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Procedural Aspects of Shared Responsibility in the European Court of Human Rights

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1. Introduction

The European Court of Human Rights (ECtHR, the Court) 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 supervisory mechanism of the Court is open to multilateral dispute settlement. Many high profile cases before the Court involved multiple respondent States, such as *Ilascu*, *Bankovic*, *M.S.S.* and *Rantsev*.[1] These cases allowed the Court not only to adjudicate claims against multiple parties, but also allowed it to develop rules on allocating responsibility to different respondent parties.

As a system for the regional enforcement of human rights, the European Convention on Human Rights (ECHR, the Convention) creates a network of multilateral undertakings of which individuals are the primary beneficiaries. The compulsory and binding nature of the Convention's supervisory machinery, aimed at ensuring the collective enforcement of human rights, is widely proclaimed as unique, operating quite differently from classic, bilateral, forms of international dispute settlement.[2] The Court's jurisdiction in individual cases does not depend on the mutual consent of the parties involved, but rests on the idea that individuals should be able to invoke their Convention rights against all Contracting States. On the one hand, the Court's adjudicatory function is indeed receptive to issues of so-called shared

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[1] ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no 48787/99; ECtHR 12 December 2001, *Bankovic a.o. v Belgium and 16 other States*, no 52207/99; ECtHR 21 January 2011, *M.S.S. v Belgium and Greec*e [GC], no 30696/09; ECtHR 7 January 2010, *Rantsev v Cyprus and Russia*, no 25965/04.
[2] Eg JG Merills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, 1993) 1; LR Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008) 19 *EJIL* 125-159 at 126.

responsibility[3], as it allows for complaints to be brought against multiple respondent States. Further, the Court's procedural practice shows that other actors may be involved in the proceedings as well, such as NGOs and international organisations. On the other hand, the regional nature of the Convention obviously restricts the Court's jurisdiction to complaints that are brought against one or more of the 47 Contracting States, potentially posing issues of how to deal with absent co-responsible parties.

This raises questions on how the Court handles multiple responsible actors and how its procedural organisation influences its capability to allocate responsibility. This article explores the degree of procedural openness of the ECtHR for receiving and adjudicating claims involving multiple wrongdoing actors. It identifies to what extent relevant procedural rules of the Court may facilitate or obstruct multilateral dispute settlement and to what extent they may contribute to the development of the substantive law on shared responsibility.

The relevant procedural aspects to be discussed are grouped in three sections: bringing multiple responsible parties before the Court, discussing issues of jurisdiction and standing (section 2); the handling of multiple responsible parties before the Court, discussing issues of joinder and specific questions raised by the future accession of the European Union to the ECHR (section 3); and the dealing with non-respondent responsible parties, discussing the "indispensable parties rule" and how the rules on third party intervention, fact finding and interim orders take account of responsibilities of absent parties (section 4). Further, the article explains how the Court deals with issues of reparation in cases where multiple States are found responsible for a violation of the Convention (section 5). The article concludes with a short discussion on the interaction between the Court's procedural rules and substantive questions of distributing responsibility.

The procedural law of the ECtHR primarily derives from Section II of the ECHR (articles 19-51) and from the Rules of Court as established and amended by the

[3] 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.

plenary Court.[4] Further procedural rules are laid down in practice directions that are issued by the President of the Court.[5] Obviously, the Court's case law is highly influential for the development of its procedural law. On such crucial issues as admissibility or the binding character of interim measures, the case law of the Court has often furthered (or limited) its jurisdictional competences.[6]

2. Bringing responsible parties before the Court

2.1 Jurisdiction of the Court

The procedure before the European Court of Human Rights displays a considerable degree of openness towards multilateral dispute settlement. This is to a large extent explained from the foundational ideas behind the Court's supervisory tasks. The ECtHR and former European Commission of Human Rights were created to ensure the collective enforcement of human rights within the countries making up the Council of Europe rather than as forum for settling bilateral disputes. Although the Court's jurisdiction was originally optional, Protocol 11 established the Court's compulsory jurisdiction in respect of all Contracting States for inter-State and individual complaints (articles 32-34 ECHR). The procedural organisation of the inter-State and individual complaint mechanisms – which operate under a different set of rules[7] – reflect this wide jurisdictional scope.

The inter-State procedure does not presume that complaints are brought by affected States but is open to all challenges that another State reneges on its human rights commitments. The Court explained in *Ireland v United Kingdom* that its competence to receive inter-State complaints rests, contrary to most forms of dispute settlement in international law, not on the idea of reciprocity, but on the notion that the Convention creates "over and above a network of mutual, bilateral undertakings,

[4] Article 25(d) ECHR. The ECtHR supervisory mechanism went through two major procedural revisions since its inception in 1959. Protocol 11 of 11 May 1994 (*CETS* No 155) abolished the European Commission of Human Rights, introduced compulsory jurisdiction of the Court and revised its internal working processes by dividing it into formations of three judge committees, chambers of seven judges and a Grand Chamber of seventeen judges. With a view to (further) reduce the Court's workload, additional procedural streamlining was envisaged by Protocol 14 of 13 May 2004 (*CETS* No 194), which introduced *inter alia* a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage, introduced the single judge and broadened the competences of three judge committees.
[5] Rule 32 Rules of Court.
[6] ECtHR 4 February 2005, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99.
[7] See art 33 and 34 ECHR and Rules 51-59 Rules of Court.

objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"."[8] Accordingly, the Convention rights, as in between the Contracting Parties, are best seen as being of *erga omnes* character whereby it is not necessary for a State wishing to bring a complaint to show to have suffered detriment or that the victim has its nationality.[9] It follows that the Court may deal with any inter-State complaint involving any alleged breach of the Convention and its Protocols, provided the admissibility criteria are fulfilled.[10] Only two admissibility criteria apply to inter-State complaints: exhaustion of domestic remedies and the six month rule.[11]

The individual complaint procedure is neither of bilateral or contractual nature but aimed at allowing individuals to vindicate their rights, irrespective of their legal bond with a Contracting State. Although individual applicants must meet the admissibility requirements set forth in article 35 ECHR, there are no obstacles as such for bringing complaints against a foreign Contracting State or, indeed, multiple Contracting States. In case applications are brought against multiple Contracting Parties, the admissibility criteria must however be met in respect of each respondent State.[12]

There remain however procedural hurdles for bringing multiple responsible States before the Court. The admissibility thresholds enshrined in the Convention may prevent standing of individuals who cannot show to have a genuine link with the applicant State (jurisdiction in the meaning of article 1 of the Convention – see section 2.2.) or who fail to demonstrate an actual relationship between the alleged misconduct and damages suffered (the victim requirement – see section 2.3). Further, although the possibility to bring complaints against multiple parties will often render the so-called indispensable parties rule redundant, it may still be relevant for applications involving the legal obligations of Non-Contracting States (section 2.4). Since inter-State complaints remain rare, this article chiefly discusses the rules applicable to individual complaints – but refers to the inter-State procedure if relevant.

2.2 Jurisdiction in the meaning of Article 1 of the Convention

[8] ECtHR 18 January 1978, *Ireland v The United Kingdom*, no 5310/71, para 239.
[9] Ibid, para 240.
[10] Art 33, 35 (1) ECHR.
[11] Art 35 (1) ECHR. See further J Vande Lanotte and Y Haeck, *Handboek EVRM* (Intersentia, Antwerp 2005) 619-20.
[12] Cf. ECtHR 27 Oct. 2011, *Stojkovic v. France and Belgium*, no 25303/08.

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 must be distinguished from the jurisdictional competence of the Court and essentially signifies the circle of persons who come within the purview of a Contracting State's human rights obligations. The jurisdictional clause of article 1 is commonly treated by the Court as a threshold of admissibility. If the individual fails to establish that he was within the respondent State's jurisdiction, the Court will declare the application 'incompatible with the provisions of the Convention' and for that reason inadmissible (article 35(3)(a)).[13] Even though, properly construed, 'Article 1 jurisdiction' is a matter of scope of Convention obligations rather than of procedural law, it is warranted to briefly discuss the Court's approach to the issue, since it is often decisive in allowing individuals to present a claim that involves collaborative conduct of a Contracting State with another entity, such as another Contracting State, an international organization or a non-Contracting State.

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[14], the 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.[15] 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.[16]

There are indeed a range of complaints involving multiple contributing States which have been dismissed by the Court and former European Commission of Human

[14] *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* (Hart Publishing, Oxford 2012) 24.
[14] *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* (Hart Publishing, Oxford 2012) 24.
[15] 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.
[16] One prominent exception are extradition and expulsion cases, dealt with in section 3.4 below.

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 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).[17]

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.[18]

In a majority of cases, 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.[19] But in conceptualising this factual connection between the individual and the State, inconsistencies arise. The essential issue appears to be whether simply any

[17] *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.

[18] 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* (Intersentia, Antwerp, 2004) 83-123; A Orakhelashvili, 'Restrictive Interpretation of the Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', (2003) 14 *European Journal of International Law* 529, 538; M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', (2008) 8 *Human Rights Law Review* 411; Concurring Opinion of Judge Bonello in *Al-Skeini* (n 6) para 4-7; Partly Dissenting Opinion of Judge Loucaides in *Ilascu* (n 16).

[19] 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.

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[20]; 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.[21] Instead, the Court had recourse to the test of 'effective control' as it had employed in its case law on Northern-Cyprus.[22] 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,[23] that it exercises public powers which are normally appertainable to the territorial State,[24] or that the individual is subject to the State's exclusive physical power or control.[25] One problem with the *Bankovic* reasoning was however that the Court in later judgments appeared to adopt a lower threshold.[26]

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[20] 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).
[21] Ibid.
[22] 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.
[23] Ibid.
[24] *Al-Skeini* (n 6) para 135.
[25] *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.
[26] 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

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[27]), 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*.[28]

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 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.

The reverse implication of the territorial bias that is embedded in the Convention by virtue of article 1 and the Court's interpretation of that provision is

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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.

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

[28] Ibid, para 149-50.

that the State in whose territory 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.[29] 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.[30] 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 its power to stop a human rights violations from occurring.[31] There may however be exceptions to this type of duties, such as in situations where compliants involve the conduct of an international organisation within a Contracting State.[32]

2.3 The victim requirement

A second admissibility 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.[33] The victim requirement only applies to individual complaints and not to the inter-State procedure of article 33 ECHR, which is seen to

[29] 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.
[30] *Assanidze v Georgia*, para 139.
[31] 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.
[32] ECtHR 9 June 2009, *Galic v The Netherlands*, no 22617/07; ECtHR 9 Oct. 2012, *Bède Djokaba Lambi Longa v The Netherlands*, no 33917/12.
[33] 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'.

protect the general interest of observance of the Convention.[34] Victim status does not necessarily require the individual to have suffered damages (or, in the words of the Court 'prejudice' or 'detriment')[35], 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.[36] A potential problematic feature of the victim requirement for scenarios of shared responsibility is that the Court will normally focus on the act which actually leads to the injury, possibly ignoring underlying legislative or facilitating acts of another State or entity.

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.[37] 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.[38]

Notably, as is further explained below[39], 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

[34] ECtHR 18 January 1978, *Ireland v the United Kingdom*, no 5310/71, para 239-40.
[35] ECtHR 22 May 1984, *De Jong, Baljet and van den Brink v the Netherlands*, nos. 8805/79, 8806/79, 9242/81, para 41.
[36] *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.
[37] ECtHR 23 May 2002, *Segi a.o. v 15 States of the European Union*, nos. 6422/02 and 9916/02.
[38] 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.
[39] Section 4.4.

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.[40] 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 ordinary admissibility criteria are upheld in respect of the 'acting' party, the Draft Agreement still requires, as a rule, that the actual violation has occurred.

Further scenarios 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.[41] 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.[42]

3. Handling of multiple responsible parties before the Court

The Court's procedural rules pertaining to *inter alia* the use of languages, representation before the Court, communications with respondents, hearings and pleadings, do not differentiate between complaints involving multiple respondent States and applications brought against a single respondent. Previous experience of the Court in handling multiple respondent parties or multiple complaints involving similar factual circumstances has however resulted in the adoption of some specific

[40] 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.
[41] 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.
[42] ECtHR 23 April, *Aziz v Cyprus, Greece, Turkey and the United Kingdom*, no 69949/01.

arrangements with a view to increasing procedural efficiency. The most pertinent ones concern the possibilities to join and simultaneously examine applications, including the appointment of a 'common interest judge' (section 3.1.). This section further discusses the co-respondent mechanism that is currently being negotiated with a view to the future accession of the European Union to the ECHR (section 3.2.).

3.1 Joinder and simultaneous examination of applications

The vast majority of cases involving multiple respondent States concern applications that already set out the names of all the respondent States in conformity with Rule 47(1)(c) Rules of Court. Rule 42(1) also allows a Chamber, at the request of the parties or of its own motion, to join two or more applications. Rule 42(2) further allows the President of a Chamber, after consulting the Parties, to order that the proceedings in applications assigned to that Chamber are conducted simultaneously. Joinder and simultaneous examination may not only involve applications brought against the same respondent State, but also complaints against different States Parties or inter-State complaints brought independently by multiple States against one and the same respondent State.[43] The Court has not drafted precise criteria as to when joinder or simultaneous examination is called for, but it commonly occurs when the applications concern the same factual circumstances.[44] It follows from the wording of Rule 42 that the decision to decide on joinder and simultaneous examination always rests with the Chamber or the Chamber's President, respectively, although all parties to the dispute have to be "consulted" before the President of the Chamber orders the simultaneous conducting of proceedings.

A specific procedural arrangement for cases involving multiple respondent (or applicant) States concerns the possibility to appoint a 'common interest judge'. This arrangement must be seen in the light of the ordinary rule that the judge elected in respect of the respondent State (or the applicant State under the inter-State procedure) always sits in the Chamber or Grand Chamber deciding the case.[45] In order to keep the number of judges under control – such as in cases being brought against all the

[43] Eg ECtHR 2 May 2007, *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, nos. 71412/01 and 78166/01; ECtHR 14 Dec. 2011, *Lakicevic a.o. v Montenegro and Serbia*, nos. 27458/06, 37205/06, 37207/06 and 33604/07; EComHR 31 May 1968, *Denmark, Norway, Sweden and The Netherlands v Greece*, nos. 3321/67 3322/67 3323/67 3344/67 (dec.).
[44] Ibid. Also see ECtHR 4 May 2000, *Granati and Pulvirenti v France*, nos. 39626/98 and 41526/98 (adm. dec.).
[45] Rule 26(1)(a) and Rule 51(2) Rules of Court.

Contracting Parties that are also party to the European Patent Office[46] or all the Contracting Parties supporting the coalition forces in Iraq[47] – Rule 30 of the Rules of Court foresees in the appointment of a single 'common interest' judge in cases that involve two or more respondent Contracting Parties (or two or more applicant parties in an inter-State procedure). A common interest judge was for example appointed in the cases of *Saramati* and *Artemi* (involving a complaint against 22 members of the EU).[48]

3.2 Special procedural provisions after EU accession: the co-respondent mechanism

A special procedure on joinder is currently being negotiated in the context of the accession of the EU to the ECHR as is foreseen in article 6(2) EU Treaty and article 59(2) ECHR as amended by Protocol 14 ECHR. 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. [49] It introduces a special procedure called the co-respondent mechanism for complaints that may involve the responsibility of both the EU and one or more of its member States.

[46] EComHR 10 Jan. 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, i.e. Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom*, no 21090/92.
[47] ECtHR 14 March 2006, *Saddam Hussein v Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom*, no 23276/04 (adm. dec.).
[48] *Saramati* (n ..); ECtHR 30 Sep. 2010, *Artemi and Gregory v Cyprus, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden*, no 35524/06 (adm. dec.).
[49] 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.

This mechanism, if adopted[50], would allow the Court not only to join applications brought separately against the EU and one of its member States under its current powers, but also to join the EU as a party to proceedings instituted against one or more of its member States or vice versa, if EU law is at issue.[51] Such a joined party, the co-respondent, is as party to the dispute bound to the Court's ruling. The Draft Agreement stipulates that the EU or the Member State will become a co-respondent only at their own request and by decision of the Court.

The co-respondent mechanism ought to absolve the burden on the part of the applicant of choosing the correct respondent. As noted in section 2.3 above, the Draft Agreement would amend the ECHR to the effect that the admissibility of an application is assessed without regard to the participation of the co-respondent in the proceedings.[52] 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.[53]

As currently envisaged, the co-respondent mechanism would be activated in respect of two types of scenarios. Firstly, it would apply to *Bosphorus* type-situations, ie situations where applications are directed against an EU Member State and where the alleged violation calls into question the compatibility of EU law with Convention rights, and "notably where that violation could have been avoided only by disregarding an obligation under European Union law".[54] Secondly, the mechanism would apply to applications being brought against the EU alone, if the alleged breach of the Convention stems directly from the EU treaties and where the responsibility of the Member States may hence also be at issue in their capacity as founding State.[55] It seems especially likely that the EU would make use of the possibility to be joined as a

[50] In accordance with art 218 of the TFEU, the Council of the EU must unanimously agree on accession after obtaining the consent of the European Parliament. Accession further needs ratification by all Member States of the EU and the Council of Europe.
[51] See art 3 Draft Agreement (n …).
[52] Ibid, art 3(1)(b).
[53] Ibid, para 37 Draft Explanatory report.
[54] Ibid. Cf. ECtHR 30 June 2006, *Bosphorus v Ireland*, no 45036/98.
[55] Ibid.

party, since the status of co-respondent would allow it to more effectively forward its position on the proper interpretation and application of EU law.

A further procedural amendment introduced in the Draft Agreement concerns the possibility for the Court of Justice of the European Union (CJEU) to make an assessment of the compatibility of EU law with the Convention in cases where it has not yet done so. This additional level of judicial review is introduced with a view to preserve the competence of the Court of Justice of the European Union to ensure compliance with Union law and decide upon the division of competence between the EU and its member States[56] 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.[57] Although this additional level of judicial review is thus primarily aimed at preserving the CJEU's competence to interpret EU law, it may also foster the Court's understanding of issues that specifically relate to the EU legal order – on a similar footing as domestic proceedings in Contracting States assist the Court in appreciating the facts and domestic law aspects of a case.

4. Handling of non-respondent responsible parties

4.1 The indispensable parties rule

Before the ICJ, the indispensable parties rule has been identified as a prominent procedural hurdle for multilateral dispute settlement.[58] The rule, developed in *Monetary Gold*, reflects the principle that the ICJ can only exercise jurisdiction over a State with its consent.[59] It signifies that it would be impossible for the ICJ to establish

[56] Art 19(1) TEU. Also see 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' (2011) 48 *Common Market Law Review* 1012; T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1028-33.
[57] Draft Agreement (n …) art 3(6).
[58] NS Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor* Case', (1996) 21 *Yale Journal of International Law* 305, 315-316; Nollkaemper (n 9) 13-25.
[59] As laid down in ICJ Statute, article 36. *Monetary Gold* (n 9) 32.

jurisdiction in a contentious case if the legal interests of a third State form the very subject matter of the dispute.[60]

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 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" [61], is also entrenched in the European Convention.[62] 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.[63]

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."[64] 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."[65]

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[60] *Monetary Gold* (n 9) 32; *East Timor* (n 9) 105 (para 34).
[61] *Monetary Gold* (n 9) 32.
[62] ECHR, articles 32-34.
[63] *Bankovic* (n 5) para 31; *Behrami* (n 5) para 67.
[64] *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.
[65] Ibid.

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 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.[66]

It is nonetheless of note that the Court is not always reticent in pronouncing on the lawfulness of conduct of receiving States, thereby potentially encroaching upon the legal position of third 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"[67], that "ill-treatment of detainees is an enduring problem in Tajikistan"[68], that there is "clear evidence of a culture of torture with impunity" in Sri Lanka[69] or that a particular set of criminal proceedings in Syria "must be regarded as a flagrant denial of a fair trial".[70] 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.[71]

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[66] On the *jus cogens* status of the prohibition of torture: *Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia, (2002) 121 *International Law Reports* 213; E de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens' (2004) 15 *European Journal of International Law* 97.
[67] ECtHR 22 June 2004, *F. v the United Kingdom*, no 17341/03.
[68] ECtHR 23 September 2010, *Iskandarov v Russia*, no 17185/05, para 129.
[69] ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 124.
[70] ECtHR 8 November 2005, *Bader and Kandor v Sweden*, no 13284/04, para 47.
[71] 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.

A further indication that the ECtHR treats the legal position of absent States rather practicably flows from its case law on member State responsibility for acts of an international organisation.[72] 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.[73] 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.[74] 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.[75]

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, in which the ICJ held that it could not pronounce on Australia's obligations vis-à-vis Portugal since such a pronouncement depended on an examination of the lawfulness of conduct of Indonesia.[76], 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.

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[72] See section 4.1 below.
[73] ECtHR 18 February 1999, *Matthews v the United Kingdom*, no 24833/94, para 33, emphasis added.
[74] ECtHR 12 May 2009, *Gasparini v Italy and Belgium*, no 10750/03.
[75] *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.
[76] *East Timor* (n 9) 104 (para 33). 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 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".

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.[77] Some have indeed suggested a rethinking of Monetary Gold, on the basis not only that it has been inconsistently applied by the ICJ,[78] but also because it would unfavourably balance the requirement of jurisdictional consent with the right of the applicant to have its claim considered.[79]

4.2 Intervention

Before the ECtHR, third party intervention serves the dual purpose of allowing third parties to defend their (or one of their nationals) interests and to assist the Court in establishing the facts. In cases declared admissible, Contracting States whose nationals have lodged a complaint against another State Party will have the right to submit written comments and take part in hearings.[80] Other Contracting Parties or persons that are not a party to the proceedings may intervene upon invitation of the President of the Court, if such intervention is in "the interest of the proper administration of justice".[81] That will commonly mean that the Contracting Party or person establishes an interest in the result of the case, or that it has specific expertise or experience relevant to the case.[82] The term "person" refers to natural as well as legal persons and may include NGOs, private undertakings and international organizations.[83] The criteria for allowing third party intervention are not very well

[77] S Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff, The Hague, 2nd ed 1985) 439; *East Timor* (n 9) 158 (Judge Weeramantry, dissenting); Klein (n 53) 316.
[78] 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', (1993) 42 *ICLQ* 710, 716-7; C Chenkin, 'International Court of Justice: Recent Cases. The East Timor Case (*Portugal v. Australia*)', (1996) 45 *ICLQ* 712, 718.
[79] *East Timor* (n 9) 158 (Judge Weeramantry, dissenting); Klein (n 53) 315-6.
[80] Article 36(1) ECHR, Rule 44(1) Rules of Court.
[81] Article 36(2) ECHR, Rule 44(2) Rules of Court.
[82] Explanatory Report to Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinary established thereby,at para 48. See eg ECtHR 27 Oct. 2011, *Ahorugeze v Sweden*, no 37075/09, where the Netherlands was allowed as third party intervener on account of its experience with the Rwandan justice system.
[83] The United Nations intervened in the case of *Behrami* (n ..), for example. In *Hirsi v Italy* (ECtHR 23 Feb. 2012, no 27765/09), leave to intervene was granted to the United Nations High Commissioner for Refugees (UNHCR), Human Rights Watch, the Columbia Law School Human Rights Clinic, the Centre for Advice on Individual Rights in Europe, Amnesty International and the International Federation for Human Rights.

developed as the Court normally refrains from stating reasons for allowing or refusing intervention.[84]

The exclusion of Non-Contracting States from both the right and possibility to intervene may seem self-evident in view of the fact that the Convention has legal force within the Contracting States only and that it therefore does not purport to affect the legal interests of Non-Contracting States. As noted in section 2.4 however, there may be all sorts of scenarios where the interests or rights of Non-Contracting States may indirectly be at issue. Further, it may be that the applicant is a national of a Non-Contracting State. Practice before the Court indicates that one way of circumventing the impossibility of direct contact with the Court for a Non-Contracting State may be to collaborate with a respondent State in providing evidence to the Court. In the high profile case of *Babar Ahmad* for example, concerning extradition of a group of terrorist suspects from the United Kingdom to the United States where they would be placed in a Supermax detention facility, the evidence on detention conditions was produced by the United States Department of Justice and forwarded to the Court by the United Kingdom authorities.[85] This type of information only pertains to questions of evidence however and will not allow a Non-Contracting State to present its views on questions of law. Further, such collaboration is obviously only at issue when the legal interests of the respondent State and a Non-Contracting State coincide.

Despite the absence of a right of Non-Contracting States to intervene, the relative openness of the Court for interventions by other legal persons – although arguably less open than before the Inter-American Court of Human Rights[86] – may well contribute to the Court's capability to adjudicate on situations of shared responsibility. Especially in cases that involve circumstances taking place outside the legal or territorial order of the respondent State(s), the Court not only relies on

[84] Eg ECtHR 9 June 1998, *McGinley and Egan v The United Kingdom*, nos. 21825/93, 23414/94, 21825/93 and 23414/94, where the President decided to grant two London-based NGOs leave to intervene but refused such leave to the New Zealand Nuclear Test Veterans' Association without further explanation.
[85] ECtHR 10 April 2012, *Babar Ahmad a.o. v The United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09.
[86] The 2009 revision of the rules of procedure of the Inter-American Court of Human Rights introduced a right to submit briefs for any person or institution seeking to act as *amicus curiae*, see current art 44 Rules of Procedure of the Inter-American Court of Human Rights.

evidence brought by the parties, but often allows intervention by NGOs or other legal persons that have special knowledge about the particular context.[87]

Because international organizations may as legal persons be allowed to intervene, they are in a position to both contribute evidence and to defend their legal interests before the Court. In the case of *Bosphorus*, for example, the European Commission was allowed to explain the scope of relevant EU law to the case and to set forth the importance of upholding Community law.[88] In *Behrami* and *Seramati*, where the question of attributing conduct of peacekeeping forces to either the United Nations or the troop-contributing countries was at stake, the intervention of the United Nations was used not only to inform the Court of the respective mandates and responsibilities of KFOR and UNMIK as subsidiaries to the Security Council, but to also present its position on the distribution of responsibilities.[89] One may wonder why a right to request intervention does exist under the ECHR for international organisations but not for Non-Contracting States which appear to be in a fairly similar position.

4.3 Fact finding

The Court's fact-finding powers are rather wide, both as to form and the actors the Court may call upon. Investigative measures can consist of invitations to produce documentary evidence, the hearing of witnesses, experts and "any person whose evidence or statements seem likely to assist in in carrying out its tasks" and, exceptionally, the carrying out of on-site visits by a delegation of the Court.[90] Although only Contracting Parties (also those that are not party to the case) and the applicant are obliged to assist the Court in implementing investigative measures[91], the President of the Chamber may invite or grant leave to "any third party" to participate in an investigative measure.[92] Even though this would seem to include Non-Contracting States, the Court has not developed a practice of inviting Non-Contracting States to submit relevant evidence. For example, in some cases that required a determination or interpretation of domestic law or practice of Non-

[87] See eg n 91 above.
[88] *Bosphorus* (n…), para 122-7.
[89] *Behrami* and *Seramati* (n…), para 118-20.
[90] Rule A1 Annex to the Rules of Court. On investigative measures extensively: Vande Lanotte and Haeck (n…) 361-69.
[91] Article 38 ECHR, Rule A2(1) Annex to the Rules of Court.
[92] Rule A1(6) Annex to the Rules of Court.

Contracting Parties, the Court preferred information provided by the parties to the case or that of (more or less) independent NGOs or international organizations.[93]

4.4 Interim orders

Contrary to some other human rights conventions, the ECHR does not endow the Court with the express power to issue interim orders.[94] The practice of indicating provisional measures has however been institutionalised in the procedural rules of the former European Commission and the Court. [95] By virtue of the Court's establishment of their binding character, interim measures have indeed become a powerful tool to prevent irreparable damage done to applicants.[96] On the basis of Rule 39 of the Rules of Court, the Chamber (but in practice the President of one of the Sections[97]) may, upon request of a party, any other person concerned or of its own motion, indicate any interim measure that is "in the interests of the parties or of the proper conduct of the proceedings". The most common circumstances giving rise to interim measures concern expulsion and extradition, cases where the death penalty is sought, detention conditions and the securing of evidence.[98]

Although other persons than parties to the case may also request interim measures[99], Rule 39 only allows interim measures to be indicated to parties. The Court may however try to address or influence the conduct of an absent State by ordering a party not to cooperate with that State. In harmony with its well-developed substantive case law on duties to prevent and to protect, the Court has often ordered States not to expose an applicant to ill-treatment emanating from other actors. This may involve situations where non-State actors are the actual or co-perpetrator[100] or

[93] Eg *Al-Saadoon and Mufdhi* (n…) or *Hirsi* (n…).
[94] Cf. art 63 American Convention on Human Rights.
[95] See current art 39 Rules of Court.
[96] *Mamatkulov* (n…).
[97] This is because interim measures are often sought when the application has not yet been assigned to a Chamber.
[98] See extensively Vande Lanotte and Haeck (n…) 441-52.
[99] Eg EComHR 5 Nov. 1969, *Denmark, Norway, Sweden and the Netherlands v Greece* (report), nos. 3321/67, 3322/67, 3323/67 and 3344/67, where an interim order was requested by the Secretary-General of the Council of Europe.
[100] Eg ECtHR 28 June 2012, *A.A. a.o. v Sweden*, no 14499/09, where a Chamber suspended deportation of a family to Yemen to prevent possible abuse and honour crimes at the hand of clans and/or male family members.

where a respondent State cooperates with a Non-Contracting State such as in the sphere of extradition.[101]

5. Principles on reparation 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.[102] International law provides however scarce authority on questions of distributing reparation obligations among multiple wrongdoing States. The ILC left the matter undecided in its Articles on State Responsibility.[103] The ICJ has only sporadically touched upon the topic, without setting forth generally applicable principles.[104] 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.[105] 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, 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.[106]

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.[107]

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[101] Eg *Babar Ahmad* (n…); ECtHR 17 Jan. 2012, *Othman (Abu Qatada) v the United Kingdom*, no 8139/09.

[102] *Factory at Chorzów*, 1927 PCIJ Rep A No 9, 21; article 31 of the Articles on State Responsibility (n 4).

[103] 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.

[104] 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* (OUP, 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', (1965) 14 *ICLQ* 1192.

[105] Art 47(1)(a) Articles on State Responsibility and art 47(3)(a) Articles on the Responsibility of International Organizations.

[106] 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', (2007) 18 *EJIL* 710-711; JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability', (1988) 13 *Yale Journal of International Law* 225.

[107] According to Harris, O'Boyle and Warwick, *Law of the European Convention on Human Rights* (2nd ed, OUP, 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.'

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.'[108] 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. Further, an award of damages by the Court does not preclude a victim from bringing further claims at the national level.[109]

Some conclusions may nonetheless be drawn from the Court's application of article 41 ECHR to instances of multiple State responsibilities. What transpires from cases involving multiple respondent States 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 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.[110]

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

[108] Eg ECtHR 18 September 2009, *Varnava a.o. v Turkey* , no 16064/90, para 224.
[109] See in respect of the Netherlands for example: Hoge Raad der Nederlanden 31 Oct. 2003, LJN: AI0351.
[110] *Ilascu* (n 16) para 484-90.

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.[111] 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*.[112]

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.[113]

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, but also because awards are often granted for non-pecuniary damage, allowing the Court to avoid strict calculations and subsequent allocations of damages. Further, the above cases dealt with separately identifiable violations. It is therefore uncertain how the

[111] *Rantsev* (n 79) para 341-48.
[112] *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.
[113] *M.S.S. v Belgium and Greece* (n 106) para 404-11.

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 Court to establish relevant principles in the future.

6. Conclusion

The European Court of Human Rights has not only done pioneering work in the field of human rights but also on the law of shared responsibility. The two key features of the European Convention system explaining its ability to adjudicate on case involving multiple responsible States are its compulsory jurisdiction and the principle that its supervisory task should ensure individuals the effective enjoyment of Convention rights. These features have been translated into a set of procedural rules that allow scenarios of shared responsibility to be brought before it. This is very much an on-going process; as the Rules of Court and procedural principles established in its case law are progressively developed with a view to maximize the efficiency of the working processes of the Court. In the light of the solemn pledge of accession of the European Union to the Convention, specific procedural rules are currently developed to take account of the special legal relationship between the EU and its Member States and concomitant issues of distributing responsibility.

The Court's procedural openness to complaints brought against multiple responsible parties has allowed it to make a significant contribution to the law on shared responsibility. Most of the typical scenarios associated with shared responsibility have been brought before the Court, such as situations where two States have independently contributed to an injury[114], where one State could be said to have

[114] Eg *Ilascu* (n 16); ECtHR 7 January 2010, *Rantsev v Cyprus and Russia*, no 25965/04; ECtHR 27 October 2011, *Stojkovic v France and Belgium*, no 25303/08; ECtHR 5 April 2005, *Monory v Romani and Hungary*, no 71099/01; EComHR 3 December 1997, *Herron v the United Kingdom and Ireland*, no 36931/97; ECtHR 27 April 2000, *Tiemann v France and Germany*, nos. 47457/99 and 47458/99;

acted on behalf of another State[115], where two or more States jointly engage in wrongful conduct[116], where one State acts wrongfully upon instruction or direction of another State[117], or where a State assists another State in committing a wrongful act.[118] Many of these cases did involve multiple co-responsible parties, thus allowing the Court to bring into practice principles on allocating responsibility and liability.

The Court has not however seized the opportunity to decide on cases involving multiple responsible States according to novel legal concepts or mechanisms of distributing responsibility. As is demonstrated by the discussion on liability in the section above, the Court's common approach in cases involving multiple respondent States is to isolate the conduct of each contributing State as much as possible and to derive from that conduct the independent responsibility of each State. Such ideas as 'joint responsibility' or 'joint and several liability' have not made inroads in the Court's case law. The contribution of the Court to issues of shared responsibility mainly lies in its discussion of principles relevant to attribution (*Al-Jedda*, *Behrami*, *Drozd and Janousek*), the division of responsibilities between States and international organisations (*Matthews*, *Bosphorus*) and in the wide scope it accords to positive obligations of a State in relation to possible misconduct of another State (*M.S.S.*, *Rantsev*, *Ilascu*).[119]

It is of note that the Court's case law on distributing responsibilities does not display essential differences between cases brought against multiple co-responsible States and cases where one of the co-responsible States is absent to the proceedings. In those latter cases too, the Court ordinarily focuses on the independent conduct of the respondent State, allowing it to at least formally refrain from determining on any responsibility of the absent State. The Court's practice in this respect is facilitated not only by its practical approach to the indispensable parties rule but also by procedural

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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; EComHR 7 March 1985, *M.G. v the United Kingdom and Ireland*, no 9837/82.

[115] *X. and Y. v Switzerland;* ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no 39473/98; ECtHR 26 June 1992, *Drozd and Janousek v France and Spain*, no 12747/87.

[116] EComHR 28 May 1975, *Hess v the United Kingdom*, no 6231/73

[117] ECtHR 14 May 2002, *Gentilhomme, Schaff-Benhadji and Zerouki v France*, nos. 48205/99, 48207/99 and 48209/99; ECtHR 21 April 2009, *Stephens v Malta (no 1)*, no 11956/07; ECtHR 26 June 2012, *Toniolo v San Marino and Italy*, no 44853/10.

[118] M.S.S. v Belgium and Greece; ECtHR 6 April 2004, *Karalyos and Huber v Hungary and Greece*, no 75116/01; ECtHR 8 November 2001, *Sari v Turkey and Denmark*, no 21889/93

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rules on evidence and intervention that enable the Court to acquaint itself with facts and circumstances prevailing in the absent State. The Court's frequent recourse to evidence produced by NGOs and international organisations on circumstances in or conduct of an absent State, as well as the Court's practice of using interim measures as a means to prevent misconduct by an absent State, have been particularly instrumental in developing the scope of positive obligations in relation to activity of absent parties.

In respect of the future accession of the EU to the ECHR, one might expect the co-respondent mechanism to have special substantive implications for issues of allocating responsibility. One reason for introducing the mechanism is that it would allow the Court to refrain from deciding on the distribution of competences between the EU and the Union. According to the Explanatory report to the Draft Agreement, the Court would be allowed to find a violation without specific apportionment of responsibility between the EU and a member State:

> [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.[120] The co-respondent mechanism would hence signify acknowledgement that the traditional attribution rules and the principle of independent responsibility are ill-suited in respect of the legal intertwining between the EU and its Member States.

There remain thresholds nonetheless for bringing multiple responsible parties before the Court. Apart from the obvious facts that the ECtHR's supervision is of regional character and, at least until the European Union has acceded, extends to

[120] Also see Jacqué (n 162) 1016.

States only, the Court's procedural rules as well at its approach to issues of admissibility and reparation remain organised around the classic idea of independent responsibility, ie the notion that each State is responsible for its own internationally wrongful conduct, also in situations of collaborative conduct.[121] It follows that in respect of each respondent State, all admissibility criteria must be fulfilled, even though some forms of collaborative conduct raise difficulties in that respect. Thus, the Court has often (but not always) shown restraint in accepting that an individual victim may be within the 'jurisdiction' of more than one State in the meaning of article 1 of the Convention; requires that a person is directly affected by an act of each contributing State (victim requirement); and distributes reparation obligations congruent to the independent wrongful conduct of each State. If one wishes therefore to characterise the ECtHR's procedural as well as substantive approach to co-responsible parties, it might be better to speak of its endorsement of cumulative responsibilities rather than shared or joint responsibility.

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[121] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN GAOR Supplement No 10 (A/56/10) chapter IV.E.1 (hereafter Articles on State Responsibility), p 64.