course, what remains are the attributable acts of the complicit state's own agents. To establish the complicit state's responsibility under the ECHR, these attributable acts must constitute a breach of the state's international obligations.[16] This is where these cases of extraterritorial complicity encounter the problem of jurisdiction. Article 1 of the ECHR imposes an obligation on state parties 'to secure to everyone in their jurisdiction the rights and freedoms defined in' the Convention.[17] To say that a potential claimant is not within the jurisdiction of the state is to say that the state owes no obligation to her. Without any such obligation, there can be no question of international responsibility.

The troubled history of extraterritorial jurisdiction under the ECHR is well known – the Turkish occupation cases; the landmark misstep of *Banković* followed by the slow correction in *Issa*, *Ocalan* and *Medvedyev*; the restoration of some semblance of order in *Al-Skeini* and *Jaloud*.[18] Today, case law and scholarship generally

[13] *El-Masri*, *supra* note 2, para. 206.

[14] *Al Nashiri*, *supra* note 2, paras 452, 517; *Husayn*, *supra* note 2, paras 449, 512. See also UNHRC, *Mohammed Alzery v. Sweden*, Doc. CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.6.

[15] See M. Jackson, *Complicity in International Law* (2015), at 194–199.

[16] ARSIWA, *supra* note 6, Art. 2.

[17] Art. 1 ECHR.

[18] *Cyprus v. Turkey* (1975) DR 2, 125; ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 23 March 1995; ECtHR, *Cyprus v. Turkey*, Appl. no. 25781/84, Judgment of 10 May 2001; ECtHR, *Banković and Others v. Belgium and Others*, Appl. no. 52207/09, Judgment of 12 December 2001; ECtHR, *Issa and Others v. Turkey*, Appl. no. 31821/96, Judgment of 16 November 2004; ECtHR, *Ocalan v. Turkey*, Appl. no. 46221/99, Judgment of 12 May 2005; ECtHR, *Medvedyev and Others v. France*, Appl. no. 3394/03, Judgment of 29 March 2010; ECtHR, *Al-Skeini and Others v. The United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011; ECtHR, *Jaloud v. The Netherlands*, Appl. no. 47708/08, Judgment of 20 November 2014.

distinguish territorial and personal models of jurisdiction. The territorial model can quickly be put aside. In these extraterritorial complicity cases, the foreign state is wholly in control of its own territory; there is no question of the complicit state exercising effective control of an area outside of its own territory.[19]

The personal model of jurisdiction, developed with varying degrees of clarity in *Ocalan*, *Medvedyev*, *Al-Skeini* and *Jaloud*, is likewise inapplicable.[20] Fundamentally, these cases concern the jurisdictional effects of the respondent state's own extraterritorial acts – the Turkish agents in *Ocalan*, the French authorities in *Medvedyev* and the UK soldiers in *Al-Skeini*. Even ignoring *Al-Skeini*'s confusing reference to the UK's exercise of 'public powers' in Iraq,[21] it is clear that the complicit state's agents do not exercise 'control and authority' over the potential claimant.[22] Authority and control rests with the foreign state – the state responsible for the arrest and torture. On this basis, it is clear that under the existing interpretation of Article 1 of the ECHR, the victim of the foreign state's acts would not fall within the complicit state's jurisdiction.[23]

This perceived jurisdictional bar in cases of extraterritorial complicity is evident in the decision of the Administrative Court of England and Wales in the case of *Zagorski and Baze* in 2010.[24] The case entailed a challenge to the refusal of the Secretary of State for Business, Innovation and Skills to control the export of sodium thiopental to the USA, a drug that was to be used in the execution of the claimants in Tennessee and Kentucky. Denying the applicability of Articles 2 and 3 of the ECHR, the Court held that the UK's obligations under the Convention did not extend to the particular claimants on the basis that they 'are not and never have been at any material times within the territorial jurisdiction of the United Kingdom.'[25] That the UK might have been complicit in their executions did not bring the claimants within the state's jurisdiction.

C *An Unprincipled Gap*

The upshot of this analysis is stark. State parties to the ECHR may facilitate acts of torture committed abroad by foreign agents without incurring international responsibility thereunder. This outcome entails an unprincipled gap in the obligations imposed by the Convention. With respect to torture itself, the moral case for absolute prohibition is strong.[26] Moreover, whatever one thinks of torture as a matter of moral philosophy,

[19] Cf. *Loizidou*, *supra* note 18, para. 62; *Al-Skeini*, *supra* note 18, para. 138.

[20] For a comprehensive account, see Milanović, *supra* note 7; Milanović, 'Al-Skeini and Al-Jeddah in Strasbourg', 23 *European Journal of International Law* (2012) 121.

[21] *Al-Skeini*, *supra* note 18, para. 149.

[22] *Ibid.*, para. 137; *Jaloud*, *supra* note 18, para. 152.

[23] See generally Milanović, *supra* note 7.

[24] *R (On the Application of Zagorski and Baze) v. Secretary of State for Business, Innovation and Skills and Another* [2010] EWHC 3110 (Admin).

[25] *Ibid.*, para. 57.

[26] See J. Waldron, What Are Moral Absolutes Like?, New York University School of Law, Public Law Research Paper no. 11–62 (2011). For a different take, one that denies absolutism in theory but affirms it in practice, see McMahan, 'Torture in Principle and Practice', 22 *Public Affairs Quarterly* (2008) 111.

the international legal prohibition on torture is established beyond doubt.[27] Within the Council of Europe, the Court has repeatedly asserted that Article 3 of the ECHR represents a fundamental democratic value from which no derogation or exception is permitted.[28]

As it is with torture, so should it be with complicity in torture. John Gardner argues that 'there are two parts of morality. There is what I should do simpliciter, and then there is what I should do by way of contribution to what you do. If I fail in the first I am a principal. If I fail in the second I am an accomplice.'[29] In the commentary to Article 16 of ARSIWA, the ILC puts it in more basic terms: '[A] State cannot do by another what it cannot do by itself.'[30] This is the basis of complicity as legal doctrine.

On top of the moral claim, there is also a strong policy reason for extending jurisdiction in this instance. In at least some cases, the complicit state's conduct would give rise to ordinary state responsibility under the customary rule prohibiting aid or assistance reflected in Article 16 of ARSIWA.[31] However, there is little chance that the victim's own state – ordinarily the principal state – or a third state will formally invoke the UK's responsibility under the customary rule. It is worth focusing on the question of jurisdiction under the ECHR as it establishes a robust system of individual petition allied with reasonably consistent remedial compliance. In practical terms, Strasbourg is the most likely site of redress.

3 Freeing *Soering*: Overcoming the Jurisdictional Bar

A *Introduction*

It is not enough to point out that existing interpretations of Article 1 of the ECHR give rise to an unprincipled gap in the protections of the Convention. The argument in this section is that the rule in *Soering* can be re-imagined and legitimately extended to cover cases of extraterritorial complicity. After briefly setting out the facts of the case, the next section argues that the rule should be understood as a prohibition on a very specific form of complicity. As a matter of logic, there is no reason that this specific rule cannot be extended to cover forms of complicity arising outside the expulsion

[27] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 1984, 1465 UNTS 85; International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 7; Art 3 ECHR; American Convention on Human Rights 1969, 1144 UNTS 123, Art. 5.

[28] See, e.g., ECtHR, *Chahal v. UK*, Appl. no. 22414/93, Judgment of 15 November 1996, para. 79; ECtHR, *Selmouni v. France*, Appl. no. 25803/94, Judgment of 28 July 1999, para. 95; ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, para. 127; ECtHR, *Gafgen v. Germany*, Appl. no. 22978/05, Judgment of 1 June 2010, para. 87.

[29] Gardner, 'Complicity and Causality', 1 *Criminal Law and Philosophy* (2007) 127, at 132.

[30] ARSIWA, *supra* note 6, Commentary to Art. 16, para. 6.

[31] As to the rule's customary status, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, 26 February 2007, ICJ Reports (2007) 43, para. 420.

context. The following section then draws together five threads to show how such an expansion would be consistent with the reasoning in *Soering* itself and other principles deeply embedded in the jurisprudence of the ECtHR.

B *Re-imagining the Rule*

The facts of *Soering* may be dealt with quickly. Wanted on capital charges in Virginia, USA, but detained in the UK, Jens Soering challenged his extradition on the basis that his treatment on death row would be contrary to Article 3 of the ECHR.[32] The case obviously raised a jurisdictional question given that the treatment at issue would be carried out by agents of a foreign state. Drawing on Article 3 of the Convention against Torture, the ECtHR held that the extraditing state's responsibility may be engaged where there are substantial grounds for believing that the claimant faces a real risk of torture or inhuman and degrading treatment in the foreign state.[33]

The rule in *Soering* has since been challenged, reaffirmed and refined and is clearly applicable in all expulsion cases.[34] No balancing of security interests is permitted under Article 3.[35] Certain issues remain, including questions as to the legitimacy of assurances provided by the receiving state and the possibility of independent monitoring of the treatment of the person concerned.[36] Of interest for present purposes is the potential extension of the rule in *Soering*. This does not refer to the extension of the principle to other articles of the Convention. Such a development did occur recently in *Othman v. UK*, where the ECtHR applied a flagrant denial of justice standard to prohibit extradition under Article 6 of the ECHR.[37] The likely use of torture evidence in criminal proceedings by the receiving state was sufficient to reach this threshold.[38]

Rather, the argument is that *Soering* can be extended to situations outside of the expulsion context – that is, to our situations of extraterritorial complicity. Of course, one distinctive feature of the expulsion cases is the presence of the claimant on the territory of the respondent state. This leads to the easy temptation of not seeing the rule in *Soering* as jurisdictionally exceptional in any way.[39] We see this in the Court's repeated assertions that there is no question of adjudicating the responsibility of a non-party state to the Convention and that the responsibility of the expelling state is founded on its own actions.[40]

However, this way of understanding *Soering* is true only in a narrow sense; more fundamentally, it is a fiction. Yes, it is correct that the claimant was at the time of

[32] *Soering*, *supra* note 3, para. 111.
[33] *Ibid.*, para. 91. Convention against Torture, *supra* note 27.
[34] See *Chahal*, *supra* note 28; *Saadi*, *supra* note 28.
[35] *Ibid.*
[36] See *Othman*, *supra* note 4; Michaelsen, *supra* note 4.
[37] *Othman*, *supra* note 4, para. 260.
[38] *Ibid.*, para. 267.
[39] See *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26, para. 109, Opinion of Lord Carswell.
[40] *Soering*, *supra* note 3, para. 91; *Saadi*, *supra* note 28, para. 126.

extradition on the territory of the respondent state.[41] However, as the judgment in *Soering* itself makes clear, it is not the extradition per se that raises difficulties. Drawing on Article 5(1)(f) of the ECHR, the ECtHR explicitly notes that 'no right not to be extradited is as such protected by the Convention'.[42] Rather, the engagement of Article 3 of the ECHR turns on the 'foreseeable consequences of extradition suffered outside [the extraditing state's] jurisdiction'.[43]

This emphasis points to a different way of understanding the rule in *Soering*. The case should be read as establishing what can be seen as a narrow preventive complicity rule. It prohibits states from engaging in a very specific form of complicity in torture – the provision to the principal state of the person of the potential victim. It is preventive because it arises where there is a real risk of the principal wrong occurring. If the rule is understood in this way, we can see that there is no good reason to confine its application to one very specific form of complicity.[44] The ways that a state might facilitate torture carried out by another state are manifold – the sharing of intelligence, the sale of equipment or the provision of technical support.[45] No matter the form of complicity, what should matter is the degree to which it contributes to the principal wrong.[46] This is how doctrines of complicity ordinarily operate in municipal criminal law,[47] municipal private law,[48] international criminal law[49] and the law of state responsibility.[50]

Such an expansion from one specific form of complicity to a general prohibition would track a common way that complicity rules have historically evolved. For instance, Joachim Vogel has shown how complicity rules now found in the general part of the criminal law in most municipal legal systems initially arose as an annex to the specific crime of murder.[51] In international law, the ILC grounded the rule

41 In this regard, see ECtHR, *Trabelsi v. Belgium*, Appl. no. 140/10, Judgment of 4 September 2014, for a recent case where the Court found a violation of Art. 3 in the extradition context even though the claimant was no longer within the territory of the respondent state.

42 *Soering*, *supra* note 3, para. 85.

43 *Ibid.*, para. 86.

44 For a discussion of how abolitionist states may similarly assist in executions carried out by foreign states, see Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty', 62 *ICLQ* (2013) 523.

45 See Joint Committee on Human Rights, *supra* note 1, para. 43.

46 On this point generally, see Jackson, *supra* note 15, at 42–46.

47 In respect of common law complicity doctrine, see, e.g., K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (2001); in respect of assistance under Strafgesetzbuch, para. 27, see N. Foster and S. Sule, *German Legal System and Laws* (2010).

48 See Davies, 'Accessory Liability for Assisting Torts', 70 *Cambridge Law Journal* (2011) 353.

49 See Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, para. 229; Judgment, *Simić et al.* (IT-95-9-A), Appeals Chamber, 28 November 2006, para. 85; Judgment, *Mrkšić et al.* (IT-95-13/1), Appeals Chamber, 5 May 2009, para. 81; Judgment, *Taylor* (SCSL-03-01-A), Appeals Chamber, 26 September 2013, para. 401.

50 See ARSIWA, *supra* note 6, Commentary to Art. 16, para. 5; Lowe, 'Responsibility for the Conduct of Other States', 101 *Japanese Journal of International Law* (2002) 1, at 5.

51 Vogel, 'How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models', *Cahiers de Défense Sociale* (2002) 151, at 160.

reflected in Article 16 of ARSIWA on a range of specific substantive prohibitions on state complicity in the wrongdoing of other states.[52] The move from the specific to the general is common in the evolution of complicity.[53] As a matter of logic, there is no reason that a similar evolution should not occur with respect to state complicity in torture under the ECHR.

C *Five Ideas in* Soering *and the Jurisprudence of the Court*

The preceding section re-imagined the rule in *Soering* as a preventive complicity rule. Re-imagined in this way, it makes sense as a matter of principle and logic to expand the rule to cover other forms of complicity. Of course, that it makes sense as a matter of principle and logic is alone not enough to override the perceived jurisdictional bar. The current section argues that such a jurisdictional expansion is supported by five ideas and principles deeply embedded in *Soering* itself and other jurisprudence of the ECtHR.

First, on the question of interpretation, the Court in *Soering* held that the Convention's special character as a treaty aimed at the protection of individual rights demanded that it be interpreted and applied in such a way as to make the rights therein practical and effective.[54] Although there is a risk of circularity here, this interpretive doctrine, which has played a central role in the development of positive duties,[55] can also be applied to the jurisdictional provision of the Convention.[56] Moreover, the ECtHR in *Soering* also emphasized the now central idea of the Convention as a living instrument, first set out in *Tyrer v. UK*,[57] that it must 'be interpreted in the light of present-day conditions'.[58]

Thinking about our cases of extraterritorial complicity in torture, these two interpretive doctrines together point towards a more expansive understanding of jurisdiction in Article 1. There is little doubt that the purpose of ensuring that the rights protections set out in the ECHR are practical and effective would be served by prohibiting states from facilitating wrongdoing by other states. In addition, in response to the demand that the Convention 'be interpreted in the light of present-day conditions', one present-day condition worth emphasizing is the fact of European state complicity in acts of torture.[59] This is exactly the kind of development that evolutionary interpretation ought to capture.

[52] ARSIWA, *supra* note 6, Art. 16.

[53] See generally Jackson, *supra* note 15.

[54] *Soering*, *supra* note 3, para. 87.

[55] See, e.g., ECtHR, *Airey v. Ireland,* Appl. no. 6289/73, Judgment of 9 October 1979. See also Mowbray, 'The Creativity of the European Court of Human Rights', 5 *European Human Rights Law Review* (2005) 57.

[56] On the application of the living instrument doctrine to institutional, as opposed to substantive, provisions of the Convention, see *Loizidou*, *supra* note 18, paras 70–72; Mowbray, *supra* note 55, at 62–63. Cf. Lord Phillips of Worth Matravers, 'The Elastic Jurisdiction of the European Court of Human Rights', Lecture at the Oxford Centre for Islamic Studies, 12 February 2014.

[57] ECtHR, *Tyrer v. The United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978.

[58] *Soering*, *supra* note 3, para. 102. On evolutionary interpretation generally, see E. Bjorge, *The Evolutionary Interpretation of Treaties* (2014).

[59] See, e.g., European Commission for Democracy through Law, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, Opinion no. 363/2005, 17 March 2005; UNHRC, 'Report of the Special Rapporteur', *supra* note 5; UNHRC, 'Joint Study on Global Practices', *supra* note 5.

Second, this claim is bolstered by the nature of the rights violation committed by the foreign state. We are dealing with violations of the prohibition on torture and inhuman or degrading treatment. The ECtHR has repeatedly affirmed both the absolute nature of the prohibition and its centrality to the Convention's system of rights protection: it 'enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.[60] This was crucial to the decision in *Soering* itself.[61] Moreover, it is often the stain of torture that has pushed the expansion of rights protection in other contexts. Under Article 6, both confessions and real evidence obtained by torture are inadmissible, regardless of their probative value.[62] In addition, in *Othman*, what drove the extension of the *non-refoulement* obligation from Articles 2 and 3 to Article 6 was the potential use by the Jordanian authorities of evidence obtained by torture.[63]

Third, an additional point that played a role in the judgment in *Soering* was the existence of a similar obligation in international law beyond the ECHR.[64] Article 3 of the Convention against Torture provides that 'no State Party shall … extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture'.[65] In other words, at least in respect of torture itself, the Court's interpretation of Article 3 of the ECHR as implicitly imposing a similar obligation rendered the Convention consistent with another international obligation binding the majority of state parties.

This idea has purchase in our cases of extraterritorial state complicity. Over the last two decades, increasing attention has been paid in international practice to the issue of state complicity. This attention culminated in the adoption by the ILC of Article 16 of ARSIWA – a prohibition on the provision by one state to another of aid or assistance used in the commission of an internationally wrongful act.[66] The rule, which reflects customary international law,[67] has increasingly been invoked in investigations of complicity in the war on terrorism.[68] The proposed extension of the principle in *Soering* would render states' obligations under the ECHR (at least) equivalent to their obligations under customary international law.[69]

Up to this point, the argument has drawn together three threads from *Soering* and other ECtHR jurisprudence: interpretive doctrines that see the ECHR as a living instrument whose safeguards must be practical and effective; the nature of the rights violation committed by the foreign state; and the fact that overcoming the jurisdictional

[60] *Soering*, *supra* note 3, para. 88. See also *Chahal*, *supra* note 28, para. 79; *Gafgen*, *supra* note 28, para. 87.

[61] *Soering*, *supra* note 3, para. 87–88.

[62] *Gafgen*, *supra* note 28, paras 166–167. It should be noted that the Court refers to 'real evidence obtained as a *direct result* of ill-treatment in breach of Article 3' (emphasis added).

[63] *Othman*, *supra* note 4, para. 267.

[64] *Soering*, *supra* note 3, para. 88.

[65] Convention against Torture, *supra* note 27, Art. 3.

[66] For a comprehensive account, see H. Aust, *Complicity and the Law of State Responsibility* (2011).

[67] *Bosnian Genocide*, *supra* note 31, para. 420.

[68] See Aust, *supra* note 66, at 120–127.

[69] As argued later in this article, the fault element of the proposed rule goes beyond that in Art. 16 of ARSIWA, *supra* note 6.

gap would render states' obligations under the ECHR consistent with their other international obligations. To these threads, we can add a fourth: the underlying rationale for the rule in *Soering* is equally applicable to cases of extraterritorial complicity.

To put this idea another way, the logical argument set out in the preceding section that we should extend the rule from one specific form of complicity to a general prohibition is underpinned by the rationale for the specific rule articulated in *Soering* itself. At root, the rule in *Soering* seeks to hold states responsible for the 'foreseeable consequences of extradition suffered outside their jurisdiction'.[70] No matter that the Article 3 violation would, in reality, be committed by a foreign state, the rule demands that states take responsibility for wrongdoing they facilitate. This rationale is equally applicable in cases of extraterritorial complicity.

Fifth and finally, an interpretation of Article 1 that overcomes the perceived jurisdictional bar would align with powerful trends in the ECtHR's recent case law on jurisdiction. Since *Banković*, the rationalization of the case law has been driven by two related ideas. First, there was a growing realization that *Banković*, strictly applied, would give rise to absurd results, which resulted in an ad hoc fudging of the strictures of the rule. Second, what Milanović has called the 'normative pull of universality' has guided the Court towards a more expansive conception of Article 1.[71]

To start with the first, the absurd consequences of *Banković* lay in the distinctions it drew, at the jurisdictional stage, between equally wrongful acts of state. Leaving aside relatively rare cases where a state exercises effective control over territory abroad,[72] *Banković* stood for the proposition that member states to the ECHR may commit human rights violations abroad that they may not commit at home.[73] Awareness of absurd results of this kind has driven an expansive interpretation of the jurisdiction clause of the International Covenant on Civil and Political Rights[74] and, in part, underpins the gradual embrace by the Court of a personal model of jurisdiction in *Issa*, *Ocalan*, *Al-Skeini* and *Jaloud*.[75]

The absurdity of these distinctions is not based only on their inconsistency and lack of coherence, but also on the value poverty of an interpretation of Article 1 that allows, at least with respect to negative obligations, state parties to a human rights treaty to commit human rights violations abroad. Behind this claim is the idea of the universality of human rights.[76] In the case law, the universality of rights assists in explaining why Turkey owed obligations to the claimants in *Issa* and *Ocalan*, France to the claimants in *Medvedyev*, and the UK to the six claimants in *Al-Skeini*.

Returning to our cases of extraterritorial complicity, the claim is not that existing understandings of the case law bring the victim within the jurisdiction of the complicit

[70] *Soering*, *supra* note 3, para. 86. Cf. ECtHR, *N. v. UK*, Appl. no. 26565/05, Judgment of 27 May 2008.

[71] Milanović, *supra* note 7, at 171.

[72] See *Loizidou*, *supra* note 18.

[73] *Banković*, *supra* note 18, para. 80.

[74] See UNHRC, *Lopez Burgos v. Uruguay*, Merits, Comm. no. 52/1979, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; UNHRC, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004. See also Milanović, *supra* note 7, at 175–180. ICCPR, *supra* note 27.

[75] See Milanović, *supra* note 20.

[76] See Milanović, *supra* note 7, at 55–57.

state. Rather, it is that such an interpretation would serve two underlying ideas in the jurisprudence: the prevention of absurd results and the universality of rights. In respect of the former, the absurdity is, in fact, twofold. First, a lack of jurisdiction in our extraterritorial complicity cases permits a state to facilitate acts of torture abroad where it cannot facilitate them at home. Second, under the principle in *Soering*, one very specific form of complicity is prohibited where other equally consequential forms are ignored. With respect to the latter, the universal recognition of human rights – itself propounded in the preamble to the ECHR – would no doubt be served by finding jurisdiction in instances of extraterritorial state complicity.

In sum, the argument is that five elements of the ECtHR case law suggest that an expansive interpretation of jurisdiction in cases of extraterritorial complicity in torture is permissible. These are existing doctrines of interpretation used by the Court; the centrality of torture within the Convention system; the fact that it would render state parties' Convention obligations (at least) consistent with their obligations in customary international law; the logical extension of the rationale for the rule in *Soering* itself; and the applicability to our cases of central ideas underpinning the recent expansion of jurisdiction under Article 1.

It should be conceded that this might leave the jurisdictional rule in extraterritorial complicity cases broader than the ordinary rule in cases of extraterritorial principal violations. This is because *Al-Skeini*'s embrace of a personal model of jurisdiction in ordinary extraterritoriality cases seems to be conditioned by the fact that the UK was exercising 'public powers' in Iraq.[77] Nonetheless, the direction of the case law is clear, and the ECtHR seems to be grasping its way towards a principled interpretation of Article 1. Such an interpretation, at least with respect to state parties' negative obligation to respect human rights, would deny any jurisdictional difference between unlawful killings domestically and unlawful killings abroad or between torture committed on one's own territory and torture committed on the territory of a foreign state.[78] Understood against this broader evolution, the jurisdictional rule in cases of extraterritorial complicity is not really that exceptional.[79]

4 The Content of the Primary Rule

The argument set out above seeks to show that victims of torture by a foreign state should be seen to be within the jurisdiction of a complicit state that is party to the ECHR. What remains is the question of when such complicity would arise. Any such inquiry must address three issues: the forms of complicity proscribed, the relationship between the complicit state's act and the principal wrong and the fault required of the accomplice state.[80] With respect to the forms of complicity required, we are clearly dealing with acts

[77] *Al-Skeini*, *supra* note 18, para. 149. See though *Jaloud*, *supra* note 18.
[78] See Milanović, *supra* note 7, at 209–222.
[79] *Ibid.*, at 219.
[80] See Jackson, *supra* note 15, at 31–55.

of assistance or facilitation. Although municipal and international doctrines of criminal complicity ordinarily include acts of instigation or encouragement within their ambit, international law does not (yet) recognize any such prohibition.[81] Within the idea of assistance or facilitation, there is no specific limitation on the kinds of conduct that might constitute complicity.[82] It is crucial, however, that the acts of facilitation do (or would) have a material effect on the foreign state's commission of the wrong. Here, it is helpful to borrow from the ILC's elaboration of the rule in Article 16 of ARSIWA: the assistance must contribute significantly to the wrong.[83] This excludes remote contributions.

Finally, the fault with which the complicit state must provide its assistance is a difficult matter. One option is to look to the general rule in Article 16 of ARSIWA. Here, there is confusion – the text of Article 16 refers to 'knowledge of the circumstances' of the principal state's internationally wrongful act, and the commentary to Article 16 refers to a requirement of wrongful intent.[84] In any case, however, the better option would be to borrow from *Soering* itself – responsibility arises where there are substantial grounds for believing that that there is 'real risk' of exposure to treatment contrary to Article 3.[85] In addition to being normatively preferable in its recognition of the gravity of the principal wrong, this standard also aligns the rule proposed in this article with one that states are used to applying in expulsion cases.

Here, it is worth noting that only acts of complicity, as opposed to omissions, are implicated by the rule. Although the question of complicit omissions is a difficult issue, for present purposes it is sufficient to say three things. First, in contrast to complicity in international criminal law, orthodox accounts of complicity in the law of state responsibility limit its ambit to positive conduct.[86] Second, at least some of the strands of reasoning set out above apply more forcefully where the state conduct at issue is an act. And, third, limiting complicity to positive acts of facilitation, at least initially, provides a more practical standard for states.[87]

5 Conclusion

States will continue to torture; others will be tempted to assist. A close analysis of *Soering* and other jurisprudence of the ECtHR allows cases of extraterritorial state

[81] See ARSIWA, *supra* note 6, General Commentary on Chapter IV, para. 9; J. Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498/Add.1 (1999); Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57 *British Yearbook of International Law* (1986) 77, at 80; Nolte and Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009) 1, at 13.

[82] See J. Crawford, *State Responsibility: The General Part* (2014), at 402; Lowe, *supra* note 50, at 5–6.

[83] ARSIWA, *supra* note 6, Commentary on Art. 16, para. 5.

[84] *Ibid*. The differences between, and justifications for, these two standards need not be addressed at length here. See, e.g., Nolte and Aust, *supra* note 81, at 14–15; Crawford, *supra* note 82, at 408; Jackson, *supra* note 15, at 159–162.

[85] See *Soering*, *supra* note 3, para. 88; *Chahal*, *supra* note 28, para. 86; *Othman*, *supra* note 4, para. 85.

[86] See, e.g., *Bosnian Genocide*, *supra* note 31, para. 432: '[C]omplicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators'; Crawford, *supra* note 82, at 403–405. This orthodox account is open to criticism. See Jackson, supra note 15, at 156–158.

[87] With respect to omissions and jurisdiction generally, see Milanović, *supra* note 7, at 106–116.

complicity in torture to be brought within the boundaries of the ECHR. This would be a principled outcome: state parties to the Convention would be prohibited from facilitating acts of torture at home and abroad. This outcome, supported as a matter of legal argument by the analysis set out above, also fits into idealized constructions of jurisdiction under the Convention. In this respect, Milanović's proposal remains compelling: '[T]he state obligation to respect human rights is not limited territorially; however, the obligation to secure or ensure human rights is limited to those areas that are under the state's effective overall control.'[88] In the account set out in this article, extraterritorial state complicity sits as an additional element of the territorially unbounded state obligation to respect the right against torture.[89] It can be thought of as an additional negative obligation on states that complements the ordinary negative obligation to refrain from violating rights.

Although the present analysis is limited to the prohibition on torture, its legal argument applies with at least as much force to other absolute rights in the ECHR. Moreover, at the level of principle, there is the possibility of extension to the other rights protected by the Convention. In this respect, the evolution of the case law should be guided by the moral claim of complicity: both the wrongs that states commit, and the wrongs that they help other states to commit, matter.

[88] *Ibid.*, at 263.
[89] *Ibid.*, at 219.