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Issues of Shared Responsibility before the European Court of Human Rights

Maarten den Heijer*

1. Introduction

This paper explores how the European Court of Human Rights (ECtHR, the Court) deals with cases involving a single injury and multiple contributing States. It identifies the principles used by the Court in deciding on such cases and examines to what extent the Court's approach corresponds to that of the work of the International Law Commission (ILC) on the topic of international responsibility and relevant judgments of the International Court of Justice (ICJ). As international law on the distribution of responsibilities among multiple contributing actors remains ill-developed[1], the paper seeks to explore whether the principles applied by the ECtHR are adequate for addressing issues of allocating responsibility and whether they can contribute to a more comprehensive theory on shared responsibility.[2]

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[1] The very fact that international law on apportioning responsibilities among multiple entities remains underdeveloped probably explains the increased focus of legal scholarship on the topic. Most authors proceed from the assumption that the law on multiple, or shared, responsibility, is uncertain, indistinct and of little guidance: I Brownlie, *Principles of Public International Law* (8th ed, Oxford University Press 2008), 457; JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988) 225; A Orakhelashvili, 'Division of Reparation between Responsible Entities', in: J Crawford, A Pellet & S Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010) 647, 664; RP Alford, 'Apportioning Responsbility Among Joint Tortfeasors for International Law Violations', 38 *Pepperdine Law Review* (2011) 233, 240. For specific efforts in the context of ECtHR caselaw see *inter alia* CA Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision', 42 *New York University Journal of International Law and Politics* (2010) 502; B Conforti, 'Exploring the Strasbourg case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in: Fitzmaurice M and Sarooshi S (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford: Hart Publishing 2004) 129.

[2] The term shared responsibility is used in this paper as umbrella concept describing all situations that deal with the allocation of responsibility and apportionment of liability in situations where multiple entities have contributed to an injury arising from an internationally wrongful act. The term 'shared' is thus descriptive and not meant to indicate specific legal consequences. The terminology is drawn from A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Concept Paper', ACIL Research Paper No 2011-07 (SHARES Series), finalised 2 August 2011(www.sharesproject.nl) 68.

Although it would go too far to claim that the Court has developed a solid and consistent set of principles in this respect, it is probably the international court with the most extensive case law on situations involving multiple wrongdoers. This is not only due to the sheer volume of judgments and decisions of the Court, but also because the ECtHR complaint mechanism allows for cases to be brought against multiple Contracting States simultaneously.[3]

Although the Court's case law is binding upon the *espace juridique* of the Contracting States only, pronouncements of the Court are often referred to as significant authority in other regimes of international law and they constituted, for example, an important source for the work of the ILC on international responsibility.[4] Leading cases of the ECtHR dealing with the allocation of international responsibilities (and the cognant issue of 'jurisdiction') have however been subject to criticism, including the cases of *Bankovic*, *Behrami* and *Bosphorus*.[5] But, the Court's case law is also subject to progressive development. The recent Grand Chamber judgments in *Al-Skeini* and *Al-Jedda* may signify a shift towards congruence with other international authority.[6] This paper traces these developments and examines how they can contribute to principles on shared responsibility.

The paper is structured as follows. Section 2 discusses obstacles of procedural nature for bringing complaints against multiple States before the Court. Section 3 discusses the principles used by the Court in several categories of concurrent conduct of States. In section 4, specific attention is paid to State activity in connection with that of an international organisation. Lastly, in section 5, the paper examines how the Court distributes obligations of reparation between multiple involved States.

[3] See n 7-8 and accompanying text below.
[4] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN GAOR Supplement No. 10 (A/56/10) chp. IV.E.1 (hereafter Articles on State Responsibility); International Law Commission, *Draft Articles on the Responsibility of International Organizations, with commentaries* (2011) UN GAOR Supplement No. 10 (A/66/10) chp. V.E.1 (hereafter Articles on the Responsibility of International Organizations).
[5] ECtHR 12 December 2001, *Bankovic a.o. v Belgium and 16 other States*, no 52207/99; ECtHR 2 May 2007, *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, nos 71412/01 and 78166/01; ECtHR 30 June 2006, *Bosphorus v Ireland*, no 45036/98.
[6] ECtHR 7 July 2011, *Al-Skeini a.o. v the United Kingdom*, no 55721/07; ECtHR 7 July 2011, *Al-Jedda v the United Kingdom*, no 27021/08.

2. Procedural aspects

In terms of procedural openness, the ECtHR is in some respects better placed than other courts to decide upon cases involving multiple States. Although the possibility to bring a case against multiple Contracting States is not as such mentioned for in the Convention, it follows from the compulsory jurisdiction of the Court in inter-State cases and individual applications.[7] The Rules of Court do expressly provide for the possibility of joinder and simultaneous examination of applications, also if involving different respondent States, for example if the applications concern the same factual circumstances.[8] The nature of the Court's jurisdiction may thus prevent applications involving multiple wrongdoing States from facing the obstacle of the "indispensable parties rule" as developed by the International Court of Justice, under which the ICJ considers it impossible to exercise jurisdiction when the principal issue requires a determination of the legal position of a State that is not a party to the proceedings.[9]

There are nonetheless procedural hurdles for invoking multiple responsibilities of States before the Court. The admissibility thresholds enshrined in the Convention prevent applications which do not entertain a genuine link between the State and the individual (jurisdiction)[10] or an actual relationship between the alleged misconduct and damages suffered (victim)[11]. Further, the indispensable parties rule principle may still be relevant for applications involving the legal obligations of Non-Contracting States.[12]

[7] Articles 32-34 ECHR
[8] Rule 42 § 1 and 2 Rules of Court. Rule 47 § 1(c) Rules of Court expressly mentions the possibility to lodge an individual complaint against more than one Contracting Party.
[9] Provided the application is indeed lodged against multiple States. *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Question) [1954] ICJ Rep 19, 32; *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90, 101. On the obstacle of the indispensable parties rule for multilateral dispute settlement extensively: A Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', ACIL Research Paper No 2011-01 (SHARES Series), finalized 8 April 2011.
[10] Section 2.1.
[11] Section 2.2.
[12] Section 2.3.

2.1. Jurisdiction

A first admissibility threshold with particular relevance in the context of multiple wrongdoing States is that, according to Article 1 of the Convention, a person who claims to be a victim of a human rights violation, must be within the jurisdiction of the respondent State. The notion of jurisdiction in Article 1 essentially signifies the circle of persons who come within the purview of a Contracting State's human rights obligations. If it cannot be established that a complainant is within the jurisdiction of a respondent State, the State owes no human rights obligations towards that individual. The Court will then declare the complaint incompatible with the provisions of the Convention and for that reason inadmissible.[13]

Jurisdiction is important as admissibility criterion, as it embeds a territorial bias in the system of human rights protection under the ECHR. In the first place, the Court's interpretation of Article 1 of the Convention will ordinarily ensure that at least one State, namely the State where the human rights violation materializes, incurs special duties in situations of multiple wrongdoers. The Court has on multiple occasions affirmed that even when the principal wrongdoer functions autonomously from the territorial State, the victim must still be presumed to fall within the territorial State's jurisdiction and therewith in the purview of its Convention obligations.[14] The basis for this special protective duty is that anyone within the State's territory is presumably subjected to the state's competence and control, and that therefore, the State is both entitled and able to prevent human rights violations in its territory.[15] It follows that, in respect of human rights violations stemming from the activity of another State or autonomous entity in its territory, the State is under a duty to prevent or terminate such a violation. Further, also in the exceptional situation where a State is effectively prevented from exercising authority in part of its territory, the Court has held the territorial State not to be discharged of its positive obligations to take the steps within

[13] *Bankovic* (n 5) para 85.
[14] See especially ECtHR 8 April 2004, *Assanidze v Georgia*, para 137-9. The Court's Grand Chamber is likely to elaborate further on this issue in respect of the conflict in Nagorno-Karabakh in two cases where the question of jurisdiction of Azerbaijan and Armenia respectively over persons affected by the conflict has been joined to the merits: ECtHR 14 December 2011, *Sargsyan v Azerbaijan*, no 40167/06 and ECtHR 14 December 2011, *Chiragov a.o. v Armenia*, no 13216/05.
[15] *Assanidze v Georgia*, para 139.

its power to stop a human rights violations from occurring.[16] Whether the State has fulfilled this obligation depends on an assessment of the primary obligation at issue in relation to the material opportunities available to the State Party to change the outcome of events.[17]

The reverse implication of the Court's approach to the jurisdiction requirement is that States are only exceptionally obliged to guarantee human rights outside of their territories.[18] Although the drafters of the Convention expressly opted for the more lenient term jurisdiction instead of territory or nationality in defining the scope *ratione personae* of a State's obligations under the Convention[19], Court has stressed in its case law that even though the notions of territory and jurisdiction need not always coincide, the term 'jurisdiction' reflects its essentially territorial meaning in public international law and thus sets a territorial limit on the reach of the Convention.[20] Because an affected individual will in most cases be situated in one State alone, the jurisdiction requirement may hence constitute an obstacle for arriving at multiple, or shared, responsibility.[21]

There are indeed a range of complaints involving multiple contributing States which have been dismissed by the Court and former European Commission of Human Rights for failure of meeting the jurisdiction requirement – including such cases as the landmark *Bankovic* decision (multiple States contributing to the NATO bombing of Belgrade in 1999), *Hess* (the detention of former nazi Rudolf Hess by the Four Powers), *Gentilhomme* (France implementing Algeria's decision to no longer enroll children of Algerian nationality at French state schools in Algeria), *McElhinney* (one

[16] ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no 48787/99, para 333; repeated in: ECtHR 15 November 2011, *Ivantoc a.o. v Moldova and Russia*, no 23687/05, para 105. *Contra* EComHR 18 January 1989, *Vearncombe v the United Kingdom and the Federal Republic of Germany*, no 12816/87, where the former European Commission of Human Rights considered that Berlin citizens complaining about the noise from a military shooting range constructed and used by the British Army in Berlin fell outside the personal scope of West Germany's obligations under the Convention.
[17] See in particular the Court's assessment of Moldova's duties in the cases of *Ilascu* case (n 16) para 336-52 and *Ivantoc* (n 16) para 107-11.
[18] *Bankovic* (n 5) para 61; *Al-Skeini* (n 6) para 131.
[19] *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, part III (Strasbourg: Council of Europe 1977), 276 (8 Sept. 1949); see further M den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing 2012) 24.
[20] Eg *Bankovic* (n 5) para 61; ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom* (adm. dec.), no 61498/08, para 84-5; ECtHR 11 December 2006, *Ben El Mahi a.o. v Denmark*, no 5853/06.
[21] One prominent exception are extradition and expulsion cases, dealt with in section 3.4 below.

State participating in civil proceedings in another State), *Treska* (one State failing to comply with a property restitution order of another State) and *Plepi* (the failure of two States to reach an agreement on the transfer of sentenced persons).[22]

A quite problematic feature of the Court's approach to the issue of extraterritorial human rights obligations is however, as is also observed by judges of the Court itself, that it is not always consistent and its elaboration of doctrinal foundations equivocal.[23]

A first issue concerns the meaning, or function, of the term jurisdiction itself. It has correctly been observed that the Court often fails to properly distinguish between the ordinary meaning of the term under international law and its more specific allocating function under the ECHR in terms of identifying the responsible State for human rights protection under the Convention.[24] If the ordinary meaning of 'jurisdiction' in public international law – which is commonly seen to allocate competences, or legal titles, among States – would be solely decisive, the term would primarily serve to avoid a State from being obliged to ensure human rights in situations where it is not internationally competent to do so.[25] The Court relied heavily on this meaning of the term in its *Gentilhomme* decision. Whilst referring to the principle that a State may not enforce its jurisdiction in another State's territory without that State's consent, the Court noted that the French refusal to enroll children with Algerian nationality in French State constituted an implementation of a decision imputable to Algeria, taken by the sovereign on its own territory and that therefore the children could not be said

[22] *Bankovic* (n 5); EComHR 28 May 1975, *Hess v the United Kingdom*, no 6231/73 (see further section 3.3 below); ECtHR 14 May 2002, *Gentilhomme, Schaff-Benhadji and Zerouki v France*, nos 48205/99, 48207/99 and 48209/99; ECtHR 9 February 2000, *McElhinney v. Ireland and the United Kingdom*, no 31253/96; ECtHR 29 June 2006, *Treska v Albania and Italy*, no 26937/04; ECtHR 4 May 2010, *Plepi a.o. v Albania and Greece*, nos 11546/05, 33285/05 and 33288/05.

[23] RA Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in: F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2004) 83-123; A Orakhelashvili, 'Restrictive Interpretation of the Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *European Journal of International Law* (2003) 529, 538; M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008) 411; Concurring Opinion of Judge Bonello in *Al-Skeini* (n 6) para 4-7; Partly Dissenting Opinion of Judge Loucaides in *Ilascu* (n 16).

[24] See esp. Orakhelashvili (n 23) 540, referring to the 'remedial, as opposed to a substantive notion of jurisdiction' under Art. 1 ECHR.

[25] *S.S. 'Lotus' (France v Turkey),* 1927 PCIJ Rep A. No. 10, 18-19; FA Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Académie de Droit International* (1964) 9-15; FA Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', 186 *Recueil des Cours de l'Académie de Droit International* (1984) 20; M. Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1972-73) 145.

to fall within the jurisdiction of France.[26] The reasoning of the Court could be taken to signify that, if to guarantee human rights comes in conflict with another State's sovereignty, the notion of jurisdiction precludes the Convention from being applicable.[27]

In a majority of cases however, the Court has stressed that 'jurisdiction' does not so much signify the *legal competence* of a State to engage in particular conduct, but rather the *factual* nature of the relationship between the respondent State and the individual. In the case of *Al-Saadoon and Mufdhi v the United Kingdom* for example, on the lawfulness of the proposed transfer of two Iraqi nationals who were held in British custody in Iraq into that of the Iraqi authorities, the Court dismissed the United Kingdom government argument that the prisoners fell outside its jurisdiction in the meaning of Article 1 of the Convention on account of its bilateral obligation to handover the suspects to Iraq (stemming also from the U.K. duty to respect Iraq's sovereignty), and instead found that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction".[28] This approach –the question of international competence of a Contracting State should not be conflated with the scope of the State's obligations under the Convention – finds support in a range of other cases.[29]

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[26] *Gentilhomme* (n 22) para 20.

[27] In this vein also: Court of Appeal (England and Wales) 21 January 2009, *R (on the application of (1) Faisal Nassar Al-Saadoon (2) Khalaf Hussain Mufdhi) v Secretary of State for Defence* [2009] EWCA Civ 7, para 25.

[28] *Al-Saadoon and Mufdhi* (n 20) para 88-9. The Court instead considered possible conflicting legal obligations vis-à-vis Iraq relevant in that they could 'modify or displace' the material Convention obligations.

[29] ECtHR 23 March 1995, *Loizidou v Turkey* (prel. obj.), no 15318/89, para 62: '[T]he responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory'; and ECtHR 16 November 2004, *Issa a.o. v Turkey*, no 31821/96, para 69, 71. Also see EComHR 12 October 1989, *Stocké v Germany* (report), no 11755/85, para 167 ('An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not […] only involve State responsibility vis-à-vis the other State, but [it] also affects that person's individual right to security under Article 5(1). The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.') and ECtHR 12 March 2003, *Öcalan v Turkey*, no 46221/99, para 93 and ECtHR 12 May 2005, *Öcalan v Turkey* [GC], no 46221/99, para 91, where the Court did not consider the question whether the arrest by Turkish authorities of PKK-leader Abdullah Öcalan on the territory of Kenya had violated Kenya's sovereignty material for the jurisdiction issue, but found it 'common ground' that the arrest – lawful or not – had brought mr. Öcalan within the effective control and therewith jurisdiction of Turkey.

But in conceptualising this factual connection between the individual and the State, further inconsistencies arise. The essential issue appears to be whether simply any act of the State affecting an individual in the enjoyment of Convention rights outside its territory brings that person within its jurisdiction under Article 1 ECHR[30]; or whether the 'jurisdictional link' between the State and the individual should meet a particular threshold – often made operational through the criterion of 'effective control'.

In *Bankovic*, the Grand Chamber had reasoned that the first approach would render the words 'within their jurisdiction' in Article 1 'superfluous and devoid of any purpose' because it would equate the jurisdiction requirement with the question whether a person can be considered to be a victim of a violation of rights guaranteed by the Convention.[31] Instead, the Court had recourse to the test of 'effective control' as it had employed in its case law on Northern-Cyprus.[32] Although the Court did not elaborate on the exact contours of this test, one may deduce from *Bankovic* and later cases where the effective control test was applied, that it would be necessary that, apart from the contested act itself, some further 'jurisdictional link' exists between the State and the individual. This may be that a State is an occupying power,[33] that it exercises public powers which are normally appertainable to the territorial State,[34] or that the individual is subject to the State's exclusive physical power or control.[35] One

[30] This approach is most evidently present in various decisions of the former European Commission which employed as as standard formula that 'authorised agents of a State bring other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property'; and that '[i]n so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.': EComHR 14 July 1977, *X. and Y. v Switzerland*, nos 7289/75 and 7349/76; EComHR 14 October 1992, *W.M. v Denmark*, no 17392/90; EComHR 24 June 1996, *Ramirez v France*, no 28780/95; EComHR 2 October 1989, *Reinette v France*, no 14009/88; EComHR 7 October 1980, *Freda v Italy*, no 8916/80; EComHR 8 September 1997, *Bendréus v Sweden*, no 31653/96; EcomHR 25 September 1965, *X v Federal Republic of Germany*, no 1611/62; EComHR 15 December 1977, *X v United Kingdom*, no 7547/76; EComHR 12 October 1989, *Stocké v Germany*, no 11755/85, para. 166-7; and *Vearncombe* (n 16).
[31] Ibid.
[32] See esp *Loizidou* (prel. obj.) (n 29) para 62 and ECtHR 18 December 1996, *Loizidou v Turkey* (merits), no 15318/89, para 56; ECtHR 10 May 2011, *Cyprus v Turkey*, no 25781/94, para 77.
[33] Ibid.
[34] *Al-Skeini* (n 6) para 135.
[35] *Öcalan* [GC] (n 29) para 91; ECtHR 29 March 2010, *Medvedyev v France*, no 3394/03, para 50; *Al-Saadoon and Mufdhi* (n 20) para 88-9.

problem with the *Bankovic* reasoning was however that the Court in later judgments appeared to adopt a lower threshold.[36]

The judgment in *Al-Skeini* on the conduct of British troops in Iraq, was a fresh attempt of the Grand Chamber at placing the general applicable principles at sounder footing. Although the Court revisited the earlier *Bankovic* principles (by noting, contrary to *Bankovic*, that the rights of the Convention can be 'divided and tailored' in accordance with the extra-territorial act in question and that the essentially regional character of the Convention does not oppose its application outside the *espace juridique* of the Contracting States[37]), it is only partly successful in elucidating the required threshold. The Court ultimately derived its conclusion that the deceased Iraqi citizens fell within U.K. jurisdiction from both the finding that the U.K. exercised authority and control over South East Iraq and the fact that the deaths occurred in the course of British security operations with direct involvement of British troops. In doing so, the Court conflates the two standards of 'state agent authority' and 'effective control', leaving open an interpretation that the shooting incidents would in themselves be insufficient for establishing a 'jurisdictional link' – à la *Bankovic*.[38]

The standard of 'effective control' or a 'further jurisdictional link' (other than the contested act) is not unproblematic for determinations of State responsibility in cases of multiple involved States. This is especially so in situations where States contribute to an injury in the absence of a direct connection with the eventual victim. Several well-established concepts in the law on State responsibility, where responsibility is derived from the State's involvement in the act of another State, including coercion, aid and assistance and direction and control, see precisely to instances where the link between one of the wrongdoing States with the injury (and, in human rights terms, the

[36] Thus, arguably contradictory to *Bankovic*, the Court accepted in *Pad*, *Solomou*, *Andreou* and *Isaak*, all involving the mere incidental use of force in another State without there being some further 'jurisdictional link', that the victims could be said to be within the jurisdiction of the acting State: ECtHR 28 June 2007, *Pad a.o. v Turkey*, no 60167/00, para 54-5; ECtHR 24 June 2008, *Solomou a.o. v Turkey*, no 36832/97, para 50-5; ECtHR 3 June 2008, *Andreou v Turkey*, no 45653/99; ECtHR 28 September 2006, *Isaak v Turkey* (adm. dec.), no 44587/98. Also see ECtHR 9 October 2003, *Kovacic a.o. v Slovenia* (adm. dec.), nos 44574/98, 45133/98, 48316/99, concerning the inability of several Croatian citizens to withdraw currency from a Slovenian Bank, where the Court considered that 'effects' produced by the Slovenian legislator outside Slovenian territory could engage its responsibility under the Convention.

[37] *Al-Skeini* (n 6), para 137, 142.

[38] Ibid, para 149-50.

victim) is of intermediary nature. To strictly adhere to the notion of jurisdiction as at all times requiring that a State asserts effective control over an individual, or territory, for that matter, may hence preclude the operationalisation of these concepts of state responsibility.

There are however signs that the Court would be willing to place such scenarios of 'remote' involvement in its well-known doctrine of positive obligations. For example, in the cases of *Treska v Albania and Italy* and *Manoilescu and Dubrescu v Romania and Russia*, the Court considered that: "[e]ven in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention".[39] The finding of violations on the part of Russia in the notorious case of *Ilascu* is grounded in a similar rationale.[40]

The manner in which the Court will further shape its doctrine on jurisdiction and extraterritorial activity is of crucial importance for issues of shared responsibility. Up to now, to quote judge Bonello, concurring in *Al-Skeini*, "the Court's case-law on Article 1 of the Convention has been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies." Bonello advances an approach that jurisdiction is neither territorial nor extra-territorial, but means "no less and no more than "authority over" and "control of"." Jurisdiction, he continues, then arises "from the mere fact of having assumed those

[39] ECtHR 29 June 2006, *Treska v Albania and Italy*, no 26937/04. ECtHR 3 March 2005, *Manoilescu and Dobrescu v Romania and Russia*, no 60861/00, para 101. Also see ECtHR 11 December 2008, *Stephens v Cyprus, Turkey and the UN*, no. 45267/06, concerning the inability of Mr. Stephens, living in Canada, to enter his house located in the UN buffer zone in Cyprus, because the Cypriot national guard had erected a defence post in the garden of his house. The Court firstly observed that in so far as the complaint was directed against Cyprus and Turkey, these states did not have effective control over the buffer zone in which the applicant's house was located. But the Court subsequently noted that the applicant had neither challenged 'a particular action or inaction by these States or otherwise substantiated any breach by the said States of their duty to take all the appropriate measures with regard to the applicant's rights which are still within their power to take'.

[40] In view of the "effective authority, or at the very least the decisive influence" asserted by the Russian Federation over the separatist regime in Transdniestria, Moldova, the Court considered the victims to come within the jurisdiction of Russia, even though the agents of the Russian Federation had not participated directly in the events complained of. It concluded amongst other things that Russia had not made (positive) attempts to put an end to the applicants' situation throughout their period of detention: *Ilascu* (n 16) para 392-4.

obligations [of the Convention-MdH] *and from having the capability to fulfil them* (or not to fulfil them)."[41] This approach, which is indeed already present in parts of the Court's case law, is much more receptive to issues of shared responsibility than the effective control-test. It is grounded in the idea that a State should in all its activity (and omissions) respect the human rights obligations it has signed up to and that it may thus not do abroad, what it is not allowed to do at home.[42] This appears at least as valid a rationale as that the Convention should apply to the European legal order only. But the Court has as of yet not full-heartedly embraced it.

2.2. Victim requirement

A second procedural hurdle of relevance for situations of shared responsibility is the victim requirement (Article 34 ECHR). Victim status is interpreted by the Court as requiring that an individual applicant should claim to have been actually affected by the violation he alleges.[43] The victim requirement only applies to individual complaints and not to the inter-State procedure of Article 33 ECHR, which is seen to protect the general interest of observance of the Convention.[44] Victim status does not necessarily require the individual to have suffered damages (or, in the words of the Court 'prejudice' or 'detriment')[45], but it is necessary that the measure complained of is applied in respect of the applicant, thus precluding complaints of *actio popularis* character. It is only in exceptional cases that the Court has accepted that measures of general nature which have not yet been applied to the detriment of the applicant, can give rise to victim status.[46] A potential problematic feature of the victim requirement for scenarios of shared responsibility is that the Court will normally focus on the act

[41] Concurring Opinion of Judge Bonello in *Al-Skeini* (n 6), para 11-13, emphasis in original.
[42] Cf. *Issa* (n 29) para 71: 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'. The formula was earlier used by the Human Rights Committee: HRC 29 July 1981, *Celiberti de Casariego v Uruguay*, no 56/1979, para 10; HRC 29 July 1981, *Lopez Burgos v Uruguay*, no 52/1979, para 12 and repeated in *Isaak* (n 36), *Andreou* (n 36) and *Solomou* (n 36) para 45.
[43] ECtHR 6 September 1978, *Klass a.o. v Germany*, no 5029/71, para 33; ECtHR 24 July 2003, *Karner v Austria*, no 40016/98, para 24-5. Note that the Court's terminology is not always consistent, as it also refers to 'personally affected' and 'directly affected'.
[44] ECtHR 18 January 1978, *Ireland v the United Kingdom*, no 5310/71, para 239-40.
[45] ECtHR 22 May 1984, *De Jong, Baljet and van den Brink v the Netherlands*, nos 8805/79, 8806/79, 9242/81, para 41.
[46] *Klass* (n 43) para 33; ECtHR 22 October 1981, *Dudgeon v the United Kingdom*, no 7525/76; ECtHR 7 July 1989, *Soering v United Kingdom*, no 14038/88.

which actually leads to the injury, possibly ignoring underlying legislative or facilitating acts of another State or entity.

Firstly, the victim requirement may come to the fore in cases where international organisations, such as the European Union, oblige their member States to undertake particular activity in respect of individuals and where the collective responsibility of the Member States is invoked. In *Segi*, the ECtHR considered that the mere placement by the Council of the European Union of an organisation on a terrorist list 'is too tenuous to justify application of the Convention' in respect of the fifteen Member States having taken that decision.[47] According to the Court, the rights of the applicant organisation would be protected in the event any concrete implementing measures were undertaken in the legal order of the State concerned. A comparable case is *Senator Lines*, where the complaint lodged against the then fifteen EU Member States concerning a competition fine issued by the European Commission was declared inadmissible for a lack of victim status, because the fine was not enforced.[48]

Notably, as is further explained below[49], the Draft Agreement on the Accession of the EU to the ECHR recognises the hurdle posed by the victim requirement in this respect, and proposes a relaxation for situations where the EU or its member State was not the party that acted or omitted, but was instead the party that provided the legal basis for that act or omission.[50] This should prevent an application from being declared inadmissible in respect of the 'co-respondent' party on the basis that it is incompatible *ratione personae* with the Convention. Because the orinary admissibility criteria are upheld in respect of the 'acting' party, the Draft Agreement still requires, as a rule, that the actual violation has occurred.

[47] ECtHR 23 May 2002, *Segi a.o. v 15 States of the European Union*, nos 6422/02 and 9916/02.
[48] ECtHR 10 March 2004, *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, no 56672/00. Note that in this case victim status was anyhow problematic to establish, since the fine at issue had during the proceedings before the Court been quashed by the Court of First Instance of the European Communities.
[49] Section 4.4.
[50] Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH-UE(2011)16, Strasbourg, 19 July 2011, Article 3(1)(b), amending Article 36 ECHR and Explanatory report, para 37.

Further scenarios of facilitating activity where the victim requirement may come to the fore are cases of direction or control and aid and assistance. In the case of *Tugar v Italy*, for example, on a complaint of an Iraqi mine clearer who stepped on a mine which was allegedly illegally sold by an Italian company to Iraq, the former European Commission of Human Rights concluded that the eventual injury sustained could not engage the responsibility of Italy for failing to properly regulate the arms trade, because there was no 'immediate relationship' between the mere supply of the mines and the accident and because Iraq's activities constituted the 'direct and decisive cause' of the accident.[51] Another case declared incompatible *ratione personae* with the Convention is *Aziz v Cyprus, Greece, Turkey and the United Kingdom*, where the responsibility of Turkey, Greece and the United Kingdom was invoked for their role in the conflict in Cyprus and the resulting inability of the applicant to exercise his voting rights in Northern Cyprus on account of him belonging to the Turkish community. The Court found the complaints directed against the other States than Cyprus to be too remote to have bearing on the situation of the applicant.[52]

2.3. Indispensable parties rule

Before the ICJ, the indispensable parties rule has been identified as a prominent procedural hurdle for multilateral dispute settlement.[53] The rule, developed in *Monetary Gold*, reflects the principle that the ICJ can only exercise jurisdiction over a State with its consent.[54] It signifies that it would be impossible for the ICJ to establish jurisdiction in a contentious case if the legal interests of a third State form the very subject matter of the dispute.[55]

Although the compulsory nature of the ECtHR's jurisdiction may circumvent the indispensable parties rule in cases involving a plurality of Contracting States, it may still be relevant in cases where the legal interests of a non-Contracting State are at

[51] ECtHR 18 October 1995, *Tugar v Italy*, no 22869/93. Note that the Commission did not expressly refer to the victim requirement in this case.
[52] ECtHR 23 April, *Aziz v Cyprus, Greece, Turkey and the United Kingdom*, no 69949/01.
[53] NS Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor* Case', 21 *Yale Journal of International Law* (1996) 305, 315-316; Nollkaemper (n 9) 13-25.
[54] As laid down in ICJ Statute, Article 36. *Monetary Gold* (n 9) 32.
[55] *Monetary Gold* (n 9) 32; *East Timor* (n 9) 105 (para 34).

issue. As with any international court, the "well-established principle of international law that the Court can only exercise jurisdiction over a State with its consent" [56], is also entrenched in the European Convention.[57] Explicit reference to the *Monetary Gold* principle was made by the respondent States in the cases of *Behrami* and *Bankovic*, where the lawfulness of acts of Member States of NATO and the UN who were not party to the Convention was also at issue. The Court declared these cases inadmissible on other grounds however and did not examine these submissions.[58]

The Court has nonetheless confirmed that it must refrain from adjudicating on the lawfulness of activities of non-Contracting States. The issue plays a topical role in extradition and expulsion cases, where the Court often starts from the general principle that "the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States."[59] It further underlines in these cases that, although the establishment of the responsibility of the expelling State "inevitably involves an assessment of conditions in the requesting country against the standards of the Convention, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[60]

In itself, the indispensable parties rule need indeed not prevent the Court from adjudicating on extradition and expulsion cases, as the primary issue in these cases concerns the likelihood that the person in question will be subjected to treatment contrary to Article 3 of the Convention. Because the Court's assessment concerns possible prospective conduct in the other State, it does not strictly speaking adjudicate on the rights and obligations of the receiving State. Moreover, although most of the

[56] *Monetary Gold* (n 9) 32.
[57] ECHR, Artt. 32-34.
[58] *Bankovic* (n 5) para 31; *Behrami* (n 5) para 67.
[59] *Soering* (n 46) para 86; ECtHR 20 March 1991 *Cruz Varas a.o. v Sweden*, no 15576/89, para 60; ECtHR 4 February 2005, *Mamatkulov and Askarov v. Turkey* [GC], nos 46827/99 and 46951/99, para 67; ECtHR 28 February 2008, *Saadi v Italy* [GC], no 37201/06, para 126.
[60] Ibid.

receiving States are signatories to concurrent human rights conventions and in any event bound to the prohibition of torture as norm of *jus cogens*, the receiving country is not bound to the Court's interpretation of Article 3 of the ECHR, since that interpretation is grounded in and binding upon the espace juridique of the Contracting States only.[61]

It is nonetheless of note that the Court is not particularly reticent in pronouncing on the lawfulness of conduct of receiving States. In some, if not many, extradition and expulsion cases the Court derives the individual risk of a future injury from either the general human rights record in the receiving State or from past injustices done to the individual. Thus, it is not uncommon to find considerations that "it must be acknowledged that the general situation in Iran does not foster the protection of human rights"[62], that "ill-treatment of detainees is an enduring problem in Tajikistan"[63], that there is "clear evidence of a culture of torture with impunity" in Sri Lanka[64] or that a particular set of criminal proceedings in Syria "must be regarded as a flagrant denial of a fair trial".[65] By such pronouncements, the Court does appear to determine the lawfulness of the third State's conduct as preliminary step for arriving at the responsibility of the expelling or extraditing Party.[66]

We may conclude that the European Court has not only never expressly embraced the indispensable parties rule, but also that the Court is rather practicable in pronouncing on the lawfulness of the conduct of States which are not before it. The Court's approach is hence less rigid than that of the ICJ in the *East Timor* case, where the ICJ considered that it could not rule on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power of East Timor, because such a determination depended on the lawfulness of Indonesia's conduct in respect of

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[61] On the *jus cogens* status of the prohibition of torture: *Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia, 121 *International Law Reports* (2002) 213; E de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens' 15 *European Journal of International Law* (2004) 97.
[62] ECtHR 22 June 2004, *F. v the United Kingdom*, no 17341/03.
[63] ECtHR 23 September 2010, *Iskandarov v Russia*, no 17185/05, para 129.
[64] ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 124.
[65] ECtHR 8 November 2005, *Bader and Kandor v Sweden*, no 13284/04, para 47.
[66] Also see the intra-ECHR expulsion case *T.I. v the United Kingdom* where the Court examined the level of human rights protecting in the receiving Contracting State Germany, even though the complaint was lodged against the UK alone: ECtHR 7 March 2000, *T.I. v the United Kingdom*, no 43844/98.

East Timor (the Court labeled this as a 'prerequisite'), and because previous statements by international bodies on the legality of Indonesia's claims could not be regarded as "givens".[67] By contrast, in the context of extradition and expulsion, the ECtHR does procure evidence on practices of non-Contracting States and does pronounce on their conformity with human rights (although often phrased in generalised terms). Also, the determination that the other State has acted or is acting contrary to human rights is in some cases a decisive factor (and hence a 'prerequisite') for arriving at the responsibility of the extraditing State.

A further indication that the ECtHR applies the indispensable parties rule rather practicably is its case law on member State responsibility for acts of an international organisation.[68] In *Matthews*, for example, the Court explicitly stated that the "United Kingdom, *together with all the other parties to the Maastricht Treaty*, is responsible […] for the consequences of that Treaty" and indeed found those consequences to be in violation of the Convention – even though the United Kingdom was the only party to the dispute.[69] It transpires from *Gasparini* (on structural deficits in the internal staff regulations of NATO) that it does not matter, in this respect, that non-Contracting States may also be a member of the international organisation in question.[70] This approach corresponds with the ICJ's dismissal of the relevance of *Monetary Gold* for *Certain Phosphate Lands in Nauru*, where the ICJ reasoned that a determination of the responsibility of one of the participating States in the joint authority did not amount to an adjudication on the legal position of the other States.[71]

The ECtHR's treatment of third party legal interests may support the more general point that too rigid an adherence to the indispensable parties rule may paralyse an international court when confronted with multilateral disputes.[72] Some have indeed suggested a rethinking of Monetary Gold, on the basis not only that it has been

[67] *East Timor* (n 9) 104 (para 33).
[68] See section 4.1 below.
[69] ECtHR 18 February 1999, *Matthews v the United Kingdom*, no 24833/94, para 33, emphasis added.
[70] ECtHR 12 May 2009, *Gasparini v Italy and Belgium*, no 10750/03.
[71] *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, 261 (para 55). One difference of potential relevance between *Certain Phosphate Lands in Nauru* and *Matthews* and *Gasparini* is that the latter cases did not concern attribution of an act of a joint organ to the participating States, but responsibility on account of the transfer of competences to an international organization.
[72] S Rosenne, *The Law and Practice of the International Court* (The Hague: Martinus Nijhoff, 2nd Ed. 1985), 439; *East Timor* (n 9) 158 (Judge Weeramantry, dissenting); Klein (n 53) 316.

inconsistently applied by the ICJ,[73] but also because it would unfavourably balance the requirement of jurisdictional consent with the right of the applicant State to have its claim considered.[74]

One particularly remarkable point in this debate concerns the ICJ's more recent approach in Advisory Proceedings. Although the indispensable parties principle was already developed by the Permanent Court of International Justice (PCIJ) in an Advisory Opinion (on the *Status of Eastern Carelia* – where the PCIJ refused to render an advisory opinion on a dispute involving Russia because Russia had never consented to its jurisdiction[75]), the ICJ *in Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* did in depth examine the lawfulness of Israel's conduct in the Occupied Territory – without mentioning Monetary Gold.[76] If it is indeed the case that the current ICJ is of the opinion that the lack of binding character of Advisory Opinions makes the indispensable parties anyhow redundant in such proceedings, it is difficult to see why the same reasoning would not apply to a third party in a contentious case – since such party would anyhow not be bound by the ICJ's ruling by virtue of Article 59 ICJ Statute. It would seem that the European Court proceeds from precisely that rationale: the rule of jurisdictional consent prohibits it from adjudicating on or establishing the responsibility of a third party, but this does not preclude the Court from establishing the lawfulness of the third State's conduct if that is necessary for determining the responsibility of a State which is a party to the case.

[73] Two particular criticisms concern the non-application of *Monetary Gold* to the cases of *Certain Phosphate Lands in Nauru* and *Corfu Channel*. See *Certain Phosphate Lands in Nauru* (n 71) 301-2 (Judge Jennings, dissenting), 329-43 (Judge Schwebel, dissenting), and 326-28 (Judge Ago, dissenting); Nollkaemper (n 9) 18, 21-2; I Scobbie, 'Case concerning Certain Phosphate Lands in Nauru (*Nauru v. Australia*), Preliminary Objections Judgment', 42 *ICLQ* (1993) 710, 716-7; C Chenkin, 'International Court of Justice: Recent Cases. The East Timor Case (*Portugal v. Australia*)', 45 *ICLQ* (1996) 712, 718.
[74] *East Timor* (n 9) 158 (Judge Weeramantry, dissenting); Klein (n 53) 315-6.
[75] *Status of Eastern Carelia*, Advisory Opinion, 1923 PCIJ Rep B No. 5, 27-8.
[76] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opion [2004] ICJ Rep 136.

3. Principles of shared responsibility in the case law of the court

3.1. Concurrent responsibility between independent wrongdoers

There is abundant case law of the Court on scenarios where two States are involved in a single injury. Most typically, these are cases where two States act independently from each other and where the Court determines the responsibility of each of the Contracting States individually, by assessing the State's own conduct in relation to its Convention obligations. For such determination, the conduct of the other State is not material and the State's responsibility is specific to the State concerned. The approach of the Court in those cases is thus congruent with the principle of independent responsibility that underlies the Articles on State Responsibility and which is explained by the ILC from the notion that each State has its own range of international obligations and its own correlative responsibilities.[77]

A prominent example is the *Ilascu* case, where Moldova and Russia independently incurred responsibility for not taking proper action in respect of a group of political activists who were detained by the break-away regime in Eastern Moldova. Moldova was held responsible for violations of Articles 3 and 5 ECHR on account of its failure to discharge its positive obligations in respect of the separatist regime detaining the applicants, while Russia's responsibility was engaged under the same provisions on account of its collaboration with the illegal regime.[78]

In the cross border human rights trafficking case of *Rantsev v Cyprus and Russia*, concerning a twenty year old Russian woman who was trafficked from Russia to Cyprus, subjected to sexual exploitation in a cabaret and found dead in March 2001, the Court held Cyprus responsible for not affording effective protection against trafficking and its failure to conduct an effective investigation into the victim's death. The Court held Russia responsible for having violated its obligation to investigate the alleged trafficking from Russia to Cyprus.[79]

[77] Articles on State Responsibility, with commentaries (n 4) 64.
[78] *Ilascu* (n 16) para 352, 385, 393.
[79] ECtHR 7 January 2010, *Rantsev v Cyprus and Russia*, no 25965/04.

In *Stojkovic v France and Belgium*, the Court found that France had violated the right to a fair trial of a Serb national who had been interrogated in Belgium by the Belgian police at France's demand for crimes committed in France.[80] Belgium had failed to provide for the presence of a lawyer. While the Court considered the conditions under which the hearing was conducted attributable to Belgium alone, it held France responsible for having failed to take remedial measures at a later stage in the French procedure.[81]

Further categories of cases where the Court independently determined the responsibility of multiple involved Contracting States are cases concerning child guardianship or abduction and property restitution proceedings involving a foreign State. In *Monory v Romania and Hungary*, for example, the Court found that the delay in custody procedures in Hungary and Romania and inaction on the part of the governments to restore the bond between husband and daughter attracted the independent responsibility of both States.[82] In the cases of *Treska*, *Manoilescu* and *Vrioni*, the Court not only examined whether restitution proceedings involving diplomatic property belonging to a sending State could attract the responsibility of the host State, but separately inquired whether the sending State could be criticised for failing to take positive measures to guarantee the property rights of the applicants.[83] In several Northern Ireland cases, the Court also conducted independent assessments of the respective duties of the United Kingdom and Ireland as party to the conflict.[84]

[80] ECtHR 27 October 2011, *Stojkovic v France and Belgium*, no 25303/08.
[81] Ibid, para 55-6. The complaints against Belgium were dismissed for failure to comply with the six-month rule.
[82] ECtHR 5 April 2005, *Monory v Romani and Hungary*, no 71099/01. Also see EComHR 3 December 1997, *Herron v the United Kingdom and Ireland*, no 36931/97; and ECtHR 27 April 2000, *Tiemann v France and Germany*, nos 47457/99 and 47458/99.
[83] ECtHR 29 June 2006, *Treska v Albania and Italy*, no 26937/04; ECtHR 3 March 2005, *Manoilescu and Dobrescu v Romania and Russia*, no 60861/00; ECtHR 29 September 2009, *Vrioni a.o. v Albania and Italy*, nos 35720/04 and 42832/06
[84] Eg EComHR 7 March 1985, *M.G. v the United Kingdom and Ireland*, no 9837/82. See, in general, B Dickinson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010).

3.2. Responsibility for acting on behalf of another State

In the above cases, the conduct of the respective States was easily identifiable and separable, rendering it unproblematic for the Court to examine the States' own conduct in relation to its human rights obligations. There are also cases where the collusion of State activity is of such character that the establishment of independent responsibility depends on the prior issue of attributing the conduct to one or the other State. One typical scenario is where a State organ is placed at the disposal of another State, described in Articles 6 of the Articles on State Responsibility. The ILC Commentary stresses that the rule applies only to exceptional situations and that, if the rule applies, the conduct is to be attributed only to the state at whose disposal the organ is placed and not to the state whose organ it is.[85] The latter rule was confirmed by the ICJ in the *Genocide* case.[86]

The Strasbourg organs have dealt with the issue in several cases. The relevant pronouncements signify a strict threshold for attributing conduct to the beneficial State. In *X. and Y. v Switzerland*, entry bans imposed by the Swiss aliens police on persons residing in Liechtenstein were held to be attributable to Switzerland. The agreements in force between the two countries provided that the administration of matters concerning the entry, exit, residence and establishment of foreigners was entrusted to the Swiss authorities and that Liechtenstein had only the powers and functions corresponding to those Swiss cantons enjoyed in these matters. The argument of the Swiss government that its aliens police was merely exercising the public functions of Liechtenstein and that therefore its conduct could not be attributed to Switzerland was dismissed, because the aliens police functioned exclusively in conformity with Swiss law and there was no distinction in competences between acts concerning Liechtenstein and Switzerland.

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[85] Articles on State Responsibility, with commentaries (n 4) 44. Also see R Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One) 53.

[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43, 204 (para 389):
'Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.'

A similar conclusion was reached in the case of *Xhavara v Italy and Albania*, where the ECtHR considered that the conduct of the Italian navy policing the high seas and territorial waters between Albania and Italy pursuant to a treaty concluded with Albania through which Albania delegated border control enforcement to Italy, could not engage the responsibility of Albania. The treaty provided, amongst others, for the Italians to inspect migrant vessels in Albanian territorial waters, to verify the identity of the passengers and to order back the ships to Albanian ports.[87]

In *Vearncombe v the United Kingdom and Germany*, the European Commission concluded that the noise nuisance emanating from the British shooting range in Berlin-Gatow could only be attributed to the United Kingdom and not to the Federal Republic of Germany, for the shooting range was constructed entirely under the control of the British Military Government. Rather than exercising public powers pertaining to the Federal republic of Germany, the Commission considered that the United Kingdom's military activities were based on belligerent occupation.[88]

By contrast, in the case of *Drozd and Janousek v France and Spain*, the ECtHR held that conduct of French and Spanish judges carrying out judicial functions in Andorra, could not be attributed to France and Spain. The judges did not function in their capacity as French or Spanish judges, and French or Spanish courts had no power of supervision over judgments rendered by the judges.[89] Although the task of the ECtHR was restricted to the question of possible attribution to Spain or France and not to Andorra, one could deduce from the judgment that because the French and Spanish judges acted solely in a capacity as member of Andorran courts and without interference of the authorities of France and Spain, their conduct was to be attributed to Andorra only.

In summary, the Strasbourg organs have followed a consistent approach in scenarios where a State organ engages in activity on behalf of another State. For such conduct to be attributed to the other State, the mere exercise of elements of governmental authority of the other state is insufficient. Not only must the organ act 'on behalf' of

[87] ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no 39473/98
[88] *Vearncombe* (n 16).
[89] ECtHR 26 June 1992, *Drozd and Janousek v France and Spain*, no 12747/87, para 96.

the other state, it must also form part of the machinery of that state and it must be subject to that state's instructions – and not to that of the lending state. This threshold is in line with that of the ILC, which notes in its Commentary that the words 'placed at the disposal of' in Article 6 of the ILC Articles imply not only that the organ must act with the consent, under the authority of and for the purposes of the receiving State, but also that the organ acts in conjunction with the machinery of that State and under the latter's exclusive direction and control.[90]

The rule of exclusive attribution in respect of organs placed at behalf of another State will normally preclude situations of multiple, or shared, responsibility from arising. This may be explained from the principle of independent responsibility and its underlying premise that a State can only be held responsible for conduct if it is directly involved in that conduct and, *a contrario*, not for conduct of an organ that functions autonomously from the State.[91] In *Drozd and Janousek*, two of the appended dissenting opinions voiced concerns over the consequences of this rule of exclusive attribution. In the dissenters' view, even though the judges served in a capacity independent from France and Spain, these two countries nonetheless enjoyed significant authority and influence over the judiciary and administration in Andorra. In their capacity as Co-Princes of Andorra, France and Spain were amongst other functions directly responsible for the enforcement of sentences of Andorran courts and competent to issue new legislation.[92] The dissenters argued that the special position of the two States obliged them to secure in Andorra the fundamental principles of the Convention.

The dissenters raise a salient point, as it may well be that, even though the specific conduct of an organ put at the disposal of another State may be outside the immediate sphere of influence of the lending State, the lending State may still enjoy ultimate authority over the organ or it may wield influence of a more general nature over activities of the other State. It is in this connection warranted to note that the rule of exclusive attribution does not necessarily preclude the lending State from incurring international responsibility for its own acts and omissions in relation to the conduct

[90] Articles on State Responsibility, with commentaries (n 4) 44.
[91] *Genocide case* (n 86) 210 (para 406).
[92] Joint Dissenting Opinions of Judges Pettiti, Valticos and Lopes Rocha and of Judges MacDonald, Bernhardt, Pekkanen and Wildhaber in *Drozd and Janousek* (n 89).

which is attributable to another State. Indeed, in one of its earlier reports on the topic of State Responsibility, the ILC qualified the rule of exclusive attribution by noting that the State to which particular conduct cannot be attributed, can nevertheless incur responsibility for acts committed on the occasion of and in connection with that conduct, for example if the State is unduly passive in respect of illegitimate conduct of another State taking place on its territory.[93] Thus, the rule of exclusive attribution does not automatically prevent a determination of multiple responsibilities: the lending State may still incur responsibility for its own, separate acts relating to the conduct of the lent organ. To some extent, this proposition also finds confirmation in the Court's judgment in *Drozd and Janousek*. Although the Court dismissed the argument that France and Spain were under a general duty to ensure the upholding of Convention standards in Andorra, it did consider the Contracting States obliged to refuse their co-operation with Andorra if a conviction would be the result of a flagrant denial of justice. It also inquired whether France or Spain had directly interfered in the applicants' trial.[94]

3.3. Responsibility for joint conduct

One exception to the rule of exclusive attribution is when States truly act in concert. State responsibility for joint conduct (be it of *ad hoc* character or of a common organ) is not expressly addressed in the Articles on State Responsibility, but, according to the ILC, the solution is implicit in them: 'according to the principles on which those articles are based, the conduct of the common organ can only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts'.[95] Arguably, this would imply that an organ can be labeled as a common organ only if its acts can be attributed to more than one state in accordance with the existing attribution rules: for example if it can be regarded as a state organ of each of them under Articles 4 or 5

[93] Report of the ILC on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, 83.
[94] *Drozd and Janousek* (n 89) para 96, 110.
[95] Ago (n 85) 54; Articles on State Responsibility, with commentaries (n 4) 44, 64, 124. Eurotunnel Arbitration, Partial Award of 30 January 2007, para 179. *Certain Phosphate Lands in Nauru* (n 71) 257-9 (esp. para 45, 48).

ILC Articles, or if the organ is put at the disposal of another state but additionally continues to receive instructions from and operates within the machinery of the sending state.

There are as of yet no clear pronouncements of the ECtHR on situations of joint conduct. In *Hussein*, the former president of Iraq argued that the Contracting States that participated in the coalition forces that occupied Iraq were collectively responsible for his arrest, detention and ongoing trial.[96] The ECtHR was not prepared, without more, to hold the respondent European countries responsible on account of their support for and taking part in the coalition. Even though one respondent state, the United Kingdom, was accepted to have played a major part in the invasion and occupation of Iraq, the ECtHR considered that the responsibility of any of the respondent states could not be invoked "on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US."[97] The Court found it of particular importance that the applicant had not indicated which respondent state (other than the US) had any – and if so, what – influence or involvement in his arrest and detention. The Court in effect requires there to be a genuine connection between the State's responsibility and its own conduct. If the State's influence and involvement in a joint enterprise cannot be established, there is insufficient basis for holding a State responsible for the enterprise's conduct.[98]

In the early case of *Hess v United Kingdom* (1975), the legal and factual embedding of the common organ was more precisely circumscribed. *Hess* constitutes a prominent example of a case where the conduct of States is truly joint, because it was at all levels shared between the Four Allied Powers. The complaint concerned the long and secluded detention of Rudolf Hess in the Allied military prison in Berlin-Spandau. Supreme authority over the prison was vested in the Allied Kommandatura and the

[96] ECtHR 14 March 2006, *Hussein v Albania and twenty other States*, no 23276/04.
[97] Ibid.
[98] S Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in: P Shiner and A Williams (eds), *The Iraq War and International Law* (Oxford: Hart, 2008).

executive authority consisted of four governors acting by unanimous decisions. Administration and supervision was at all times quadripartite, and instructions of the governors were carried out by prison staff appointed by the governors. The prison was guarded in monthly turns by military personnel of the Four Allied Powers. The complaint was lodged against the United Kingdom alone.

The European Commission of Human Rights concluded that the 'responsibility' for Spandau prison was exercised on a Four Power basis and that the United Kingdom acted as a partner in the joint responsibility which it shared with the other three powers. The Commission declared the complaint inadmissible nonetheless, because it was of the opinion that 'the joint authority cannot be divided into four separate jurisdictions' and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison was not a matter within the jurisdiction of the United Kingdom, within the meaning of Article 1 of the Convention.[99]

Under this reasoning of the Commission, it would seem that questions of multiple responsibilities for conduct of a common organ can simply not arise under the ECHR, because common organs always transcend the jurisdictions of each of the participating States. The Commission added that the only possible scrutiny it could assert over the United Kingdom was over it having concluded the agreement concerning Spandau prison, provided this would have occurred after the entry into force of the Convention.[100]

It should be noted however that the Commission's interpretation of the jurisdiction threshold predates the Court's jurisprudential developments on the issue, as explained in section 2 above. Notably, in *Al-Skeini*, the Court explicitly stated that the State's obligations under Article 1 can be divided and tailored in accordance with the extent to which the State exercises control and authority over an individual.[101] Further, although common organs do indeed not fall within the exclusive jurisdiction of one State and may pose the difficulty for the Court of having to pronounce also on the

[99] *Hess* (n 22).
[100] Ibid.
[101] *Al-Skeini* (n 6) para 137.

legal rights and duties of other States, this is not necessarily the case if the assessment is restricted to the particular role played by the respondent State. Indeed, the primary request of the applicant, his wife Ilse Hess, had been for the Commission 'to press the United Kingdom to step up its efforts to secure renegotiation of the Four Power Agreement in order to obtain the release' of her husband. A reasoning under the doctrine of positive obligations – and in conformity with the principle of independent responsibility – would be sustainable that because the United Kingdom was legally and factually capable of exerting influence, it should therefore had taken the steps within its power to prevent possible violations under Articles 3 and 8 ECHR from occurring.

3.4. Derived responsibility for conduct of another State

There may also be scenarios where the responsibility of a State's depends on another State committing an internationally wrongful act. In these instances, the State is implicated in the wrongful conduct of another State and the establishment of its responsibility derives from its participation in that act. The ILC signals these scenarios as instances of derived responsibility which constitute exceptions to the principle of independent responsibility.[102] In the Articles on State Responsibility three situations are distinguished: aid and assistance, direction and control and coercion (Arts 16-18).

The ECtHR does not in its case law specifically refer to these concepts, nor to the overriding notion of derived responsibility. One explanation may be that Articles 16-18 of the ILC Articles each entertain as condition for the responsibility of the participating State that the other State does indeed commit a wrongful act.[103] Because

[102] Articles on State Responsibility, with commentaries (n 4) 64-5. In literature, these situations are also termed indirect, dependent or accessory responsibility: Ago (n 85) 52; JD Fry, 'Coercion, Causation and the Fictional Elements of Indirect State Responsibility', 40 *Vanderbilt Journal of Transnational Law* (2007) 615; G Nolte and HP Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009) 5; M Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', 12 *Journal of Conflict & Security Law* (2008) 359.
[103] With the exception that, under Article 18 on coercion, the wrongfulness of the conduct of the coerced State may be precluded because of force majeur. Article 18 nonetheless requires that the act would be unlawful but for the coercion. See Articles on State Responsibility, with commentaries (n 4) 69.

this requirement would oblige the Court to also ascertain the wrongfulness of the third State's conduct, it may conflict with the indispensable parties rule.[104]

Further, and probably more pertinently, the Court tends to incorporate scenarios of derived responsibility in the primary human rights norms binding the Contracting States. Particularly under its doctrine of positive obligations – understood as encompassing the duties to prevent, to protect and to fulfill – the Court has interpreted the scope of a State's Convention obligations to include a duty to make use of material opportunities to prevent or redress conduct of another State which contravenes the standards of the ECHR.

The obligation on the part of States to engage in positive action to prevent or redress human rights injuries has especially been developed in case law on conduct of non-state actors, but also in respect of natural illnesses.[105] It transpires from the Court's case law, as a general rule, that whenever it is known or when it ought to have been known that an individual within the jurisdiction of a Contracting State is exposed to a real risk of ill-treatment, it is incumbent on the State to take steps to prevent that risk from materializing.

It does not appear that the Court entertains a fundamental distinction in this respect between situations where the injury stems from the conduct of a private party or where it concerns conduct of another State. The Court's case law on protective duties in the context of conduct of a foreign State is probably best developed in expulsion and extradition cases, where ill-treatment is feared in the foreign State. The standard criterion employed by the ECtHR, which it derives from Article 3 of the Convention, is that expulsion or extradition is prohibited if there is a real risk of exposure to treatment proscribed by that Article.[106]

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[104] See also Nollkaemper (n 9) 17.
[105] Eg ECtHR 28 October 1998, *Osman v the United Kingdom*, no 23452/94, para 115. ECtHR 10 May 2001, *Z. a.o. v the United Kingdom*, no 29392/95, para 73; ECtHR 4 May 2001, *Kelly a.o. v the United Kingdom*, no 30054/96, para 94-95; ECtHR 9 June 1998, *L.C.B. v the United Kingdom*, no. 23413/94, para 38; ECtHR 29 April 1997, *H.L.R. v France*, no 24573/94; ECtHR 27 May 2008, *N. v the United Kingdom*, no 26565/05.
[106] Eg *Soering* (n 46) para 88; *Cruz Varas* (n 59) para 69-70; *Saadi* (n 59) para 125; ECtHR 21 January 2011, *M.S.S. v Belgium and Greec*e [GC], no 30696/09, para 342; ECtHR 12 April 2005, *Shamayev a.o. v Georgia and Russia*, no 36378/02, para 335.

Even though the eventual injury in this type of cases is meted out in and by the receiving State, the Court construes these cases as giving rise to independent responsibilities on the part of expelling States. Unlike Article 16 ILC Articles, the establishment of the expelling State's responsibility is not contingent upon the receiving State committing a wrongful act, but follows directly from the State violating a protective duty in respect of an individual situated in its territory.

An important feature of expulsion and extradition cases is that the individual who may suffer an injury is at the material time within the State's territory and therefore indisputably within its jurisdiction. It may be more problematic to make protective duties operational in scenarios where the individual is not and has never been within the territory of the 'facilitating' State. In those situations there will likely be only a 'remote' connection between the facilitating conduct of the State and the injured individual, raising issues under both the jurisdiction and victim requirement. The case of *Tugar*, concerning arms sales, is an example, and one can think of further instances where a State knowingly supports a foreign regime with a manifestly poor human rights record without there being a direct relationship between the State and an affected individual.[107]

Although the Court's doctrine on protective duties often appeals to common sense, it is not always framed in a clear set of legal requirements. The Court's case-by-case approach need not necessarily be problematic, but it may risk arbitrariness, not only in respect of the scope of protective duties but also as regards the preliminary question when protective duties exactly arise. One example is the judgment in *Karalyos and Huber v Hungary and Greece*.[108] The case concerned a civil action in Hungary for recovery of damages incurred by two Hungarian citizens as a result of a fire on a vessel owned by a Greek company. The Court found the length of proceedings to be excessive, which was in part due to the uncooperative attitude of the Greek authorities, which failed to deliver necessary information on relevant Greek law to the Hungarian court. The Court, reasoning that the delays were 'largely' imputable to the Hungarian State, found Hungary to have violated Article 6 of the Convention. In respect of the complaint that Greece had contributed to the protraction of the proceedings, the Court

[107] *Tugar* (n 51).
[108] ECtHR 6 April 2004, *Karalyos and Huber v Hungary and Greece*, no 75116/01.

considered that although Greece had violated international provisions on legal aid and private law, its actions could not be 'a subject matter' before the Court.

It is unsatisfactory that the Court does not motivate why no protective duties on the part of Greece arose. Under Article 16 of the Articles on State Responsibility, relevant questions would have been whether the Greek authorities were aware of the duration of the proceedings in Hungary and whether their failure to provide information contributed significantly to the delay of proceedings.[109] And under the Court's own doctrine of positive duties, a reasoning would be tenable that the failure to cooperate with the Hungarian authorities independently engaged Greece's responsibility – as this created a real risk that the applicants would be exposed to a violation of their rights under Article 6 in Hungary.

A further relevant judgment in this context concerns *Sari v Turkey and Denmark*, concerning the length of criminal proceedings which were consecutively instituted in Denmark and Turkey against a Turkish national for crimes committed in Denmark.[110] Mr. Sari complained that the criminal proceedings were not settled within reasonable time: eight years, seven months and twenty-two days had lasted between the indictment by a Danish Court and the sentence delivered by the Turkish court. The delays in the procedure were due to the case not only concerning criminal proceedings, but also an extradition procedure and a procedure for transferring jurisdiction between the two countries. Although the Court held the length of the proceedings to fall under the 'joint responsibility' ('*la responsabilité conjointe*') of Denmark and Turkey, the Court did not find a violation of Article 6 on the part of either State. The Court reasoned that the delays could not be attributed to either State, because they resulted, rather, from "a system of mutual assistance under which the requesting State is dependent on the co-operation of the other State."[111] In effect, the very fact that responsibility was joint and that both States were dependant on one another, precluded an establishment of the independent responsibility of the two States involved.

[109] Articles on State Responsibility, with commentaries (n 4) 66.
[110] ECtHR 8 November 2001, *Sari v Turkey and Denmark*, no 21889/93.
[111] Ibid, para 91-2, 96. Also see EComHR 9 December 1987, *D v Federal Republic of Germany,* no 11703/85, where it was considered that delays in the hearing of witnesses who had to come from Yugoslavia to the West-Germany could not be attributed to Germany but were to be 'considered as a part of a recognised system which unfortunately is time-consuming and thus […] as unavoidable.'

The *Sari* case exemplifies the limits of the principle of independent responsibility for situations where an injury results from concurrent conduct of States. Although there certainly was an injury – as a duration of criminal proceedings exceeding eight years undoubtedly is at odds with the substantive norm protected by Article 6(1) of the Convention – the Court's focus on the independent obligations of the cooperating States prevented Mr. Sari from vindicating his individual right. It results in a situation where injuries committed by one State are amenable to judicial relief, while injuries resulting from international cooperation are not.

Sari is a special case, because the conduct of both States did not independently amount to a wrongful act. This form of co-perpetration does not appear to be satisfactorily covered by the instances of derived responsibility formulated by the ILC, since these are conditioned on one of the States having actually committed the wrongful act. It is further problematic to construe the case as one of joint conduct, as the proceedings were autonomously conducted in two different States. An alternative reasoning leading to a more satisfactory outcome from the perspective of the individual right would have been for the Court to construe the duties of due diligence of both States more stringently, by obliging them to take the duration of proceedings in the other State expressly into account. The Court did not do so however, but instead found the authorities to have 'generally' shown due diligence.[112]

The Court has neither applied the ILC's regime of derived responsibility to scenarios of direction and control as laid down in Article 17 ILC Articles. Under that provision, acts of one State which cannot as such be attributed to a directing or controlling State, can nonetheless engage the latter State's responsibility if it controlled or directed the act in its entirety. [113] One case that could have been brought under that rule is *Stephens v Malta*, concerning the arrest and detention of a British national in Spain following an invalid request for extradition from the Maltese authorities.[114] The Court, after having struck the complaints against Spain from the list, noted that even though the applicant was under the control and authority of the Spanish authorities, "it cannot

[112] Ibid, para 99.
[113] Articles on State Responsibility, with commentaries (n 4) 68.
[114] ECtHR 21 April 2009, *Stephens v Malta (no. 1)*, no 11956/07.

be overlooked that the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities" and that his arrest and detention, "having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain."[115]

Accordingly, and in apparent deviation of the ILC Articles, the Court chose to attribute Spain's conduct to that of Malta on the basis of it having instructed that conduct – possibly applying the rationale of Article 8 ILC Articles (speaking of 'instructions' and 'direction or control'), which however only applies to conduct of non-State entities. Neither would there seem to be another basis in the ILC Articles for attributing Spain's conduct to Malta. The case seems more readily to fall within Article 17 ILC Articles, under which both the directing and directed party independently incur responsibility for their own activity.[116] That the Court chose to resolve the case through attribution further rendered it unnecessary to examine Malta's responsibility in the context of its positive obligations. Although the applicant had particularly complained about the inaction of the Maltese authorities *vis a vis* his release in Spain after the arrest warrant had been declared invalid, the Court simply attributed the prolonged detention – which under the ILC Articles would have been properly attributable to Spain – to Malta.[117]

Gentilhomme, which may also be construed as a scenario of direction and control, was resolved in similar terms: the French decision to close its schools in Algeria was attributed to Algeria on account of it being an implementing decision by France 'beyond its control' ("*échappant au contrôle*").[118] A more fitting resolution of the case within the system of the ILC Articles would have been to first apply Article 17 ILC (under which France would remain *prima facie* responsible for its own conduct) and to next examine whether France could invoke a circumstance precluding wrongfulness, such as *force majeur*. Notably, Article 23 ILC on *force majeur* refers to an event 'beyond the control of the State' as constitutive element.

[115] Ibid, para 51-2.
[116] Articles on State Responsibility, with commentaries (n 4) 68-9.
[117] Ibid, para 71, 79.
[118] *Gentilhomme* (n 22).

4. Responsibility for conduct in connection with an international organisation

The case law of the Court on conduct in which both the State and an international organization are involved may be characterised as balancing the effective protection of Convention rights with respecting the autonomous legal order of international organisations. The case law revolves around three distinct issues: i) the question of member State responsibility as such: whether and to what extent member States incur responsibility for wrongful acts of international organisations; ii) the standard for attributing conduct to the organisation or the member State, and iii) the reconciliation of a State's Convention obligations with possible conflicting obligations imposed by an international organisation. The Court's present approach to these issues is governed by the guiding principles set out in *Bosphorus*, *Behrami* and *Al-Jedda*.

4.1. Member State responsibility for a wrongful act of an international organisation

The Court is in harmony with the generally endorsed view that State members are not, solely on account of their membership, responsible for wrongful conduct of an international organisation.[119] This was confirmed in *Behrami* and the more recent cases of *Connolly*, *Boivin*, *Biret* and *Rambus Inc.*.[120]

In several cases it was argued that the Court should assert *some* level of scrutiny over the act of the organisation, by applying the *Bosphorus* standard of 'equivalent

[119] Articles on the Responsibility of International Organizations, with commentaries (n 4) 164-5, with further references. For a critique, see J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', 4 *International Organization Law Review* (2007) 91.

[120] *Behrami* (n 5) para 151-2; ECtHR 9 December 2008, *Connolly v 15 Member States of the European Union*, no 73274/01; ECtHR 9 September 2008, *Boivin v 24 Member States of the Council of Europe*, no. 73250/01; ECtHR 9 December 2008, *Biret v Belgium and 14 other States*, no 13762/04; ECtHR 16 June 2009, *Rambus Inc. v Germany*, no 40382/04. Also see the earlier case law of the Court and former European Commission: EComHR 10 July 1978, *C.F.D.T. v The European Communities*, no 8030/77; ECtHR 10 January 1994, *Heinz v the Contracting States party to the European Patent Convention insofar as they are High Contracting Parties to the European Convention on Human Rights,* no 21090/92; ECtHR 9 February 1990, *M. & Co. v the Federal Republic of Germany*, no 13258/87; ECtHR 18 February 1999, *Waite and Kennedy v Germany*, no 26083/94.

protection' as further discussed below.[121] In *Rambus Inc.*, concerning the conformity of the appeal procedure before the European Patent Office with the right to a fair trial, the Court left open the possibility that the equivalent protection-test would apply to the case and noted that, "even assuming […] the applicability of the *Bosphorus* case-law to the present case", the applicant had not put forward any arguments supporting a finding that the protection of fundamental rights within the framework of the European Patent Organisation was not equivalent to Convention protection".[122]

In *Gasparini* however, the Court did accept that Member States could be held responsible under the Convention for acts of NATO resulting from 'structural human rights weaknesses' in the internal structure of the organisation.[123] Because intrinsic deficiencies in the staff regulations of NATO were at issue, the Court found it necessary to consider whether the mechanisms for settling internal labour disputes did not display a 'manifest deficit' – the test borrowed from *Bosphorus*.[124] The apparent justification for this distinction between incidental decisions and structural characteristics of the organization is that the latter necessarily involve the consent of the member States, either at the moment of accession or when the regulations are adopted.[125] This rationale can be traced back to the earlier cases of *Heinz* and *Matthews*, where member State responsibility for a wrongful act of an international organisation – absent intervention or participation of a member State in the act – was derived from the act constituting a mere implementation of (founding) treaty commitments of the member State(s).[126] The lower level of scrutiny expressed in the manifest deficiency test is grounded, as it is in *Bosphorus* (see below), in the separate legal identity of the international organisation and the fact that it is not a Contracting Party.

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[121] Section 4.3.
[122] *Rambus Inc.* (n 120).
[123] *Gasparini* (n 70). Also see ECtHR 20 January 2009, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v the Netherlands*, 13645/05, where the Court had applied the 'manifest deficient' test to the procedure before the European Court of Justice.
[124] See section 4.3 below
[125] *Gasparini* (n 70).
[126] *Heinz* (n 120); ECtHR 18 February 1999, *Matthews v the United Kingdom*, no 24833/94. For a comprehensive review of older jurisprudential developments see RA Lawson, *Het EVRM en de Europese Gemeenschappen* (Deventer: Kluwer 1999) 345-421.

4.2. Attributing conduct to the State or the organisation

The question of whether particular conduct should be attributed to either the member State or the international organization was addressed by the Court in the two landmark cases of *Behrami* and *Al-Jedda*, both concerning military operations authorized by the United Nations.

In *Behrami*, in respect of the conduct of KFOR, the peacekeeping force led by NATO, the Court reasoned that by virtue of the ultimate authority and control retained by the UN Security Council over the mission, the impugned acts of KFOR were attributable to the UN and not to the contributing States, even though the latter retained retain some authority over their troops.[127] Although it had additional recourse to the fact that the Contracting Parties joined the UN before they signed the Convention and the imperative nature of the powers of the Security Council under Chapter VII of the UN Charter, the Court seemed to postulate a general attribution rule applicable to organs placed at the disposal of an international organisation. In respect of UNMIK, the Court did not refer to the criterion of ultimate authority and control, but found decisive that it was a subsidiary organ of the UN and, as such, institutionally directly and fully answerable to the Security Council. Therefore, its acts were attributable to the UN only.[128]

Behrami was criticized for applying an overly broad standard of attribution ('ultimate authority and control') which was moreover seen to differ from the attribution rule of Article 7 (then 5) of the Articles on the Responsibility of International Organizations adopted on second reading in 2011 (which was drafted precisely with a view to UN peacekeeping operations) – which speaks of 'effective control'.[129] Under the latter test, rather than the delegation model and institutional chain of command which were

[127] *Behrami* (n 5) para 132-141.
[128] Ibid, para 142-143.
[129] M. Milanovic and T Papic, 'As Bad As It Gets:The European Court of Human Rights's *Behrami and Saramati Decision* and General International Law', 58 *ICLQ* (2009) 267; A Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*', 11 *International Community Law Review* (2009) 155; H Krieger, 'A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights', 13 *Journal of International Peacekeeping* (2009) 159.

dispositive in *Behrami*, the central issue concerns the operational control asserted over the specific conduct complained of.[130]

A related criticism voiced against *Behrami* was that the Court ignored the possibility of dual attribution – or multiple responsibility grounded in independent conduct.[131] The Articles on the Responsibility of International Organizations expressly envisage the 'joint responsibility' of an international organisation with one or more States in Articles 14 to 18 (which concern the responsibility of an international organization in connection with the act of a State) and in Articles 58 to 62 (which deal with the responsibility of a State in connection with the act of an international organization). In *Behrami* however, the Court did not consider the possibility of dual attribution but essentially reasoned that because the impugned acts were 'in principle' attributable to the UN, they could 'not be attributed to the respondent States'.[132]

Subsequent complaints in *Beric*, *Gajic* and *Kasumaj* on the functioning of the UN mission in Kosovo were all declared incompatible *ratione personae* with the Convention with reference to *Behrami*.[133] In the cases of *Blagojevic* and *Galic*, where the complaints were directed at decisions taken by the ICTY, the Court placed emphasis on the organisational embedding of the ICTY within the UN and concluded the ICTY to be a subsidiary organ of the UN, congruent with its reasoning in respect of UNMIK in *Behrami*.[134]

The Grand Chamber judgment in *Al-Jedda* is, albeit somewhat covertly, receptive to the critique mentioned above. Firstly, paragraph 80 of its judgment could be read as

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[130] Articles on the Responsibility of International Organizations, with commentaries (n 4) 87-8.
[131] CA Bell, 'Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision', 42 *N Y U J Int'l L & Pol* (2010) 501, 518-519; A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', 8 *Human Rights Law Review* (2008) 151, 158-59; and T Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', 51 *Harvard International Law Journal* (2010) 113, 169-70. The ILC has also recognized the possibility of multiple attribution, see: ILC Report on its 56th Session, UN GAOR Supplement No 10 (A/59/10) 101 (para 4).
[132] *Behrami* (n 5) para 151.
[133] ECtHR 16 October 2007, *Beric a.o. v Bosnia and Herzegovina*, nos 36357/04, 36360/04, 38346/04; ECtHR 28 August 2007, *Gajic v Germany*, no 31446/02; ECtHR 5 July 2007, *Kasumaj v Greece*, no 6974/05.
[134] ECtHR 9 June 2009, *Blagojevic v the Netherlands*, no 49032/07; ECtHR 9 June 2009, *Galic v the Netherlands*, no 22617/07.

acknowledging the possibility of dual attribution of conduct undertaken in a peacekeeping operation.[135] The formula used by the Court is not only indicative of the possibility of dual attribution but also signals the perhaps more fundamental point that the Court need not as such be burdened with determining the responsibility of an international organisation (or any other non-Contracting party for that matter). As the Court's supervisory function is restricted to the fulfillment by Contracting States of their Convention obligations, the only questions of attribution of essential relevance are those pertaining to a Contracting State. Thus, the Court need not necessarily determine on the rules of attribution laid down in Articles 6 or 7 of the Articles on the Responsibility of International Organizations – as these exclusively concern attribution to the international organisation. The relevant rules for the responsibility of States in connection with conduct of an international organization are those laid down i) in part V of the Articles on the Responsibility of International Organizations (Arts. 58-62), listing a variety of situations of derived responsibility, and ii) the pertinent attribution rules of the Articles on State Responsibility.[136] Note however, that the Grand Chamber in *Al-Jedda* nonetheless determined first that the conduct of the British troops in Iraq could not be attributed to the UN, and only subsequently found the internment of the applicant attributable to the United Kingdom.[137] The judgment could therefore still be read as applying the 'zero-sum' principle.[138]

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[135] 'The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations *or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations*.' Emphasis added.

[136] Also see the ILC's commentary: Articles on the Responsibility of International Organizations, with commentaries (n 4) 157-8.

[137] *Al-Jedda* (n 6) paras 84-5.

[138] See, for a contrasting approach, the two judgments of the Dutch Court of Appeal of the Hague on the eviction of Bosnian nationals from the compound of Dutch UNPROFORforces in Srebrenica, issued two days before *Al-Skeini*, in which the District Court affirmed the possibility of dual attribution of conduct undertaken in a peacekeeping operation: Gerechtshof 's-Gravenhage 5 July 2007, *Mustafic-Mujic a.o. v the State of the Netherlands*, no. 200.020.173/01, esp. para 5.9; and Gerechtshof 's-Gravenhage 5 July 2007, *Nuhanović v the State of the Netherlands*, no 200.020.174/01. The Distrcit Court proceeded from 'the generally accepted' principle that more than one party can exercise 'effective control' over conduct in the course of a peacekeeping operation and, leaving open the possibility of attributing the activities of Dutchbat to the UN, found that that the Dutch government actively instructed the Dutch contingent in the course of the evacuation from Srebrenica and that therefore they could be said to exercise 'effective control'. Particularly salient is that the Court of Appeal, in conceptualizing the standard of effective control, not only accords significance to specific instructions issued by the State, but also to the ability, or power (*'macht'*), to prevent the impugned conduct. Although the Court situates this factual ability to intervene in the attribution rule of Article7 of the Articles on the Responsibility of International Organizations, it is also possible to construe this as a protective duty quite separate from the actual misconduct of the Dutchbat soldiers.

Secondly, in considering whether conduct of the British troops was attributable to the UN, the Grand Chamber referred cumulatively to the *Behrami* standard of 'ultimate authority and control' and the 'effective control' formula of current Article 7 of the Articles on the Responsibility of International Organizations. It concluded that the circumstances of the case did not satisfy either test.[139] Thus, although not explicitly revoking *Behrami*, the Court may have opened a path for future convergence with the approach taken by the ILC.

The *Behrami* decision also points to the question how one should distinguish the attribution rules currently laid down in Articles 6 and 7 of the Articles on the Responsibility of International Organizations. In *Behrami*, the Court applied the standard of ultimate authority and control in respect of KFOR (analogous but not identical to the formula of Article 7 on organs placed at the disposal of an international organization). In respect of UNMIK (*Behrami*), and the ICTY (*Blagojecic* and *Galic*) on the other hand, the Court found decisive that these were subsidiary organs of the UN. This conclusion was not grounded in an appreciation of the level of control, but on the statutory embedding of the organs within the UN. This latter test displays more similarities with the attribution rule of Article 6 of the Articles on the Responsibility of International Organizations, laying down the general rule that conduct of organs or agents which exercise functions of the organization (or act 'in official capacity') are to be attributed to the organisation. The essential distinction between the two attribution rules, according to the ILC, is that Article 6 presupposes an organ to be 'fully seconded' to the organisation, while Article 7 applies only when the lent organ still acts 'to a certain extent as organ of the lending State'.[140] The ILC further explains that the latter rule is necessarily at issue in peacekeeping operations, as these are normally characterized by States retaining disciplinary powers and criminal jurisdiction over their contingents.[141] This would imply firstly, that a test based on control rather than agency is ordinarily required in respect of peacekeeping operations and, secondly, that if Article 7 is found to be applicable, there may be ample occasion to determine in parallel whether the

[139] *Al-Jedda* (n 6), para 84.
[140] Articles on the Responsibility of International Organizations, with commentaries (n 4) 87.
[141] Ibid.

remaining involvement of the seconding State should give rise to its concurrent responsibility.[142]

4.3. Responsibility for implementing decisions

The third and final topical issue in the Court's case law on international organisations concerns the relation between the Convention and implementing activity of member States. *Bosphorus*, concerning the Irish implementation of a EC regulation that was allegedly in conflict with the right to property, has become the leading case.[143]

In *Bosphorus*, the Court sought to reconcile two principles set forth in its earlier case law: on the one hand, the separate legal identity of the international organisation and the freedom of Contracting Parties to transfer power to an international organisation; and on the other hand the principle that a Contracting Party is responsible under the Convention for all its acts, also if the act in question is a mere necessity to comply with international legal obligations.[144] In reconciling these principles, the Court first held that implementing acts of Member States fall squarely within their jurisdiction and therefore within the reach of the Convention.[145] It next formulated the equivalent protection test, first introduced in *M. & Co.*[146], by stipulating that State action taken in compliance with legal obligations stemming from its membership of an international organisation which protects fundamental rights in a manner equivalent to that of the Convention, is presumed to be in conformity with the Convention.[147] Such presumption could be rebutted, if the circumstances of the case show that protection was manifestly deficient.[148] The equivalent protection test has aptly been described as a conditional immunity: if an international organisation both materially and procedurally provides for equivalent (which the Court explains as 'comparable' and

[142] Also Dannenbaum (n 131) 152.
[143] Earlier case law on implementing acts includes: *M. & Co.* (n 120); ECtHR 11 November 1996, *Cantoni v France*, no 17862/91; EComHR 9 Decmber 1987, *Tête v. France*, no 11123/84; ECtHR 19 March 1997, *Hornsby v Greece*, no 18357/91.
[144] Cf. *M. & Co.* (n 120); ECtHR 26 February 1998, *Pafitis a.o. v Greece*, no 20323/92; *Matthews* (n 69).
[145] *Bosphorus* (n 5) para 137.
[146] *M. & Co.* (n 120).
[147] For an extensive commentary: Lawson (n 126).
[148] *Bosphorus* (n 5) para 152-6.

not 'identical') protection as under ECHR, implementing activity of a member State is in principle – but for the rebuttal – immune from the Court's scrutiny.[149]

The *Bosphorus* test was applied in all later cases involving Member State implementation of European Union decisions, albeit, it has been submitted, not always consistently.[150] *Bosphorus* was also applied to other international organisations.[151]

Bosphorus has been welcomed by some for allowing, on a case by case basis, a review of the level of human rights protection in the EU legal order.[152] It allows not only for a scrutiny of human rights protection in the organisation in *abstracto* (the equivalent protection-test), but also for a determination of whether in the circumstances of the case protection has been effective (the manifest deficient-test).[153] It has nonetheless been questioned whether indeed the notions of strengthening international cooperation and the need to secure the proper functioning of international organisations as relied on in Bosphorus, should be considered so fundamental as to allow for a conditional immunity of acts which are fully attributable to a Member State. As noted by several authors, *Bosphorus* may ultimately result in a double standard of human rights protection as regards unilateral State action and action taken in a capacity of member State.[154] It may thus be questioned why the

[149] C Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', 6 *Human Rights Law Review* (2006) 87-130; T Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', 10 *Human Rights Law Review* (2010) 529-45 .

[150] Inter alia *Kokkelvisserij* (n 123); ECtHR 10 October 2006, *Coopérative des Agriculteurs de Mayenne v France*, no 16931/04. T Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of Internationakl Organisations under the European Convention on Human Rights', 10 *Human Rights Law Review* (2010) 529, 536-45.

[151] *Rambus Inc.* (n 120), *Gasparini* (n 70), ECtHR 24 November 2011, *Capital Bank AD v Bulgaria*, no 49429/99.

[152] F. Schorkopf, 'The European Court of Human Rights' Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*', 6 *German Law Journal* (2005) 1255, 1263.

[153] Costello (n 149) 129, noting that the in depth inquiry of the Court into 'equivalent protection' and 'manifest deficiencies' in *Bosphorus* contrasts sharply with the marginal application of the equivalent protection-test in earlier cases.

[154] S Peers, 'Limited responsibility of European Union member states for actions within the scope of Community law. Judgment of 30 June 2005, *Bosphorus Airways* v. *Ireland*, Application No. 45036/98', 2 *European Constitutional Law Review* (2006) 443, 454-5; Costello (n 149) 118; LFM Besselink, 'The European Union And The European Convention On Human Rights: From Sovereign Immunity in Bosphorus to Full Scrutiny under the Reform Treaty?', in: I Boerefijn and JE Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Antwerp: Intersentia 2008) 295-309; K Kuhnert, 'Bosphorus: Double Standards in European Human Rights Protection?', 2 *Utrecht Law Review* (2006) 177, 186-7.

Court should treat conduct resulting from obligations as member of an international organisation different from activity which sprouts from other sources of international law, which are normally subjected to the Court's full scrutiny.[155] The Court's approach creates a state of affairs where, even though human rights are accorded ever greater primacy in the global era, the very agents of this global era – international organisations – are not only themselves exempted from external human rights scrutiny, but allow member States to share in their immunity.[156]

4.4. Accession of the EU to the ECHR

The future accession of the EU to the ECHR provides, at least in the European legal order, a welcome opportunity to address this paradox. After accession, the acts, measures and omissions of the EU, like every other Contracting Party, will be subject to the external control exercised by the Court in the light of the rights guaranteed under the Convention.[157] It will also be possible to lodge a complaint against the EU and a member State simultaneously.

The fact of EU accession does not however in itself resolve the issues underlying *Bosphorus* and *Behrami*. In the first place, the question of the specific relationship between an EU member State's legal order and that of the EU remains. With the accession of the EU, the unique situation can arise in the Convention system that a legal act is enacted by one Contracting Party and implemented by another. This legal intertwining has been a key issue in the negotiations on the accession agreement. The Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in July 2011, expressly aims to avoid consequential gaps in participation, accountability and enforceability in the Convention system. [158] It introduces several adaptations to the

[155] Such as in the context of extradition treaties or the rule of non-intervention: *Soering* (n 46); *Al-Saadoon* (n 20).
[156] Besselink (n 154) 301-2.
[157] Article 1(2) Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH-UE(2011)16, Strasbourg, 19 July 2011. Also see the Draft Explanatory report, CDDH-UE(2011)16, para 5.
[158] Ibid.

ECHR supervisory mechanism to that purpose, tailored to the special features of the EU legal system.

The *Bosphorus* situation (where an alleged violation can only be avoided by disregarding an obligation under European Union law) is addressed through the introduction of the co-respondent mechanism. This mechanism would allow the EU to become a co-respondent to proceedings instituted against one or more of its member States and vice versa, if EU law is called into question (and: 'notably where that violation could have been avoided only by disregarding an obligation under European Union law').[159] Because co-respondents have the status as party to the dispute, they are bound to the Court's ruling. The co-respondent mechanism ought to absolve the burden on the part of the applicant of choosing the correct respondent. The mechanism is also introduced with a view to those cases where a breach of the Convention stems directly from EU treaties and where the responsibility of the member States may be at issue in their capacity as signatories to those treaties.

As noted in section 2.2 above, in respect of the co-respondent mechanism, an amendment to the Convention is foreseen stipulating that the admissibility of an application shall be assessed without regard to the participation of the co-respondent in the proceedings.[160] This applies not only to the requirement of exhaustion of domestic remedies in respect of the co-respondent, but also to victim status. The Draft Explanatory report explains that where an application is directed against both the EU and an EU member State, the mechanism would also be applied if the EU or its member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission.[161]

A second issue concerns the autonomy of the Union as a legal entity. The autonomy of Union law and consequently the exclusive competence of the CJEU to ensure compliance with Union law and decide upon the division of competence between the

[159] Ibid, Article 3(1)(2), amending Article 36 ECHR. The Agreement also introduces the possibility, in the event a complaint is direct against the EU and one or more of its member States, for the Court to change status of any respondent to that of a co-respondent, Article 3(4).
[160] Art 3(1)(b).
[161] Draft Explanatory report (n 157), para 3.7

EU and its member States is grounded in Art 19(1) TEU.[162] To ensure that the competence of the Court to assess the conformity of EU law with the provisions of the Convention does not prejudice the principle of the autonomous interpretation of EU law, the Draft Agreement sets forth that, in situations where EU law is at issue but where no preliminary ruling of the CJEU was previously obtained, an internal EU procedure is to be put in place before the Court decides upon the merits of the case. This procedure would allow the CJEU to review the compatibility of the provision of EU law at issue with the Convention. It is expressly stated that the assessment of the CJEU will not bind the Court.[163]

The co-respondent mechanism also serves to prevent the Court from deciding on the distribution of competences between the EU and the Union. To this purpose, and quite notably, it is envisaged that the co-respondent mechanism would allow for the finding of a violation without specific apportionment of responsibility between the EU and a member State. This is not laid down in the Draft Agreement, but follows from the Explanatory report:

> [T]he respondent and the co-respondent(s) may be jointly responsible for the alleged violation in respect of which a High Contracting Party has become a co-respondent. Should the Court find this violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent(s); there would otherwise be a risk that the Court would assess the distribution of competences between the EU and its member States. The respondent and the co-respondent(s) may, however, in any given case make joint submissions to the Court that responsibility for any given alleged violation should be attributed only to one of them.

On this basis, one might expect the Court, instead of determining on the independent responsibility of the EU or the member State, to pronounce upon the joint responsibility of the EU and an implementing member State in *Bosphorus*-type situations, and perhaps also in respect of violations directly stemming from founding treaties agreed upon by the member States and implemented by an EU institution.[164]

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[162] Opinion 1/91 [1991] ECR I-6079, paras 74 et seq.; JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011) 1012; T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order', 48 *Common Market Law Review* (2011) 1028-33.
[163] Draft Accession Agreement (n 157) Art 3(6).
[164] Also see Jacqué (n 162) 1016.

Although there are still several outstanding issues and the full import of the Draft agreement – when it is ratified – will depend on its interpretation by the Court, it is anyhow clear that the accession of the EU to the ECHR provides some unique prospects for further developing the law on shared responsibility. The introduction of the co-respondent mechanism may be taken as recognition that the traditional attribution rules are not well tailored to the special relationship between the EU and its member States. Possibly, the co-respondent mechanism will signal a novel concept of responsibility in international law apart from independent or derived responsibility. Further, the relaxation of admissibility thresholds in the co-respondent procedure would constitute codification of the idea that an individual must also be able to seek redress from a party that is not the author of the breach but acts through an intermediary party.

5. Principles of shared liability in the case law of the Court

The legal consequence of an internationally wrongful act is that the responsible State is under an obligation to make reparation for the injury sustained.[165] The principles applicable to distributing reparation obligations among multiple wrongdoing States are however unclear. International law provides scarce authority on the issue. The ILC left the matter undecided in its Articles on State Responsibility.[166] The ICJ has only sporadically touched upon the topic, without setting forth generally applicable principles.[167] The one uncontested rule appears to be that it should never be possible for the injured State to obtain reparation greater than the injury sustained.[168] But as regards the distribution of reparation obligations, it is unsure whether liability should as a rule be proportionate to the share of each State in the harm – in accordance with,

[165] *Factory at Chorzów*, 1927 PCIJ Rep A No. 9, 21; Article 31 of the Articles on State Responsibility (n 4).
[166] See esp. Articles on State Responsibility, with commentaries (n 4) 124-5, where the ILC notes that although treaties may spell out how liability should be distributed, such rules constitute a *lex specialis* from which no general principles should be deduced.
[167] See in particular *Certain Phosphate Lands in Nauru* (n 71) 258-259 (para 48); Nollkaemper (n 9) 37; A Orakhelashvili, 'Division of Reparation Between Responsible Entities', in: J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 647, 664, noting that the law is currently 'uncertain, unsatisfactory and even chaotic'. LFE Goldie, 'Liability for Damage and the Progressive Development of International Law', 14 *ICLQ* (1965) 1192.
[168] Art 47(1)(a) Articles on State Responsibility and Art 47(3)(a) Articles on the Responsibility of International Organizations.

for example, the degree of *culpa* or the causal connection between the breach and damage – or that it is governed by the principle of joint and several liability.[169]

The ECtHR case law on allocating liability among multiple contributing actors is neither grounded in well-developed principles, which may in part be explained from the subsidiary nature of the duty to provide just satisfaction of Article 41 ECHR.[170] According to the Court: '[n]or is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.'[171] This grants the Court considerable leniency in choosing the appropriate form and magnitude of reparation. If *restitio in integrum* is impossible, the Court may grant pecuniary or non-pecuniary awards, although often, the finding of a violation is considered by the Court as sufficient satisfaction.

Some conclusions may nonetheless be drawn from the Court's application of Article 41 ECHR to instances of multiple State responsibilities. What transpires from the cases discussed in this paper is that liability is typically apportioned according to the contribution of each State to an injury. This may either mean that the Court awards damages for one – indivisible – injury to an applicant, which it subsequently apportions to the respondent States in accordance with the causal link between their violations and the injury; or, as appears to happen more frequently, that the Court frames a single incident into specific injuries arising out of the distinct conduct of each State.

In *Ilascu*, where violations of Article 3 and 5 committed independently by Moldova and Russia in respect of three of the applicants were found, the Court took the first

[169] See extensively: Special Rapporteur G Arangio-Ruiz, 'Second Report on State Responsibility', *Yearbook of the ILC 1989*, Vol. II (Part 1) 8 et seq.. Further: A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *EJIL* (2007) 710-711; JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988) 225.

[170] According to Harris, O'Boyle and Warwick, *Law of the European Convention on Human Rights* (2nd Ed., Oxford University Press 2009) 856: 'The case law under Article 41 is characterized by the lack of a consistently applied law of damages at the level of detail which one could find in national systems and which permit specific calculations to be made on the basis of precedent for injury, loss of life, unlawful imprisonment, and loss of property.'

[171] Eg ECtHR 18 September 2009 *,Varnava a.o. v Turkey* , no. 16064/90, para 224.

approach. It first awarded EUR 180,000 for pecuniary and non-pecuniary damage arising from the violations of Articles 3 and 5 of the Convention to each of the three applicants; of which it subsequently apportioned EUR 60.000 to Moldova and EUR 120.000 to Russia, by taking into account the gravity of their respective breaches.[172]

In *Rantsev*, also concerning independent conduct in relation to a single injury, the Court took the second approach. It considered that the failure of the Cypriot authorities to protect the victim from trafficking, to investigate whether she had been trafficked and to conduct an effective investigation into her death (Articles 2 and 4) to have caused anguish and distress to her father, who was the author of the complaint, awarding him the sum of EUR 40,000 to be paid by Cyprus. In respect of Russia's procedural violation of Article 4, the Court awarded him EUR 2,000 in non-pecuniary damage.[173] This approach is also present in the cross border child custody case of *Monory v Romania and Hungary* and in the two only 'intra-ECHR' expulsion cases found to be in violation of the Convention, *M.S.S. v Belgium and Greece* and *Shamayev v Georgia and Russia*.[174]

The Court's case law demonstrates that it not only isolates the distinct acts of States contributing to the injury (the principle of independent responsibility), but that it also tends to isolate, as far as possible, the distinct damages which may arise out of a single injury. Even in cases where there the injury is indivisible, the Court apportions liability congruently with the nature (or gravity) of and causal relationship with each breach. The principle of equity does allow for some flexibility on the part of the Court in this respect, rendering it unnecessary to strictly establish degrees of fault or causal contribution. In *M.S.S.* for example, even though the applicant sustained ill-treatment in a Greek center for aliens detention for which the Greek authorities were 'directly' responsible, the Court held Greece liable for an amount of EUR 1,000 on account of 'certain distress' and 'the nature of the violations', while the expelling State Belgium was to pay the applicant EUR 24,900 based on these very same considerations.[175]

[172] *Ilascu* (n 16) para 484-90
[173] *Rantsev* (n 79) para 341-48.
[174] *Monory v Romania and Hungary* (n 82) para 93-99; *M.S.S. v Belgium and Greece* (n 106) para 404-11; *Shamayev v Georgia and Russia* (n 106) para 523-26.
[175] *M.S.S. v Belgium and Greece* (n 106) para 404-11.

Although the Court thus seems to allocate reparation obligations on the basis of *proportionality* instead of the principle of *joint and several liability* (holding that each contributing State is liable for the full measure of damages) , it remains difficult to draw firm conclusions. This is not only due to the absence of a set of well-established principles applicable to reparation obligations under Article 41 as such, but also because awards are often granted for non-pecuniary damage, allowing the Court to avoid strict calculations and subsequent allocations of damages. Further, all the above cases dealt with separately identifiable violations. It is therefore uncertain how the Court would allocate liabilities in respect of conduct which is truly joint, such as in case of common organs or member State responsibility. Unfortunately for the development of the law in this respect, is that in the single judgment where the Court established member State responsibility on account of the State having entered into treaty obligations found in breach of the Convention (*Matthews*) and where responsibility must thus deemed to have been shared with all the other parties – no claim for damages under Article 41 was brought. The EU-ECHR Draft Accession Agreement neither provides any specific arrangements on reparation in the context of the co-respondent procedure, leaving it to the future Court to establish relevant principles.

6. Conclusion

Even though the case law of the European Court of Human Rights on issues of shared responsibility suffers from inconsistencies and its case-by-case approach renders it problematic to formulate generally applicable principles, the Court has made a significant contribution to the law on shared responsibility. Moreover, the Court's pronouncements and the wide variety of issues brought before it have provided ample occasion for scholarly reflection, thus furthering legal theory on shared responsibility.

Perhaps the key feature of the Court's approach to shared responsibility is its firm adherence to the principle of independent responsibility. The typical approach of the Court in cases involving multiple wrongdoers is to isolate the independent conduct of the Contracting States concerned and to examine the conformity of that conduct with the State's Convention obligations. It is symptomatic that the Court has never had

recourse to the rules on derived responsibility laid down in the Articles on State responsibility. Situations which could be construed as falling within the ambit of aid and assistance (eg *Tugar*; extradition and expulsion cases) or direction and control (eg *Stephens*), have instead been resolved through either the instrument of attribution or by construing them within the State's primary obligations under the Convention – in particular under duties of protection and prevention.

The Court has shown, in this respect, that the principle of independent responsibility need not as such obstruct determinations of multiple responsibility. A prominent feature of the Court's case law is its expansive interpretation of the substantive scope of the State's primary obligations, allowing the Court to develop its own, distinct solutions for situations of shared responsibility. The guiding principle that the Convention guarantees rights that are not theoretical or illusory but practical and effective ensures that States may well incur responsibility for acts of which they are not the principal author, but to which they have contributed nonetheless, such as in the cases of *Rantsev*, *Ilascu* and *M.S.S.*.

The expansive interpretation of positive duties not only renders it unnecessary for the Court to have recourse to the concept of derived responsibility, it may also render issues of attribution redundant. In the case of *Ilascu*, for example, the Court could refrain from explicitly attributing the conduct of the seperatists to Russia, because it found Russia's decisive influence over the regime to enliven both preventive and protective duties.[176] On a similar footing, the Court in the Cyprus cases derives the responsibility of Turkey from a general duty to secure the full panoply of rights and freedoms in a territory under its control. This was contrary to the earlier position of the former Commission on Human Rights, which, approaching the matter solely from an attribution perspective, had restricted Turkey's responsibility to the activities of the Turkish armed forces in Northern Cyprus.[177]

Yet, there remain intrinsic obstacles in the ECHR supervisory mechanism for determining upon shared responsibility. Firstly, the admissibility thresholds of victim

[176] *Ilascu* (n 16) para 392-3.
[177] EComHR 26 May 1975, *Cyprus v Turkey* (report), nos 6780/7, 6950/75.

and jurisdiction pose issues, especially in those situations where there is only a remote link between the State's own conduct and an injury suffered.

Secondly, the Court has tended to a marginal level of scrutiny over conduct of States in their capacity as member of an international organisation. The cases of *Bosphorus* and *Behrami* signify the importance accorded by the Court to 'the proper functioning of international organizations', 'the current trend towards extending and strengthening international cooperation' and 'the effective pursuit of transnational interests'.[178] To some extent, this extenuating stance of the Court is also discernible in respect of misconduct stemming from other forms of inter-State cooperation, as exemplified by the cases of *Sari* and *Karalyos and Huber*.[179]

It may on the other hand be expected that the Court's shift in *Al-Jedda* and the future EU-ECHR accession will strengthen Convention protection vis-à-vis conduct undertaken in the context of resolutions of the UN Security Council and the EU, respectively. That the EU will be subjected to the ECtHR's compulsory jurisdiction is in itself an important step for the development of the law on shared responsibility. It will allow the Court to further shape the principles pertaining to the distribution of responsibilities between an international organisation and its members. This will only amplify the ongoing influence of the European Court on the law on international responsibility.

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[178] *Bosphorus* (n 5) para 150; *Behrami* (n 5) para 148-9. Also see *Waite and Kennedy* (n 120) para 72; ECtHR 18 February 1999, *Beer and Regan v Germany*, no 28934/95, para 62.
[179] See section 3.4.