State Responsibility and the European Convention on Human Rights

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1. Introduction

The subject of the present symposium is the European Convention on Human Rights (ECHR, 1950) that soon commemorates its 70th anniversary. It is a unique occasion to look closer at the ECHR's contribution to the development of general international law. It is largely accepted that the ECHR distinguishes among other international legal instruments on at least two grounds. First, the ECHR is a human rights treaty providing obligations *erga omnes partes* for states and direct rights for individuals. Second, the Convention established the European Court of Human Rights (ECtHR), a judicial body with compulsory jurisdiction that ensures the uniform interpretation and enforcement of obligations under the ECHR.

Notwithstanding its specific features, the ECHR is a part of international law. Hence, it cannot operate in clinical isolation from general international law. On the contrary, principles and rules of general international law inform the interpretation, application, and enforcement of the Convention. In this context, the law of state responsibility can play an indispensable role.

On the one hand, there is a body of written law, represented by the ECHR and the Protocols thereto, complemented by the case law of the ECtHR. On the other hand, the law of international responsibility has not been systematised for a long time.[1] In a sense, the system of the law of international responsibility came into existence thanks to its codification, in particular, that which was achieved by the UN International Law Commission (ILC). Today, the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) are generally considered codified customary international law. In 2001, the UN General Assembly only took note of the ARSIWA adopted by the Commission and published them as Annex to the GA resolution 56/83.[2] Nevertheless, they enjoy a high level of authority as an expression of customary international law in the field. The number of decisions of international courts, tribunals, and other bodies thus proves the relevance of these Articles.[3]

This contribution aims to examine if and to what extent the application of the Convention by the ECtHR reflects the principles of state responsibility (as reflected in the

[1] KOLB, R., *The International Law of State Responsibility*, Cheltenham, Edward Elgar, 2017, p. 6.
[2] See UN Doc. A/RES/56/83, 12 December 2001.
[3] Up to 31 January 2013, there had been 210 decisions of international courts, tribunals, and other bodies referring to the ARSIWA.

ARSIWA). The second aim of the paper is to verify whether the ECHR (in particular the decisions of the ECtHR) has contributed to the development of the law of state responsibility.

The above questions are important, as the case law of the ECtHR and doctrinal views provide a rather unclear and controversial picture. Referring to the principles of the ARSIWA in the operation of the ECHR, the views oscillate between irrelevance,[4] faithful application, and development in the practice of the Court.[5]

The present contribution will focus on the following aspects. The first part deals with the issues of attribution that seem to be, *a priori*, the most relevant for decision-making by the ECtHR. The second part addresses the questions related to the third-state responsibility and shared responsibility in the practice of the ECtHR. In turn, the third part aims at commenting if and how the ECHR as a *lex specialis* reflects, or rather, replaces the classical content of international responsibility of states (in particular cessation and reparation).

2. Issues of attribution

2.1. The difference between "jurisdiction" and "attribution"

Before embarking into an inquiry of the application or modification of general rules of attribution, it is worth noting that the rules in Part One of the ARSIWA are the most likely to be applied even in the specific context of the Convention responsibility of state for the breach of human rights of individuals. This is because the content of Part One is general in nature; it deals with an internationally wrongful act of a state and its elements. Therefore, such rules, in particular those on attribution of conduct to a state, may directly apply even to claims based on the violation of individual rights, including before human rights courts or investment treaty arbitration.

This is a difference to the rules codified in Parts Two and Three, as they cover the relations between the responsible states and the injured states. This was made clear in Article 33 of the ARSIWA.[6] At the same time, nothing precludes the possibility of applying *mutatis*

[4] See EVANS, M., State Responsibility and the ECHR, in: FITZMAURICE, M. and SAROOSHI, D. (eds.), *Issues of State Responsibility before International Judicial Institutions*, Oxford, Hart, 2004, p. 159.
[5] See CRAWFORD, J. and KEENE, A., The Structure of State Responsibility under the European Convention on Human Rights, in: VAN AAKEN, A., MOTOC, I. (eds.), *The European Convention on Human Rights and General International Law*, Oxford, OUP, 2018, pp. 197-198.
[6] "1.The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach."

mutandis or *per analogiam* to some of the rights and obligations arising from state responsibility with respect to any person other than a state.[7]

However, the case law of the ECtHR shows a much more complex picture even when it comes to the application of the rules of attribution.

At the outset, it should be known that attribution is just one of the elements of an internationally wrongful act of a state. The other element is a breach of an international obligation of the state.[8] When it comes to the objective element (breach), it relates to the applicability of the ECHR. The Convention bounds all 47 member states of the Council of Europe. However, its object and purpose is protecting human rights and freedoms of individuals. The states parties to the ECHR are obliged to do so not anywhere in the world but only with respect to individuals within their jurisdiction.

The key is Article 1 of the ECHR that provides: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.*" As it was rightly pointed out, "human rights jurisdiction" under Article 1 is pivotal to the application of the ECHR. "ECHR rights apply and give rise to duties, provided there is a relationship of jurisdiction between their potential right holder and their potential duty bearer, i.e., between some private parties and one (or more) state party".[9] This jurisdiction is essentially territorial in scope, but it can also be extraterritorial in some cases. The territorial jurisdiction still constitutes a rule under general international law and in the jurisprudence of the ECtHR. The extraterritorial jurisdiction can be exercised by a state party to the ECHR through its control over a certain person (personal control) or through its control over a territory outside national territory (spatial control). Although the Court tends to interpret such jurisdiction broadly in some cases,[10] it took a rather restrictive approach in other cases.[11] It is interesting that the ECtHR, when adopting a more restrictive approach to the scope of extraterritorial jurisdiction, bears on the coherence of international law.[12]

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[7] Art. 33, para. 2: "This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."

[8] ARSIWA, Art. 2: "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State."

[9] BESSON, S., Concurrent Responsibilities under the European Convention on Human Rights, in: VAN AAKEN, A., MOTOC, I. (eds.), *The European Convention on Human Rights and General International Law*, Oxford, OUP, 2018, p. 160.

[10] See, e.g., ECtHR, *Loizidou v. Turkey* (Preliminary Objections), no. 15318/89, 23 March 1995; ECtHR, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011.

[11] See, e.g., ECtHR, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 12 December 2001.

[12] See *Banković*, ibid., § 57: "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

At the same time, the concept of jurisdiction of a state under Article 1 needs to be distinguished from the jurisdiction of the ECtHR and from the attribution of a specific conduct to a state for the purpose of its responsibility.[13] Put simply, human rights jurisdiction (under Article 1) refers to a certain link of control (territorial or personal) between the state in question and an individual right holder. By contrast, attribution refers to a link (organic, functional or other) between a person or entity, author of the conduct in violation of an international obligation, and the state to make it responsible for such conduct.

However, in practice, the Court is often satisfied with the establishment of "human rights jurisdiction" and do not refer, at least not expressly, to the rules of attribution under the ARSIWA (Articles 4 to 11). Obviously, there is very little impact in simple and usual cases where a breach of human rights was committed by organs of a state.[14]

2.2. Implicit or no reference to attribution

Of more complex nature are the cases where the ECtHR deals with the acts of private individuals carrying out certain governmental functions. From the perspective of the case law of the ECtHR, two grounds of attribution, under Articles 5 and 8 of the ARSIWA, seem to be the most relevant. According to Article 5,

> *the conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*

It is probably in *Costello-Roberts*, when the ECtHR faced difficult issues of attribution regarding the acts of private persons (teachers in a private school) to the respondent state for the first time. As an initial matter, the Court noted that the UK could be held responsible for disciplinary practices (corporal punishment) at all of the country's schools given the obligation to ensure children's right to education. In other words, the Court did not attempt to base its decision on attribution (ARSIWA) but it confirmed the positive obligation of protection that is

with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty."

[13] See BESSON, S., op. cit., pp. 169-170; CRAWFORD, J. and KEENE, A., op. cit., p. 190: "Yet overlapping terminology and a lack of clarity in the Court's reasoning has given rise to much academic debate and considerable confusion. The Court's misunderstanding of the interactions between jurisdiction and attribution has the potential to threaten both the coherence of the secondary rules on State responsibility and the Court's own jurisprudence."

[14] ARSIWA, Art. 4 (Conduct of organs of a State).

particularly important in the field of education. However, it did not find any violation of Article 3 of the ECHR.[15]

Similarly, without reference to the rules of attribution, the Court in *O'Keefe* held Ireland responsible for failing to protect the applicant from sexual abuse that occurred at a private primary school. It decided that Ireland had breached its positive obligation in Article 3 of the ECHR to take measures to ensure that individuals are not subjected to ill-treatment.[16]

The Court also decided on the basis of positive obligations in various cases in the context other than education. For example, in *Storck*, the ECtHR held that the wrongful detention under Article 5 of the ECHR was imputable to Germany on the basis that police officers were used to force the applicant to return to a private psychiatric clinic. The Court also decided that there had been a breach of a positive obligation of the state under Articles 5 (right to freedom and security) and 8 (respect to private life).[17]

2.3. A moderate shift to the use of rules on attribution

According to some views, some more recent decisions of the ECtHR, in particular *Kotov v. Russia*,[18] can be seen as an attempt to reconcile its jurisprudence with the rules of attribution in the ARSIWA.[19] It is true that the Grand Chamber reversed the decision of a Chamber. The Court held that "the liquidator did not act as a State agent. Consequently, the respondent State cannot be held directly responsible for his wrongful acts in the present case."[20] Before coming to that conclusion, the Court quoted, in the survey of relevant international law and practice, section "Attribution of international responsibility to States", from the commentary to Article 5 of the ARSIWA. In a sense, the conclusion of the ECtHR bears on at least one of the quoted paragraphs.[21]

At the same time, the Court continued its analysis beyond the issue of attribution and found that Russia also had not breached its own positive obligation to provide a mechanism to protect the applicant's rights under Article 1 of Protocol No. 1.

However, in other cases against Russia, concerning the failure to enforce the claims of salaries of the employees of the liquidated companies carrying out social tasks (water and

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[15] ECtHR, *Costello-Roberts v. the United Kingdom*, no. 13134/87, 25 March 1993.
[16] ECtHR, *O'Keefe v. Ireland*, no. 35810/09, 28 January 2014.
[17] ECtHR, *Storck v. Germany*, no. 61603/00, § 103, 16 June 2005: "The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere on private bodies or individuals."
[18] ECtHR, *Kotov v. Russia* [GC], no. 54522/00, 3 April 2012.
[19] Cf. CRAWFORD, J. and KEENE, A., op. cit., p. 182.
[20] *Kotov v. Russia* [GC], § 107.
[21] Ibid., § 32: "Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise." (see para. 6 of the commentary to Art. 5).

heating supplies and public transportation, the ECtHR concluded that Russia should be responsible for a breach of Article 6 of the Convention. Although the Court briefly cited Articles 5 and 8 of the ARSIWA, it did not apply Article 5 (functional test) in its reasoning and only referred to Article 8 (test of control).[22] Moreover, it is not clear that the Court correctly applied that article of the ARSIWA.

2.4. Attribution in cases involving international organisations

On some occasions, the ECtHR entered the unchartered waters of competing rules of responsibility of international organisations and state responsibility. In addition to the complicated relationship between the Articles on Responsibility of International Organisations (ARIO, 2011)[23] and the ARSIWA,[24] the Court seems to develop its own approach to the question of member state responsibility for violations of the ECHR on the part of international organisations.

In principle, the jurisprudence of the ECtHR displays a conflict between the principle that international organisations have legal personality different from the member states and can be held responsible, and the principle that states parties to the ECHR have a duty to provide an effective remedy.[25] Moreover, the situation is complicated by the fact that international organisations are not parties to the ECHR, which implies that the attribution of conduct to the organisation (however correct under the general rules of international law) means that neither the organisation nor its member state will incur responsibility under the Convention.

In the *Waite and Kennedy* case, the ECtHR established that the Convention allows state parties to comply with international obligations so as not to thwart the current trend towards extending and strengthening international cooperation.[26] Therefore, it is not contrary to the Convention to join international organisations and undertake other obligations once such international organisations offer human rights' protection equivalent to the Convention. This principle was first outlined in the *M & Co.* case.[27]

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[22] ECtHR, *Liseytseva and Malov v. Russia*, nos. 39483/05 and 40527/10, §§ 128, 205-206, 9 October 2014.
[23] GA resolution 66/100 of 9 December 2011.
[24] See ŠTURMA, P., Codification of the rules of international responsibility and their (non-)application by European courts. In: *Évolution de rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber Amicorum Jiří Malenovský*, Bruxelles: Larcier, 2020, p. 427-443.
[25] RYNGAERT, C., The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations, *International and Comparative Law Quarterly*, vol. 60, 2011, p. 998.
[26] ECtHR, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 72, 18 February 1999.
[27] ECtHR, *M. & Co. v. Germany*, no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138.

In its landmark judgment in the *Bosphorus* case, the ECtHR dealt with an act of a member state of the EU when implementing the binding acts of the EU law (regulations of the EU Council that implemented in turn the binding resolution of the UN Security Council) and ruled that Ireland, as a member state, would be fully responsible under the ECHR for all acts outside its strict international obligations.[28] In the case in question, however, the Court concluded that the member state did not do more than it was required by the Council regulation, therefore it applied the concept of "equivalent protection" and did not find responsibility of the state.

Similarly, in *Gasparini v. Italy and Belgium*, the ECtHR stated that a "structural lacuna" in the internal dispute-resolution system of an international organisation would suffice for it to hold a member state responsible.[29] However, according to commentators, the jurisprudence of the Court based on the principle of equivalent protection remains unclear, as no breach by a state has yet been found.[30]

From a broader perspective, it seems that the ECtHR was not able to rely on the ARSIWA (which are silent on that issue). Instead, the Court tried to develop its own rules or doctrine, which in turn influenced some articles in the ARIO, in particular those on circumvention of international obligations of an international organisation or of a state.[31] Nevertheless, these provisions are also open to criticism. At the very least, they need to be tested in practice. Allocating responsibility between an international organisation and a state remains one of the most serious issues.

3. Extraterritoriality, the third-state responsibility and shared responsibility

3.1. Attribution in peace-keeping and other operations

The most complicated and controversial decisions are probably those relating to the acts of troops from the states parties to the ECHR operating extraterritorially and under the mandate of an international organisation. It concerns UN or NATO peacekeeping or security operations (such as in Kosovo, Iraq, Afghanistan).

[28] ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* [GC], no. 45036/98, § 157, 30 June 2005.
[29] ECtHR, *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009.
[30] See CRAWFORD, J. and KEENE, A., op. cit., p. 184; RYNGAERT, C., op. cit., p. 998.
[31] See Articles 17 and 61 of the DARIO.

The landmark decision is *Behrami and Saramati*, where the ECtHR rejected the attribution to France of acts of French troops carrying out a NATO operation in Kosovo.[32] Here, the Court dealt extensively with the issue of attribution. It first cited Article 5 of the DARIO and Article 6 of the ARSIWA, as well as the relevant ILC commentary to Article 5.[33] Next, it concluded that

> UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR.[34]

In spite of the correct approach based on the articles on attribution adopted by the ILC, the Court arrived at a surprising conclusion. The reason is that it replaced the concept of "effective control" that is to be established on a factual criterion (which had retained the troop contributing states) by the innovative notion of "ultimate control". This made it possible for the Court to exclude responsibility of the respondent states. It goes without saying that when it attributed the acts to the United Nations, it had no jurisdiction to decide on the responsibility of the organisation that is not party to the ECHR.

This decision was rightly criticised by experts, including by the former member and Special Rapporteur G. Gaja, on the grounds that the ECtHR failed to apply the correct rules on responsibility.[35]

Similarly, in *Berić and others v. Bosnia and Herzegovina* the ECtHR quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that the conduct of the High Representative in Bosnia and Herzegovina had to be attributed to the United Nations also.[36]

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[32] ECtHR, *Behrami and Saramati v. France* and *Saramati v. France, Germany and Norway* (dec.), no. 71412/01 and 78166/01, 2 May 2007.
[33] Ibid., §§ 28-34: "When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. ... Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect. As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."
[34] Ibid., § 135.
[35] GAJA, G., Seventh Report on Responsibility of International Organizations, UN Doc. A/CN.4/610 (27 March 2009), § 26: "Several commentators rightly observed that, had the Court applied the criterion of effective control set out by the Commission, it would have reached the different conclusion that the conduct of national contingents allocated to KFOR had to be attributed either to the sending State or to NATO."
[36] ECtHR, *Berić and Others v. Bosnia and Herzegovina* (dec.), no. 36357, 16 October 2007.

However, the judgment of the Grand Chamber of the ECtHR in the *Al-Jedda* case of 7 July 2011[37] appears to turn the previous approach of the Court drawn in *Behrami* and *Saramati* around. It carefully studies the factual situation in Iraq, relevant resolutions of the Security Council, the decision of the House of Lords, the Hague Regulations of 1907, and the Geneva Convention (IV) of 1949, as well as the relevant case law of the ICJ, the ECJ, and the US Supreme Court, but also the ILC ARIO and the ILC Report of the Study Group on "Fragmentation of international law" (2006) in respect of Article 103 of the UN Charter. On this background, the Court concluded that "the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999." However, the Court did not reject its earlier test but it concluded that both the effective control and ultimate authority tests were satisfied.[38]

Another decision in that direction was the *Jaloud* case.[39] The essential difference between this case and the cases such as *Al-Jedda* or *Al-Skeini* was that the Netherlands, unlike the United Kingdom, was not recognised as an "occupying power" within the meaning of Article 42 of the 1907 Hague Rules. In *Jaloud*, a patrol of Dutch soldiers, sent to Iraq to investigate a previous incident, opened fire on a car which had failed to stop at a checkpoint. The Netherlands participated in the Stabilization Force in Iraq (SFIR) as a part of the Multinational Division South-East, which was under the command of the United Kingdom.

It is worth noting that the judgment cited extensively not only Articles 2, 6, and 8 of the ARSIWA, with commentaries, but also extracts from the ICJ *Genocide* case (Bosnia and Herzegovina v. Serbia and Montenegro), all supporting the test of "effective control". However, the decision is somehow ambiguous, as it seems to bear on the concept of jurisdiction under Article 1 of the ECHR.[40] In spite of that, the Court continues to dwell on the issue of state responsibility[41] and finished with its unclear statement on the difference between jurisdiction

[37] ECtHR, *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 7 July 2011.
[38] Ibid., § 84: "the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations."
[39] ECtHR, *Jaloud v. The Netherlands* [GC], no. 47708/08, 20 November 2014.
[40] Ibid., § 143: "The respondent Party is therefore not divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of MND (SE), a United Kingdom officer. The Court notes that the Netherlands retained "full command" over its military personnel…"
[41] Ibid., § 151: "the Court cannot find that the Netherlands troops were placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility…)."

and attribution.[42] It concludes that "the facts giving rise to the applicant's complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention."[43] It was commented that this case shows the trend to the integration of principles of general international law in the case law of the ECtHR. Above all, however, it confirms a more expanding approach to the extraterritorial application of the ECHR.[44]

3.2. Some other extraterritorial cases

There are a few cases which deal with the Russia's continuing control of Transdniestria, a separatist region in Moldova. They follow the well-known *Ilaşcu* judgment.[45] While in this case, the Court concluded that the applicants came within the jurisdiction of both the Republic of Moldova and the Russian Federation, within the meaning of Article 1 of the ECHR, and found some violations of Article 3 and Article 5 (unlawful detention of Mr Ilaşcu and others) by both states (yet, in case of Moldova, only in regard to its positive obligations), the Court later declared the sole responsibility of Russia in *Catan*.[46]

What is interesting from the perspective of (non)application of rules of state responsibility, which was the failure strongly criticised not only by the Russian Federation and judge Kovlar, was the ECtHR's refusal to deal with the rules of attribution in the ARSIWA. Instead, the Court bluntly said that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law."[47]

However, the Court failed not only to explain the difference between "jurisdiction" and "attribution" but also to justify how the conduct of persons who were not organs of the respondent state would entail responsibility of that state for a particular breach. It suggests interpreting the decision of the ECtHR as a replacement to general international law by a kind of *lex specialis*, even though it never referred explicitly to that concept.

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[42] Ibid., § 154: "The Court reiterates that the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law…"
[43] Ibid., § 155.
[44] See MOTOC, I., VASEL, J.J., The ECHR and Responsibility of the State: Moving Towards Judicial Integration. In: VAN AAKEN, A., MOTOC, I. (eds), *The European Convention on Human Rights and General International Law*, Oxford, OUP, 2018, pp. 206-207.
[45] ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004.
[46] ECtHR, *Catan and Others v. Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19 October 2012.
[47] Ibid., § 115.

The Court referred to the previous case law concerning the Northern Cyprus[48] and concluded that "the fact that the local administration survives as a result of the contracting state's military and other support entails that state's responsibility for its policies and actions."[49]

On balance, what seems to be more promising is the fact that in the *Ilaşcu* judgment the ECtHR found both Moldova and Russia responsible. It may speak in favour of multiple or shared responsibility. However, this evaluation must be taken with caution because its value is limited by the lack of argumentation regarding the attribution of conduct of separatists to one and the other state. At best, one can assume that Moldova was responsible for a violation different from that of the Russian Federation.[50]

3.3. The third-state responsibility and other forms of participation

Another important set of cases, where the ECtHR partly departed from and partly contributed beyond the boundaries of the ARSIWA, concerns first the responsibility of a third state for aid or assistance in the commission of an internationally wrongful act. As a matter of substance, some cases are quite serious because they involve extraordinary renditions of persons suspected of terrorism from the member states of the Council of Europe to third countries. They concern a (possible) violation of the prohibition of torture or other inhuman treatment (Article 3) or other rights under the ECHR.

As a matter of law of state responsibility, those cases would involve the question of responsibility of a state in connection with the act of another state, namely Article 16 of the ARSIWA (on aid or assistance).[51]

However, in the *El-Masri* case, the ECtHR did not address the participation of Macedonia (today Northern Macedonia) that handed over suspects to CIA agents, from the

[48] ECtHR, *Cyprus v. Turkey* [GC], no. 25781/94, § 77, 10 May 2001

[49] *Catan and Others*, § 106: "…The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights."

[50] From the point of view of "shared responsibility" it would be the case of shared responsibility arising from multiple internationally wrongful acts; see SHARES, Guiding Principles on Shared Responsibility in International Law (version 28 October 2019), Principle 4: "International persons share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct consisting of an action or omission that: (a) is attributable to each of them separately; and (b) constitutes a breach of an international obligation for each of those international persons; and c) contributes to the indivisible injury of another person." Cf. also NOLLKAEMPER, A., Introduction, in: NOLLKAEMPER, A., PLAKOKEFALOS, I., *Principles of Shared Responsibility in International Law*, Cambridge: CUP, 2014, pp. 9-10, who distinguished between *concurrent*, *cumulative* and *joint* responsibility.

[51] Art. 16: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State."

perspective of aid or assisting in violation of human rights. Instead, the Court found that Macedonia was *directly responsible* for a violation of Article 3 of the ECHR but also a violation of Article 5 (unlawful detention) for the entire period of captivity of Mr El-Masri, i.e. not only for 23 days in the hotel in Skopje but also for the subsequent captivity in Afghanistan.[52]

In this case, it is interesting that the Court cited few relevant articles of the ARSIWA, namely Article 7 (Excess of authority or contravention of instructions), Article 14 (Extension in time of the breach of an international obligation), Article 15 (Breach consisting of a composite act) and Article 16 (Aid or assistance in the commission of an internationally wrongful act). However, the ECtHR did not explore the possible arguments based on aid or assistance which would suggest the parallel attribution and responsibility of both the US and Macedonia. Instead, the Court developed its jurisprudence based on "acquiescence or connivance"[53] or on the usual narrative of positive obligations.[54] The ECtHR asked the question whether the treatment suffered by the applicant at the hands of a special CIA rendition team "is imputable to the respondent state". This implies the concept of imputation (or attribution) of the conduct to the state other than that whose agents actually mistreated the applicant.

This approach of the Court, departing from the general law of international responsibility in the ARSIWA, was commented and criticised by some scholars.[55] It looks like a new, special attribution test, departing from the rules of attribution in the ARSIWA.[56]

Later on, the ECtHR referred to the above standard in another extraordinary rendition case, *Al Nashiri v. Poland*.[57] The only slight difference is that this judgment seems to place

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[52] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 80, 13 December 2012.
[53] Ibid., §206: "… it emphasises 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".
[54] Ibid., § 239: "The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004."
[55] Cf. CRAWFORD, J. and KEENE, A., op. cit., p. 189; NOLLKAEMPER, A., The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis? *EJIL: Talk!* (2012), at: https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/ : "For all its incoherence and lack of clarity, the Court's language has a hint of normative power that the general law of responsibility lacks. The general law of responsibility by its conception of responsibility-based-on-wrongfulness, prefers determinations that one is responsible for the handing over of a person or for its inaction, not for the resulting torture itself. In contrast, the Court's approach may allow us to say that if a state hands over a person to another state in the knowledge that the person is tortured, and stands by when that torture happens, it bears responsibility for the torture *itself*."
[56] See, e.g. MILANOVIĆ, M., Special Rules of Attribution of Conduct in International Law, at: https://ssrn.com/abstract=3623309.
[57] ECtHR, *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.

greater emphasis on the responsibility of Poland for its own breaches.[58] Again, the Court does not make distinction between the attribution to a respondent state of the acts of private individuals and the acts of agents of a foreign state.

The interesting part of the jurisprudence of the ECtHR (from the point of view of application and development of rules on state responsibility) relates to the extraterritorial cases that involve two or more states.

One of the complex cases was decided by the ECtHR in *Chiragov and Others v. Armenia,* with Azerbaijan as the third-party intervener.[59] The case deals with the right of persons displaced by the conflict in Nagorno-Karabakh to access their property (under Article 1 of Protocol No. 1 to the ECHR). Key to this case was the question of whether the government of Armenia had effective control over the region concerned (despite the existence of the so-called Republic of Nagorno-Karabakh, NKR).

It is quite interesting that the survey of relevant international law cited in the judgment includes Article 42 of the 1907 Hague Regulations and Article 49 of the Geneva Convention (IV), as well as the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, but does not even mention any rules on attribution of responsibility.[60] The Court was satisfied with the conclusion that "Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its administration survive by virtue of the military, political, financial, and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin."[61]

It was also pointed out by Judge Motoc, in her concurring opinion, that the Court did not examine the question of the attribution of the acts on account of which applicants have been

[58] Ibid., § 517: "…under Article 1 of the Convention, taken together with Article 3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals... Notwithstanding the above Convention obligation, Poland, for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring. As the Court has already held above**,** on the basis of their own knowledge of the CIA activities deriving from Poland's complicity in the HVD Programme and from publicly accessible information on treatment applied in the context of the "war on terror" to terrorist suspects in US custody the authorities – even if they did not witness or participate in the specific acts of ill-treatment and abuse endured by the applicant – must have been aware of the serious risk of treatment contrary to Article 3 occurring on Polish territory."

[59] ECtHR, *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16 June 2015.

[60] Ibid., §§ 96-98.

[61] Ibid., § 186.

deprived of their possessions. However, she admits that "the situation under general international law is not the same as in the earlier cases. Here, the Court has already established the existence of a high degree of integration between the two entities" (i.e. NKR and Armenia). Therefore, she came to an optimistic conclusion that "the present case looks… to be the closer to the criterion of effective control, imposed by the ICJ." If this is true, then "this judgment represents one of the strongest returns to general international law".[62]

The most recent decision of one Chamber of the ECtHR in *Makuchyan and Minasyan*[63] involves many interesting aspects of extraterritorial jurisdiction, two states, and application of the rules of state responsibility under the ARSIWA.[64]

The incident took place at the NATO language training course in Budapest where one Azerbaijani officer assassinated (decapitation by axe) one Armenian officer and attempted assassination of another. The Hungarian police and courts acted promptly, arrested, tried, and sentenced the wrongdoer to a life imprisonment. However, eight years later, in 2012, he was transferred to Azerbaijan according to the Convention on the Transfer of Sentenced Persons.[65] After his arrival to Baku, he was immediately pardoned by the Azerbaijani president and received a glorious welcome and promotion to a higher rank. The ECtHR found the application admissible with regard to both Hungary and Azerbaijan.

The ECtHR in this case extensively discussed the law of state responsibility, namely Article 11 of the ARSIWA (Conduct acknowledged and adopted by a state as its own) and the commentary thereto, as well as some cases of the ICJ and the ICTY. The Court then concluded that Azerbaijan did not violate Article 2 of the ECHR in its substantive limb on the basis of its "acknowledgment" and "adoption" of R.S.'s criminal acts.[66] However, it found violation of the procedural limb of Article 2 by Azerbaijan. On balance, the Court did not find Hungary

[62] Concurring Opinion of Judge Motoc, ibid., pp. 84-85. See also MOTOC, I., VASEL, J.J., The ECHR and Responsibility of the State: Moving Towards Judicial Integration, op. cit., pp. 207-210.
[63] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020.
[64] See MILANOVIĆ, M., Attribution, Jurisdiction, Discrimination, Decapitation: A Comment on Makuchyan and Minasyan v. Azerbaijan and Hungary, *EJIL: Talk!*, at https://www.ejiltalk.org/attribution-jurisdiction-discrimination-decapitation-a-comment-on-makuchyan-and-minasyan-v-azerbaijan-and-hungary/
[65] The 1983 Council of Europe Convention on the Transfer of Sentenced Persons (ETS No. 112 – "the Transfer Convention").
[66] *Makuchyan and Minasyan v. Azerbaijan and Hungary*, § 118: "although the Court considers it beyond any doubt that by their actions various institutions and highest officials of the State of Azerbaijan "approved" and "endorsed" the criminal acts of R.S., applying the very high threshold set by Article 11 of the Draft Articles – as interpreted and applied by international tribunals, in particular the ICJ and the ICTY… – the Court cannot but conclude that, on the facts of the case, as presented by the applicants, it has not been convincingly demonstrated that the State of Azerbaijan "clearly and unequivocally" "acknowledged" and "adopted" "as its own" R.S.'s deplorable acts, thus assuming, as such, responsibility for his actual killing of G.M. and the preparations for the murder of the first applicant. The Court places emphasis on the fact that this assessment is undertaken on the basis of the very stringent standards set out by the existing rules of international law, as they stood at the material time and stand today, from which the Court sees no reason or possibility to depart in the present case."

responsible for any violation of procedural obligations under Article 2. This judgment should also be praised because it clearly shows the ability and willingness of the ECtHR to apply general international law.

4. Content of responsibility under the ECHR

Although the main interest of scholars seems to be attracted by the debate on jurisdiction and attribution in the jurisprudence of the ECtHR, one should not overlook the aspects of content of state responsibility in judgments of this Court.

The main question to be addressed here is whether the concept of "just satisfaction" under Article 41 of the ECHR provides for a *lex specialis* that excludes the usual content of international responsibility, i.e. the obligations of cessation and reparation. Of course, the term "just satisfaction" in the ECHR cannot be equated with satisfaction under general international law aiming at redress of moral injury, as codified in Article 37 of the ARSIWA.[67] According to the ECHR and the case law of the ECtHR, it may include, as appropriate, financial sum making good both material and non-material injury. Neither "just satisfaction" seems to amount to reparation *stricto sensu*, including all forms with the priority of restitution.

The real question is whether the special rules under the ECHR exclude legal consequences under general international law or allow their application subsidiarily or per analogy. Again, the difficulty is in the fact that the Court did not explain its position as to the general applicability of the rules on state responsibility to obligations imposed on the responsible state under the ECHR.

Traditionally, the Court has issued declaratory judgments on violation or non-violation of the invoked articles of the Convention or of one of the Protocols thereto. In addition, the Court may, under Article 41 of the ECHR, afford just satisfaction to the injured party.[68] The wording of that article, which makes this option subsidiary to the lack of reparation in internal law, does not seem to follow the formula of full reparation in all forms under general international law. The practice shows, however, that such "just satisfaction" is usually adjudicated, though in various forms and amount.

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[67] Art. 37 of ARSIWA: "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

[68] Art. 41: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Moreover, the ECtHR, starting from its judgment in *Papamichalopoulos* (1995), deduced, on some occasions, the obligation of full reparation. Although it admitted that "the Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach", it decided for the *restitutio in integrum*.[69] Quite interestingly, the ECtHR referred to the dictum of the Permanent Court of International Justice (PCIJ) in *Chorzów* case.[70] Nevertheless, the Court did explain that and why it felt obliged to apply rules of state responsibility under general international law.

It is clear that the Court did not base its judgment on Article 41 (formerly Article 50) of the ECHR. Instead, it seems that the Court concluded that power from general provisions of the Convention, concerning the obligation of the contracting parties to abide by the decision of the Court (Article 46, formerly Article 53),[71] as well as the obligation to secure the rights and freedoms guaranteed (Article 1).[72]

The attachment to general law of state responsibility also appears in other cases of the ECtHR. The Court went on even further and concluded that in cases of widespread and systemic problems, the responsible state had to adopt general measures in domestic legal order.[73] Again, the ECtHR referred to a general obligation under Article 46 of the Convention (instead of Article 41),[74] as well as to two resolutions or recommendations of the Committee of Ministers of the Council of Europe.[75] The second one seems to recommend the obligation of cessation and non-repetition,[76] although the document did not mention the pertinent provisions of the

[69] ECtHR, *Papamichalopoulos and Others v. Greece* (Article 50), no. 14556/89, § 34, 31 October 1995: "This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (art. 1). If the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it…"
[70] PCIJ, *Factory at Chorzów* (Germany v. Poland), judgment of 13 September 1928, Series A no. 17, § 47.
[71] *Papamichalopoulos*, § 34: "The Court points out that by Article 53 … of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties…"
[72] Ibid., § 34: "This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1)." See also MALENOVSKÝ, J., *Mezinárodní právo veřejné. Obecná část* [Public International Law. General Part], Brno: MUNI Press, 2020, p. 243.
[73] ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, § 190-192, 22 June 2004.
[74] Ibid., § 192: "the Court wishes to consider what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects."
[75] Resolution (Res(2004)3) on judgments revealing an underlying systemic problem, adopted on 12 May 2004; and Recommendation of 12 May 2004 (Rec(2004)6) on the improvement of domestic remedies.
[76] Rec(2004)6 recommends that the Contracting States, following Court judgments which point to structural or general deficiencies in national law or practice, review and, "where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court".

ARSIWA.[77] On balance, while using such strong words in its reasoning, the Court put in the operative part of the judgment the obligation of restitution in alternative with financial compensation.[78]

It is an example of the creative interpretation of the ECHR by the Court that, without expressly referring to general international law, it includes into its routine decisions on "just satisfaction" some other forms of legal consequences of internationally wrongful acts. Although Article 41 of the ECHR does not provide a sound legal basis for it, the Court justifies its decision by reference to other provisions of the Convention (Article 46). At the same time, the ECtHR adopts such decisions only in cases that reveal widespread and systemic problems. Otherwise, it respects the discretion of the states parties as to the manner of execution of a judgment.

However, the most recent and significant judgment of the Grand Chamber in *Mammadov* (in proceedings under Article 46 § 4)[79] seems to bring a breakdown decision in various aspects: from the point of view of application of general international law, clarification of the *restitutio in integrum*, and the judicialisation of the execution of the Court's rulings.

5. Conclusion

The above analysis of the case law shows that, in the practice of the ECtHR, the principles of state responsibility are not irrelevant. However, it is quite difficult to evaluate how much they inform the jurisprudence of the Court. The main difficulty arises from the fact that the ECtHR rarely develops its reasoning on the express and clear interpretation of general rules of responsibility. Even if the Court now more often refers to some articles of the ARSIWA in the survey of international law, it does not always find reflection in the operative part of a judgment and its reasoning. The ambiguity as to the application of or departure from the rules in the ARSIWA is only strengthened by the silence of the Court. It is not easy to discern if the judgment applies a certain rule or aims at replacing it by a *lex specialis*.

The main area of rules of state responsibility likely to be relevant for the ECtHR concerns rules on attribution of conduct to a state. They are general in nature and may apply to any internationally wrongful act and are not exclusive to inter-state cases. In most cases, the

[77] See Art. 30: "The State responsible for the internationally wrongful act is under an obligation:
(a) to cease that act, if it is continuing;
(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."
[78] *Broniowski v. Poland* [GC], ibid., §§ 73-74: "… *Holds* that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1."
[79] ECtHR, *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, 29 May 2019.

Court may apply them implicitly, without saying, as most violations of human rights are committed in the territory of a state by its organs. One can understand that attribution is an issue only in a limited number of complicated cases, mostly of extraterritorial character. Still, the Court has been able to decide in most cases, bypassing thus the reference to precise rules of attribution. The main avenues explored by the ECtHR seem to be in the interpretation of jurisdiction under Article 1 of the ECHR and the concept of positive obligations. However, the confusion of jurisdiction and attribution of conduct (responsibility) does not help. In some cases, in particular *El-Masri*, it even looks like the Court would adopt a special rule of attribution of direct responsibility in a situation that would rather call for responsibility for aid or assistance. In other, more recent cases, the Court seems to go closer to general rules such as those that appear in the ARSIWA.

When it comes to the content of responsibility, Article 41 and the older prevailing practice of the Court would speak in favour of special rule ("just satisfaction"). Nevertheless, the more recent jurisprudence reveals that the Court does not hesitate to apply the forms of obligations known in general international law (full reparation, cessation, and non-repetition) in cases when it found systemic violations of rights.

All in all, the relations between the ECHR and general law of tate responsibility are not easy. The development of the jurisprudence of the ECtHR shows an oscillation between a silent neglect, application, and modification of the rules in the ARSIWA. The recent cases seem to confirm the increasing interest of the Court in those rules.