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International Responsibility and Attribution of Conduct: An Analysis of Case Law on Human Rights and Humanitarian Law

DISSERTATION

to obtain the degree of Doctor at the
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on the authority of the Rector Magnificus,
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in accordance with the decision of the Board of Deans,
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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACionHPR	African Commission on Human and Peoples' Rights
AfCLR	African Court Law Report
AHRLR	African Human Rights Law Reports
AJIL	American Journal of International Law
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CUP	Cambridge University Press
EAC	East African Community
EACJ	East African Court of Justice
EACLR	East African Court of Justice Law Report
ECCJ	Community Court of Justice of the Economic Community of West African States
ECHR	European Convention on Human Rights (formally: Convention for the Protection of Human Rights and Fundamental Freedoms)
ECionHR	European Commission of Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
GC	Grand Chamber of the European Court of Human Rights
IAC	International armed conflict
IACionHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
NIAC	Non-international armed conflict
NTC	National Transitional Council
OAG	Organized armed group
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
REC	Regional Economic Community
UN	United Nations
UNGA	United Nations General Assembly
YB ILC	Yearbook of the International Law Commission

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Charter of the United Nations (adopted 26 June 1945, entry in force 24 October 1945) USTS 993. (**UN Charter**)

Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entry in force 26 June 1987) 1465 UNTS 85. (**CAT**)

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Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry in force 3 September 1953) 213 UNTS 221, as amended by Protocol 14 (adopted 13 May 2004, entry in force 1 June 2010) CETS 194. (**ECHR**)

Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entry in force 20 April 2006) 2368 UNTS 3.

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry in force 3 September 1981) 1249 UNTS 13. (**CEDAW**)

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entry in force 18 March 2007) 2440 UNTS 311.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entry in force 3 May 2008) 2515 UNTS 3. (**CRPD**)

Convention on the Rights of the Child (adopted 20 November 1989, entry in force 2 September 1990) 1577 UNTS 3. (**CRC**)

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International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entry in force 23 December 2010) 2716 UNTS 3. (**CPED**)

International Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entry in force 4 January 1969) 660 UNTS 195. (**ICERD**)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entry in force 1 July 2003) 2220 UNTS 3. (**ICMW**)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entry in force 23 March 1976) 999 UNTS 171. (**ICCPR**)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry in force 3 January 1976) 993 UNTS 3. (**ICESCR**)

Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entry in force 26 December 1934) 165 LNTS 19.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entry in force 22 December 2000) 2131 UNTS 83.

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CHAPTER 1 INTRODUCTION

A. Introduction to the Topic

The law of State responsibility plays a fundamental role in seeking to achieve one of the principal objectives of international law, which is to balance and resolve conflicting interests between States and other subjects of international law.[1] As noted by the American scholar Frederick Sherwood Dunn in the first half of the previous century, the existence of international rules in this field helps maintaining economic and social order and it facilitates trade and international relations among sovereign political units of diverse strength and prestige.[2] The international community of States thus has a great interest in seeing that the interpretation and application of rules governing the responsibility of States is well understood and that States cannot escape responsibility for any wrongful acts they may commit.

Already in the 1950s, the United Nations (UN) General Assembly (UNGA) recognized the significance of a well-developed body of rules and principles governing State responsibility. In 1953, the UNGA adopted Resolution 799 (VIII), in which it considered that a codification of the law of State responsibility was 'desirable for the maintenance and development of peaceful relations between States'.[3] By the same Resolution, the UNGA requested the International Law Commission (ILC, or the Commission) to produce a draft laying down those very principles.[4] Nearly fifty years later, in 2001, the ILC completed its project by adopting the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA, or the Articles).[5]

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[1] See e.g. Arbitral Award, *British Claims in the Spanish Zone of Morocco (Spain v. United Kingdom)* (1925) 640: 'Il est acquis que tout droit a pour but d'assurer la coexistence d'intérêts dignes de protection légale. Cela est sans doute vrai aussi en ce qui concerne le droit international.'

[2] Dunn (1932) 3. For a more recent take on the facilitative and incentivizing function of responsibility, see Nollkaemper (2019) 767–69.

[3] UN Doc A/RES/799(VIII) (1953).

[4] The ILC is a subsidiary organ of the UNGA, created pursuant to UNGA Resolution 174 (II) of 21 November 1947, UN Doc A/RES/174(II) (1947). It consists of 34 individuals with recognized competence in international law and has as its mandate the codification and progressive development of international law; see Arts 1(1) and 2(1) ILC Statute, annexed to Resolution 174 (II) and subsequently amended. The authority and influence of the ILC in the field of international law is widely recognized, see e.g. Boutros-Ghali (1997) vii–viii ('substantial influence on the practice of States and of international organizations, national legislation and international rule-making'); Annan (2000) viii ('instrumental in fostering aspects of law which subtly but undeniably pervade many different areas of international life').

[5] ILC, *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77. In 2001, the UNGA took note of the ILC draft articles, included them in an annex to the resolution (deleting all references to "draft") and commended them to the attention of Governments; see UNGA Resolution 56/83 of 12 December 2001, UN Doc A/RES/56/83 (2001). The Assembly has had the item on its agenda triennially

The provisions of ARSIWA are widely regarded to be the most authoritative statement on the rules of State responsibility.[6] International courts and tribunals tend to consider them as largely representing a restatement of customary international law,[7] and the same can be said of States themselves.[8] Consequently, as James Crawford has observed on this point, States and non-State actors are 'increasingly relying on the Articles and commentaries, and international courts and tribunals are treating them as a source on questions of State responsibility'.[9]

The opening clause of ARSIWA provides that a State is responsible when it commits an internationally wrongful act.[10] An internationally wrongful act, in turn, is defined as conduct that is 'attributable to the State under international law [and] constitutes a breach of an international obligation of the State'.[11] The Articles also set forth standards pursuant to which international law considers whether conduct is attributable to it so as to constitute an act of the State.[12] The general rule is that the notion of an act of the State is limited to conduct of its organs or other persons and entities exercising governmental authority.[13] The corollary of this rule is that the conduct of non-State actors is not considered an act of the State. That said, ARSIWA does envisage certain situations in which in light of a specific factual relationship

since 2004; see UN Doc A/RES/59/35 (2004); A/RES/62/61 (2007); A/RES/65/19 (2010); A/RES/68/104 (2013); A/RES/71/133 (2016); A/RES/74/180 (2019).

[6] See e.g. Iran–US Claims Tribunal, *Rankin v. Iran* (1987) para 18, considering the draft articles as provisionally adopted by the ILC in 1980 to constitute 'the most recent and authoritative statement of current international law in this area'. With respect to the Articles as finally adopted in 2001, see similarly ICSID, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (2008) para 773; European Court of Human Rights (ECtHR), *Kotov v. Russia* (2012) para 30; ECtHR, *Samsonov v. Russia* (2014) para 45; Permanent Court of Arbitration (PCA), *Hulley Enterprises Limited (Cyprus) v. Russia* (2014) para 113.

[7] See UNGA, *Report of the Secretary-General, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies*, UN Doc A/62/62 and Add. 1 (2007); A/65/76 (2010); A/68/72 (2013); A/71/80 (2016); A/74/83 (2019).

[8] A question which divides States, however, is whether or not the text of ARSIWA should be subjected to negotiation and adoption in the form of a treaty; see UNGA, *Report of the Secretary-General, Responsibility of States for internationally wrongful acts: Comments and information received from Governments*, UN Doc A/62/63 and Add.1 (2007); A/65/69 and Add.1 (2010); A/68/69 and Add.1 (2013); A/71/79 (2016); A/74/156 (2019). Paradoxically, ARSIWA may have more influence in its current form than as a (potentially watered-down) treaty, see Caron (2002); Crawford and Olleson (2005); Mik (2019). For a plea in favour of a treaty on State responsibility, see Pacht (2014).

[9] Crawford (2006) para 65.

[10] Art 1 ARSIWA. The text of the Articles and commentary is conveniently reproduced in Crawford (2002b) 74–314. In this thesis, all references to footnotes in the commentary refer to those contained in the latter publication (which uses a slightly different numbering of the footnotes than that appearing in the 2001 Yearbook of the ILC).

[11] Art 2 ARSIWA. For an analysis of the development and drafting history of Arts 1 and 2 ARSIWA, see Chapter 2.

[12] The standards of attribution of conduct are laid down in Arts 4–11 ARSIWA. This thesis follows the terminology of the ILC and uses the expressions "act of the State" and "conduct attributable to the State" interchangeably.

[13] See Arts 4–7 ARSIWA.

between the State and the non-State actor acting on its behalf, conduct by a private person or entity can nevertheless be regarded as an act of the State.[14]

The legal operation of attributing conduct to a State is indispensable for establishing its responsibility. As aptly noted by Christine Chinkin, State responsibility is a legal construct that allocates the consequences of internationally wrongful acts 'to the artificial entity of the State,' with the doctrine of attribution providing 'the human link' between the conduct and the State.[15] States are abstract entities and as such they lack the characteristics of human beings. Accordingly, they can only act 'by and through their agents and representatives'.[16] The rules of attribution determine whether conduct can be imputed to the State, to the effect that the conduct can be seen as its own conduct for the purpose of determining whether it has committed an internationally wrongful act leading to its international responsibility.[17] Thus, attribution rules connect conduct in the physical world to the State as an international legal person that is subject to rights and obligations under international law. The fact that conduct is considered as an act of the State, however, is not enough to speak of an internationally wrongful act committed by it. In order for the State to be responsible, it is necessary that the act of the State is not in conformity with what is required by an international obligation incumbent upon it.[18]

For a long time, international law was solely concerned with the relations between States.[19] Only States could possess rights and duties, and consequently only States could claim the vindication of their rights or be the addressee of such claims in international legal proceedings. In this traditional, horizontal system of international law, where actors other than States do not enjoy any rights and obligations, international responsibility was essentially limited to (and thus coterminous with) State responsibility.[20] However, this is no longer the case. Especially since the end of World War II and the creation of the UN, international law has developed in such a way as to account for a variety of actors other than

[14] Art 8 ARSIWA, commentary para 1. The standards governing the attribution of private conduct to a State are laid down in Arts 8–11 ARSIWA.

[15] Chinkin (1999) 395. See also ILC, *Summary record of the 1080th meeting*, UN Doc A/CN.4/SR.1080 (1970) para 54 (Rosenne, observing that the concept of attribution refers to 'the process through which a juridical person — the State or other subject of international law — became answerable according to international law for the act of an individual').

[16] Permanent Court of International Justice (PCIJ), *Settlers of German Origin in the Territory Ceded by Germany to Poland (Advisory Opinion)* (1923) 22. See also ECtHR, *Jones and Others v. United Kingdom* (2014) para 202, noting that 'an act cannot be carried out by a State itself but only by individuals acting on the State's behalf'.

[17] See Part One, Chapter II ARSIWA, commentary paras 1 and 4.

[18] See Art 2 jo. 12 ARSIWA.

[19] See e.g. Oppenheim (1912) 19: 'States solely and exclusively are subjects of international law'. For a discussion of the traditional function of international law as a law of co-existence and its modern development into a law of co-operation, see generally Friedmann (1964).

[20] Crawford (2010a) 24, describing the traditional notion of international responsibility as 'quintessentially an inter-State issue'.

States.[21] There has been an emergence of additional subjects of international law (for example, international organizations, individuals, multinational corporations, organized armed groups) who enjoy at least for the functional purpose of certain treaties some degree of international legal personality that is derived from that enjoyed by States themselves. Thus, in modern international law, non-State actors have a measure of international legal personality in the form of rights and obligations, with established international institutions and legal procedures to enable the settlement of disputes pertaining to these rights and obligations.[22]

The decrease in State-centeredness and the emergence of additional actors with international legal personality is a welcome development, as it testifies to the importance of accommodating the various interests at stake. However, a drawback of this differentiation is the consequential fragmentation of international law in terms of substance, procedures and institutions.[23] Indeed, the international legal landscape 'inhabits a much more complicated world'[24] than the one that existed when the ILC commenced its State responsibility project in the 1950s.

The modern notion of international law as conferring rights and imposing obligations on States as well as non-State actors inevitably influences how responsibility and legal personality should be perceived.[25] While the ILC has shown an acute awareness of the transformation of international law and its potential implications for the project,[26] it is contested whether ARSIWA takes these

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[21] See e.g. Pellet (2010a) 6, explaining that modern international responsibility is no longer reserved to States only, as it has also become 'an attribution of the international legal personality of other subjects of international law'. See also UNGA, *Memorandum of the Secretary-General: Survey of international law in relation to the work of codification of the International Law Commission – Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission*, UN Doc A/CN.4/1/Rev.1 (1949) para 27: 'Practice has abandoned the doctrine that States are the exclusive subjects of international rights and duties.'

[22] See UNGA, *Memorandum of the Secretary-General*, *supra* note 21, referring to the internationally endowed 'procedural capacity of the individual'.

[23] See e.g. Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly (26 October 2000), available at https://www.icj-cij.org/public/files/press-releases/9/2999.pdf, commenting on the problems caused by fragmentation, the proliferation of international courts, overlapping jurisdictions and conflicting case law.

[24] Brown-Weiss (2002) 798. See also *ibid*, 799, arguing that the Commission's 'almost exclusive concern with states may have been appropriate at the beginning of its work [but] it does not reflect the international system of the twenty-first century'.

[25] See e.g. Nollkaemper (2019) 762, noting that changes in the international legal system 'that move the dominant interstate system to the background inevitably affect the role of international responsibility'. Chapter 3 of this thesis discusses the capacity of States to incur responsibility for violations of human rights law, as well as the capacity of individuals to be criminally responsible for war crimes in international armed conflicts (IACs), and further analyses whether and to what extent the provisions of ARSIWA apply to such disputes or procedures.

[26] See e.g. ILC, *First report on international responsibility, by Francisco V. García Amador, Special Rapporteur*, UN Doc A/CN.4/96 (1956) para 10, noting that 'it is necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law [and] bring the "principles governing State responsibility" into line with international law at its present stage of development.'

developments sufficiently into account. Legal commentators differ on the question of whether the provisions of ARSIWA adequately recognize the specialization and fragmentation in various fields of substantive international law.[27]

Accordingly, given the traditionally inter-State nature of international responsibility it might be questioned whether the provisions of ARSIWA are at all relevant in disputes involving non-State actors as rights-holders or duty-bearers. And, if they are deemed relevant and *prima facie* applicable, are the provisions of ARSIWA not partly or completely outdated in light of modern developments in specialized fields of law? After all, particular subject-matter areas of international regulation might impose *lex specialis* rules that are monitored and enforced by specialized courts or tribunals operating within their own particular procedural, institutional and substantive environment.[28] These special rules might be different from those found in the customary international law of State responsibility.[29] To take a well-known example to which this thesis will return in more detail,[30] in the *Tadić* judgment the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) pronounced a standard of attribution of *overall* control with respect to the conduct of individuals making up an organized and hierarchically structured group.[31] This standard deviates significantly from the more-demanding standard of *effective* control as set forth in international customary law and reflected in Article 8 ARSIWA.[32]

At this juncture, it might be useful to introduce a notion that will occur in various parts of this thesis. The ILC regards the law of State responsibility as a framework of so-called "secondary rules" that purportedly do not address or regulate the content, interpretation or application of "primary" (substantive) rules of international law.[33] The secondary rules of State responsibility comprise a general

[27] See e.g. Bodansky and Crook (2002) 774 (describing the ARSIWA as 'a bit anachronistic'); Brown Weiss (2002) 816 ('out-of-date at their inception'). For the opposites view, see e.g. Rosenstock (2002) 797 ('solid foundation for future development of the law in the light of changing circumstances').

[28] See Speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Sixth Committee of the General Assembly (30 October 2009), available at https://www.icj-cij.org/public/files/press-releases/4/15744.pdf (suggesting that the fragmentation of case law often arises from 'a difference in the identifiable objectives to be achieved by different courts, whose assigned tasks are quite varied, as is the legal methodology to be employed for achieving such objectives'); Seibert-Fohr (2016) 8; Alter et al (2013) 778.

[29] Cf Art 55 ARSIWA, which provides that the Articles do not apply where and to the extent rules on State responsibility are laid down in *lex specialis*.

[30] See Chapter 6.

[31] See ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 122, holding that if an organized group is under the overall control of a State, 'it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State.'

[32] As the International Court of Justice (ICJ) held in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 401, the standard of attribution under Art 8 ARSIWA requires 'effective control' and this standard reflects 'the state of customary international law'.

[33] See YB ILC 1973-II, 169 para 40, noting that in dealing with the topic of responsibility, the ILC is undertaking to define rules that 'may be described as "secondary" inasmuch as they are concerned

framework to determine whether an internationally wrongful act has occurred, and to establish the consequences of international wrongfulness and how it can be implemented and invoked by other States. Primary rules of international law, on the other hand, are substantive rules, which if violated by a State give rise to an internationally wrongful act and consequently its responsibility. As put by the ILC, 'it is one thing to define a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what should be the consequences of the breach'.[34] Thus, in the view of the ILC, the principles governing the responsibility of States for internationally wrongful acts must be regarded as *wholly distinct* from the rules that place obligations on States, the violation of which may generate responsibility.[35]

By excluding substantive law from the scope of the project, the ILC was able to formulate a general matrix of rules, applicable across the whole board of international law to all types of international obligations, regardless of the source of the obligation or the subjects or interests it seeks to protect. By adopting this approach, the ILC avoided the need to undertake the arduous (and arguably impossible) task of codifying the whole corpus of substantive international law. However, this generalization of State responsibility law has certain drawbacks and instead introduced uncertainty at another level. Given the "secondary" nature of State responsibility law, its rules and principles will always operate in conjunction with (or supplementary to) a specific "primary" rule or set of rules of international law. Thus, the question of what constitutes wrongful conduct on the part of a State is in principle touched upon or regulated by two legal regimes, each from their own perspective: the secondary rules in the general law of State responsibility and the specific primary rule or regime of substantive international law of which the violation is alleged.

As already noted, specialized legal regimes (such as, as discussed in this thesis, human rights and international humanitarian law [IHL]) may include *lex specialis* rules that deviate from the general law of State responsibility as laid down in the ARSIWA, including *lex specialis* rules on the attribution of conduct.[36] However, the recognition in the ARSIWA of the possibility of *lex specialis* attribution rules begs the

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with determining the legal consequences of failure to fulfil obligations established by the "primary rules"'.

[34] *Ibid*, 170 para 41.

[35] See *ibid*, 169 para 40, noting that there is a 'strict distinction' between determining the rules which govern State responsibility and defining the rules which impose obligations on States, and that this distinction is deemed 'essential if the topic of international responsibility was to be placed in its proper perspective and viewed as a whole'.

[36] See Art 55 ARSIWA, commentary para 3, noting that a particular treaty regime might produce different results than would otherwise flow from the rules of attribution in Part One, Chapter II ARSIWA. Chapter 4 of this thesis analyses the question of whether human rights courts follow the standards of attribution in Arts 4–11 ARSIWA or whether they instead adopt a *lex specialis* approach that deviates from ARSIWA. Chapter 6 examines, *inter alia*, the standard of attribution in IHL.

question as to whether there are in fact such special rules.[37] By adopting a distinction between primary and secondary rules, the State responsibility project has skilfully avoided this question,[38] only for it to re-appear as an uncertainty in the scholarship and practice of particular branches of law, such as human rights law and IHL.

According to former President of the International Court of Justice (ICJ) Rosalyn Higgins, it is one of the great excitements of international law to discover 'how one legal concept bears on another apparently unrelated matter … to see how the jigsaw fits together, and how there is always a new interrelationship to be discovered'.[39] This thesis pays heed to this encouragement. Within human rights law and IHL, the primary/secondary distinction raises fundamental questions not only because of the possibility of *lex specialis* attribution rules, but also because of the related questions of applicable law and jurisdiction. Case law of human rights courts and of international criminal tribunals with jurisdiction over war crimes suggests that attribution rules from the law of State responsibility may actually serve a purpose that is related yet conceptually different from the determination of an internationally wrongful act *stricto sensu*.

By way of example, the European Court of Human Rights (ECtHR) has resorted to attribution rules and principles from the law of State responsibility to determine whether by impeding access to property in northern Cyprus the Respondent State (Turkey) committed an internationally wrongful act. Yet, in the very same case the ECtHR also employed such rules to determine whether the territory in question was controlled by Turkey and thus subject to the provisions of the European Convention on Human Rights (ECHR) as applicable human rights law governing the situation, with the effect that the Court had jurisdiction to examine the case.[40] Similarly, in the *Tadić* judgment already referred to above, the ICTY Appeals Chamber applied a standard of attribution from the law of State responsibility for the purpose of classifying the armed conflict and thereby determining the applicable law so as to enable the Tribunal to exercise criminal jurisdiction over the accused.[41] Admittedly, as noted above as well, the ICTY Appeals Chamber adopted a test that deviated from the customary law of State responsibility

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[37] See e.g. Crawford (1999) 439: 'the extent or impact of the law of State responsibility depends on the content and development of primary rules'.
[38] See e.g. Bodansky and Crook (2002) 782, observing that the abstractly defined Arts 1 and 2 ARSIWA are 'essentially tautological' as they push 'key substantive issues' into the notion of what constitutes an internationally wrongful act.
[39] Higgins (1995) vi.
[40] See ECtHR, *Loizidou v. Turkey (Merits)* (1996) para 52: '[I]n conformity with the *relevant principles of international law governing State responsibility* … the responsibility of a Contracting Party could also arise when as a consequence of military action … it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be *exercised directly*, through its armed forces, *or through a subordinate local administration*' (emphasis added).
[41] ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 104, explaining that it was 'establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials' in order to determine whether or not the armed conflict must be classified as international.

as laid down in Article 8 ARSIWA. It was, in other words, a *lex specialis* test on attribution of conduct. However, the purpose of mentioning the case in this context is not so much that the ICTY Appeals Chamber used a different *standard* of attribution. Rather, the point here is that the Appeals Chamber resorted to an attribution analysis for an altogether different *purpose*, namely to characterize the armed conflict as an international one, to determine the applicable law, and consequently to exercise jurisdiction over the conduct in question.

As will be shown in more detail in this thesis, case law in the areas of human rights law and IHL demonstrates that attribution rules are frequently used to define the applicable law and, as a related matter, whether a court or tribunal consequently has jurisdiction to entertain claims against the State.[42] The function of attribution rules from the law of State responsibility in relation to the applicable law and the existence and exercise of a court's jurisdiction then would suggest that those rules have a normative and procedural dimension, which goes beyond the narrow purpose of international wrongfulness. After all, in legal proceedings, questions of applicable law and the existence of jurisdiction are preliminary to a determination that an internationally wrongful act (as for States) or war crime (as for individuals) has occurred. Accordingly, this thesis will explore not only the role of attribution rules in establishing State responsibility *stricto sensu*, but also the relationship between attribution of conduct and other legal concepts, such as the applicability of primary rules of human rights law and IHL, and the ability for a court or tribunal to exercise jurisdiction over the matter. In doing so, this thesis thus examines how the jigsaw of State responsibility, international legal personality and attribution of conduct fits together within the context of human rights law and IHL.

B. Objectives and Relevance

This thesis examines the standard and function of attribution rules in establishing State responsibility for human rights violations, as well as individual criminal accountability for war crimes. From the outset, it must be noted that there are some fundamental differences between human rights law and IHL. First of all, IHL is the law governing armed conflicts, whereas human rights law applies at all times, albeit that in times of armed conflict international IHL is seen as either *lex specialis* to human rights law,[43] or as the normative framework in light of which the latter must

[42] The function of attribution of conduct in relation to applicable law and jurisdiction is examined in Chapters 5 (with respect to human rights courts) and 6 (with respect to international criminal tribunals as far as war crimes in international armed conflicts [IACs] are concerned).

[43] See ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) para 25, where the Court held that the test of what is an arbitrary deprivation of the human right to life 'falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict'. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) para 106, finding that the Court must consider 'human rights law and, as *lex specialis*, international humanitarian law'.

be interpreted.[44] Moreover, while human rights treaties only bind States parties,[45] the general consensus is that IHL binds States and all individuals participant in armed conflicts alike.[46] Finally, in international armed conflicts (IACs) that take place between States the application of IHL is not limited to a State's own territory,[47] whereas human rights law applies *prima facie* within a State's own territory and only exceptionally abroad (i.e. the so-called extraterritorial application).

However, despite these differences there are important similarities between human rights law and IHL, which makes it appropriate to engage with both legal regimes in this thesis. Simply put, if a human rights treaty or IHL treaty does not apply to the conduct that is alleged to constitute a violation, there will be no breach of that treaty in the first place, and thus no international responsibility on the part of the State or the individual perpetrator. In human rights law, the question of application depends on whether the impugned conduct takes place within a State's jurisdiction.[48] In IHL, the question of application depends on whether the impugned conduct occurs in an IAC or a non-international armed conflict (NIAC).[49] Thus, the notions of State jurisdiction (in human rights law) and armed conflict (in IHL) are substantive thresholds that need to be met in order for the relevant rules to be applicable to the situation that gives rise to an alleged violation. Consequently, a human rights court can only exercise its jurisdiction over conduct that takes place subject to a State's jurisdiction. And, by the same token, a criminal tribunal will only be able to exercise its jurisdiction over violations of IHL committed by individuals

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[44] See e.g. Todeschini (2018), 374 arguing that the ICJ use the principle of systemic integration to interpret human rights in times of armed conflict, albeit under the guise of *lex specialis*. This position certainly appears correct if one looks at the General Comments of the Human Rights Committee; see e.g. *General Comment No 31 (Nature of the general legal obligation)*, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004) para 11 ('in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights'); *General Comment No 36 (Right to life)*, UN Doc CCPR/C/GC/36 (2018) para 64 ('While rules of international humanitarian law may be relevant for the interpretation and application of article 6 [International Covenant on Civil and Political Rights, ICCPR] when the situation calls for their application, both spheres of law are complementary, not mutually exclusive).

[45] The European Union is party to the Convention on the Rights of Persons with Disabilities (CRPD), but this is a rather exceptional case of an international organization that is currently party to a human rights treaty.

[46] One might even say that every individual is in a position to violate IHL as long as there is a sufficiently close nexus to the armed conflict.

[47] ICTY, *Prosecutor v. Tadić (Jurisdiction Decision)* (1995) paras 67–70.

[48] See e.g. Art 1 ECHR, which provides that the rights as defined in Arts 2–18 ECHR must be secured 'to everyone within [a State's] jurisdiction'. See also Art 1 American Convention on Human Rights (ACHR) ('States Parties … undertake to respect … to all persons subject to their jurisdiction'); Art 2 ICCPR ('Each State Party undertakes to respect … to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant').

[49] IACs are subject to the universally ratified four Geneva Conventions (Geneva Convention I–IV) and, should the State concerned have ratified it, the First Additional Protocol to the Geneva Conventions (Additional Protocol I). NIACs, on the other hand, are subject to a more limited set of rules, to be found in common Art 3 Geneva Convention I–IV and, if ratified by the State in question and further conditions are fulfilled, the Second Protocol Additional to the Geneva Conventions (Additional Protocol II).

when such conduct takes place in the context of an armed conflict. As will be shown in more detail in this thesis, the notion of attribution of conduct plays an instrumental role in deciding whether (and *through whom*) a State brings a victim under its jurisdiction for the purposes of human rights law, and whether (and *through whom*) a State is engaged in an IAC against another State.

An examination of the standard and function of attribution rules in human rights law and IHL has become all the more important as a result of an erosion of the public-private distinction.[50] The attribution rules from ARSIWA attach conduct to the State as an actor with legal personality and doing so, they reflect a balance between different legal and political views about delimiting the public domain.[51] On one hand, a State cannot be said to be the actor of all that happens in its territory or subject to its jurisdiction.[52] It is, in principle, only responsible for the conduct of its organs as defined by the laws of its internal organization. On the other, a consideration of the internal laws of a State cannot be fully determinative in what constitutes an act of the State, as this would allow a State to escape responsibility 'by a mere process of internal subdivision'.[53] The effort to strike a balance between these competing notions of limited and effective responsibility is reflected in the observation by the ICJ in *Bosnian Genocide*. Here the Court held that one must look beyond legal status alone 'in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility'.[54] A State is thus not only responsible for its *de jure* organs but also its *de facto* organs or other entities exercising governmental authority. Additionally, there may be an act of the State when the conduct is that of private parties if there are special circumstances warranting attribution to it of such conduct.

States increasingly resort to private parties for the carrying out of functions traditionally exercised by States.[55] Examples of such activities are the (covert or overt) use of force, policing and detention. Such privatization can be done for various intended or expected motives, for example economically (the marketplace is the most effective and efficient method of allocation of resources), politically (evasion of democratic control; reducing the size of government), or ideologically (sense of

[50] Bodansky and Crook (2002) 782–84.
[51] Condorelli and Kress (2010) 226. For a critical perspective, see further Chinkin (1999).
[52] ICJ, *Corfu Channel (United Kingdom v. Albania)* (1949) 18: '[I]t cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.'
[53] Part One, Chapter II ARSIWA, commentary para 7.
[54] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 392.
[55] See e.g. Schachter (1997); Wolfrum (2005) 423; Nollkaemper (2019) 765. On the rise of non-State actors and their position in international law, see further Noortmann et al (2015); International Law Association (Committee on Non-State Actors, 2005–2016), *Final Report* (Johannesburg Conference, 2016).

psychological ownership, involvement, and incentives to contribute to society). However, a possible effect — intended or not — of privatization is the possibility of the evasion of legal responsibility. This is particularly problematic, given that despite the emergence of new subjects of international law, most of its rules are still addressed to States. As a matter of principle, in the case *Costello-Roberts v. United Kingdom* the ECtHR held that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[56] But the process by which a State answers for the conduct of private parties and its effect on the applicability of human rights law and IHL remains rather nebulous and hitherto underexplored. The lack of clarity on the effect of attribution rules on these primary rules of international law contributes to a situation in which it is unclear if, and under what circumstance, a State is responsible for the actions of non-State actors. Any uncertainty in this regard may be an incentive for States to resort to non-State actors at the expense of legal protection for those who are adversely affected by such private conduct.

Specifically within the context of human rights it is pertinent to point out the availability of legal dispute settlement procedures that can be invoked against States. Human rights treaties are only binding on States parties, and only those States parties can appear as a respondent in human rights courts or (quasi-judicial) human rights treaty bodies charged with monitoring compliance. As will be demonstrated in this thesis, rules on attribution of conduct are relevant at two levels of judicial decision-making: as a preliminary question (this relates to the question of whether the court, tribunal or body has jurisdiction to entertain the complaint of the applicant), and as a substantive question (whether the State has committed a violation of international law through conduct attributed to it). Examining how attribution rules relate to jurisdiction and substantive law is expected to contribute to a better understanding of the availability of legal avenues of redress for victims of human rights violations. Invoking State responsibility as opposed to the responsibility under private law of the actor who acts on behalf of the State may additionally be preferred from the point of view of the availability of State resources to make reparation, or because of the institutional nature of how judgments and awards can be enforced at the international or national level.

With respect to IHL, the importance of the research in this thesis lies predominantly in the area of clarifying the legal regime under which an accused can be held responsible. The statutes of criminal tribunals distinguish between war crimes committed within the context of an IAC, and those committed within the context of NIACs.[57] Consequently, whether or not an alleged perpetrator can be found

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[56] ECtHR, *Costello Roberts v. United Kingdom* (1993) para 27.

[57] Compare, for instance, the list of war crimes in IACs in Art 8(2)(a) and (b) Rome Statute of the International Criminal Court (ICC Statute) with the (shorter) list of war crimes in NIACs in Art 8(2)(c) and (e). Similarly, Art 2 Statute of the ICTY, annexed to UN Security Council Resolution 827 of 25 May 1993, UN Doc S/RES/827 (1993) (as amended), which gives the Tribunal jurisdiction over 'grave breaches' which by definition can only occur within the context of IACs. Violations the law pertaining to NIACs can only be prosecuted under Article 3 Statute of the ICTY.

guilty of a particular crime depends first and foremost on the classification of armed conflict in which the violation took place.

C. State of the Art

There is no shortage of academic contributions on the general law of State responsibility.[58] The same can be said of scholarly writing dealing in general terms with the various standards of attribution of conduct as laid down in ARSIWA.[59] However, the more specific question of attribution of conduct within a particular specialized regime of international law has so far received attention mostly from scholars in the domain of international investment law and international trade law.[60]

In 2017, the UN Secretary-General issued a statistical report,[61] documenting 163 cases with a total of 392 references to specific Articles or parts of ARSIWA in international judicial decisions.[62] More than 70% of these references come from either arbitral tribunals such as those established and/or administered by the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) (264 references) or panel and Appellate Body reports of the World Trade Organization (22 references).[63] Thus, the scholarly attention that is paid to the reception of ARSIWA in international investment and trade law is very understandable. From a quantitative point of view, courts and tribunals in these fields have proved to be very enthusiastic consumers of the provisions of ARSIWA,

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[58] For some of the standard works, see De Visscher (1924); Eagleton (1928); Brownlie (1983); Prevost (2002); Fitzmaurice and Sarooshi (2004); Ragazzi (2005); Crawford et al (2010); Crawford (2013); Proulx (2016), Besson (2017); Kolb (2017); Kanehara (2019); Creutz (2020).

[59] See e.g. Starke (1938); Condorelli (1984), Condorelli and Kress (2010), Cahin (2010a), de Frouville (2010), Momtaz (2010), Finck (2011).

[60] As for attribution of conduct in international investment law, see e.g. Hobér (2008); Silva Romero (2008); Crawford (2010b); Feit (2010); Knahr (2011); Schicho (2011); Feit (2012); Lee (2015); Badia (2017); Cortesi (2017); Kovács (2018); De Stefano (2020). As for attribution of conduct in international trade law, see e.g. Villalpando (2002); Ngangjoh Hodu (2007); Cook (2015) 31–48; Vidigal (2017).

[61] UNGA, *Report of the Secretary-General, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies – Addendum*, UN Doc A/71/80/Add.1 (2017). The statistical report covers a period from the 1 January 2001 to 31 January 2016.

[62] *Ibid*, 7–10. The report is largely based on the UN Secretary-General's triennial compilation of decisions (see *supra*, note 7). Like the triennial reports, the 2017 statistical report is not exhaustive, but it can be taken to present a fair representation of the relative distribution amongst the various judicial bodies.

[63] *Ibid*. The remaining references are from the ECtHR (47 references); ICJ (18); Inter-American Court of Human Rights (IACtHR) (12); International Tribunal for the Law of the Sea (ITLOS) (9); African Court on Human and Peoples' Rights (ACtHPR), United Nations Claims Commission (both 4); Extraordinary Chambers in the Courts of Cambodia (3); Court of Justice of the European Union, Community Court of Justice of the Economic Community of West African States (ECCJ), ICTY (each 2); Special Tribunal for Lebanon, Human Rights Committee (both 1); African Commission on Human and Peoples' Rights (ACionHPR) (1).

especially its rules on the attribution of conduct.[64] This thesis will not venture into these domains, given the rather overwhelming amount of literature that has already been produced on matters of attribution within international investment and trade law.

There has also been a noticeable reception of attribution rules in the case law of human rights courts and human rights treaty bodies.[65] However, despite the body of case law that has accumulated on this topic, the question of the standard and function of attribution in the case law of human rights courts has so far not been explored sufficiently in the academic literature. A book published in 2009 and edited by Menno T. Kamminga and Martin Scheinin appears to be on point as it explores the impact of international human rights law on general international law.[66] It also includes a chapter by Robert McCorquodale that specifically addresses human rights law and State responsibility law.[67] However, this chapter examines whether human rights law has exerted any impact on the general law of State responsibility,[68] rather than the question of whether human rights law employs any *lex specialis* tests of attribution. And, to the extent that the author seeks to address the latter question, it appears as if he does not adequately distinguish between — or outright conflates — control over non-State actors as perpetrators (i.e. the question of attribution) and control over territory (i.e. the question of belligerent occupation and/or extraterritorial application of human rights).[69] More precisely, McCorquodale appears to allude to the existence of a *lex specialis* attribution test but does so by way of examining the *function* of attribution of conduct in relation to the application of human rights law and IHL and without clearly distinguishing between these two legal questions. As this thesis will demonstrate, issues of attribution and application of primary rules of law are conceptually distinct and governed by separate legal regimes, even if there is a certain relationship between these two concepts. Thus, a certain level of control over territory (triggering the application of human rights or

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[64] See *ibid*. Out of the total number of references, 120 concern the individual attribution rules in Arts 4–11 and/or Part One, Chapter II ARSIWA as a whole. About two-thirds (79) of the references in this sub-set come from arbitral tribunals. The remaining ones are from the ECtHR (22); World Trade Organization (7); ICJ, IACtHR (both 3); ITLOS (2); ACtHPR, Court of Justice of the European Union, Human Rights Committee, ICTY (each 1).

[65] The data set of 120 references to ARSIWA attribution rules comprises 27 references from the ECtHR, IACtHR, ACtHPR and Human Rights Committee; see *ibid*.

[66] See Kamminga and Scheinin (2009).

[67] See McCorquodale (2009).

[68] On this point, the author concludes that '[o]verall international human rights law has had a minimal impact on the general international law of State responsibility in regard to attribution to the State'; see *ibid*, 245.

[69] See *ibid*, where the author (mistakenly) relies on the ICJ judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) (in particular paras 179–80 and 219–220), to argue that '[h]uman rights treaty monitoring bodies [may] require a lower level of control by a State over a non-State actor than that found in general international law [as] international human rights law applies to a State's conduct extraterritorially even when the level of control is less than that of an occupying power'.

IHL) does not *ipso facto* say anything about the level of control exercised by a State over a non-State actor for purposes of attribution.

The *Oxford Handbook of International Human Rights Law* of 2013, edited by Dinah Shelton,[70] contains a Chapter written by Malgosia Fitzmaurice on the topic of interpretation of human rights treaties.[71] In this Chapter, the author observes that the question of whether human rights law constitutes or involves a form of *lex specialis* is 'particularly divisive'.[72] While the Chapter does engage in an analysis of whether human rights law could be considered as a *lex specialis* or even a whole self-contained regime,[73] it does not confront the specific question as to whether human rights law knows any *lex specialis* rules on the attribution of conduct. Unfortunately, this edited volume does not have a separate chapter on State responsibility for human rights violations. As explained in the introduction of the *Handbook*, a chapter on State responsibility for human rights violations was originally planned (which in itself already illustrates the pertinence of this topic) but the intended author did not deliver a text before the deadline of the manuscript.[74]

A recently published book edited by Anne van Aaken and Iulia Motoc deals with the relationship between the ECHR and general international law.[75] It has several chapters that are of interest to this thesis,[76] but the relevant chapters are for the most part dedicated to the function of the attribution of conduct within the specific context of the intra- or extra-territorial jurisdiction under Article 1 ECHR. There is little attention paid to the various standards of attribution in Articles 4 to 11 ARSIWA and to the question of whether these standards are followed or deviated from in the case law of the ECtHR. In short, this volume analyses some of the symptoms and their bearing on the applicability of the Convention, but without addressing the underlying root causes such as the distinction between primary and secondary rules that runs like a thread through this thesis. Moreover, as the title already suggests, the book is Euro-centric by focusing exclusively on the ECHR and the case law of the ECtHR. Contrary to this thesis, it does not engage with the human rights case law of other courts established at the regional level (i.e. the Inter-American Court of Human Rights [IACtHR] and the African Court on Human and Peoples' Rights [ACtHPR]) or at the sub-regional level (i.e. the East African Court of Justice [EACJ] and the Community Court of Justice of the Economic Community of West African States [ECCJ]). Nor does this volume engage with IHL or the output of the various quasi-judicial human rights treaty bodies that will be included in this thesis as well.

[70] Shelton (2013).
[71] Fitzmaurice (2013).
[72] *Ibid*, 739.
[73] *Ibid*, 740–44.
[74] Shelton (2013) 3.
[75] See Van Aaken and Motoc (2018).
[76] *Ibid*, see the chapters by Milanović, Karakaş and Bakirci, Yudkivska, Crawford and Keene, and Motoc and Vasel.

Several publications dealing with attribution of conduct in human rights law and in IHL have been authored by Marko Milanović.[77] However, he has approached questions of attribution of conduct in these fields of law in rather contradictory ways. In his works on IHL, Milanović argues that maintaining as much as possible the distinction between primary and secondary rules is necessary to 'preserve a semblance of methodological sanctity'.[78] In other words, with respect to IHL, he categorically rejects the idea that a test of attribution (secondary rules) can determine the content or application of international law (primary rules).[79] Yet, this is *precisely* what he advocates (rightly, in the present author's opinion) in his monograph on extraterritorial application of human rights.[80] Indeed, here the author suggests that the assessment of whether (and through whom) a State exercises jurisdiction giving rise to the application of the ECHR falls to be determined by attribution rules from the law of State responsibility.[81] This thesis seeks to rebut his arguments on IHL and classification of armed conflict and develop further his line of argumentation in the field of human rights law, while paying adequate attention to the possibility of *lex specialis* rules on attribution of conduct and the arguably less than strict separation between primary and secondary rules of international law.

Thus, so far little effort has been made to undertake a broad, case law-based assessment of both the standard and function of attribution rules in (or in relation to) human rights law and IHL. Indeed, at present, there exists no contemporary academic study that looks into the interpretation and application of attribution rules from the law of State responsibility across the board of international courts with a mandate to adjudicate violations of human rights law and IHL.[82] This thesis intends to fill this gap by providing original and up-to-date research, taking stock of the considerable body of case law that has been generated so far.

D. Principal Argument and Research Questions

[77] See in particular Milanović (2006); Milanović (2011); Milanović (2015); Milanović (2018).
[78] Milanović (2006) 561.
[79] See also Milanović (2015) 36 para 31 (claiming that 'it is conceptually inappropriate' to use rules belonging to State responsibility law for the purposes of determining the scope and application of IHL); Milanović (2011) 43 (in IHL 'the same test cannot logically be used to establish both what obligations a State has [i.e. the applicable law, RJ] and whether a breach of that obligation is attributable to it').
[80] Milanović (2011).
[81] *Ibid*, 19. See also *ibid*, 51, explaining that the notion of State jurisdiction is a 'threshold criterion for the existence of [human rights treaty] obligations' and that the question of attribution of conduct 'logically' comes first, since a State can only exercise extraterritorial jurisdiction 'through its own agents, i.e. persons whose acts are attributable to it'.
[82] For an older publication in French on the topic of attribution and human rights law, see Dipla (1994). Another relevant publication would have been Simon Olleson's monograph with the working title *State Responsibility before International and Domestic Courts: The Impact and Influence of the ILC Articles*, which Oxford University Press postponed several times and eventually abandoned altogether. For the preliminary draft, see Olleson (2008).

As already mentioned above, a reoccurring theme in this thesis is the distinction between primary rules of international law and secondary rules of State responsibility. Rather than taking it for granted, the conventional wisdom that there is a strict distinction between primary and secondary rules is something that will be scrutinized more closely. As an overarching theme, this thesis critically analyses whether the primary/secondary distinction holds true as far as attribution of conduct is concerned.

The principal argument put forward in this thesis is the following: Secondary rules on attribution of conduct as found in the law of State responsibility do not operate in isolation from, and are thus not completely autonomous in relation to, primary rules of international law. These rules identify the types of actors through whom the State may act, and as such they have a permeating effect on the content and application of primary rules. After all, once the legal process of attribution reveals that the State is considered in law as the true author of conduct, this may have implications with respect to the normative framework in which the lawfulness of such conduct has to be assessed and, consequently, the lawfulness of the conduct itself.

It will be thus argued that attribution rules exercise a certain normative pull by making primary rules (here: human rights law and IHL relating to IACs) applicable in the sense of providing rights and obligations to a legal subject in a *particular* situation?[83] Apart from the question of whether there has been an internationally wrongful act *stricto sensu*, rules on attribution of conduct serve a wider purpose. Such rules (whether found in customary international law or in *lex specialis* provisions) must be resorted to in order to establish whether a State has acted in a way that entails legal effects with respect to applicable law and consequently the jurisdiction of a human rights court or the jurisdiction of an international criminal tribunal with subject-matter competence over violations of IHL in IACs.

The principal argument as outlined here will be tested and validated by way of answering two main research questions. The first research question of this thesis relates to the *standard* of attribution of conduct. More specifically, this thesis analyses whether human rights courts on the one hand, and international criminal tribunals when dealing with IHL on the other, have followed the attribution rules in Articles 4 to 11 ARSIWA as a representation of customary international law or, rather, whether these courts and tribunals have adopted or recognized *lex specialis* rules to determine whether certain conduct constitutes an act of the State?

[83] Cf ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi)*, UN Doc A/CN.4/L.682 and Corr.1 (2006) para 46 fn 48. Here, the report of the Study Group makes a distinction between a rule that is *valid* in the sense of being part of the international legal order, and a rule that is *applicable* as a matter of producing international legal effects (e.g. rights and obligations) in a concrete situation.

The second research question concerns the *function* of attribution of conduct. To the extent that an international court or tribunal can exercise jurisdiction over violations of a certain set of applicable primary rules, the attribution rules may have a procedural dimension as well. The second research question is thus whether human rights courts and criminal tribunals apply attribution rules from the law of State responsibility to determine the applicable law and consequently enable the exercise of their judicial function.

E. Methodology and Approach

This thesis involves doctrinal research and primarily focuses on human rights law and IHL treaties, relevant case law, and the scholarly efforts by the ILC to codify the law of State responsibility as ultimately culminating in ARSIWA. A premise upon which this thesis builds is that the attribution rules in Articles 4 to 11 ARSIWA represent a codification of customary international law.[84] However, an important caveat must be added. The case law of international courts demonstrates that the interpretation and application of Articles 4 to 11 ARSIWA is subject to some fundamental divergences of opinion, even if generally speaking courts share the starting point that the attribution rules in ARSIWA represent customary international law.[85] This applies not only to the exact content and interpretation of each of these provisions (i.e. the *standard* of attribution of conduct) but also, more fundamentally, to their relevance with respect to applying and interpreting primary rules of international law (i.e. the *function* of attribution of conduct).

Case law by international courts and tribunals with subject-matter competence over human rights law and IHL provides a valuable data set to answer the research questions as outline above. This body of judgments and decisions provides insights as to whether the attribution rules from ARSIWA are indeed of general application, or whether in the estimation of these courts the rules of ARSIWA influence, interact with, or defer to solutions as found in a particular branch of international law. Accordingly, based on an extensive examination of judicial practice, this thesis employs an inductive method and explores the possibility to distil from the case law any common denominators on the attribution of conduct in human

[84] The ILC considers that a number of provisions in ARSIWA may constitute progressive development; see Art 41 ARSIWA, commentary para 3; Art 48 ARSIWA, commentary para 12. The rules of attribution as set forth in Arts 4–11 ARSIWA, however, are generally seen as a codification of customary international law; see the sources cited in *supra* notes 7 and 8.

[85] Cf ILC, *Draft conclusions on identification of customary international law, with commentaries*, UN Doc A/73/10 (2018) 122 para 66, Conclusion 1, commentary para 4, noting that 'while often the need is to identify both the existence and the content of a rule [of customary international law], in some cases it is accepted that the rule exists but its precise content is disputed'.

rights law and IHL. The latter will be outlined in the concluding Chapter of this thesis.[86]

E.1. The Work of the International Law Commission on the Topic of State Responsibility

The first main source of legal materials that will be examined in this thesis concerns the work of the ILC on the topic of State responsibility. An accurate understanding of the interpretation and value of ARSIWA as a product of codification and progressive development requires an examination of the working methods and procedures that guided the consideration of the topic.[87] It is thus worth to elaborate on this in some detail.

For each topic, the ILC appoints a Special Rapporteur who produces reports and draft articles that are subsequently presented to the plenary for discussion and guidance. After discussion, draft articles are referred to a Working Group or to the Drafting Committee and back to the plenary for examination and provisional adoption, following which the Special Rapporteur produces an article-by-article draft commentary. When the ILC adopts the text and commentary of the draft articles on first reading, they are sent to the UNGA and to Governments.[88] This procedure is repeated for the second reading, at the end of which the text and commentary are adopted in their final form. The second reading offers an opportunity for the ILC to refine the text and take into account written comments submitted by Governments and statements made in the Sixth (Legal) Committee of the UNGA where the annual reports of the ILC are discussed.

The whole process involves various stages and often takes years.[89] Because of the continuous process of adding, modifying, deleting, merging etc, the draft articles and commentary often undergo a number of substantive changes over time. There may not only be considerable differences between the texts adopted on first reading and those on second reading (or certain assumptions underlying the individual provisions, or the text as a whole) but also within the same reading, with substantive

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[86] See Chapter 7.

[87] See e.g. Caron (2002) 866. On the interpretation of the work of the ILC, see further Gaja (2015). The information in this Section on the background, mandate and working methods is largely taken from the ILC Statute (*supra* note 4) and the website of the ILC, available at http://legal.un.org/ilc. It may be added that it is onerous to draw an exact boundary between the exercises of codification and progressive development of international law. Consequently, the separation between the two procedures has gradually been abandoned; see Tomuschat (1995) 706; Jalloh (2019) 979. On the codification versus progressive development dichotomy in the legislative history of Art 13(1)(a) UN Charter (pursuant to which the ILC was created in 1947), see Pronto (2019).

[88] Art 16(j) and 21(2) ILC Statute, *supra* note 4.

[89] See e.g. Tomuschat (1995) 708, noting that law-making under the auspices of the ILC is 'extraordinarily protracted'.

changes made as a result of the discussions reflected in text of the article, the accompanying commentary, or both.

The provisions of ARSIWA are widely considered to be one of the most important achievements of the Commission.[90] It has even been argued that they have a certain degree of normative autonomy.[91] Formally speaking, the Articles represent the product of scholarly writing. They are material evidence of a source of law, or 'subsidiary means for the determination of rules of law' when put in terms of Article 38(1)(d) Statute of the International Court of Justice (ICJ Statute). Even though scholarly writing appears only scarcely in decisions and judgments of international courts and tribunals,[92] the work of the ILC in general and on this topic in particular occupies a privileged position when compared to other scholarly writing.[93] This is mostly due to the composition and working methods of the ILC,[94] as well as the 'quasi-imprimatur'[95] given to it as a result of the decision by the UNGA to include ARSIWA as an annex to a resolution. Other factors that explain the special position of ARSIWA are the importance of the topic and the authoritative quality of the text,[96] combined with the lack of equally or more authoritative restatements.[97] Thus, the work of the ILC on State responsibility is highly significant because it offers guidance for the

[90] See e.g. Simma (2000) 43 (characterizing the work on State responsibility as 'the most interesting, maybe the most important, advance in codification'); Šturma (2019) 1131; Wiessner and González (2019) 1154. But see Allot (1988), 2 (arguing that the ILC is 'a law processor, chopping up the ingredients of law into small pieces and blending them into a bland gruel,' and that its work on State responsibility 'affirms rather than constrains power'); Higgins (1995) 168 (advising the ILC that State responsibility 'is surely a topic of which it can be said that less is more').

[91] Mik (2019) 260.

[92] In PCIJ, *S.S. Lotus (France/Turkey)* (1927) 26, the Court declined to take a position on the question as to what value teachings of publicists may have from the point of view of establishing the existence of a rule of customary law.

[93] See Pellet and Müller (2019) para 341, noting that the reliance by the ICJ on the works of the ILC is a notable exception to the apparent disregard of the Court for the legal doctrine.

[94] As an unwritten rule, ILC members serve in an individual capacity but it is widely understood that they 'do not labor in a vacuum' and members are well-aware that 'the utility of their work requires acceptance by a broad community of States … without whom the Commission's work comes to little'; see Rosenstock (2002) 794. See also Morton (2019), pointing out that the process of nomination by UN member States and election in the UNGA 'virtually insures that the ILC member and her/his government will be in agreement in their jurisprudence' (at 1066–67) and that its final drafts stand a greater chance of becoming law because the ILC exercises 'careful concern over the acceptance of its documents by nation-States' (at 1073).

[95] Pronto (2008) 610. See also Wiessner and González (2019) 1165 (recognizing that the products of the ILC command a great influence in the international legal system, as they are 'closer to the pulse of State practice and *opinio juris*'); Pellet and Müller (2019) para 341 (praising the ILC for its interaction with States and the ability to mitigate idealism with the lack of legal creativity on the part of State representatives); Baylis (2019) 1014 (noting that the ILC's products 'possess the imprimatur of States' consideration, analysis, and input'); Šturma (2019) 1129 (describing the ILC as 'the codification organ that seems to be best placed to deal with general international law and to preserve the relative autonomy of international law').

[96] Gaja (2015) 11.

[97] See e.g. Caron (2002) 866, noting that 'when there is a "legal vacuum" of authority relevant to an issue, courts and arbitral panels will turn to whatever is available.'

determination of the existence and content of rules of customary international law.[98] In other words, the work of the Commission on this topic has been characterized as part of a 'process of customary law articulation'.[99] Indeed, the provisions of ARSIWA (including the rules on attribution) tend to be treated and interpreted as hard law,[100] which may be largely explained by the fact that they have the structural form and logic of a treaty.[101] International courts and tribunals generally tend to cite ARSIWA provisions and apply them as a given to the facts of a case, unhampered by the fact that the Articles in themselves do not constitute a formal source of law.[102]

Certain authors have warned against relying on a merely textual interpretation as indicative of the true meaning of the Articles.[103] The Articles do not constitute a treaty. But the fact that the Articles are drafted in a way that resembles the form of a treaty, it is argued, creates the false impression of certainty and authority. After all, the treaty form obscures the 'whole complex of additional meaning'[104] that can be found not only in the commentary but also in decades of consideration by the ILC and the Sixth Committee. In many cases, the final text of the Articles is a hard-fought and/or watered-down compromise, obscuring the various perceptions and assumptions amongst ILC members with some of the provisions deliberately kept vague, open-ended or simply abstract. In this context, it has been noted that it would be difficult to describe the outcomes of the work of the ILC as true collective opinion, given that it might be more accurately seen as 'a large commission (whose members vary in capability and commitment) that through painful compromise has yielded a lengthy advisory opinion'.[105] To put it more frankly, the group decision-making process in the Commission and its collective production of ARSIWA aptly brings to mind the expression that a camel is a horse drawn by committee.[106]

It is precisely because of the vague, open-ended and highly contextual attribution rules in ARSIWA, that the interpretive focus must extend beyond the textual terms of the provisions. The Articles do not constitute a treaty and therefore they fall outside the formal scope of rules of interpretation as codified in the Vienna

[98] See ILC, *Draft conclusions on identification of customary international law*, *supra* note 85, Conclusion 14, commentary para 2. See *ibid*, Part Five, commentary para 2 and Conclusion 14, commentary para 5, where special consideration is given to the output of the ILC as an expert body.
[99] Crawford (2002a) 890.
[100] Thirlway (2019) 145–46. See also Mik (2019) 271, noting that in some cases the provisions of ARSIWA are described by international courts as 'customary or well-established, [while] in others they were superficially asserted as axiomatic'.
[101] Gaja (2015) 18. See further Caron (2002); Pacht (2014) 465–67.
[102] Caron (2002) 867–68.
[103] See e.g. Caron (2002) 868–70. See also Bodansky and Crook (2002) 781, arguing that the Articles merely represent a reflection of areas where the ILC could reach consensus on general default rules that can be applied 'more or less comprehensibly across the entire range of international law'.
[104] Caron (2002) 869.
[105] Caron (2002) 867.
[106] The author wishes to thank Marco Benatar for bringing this appropriate expression to his attention.

Convention on the Law of Treaties.[107] Nevertheless, it is self-evident that in addition to the ordinary textual meaning other interpretive maxims, such as good faith, context, object and purpose, and the preparatory works should be taken into account when interpreting the work of the ILC.[108] This gives more analytical room for teleological considerations as well as an evaluation of the genesis and development (i.e. its *travaux préparatoires*) of the Articles.

In this respect, the commentary to ARSIWA provides vital insights and offer crucial clarifications that allow the reader to gain a better understanding of the outcome of this topic.[109] The commentary contains case law and other relevant data (including treaties, case law, doctrine and instances of State practice), together with conclusions defining divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.[110] The text of any given provision and the accompanying commentary are equally relevant to provide the context within which the Articles must be interpreted, given the fact that both texts are adopted as a whole by the plenary in order to give more meaning to the text.[111]

The provisions of ARSIWA are thus to be read together with their commentary, which are adopted by the plenary precisely in order to contribute to their interpretation.[112] This becomes pertinent especially where the commentary offers important considerations or qualifications that are not found in the text of the provision itself.[113] Nevertheless, one has to take into account that there is an important material difference in interpretive value between the commentary written

[107] Art 1 Vienna Convention on the Law of Treaties provides that the Convention applies to treaties between States.

[108] See e.g. Caron (2002) 867–70, advising to study the work of the ILC 'as though it were a narrative study' to reveal the ambiguity hidden in the 'often artificially concrete language' of ARSIWA provisions. See also Gaja (2015) 18–19.

[109] Bodansky and Crook (2002) 789. See also Azaria (2021) 181: '[T]he fact that the [ICJ] has relied on the commentaries in more than half of the decisions where it has relied on the Commission's work overall shows that commentaries play a crucial role in judicial practice.'

[110] Art 20 ILC Statute, *supra* note 4.

[111] Cf Art 31(4) Vienna Convention on the Law of Treaties. See also Gaja (2015) 19, arguing that the commentary is more than merely a 'supplementary means of interpretation' under Art 32 Vienna Convention on the Law of Treaties. On the production process and legal significance of ILC commentaries, see further Azaria (2021) 177–92.

[112] See EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) para 14, holding that the interpretation of ARSIWA provisions 'would be aptly guided by the principles advanced in Articles 31(4) and 32 [Vienna Convention on the Law of Treaties]. The Commentaries establish the intention of the framers of the ILC Articles and, in so far as they accrue to the draft Articles, would constitute preparatory work to the ILC Articles.' See also ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) paras 112 and 114, engaging with Art 11 ARSIWA 'as elaborated in the ILC Commentary and applied by international tribunals'. For a recent study of how the ICJ relies on the final products and commentaries of the ILC, see Azaria (2021) 178–81.

[113] See e.g. Art 10 ARSIWA, commentary para 7, which adds a qualification that the rule 'should not be pressed too far in the case of governments of national reconciliation'. See also Art 8, commentary para 3, which explains that the notion of direction or control must be understood to be *effective* control, i.e. direction or control of 'the specific operation and the conduct complained of was an integral part of that operation'.

on first reading and that on second reading. On first reading, it includes minority views within the Commission, as well as a description of alternative solutions sought, while in second reading the commentary reflects only the decisions and positions taken by the plenary Commission.[114] This also applies to ARSIWA. As a result of this practice, the commentary adopted on second reading may 'convey a deceptive degree of clarity and authority,'[115] in the same way as the Articles themselves do.[116]

In light of the foregoing considerations relating to the working methods of the Commission and its final output in the topic of State responsibility, this thesis examines not only the Articles and the commentary on first and second reading but also the preparatory works, including meetings of Working Groups and Drafting Committees. These important contributions and clarifications would be lost if one relies solely on a mechanical application of the rule that a term should be interpreted principally in accordance with its ordinary meaning.[117]

Accordingly, the following sources pertaining to the topic of State responsibility will be examined: (i) the text of the Articles; (ii) the accompanying commentary; (iii) the reports of the Special Rapporteurs; (iv) the reports of Working Groups (including the 1963 Sub-Committee on State Responsibility and its working papers) and Drafting Committees; (v) the summary records of the relevant plenary meetings of the ILC; and (vi) the ILC annual reports to the UNGA. The examination will focus not only on the interpretation given by the ILC to the individual provisions, but also — perhaps even more so — on the role that attribution rules as a whole are expected to play in the complex interplay of breach, applicable law, jurisdiction and responsibility, having regard to the adopted distinction between primary and secondary rules of international law and the possibility of *lex specialis* rules of international law.

E.2. International Case Law in the Fields of Human Rights and Humanitarian Law

The second source used in this thesis is the body of case law of human rights courts, as well as that of international criminal tribunals with jurisdiction over violations of IHL. The relevant cases were retrieved from the triennial reports of the UN

[114] United Nations (2017) 50 fn 212.
[115] Bodansky and Crook (2002) 789.
[116] For instance, Art 4(2) ARSIWA provides that the notion of State organ '*includes* any person or entity' characterized as such, *de jure*, in accordance with a State's internal law (emphasis added). The commentary explains that the word 'includes' shows that it may be insufficient to refer to a State's internal laws because the conduct of 'a body which does in truth acts as one of its organs' is also an act of the State (at para 11). Yet, this begs the question as to the breadth of the scope of the notion of *de facto* State organs. For a similar non-committal or open-ended formulations, see Art 5, commentary para 6 (on the notion of what constitutes governmental authority) and Art 8, commentary para 8 (on *ultra vires* conduct by persons or groups of persons under a State's direction or control).
[117] Caron (2002) 868–69.

Secretary-General,[118] the websites of the relevant courts where judgments and decisions are published,[119] as well as journals and databases devoted to case law.[120] Where relevant, this thesis will also devote attention to and where possible draw parallels with the contributions of other international courts and tribunals, first and foremost the ICJ.

As noted by Daniel Bodansky and John R. Crook, the Articles are 'tested and perhaps reshaped through the varied processes of application'[121] by relevant international actors such as international courts and tribunals. Article 38(1)(d) ICJ Statute lists judicial decisions as subsidiary means for the determination of rules of law. Thus, judicial decisions are useful authoritative statements on a particular point of law, even if they themselves do not constitute a formal source of law.[122] Nevertheless, the importance of judicial decisions cannot be downplayed by merely pointing out their subsidiary nature. While it is true that international courts and tribunals do not formally operate by the principle of *stare decisis* and are thus not necessarily bound to follow previous case law decided by the same court, absent a special justification, international courts and tribunals tend not to deviate from earlier established case law.[123] Thus, the authority and predictive value with regard to future disputes of a similar nature argue in favour of conferring upon judicial decisions a great measure of importance for the purpose of establishing and confirming the existence and interpretation of international law.[124]

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[118] See *supra* note 7. These triennial reports offer an overview of international case law in which provisions of ARSIWA (or the draft articles as provisionally adopted or adopted on first reading from 1973 to 1996) were invoked by an international court, tribunal or other (quasi-)judicial body as the basis for its decision, or where it otherwise indicated its view concerning the status of the relevant provision as the existing law governing the issue in question. The triennial compilations of decisions do not present an exhaustive overview; the present author has found numerous relevant cases that will be examined in this thesis but were not included in the compilations.

[119] The data was retrieved by searching for relevant keywords such as "State responsibility"; "attribut*"; "internationally wrongful act"; "International Law Commission"; "ILC"; "Articles AND responsibility", "secondary rules", "primary rules" etc.

[120] Particularly useful are: *African Human Rights Law Reports* (AHRLR), *African Court Law Report* (AfCLR), *East African Court of Justice Law Report* (EACJLR).

[121] Bodansky and Crook (2002) 790.

[122] See e.g. ILC, *Draft conclusions on identification of customary international law*, *supra* note 85, Conclusion 13(1): 'Decisions of international courts and tribunals … concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.' As explained in *ibid*, Conclusion 13, commentary para 2, the term 'subsidiary' denotes the 'ancillary role of such decisions in elucidating the law,' but it is not meant to suggest that decisions of international courts are not important for the identification of customary international law.

[123] See e.g. ECtHR, *Goodwin v. United Kingdom* (2002) para 74, holding that 'in the interests of legal certainty, foreseeability and equality before the law' the Court should not depart without good reason from precedents laid down in previous cases. See also ECtHR, *Jones and Others v. United Kingdom* (2014) para 194.

[124] See ILC, *Draft conclusions on identification of customary international law*, *supra* note 85, Conclusion 13, commentary para 4, noting that the skills and the breadth of evidence usually at the disposal of international courts such as human rights courts may lend 'significant weight to their decisions'.

Given their subject-matter expertise and mandate, human rights courts and international criminal tribunals with jurisdiction over IHL provide authoritative assertions of the interpretation and application of the relevant treaty provisions within their mandate. It is thus only natural that this thesis relies predominantly on the contributions of those courts and tribunals in order to assess the standard and function of attribution of conduct in human rights law and IHL. The cases of these courts and tribunals provides a means to determine the existence and reinforce the precision of customary international law, but it may also reveal approaches to attribution of conduct that are different and thus provide a means for asserting the existence of *lex specialis* rules.[125]

An important caveat must be added here. The determinations on attribution of conduct by human rights courts and international criminal tribunals are not always fully conclusive, crystal clear, or even internally consistent. Thus, it must be borne in mind that one should not treat international case law too generously as confirming the existence of customary international law or endorsing a *lex specialis* rule.[126] First of all, these international courts and tribunals deal not only with particular substantive (primary) rules of law, but also with procedural concepts such as admissibility and jurisdiction, sometimes without clearly separating them in their case law. Second, within their highly specialized area of jurisdiction, human rights courts and international criminal tribunals are primarily concerned with resolving the case at hand, without necessarily feeling the need to adopt a solution that conforms to customary international law or to the case law of other international courts. And, lastly, there is the problem of conflicting case law, which may make it a very challenging exercise to determine with much precision the judicial decision that is the odd one out when compared to the rest. This thesis seeks to overcome these challenges by carefully considering the procedural and substantive frameworks within which human rights courts and international criminal tribunals operate, by drawing parallels with the case law of other international courts, and by examining more closely those cases that are considered (or perceived) as presenting a conflicting or out-of-touch approach.

This thesis also takes stock of relevant statements on attribution of conduct as found in General Comments and decisions in response to individual complaints (so-called Views), adopted by the various human rights treaty bodies.[127] Strictly speaking, General Comments (some bodies use the term General Recommendations) and Views are neither legally binding nor case law of international "courts". However, the authoritative value of the output of human rights supervisory committees as quasi-judicial bodies[128] is widely recognized in the case law of international courts

[125] Daillier (2010) 37.
[126] *Ibid*, 40.
[127] For the Human Rights Committee the legal basis for General Comments is laid down in Art 40(3) ICCPR, and for Views in Art 5(4) (First) Optional Protocol to the ICCPR. For the legal bases and procedure of adopting General Comments/Recommendation, see further Ando (2008).
[128] For a discussion of quasi-judicial bodies at the international level, see further Fromageau (2020) paras 14–32. Individual communications procedures under human rights treaties are characterized as

proper. For instance, in the *Diallo* case, the ICJ relied on the General Comments and the Views adopted by the Human Rights Committee in its interpretation of Article 13 International Covenant on Civil and Political Rights (ICCPR).[129] The Court explained that it should ascribe great weight to the 'interpretative case law' adopted by the Human Rights Committee — which it termed its 'jurisprudence' — because it was established specifically to supervise the application of the ICCPR,[130] emphasizing the need to achieve clarity, consistency, and legal security 'to which both the individuals with guaranteed rights and States obliged to comply with treaty obligations are entitled'.[131] Accordingly, the inclusion of the output of human rights treaty bodies is warranted on account of the legal value it represents.[132] It constitutes a body of authoritative statements on the law, with legal significance and contributing to community expectations of appropriate or required State behaviour.[133] Thus, General Comments/Recommendations and Views are included in this thesis where they pronounce on matters of attribution for the purpose of State responsibility, even though that they do not constitute case law by international courts proper.[134]

The number of references to ARSIWA provisions in the case law of human rights courts[135] and criminal tribunals[136] says little as such. As James Crawford

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quasi-judicial because of 'the task, the nature of the decision-making process, and the procedural safeguards,' see Seibert-Fohr (2016) 9.

[129] ICJ, *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)* (2010) para 66.

[130] On this, see also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004), Separate Opinion of Judge Higgins, paras 26–27, questioning whether it was at all appropriate for the UNGA to request an Advisory Opinion on Israel's compliance with human rights obligations given that 'such obligations … are monitored, in much greater detail, by a treaty body established for that purpose'.

[131] *Ibid*. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012) para 101 (citing output of the Committee against Torture); ECtHR, *Mamatkulov and Askarov v. Turkey* (2005) paras 41–42, 44–45, 114–15, 124 (re Human Rights Committee and Committee against Torture); IACtHR, *Caesar v. Trinidad and Tobago* (2005) paras 62–63 (re Human Rights Committee). For further examples of international (and regional) courts engaging with the work of the Human Rights Committee, see Seibert-Fohr (2016) 9–12.

[132] On the legal significance of the output of human rights treaty bodies, see further Ulfstein (2012) 94–100; Keller and Grover (2012) 128–33; Azaria (2020).

[133] Rodley (2013) 639.

[134] See Human Rights Committee, *General Comment No 33 (Obligations of States parties under the ICCPR Optional Protocol)*, UN Doc CCPR/C/GC/33 (2008), where the Committee considers Views to represent 'an authoritative determination' (para 13), which 'exhibit some important characteristics of a judicial decision … including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions' (para 11). At the same time, the Committee recognizes that it is 'not, as such … a judicial body' (*ibid*).

[135] In the remainder of this thesis and unless indicated otherwise, the term "human rights court" refers to: (i) regional or subregional human rights courts (i.e. ACtHPR, ECCJ, ECtHR, IACtHR), (ii) the EACJ (which, as will be discussed in Chapter 3 Section C.1.b, has relevant case law on this topic even though it does not yet have an explicit human rights mandate), and (iii) quasi-judicial human rights treaty bodies.

[136] In this thesis and unless indicated otherwise, the term "criminal tribunals" refers exclusively to the ICTY and the International Criminal Court (ICC).

observed in another context (i.e. that of investment arbitration), its provisions 'might be described as the wallpaper or the furniture [or, alternatively] the architecture or structure of the decision'.[137] Courts and tribunals will always have to consider, within their respective institutional-procedural environments, if and how the provisions of treaties within their mandate interact with relevant attribution rules as found in ARSIWA. This may take a variety of *forms*: ARSIWA rules may be referred to as a matter of signposting, as support for conclusions otherwise drawn, or as relevant source of law to be determinatively taken into account by the court. Alternatively, international courts might find that the substantive legal regime falling within their mandate is endowed with *lex specialis* attribution rules that deviate from those found in the general law of State responsibility.

Of additional importance for the present thesis is the fact that a recourse to attribution rules may also serve a number of different *purposes* or *functions*: Such rules may be used to establish State responsibility *stricto sensu* (i.e. to determine whether conduct is an act of the State for the purpose of finding a human rights violation), to determine the (application or exclusion of) applicable law, or to determine whether an international court or tribunal seized of the matter can exercise its jurisdiction over the case.[138] The examination of the cases in this thesis will address each of these elements, in addition of course to the outcome. Where relevant, this thesis also includes cases in which the court or tribunal, for one reason or another, considered ARSIWA to be irrelevant.[139]

F. Structure of the Thesis and Demarcation of the Topic

The first two Chapters provide the historical and theoretical framework. First, it offers an account of the development of the law of State responsibility, as well as the foundations of the final result on this topic as adopted by the ILC in 2001 (Chapter 2). Particular attention will be paid here to the general notion and constituent elements of an internationally wrongful act, as well as the conceptualization of State responsibility law as a generally applicable normative framework that is divorced, or perceived to be divorced, from the underlying substantive rules of international law. Chapter 3 further contextualizes the importance of attribution rules within the wider framework of international legal personality and the capacity to incur responsibility for violations of human rights law and IHL.

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[137] Crawford (2010b) 132.

[138] See *supra* Section D, where it is explained that the research questions for this thesis address the standard and function of attribution rules.

[139] See in particular ECtHR, *Reilly v. Ireland* (2014) para 55. In this case, the Applicant relied *inter alia* on Arts 4 and 7 ARSIWA when claiming that Ireland be held responsible for acts of sexual assault committed by his superior officers while serving in the Irish Defence Forces. The Court held that the acts of the superior officer could not be attributed to the State and that the Applicant could not rely on ARSIWA as it was deemed irrelevant. This case will be examined further in Chapter 3, Section D.2.

The three Chapters that follow give a quantitative and qualitative assessment of case law of human rights courts and international criminal tribunals, inquiring whether, and for what purpose, attribution rules in ARSIWA are used within the context of human rights law and IHL. More specifically, it looks at the question what role is assigned to attribution rules in determining not only the narrow question of responsibility (Chapter 4), but also the preliminary questions of applicable law and the exercise of jurisdiction by human rights courts and international criminal tribunals (Chapters 5 and 6).

Finally, Chapter 7 offers a synthesis and concluding observations in relation to the attribution of conduct in human rights law and IHL. Based on the case law examined in this thesis, this concluding Chapter revisits the standard and function of attribution rules for the purpose of holding a State responsible, taking into account the preliminary questions of applicable law and jurisdiction. The novelty of this Chapter is that it takes stock of a period of approximately twenty years of judgments and decisions rendered by relevant (international and regional) human rights courts, human rights treaty monitoring bodies, and international criminal tribunals since 2001. Accordingly, this Chapter reflects on the various standards of attribution of conduct as used in these particular fields of law. Importantly, though, this Chapter also puts the legal operation of attribution of conduct within the wider context of the related but hitherto under-explored questions of applicable law and jurisdiction. Lastly, and on a more general and theoretical level, this Chapter critically examines the conventional wisdom that primary rules of international law are conceptually separated from the secondary rules on attribution as laid down in Articles 4 to 11 ARSIWA.

A number of questions or topics fall outside the scope of the thesis. First, this thesis will not address questions of attribution of conduct that are governed by the law of responsibility of international organizations. It is nowadays widely accepted that international organizations can invoke responsibility,[140] and, conversely, that they can incur responsibility for conduct attributable to it and in breach of their international obligations.[141] That said, international organizations give rise to delicate problems in identifying who is responsible for any given conduct, given the duality of such organizations as separate international legal persons one the one hand, and instruments of cooperation between States (who are in charge of the most

[140] See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 179, where the Court held that the UN is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

[141] See ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* (1999) para 66, where the Court confirmed that the UN can be internationally responsible for acts performed by the organization or its agents. See also EACJ, *Zziwa v. Secretary General of the East African Community* (2018) para 38: 'In the instant matter, the breach of Treaty is by [East African Legislative Assembly], an organ of the Community, and, accordingly, the appropriate law is the law on the responsibility of international organizations.'

important decision-making organs) on the other.[142] Another issue that illustrates the difficulties in the law of responsibility of international organizations, is that it is not really clear how many legal obligations international organizations even have.[143]

In 2011, the ILC adopted a set of secondary rules on the topic of responsibility of international organizations, the Draft Articles on the Responsibility of International Organizations.[144] The outcome of this project has so far not received the same level of acceptance as ARSIWA. This is mostly due to the lack of practice and international case law that could otherwise be used to support some of the solutions adopted in the 2011 Articles.[145] Accordingly, attribution of conduct to international organizations,[146] and the related and specific problems of multiple attribution or shared responsibility will not be examined here.[147] For the same reason that this thesis focuses on State responsibility and ARSIWA, it will likewise not deal with the question of responsibility of a State that is a member of an international organization for wrongful acts committed by the latter (the so-called *Durchgriffshaftung*[148]), as the latter is governed by the 2011 Articles and not by ARSIWA.[149]

Second, this thesis is primarily concerned with cases of (what is denoted in this thesis as) *direct* responsibility to the exclusion of cases of indirect responsibility.[150] As a rule, a State bears direct responsibility only for acts of the State, i.e. conduct that is attributable to it, be it of its *de jure* organs or of other persons or entities whose conduct falls within the purview of Articles 4 to 11 ARSIWA. Conversely, the conduct of non-State actors is generally not attributable to the State and the latter is not directly responsible for such private conduct.[151] In relation to such "purely" private

[142] Condorelli and Kress (2010) 221.
[143] See e.g. Klabbers (2017) 1145, noting that 'few primary obligations rest on international organizations'. See further Klabbers (2009) 284–85; Gill et al (2017) 276–78. For a discussion of the extent to which the UN is bound by customary human rights law and IHL, see Pacholska (2020) 55–60.
[144] ILC, *Draft articles on the responsibility of international organizations, with commentaries*, YB ILC 2011-II(2) 46 para 88.
[145] See *ibid*, general commentary para 5: 'The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.' This is an exception to the general practice by the ILC of not qualifying its final product as a whole as codification or progressive development; see Galvão Teles (2019) 1040.
[146] On this, see e.g. Hirsch (1995); Klein (2010); Finck (2011), Ragazzi (2013); Delgado Casteleiro (2016); Galetto (2017); Moelle (2017); Pacholska (2020).
[147] On this, see e.g. Nollkaemper and Plakokefalos (2014); Nollkaemper and Jacobs (2015); Nollkaemper and Plakokefalos (2017); Voulgaris (2019); Nollkaemper et al (2020).
[148] Klabbers (2009) 273. On international organizations and member State responsibility, see further Barros et al (2017); Murray (2017).
[149] See ILC, *Draft articles on the responsibility of international organizations*, *supra* note 144, Art 1, commentary para 6.
[150] The terminology of "direct" versus "indirect" responsibility is taken from Schönsteiner (2019) 901 and fn 19, where it is explained that direct responsibility arises out of attributable conduct, whereas indirect responsibility arises out of omissions in breach of a due diligence obligation.
[151] See e.g. draft Art 11(1) ARSIWA as adopted on first reading, YB ILC 1975-II, 70: 'The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.'

(non-attributable) acts, a State can at the most be *indirectly* responsible when it fails to comply with its positive obligations (e.g. the obligation to prevent, to mitigate, to punish, etc; all obligations of due diligence), in anticipation of or in reaction to private acts.[152] In these situations, the conduct of non-State actors is not attributable to it, but forms the catalyst to reveal the indirect responsibility of a State as a result of a failure to do what international law requires from it.[153] What is attributed in such cases is not the private conduct itself, but rather the State's *own* conduct, namely the non-performance of the positive obligation in question.[154] When the complaint concerns a failure by the State to comply with a positive obligation, the question of attribution does not play as significant a role as it does for cases of direct responsibility. At least within its own territory and in other areas subject to its jurisdiction, it can be presumed there is always a State organ in a position to act and a failure to do so (in circumstances where a certain action is required) is by definition attributable following the ordinary rules governing the attribution of conduct by State organs.[155] That said, Chapters 3, 4 and 5 of this thesis explore a number of cases in which the relevant international court or tribunal made findings on State responsibility without clearly explaining whether responsibility for a violation of the relevant applicable law was the result of a failure to act by a State (i.e. indirect responsibility), or rather the result of attributing the acts of non-State actors to a

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[152] See e.g. IACtHR, *Velásquez-Rodríguez v. Honduras* (1988) para 172: 'An illegal act which violates human rights and which is initially not directly imputable to a State … can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.' See also ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980) para 61; ECtHR, *Osman v. United Kingdom* (1998) para 115; ACionHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006) para 143; ACionHPR, *Sudan Human Rights Organisation and Another v. Sudan* (2009) para 148; ECCJ, *Adamu and Others v. Nigeria* (2019) 13; ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (2015) para 146. On the responsibility of States to control, prevent, react or otherwise mitigate private conduct, see generally Shelton (1989).
[153] Condorelli and Kress (2010) 232. See further draft Art 11 ARSIWA as adopted on first reading, YB ILC 1975-II, 70, commentary paras 4 and 8.
[154] See e.g. Stern (2010) 209 ('[W]here there is an omission to act in violation of an obligation of due diligence, it is not a question of attribution of the act of a private party, but rather a failure of the State itself to comply with its primary obligations'); Wolfrum (2005) 425 (in case a State fails to comply with an obligation to protect or prevent, it is 'not held directly responsible for the private conduct but for the State action or rather the lack thereof'). For a different position, see Christenson (1991) 326, arguing that the question of whether or not an omission is attributable depends upon the (in his view) prior question of the international obligation in question.
[155] See e.g. ECtHR, *Likvidējamā p/s Selga v. Latvia and Vasiļevska v. Latvia* (2013). The case concerned a claim by the Applicants that they could not dispose of certain assets frozen by a bank, and that Latvia was either directly responsible for the freezing of assets, or indirectly responsible as a result of a failure by the authorities to take measures to make the assets available. As for the second claim, the Court held that this concerns an omission (i.e. failure to act when a positive obligation exists) so that 'no concerns over attribution of conduct could arise' (at para 104). See also Antonopoulos (2019) 18, arguing that in case of a failure to exercise due diligence 'the proof of attribution … is redundant because it concerns an omission to act in accordance with a primary obligation and it may be established on the fact that a State possesses the requisite infrastructure … in order to prevent such injurious acts'.

State (i.e. direct responsibility). With that in mind, State responsibility arising out of omissions will not be a central focus in this thesis and it will be addressed only marginally wherever pertinent in light of the relevant case law.

Third, this thesis concerns attribution and State responsibility within human rights law and IHL. Therefore, it does not examine the relationship between rules on attribution of conduct and questions of whether certain conduct by a State official or agent benefits from immunities *ratione materiae* in foreign courts.[156] Nor does this thesis analyse the extent to which the rules of attribution determine what constitutes an act (or: practice, unilateral declaration, etc) of the State for the purposes of the existence or interpretation of sources of international law or international obligations.[157]

Lastly, given that this thesis analyses attribution of conduct in the case law of international courts, the interpretation and application of attribution rules in domestic case law will not be addressed either.[158]

The research in this thesis is current as of 31 December 2020. As the thesis was substantively finalized by that day, newer developments could not be considered. All URLs were last accessed by the same date.

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[156] In *Jones and Others v. United Kingdom* (2014) paras 107–09 and 207, the ECtHR cited Arts 4, 5, 7 and 58 ARSIWA as 'relevant international law materials' but noted that attribution for purposes of State responsibility is not conclusive as to whether a claim for State immunity is always to be recognized in respect of the same acts. On these questions, see further ILC, *Second report on immunity of State officials from foreign criminal jurisdiction, by Roman Kolodkin, Special Rapporteur*, UN Doc A/CN.4/631 (2011) paras 24, 60–62, 94(c)–(e); *Third report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, UN Doc A/CN.4/673 (2014) paras 106–10; *Fourth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, UN Doc A/CN.4/686 (2015) paras 79–85, 98–101 and 111–17. At the time of writing, the work on this topic is still ongoing.

[157] These questions have been addressed in three topics of the ILC. Here, it suffices to note that the discussions within the Committee revealed a wide variety of views when it comes to the proper role and function of ARSIWA attribution rules. For the final outcomes, see ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries*, YB ILC 2006-II(2) 161 para 177, Guiding Principle 4; *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, UN Doc A/73/10 (2018) 16 para 52, Conclusion 5(1); *Draft conclusions on identification of customary international law, with commentaries*, UN Doc A/73/10 (2018) 122 para 66, Conclusion 5.

[158] For a study of the reception of ARSIWA in domestic courts, see e.g. Nollkaemper (2007); Olleson (2013); Wiessner and González (2019). See further *Oxford Reports on International Law in Domestic Courts*, available at https://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts (Subject > International Responsibility > Attribution).

CHAPTER 2 HISTORY AND FOUNDATIONS OF THE LAW OF STATE RESPONSIBILITY

A. Introduction

The law of State responsibility is a structuring pillar of the international legal order.[1] Indeed, it has rightfully been claimed that State responsibility law 'goes to the very heart of the enigma of the very existence of international law'.[2] Different rationales have been offered to provide an underlying justification for the rule that a State is internationally responsible for the commission of an internationally wrongful act.[3] It has been argued that State responsibility testifies to the existence of international law as a source of binding obligations and correlated rights for equally sovereign States. Thus, where the violation of binding rules leads to responsibility, the normative system itself bears the quality of law: *ubi responsibilitas, ibi jus*.[4] Put differently, State responsibility is the corollary of external sovereignty and the existence of an international legal order.[5] Another rationale for the theory and practice of State responsibility is that it forms the corollary of a State's exclusive territorial jurisdiction and its associated internal sovereignty. In the absence of a specific permissive rule, the State of nationality of a foreigner who suffers injury in another State is legally precluded from taking any self-help or enforcement action on

[1] United Nations (UN) General Assembly (UNGA), *Report of the Secretary-General, Responsibility of States for internationally wrongful acts: Comments and information received from Governments*, UN Doc A/62/63 (2007) 4 para 4 (Portugal). See further Mik (2019) 272, noting that rules of State responsibility that deal with attribution, breach and reparation 'impose with such force that no State can ignore them … as they are inextricably linked to the law itself and present in every legal order. There are no legal obligations without accepting the principle of responsibility.'

[2] Pellet (1997) xv. See also Higgins (1995) 146, noting that State responsibility law is 'a central element in the whole theoretical structure of international law'.

[3] For an overview of the prevailing theories as to the nature and rationale of State responsibility law, see International Law Commission (ILC), *Second report on State responsibility, by Roberto Ago, Special Rapporteur: The origin of international responsibility*, UN Doc A/CN.4/233 (1970) paras 12–23.

[4] See also Brownlie (1983) 1 (noting that responsibility is an 'inherent element in any community based upon some system — perceived as such, however diffuse — of morality, religion, or law, or several of these'); Nollkaemper (2019) 761–64 (explaining that responsibility is central or even inherent to the notion of law and legal obligations).

[5] See Permanent Court of International Justice (PCIJ), *S.S. Wimbledon (United Kingdom, France, Italy and Japan v. Poland)* (1923) 25 (noting that far from constituting 'an abandonment of its sovereignty,' the right for States to commit themselves to international obligations for which they can be held responsible constitutes 'an attribute of State sovereignty'); PCIJ, *Factory at Chorzów (Germany v. Poland)* (1928) 29 (holding it a 'principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'); Arbitral Award, *British Claims in the Spanish Zone of Morocco (Spain v. United Kingdom)* (1925) 641 ('La responsabilité est le corollaire nécessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale.').

the territory of the wrongdoing State.[6] The legal mechanism of State responsibility thus ensures that the rights of the foreigner and the State of nationality can be maintained and vindicated at the international level.[7]

As already noted in the Introduction,[8] there are two bedrock principles in contemporary State responsibility law. The first principle, which as will be demonstrated crystalized in the International Law Commission (ILC, or the Commission) discussions and the work of the Special Rapporteur in the 1950s, holds that a State commits an internationally wrongful act (which gives rise to State responsibility) when conduct is attributed to it and constitutes a breach of an international obligation of that State.[9] The second bedrock principle is that there is a distinction between primary rules of substantive law and secondary rules of State responsibility law.[10] The latter perspective as adopted by the ILC in the 1960s was a response to the failure to achieve any meaningful result in the earliest stages of the project.

Following David Caron's advice 'to analyze, perhaps even rewrite, the work of the ILC [on State responsibility] as though it were a narrative study,'[11] this Chapter offers a detailed account of the historical evolution of the notion and constituent elements of an internationally wrongful act. The primary purpose of this analysis is to gain a better understanding of the standards and (perhaps even more so) the function of attribution of conduct as a legal operation in international law. A historical account of the development by the ILC of the law of State responsibility will assist in appreciating the proper role of attribution of conduct in relation to the existence an internationally wrongful act. Moreover, a closer examination of the ILC's work on this topic may not only reveal the advantages and disadvantages of the proposed distinction between primary and secondary rules, but also whether this distinction truly holds up in the face of further scrutiny. By outlining the historical evolution of the concept of an internationally wrongful act, it is demonstrated that this new outlook on State responsibility must be looked at against the backdrop of

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[6] See PCIJ, *S.S. Lotus (France/Turkey)* (1927) 18–19, where the Court held that the enforcement jurisdiction of a State is territorial and cannot be exercised by a State outside its territory except by virtue of a permissive rule of international law.

[7] This rationale is expressed clearly in Arbitral Award, *British Claims in the Spanish Zone of Morocco (Spain v. United Kingdom)* (1925) 640, where it was held that '[l]es intérêts contradictoires en présence pour ce qui est du problème de l'indemnisation des étrangers sont, d'une part, l'intérêt de l'État d'exercer sa puissance publique dans son propre territoire sans ingérence et contrôle aucun des États étrangers, et, d'autre part, l'intérêt de l'État de voir respecter et protéger effectivement les droits de ses ressortissants établis en pays étranger'.

[8] See Chapter 1.A.

[9] See ILC, *Draft articles on responsibility of States for internationally wrongful acts, with commentaries* (ARSIWA), Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77, Arts 1 and 2.

[10] See ARSIWA, general commentary paras 1 and 4; Crawford (2002b) 14–16.

[11] Caron (2002) 868. As the author continues, the treaty form of ARSIWA 'belies the division of opinion on certain issues even within the ILC itself. … To rectify the problem, one needs at a minimum to read the commentary and, more appropriately, to trace every step of the development'; *ibid*.

the problems it sought so solve. It may be inappropriate, therefore, to extrapolate any other meaning or effect to this distinction than the one laying at the foundation of its adoption.

The structure of this Chapter is as follows. First it will be shown (Section B.) that in early legal writing and codification efforts the topic of State responsibility was either not contemplated as a distinct area of international legal regulation or when it was, it was seen as arising almost exclusively within the narrow context of injury to foreigners. Next, Section C examines the evolution of State responsibility law through the lens of the ILC's codification project that lasted from 1949 to 2001. Particular attention will be paid here to the constituent elements of an internationally wrongful act, the genesis of the distinction between primary (substantive) and secondary (responsibility) rules, the various standards of attribution of conduct, and the possibility of *lex specialis* rules governing matters of State responsibility. Following this, Section D takes a closer look at the purportedly strict distinction between primary and secondary rules of international law, in order to demonstrate that this distinction is not as absolute as perceived and presented by the ILC. This examination is of significant importance, given that legal arguments and judicial reasoning that build on a false premise cannot sustain.

This Chapter engages primarily with case law of international courts and tribunals other than human rights courts and international criminal tribunals dealing with international humanitarian law (IHL). The examination undertaken here is largely of an abstract and theoretical nature. This should not be taken as an apologetic statement, however. To the contrary, an examination of how international law is interpreted and applied in practice often requires 'nuanced prior theoretical work' on various legal rules, concepts and underlying assumptions.[12] The conclusions that this Chapter draws from theory, law and case law — e.g. that attribution as a legal operation connects conduct with the State as an international legal person and interacts in complicated ways with the content and application of primary rules of international law — will be utilized in Chapters 4, 5, and 6 of this thesis, dealing with attribution rules in the judicial practice of human rights law and IHL. Thus, this Chapter (as well as Chapter 3 dealing with international legal personality and the capacity for States and individuals to incur international responsibility) provide the theoretical stepping stones to understand and critically evaluate the human rights law and IHL cases analysed in this thesis.

B. Early Perceptions and Codification Efforts of the "Law" of State Responsibility

[12] Vidmar (2016) 338. As the author continues, theoretical and abstract work 'can fix a small but pressing legal problem, and add yet another small piece into the puzzle of the international legal system … further [diminishing] the zone of dangerous ambiguity in international legal relations'; *ibid*.

Until the late nineteenth century legal doctrine did not consider the topic of State responsibility as a distinct regime or area of international law.[13] Instead, the topic was considered, if at all, in an *ad hoc* manner subjected to the particularities of a specific substantive field of law. Pierino Belli, for example, touched upon aspects of what we would call today the law of State responsibility, but he did so in connection with the question of receiving payment for losses inflicted on a State's citizens during an unjust war.[14] Other early writers dealt with the topic in their discussion of the specific question of injuries done to the ambassadors of another State.[15] And yet others limited the treatment to individual responsibility under civil law or natural law, rather than State responsibility under the laws of nations.[16] Some elements of a law of responsibility such as the importance of attribution and the obligation to pay reparation did appear in early monographs wholly devoted to international law.[17] However, here too the issue of responsibility of the State was raised more so in connection with specific substantive obligations, than it was presented as an area of international legal regulation in its own right. The same can be said of Henry Wheaton's *Elements of International Law*. In this book, Wheaton discusses the obligation to pay reparation that arises because of an earlier wrongful act, but he does so through the lens of the law of prizes only, and not as the result of a rule of general application.[18]

The treatment of State responsibility as a distinct topic of law gradually emerged in the late nineteenth and the early twentieth century. Heinrich Triepel's *Völkerrecht und Landesrecht* analysed, without having a particular substantive area of law in mind, whether a federal State could be held responsible for the conduct of its constituent units.[19] His book addressed a number of questions that fall squarely within the modern law of State responsibility, such as attribution to the State of the conduct of its organs and territorial units, and the question of whether a (federal) State could justify non-compliance with its international obligations by invoking its domestic law and institutional structure. The writings of Dionisio Anzilotti and Edwin Borchard approached State responsibility still through the lens of a field of substantive law, namely the status and protection of foreigners on the territory of a State.[20] That said, the contributions by Anzilotti and Borchard are particularly noteworthy given that their systematic treatment of the topic had some potential for an early identification of rules of a wider or even more general application. At the same time, at this point State responsibility more and more came to be associated or

[13] See e.g. Brownlie (1983) 2 and 7.
[14] Belli (1563) 296–98.
[15] See Gentili (1594) 73.
[16] See Grotius (1625) 1431–39.
[17] See especially Wolff (1764) 161–62; De Vattel (1758) 298–300.
[18] Wheaton (1836) 260–78.
[19] Triepel (1899) 355–71.
[20] See Anzilotti (1906) (addressing attribution as a legal process subject to its own rules, the exception of necessity, and the consequences of internationally wrongful conduct); Borchard (1916) (presenting a general outline of State responsibility and rules on four categories of conduct giving rise to it).

even equated with the very notion of injury sustained by foreigners in the territory of another State.

The first English monograph wholly devoted to State responsibility was written by Clyde Eagleton and appeared in 1928.[21] According to Eagleton, State responsibility is a distinct area of international law, subject to its own rules. In what marks an important change compared with most of his predecessors, Eagleton's book is on responsibility *as such*. His treatise contains one chapter on substantive law (i.e. contractual claims and denial of justice), with the remainder of the book devoted to the formulation of general rules that can be applied across the board. A substantial part of the book deals with attribution. After all, as Eagleton pointed out, 'while the responsibility of a state is … based upon the control which it exercises within its borders, it does not follow that the state may be held responsible for any injury occurring therein'.[22] Accordingly, the State 'is answerable, under international law, only for those injuries which can be fastened upon the state itself'.[23]

During the Interbellum, the law of State responsibility figured prominently in codification efforts by the League of Nations, learned societies and private scholars.[24] These codification efforts gradually led to a vision of State responsibility as a distinct body of rules, meriting academic reflection in its own right. However, with some exceptions, the successive efforts to codify the law of State responsibility concentrated on one particular area of the topic, namely the international responsibility of States for the treatment of foreigners and their property, or certain aspects thereof such as diplomatic protection or the exhaustion of domestic remedies.

In 1920, the Advisory Committee of Jurists (the drafters of the Statute of the Permanent Court of International Justice [PCIJ]) recommended a continuation of the successful 1899 and 1907 Hague Conferences to discuss the codification and development of international law. By a resolution of 22 September 1924, the Assembly of the League of Nations requested the Council to establish a committee of experts, which was to prepare a provisional list of topics suitable for codification by international agreement.[25] One of the sub-committees of the Committee of Experts for the Progressive Codification of International Law thus established, was instructed to examine '[w]hether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners'.[26] Based on the report of the sub-committee, replies received from governments, and the final report of the Committee of Experts, the League Assembly decided in 1927 to schedule a Codification

[21] Eagleton (1928).
[22] *Ibid*, 8.
[23] *Ibid*.
[24] For a broad overview of early codification efforts in the Interbellum, see ILC, *First report on State responsibility, by Roberto Ago, Special Rapporteur: Review of previous work on codification of the topic of the international responsibility of States*, UN Doc A/CN.4/217 and Corr.1 and Add.1 (1969), Annex I–XXIII. See further Laithier (2010).
[25] The Resolution of the League Assembly is reproduced in 20 *American Journal of International* (AJIL) *Special Supplement* (1926) 2–3.
[26] 20 *AJIL Special Supplement* (1926) 14.

Conference to examine three topics, one of them being State responsibility for injury to foreign nationals and their property.[27] With respect to this topic, the Codification Conference held in The Hague in 1930 proved to be a failure due to the politically sensitive nature of the topic combined with the lack of time in which it was examined.[28] As later put by Roberto Ago, the 1930 Conference had some potential of being successful 'if it had confined itself to responsibility instead of venturing onto the quicksand of aliens' rights'.[29]

Attempts to arrive at a codification of rules and principles on State responsibility have also been undertaken by private bodies. For instance, at its session in Lausanne in 1927, the *Institut de Droit International* adopted a resolution on the topic of State responsibility for injury to foreigners.[30] A 1927 draft convention prepared by Harvard Law School equally dealt with State responsibility within the context of injury to foreigners.[31] The same can be said of Project Nos. 15 and 16 on the Responsibility of Governments and on Diplomatic Protection as prepared in 1925 by the American Institute of International Law,[32] as well as Chapter II of the 1926 draft Code of International Law prepared in 1926 by the Japanese Association of International Law.[33]

From the titles of the instruments adopted or discussed it becomes obvious that State responsibility was traditionally perceived as intimately connected (and even largely coterminous) with how a State treated foreigners and their property, rather than as a framework of rules and principles of general application.[34] From a

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[27] League of Nations, Official Journal, Special Supplement No 53 (October 1927) 9 para 5. The other two topics to be discussed during the Codification Conference were nationality and territorial waters.
[28] Bories (2010) 62–63.
[29] ILC, *Summary record of the 1011th meeting*, UN Doc A/CN.4/SR.1011 (1969) para 14.
[30] Institut de Droit International, *Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers* (Lausanne session, 1927), available at www.idi-iil.org/app/uploads/2017/06/1927_lau_05_fr.pdf (French only). An earlier resolution by the same institute dealt with State responsibility for damages suffered by foreigners in case of riot, insurrection or civil war; see Institut de Droit International, *Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile* (Neuchâtel session, 1900), available at www.idi-iil.org/app/uploads/2017/06/1900_neu_01_fr.pdf (French only).
[31] The text of the Harvard Law School draft convention on responsibility of states for damage done in their territory to the person or property of foreigners (1929) is reproduced in ILC, *First report on international responsibility, by Francisco V. García Amador, Special Rapporteur*, UN Doc A/CN.4/96 (1956), Annex 9. For the text of the revised 1961 Harvard Law School draft; see ILC, *First report Ago*, *supra* note 24, Annex VII.
[32] Project Nos 15 ('Responsibility of Governments') and 16 ('Diplomatic Protection') prepared by the American Institute of International Law (1925), reproduced in ILC, *First report García Amador*, *supra* note 31, Annex 7.
[33] Draft code of international law, adopted by the Japanese branch of the International Law Association and the Kokusaibo Gakkwai (1926), reproduced in ILC, *First report Ago*, *supra* note 24, Annex II. Chapter II of the draft code provides rules concerning the responsibility of a State in relation to the life, person and property of aliens.
[34] A noteworthy exception can be found in Karl Strupp's draft treaty concerning State responsibility for illicit acts (1927), Art 1: 'A State is responsible to other States for the acts of persons or groups of

quantitative point of view, this could be explained by the fact that the bulk of practice of international claims and case law from arbitral tribunals dealt with State responsibility for injuries to foreign nationals.[35] To this, one can add a qualitative argument, namely that the juridical aspects of the treatments of foreigners, and the possibility to hold States responsible, served the useful purpose of providing 'in the general world interest, adequate protection for the stranger, to the end that travel, trade, and intercourse may be facilitated'.[36]

Nonetheless, this traditional focus on injury to foreigners had two major disadvantages. First of all, it almost inevitably resulted in a statement of rules and principles as to what treatment, in terms of substance, should be afforded to them. At that time, European and North-American States generally favoured an attitude whereby the legality of a State's treatment of foreigners was 'put to the test of international standards'.[37] The international standard of treatment must be contrasted with the standard of national treatment that was largely favoured by Latin American States and strongly influenced by the Argentinian jurist Carlos Calvo.[38] According to this doctrine, foreigners must receive on a non-discriminatory basis the same substantive and procedural treatment as nationals.[39] Disagreements as to which substantive standard was to prevail explain in large part why the 1930 Codification Conference failed and why codification efforts by private bodies had such a limited influence on the law of State responsibility as eventually developed and adopted by the ILC.[40]

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persons whom it employs for the accomplishment of its purposes (its "organs") insofar as these acts conflict with the duties which arise out of the State's international legal relations with the injured State'. See also Anton Roth's draft convention on State for international wrongful acts (1932), Art 1: 'A State is responsible for the acts contrary to international law of any individuals whom or corporations which it entrusts with the performance of public functions, provided that those acts are within the general scope of their jurisdiction.' Both texts are reproduced in ILC, *First report Ago*, *supra* note 24, Annex IX and X, respectively.

[35] See e.g. UNGA, *Memorandum of the Secretary-General: Survey of international law in relation to the work of codification of the International Law Commission – Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission*, UN Doc A/CN.4/1/Rev.1 (1949) para 97, noting that the treatment of foreign nationals constituted 'the most conspicuous application of the law of State responsibility and the bulk of cases decided by international tribunals'.

[36] Jessup (1948) 105.

[37] Arbitral Award, *Neer and Neer v. Mexico* (1926) 61. See also Arbitral Award, *Hopkins v. Mexico* (1926) 47, holding that when a State is required to accord to foreigners a broader and more liberal treatment than it accords to its own citizens under its municipal laws, this is 'not a question of discrimination, but a question of difference in their respective rights and remedies'.

[38] Hence, the doctrine is often referred to as the Calvo Doctrine. Its corollary, the Calvo Clause, is a provision in contracts between foreigners and States, whereby the former undertakes not to seek diplomatic protection from the government of its nationality in respect to disputes arising out of a contract entered into with the host State; see Juillard (2007) para 5.

[39] For a treaty provision on national treatment, see Art 9 Montevideo Convention on the Rights and Duties of States: 'Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights or other or more extensive than those of the nationals.'

[40] See Bodansky and Crook (2002) 777; Laithier (2010).

The second disadvantage of the traditional method of focusing on State responsibility for injury to foreigners was that the rules and principles thus formulated could not easily be transposed to questions of State responsibility outside of this narrow context.[41] For example, in situations where one State complained that another State did not respect the inviolability of its diplomatic premises or resorted to an unlawful use of force, rules on State responsibility for its treatment of foreigners would be of little to no use. In other words, State responsibility law was not perceived as an international legal regime of general application and the instruments adopted or discussed prior to 1945 did not provide any constituent elements or consequences of State responsibility (i.e. attribution of conduct, and breach of an international obligation) that could be applied on a level beyond the limited environment of injury to foreigners and their property.

C. The International Law Commission's Articles on State Responsibility

The United Nations (UN) showed a keen interest in codifying the law relating to State responsibility already shortly after its inception at the San Francisco conference of 1945. Immediately after creating the ILC,[42] the UN General Assembly (UNGA) instructed the Secretary-General to draw up a memorandum prior to the first meeting of the Commission, to assist the latter in identifying areas of international law that could serve as possible topics for codification.[43] In this memorandum, the Secretary-General identified the 'law of State responsibility' as a suitable candidate.[44] The ILC took up the proposal of the Secretary-General during its inaugural session in 1949 and selected 'State responsibility' (as such) as one of fourteen topics suitable for codification.[45] The UNGA subsequently adopted Resolution 799 (VIII) of 7 December 1953, inviting the Committee to 'undertake the codification of the principles of international law governing State responsibility'.[46] The following year the ILC took note of Resolution 799, but due to its heavy workload it was unable to begin work on the topic or discuss a memorandum submitted by Francisco V. García Amador.[47] In 1955, at its seventh session, the ILC finally decided to begin its study

[41] See e.g. UNGA, *Memorandum of the Secretary-General*, *supra* note 35, para 98, noting that international law on State responsibility 'transcends the question of responsibility for the treatment of aliens'.
[42] On the creation and mandate of the ILC, see further Chapter 1, Sections A and E.1.
[43] UNGA Resolution 175 (II) of 21 November 1947, UN Doc A/RES/175(II) (1947).
[44] UNGA, *Memorandum of the Secretary-General*, *supra* note 35, paras 97–98.
[45] YB ILC 1949, 281 para 16. For the discussion, see ILC, *Summary record of the sixth meeting*, UN Doc A/CN.4/SR.6 (1949) paras 27–32 and 69.
[46] UN Doc A/RES/799(VIII) (1953).
[47] YB ILC 1954-II, 162 para 74. For García Amador's memorandum, see ILC, *Request of the General Assembly for the Codification of the Principles of International Governing State Responsibility: Memorandum by Francisco V. García Amador*, UN Doc A/CN.4/80 (1954) (Spanish only).

of the topic of State responsibility and appointed García Amador as special rapporteur.[48]

The fact that it took the Commission 45 years — involving five Special Rapporteurs producing a total of no less than 33 reports — to conclude its topic on second reading, shows that the subject of State responsibility has been 'one of the most vast and complex of international law; it would be difficult to find a topic beset with greater confusion and uncertainty'.[49] Indeed, the relationship between breach, attribution, and responsibility has undergone a number of radical changes, particularly in the first decade of the of the Commission's codification project. More fundamentally, one of the contentious issues in the initial stages of the project related to the scope of the codification effort. The crux of the debate was whether the law of State responsibility ought to be studied through the context of the treatment of foreign nationals and their property, or whether the study should adopt a perspective aimed at formulating general rules and principles of State responsibility regardless of the subject-matter of the obligation breached.

In order to understand and analyse the contemporary standard and function of attribution rules in human rights law and IHL, a historical perspective is in order. As will be shown in the Sections that follow, the contributions of Francisco V. García Amador (as first Special Rapporteur on State responsibility, 1955–1961) and Roberto Ago (second Special Rapporteur, 1963–1979) have been especially important in shaping the contours of the debate on these questions.

C.1. First Reading (1955–1996)

The first reading lasted from 1955 to 1996 and resulted in a set of 60 draft articles as adopted by the ILC.[50] The fact that this was a relatively long period of time even for ILC standards can be at least partly explained by the fact that García Amador's initially attempted to codify State responsibility law through the lens of injury to foreigners. As will be shown, the first Special Rapporteur's approach towards the topic was largely unsuccessful and ultimately rejected by the ILC. Nevertheless, some of García Amador's contributions outlasted his mandate and are still relevant principles of contemporary State responsibility law as laid down in Articles on the Responsibility of States for Internationally Wrongful Acts[51] (ARSIWA, or the Articles) as adopted on second reading. Especially important for the purposes of the present thesis was García Amador's formulation of attribution and breach as constituent elements of an internationally wrongful act, as well as his eventual

[48] YB ILC 1955-II, 42 paras 31 and 33.
[49] ILC, *First report García Amador*, *supra* note 31, para 6.
[50] For the text of the complete set of draft articles as adopted in 1996 on first reading, see YB ILC 1996-II(2) 58. These draft articles are also reproduced in Crawford (2002b) 348–65.
[51] ILC, *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, YB ILC 2001-II(2) 30 para 77.

understanding of attribution as a legal operation to attach factual conduct to a State as an international legal person. At the same time, García Amador presented the criteria of attribution and breach only for the narrow purpose of establishing State responsibility for injury to foreigners, rather than as a general framework that could be applied to other causes of action.

García Amador's efforts on this topic proved so controversial that the ILC failed to achieve any meaningful progress in the first few years. After some heated debate within the Commission, the topic regained momentum as a result of a paradigm shift that occurred in the early 1960s. This radical change of direction took place under the leadership of Ago as second Special Rapporteur. Ago successfully convinced the ILC that the topic was to concentrate on the formulation of generally applicable rules, divorced as much as possible from the substantive rights and obligations of States. Thus, one of the most significant contributions during Ago's tenure was the introduction of the so-called distinction between primary rules of international law and secondary rules of State responsibility law.

Given the centrality in this thesis of attribution of conduct and the distinction between primary and secondary rules of international law, both García Amador's (Section C.1.a.) and Ago's (Section C.1.b.) imprint during this formative period in the codification of State responsibility law will be analysed and put in perspective in detail below.

C.1.a. Off to a False Start: Codifying the Law of State Responsibility through the Lens of Injury to Foreign Nationals and Their Property

García Amador's efforts to codify the law of State responsibility proceeded on the assumption that the substantive treatment and legal status of foreign nationals, on the one hand, and the conditions and circumstances in which States must assume responsibility, on the other, could be regarded as two aspects pertaining to the same question.[52] According to the first Special Rapporteur, one of the objectives was to 'enumerate those very obligations and rules … and to define their content' with respect to foreign nationals. Thus, in his view the draft articles 'should not constitute a merely subsidiary instrument which leaves the final solution … to the very principles and rules of international law which it is supposed to assemble and formulate in an ordered and systematic form'.[53] In other words, already from the start

[52] ILC, *Summary record of the 568th session*, UN Doc A/CN.4/SR.568 (1960) para 50.

[53] See ILC, *Second report on international responsibility, by Francisco V. García Amador*, Special Rapporteur: Responsibility of the State for injuries caused in its territory to the person or property of aliens – Part I: Acts and omissions, UN Doc A/CN.4/106 (1957) paras 9 and 10. See also *Sixth report on international responsibility, by Francisco V. García Amador, Special Rapporteur: Responsibility of the State for injuries caused in its territory to the person or property of aliens – Reparation of the injury*, UN Doc A/CN.4/134 and Add.1 (1961). Draft art 2(2) of this revised draft narrowly defined

of his mandate as a Special Rapporteur, García Amador was preoccupied with the substantive position of foreigners in the territory of another State, rather than with the formulation of rules on State responsibility which could be applied on a more general basis regardless of the subject-matter.

It has to be admitted from the outset, however, that the first Special Rapporteur did not *a priori* exclude that *other* situations might also give rise to State responsibility. For instance, in his first report García Amador already noted that the topic he was to study 'is vast, owing to the practically unlimited number and variety of circumstances which can give rise to international responsibility'.[54] Apart from injury to foreigners and claims through the exercise of diplomatic protection, García Amador contemplated a second category of acts and omissions that could result in State responsibility. This second category related to conduct 'which affects a State as such, i.e. those which injure the interests or rights of the State as a legal entity,' or, in other words, the violation of any of the rights 'which are intrinsic attributes of the personality of the State — political sovereignty, territorial integrity, property rights'.[55] Thus, rather than giving the impression that the topic under consideration was exclusively limited to State responsibility for injury to foreigners, García Amador consciously chose to adopt a gradual approach by focusing on that part of the topic that in his view was most ripe for and in need of codification.[56] It would be more logical and practical, he argued, to include matters of substantive law and to consider at a later stage 'about omitting whatever is not pertinent' to the principles governing State responsibility.[57]

The approach of codifying State responsibility through the lens of the substantive treatment of foreigners and their property persisted throughout García Amador's mandate as a special rapporteur. This, despite the fact that the UN Secretary-General's memorandum of 1949,[58] the terms of reference in UNGA

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international obligations of the State as substantive obligations 'as specified in the relevant provisions of the draft' (i.e. obligations pertaining to the treatment of foreigners).

[54] ILC, *First report García Amador*, *supra* note 31, para 11.

[55] *Ibid*, para 41.

[56] ILC, *First report García Amador*, *supra* note 31, para 241; ILC, *Second report García Amador*, *supra* note 53, para 1. See also ILC, *Memorandum García Amador*, *supra* note 47, para 18: 'Por razones obvias, es muy posible que la omisión también pueda, en el séptimo período de sesiones, hacer un estudio preliminar de los principios relativos a la responsabilidad del Estado por daños causados en su territorio a la persona o bienes de los extranjeros. *En su mayor parte* los principios fundamentales a que aludimos se refieren a estos casos de responsabilidad' (emphasis added); ILC, *Summary record of the 371st meeting*, A/CN.4/SR.371 (1956), paras 3–4 (Sir Fitzmaurice, advocating a gradual approach given that '[t]he primary consideration was not the general responsibility of all international obligations, but, in particular, the responsibility of States for damage caused to the person or property of aliens,' and that this approach would be useful 'in the demarcation of the field of study and in opening up a wider view of a most important subject.').

[57] ILC, *Third report on international responsibility, by Francisco V. García Amador, Special Rapporteur: Responsibility of the State for injuries caused in its territory to the person or property of aliens – Part II: The international claim*, UN Doc A/CN.4/111 (1958) para 5.

[58] UNGA, *Memorandum of the Secretary-General*, *supra* note 35, paras 97–98.

Resolution 799 (VIII),[59] as well as the Commission's decision of 1955 to initiate the topic,[60] all called for a general approach of State responsibility that was disconnected from the position of foreigners and their treatment in another State.

With regard to the constituent elements of an internationally wrongful act, García Amador initially adopted the position that the mere failure to fulfil an international obligation gives rise to international responsibility.[61] Once established, the next step would be to attribute this responsibility to a State in order to 'bring into operation' the regime of State responsibility.[62] In his first report (1956), García Amador suggested seven bases of discussion to guide the ILC's work on the topic. The second basis of discussion included the following definition: 'International responsibility being the consequence of the breach or non-observance of an international obligation, its imputability depends on who is the direct subject of the obligation.'[63] Drawing on Hans Kelsen's distinction between the subject of the obligation (i.e. the person or entity who may commit the breach, e.g. a State official) and the subject of responsibility (i.e. the person or entity against whom the sanction or demand for reparation is directed; here, the State),[64] García Amador thus saw the concept of attribution as a legal operation to allocate pre-determined *responsibility for a breach* to the State as a legal person, as opposed to the currently prevailing method of using it to attach *conduct* to a legal person in order to establish whether a breach (and, as a result, responsibility) exists at all.[65]

In the reports that followed, García Amador revisited the notion of State responsibility and presented a set of draft articles on injuries caused to foreigners and their property. Within this substantive context, draft article 1, paragraph 1, contained in his second report (1957) contained a thorough redefinition of State responsibility, which provided that:

> For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries if these are the consequence of some *act or omission on the part of the organs or officials* which *contravenes the international obligations of the State*.[66]

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[59] UNGA Resolution 799 (VIII) of 7 December 1953, UN Doc A/RES/799(VIII) (1953).
[60] YB ILC 1955-II, 42 para 31.
[61] ILC, *First report García Amador*, *supra* note 31, para 64. This approach closely follows García Amador's preceding course at the Hague Academy of International Law; see García Amador (1958) 376–77.
[62] ILC, *First report García Amador*, *supra* note 31, para 58.
[63] *Ibid*, para 241, Basis of discussion No II, para 1.
[64] Kelsen (1948) 226: 'Legal responsibility for the delict is upon the person against whom the sanction is directed, whereas legal obligation is upon the one why by his own behavior may commit or refrain from committing the delict, the actual or potential delinquent.'
[65] On the attribution of responsibility to a State, see ILC, *First report García Amador*, *supra* note 31, paras 58–75.
[66] ILC, *Second report García Amador*, *supra* note 53, Annex, draft art 1(1) (double inverted commas appear in original; emphasis added). The twelve draft articles in this report constitute a Draft on

Accordingly, already in the second half of the 1950s we see the genesis of the current conception of an internationally wrongful act reflected in the second report of García Amador, namely one that results from the fulfilment of two cumulative conditions. First, García Amador's draft article 1 demonstrated that it is necessary to determine whether conduct qualifies as an act of a State, i.e. whether conduct is attributable or imputable to it (the requirement of an 'act or omission on the part of the organs or officials'). Second, this conduct of the State must constitute a breach of an international obligation (the requirement that State conduct 'contravenes the international obligations of the State'*)*. At the same time, from the purposive definition in the draft article quoted above it follows clearly that his understanding of State responsibility and its constituent elements was formulated still within the narrow context and for the limited purpose of injury to foreigners.

The main difference with his first report is the function of the element of attribution with respect to the existence of an internationally wrongful act. Rather than seeing it as extraneous to it, as was the case in García Amador's first report, the question of attribution is now integrated as a constituent element in the definition of what constitutes State responsibility. Thus, what is now attributed to the State as a legal person is *conduct*, rather than *responsibility*. This was an important change of perspective, as it testifies to the idea that a breach cannot be established at the level of the State agent or official whose conduct is at stake, but must rather be examined at the level of the State itself (as an entity with rights and obligations under international law). Moreover, this change of perspective signalled that one cannot speak of State responsibility without a prior determination that a particular conduct is in fact and in law an act of the State.[67]

Yet, even in this redefined draft, it would be difficult to speak of attribution rules with a function that is similar to how we understand and employ it today. Concepts such as "breach", "act of the State" and "State responsibility" were not clearly defined, demarcated, or put in perspective. At various occasions, the draft articles stipulated that conduct of State organs could only be considered as an act of the State if the conduct amounted to a breach of international law, making the former dependent on the latter and thereby blurring the distinction between the two elements.[68] Moreover, the draft contained no provisions to attribute the conduct of non-State actors to a State (e.g. based on the State controlling or directing them). It merely provided that a State could be indirectly responsible for its *own* conduct in

International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens.

[67] This will be examined more closely when analysing the order in which the elements of attribution and breach ought to be assessed; see Chapter 4, Section D.1.

[68] See ILC, *Second report García Amador*, *supra* note 53, Annex, draft art 2 on acts and omissions of the legislature: 'The State is responsible for the injuries caused to an alien by the enactment of any legislative … provisions which are incompatible with international obligations [unless the State can] avoid the injury or make reparation thereof.' This provision was located in a chapter devoted to defining 'acts and omissions of organs and officials of the State'.

relation to the acts by private persons, i.e. if it had been manifestly negligent in taking measures of prevention or punishment.[69]

Thus, while the work of the first Special Rapporteur in the 1950s is innovative inasmuch as it identified attribution and breach as constitutive elements of an internationally wrongful act, it fell short of providing the necessary analytical and conceptual distinction between them.[70] The preoccupation with the substantive position of the foreign individual vis-à-vis the State was a hallmark of all of García Amador's reports, including his sixth and final report (1961) containing a set of twenty-seven articles comprising a Revised Draft on International Responsibility of the State for Injuries caused in its Territory to the Person or Property of Aliens.[71] One of the clearest examples of his attempts to codify substantive law could be found in one of his draft articles that aimed at cataloguing the substantive fundamental human rights enjoyed by foreigners.[72] Other examples of substantive law proper concern García Amador's draft articles dealing with State responsibility for measures of expropriation and nationalization and the cancellation of public debts.[73] As García Amador explained in his second report, to lay down a general rule that State is responsible for injury to foreign nationals if it violated its international obligations in this respect, would result in a text that is open to serious criticism for uncertainty; hence, in his view there was a need to enumerate those substantive rights.[74]

The ILC spent little time discussing García Amador's six reports and the draft articles contained therein,[75] and was accordingly unable to give proper guidance to the direction of his work. The little time that the ILC spent discussing his reports and

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[69] See *ibid*, draft arts 10 ('Acts of ordinary private individuals') and 11 ('Internal disturbances in general').

[70] Occasionally, García Amador even returns to the approach adopted in his first report by discussing the 'attribution of responsibility' and making such attribution dependent on the existence of a certain level of fault; see ILC, *Fifth report on international responsibility, by Francisco V. García Amador, Special Rapporteur: Responsibility of the State for injuries caused in its territory to the person or property of aliens – Measures affecting acquired rights (continued) and constituent elements of international responsibility*, UN Doc A/CN.4/125 (1960) para 102: 'In cases when the existence or imputability of responsibility depend on *culpa* or on some other subjective element, or when such element constitutes the very basis on which responsibility and imputability rest, express provision therefor has to be made.'

[71] See ILC, *Sixth report García Amador*, *supra* note 53, Addendum, especially revised draft arts 1 (on the substantive rights of foreigners), 2(1) (on the constituent elements of State responsibility for injury to foreigners), 7 (on the standard of due diligence), 12 (on the attribution of conduct of State organs and officials) and 13 (on the attribution of conduct of the legislature).

[72] See ILC, *Second report García Amador*, *supra* note 53, draft arts 5 and 6 and accompanying commentary; *Sixth report García Amador*, *supra* note 53, draft art 1 and accompanying commentary.

[73] ILC, *Sixth report García Amador*, *supra* note 53, draft arts 9 and 11, which provided *inter alia* that a State is responsible if measures are not justified on grounds of public interest and involve discrimination between nationals and foreigners.

[74] ILC, *Second report García Amador*, *supra* note 53, draft arts 5 and 6, commentary para 20.

[75] From 1956, when the ILC for the first time considered the bases of discussion in García Amador's first report, up to and including 1961 (when he submitted his sixth and final report), merely eight meetings (or parts thereof) divided over two annual sessions were devoted to a discussion of the Special Rapporteur's reports.

articles showed that the product of the efforts of the first Special Rapporteur was both too wide and too narrow. Too wide, inasmuch as it attempted to codify the whole body of substantive law governing the status and protection of foreigners and their property, thus inheriting all the difficulties in determining substantive law such as their human rights, judicial guarantees, and the possible justifications and standards in relation to expropriations and nationalizations.[76] At the same time, the focus was too narrow, because García Amador's reports and draft articles did not address situations where a State was held accountable for violations in other spheres of international law (such as rules on the use of force, non-intervention, the protection of diplomats, self-determination, etc).[77]

By 1962, during the discussion of the ILC's future program of work, it had become apparent that the project was deadlocked as a result of fundamental disagreement in terms of method and substance of the codification project of State responsibility.[78] As put by one member of the ILC:

> The real cleavage of opinion … was over the place of the question of the treatment of aliens in the subject of state responsibility. For some members, it was the foundation of the law of state responsibility; for others, it was simply one of the many hypotheses in international law where a breach of international law gave rise to state responsibility.[79]

It had even been suggested that the rejection (or, at least, lack of sufficient discussion) by the ILC of the reports by García Amador — whose membership of the Commission ended in 1961 — meant that the study of the topic would have to start afresh.[80] Another approach was drastically needed to breathe new life into the codification of the international law of State responsibility.

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[76] The 'enormously ambitious' drafts of García Amador have been described as 'the Code Napoléon without the Emperor'; see Crawford (2002b) 15.

[77] These two interrelated objections were formulated by Jaroslav Žourek, who preferred to deal in general terms with 'the technical rules that were usually regarded as exhausting the subject of State responsibility,' instead of injury to foreign nationals 'every part of which fairly bristled with difficulties'; see ILC, *Summary record of the 415th meeting*, UN Doc A/CN.4/SR.415 (1957) para 2. For similar sentiments, see the comments in ILC, *Summary record of the 6th meeting*, UN Doc A/CN.4/SR.6 (1949) para 28 (Cordova); *Summary record of the 413th meeting*, UN Doc A/CN.4/SR.413 (1957) para 61 (Ago); *Summary record of the 414th meeting*, UN Doc A/CN.4/SR.414 (1957) para 39 (Verdross); *Summary record of the 415th meeting*, UN Doc A/CN.4/SR.415 (1957) paras 4–6 (François), 32 (Tunkin) and 39–40 (Ago); *Summary record of the 416th meeting*, UN Doc A/CN.4/SR.416 (1957) para 2 (Spiropoulos); *Summary record of the 512th meeting*, UN Doc A/CN.4/SR.512 (1959) paras 32 (Verdross), 34–35 (Ago) and 53 (Amado); *Summary record of the 568th meeting*, UN Doc A/CN.4/SR.568 (1960) paras 10 (Verdross), 15–17 (Ago) and 41–44 (Tunkin).

[78] For a summary of the various positions as to the scope of the topic and the method of work, see YB ILC 1962-II, 188–89 paras 33–46.

[79] ILC, *Summary record of the 632nd meeting*, UN Doc A/CN.4/SR.632 (1962) para 4 (Gros).

[80] YB ILC 1962-II, 188 para 34.

C.1.b. Paradigm Shift: A Generally Applicable Framework of "Secondary" Rules on State Responsibility

To break the deadlock and guide the scope and approach of its study, the ILC decided in 1962 to create a Sub-Committee chaired by Ago.[81] The difference of opinion that could be observed in discussions in the plenary was also reflected within the Sub-Committee.[82] Briggs, Tsuruoka, and Jiménez de Aréchaga wished to see the topic of State responsibility develop in connection with the specific topic of protection of foreigners. They pointed at the abundance of available State practice, judicial and arbitral decisions, and private codification initiatives within this context.[83] According to them, it would go beyond codification and even progressive development to formulate rules that were of general application to new fields of law having generated very little practice so far.

However, the remaining members of the Sub-Committee, most prominently Ago, disagreed with the approach of using injury to foreigners as a vehicle to formulate rules on State responsibility and instead preferred a general approach.[84] They observed there were many other fields that also could give rise to State responsibility.[85] Another disadvantage of codifying the field through the lens of injury to foreigners, it was argued, was that by default such exercise would inherit the many controversies on substantive law.[86] These controversies, after all, had greatly contributed to the lack of tangible success during the initial stages of the codification project, and would only be exacerbated unless one could see State responsibility as conceptually distinct from the standard of treatment of foreigners and their property.

Fed by the broadly shared feeling that a new methodological perspective was necessary to resuscitate the project and give it its much-needed focus, the majority led by Ago eventually convinced the minority. As a result, the Sub-Committee's report of 1963 unanimously recommended that 'with a view to the codification of the topic, [the ILC] give priority to the definition of the *general* rules governing the international responsibility of the State,'[87] regardless of the origin or sphere of the substantive rule alleged to be breached. This redirection of the project's focus was subsequently approved by the plenary ILC when discussing the recommendations of

[81] YB ILC 1962-II, 189 para 47. The other members of the Sub-Committee were Herbert Briggs, André Gros, Eduardo Jiménez de Aréchaga, Antonio de Luna, Angel Modesto Paredes, Senjin Tsuruoka, Grigory Tunkin, and Mustafa Kamil Yasseen.
[82] For the summary records of the meeting of the Sub-Committee, see ILC, *Report by Roberto Ago, Chairman of the Sub-Committee on State Responsibility*, UN Doc A/CN.4/152 (1963), Appendix I.
[83] See e.g. the comments by Jiménez de Aréchaga and Briggs in *ibid*, Appendix I, *Summary record of the 3rd meeting*. See further the memoranda submitted by Jiménez de Aréchaga and Tsuruoka in *ibid*, Appendix II
[84] See the memoranda submitted by Paredes, Gros, Yasseen and Ago in *ibid*, Appendix II.
[85] See the comments by Luna (*ibid*, Appendix I, *Summary record of the 3rd meeting*) and Tunkin (*ibid*, Appendix I, *Summary record of the 4th meeting*).
[86] See e.g. the comments by Yasseen in *ibid*, Appendix I, *Summary record of the 3rd meeting*.
[87] *Ibid*, para 5 (emphasis added).

the Sub-Committee.[88] In his second report (1970), Ago described the conclusion as follows:

> The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a *strict distinction* between this task and the task of defining the rules that place obligations on States. … [I]t is one thing *to define a rule and the content of the obligation* it imposes and another to determine *whether that obligation has been violated and what should be the consequences of the violation*. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of successful codification.[89]

This came to be known as the distinction between primary rules and secondary rules of international law.[90] As explained by Ago:

> In its previous drafts [for other topics], the Commission has generally concentrated on defining the rules of international law which … impose particular obligations on States, and which may, in a certain sense, be termed "*primary*", as opposed to the other rules — precisely those covering the field of responsibility — which may be termed "*secondary*", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules.[91]

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[88] See YB ILC 1963-II, 223–24 para 52. Upon request by Ago, this instruction was confirmed by the ILC in 1967 after its membership had changed; see YB ILC 1967-II, 368 para 42. In 1969, the ILC held that the priority given to the general rules governing State responsibility was among the 'strict criteria by which it proposes to be guided in codifying the topic'; see YB ILC 1969-II, 233 para 84.

[89] ILC, *Second report Ago*, *supra* note 3, para 7. This passage appeared in virtually identical wording in that year's annual report to the UNGA; see YB ILC 1970-II, 306 para 66(c).

[90] This is to be distinguished from H.L.A. Hart's terminology, who employs the label of 'secondary' to describe rules about rules, i.e. rules — such as found in the law of treaties — identifying how primary rules of international come into being and how they should be interpreted; see Hart (1994) 79–99. See also Gourgourinis (2011) 1016, explaining that 'Hartian thought should not be considered as the origin of the distinction, especially given Hart's broader definition of secondary norms'; Bodansky and Crook (2002) 779 and fn 48.

[91] ILC, *Second report Ago*, *supra* note 3, para 11 (emphasis added). The primary/secondary terminology can in fact be traced back to Herbert Briggs observing that the 1929 Harvard Draft Convention 'correctly treated State responsibility as a *secondary* obligation, having its source in the non-observance of a *primary* obligation under international law'; see ILC, *Sub-Committee report Ago*, *supra* note 82, Appendix I, *Summary record of the 3rd meeting* (emphasis added). See also ILC, *Summary record of the 1012th meeting*, UN Doc A/CN.4/SR.1012 (1969) para 5 (Tammes): 'For want of a better terminology, the [newly adopted approach] could be described as a distinction between *primary*, material or substantive rules of international law, on the one hand, and *secondary* or functional rules, on the other. Primary rules … influence the conduct of States directly; secondary rules [of] State responsibility proper … promote the practical realization of the substance of international law contained in the primary rules' (emphasis added). The primary/secondary terminology is also seen as a way to express the difference between responsibility that originates from a wrongful act and liability

Primary rules of international law thus comprise substantive customary and conventional rules that prescribe or prohibit certain conduct, while the secondary rules of State responsibility law provide a 'framework or matrix of rules of responsibility, identifying whether there has been a breach by a State and what were its consequences'.[92] Divorcing the primary rules from the scope of the ILC's work allowed general rules on responsibility to develop, which are applicable to all types of international obligations, regardless of the source of the obligation or the subjects or interests it seeks to protect. This approach meant that it was no longer deemed necessary to resolve difficult issues of substance — e.g. culpability (intention, fault, or lack of due diligence), injury or damage, and the doctrine of abuse of rights — these questions being left to relevant primary rules to be found or developed elsewhere.[93]

A logical and welcome implication of the distinction between primary rules of substantive international law and secondary rules of State responsibility — a paradigm shift in the true sense of the word — was that it paved the way for a clear division between the constituent elements of an internationally wrongful act. Indeed, the distinction between primary and secondary rules (and the project's priority of focusing on the latter) meant that the two elements of attribution and breach were not only *necessary* but also *sufficient* for the purpose of formulating a generally applicable rule on State responsibility. Indeed, already during the discussions of García Amador's second report, Ago expressed doubts about how the draft articles of the first Special Rapporteur dealt separately with the attribution of conduct by legislative, executive and judicial organs.[94] Instead, Ago suggested that the international responsibility of the State could be defined in general terms as 'an unlawful act imputable to a State as a subject of international law'.[95] Later, in a memorandum (1962) as well as in his report containing the conclusions of the Sub-Committee on State Responsibility, Ago formulated the criteria of attribution and breach as constituent elements of *any* internationally wrongful act.[96] In his second report as Special Rapporteur (1970), Ago elaborated on this idea and proposed the following draft article 2 containing a general definition of an internationally wrongful act:

An internationally wrongful act exists where:

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from a lawful one, given that non-prohibited acts 'by definition … do not breach any obligation and therefore pertain to the primary rules'; see Barboza (1997) 323.

[92] Crawford (2002b) 2.

[93] See e.g. Art 2 ARSIWA, commentary para 3: 'Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence.' In fact, the text of ARSIWA is replete with clauses that refer — or are without prejudice — to potentially applicable primary rules; see e.g. Arts 27, 33(2), 41(3), and 54–59 ARSIWA.

[94] ILC, *Summary record of the 413rd meeting*, UN Doc A/CN.4/SR.413 (1957) para 64.

[95] *Ibid*, para 62.

[96] See ILC, *Sub-Committee report Ago*, *supra* note 82, para 6. For Ago's 1962 memorandum that adopted the same approach, see *ibid*, Appendix II.

(a) Conduct consisting of an action or omission is imputed to a State under international law; and

(b) Such conduct, in itself or as a direct or indirect cause of an external event, constitutes a failure to carry out an international obligation of the State.[97]

Contrary to his predecessor García Amador, Ago presented these two conditions as a unitary rule, providing the foundation of a systematic and consolidated body of generally applicable rules.[98] The essential difference with the approach of García Amador was that the two elements were no longer formulated differently, depending on which part of the State apparatus it concerned, such as a State organ or a political subdivision.

The element of attribution with respect to the definition of an internationally wrongful act was not appreciated by everyone in the Commission.[99] One of the most prominent critics was Nikolai Ushakov, who felt that the problem of attribution does not exist in the theory of State responsibility.[100] If the public organs of the State acted, it was the State itself that acted, he argued, and accordingly the operation of attribution 'was no more necessary than imputing to a person the conduct of his arm'.[101] All that was required, according to this view, was an act of the State in breach of its obligations.[102] Ago's response was to point out that the State as such is not capable of physical action and that an act of the State can only be some physical conduct by individual human beings.[103] The relevance of the issue of attribution had become even more obvious now that a number of Ago's draft articles were devoted to formulating rules on the attribution to a State of the conduct of its organs (even if acting *ultra vires*), as well as that of other actors, including private persons acting on behalf of the State in some way or another. Indeed, to discard the element of attribution would have merely begged the question what can be regarded as an act of the State in the first place.[104] To answer this question it is necessary to define what

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[97] ILC, *Second report Ago*, *supra* note 3, para 55.

[98] *Ibid*, para 24, declaring his aspiration that the Articles set out a 'unitary principle of responsibility, which it should be possible to invoke in every case'.

[99] See e.g. ILC, *Summary record of the 1076th meeting*, UN Doc A/CN.4/SR.1076 (1970) para 11 (Reuters); *Summary record of the 1207th meeting*, UN Doc A/CN.4/SR.1207 (1973) paras 19 (Ustor) and 23 (Castañeda).

[100] ILC, *Summary record of the 1076th meeting*, UN Doc A/CN.4/SR.1076 (1970) paras 20–23.

[101] *Ibid*, para 23.

[102] See also ILC, *Summary record of the 1079th meeting*, UN Doc A/CN.4/SR.1079 (1970) para 12 (Ustor, explaining the theory prevailing among international lawyers in the Soviet Union, that if the Head of State/Government or another duly accredited representative acted on behalf of the State, it would be 'much too artificial and, for all practical purposes, perhaps futile to consider the imputability of the act'.)

[103] ILC, *Third report on State responsibility, by Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility*, UN Doc A/CN.4/246 and Add.1–3 (1971) para 53. See also draft Art 3 ARSIWA as adopted on first reading, YB ILC 1973-II, 179, commentary para 5: 'The State is a real organized entity, but to recognize this "reality" is not to deny the elementary truth that the State as such is not capable of physical action.'

[104] See ILC, *Summary record of the 1079th meeting*, UN Doc A/CN.4/SR.1079 (1970) para 13 (Ustor, clarifying that there was no real difference between the approach of the Special Rapporteur and that

constitutes a State organ (its own arms, in Ushakov's parlance) and who, as a result of some other institutional or factual link with the State, can otherwise be said to be acting *longa manu* on behalf of the State. After all, under Ago's direction, attribution was no longer merely the reflection of a State's internal institutional rules. Through the recognition of various connecting factors (such as conduct under the direction and control of a State, or conduct in situations where State authority was lacking altogether) the process of attribution had become one that also takes into account State/agent-relations of a more factual nature.

Some of the discomfort related to attribution as a legal operation in international law was in some part also caused by false analogies with domestic law. In domestic criminal law one might speak of the imputation to a person of charges or guilt by a judicial authority, or of the imputation to a person of their conduct and its legal consequences based either on an examination of material, physical causality, or on an individual's mental state or ability.[105] However, such analogies were inappropriate. As aptly demonstrated by the fate of the controversial draft article 19 as adopted on first reading, State responsibility is essentially civil in nature.[106] Individual criminal accountability in national law systems, on the other hand, is subject to completely different sets of rules, values, assumptions and institutions.[107] It was largely to prevent any connotations with domestic law principles that the ILC in 1970 stopped speaking of imputation and started using the term attribution.[108]

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of Ushakov, 'since whenever one of them said that a State was responsible for a certain act, the other could express the same idea by saying that certain acts of certain people were imputable to the State and that the State was therefore responsible. The difference would then come down to a mere question of terminology.').

[105] See ILC, Summary of record of the 1080th meeting, UN Doc A/CN.4/SR.1080 (1970) para 72 (Ushakov: 'As in all systems of internal law, [imputation] was intimately linked with the concept of fault (*culpa*). In that sense, it would be said that fault could not be imputed to a child or to a person of unsound mind.').

[106] Draft Art 19 ARSIWA as adopted on first reading sought to introduce a distinction between 'international delicts' and 'international crimes' committed by States; see YB ILC 1976-II(2) 95. This provision proved so controversial that it was eventually deleted when the ILC proceeded to the second reading; see e.g. Crawford (2010a) 22. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Blaškić (Review Judgment)* (1997), para 25 (holding that States cannot be the subject of criminal sanctions akin to those provided for in national criminal systems); International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 170 (holding that State responsibility for breaches of the Genocide Convention is not of a criminal nature).

[107] This point was made clearly in ILC, *Second report Ago*, *supra* note 3, para 39 and fn 65. See also *Summary record of the 1081th meeting*, UN Doc A/CN.4/SR.1081 (1970) para 26 (Ago, agreeing that the term imputation as used in domestic criminal law has no place in international law).

[108] YB ILC 1970-II, 308 para 77; ILC, *Third report Ago*, *supra* note 57, paras 50, 53 and 58. See on this point draft art 2 as proposed by Ago in his third report, which provides that an internationally wrongful act exists when: (a) Conduct consisting of an act or omission is *attributed* to the State in virtue of international law, and (b) That conduct constitutes a failure to comply with an international obligation of the State; ILC, *ibid*, para 75 (emphasis added). The change in terminology was also applied to the French and Spanish versions of the text by replacing the terms 'imputation' and 'imputación' by 'attribution' and 'atribución', respectively.

The large majority of the members of the ILC who explicitly addressed the issue agreed with Ago and spoke out in favour of retaining the two elements of attribution and breach. Shabtai Rosenne's defence of keeping the notion of attribution was particularly strong, warning that 'any serious attempt to displace the concept of imputability from its central place would lead rapidly to a state of anarchy'.[109] This new presentation of the generally applicable constituent elements of an internationally wrongful act would eventually earn the approval of the plenary ILC when it provisionally adopted (what had in the meantime become) Article 3 on first reading in 1973. Article 3 as adopted on first reading accordingly provided that there is an internationally wrongful act of a State when '(a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of that State'.[110] Ago's subsequent reports would provide more detail on the conditions under which conduct by various actors is attributable to the State,[111] as well as on the parameters of what exactly constitutes a breach of a State's international obligation.[112]

Evidence of the necessity of these two elements can be found in judgments, awards and decisions rendered by general or system-specific international courts. For instance, in the *Phosphates in Morocco* case the PCIJ held that State responsibility results from 'acts being attributable to the State and described as contrary to the treaty right of another State'.[113] In *Diplomatic and Consular Staff in Tehran*, the International Court of Justice (ICJ) found that it had to determine '[f]irst, … how far, legally, the acts in question may be regarded as imputable to the Iranian State' and '[s]econdly, … their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable'.[114] International arbitral tribunals have followed the same approach.[115]

[109] ILC, *Summary record of the 1080th meeting*, UN Doc A/CN.4/SR.1080 (1970) para 56.
[110] YB ILC 1973-II, 179
[111] See ILC, *Third report Ago*, *supra* note 57; ILC, *Fourth report on State responsibility, by Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility (continued)*, UN Doc A/CN.4/264 and Add.1 (1972).
[112] ILC, *Fifth report on State responsibility by Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility (continued)*, UN Doc A/CN.4/291 and Add.1 & 2 and Corr.1 (1976); *Sixth report on State responsibility by Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility (continued)*, UN Doc A/CN.4/302 and Add.1, 2 & 3 (1977); *Seventh report on State Responsibility by Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility (continued)*, UN Doc A/CN.4/307 and Add.1 & 2 and Corr.1 & 2 (1978).
[113] PCIJ, *Phosphates in Morocco (Italy v. France)* (1938) 28.
[114] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980) para 56. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) para 226; International Tribunal for the Law of the Sea (ITLOS), *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (2015) para 144.
[115] See e.g. International Centre for Settlement of Investment Disputes (ICSID), *Amco Indonesia Corporation and Others v. Indonesia* (1984) para 172; ICSID, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (2007) para 275; ICSID, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (2008) para 773; Permanent Court of Arbitration (PCA), *Frontier Petroleum Services Ltd. v. Czech Republic* (2010) para 223.

Accordingly, the rule that an internationally wrongful act requires the fulfilment of the two conditions of attribution of conduct and breach is a firmly established rule of customary international law.

C.2. Revision and Adoption on Second Reading (1996–2001)

In 1997, the ILC decided to proceed to the second reading of the topic and appointed James Crawford as fifth Special Rapporteur.[116] In his first report (1998), Crawford recommended that Article 3 with its definitional elements of an internationally wrongful act be adopted without changes.[117] With minor (and, for the purposes of the present thesis, insignificant) changes in wording the definition of an internationally wrongful act was finally laid down in Article 2 ARSIWA as adopted on second reading (2001). It is not necessary for the purposes of the present thesis to give a detailed overview of all changes introduced in the second reading of ARSIWA.[118] Accordingly, this Section will only focus on two aspects as laid down in the 2001 text inasmuch as they have a bearing on the research questions under consideration. The first aspect is the formulation of various standards of attribution of conduct (C.2.a), while the second aspect relates to the recognition of *lex specialis* rules as found in particular fields of international law (C.2.b).

C.2.a. Standards for the Attribution of Conduct

A State is a legal person with full authority to act under international law. Yet, as an abstract collective entity, a State can only act 'by and through their agents and representatives'.[119] More precisely, States cannot act except through persons who have a certain *de jure* or *de facto* relationship with the State so as to act on its behalf. The legal operation of attribution in international law looks into the connection that exists between a State and the physical author of an act, in order to establish whether the act in question amounts to an act of the State.[120] The rules of attribution in Part One, Chapter II (i.e. Articles 4 to 11) of ARSIWA thus serve to distinguish private acts from those which can be genuinely regarded as acts of the State for the purpose of establishing the responsibility of the latter. The importance of attribution within

[116] YB ILC 1997-II(2) paras 158–61.
[117] ILC, *First report on State responsibility, by James Crawford, Special Rapporteur*, UN Doc A/CN.4/490 and Add. 1–7 (1998) para 135.
[118] For a discussion, see Crawford et al (2001).
[119] PCIJ, *Settlers of German Origin in the Territory Ceded by Germany to Poland (Advisory Opinion)* (1923) 22. See also European Court of Human Rights (ECtHR), *Jones and Others v. United Kingdom* (2014) para 202, noting that 'an act cannot be carried out by a State itself but only by individuals acting on the State's behalf'.
[120] Condorelli and Kress (2010) 221.

the context of establishing State responsibility under international law is supported by academic writing 'from Grotius to Ago'.[121]

The underlying rationale of ARSIWA is that of limited responsibility.[122] This entails that, in principle, only the conduct of its organs and agents exercising public authority can be attributed to a State in international law. The other side of the coin is the point of departure that the conduct of private persons is not attributable to the State.[123] That said, there may exist special factual circumstances that justify that such conduct should nevertheless be considered as an act of the State with a view to determining its responsibility.[124]

The principle of limited responsibility is illustrated well by the 1979 student protests in Tehran, leading to the *United States Diplomatic and Consular Staff in Tehran* case.[125] In the initial stages of the protest, the breach committed by Iran consisted of a failure to take adequate protective measures in violation of a due diligence obligation (a breach of a positive obligation),[126] but not the actual use of violence against the embassy itself (which would be a breach of a negative obligation) as this was not attributable to Iran under international law.[127] It could even be argued that when the violent protesters spontaneously attacked the embassy, the individual acts of violence *as such* constituted neither a violation of international law on the part of the protesters (as they are not bound by an international obligation to respect embassies),[128] nor a violation committed by the State (given that the acts of violence could not be attributed to the State). It was only after Iran acknowledged

[121] Christenson (1991) 327.
[122] ILC, *First report Crawford*, *supra* note 117, para 154(a).
[123] See e.g. draft Art 11(1) ARSIWA as adopted on first reading, YB ILC 1975-II, 70: 'The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.' See also ECtHR, *Tagayeva and Others v. Russia* (2015) para 581 ('the conduct of private persons is not as such attributable to the State'): ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (2015) para 146 (holding that illegal, unreported and unregulated fishing activities by private vessels are 'not *per se* attributable to the flag State').
[124] See e.g. ILC, *Summary record of the 1205th meeting*, UN Doc A/CN.4/SR.1205 (1973) para 37 (Sette Câmara, explaining the 'philosophy of the draft' that State responsibility depends on 'some special relationship existing between the individual or group of individuals who were the physical instruments of the conduct, and the State itself'). As for human rights law, see e.g. Committee on the Elimination of Discrimination Against Women, *General Recommendation No 28 (Core obligations under Art 2)*, UN Doc CEDAW/C/GC/28 (2010) para 13 ('In some cases, a private actor's acts or omission of acts may be attributed to the State under international law.')
[125] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980).
[126] *Ibid*, paras 61–68.
[127] *Ibid*, paras 57–60.
[128] Art 11 ARSIWA, commentary para 7 explains that conduct attributed under this provision 'may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law'.

and adopted the acts of the protesters, that the violent acts turned into conduct on the part of the State.[129]

In the following Sections, an overview will be given of the various bases for attribution of conduct to a State. A detailed treatment of these standards of attribution, as laid down in ARSIWA and explained through the commentary, is necessary because it allows us to examine in Chapters 4, 5, and 6 of this thesis whether these standards are followed in case law in the domains of human rights law and IHL, or, rather, whether there are *lex specialis* standards of attribution in these fields.

The first two Sections (C.2.a.i. and C.2.a.ii.) deal with the relatively straightforward scenario of conduct by State organs and other persons or entities empowered to exercise governmental authority. With respect to the standards of attribution as described in this first Section, the domestic law of the State and the latter's right to determine its own internal organization play a leading (though not fully decisive) role. As explained by Crawford: 'international law has to accept, by and large, the actual systems adopted by States, and the notion of attribution thus consists primarily of a *renvoi* to the public institutions or organs in place in the different States'.[130] The two Sections that follow (C.2.a.iii and C.2.a.iv) entertain situations in which a State bears direct responsibility for conduct of private individuals outside of its institutional structure. Here the rationale for attribution lies not so much on formal considerations of a State's domestic law, as it does on the way how States, from a factual point of view, instrumentalize private individuals as proxies to achieve certain aims.

The bases of attribution to be discussed were already introduced in the first reading of ARSIWA.[131] However, the formulation and structure of the relevant provisions underwent significant changes during the second reading, which makes it more appropriate to consider them at this stage.

C.2.a.i. State Organs and Other Persons or Entities Empowered to Exercise Governmental Authority (Articles 4 to 6 ARSIWA)

[129] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980) para 74, holding that the approval given by the Ayatollah and other State organs 'translated continuing occupation of the Embassy and detention of the hostages into acts of that State,' and that the militants and hostage-takers had become 'agents of the Iranian State for whose acts the State itself was internationally responsible'. This standard of attribution based on acknowledgment and adoption of private conduct found its way into Art 11 ARSIWA.

[130] ILC, *First report Crawford*, *supra* note 117, para 154(b).

[131] For the attribution articles as adopted on first reading, with commentaries, see YB ILC 1973-II, 191–93; YB ILC 1974-II, 277–90; and YB ILC 1975-II, 61–70 and 91–106. The articles and commentary to Part One as adopted on first reading are reproduced in Rosenne (1991). Art 11 ARSIWA (on conduct acknowledged and adopted by a State) was introduced during the second reading without an equivalent predecessor in the first reading. For its genesis, see ILC, *First report Crawford*, *supra* note 117, paras 278–82.

Article 4, paragraph 1, ARSIWA provides that the conduct of 'any State organ' is attributable to the State.[132] This Article covers the conduct of all persons and entities that comprise the organization of the State. Accordingly, the scope of the Article is wide. It is applicable to the legislative, executive, and judicial branches of government at the central, regional and local levels of government (thus including provinces, municipalities and component units of a federal State). This is regardless of the position in a State's organization, whether superior, subordinate, or in charge of national or international affairs. Indeed, for the purpose of State responsibility, the State is treated as a unity; a single legal person in international law.[133] Issues such as separation-of-powers — including the sovereignty of parliament, the independence of domestic courts, or the autonomy of territorial units — concern the internal political organization of the State and cannot be relied on vis-à-vis third States.[134] Article 4 covers all conduct (i.e. *acta jure imperii* and *acta jure gestionis*) by persons and entities accorded the status of organ by the relevant State's internal laws.[135] However, merely looking at internal laws is not sufficient; Article 4 also applies to persons or entities which are traditionally considered by international law as State organs such as the police or diplomats, even when they are denied such formal status in domestic law.[136] This provision undoubtedly represents customary international law, as recognized in a great number of cases by international courts and arbitral tribunals.[137]

Moreover, according to the ICJ, Article 4 ARSIWA covers not only those persons or entities considered as its *de jure* organs, but also a State's *de facto* organs, i.e. those persons or entities who, while not having the formal status of State organ, are equated with such provided that the persons, groups or entities act in 'complete dependence' on the State.[138] For this to be the case, it is required that the non-State actor is a mere instrument through which the State acts, lacking any real autonomy, and that there is a 'particularly great degree of State control' akin to what a State

[132] Art 4 ARSIWA.
[133] See Art 2 ARSIWA, commentary para 6; Art 4 ARSIWA, commentary para 5.
[134] Momtaz (2010) 239.
[135] Art 4 ARSIWA, commentary para 6.
[136] See Art 4(2) ARSIWA and commentary para 11. See also Dupuy (2010) 180, who notes that the question as to which entities are considered State organs is initially determined by the State itself, but international law 'ultimately remains the master of the final characterization' as a State organ.
[137] See e.g. ICSID, *Amco Indonesia Corporation and Others v. Indonesia* (1984) para 172; ICTY, *Prosecutor v. Blaškić* (1997) para 41; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* (1999) para 62; ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 109 and n 129; PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)* (2003) paras 144 and 146; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) para 213; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) paras 385 and 388.
[138] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 392.

ordinarily exercises over its organs.[139] Or, as the ICJ held earlier in *Nicaragua*, it depends 'on the extent to which the [State] made use of the potential for control inherent in that dependence'.[140] Once such a relationship exists, all conduct of the *de facto* organ is attributed to the State.[141]

The conduct of persons or entities that are not State organs in the sense of Article 4 ARSIWA but which are nonetheless empowered by domestic law to exercise some elements of governmental authority akin to that normally exercised by a State (so-called para-statal entities), is covered by Article 5 ARSIWA. This category, which equally represents customary international law,[142] is a relatively narrow one whose outer contours are difficult to identify with much precision. Such uncertainty is unfortunate. States increasingly delegate or authorize the exercise of sovereign authority by private institutions, such as public agencies or corporations, semi-public entities, and even private companies.[143] According to the commentary, five factors should be taken into account for application of this provision: (1) the particular society, its history and traditions; (2) the content of governmental powers; (3) the way such powers are conferred; (4) the purpose for which are to be exercised; and (5) the extent to which the entity is accountable to government for their exercise.[144] Article 5 only applies to conduct in the exercise of governmental authority (*acta jure imperii*); it does not cover private or commercial activities undertaken by the entity.[145]

Article 6 ARSIWA addresses situations in which a State organ (the so-called transferred servant) is placed at the disposal of another State. For application of this provision, it is required that the organ of the sending State exercises elements of governmental authority of the receiving State, under the exclusive authority of and

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139 *Ibid*, para 393.

140 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) para. 110.

141 See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 397, where the Court distinguishes the situation of *de facto* organs from that of (groups of) persons under a State's direction and control (i.e. the base of attribution laid down in Art 8 ARSIWA).

142 See e.g. ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 109 and n 130; PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)* (2003) para 145; ICSID, *Nobles Ventures, Inc. v. Romania* (2005) para 70; ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion, Seabed Disputes Chamber)* (2011) para 182.

143 See Momtaz (2010) 244. See also ILC, *Summary record of the 1203rd meeting*, UN Doc A/CN.4/SR.1203 (1973) para 52 (Bartoš, pressing the ILC to study the question of attribution to the State of 'acts of established bodies such as trade unions, co-operative and collective enterprises, which were not State organs, but exercised a great influence on the internal order. Given the existence of those semi-public — or semi-private — bodies, the divisions between the public and the private domain was no longer absolute where State responsibility was concerned').

144 Art 5 ARSIWA, commentary para 6. See also Dupuy (2010) 181, arguing that Art 5 ARSIWA requires one to 'go beyond appearances to reveal the reality of the legal situation specific to the entity in question'.

145 *Ibid*, commentary para 5.

for the purposes or benefit of the latter.[146] If this is the case, the conduct of the organ of the sending State is attributed solely to the receiving State to which the organ is seconded. There is little international case law that deals with the problem of State organs at the disposal of another State.[147] Nevertheless, the little practice that does exist on this matter supports the conclusion that this too concerns a rule of customary international law.[148]

C.2.a.ii. Ultra Vires *Conduct by State Organs and Other Persons or Entities Empowered to Exercise Governmental Authority (Article 7 ARSIWA)*

Article 7 ARSIWA does not contain an independent standard of attribution. Rather, it operates in conjunction with other attribution provisions in the Articles. Article 7 makes clear that if State organs (covered Arts 4 and 6 ARSIWA) or persons or entities empowered to exercise governmental authority (covered by Art 5 ARSIWA) act in official capacity, their conduct is attributable to the State even if such conduct is in excess of their authority or in violation of instructions given to them (i.e. if their conduct is *ultra vires*).[149] This provision, which also represents customary international law,[150] is significant since otherwise States would be able to deny responsibility in cases where their organs and officials abuse their authority in order to commit violations of international law.[151] The logical implication of Article 7 is that a State will not be held responsible if a person, who happens to be a State organ of official, acts in a purely private capacity; that is, when, given the circumstances, the conduct 'is so removed from the scope of their official functions that it should be assimilated to that of private individuals'.[152] Thus, what is crucial for purposes of attribution is the existence of *actual* or *apparent* authority.

[146] Art 6 ARSIWA, commentary paras 1 and 2.
[147] See also Dupuy (2010) 182, noting that the circumstances as foreseen in Art 6 ARSIWA occur only exceptionally.
[148] See e.g. Arbitral Award, *Chevreau (France v. United Kingdom)* (1931), where the arbitrator held (at 1141) that the United Kingdom could not be held responsible for the conduct of its Consul in his capacity as the person in charge of the Consulate of France, as the Consul was acting on behalf of the latter. A more recent case can be found in ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 389, where the Court noted 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'.
[149] Art 7 ARSIWA.
[150] See e.g. ICSID, *Amco Indonesia Corporation and Others v. Indonesia* (1984) para 172; Iran–United State Claims Tribunal, *Yeager v. Iran* (1987) para 65; ICSID, *Nobles Ventures, Inc. v. Romania* (2005) para 81; ICTY, *Prosecutor v. Tadić (Appeal)* (1999) paras 121 and 123.
[151] Art 7 ARSIWA, commentary para 2. See also Dupuy (2010) 176.
[152] Art 7 ARSIWA, commentary para 7.

C.2.a.iii. Instructions, Direction or Control of a State (Article 8 ARSIWA)

According to Article 8 ARSIWA, the conduct of a person or group of persons is attributable to a State when 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[153] When it comes to the exact level of control required by Article 8, international courts and tribunals have adopted divergent positions. In *Bosnian Genocide* the ICJ required proof of 'effective control,' which it defined as control exercised 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions' taken by the non-State actor in question.[154] Case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) agrees with effective control being the proper test for attribution under State responsibility law, but as an exception it considers the less-demanding test of 'overall control' appropriate when the non-State actor is an organized armed group involved in an armed conflict.[155] It defines overall control as 'more than the mere provision of financial assistance or military equipment or training [but without the need to show] the issuing of specific orders by the State, or its direction of each individual operation'.[156]

It is not only the level of control that suffers from uncertainty. It has also been submitted that it is rather unclear how the level of control required for the purposes of Article 8 ARSIWA differs from that articulated by the ICJ in *Bosnian Genocide* with respect to completely dependent *de facto* organs covered by Article 4 ARSIWA,[157] discussed earlier in Section C.2.a.i.

C.2.a.iv. Absence of Official Authorities, Insurrectional Movements, and Acknowledgment and Adoption by the State (Articles 9 to 11 ARSIWA)

Article 9 ARSIWA provides that the conduct of persons or groups of persons is attributed to the State when 'in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'.[158] An absence or default of the

[153] Art 8 ARSIWA.
[154] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para. 400. See also ICJ, *United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*) (1980) para 58; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) para. 115; *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) para 160.
[155] ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 137.
[156] *Ibid*. The Tribunal has repeatedly confirmed and applied this test, up to its final appeals judgment; see *Prosecutor v. Prlić et al.* (2017) paras. 238 and 246. The standards of effective and overall control will be revisited in more detail in Chapter 5.
[157] Stern (2010) 206; Cahin (2010b) 333.
[158] Art 9 ARSIWA.

official authorities may exist in cases of a total collapse of the State apparatus or in cases where the official authorities do not exercise the totality of their functions; i.e. where the regular authorities are dissolved, disintegrating, suppressed or otherwise rendered inoperative (e.g. during revolution, armed conflict or foreign occupation), prompting so-called agents of necessity to fill the void for the purpose of replacing or supplementing the regular State apparatus.[159] The conduct of the Revolutionary Guard in the immediate aftermath of the Iranian revolution of 1979 is an example of conduct that would be covered by this article.[160]

Article 10 ARSIWA provides two rules in respect of insurrectional movements, or so-called victorious revolutionaries. First, the conduct of an insurrectional movement that becomes the *new government* of a State, is considered as an act of that new State.[161] Second, if the insurrectional movement succeeds in establishing a *new State* in part of the territory belonging to or administered by a pre-existing State, their conduct is attributed to this new State.[162] This provision is justified by the need for stability in international law and the continuity that exists between the movement and the eventually formed new government or new State.[163] While Article 10 does not indicate the point at which an insurrectional or other movement can be characterized as such,[164] the commentary appears to equate the idea of an insurrectional movement with the notion of 'dissident armed forces' under Article 1 of Additional Protocol II.[165]

In cases where the insurrectional movement is defeated, the general rule applies that the State is not directly responsible for their conduct, unless the conduct of the movement is to be considered as an act of the State by virtue of the remaining provisions of ARSIWA.[166] Moreover, regardless of the outcome of the movement's struggle, the State may still be held responsible *indirectly*, e.g. as a result of a failure to take measures of prevention.[167] However, it must be noted that responsibility for such omissions is less likely to occur than in cases of ordinary mass riots and

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[159] Art 9 ARSIWA, commentary paras 1 and 5.
[160] See Iran–US Claims Tribunal, *Yeager v. Iran* (1987) paras 42 and 43.
[161] Art 10(1) ARSIWA.
[162] Art 10(2) ARSIWA.
[163] Art 10 ARSIWA, commentary paras 4–6. See in this respect also Tomuschat (1997) 43, pointing out that 'the notion of international responsibility presupposes a well-organized machinery [and] stable institutions responsive to the claims and expectations of the international community.'
[164] See Art 10 ARSIWA, commentary para 9, noting that the wide variety of forms which insurrectional movements may take stands in the way of providing a clear-cut definition of what constitutes such movement.
[165] See Art 10 ARSIWA, commentary para 9. See also Cahin (2010a) 252. Art 1 Additional Protocol II to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts provides that its provisions apply to non-international armed conflicts (NIACs) 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'
[166] Art 10 ARSIWA, commentary para 2.
[167] Art 10(3) ARSIWA and commentary para 15.

demonstrations, given that the State's ability to prevent may be limited by various factors, such as its resources and capacity to control the activities of insurrectional movements that have control over a portion of its territory.[168] The rules in relation to the two situations described in Article 10 ARSIWA, too, represent customary international law.[169]

Finally, Article 11 ARSIWA provides that conduct is considered as an act of the State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'.[170] The conditions of acknowledgement and adoption are cumulative, so that the mere expression of knowledge or even support with regard to certain conduct is not sufficient. What is required is a further step in the form of approval or identification by a State that the conduct in question is, in effect, its own.[171] An illustration of this base of attribution concerns the *Diplomatic and Consular Staff in Tehran* case, decided by the ICJ. The case dealt with the responsibility of Iran in respect of violent protesters spontaneously attacking the US embassy in Tehran. In the initial stages of the protest, the breach committed by Iran consisted of a failure to take adequate protective measures in violation of a due diligence obligation (breach of a positive obligation), not the actual use of violence against the embassy (which would be a breach of a negative obligation).[172] It was only after the Ayatollah of Iran acknowledged and adopted the acts of the protesters, that the violent acts were regarded as acts directly attributable to Iran: 'The approval given to these facts by the Ayatollah Khomeini … and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.'[173] It has been argued that Art 11 ARSIWA has an insufficiently solid basis in international practice.[174] However, this provision has been deemed to represent customary international law by several international courts and

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[168] Cahin (2010a) 253. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 430, where with respect to the obligation to prevent genocide (an positive obligation of conduct, not result), the Court held that a State 'cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide,' and that various parameters — such as the capacity to exert some legal or factual leverage or influence over the perpetrators — influence the assessment whether a State has used reasonable means to discharge its due diligence obligation to prevent genocide.

[169] See in particular Iran–United States Claims Tribunal, *Short v. Iran* (1987) paras 28 and 33; Iran–United States Claims Tribunal, *Rankin v. Iran* (1987) para 25. In ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 104, the Court held that 'even if Article 10(2) [ARSIWA] could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State'.

[170] Art 11 ARSIWA.

[171] Art 11 ARSIWA, commentary para 6.

[172] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980) paras 63–68.

[173] *Ibid*, para 74.

[174] See Condorelli and Kress (2010) 231–32.

tribunals in subsequent case law.[175] In the recent judgment in *Makuchyan and Minasyan v. Azerbaijan and Hungary*, the European Court of Human Rights (ECtHR) confirmed that Art 11 ARSIWA provides 'the current standard under international law' in terms of attribution of conduct by way of acknowledgment and adoption.[176] The Court added that that this provision belongs 'to the existing rules of international law, as elaborated in the ILC Commentary and applied by international tribunals'.[177]

The remarkable characteristic of attribution of conduct pursuant to Articles 10 and 11 ARSIWA, is the fact that it takes place *ex post facto*. Whether the conduct undertaken *during* the struggle to become a new government or new State is attributed under Article 10 depends on the eventual success of the movement later on. Similarly, clear and unequivocal acknowledgement and adoption in the sense of Article 11 thus has retroactive effect in relation to prior conduct. In both cases this is significant, given that the (factual) conduct as such may have been lawful conduct of a 'private party whose conduct in the relevant respect was not regulated by international law'.[178] It is only upon attribution that the conduct in question becomes that of the State, and as such it may render that particular conduct unlawful inasmuch as it does not live up to that State's obligations under international law.

C.2.b. The Recognition of *Lex Specialis* Rules of State Responsibility

The expansion of international law into a wide variety of topics has been accompanied with numerous international instruments containing special regimes and rules, catered for particular needs within discrete areas of law. This substantive fragmentation is characterized by 'the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law'.[179] One of the methods to resolve possible norm conflicts arising out this fragmentation, is by way of the maxim *lex specialis derogat legi generali*: special law derogates from general law.[180]

ARSIWA recognizes the primacy of tailor-made special (primary) rules of international law in matters of State responsibility. Article 55 ARSIWA is a saving clause found in Part Four (i.e. general provisions applicable to the Articles as a whole)

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[175] See e.g. ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion, Seabed Disputes Chamber)* (2011) para 182; PCA, *Luigiterzo Bosca v. Lithuania* (2013) para 114; ICSID, *Saint-Gobain Performance Plastics Europe v. Venezuela* (2016) paras 456 and 461.
[176] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) para 112.
[177] *Ibid*, para 113.
[178] Art 11 ARSIWA, commentary para 7.
[179] ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi)*, UN Doc. A/CN.4/L.682 and Corr.1 (2006) para 13.
[180] On the function and scope of the principle of *lex specialis* in international law, see *ibid*, paras 56–122.

which stipulates that its provisions do not apply 'where and to the extent the conditions for the *existence of an internationally wrongful act* or the *content* or *implementation* of the international responsibility of a State are governed by special rules of international law'.[181] The purpose of Article 55 ARSIWA is to indicate that Part One (Articles 1 to 27, on the existence of an internationally wrongful act), Part Two (Articles 28 to 41, on the content of State responsibility), and Part Three (Articles 42 to 54, on the implementation of State responsibility) can be modified or displaced altogether by relevant primary *lex specialis* rules of international law. The Articles as a whole are thus not only general in character in terms of their applicability to all forms of State responsibility, regardless of the origin or nature of the rule which is said to be violated. They are also general in the sense that States are free to agree to be bound by rules that depart from the customary international law as laid down in ARSIWA.[182] By introducing an article allowing deviation from any of the Parts of ARSIWA, the ILC was able to dispel concerns that a one-size-fits-all solution would insufficiently recognize the needs arising in certain branches of law.[183]

One example of a human rights provision that is *lex specialis* in the matter of State responsibility is Article 41 European Convention on Human Rights (ECHR), which provides that in case of a violation the Court may order 'just satisfaction' (i.e. a sum of money by way of compensation) in lieu of full reparation if the internal law of the High Contracting Party concerned allows only partial reparation to be made. This example concerns a *lex specialis* deviation from Parts Two of ARSIWA dealing with the content of State responsibility. After all, it departs from the general rule that a State cannot invoke its internal laws as a justification for failure to comply with its obligations to make full reparation.[184]

As Article 55 makes clear, it is also possible that special rules of international law depart from Part One, including from the rules of attribution in Articles 4 to 11.[185] On this, the commentary notes that 'a particular treaty might impose obligations on

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[181] Art 55 ARSIWA (emphasis added). Draft Art 37 ARSIWA as adopted on first reading allowed *lex specialis* rules to deviate from one particular portion of the draft, namely the provisions dealing with the content, forms and degrees of responsibility; see YB ILC 1983-II(2), 42. During the second reading, the Special Rapporteur recommended that *lex specialis* deviations should be allowed from any of the Articles; see ILC, *First report Crawford*, *supra* note 117, paras 27 and 101–02. See also ILC, *Third report on State responsibility, by James Crawford, Special Rapporteur*, UN Doc A/CN.4/507 and Add. 1–4 (2000), paras 415–21.

[182] In this connection, the commentary to ARSIWA employs the term 'residual' (see e.g. ARSIWA, introductory commentary, para 5; Art 55 ARSIWA, commentary para 2), but in the present author's opinion this adjective is perhaps not the most appropriate one, given that it presumes there is always a *lex specialis* and that ARSIWA applies only exceptionally.

[183] See e.g. Simma and Pulkowski (2010) 139, calling Art 55 ARSIWA a 'tool for connecting the rules of State responsibility with other regimes of international law'.

[184] For this general rule, see Art 32 ARSIWA. For a study of how the content of State responsibility under the ECHR relates to the provisions in ARSIWA, see Loup (2017).

[185] This possibility is also recognized in international case law, see e.g. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 401; ICSID, *Adel A Hamadi Al Tamimi v. Oman* (2015) para 421; PCA, *Mesa Power Group LLC v. Canada* (2016) para 362.

a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution'.[186] The difficulties that such *lex specialis* rules of attribution of conduct raise in light of the purportedly strict distinction between primary and secondary rules of international law will be examined in more detail below.[187]

D. From Paradigm Shift to Dogma: A Closer Look at the Purportedly "Strict" Distinction between Primary and Secondary Rules of International Law

As can be observed from the foregoing, the distinction and ensuing separation between primary rules (defining what behaviour is expected from States) and secondary rules (determining the existence and consequences of an internationally wrongful act) proved to be a major catalyst in the completion of the project on State responsibility. The unrealistic aim of the first Special Rapporteur to codify State responsibility law together with substantive rules on the protection of foreigners and their property was one of the most important reasons that prevented the project from achieving much progress in the 1950s. The separation between the two types of rules as advocated in the 1963 report of the Sub-Committee on State responsibility was 'the key that allowed Ago to unlock State responsibility from the box into which García Amador had placed it [and] created a politically safe space'[188] within which the ILC could continue its work and avoid contemporary difficulties about standards of treatment and expropriation. Indeed, Ago's new approach enabled the ILC sidestep those issues and focus on what was feasible to agree on.[189] However, as Endre Ustor aptly observed, 'when the Commission had avoided the Scylla of an approach fraught with political implications it had met with the Charybdis of an enormous number of highly complex theoretical problems'.[190] One of these highly complex problems is the alleged strict distinction between, on the one hand the secondary rules governing State responsibility (including the rules on attribution of conduct), and on the other, primary rules involving norms of conduct for States.

Throughout its work on the project, the Commission continuously recalled the primary/secondary divide as a means to demarcate the study of the topic.[191] In fact,

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[186] Art 55 ARSIWA, commentary para 3.
[187] See *infra* Section D.3.
[188] Bodansky and Crook (2002) 780. See also Caron (2002) 861: 'The Ago shift in focus to trans-substantive rules avoided … a pervasive lack of consensus'.
[189] Rosenstock (2002) 793. See also Crawford (1997) 120, calling the decision to separate primary rules from State responsibility law 'one of the best known and most successful "moves" in the Commission's history'.
[190] ILC, *Summary record of the 935th meeting*, UN Doc A/CN.4/SR.935 (1967) para 2.
[191] See e.g. YB ILC 1973-II, 169 para 40; ILC, *First report Crawford*, *supra* note 117, paras 15–16; ARSIWA, general commentary paras 1 and 4.

as Allain Pellet noted, the distinction 'turned into a veritable *credo* at the ILC'.[192] The distinction as such has attracted support not only in the Commission itself but also in academic writing. Illustrative is the position of the International Law Association Study Group on State Responsibility, which in its 2000 report[193] noted:

> [I]t is not practical to reconsider, at this stage of the codification process, the distinction between "primary" and "secondary rules" of the law of state responsibility. The work of the ILC prudently continues to focus on the formulation of "secondary rules" that may be modified in their application by special modalities arising from the "primary" rules in a given area of international law. It would not be feasible to attempt to codify the vast field of such "primary" rules.

It would be fair to say, therefore, that the perception of primary rules as being distinct from secondary rules is deeply entrenched in legal thinking. Nevertheless, it is often overlooked that the distinction was introduced with a pragmatic aim. It was intended to serve as a convenient method to define and delimit (as far as possible) the outer boundaries of the codification project.[194] Rosenne, for example, found the distinction in principle sound and valid but only as a starting point, cautioning that the ILC should not allow itself to become 'the prisoner of its own dialect'.[195] Also Crawford acknowledged that it might be difficult to draw the distinction in particular cases.[196] At the same time, he admitted that to abandon the distinction and to search for some different organizational principle would be extremely difficult, as it would amount to going back to the drawing board.[197] Thus, it appears as if the Commission was only convinced of the validity of the primary/secondary divide because this was the only way out, rather than being convinced of it as a matter of structural logic, consistency and coherence. Indeed, in this respect it is interesting to note that until 1970 the ILC used far softer terms to describe the nature of the codification effort.[198] It was only in

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[192] Pellet (2010b) 76.

[193] International Law Association (Study Group on Law of State Responsibility, 1998–2003), *First Report: Submitted by the Chair of the Study Group to the Special Rapporteur and the Chair of the UN International Law Commission and the ILA Director of Studies* (June 2000) para 7.

[194] David (2010) 29.

[195] ILC, *Summary record of the 1036th meeting*, A/CN.4/SR.1036, para 58 (Rosenne).

[196] Crawford (2002b) 15. See also Crawford (2002a) 876–77: '[T]he distinction between primary and secondary obligations was, and is, somewhat relative. A particular rule of conduct might contain its own special rule of attribution, or its own rule about remedies. In such a case, there would be little point in arguing about questions of classification.'

[197] ILC, *Second report on State Responsibility, by James Crawford, Special Rapporteur*, UN Doc A/CN.4/498 and Add.1–4 (1999), para 15. See also Crawford (2002a) 879, noting that the distinction 'is to some extent a functional one, related to the development of international law rather than to any logical necessity'.

[198] See in particular ILC, *Summary record of the 668th meeting*, UN Doc A/CN.4/SR.668 (1962) para 166 (Ago, advocating a study of the 'essential principles of responsibility'). This was approved by the ILC when it reported to the UNGA that the terms of reference of the Sub-Committee would be to devote its work 'primarily to the general aspects' of State responsibility; see YB ILC 1962-II, 191 para 68. The Sub-Committee subsequently agreed that with a view to the codification of the topic, the ILC should give 'priority to the definition of the general rules'; see *Sub-Committee report Ago*, *supra* note

1970 that the ILC came to speak of a categorically 'strict distinction' between the two types of rules,[199] a dichotomy it has held on to until its completion of the State responsibility project in 2001.

On a general level, the criticism that is levied against the primary/secondary distinction is closely associated with the intended universal character of ARSIWA and its 'deceptively simple texts'.[200] As was noted by Ago, the law of State responsibility contains relatively few principles but 'the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter'.[201] On the contrary, he argues, 'on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted'.[202] While the primary/secondary distinction and the associated generality of the text of ARSIWA turned out to be a very clever device to complete the project, this approach inevitably invites uncertainties and criticism.[203] It is thus necessary to examine more critically whether this legal terminology as introduced in the late 1960s and early 1970s still gives an adequate description of the current state of law. After all, as Ulf Linderfalk has argued in an article dealing with the primary/secondary distinction, legal scholarship should not employ terminology as the result of mere incidence or unconsidered routine.[204]

On a more specific level, the distinction has been criticized on a number of grounds, which the following Sections will turn to. First, there is the issue of internal logic. As will be shown, the Articles themselves fail to apply the distinction consistently by addressing matters that appear to fall within the realm of substantive law (Section D.1.). Second, specifically with regard to the rules pertaining to the attribution of conduct, the idea that secondary attribution rules are strictly distinct from primary rules is an overly academic abstraction that is of little use when applied to scenarios in the real world (D.2.) and, in any event, it overlooks the possibility of *lex specialis* attribution rules (D.3.).

82, para 5 (confirmed by the ILC in YB ILC 1963-II, 224 para 52; YB ILC 1967-II, 368 para 42). In its 1969 report to the UNGA, the ILC noted that the division between substantive law and State responsibility law had become one of the 'strict criteria by which it proposes to be guided in codifying the topic' (YB ILC 1969-II, 233 para 84), but the members of the Commission decided against using the primary/secondary terminology in their report because there was no agreed definition of these terms (see *Summary record of the 1041st meeting*, UN Doc A/CN.4/SR.1041 (1969)).

[199] See ILC, *Second report Ago*, *supra* note 3, para 7 and, in identical terms YB ILC 1970-II, 306, para 66(c).

[200] Bodansky and Crook (2002) 790.

[201] ILC, *Second report Ago*, *supra* note 3, para 11.

[202] *Ibid.*

[203] See e.g. UNGA, *Memorandum of the Secretary-General*, *supra* note 35, para 105, warning that the principal object of any codification exercise — i.e. the removal of uncertainties or divergencies in the law — will not be achieved by drafts 'which may conceal continued disagreement behind the cloak of vague and elastic statement of general principle'. See also Caron (1998) 181, warning that the ILC's work on this topic has 'run the risk of theoretically spinning out [by] valuing generally applicable rules'.

[204] Linderfalk (2009) 54.

D.1. Structural Inconsistencies in Selected Parts of the Articles on State Responsibility

The contents of ARSIWA are far from consistent when it comes to applying the primary/secondary divide within its own terms. In fact, these structural inconsistencies are so pertinent that it may be questioned whether the distinction is an accurate reflection of reality and applicable to the text as a whole. As will be explained in more detail below, the primary/secondary terminology can be maintained to the point of upholding consistency and logic only if one adopts a particular understanding of the term "secondary". Rules of State responsibility law are for the most part rules on content, implementation and invocation, which come into play once an internationally wrongful act has already occurred. In other words, the majority of rules in ARSIWA could be labelled as "secondary" (in the temporal sense of the word) insofar as they describe the consequences *ex post facto* of the commission of an internationally wrongful act. These provisions *inter alia* enumerate the modalities of making full reparation for injury caused,[205] and determine which States are entitled to invoke the responsibility of another State.[206] However, the rules pertaining to the question of what constitutes an internationally wrongful act do not fit in this category. Indeed, rules on breach of an international obligation of the State and attribution of conduct serve a wholly different purpose, since these provisions determine whether there is an internationally wrongful act in the first place.[207]

This Section illustrates the difficulty of drawing a strict dividing line between substantive rules and State responsibility rules by comparing two selected topics in ARSIWA — the responsibility of a State in connection with the act of another State and circumstances precluding wrongfulness (D.1.a) — with the provisions on attribution and breach (D.1.b). This analysis serves to demonstrate that it would be wrong to equate the rules on attribution and breach as "secondary" and ascribing to that label the same meaning as it has for other rules in ARSIWA.

D.1.a. The Responsibility of a State in Connection with the Act of Another State and Circumstances Precluding Wrongfulness

The first category that will be examined here to illustrate the internal inconsistency in ARSIWA deals with the responsibility of a State in connection with the act of another State, governed by Part One, Chapter IV (i.e. Articles 16 to 19) ARSIWA. For example, Article 18 ARSIWA provides that a State which coerces another State to commit an act is internationally responsible for the act of the coerced State. There is no requirement that the act be internationally wrongful if committed by the coercing

[205] See Arts 31 and 34–37 ARSIWA.
[206] See Arts 42 and 48 ARSIWA.
[207] See Arts 1 and 2 ARSIWA.

State itself.[208] This means that the coercing State may become responsible for conduct that would be lawful if performed by itself, running counter to the basic principle laid down in Article 34 Vienna Convention on the Law of Treaties,[209] something which the commentary appears to accept.[210] As the commentary to Part One, Chapter IV ARSIWA concedes, this Chapter 'specifies certain conduct as internationally wrongful [and thus] may seem to blur the distinction' between rules of substance and rules of responsibility.[211]

The commentary to ARSIWA purports to justify the inclusion of this Chapter as belonging to secondary rules because in situations where one State is responsible is connection with the acts of another State, responsibility of the former State is 'in a sense derivative'.[212] It explains in the commentary to Article 18 that the responsibility of the coercing State with respect to the third State in such cases 'derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State'.[213] However, unless one sees Article 18 as a primary rule of law, it is difficult to see how any responsibility can derive from the "wrongful" conduct of the coerced State, taking into account that in most cases the wrongfulness of the conduct of the latter will be precluded as the result of *force majeure*.[214] If the wrongfulness on the part of the coerced State is precluded, then there is simply no wrongfulness on the part of the latter.

In essence, Article 18 ARSIWA (as well as Article 16 on aid and assistance, and Article 17 on direction and control of a third State) is a primary rule of international law,[215] providing that a State is not allowed to coerce another State to commit an internationally wrongful act. It is a generalized version of the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

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[208] See Art 18 ARSIWA, commentary para 6, explaining that a coercing State is responsible to the third State for the consequences, 'regardless of whether the coercing State is also bound by the obligation in question'.

[209] Arts 34 and 35 Vienna Convention on the Law of Treaties provide that a treaty does not create obligations or rights for a third State without its consent.

[210] See Part One, Chapter IV ARSIWA, commentary para 8: 'Rules of derived responsibility cannot be allowed to undermine [Art 34 Vienna Convention on the Law of Treaties]. Hence, it is only in the extreme case of coercion that a State may become responsible under this Chapter for conduct which would not have been internationally wrongful if performed by that State'.

[211] Part One, Chapter IV ARSIWA, commentary para 7.

[212] Part One, Chapter IV ARSIWA, commentary para 7. The commentary further notes that these cases might be comparable to rules in national legal systems dealing with, for example, conspiracy and inducing a breach of contract; see *ibid*.

[213] Art 18 ARSIWA, commentary para 1.

[214] The equation of coercion as *force majeure* (a circumstance precluding wrongfulness under Art 23 ARSIWA) is explained in Art 18 ARSIWA, commentary paras 4 and 6.

[215] See also Dominicé (2010) 289, noting that Arts 16 to 18 ARSIWA constitute primary rules of international law, whose inclusion in ARSIWA is 'exceptional [but] justified because they punish acts of the implicated State which are reprehensible'.

which forms part of the obligation of non-intervention, itself a primary rule of customary international law.[216]

Circumstances precluding wrongfulness provide the second category of rules that defy the primary/secondary logic in terms of internal consistency within ARSIWA. Articles 20 to 25 ARSIWA offer a list of circumstances — e.g. self-defence, *force majeure*, necessity, or the taking of countermeasures — in which State conduct is *prima facie* unlawful, but nevertheless justified or excused in light of an exceptional situation. It is important to note in this connection that ARSIWA asserts that these circumstances preclude *wrongfulness* (i.e. they negate the existence of an internationally wrongful act). In other words, circumstances precluding wrongfulness do not preclude *responsibility*, even though that approach would have been more appropriate in terms of upholding the primary/secondary logic in any meaningful sense.[217]

The commentary explains that circumstances precluding wrongfulness 'are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place'.[218] However, this seems to be an artificial way of justifying the treatment of circumstances precluding wrongfulness as secondary rules. At the end of the day it is difficult to disagree with Giorgio Gaja where he argues that the provisions in Articles 20 to 25 ARSIWA 'affect compliance with an international obligation and may thus be regarded as concerning the scope of the obligation'.[219] Indeed, to say that actions taken by way of circumstances precluding wrongfulness do not preclude responsibility but are not even *wrongful* to begin with (thus taken in accordance with international law despite the existence of a *prima facie* breach), is to say that we are dealing here with primary, substantive rules.[220] Moreover, some circumstances

[216] See UNGA Resolution 2625 (XXV) of 24 October 1970, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', UN Doc A/RES/2625(XXV) (1970): 'No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.' See also Art 18 ARSIWA, commentary para 3: 'As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g. because they involve a threat or use of force [or] intervention, i.e. coercive interference, in the affairs of another State.' In a similar way, Arts 16 and 17 ARSIWA can be seen as generalized substantive prohibitions of State aid or assistance in, or State direction and control over, the commission of an internationally wrongful act by another State.

[217] Cf ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) para 48: 'The state of necessity claimed by Hungary … could not permit of the conclusion that … it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary *would not incur international responsibility* by acting as it did' (emphasis added). See also *ibid*, para 101, holding that a state of necessity 'may only be invoked to *exonerate from its responsibility* a State which has failed to implement a treaty' (emphasis added). See further Stern (2010) 218.

[218] Part One, Chapter V ARSIWA, commentary para 7.

[219] Gaja (2014) 985.

[220] David (2010) 29–32. As early as 1973, a similar observation was made in the ILC when Tammes pointed out that concepts such as self-defence and necessity concerned substantive issues, and not

precluding wrongfulness (most notably self-defence and countermeasures) involve rules and conditions on conduct the violation of which leads to a separate basis of State responsibility, such conduct thus constituting the fulfilment of the objective element of an internationally wrongful act (i.e. breach).[221]

The ILC's treatment of circumstances precluding wrongfulness as autonomous secondary rules is difficult to accept given that those circumstances have a primary dimension.[222] In the context of circumstances precluding wrongfulness the terminology of secondary rules is even more awkward, given the fact that, should consent, self-defence and countermeasures have to be regarded as secondary rules, there is no logical argument why the same label should not be accorded to other exceptions to obligations or prohibitions as found in primary rules, such as the use of force under the collective security scheme of Chapter VII of the UN Charter, exercising the right of hot pursuit, or the seizure of a pirate ship in the high seas.[223]

It would only be possible to defend the primary/secondary divide by claiming that the prohibition of coercion, the obligation to respect the conditions on countermeasures and self-defence, etc, are not truly independent primary rules of law, but rather rules that come into play after the commission of an internationally wrongful act. If one follows this logic, it can indeed be maintained that these provisions are truly secondary, but in the *temporal* sense of the word.[224] In other words, it could be argued that rules on coercion, circumstances precluding wrongfulness, serious *jus cogens* violations, reparations etc, are "secondary" because they form part of the new legal regime that comprises State responsibility once an internationally wrongful act *has already occurred*.[225] Yet, this does not explain why

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secondary issues under the general law of State responsibility; see ILC, *Summary record of the 1205th meeting*, UN Doc A/CN.4/SR.1205 (1973) paras 18–21.

[221] David (2010) 31–32. The rules and conditions on taking countermeasures are laid down in customary international law as (largely) reflected in Arts 49–54 ARSIWA. The rules on self-defence are laid down in customary international law and the UN Charter, in particular Arts 2(4) and 51. A State which resorts to countermeasures or self-defence without the conditions being fulfilled is responsible for it under international law; see e.g. Art 49 ARSIWA, commentary para 3 and fn 788 and Art 21 ARSIWA, commentary para 6.

[222] See also Rosenstock (2002), 794, arguing that the 'grab bag of circumstances precluding wrongfulness is not particularly compelling as a logical structure [and] reflects the triumph of pragmatism over pure logic'. See further Higgins (1995) 161–62.

[223] David (2010) 31.

[224] See e.g. Linderfalk (2009) 68: 'The primary-secondary rules terminology builds on the idea that the contents of ARSIWA always apply *subsequent* to the primary regulative rules [but this] does not withstand analysis' (emphasis added).

[225] See Part One, Chapter I ARSIWA, commentary para 3: '[E]very internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to *new international legal relations* additional to those which existed before the act took place' (emphasis added). See also de Frouville (2010) 262, defining secondary rules on State responsibility as 'rules the implementation of which is subordinate to the *previous* occurrence of … a breach of a "primary" obligation' (emphasis added). See similarly Community Court of Justice of the Economic Community of West African States (ECCJ), *Konte and Diawara v. Ghana* (2014) 35, holding that 'secondary rules are the rights and obligations that apply *after* a primary rule has been violated' (emphasis added).

the rules of attribution and breach, in Part One, Chapter II ARSIWA ought to be regarded as secondary. After all, and this cannot be stressed enough, attribution and breach are elements that need to be examined in order to establish if there is an internationally wrongful act *in the first place*. Said differently, the provisions on attribution and breach — to be examined in order to establish the existence of an internationally wrongful act — are conceptually different in character from those parts of ARSIWA dealing with the *ex post facto* consequences (i.e. content and implementation) of internationally wrongful acts already having taken place. This difference in character begs the question of whether in respect of the elements of breach and attribution the label "secondary" has a different meaning than it has for the other rules in the Articles.[226]

D.1.b. Breach of an International Obligation of the State and Attribution of Conduct and Attribution of Conduct

As for the element of breach, Articles 12 to 15 ARSIWA provide secondary rules that define *if* and *when* there is a violation of a State's international obligations. According to the commentary, the rules in this Chapter define the parameters of what constitutes a breach, but only 'to the extent that this is possible in general terms'.[227] Given the principal focus on the content of the applicable primary rule, the rules in Part One, Chapter III ARSIWA 'only play an ancillary role' in determining whether there is a breach (and at which point in time, or for how long),[228] and on several occasions the commentary to provisions in this Chapter refers to the applicable primary rule.[229]

The content and scope of the primary rule are thus considered decisive when assessing whether there is a breach of an international obligation. The so-called secondary rules in ARSIWA that address the concept of breach do no more than specifying that a breach exists from the moment that conduct attributable to a State is not in conformity with international obligations in force for that that State. By delineating the contours of what constitutes a breach of an international obligation (and also, by necessary implication, what would not amount to a breach and thus remain lawful), Articles 12 to 16 ARSIWA enter the realm of primary rules of international law, even if only in the most general, complementary and rather

[226] Hence, Gaja argues that if one would favour the deletion of particular provisions of ARSIWA because they state rules which should be considered primary, Part One would have to omitted as a whole; see Gaja (2014) 990–91.
[227] Part One, Chapter III ARSIWA, commentary para 1.
[228] *Ibid*, para 2.
[229] *Ibid*. See further Art 12 ARSIWA, commentary paras 1 and 12; Art 14 ARSIWA, commentary paras 1, 4 and 13; Art 15 ARSIWA, commentary paras 4 and 8.

tautological manner.[230] In any case, Articles 12 to 16 ARSIWA are not "secondary" rules in the same way as rules relating to content and implementation are secondary in the temporal meaning of the word.

Turning to the rules in ARSIWA on the attribution of conduct, a trace of the difference in character can be found in the judgment by the East African Court of Justice (EACJ) in the case of *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda*.[231] The facts of the case and the treatment of the attribution rules in ARSIWA will be explained in more detail in another Chapter.[232] For now, however, it suffices to note that when addressing the relationship between the primary rules as laid down in the EACJ Treaty and State responsibility law, the EACJ characterized the attribution rules not as secondary, but as supplementary. The Court held that primary rules that place obligations on member States would be found in East African Community (EAC) Treaty, while 'the ILC Articles would constitute *supplementary* rules [to] determine whether the action or conduct in alleged contravention of a Treaty provision can be attributed to a Partner State so as to render it responsible for the alleged breach'.[233] It is interesting to see that the Court, consciously or not, departed from the ILC's primary/secondary dichotomy, which it did quote in full in the preceding paragraph.[234] Now, if, as the ILC sees it, the provisions on breach in Article 12 to 15 ARSIWA only play an ancillary, supplementary or complementary role in light of the relevant primary rule, could the same thing be said about the attribution rules in Articles 4 to 11? This is the question to which the next Section turns.

D.2. Secondary Rules on the Attribution of Conduct as Abstract, Arbitrary and Devoid of Independent Meaning

The second ground on which the strictness of the distinction between primary and secondary rules can be criticized relates specifically to the abstract nature of attribution rules. The distinction between primary and secondary rules, and the ILC's focus on the latter, was accepted by the Commission as a whole. Nevertheless, there

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[230] See also Gaja (2014) 984, pointing out that 'all the elements that are useful in order to determine the content of an international obligation are also relevant with regard to defining whether there is a breach'.

[231] EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014).

[232] See Chapter 4, Sections C.1.c and C.2.

[233] EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) para 17 (emphasis added). For the 'supplementary' application of ARSIWA to treaties such as the Treaty for the Establishment of the East African Community (EAC Treaty), see also *ibid*, paras 13 and 20.

[234] *Ibid*, para 15, where the Court quotes in full ARSIWA, general commentary para 1, which *inter alia* stipulates: 'The emphasis [of ARSIWA] is on the *secondary* rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, [which] is the function of the *primary* rules' (emphasis added).

always remained a feeling of unease among certain members when applying the primary/secondary distinction too rigidly to matters of attribution despite the fact that, in order to maintain the proper perspective, its adoption was essential for the completion of the ILC's project. Richard Kearny, for example, was of the opinion that the distinction 'seemed to be an unduly psychological approach to the definition of a wrongful act,'[235] and that 'rules limited to pure, abstract responsibility might prove to be too metaphysical for the kind of international society that existed in the world today'.[236] Taslim Olawale Elias found that the distinction 'could no doubt be perceived intellectually,' but warned that given its intended application to real-world scenarios the draft suffered from 'such a level of abstraction' that its usefulness might be in question.[237] Also Ago admitted that taking the distinction too far may lead to abstract results, and that the concrete nature of State responsibility meant that it should not be 'sterilized'.[238] At the same time, he pointed out that legal rules were necessarily formulated in abstract terms, so as to be able to use them in an indefinite number of real-life situations. The formulation of legal rules may be abstract, he argued, but their content and application to concrete situations certainly was not.[239]

The view that it is difficult to accept the primary/secondary dichotomy when attribution rules of ARSIWA are to be applied to concrete situations is also shared by academic writers. This is, in short, because the attribution rules do not apply in splendid isolation from substantive rules of international law. Daniel Bodansky and John R. Crook, for instance, allude to the substantive dimension of attribution rules when they argue that 'classifying an issue as part of the rule of conduct (the primary rule) or as part of the determination of whether that rule has been violated (the secondary rule) is arbitrary'.[240] In their view, it might just as well be said that that attribution is part of the complete specification of a primary rule 'by addressing the actors to whom the primary obligation applies'.[241]

A similar position is taken by David Caron, who calls the provisions on attribution 'trans-substantive' rules because by separating the public from the private for which the State is not responsible, they 'delineate the edge of State responsibility'.[242] Based on his extensive experience as a member of the Iran–United

[235] ILC, *Summary record of the 934th meeting*, UN Doc A/CN.4/SR.934 (1967) para 89.
[236] ILC, *Summary record of the 1080th meeting*, UN Doc A/CN.4/SR.1080 (1970) para 32.
[237] *Ibid*, para 88.
[238] ILC, *Summary record of the 1036th meeting*, UN Doc A/CN.4/SR.1036 (1969) para 19.
[239] ILC, *Summary record of the 1081st meeting*, UN Doc A/CN.4/SR.1081 (1970) para 4.
[240] Bodansky and Crook (2002) 780.
[241] *Ibid*, 780–81. It would probably be more precise to speak of rules addressing the actors *through* whom the primary obligation applies. Or, alternatively, rules addressing the range of actors whose behaviour might directly lead to legal consequences (such as responsibility) for the State. The actor to whom the primary obligation applies, after all, remains the State as the most important duty-bearer under international law.
[242] Caron (1998) 110.

States Claims Tribunal, he argues that questions of attribution tend to be 'deeply … buried in the examination of whether a primary rule has been breached'.[243]

Scepticism as to the purportedly strict distinction between attribution rules and primary, substantive rules of international is also voiced by Gaja. In his opinion, attribution rules possess a practical, substantive importance, given that they 'define the content and scope of [a] State's obligations,' or, more precisely, the 'conditions under which the primary rule imposing an international obligation applies'.[244] He illustrates this by the example of the prohibition for a State to exercise sovereign powers in the territory of another State. Gaja explains that this (primary) rule cannot merely be breached through the conduct of a State's *de jure* organs (including the regular army), but also through other actors whose actions are attributable to the State. Accordingly, in the same vein as Caron, and Bodansky and Crook, Gaja maintains that the content and scope of this primary rule of international law is delineated by (secondary) rules on attribution that allow one to establish whether a certain form of conduct amounts to an act of the State that is potentially in breach of its international obligations.[245]

Thus, it is exactly where attribution rules are applied to real-life situations, that the criticism as to the abstract and arbitrary nature of the distinction is expressed in the strongest terms in the scholarly writing cited above. This is, in short, because in drawing a dividing line between private acts and acts of the State, attribution rules could be conceptualized as informative of the various actors through whom a State acts and through whom a State may violate one of its obligations. In other words, given their complementary or non-autonomous nature, attribution rules in ARSIWA may not be purely secondary in nature but interact in complicated ways with the (interpretation and application) of primary rules. Any person or entity whose conduct is attributed to the State, must comply with the international law obligations of that State when carrying out that conduct. Following this line of thought, attribution rules from the law of State responsibility have a substantive dimension, or a permeating effect, with respect to the applicability of a normative rule to a particular instance of conduct.

D.3. *Lex Specialis* Attribution Rules

A third ground of criticism lodged towards the primary-secondary dichotomy stems from the possible existence of *lex specialis* attribution rules. As already explained briefly before,[246] Article 55 ARSIWA provides that the Articles 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful

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[243] *Ibid*, 119 fn 27. See further Caron (2002) 871–72.
[244] Gaja (2014) 989–90.
[245] Gaja (2014) 990. See also Linderfalk (2009) 62, arguing that Arts 4–11 ARSIWA 'lay down conditions for the application of the great majority of primary rules existing in international law'.
[246] See *supra* Section C.2.b.

act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. Article 55 thus envisages that general rules of State responsibility in Parts One, Two and Three of the Articles may be modified or displaced altogether by relevant *lex specialis* rules.[247] The advantage of *lex specialis* provisions is that they allow international law to cater for particular needs that exist in specific fields of law. The downside of such provisions, however, is that they reduce the usefulness of ARSIWA as a generally applicable framework, and consequently legal certainty might be impaired as a result of fragmented solutions found across various sub-systems of international regulation.

Pursuant to Article 55, a primary rule of international law may thus contain a *lex specialis* rule that deviates from the attribution rules as found in Part One, Chapter II ARSIWA. When this is the case, the attribution of conduct runs along different lines than what would otherwise follow when applying Articles 4 to 11 ARSIWA. Luigi Condorelli and Claus Kress point out that in such a situation the distinction between primary rule and *lex specialis* rules of attribution 'becomes extremely subtle, and to a large extent, theoretical'.[248] Similarly, Caron has argued that Article 55 ARSIWA is deceptively simple but difficult to apply in practice.[249]

Article 55 ARSIWA raises further challenges to the alleged distinction between primary and secondary rules. First, it means that the distinction is not absolute. It must be toned-down in order to account for the fact that legal instruments laying down primary norms may at the same time enter the realm of secondary rules, for example by addressing issues such as whose conduct may be considered as an act of the State for the purposes of the interpretation or application of the primary rule in question. In other words, the fact that primary rules may contain secondary rules on attribution makes it very unlikely to insist on the existence of a definite and categorical separation between both categories of rules.

Yet, even when speaking of the distinction in these terms it is difficult to draw a clear line, especially between *lex specialis* rules of attribution on the one hand, and the scope of application *ratione personae* of a primary rule of international law on the other. In its commentary, the ILC gives two examples of what in their view amounts to a *lex specialis* rule on the attribution of conduct: (1) Article 1 Convention against

[247] Art 55 ARSIWA, commentary para 2.
[248] Condorelli and Kress (2010) 225.
[249] Caron (2002) 871–72, citing the ICSID case of *Loewen Group v. United States*. At issue was the question of whether judicial acts in private litigation are 'measures adopted or maintained by a Party' within the meaning of Art 1101(1) North American Free Trade Agreement. The Respondent State had argued that this term must be understood to exclude judicial acts of domestic courts in purely private matters. The Tribunal disagreed and found that 'the general principle of State responsibility [in Art 4 ARSIWA] … supports the wider interpretation of the expression "measures adopted or maintained by a Party"'; see ICSID, *Loewen Group v. United States* (2010) paras 47 and 54. Caron highlights this part of the decision to illustrate the difficulty of applying 'academic abstractions to concrete situations' (at 871). He points out that Art 4 ARSIWA is only half the story; State responsibility (in the sense of having committed an internationally wrongful act) cannot be solved merely by looking at the question of attribution, especially if — as the Respondent State maintained — the primary rule itself imposes only few obligations on States in respect of judicial acts (at 872).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and (2) so-called federal clauses.[250] Article 1 CAT is the subject of separate, more extensive examination at a later point.[251] Accordingly, this Section examines only whether federal clauses can properly be characterized as *lex specialis* attribution rules, or rather, whether they should more properly be seen as qualified substantive obligations.

A federal clause is a provision that limits the obligations (and thus the responsibility) of a federal State with respect to its component units (e.g. constituent states, countries, provinces or cantons), especially in cases where the federal State is incapable of making its component units comply with the terms of a particular treaty.[252] An example of a federal clause can be found in Article 34(2) Convention for the Protection of the World Cultural and Natural Heritage, which provides for federal or non-unitary constitutional State that if the implementation of the provisions of the Convention come under the legal jurisdiction of individual constituent units that are not obliged by the constitutional system of the federation to take legislative measures, 'the federal government shall inform the competent authorities of such [constituent units] of the said provisions, with its recommendation for their adoption.' Such clauses,[253] which are applicable solely in relations between the States party to the treaty and in the matter which the treaty cover,[254] form an exception to the general rule that a State bears responsibility in respect of all of its internal territorial subdivisions.

There can be no doubt that, as the ILC maintains, 'the responsibility of the federal State [with respect to its component units] under a treaty may be limited' by virtue of such federal clauses.[255] However, it is not clear why this necessarily implies — as the ILC equally claims — that these clauses ought to be considered as *lex specialis* rules operating on the level of attribution. Another way of looking at it, is by saying that they '[disengage] responsibility for the federal State's incapacity to make the component units comply with the treaty [through] qualifying the extent of the primary obligation'.[256] Thus, rather than prescribing that the conduct of a constituent unit is not attributed to the federal State it belongs to, such clauses are better understood as imposing special substantive obligations on the State (thus operating wholly at the level of what constitutes a breach). To return to the example given above, Article 34(2) World Heritage Convention simply compels the authorities of the federal State to persuade lower levels of governance to give effect to the provisions of

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[250] See Art 55 ARSIWA, commentary para 3 n 865.
[251] See Chapter 4, Section D.2.b.
[252] Federal clauses, which modify the *substance* of a treaty, must be distinguished from territorial clauses, which relate to the *geographic scope* of application; see Burmester (1985) 527.
[253] For similarly phrased clauses, see also Art 30 Convention on the Protection and Promotion of the Diversity of Cultural Expressions and Art 35 Convention for the Safeguarding of the Intangible Cultural Heritage.
[254] Art 4 ARSIWA, commentary para 10.
[255] Art 4 ARSIWA, commentary para 10.
[256] Momtaz (2010) 243.

the Convention where those central authorities lack direct federal or central government power.[257] By demanding certain conduct (*ratione materiae*) from a certain actor (*ratione personae*), federal clauses provisions enter the realm of the nature of the substantive obligation.[258] To call such provisions at the same time examples of *lex specialis* attribution rules, as the ILC does, is to acknowledge that secondary rules interact or coincide in complicated ways with substantive rules in order to determine in what circumstance certain conduct is prescribed or prohibited.

E. Conclusion

This Chapter examined the historical background of the rules on State responsibility, as well as the ILC's efforts to codify this branch of law through ARSIWA. As shown, in the early phase of this codification project the topic of State responsibility was seen as closely associated with the possibility to hold States accountable for injury to foreigners on their territory. Contrary to the situation that prevails today, attribution was initially regarded as a legal operation to attach responsibility to a State. Especially under Ago's leadership as second Special Rapporteur, two major changes took place. First, the ILC became convinced of the need to separate the general law of State responsibility as much as possible from substantive rules of international law that could be violated. Thus, State responsibility law was no longer confined to the sphere of foreigners and their treatment, but it was envisaged as a legal regime of so-called "secondary" rules that could be applied more generally. The second major change lies in the formulation of various standards of attribution, dealing not only with State organs but also with private persons who because of their factual relationship with the State can be regarded as acting on behalf of the latter.

These changes represent a fundamental reorientation in the underlying logic of State responsibility law and the role that attribution rules are supposed to play. Attribution rules were from then on no longer seen as legal rules that attach *responsibility* to a State, but rather as rules that attach *conduct* to a State. If such conduct is considered as an act of the State, this may but need not be in breach of an international obligation of the State concerned. Either way, the developments discussed in this Chapter show that one cannot determine in the abstract whether a State is responsible under international law, unless one establishes that, pursuant to

[257] Boer (2008) 356. As the author concludes, in practice this provision has not given rise to much difficulties because federal or non-unitary States parties have been able to achieve the local implementation of the Convention through 'legislation, judicial action, policy agreements, negotiation, and political pressure'; see *ibid*, 360. See also Raschèr and Vitali (2012) 687–88.

[258] See also Burmester (1985) 527 (commenting that federal clauses 'modify the substantive obligations of a federal State under the individual treaty it has ratified [and] the level of obligation accepted by a ratifying federal State will clearly be less than for a unitary State'). For the same position, see Raschèr and Vitali (2012) 686; Aust (2007) 212; Bodansky and Crook (2002) 781 fn 60.

the various standards of attribution, the conduct in question is an act of the State in the first place.

This Chapter also demonstrated that the primary/secondary divide had originally been formulated within a specific context and for the purpose of achieving a particular aim, namely to serve as a method of project delimitation. At the time of its inception, the distinction was not accompanied by visions of further consequences at the international level. Over time, however, the distinction started to lead a life of its own, far beyond the environment in which it was originally conceived. The distinction is artificial and difficult to maintain in such absolute terms. Attribution rules have a substantive dimension, given that they have a permeating effect on the scope, content or application of primary rules of international law. The legal operation of attribution rules from the law of State responsibility reveals that the State is considered in law as the true author of factual conduct, which may have implications for the applicable legal framework within which such conduct ought to be assessed (and, consequently, the lawfulness of the conduct itself). As will be shown in more detail in Chapters 4, 5, and 6 of this thesis, there are cases in which the divide is used as an almost rebuttable presumption against the interaction, of any kind, of the two types of rules, in particular when it comes to using secondary rules of attribution to determine the scope and application of primary rules (and the jurisdiction of an international court or tribunal to adjudicate allegations of a violation). This is at odds with how the distinction came into being in the first place, namely as a tool to delineate the codification project.

Eric David has argued that 'reality often rebels against classifications which are too rigid [and] simple schemes may not always take into account all of the complexities of a topic'.[259] Criticism towards the conventional wisdom that there is, as such and without further qualification, a strict distinction between primary rules and secondary rules is also voiced by Ulf Linderfalk, who points out that the ILC's adoption of the primary/secondary divide, even if at one point serving a very useful purpose, 'cannot be tantamount to a blanket approval of the primary-secondary rules terminology for all times'.[260] Therefore, whether the attribution rules in ARSIWA apply as customary international law or defer to *lex specialis*, it is difficult to insist on a clear-cut distinction between both: some secondary rules in ARSIWA may have a primary character, whereas some primary rules outside of ARSIWA may actually be of a secondary nature.

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[259] David (2010) 32. The author continues: '[I]f the classification can facilitate the perception of reality it also leads, as in mathematics, to its simplification. It is sufficient to be conscious of this so that the classification maintains its operational virtues without excluding from view the object examined' (at 33). See further Caron (1998) 111, commenting on the ILC Articles that 'like all unravelling, one understands more of what has been unravelled — but perhaps loses sight of that which once was viewed as one thing'. For an attempt at categorizing different types of primary obligations, see Combacau and Alland (1985).

[260] Linderfalk (2009) 55. In the conclusion, the same author doubts that the introduction of the primary-secondary rules terminology has ever outweighed 'the accompanying legal effects that the terminology entailed for a correct understanding of the international legal system' (at 72).

CHAPTER 3 INTERNATIONAL LEGAL PERSONALITY AND THE CAPACITY TO INCUR RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

A. Introduction

In the previous Chapter it was explained how the notion of an internationally wrongful act has developed throughout the work of the International Law Commission (ILC, or the Commission) on the topic of State responsibility. With Roberto Ago as the main driving force, the ILC formulated the abstract and generally applicable rule that an internationally wrongful act requires conduct that is attributed to the State and in breach of its international obligations. This allowed the ILC to sidestep the controversial issues that arose in the earlier stages of the project when the codification effort was primarily concerned with the standard of treatment of foreigners on a State's territory.

This Chapter takes a turn from the historical origins of attribution as an element of an internationally wrongful act and examines its relation with international legal personality. It will be shown that the traditional notion of international responsibility that emerged in State practice and case law in the early nineteenth century, was exclusively of an inter-State character. States were regarded as the only actors with international legal personality, and thus only States could address other States' wrongdoings and claim reparation for injury. Consequently, the law of international responsibility was essentially bilateral and civil in character, confined to responsibility of States as the exclusive actors in the international domain. This traditional system entailed that the relevance of rules on the attribution of conduct was limited to inter-State disputes.

After the Second World War this changed radically. The resulting modern notion of international responsibility is no longer considered exclusively inter-State, given the fact that States may be responsible towards non-State actors whose internationally-conferred rights are violated (in particular in the field of human rights law). Moreover, individuals can be tried before international criminal tribunals for conduct prohibited by international law, such as violations of international humanitarian law (IHL) in international armed conflicts (IACs). In human rights law as well as IHL relating to IACs, the notion of attribution of conduct plays a crucial albeit underexamined role with regard to the establishment of State responsibility and individual criminal accountability, respectively. The purpose of this Chapter is thus to take a closer look at how the legal operation of attribution relates to international legal personality. Particular attention will be paid here to the relevance

of attribution of conduct within the context of establishing State responsibility for human rights violations, as well as individual criminal responsibility for violations of IHL in IACs.

The structure of this Chapter is as follows. First, the meaning of the term international legal personality will be analysed (Section B). It will be shown that as far as responsibility is concerned, international legal personality revolves around having rights and obligations and the possibility to bring or be subjected to international claims. In other words, rights, obligations and responsibility can be seen as the flipside of international legal personality; there cannot be one without the other. The Section that follows builds on this analysis and distinguishes between the traditional notion of international (inter-State) responsibility and the modern notion of international responsibility (Section C). The latter, it will be shown, is not restricted to inter-State relations and bilateral disputes, but encompasses, as far as relevant for this thesis, individuals as rights-holders (vis-à-vis the State) in human rights law, as well as individuals as duty-bearers in IHL. The legal (and, for human rights law, quasi-legal) procedures before international courts, tribunals and other bodies demonstrate that these individual rights and obligations can be adjudicated at the international level. Lastly, Section D looks closer into the scope of application of various parts of the Articles on the Responsibility of States for Internationally Wrongful Acts[1] (ARSIWA, or the Articles) and examines whether and to what extent its provisions apply to human rights disputes and international criminal proceedings for violations of IHL in IACs, which involve a non-State actor as rights-holder or duty-bearer, respectively. This Section also takes issue with an interesting yet exceptional case of the European Court of Human Rights (ECtHR), in which the Court denied to the applicability of ARSIWA to the case at hand.

B. International Legal Personality as a Juridical Concept

International law is not a random collection of norms; it is a 'legal system'.[2] As a legal system, international law determines the status, rights and capabilities of those who participate in the activities which it seeks to regulate. It is a normative framework applied to define the characteristics of subjects of international law,[3] or, in more contemporaneous language, actors with international legal personality.[4] In essence,

[1] ILC, *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77.
[2] ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi)*, UN Doc. A/CN.4/L.682 and Corr.1 (2006) para 17.
[3] Shaw (2014) 153.
[4] This thesis uses the terms "subject of international law" and "actor with international legal personality" interchangeably. For the same approach, see e.g. Malanczuk (1997) 91; Portmann (2010) 4–5; McCorquodale (2014) 281–84; Shaw (2014) 142. See also International Court of Justice (ICJ),

the expression "international legal personality" is used to determine the actors whose actions have international legal consequences and thus to distinguish 'those social actors belonging to the international legal system from those being excluded from it'.[5] Hence, the notion of international legal personality is intrinsically bound up with how international law functions as a legal system.

The institution of legal personality is also used in domestic law, albeit that it is used here in a slightly different way. Domestic law recognizes natural persons (individuals) as persons in the eyes of the law and distinguishes between them based on criteria such as age and mental capacity.[6] In addition, domestic law allows for the establishment of legal persons, such as corporations and associations.[7] A legal person in domestic law denotes an entity established in accordance with and subject to national law, which is treated (for certain purposes, such as contracts, tax or bankruptcy) as a separate entity in law. The legal person is legally distinct from its founders, members, directors and shareholders. This means that a company, etc, *as such* is able to acquire rights, assume obligations, and that it can sue and be sued for legal commitments entered into.[8] Another implication of legal personality is that the entity created as such is physically intangible and to some extent fictional, existing on paper and in law, but incapable of acting in the real world except through natural persons. Therefore, domestic law invariably provides rules on representation (i.e. on how persons, such as directors, can *represent* the legal person for the purposes of legal transactions)[9] and on responsibility (i.e. on persons such as employees or sub-contractors whose conduct can *engage* the liability of the legal person).[10] As is the case for natural persons, domestic law prescribes how legal persons function in the domestic legal system, differentiating rights, obligations and liability between various categories of legal persons.

At the international level, it is difficult to find clear-cut rules or universally accepted pronouncements on what it exactly means to have *international* legal

Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) (1949), where the Court uses both expressions without implying any normative difference. Thus, the ICJ asks whether the United Nations (UN) has international legal personality, and then explains that the 'subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights' when comparing the personality (or subjectivity) of States and international organizations.

[5] Portmann (2010) 19.

[6] In Dutch law these matters are largely regulated in Book 1 of the Dutch Civil Code.

[7] For instance, Art 2:3 Dutch Civil Code provides that associations (*verenigingen*), cooperatives (*coöperaties*), mutual insurance societies (*onderlinge waarborgmaatschappijen*), public and private limited companies (*naamloze en besloten vennootschappen*) and foundations (*stichtingen*) have legal personality.

[8] Portmann (2010) 7–8.

[9] See e.g. Art 2:130 Dutch Civil Code, which provides that the power of representation of private limited companies belongs to the board of directors or the directors to whom such power is granted. Art 2:7 is a general provision that deals with the validity of a juridical act performed by a legal person that exceeds the purpose (objective) of the legal person (*ultra vires* acts).

[10] See e.g. Art 6:170 Dutch Civil Code, which governs the tortious liability for damage caused by the conduct of a subordinate.

personality.[11] There is, for example, no treaty that outlines how it is bestowed, or what it entails. Certainly, there are rules governing who can represent the State for the purpose of binding the State in international transactions,[12] as well as rules on when States are responsible for the conduct of their organs or other persons or entities.[13] Yet, an all-encompassing legal instrument covering all aspects of international legal personality is lacking.[14]

To make matters more complicated, there is a certain causality dilemma — or cause-or-effect paradox — when it comes to the concept of international legal personality. It is unclear whether this personality as such exists and certain defined consequences flow from it, or, conversely, whether the presence of certain criteria actually indicates the existence of international legal personality.[15] It may actually be that there is no general rule in this regard, and that it all depends on which type of actor one looks at. Nevertheless, any uncertainty with regard to these criteria as being indicators or consequences of international legal personality should not detract from the meaningfulness of the concept itself. Similar to the question of Statehood itself (which is subject to the competing doctrines of the declaratory or constitutive theory and various shades in between[16]), the concept of international legal personality is central to how international law operates, even if its exact contours and content are uncertain.

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[11] As noted in Portmann (2010) 9, 'there is no centralized law of persons in the international legal system'. There is no provision in ARSIWA that addresses the international legal personality of States. Art 1 ARSIWA merely provides that every internationally wrongful act of a State entails its international responsibility, but the provision itself is silent as to how this responsibility relates to international legal personality. International legal personality is addressed in the commentary, though, albeit very succinctly; see Art 1 ARSIWA, commentary para 7 ('the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality') and Art 4, commentary para 10 (noting the lack of separate international legal personality of the constituent units of a federal State).

[12] For the adoption or authentication of the text of a treaty, see Arts 7 and 8 Vienna Convention on the Law of Treaties. On the authority to bind the State by way of a unilateral declaration, see ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries*, YB ILC 2006-II(2) 161 para 176, Guiding Principle 4, which provides that by virtue of their functions 'heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.'

[13] See Arts 4–11 ARSIWA.

[14] In 1949, the topic of subjects of international law was suggested to be taken up by ILC for codification; see UN General Assembly (UNGA), *Memorandum of the Secretary-General: Survey of international law in relation to the work of codification of the International Law Commission – Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission*, UN Doc A/CN.4/1/Rev.1 (1949) paras 27–32. The ILC did not follow this suggestion.

[15] On the tautological or circular nature of the definition of international legal personality, see e.g. Portmann (2010) 10; Nollkaemper (2019) 766. See also Pellet (2010a) 6, pointing out that international responsibility is an indicator as well as a consequence ('both a manifestation and the proof') of international legal personality.

[16] On the various theories of State recognition, see generally Grant (1999); Crawford (2007) 19–26; Visoka et al (2020).

In its 1949 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice (ICJ) offers one of the few judicial statements on international legal personality in the context of an assessment whether this is enjoyed by the United Nations (UN), an international organization.[17] An international organization can enjoy international legal personality as a result of its constituent instrument.[18] However, this is rare, and in most cases the founding treaty will either be silent on the matter or merely grant domestic legal personality as opposed to legal personality at the international level. Such is also the case for the UN, the central international organization in existence today. The UN Charter provides that the organization has the necessary (national) 'legal capacity' to function in the territory of UN member States,[19] but it is silent on international legal personality. In *Reparation for Injuries*, the question the Court had to face was whether the UN as an international organization has the capacity to bring an international claim against a State with a view to obtaining reparation due in respect of damage caused to the UN. The factual background of the case was the killing of the UN Mediator in Palestine (Count Bernadotte) and other members of the mission in Jerusalem, in 1948. The Court held that the capacity for the UN to bring a claim depends on whether the organization has international rights that it can rely on vis-à-vis its member States, which it essentially rephrased as a question of having international legal personality.[20] The Court opined that the UN has 'a large measure' of international legal personality that is based on being 'capable of possessing international rights and duties [and having] the capacity to bring forward a claim to maintain those rights'.[21]

Phrased differently, according to the Advisory Opinion, international legal personality allows an actor as a subject of international law (1) to possess international rights (2) to put forward a claim in order to invoke responsibility for violations of these rights, and (3) to possess international obligations ('duties'). The definition provided by the ICJ does not refer to the possibility that an actor has the capacity to violate its international obligations and be responsible. Nevertheless, this is usually also taken into account for the purposes of examining the personality of States and other subjects of international law.[22] Therefore, as far as it is linked with

[17] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949).
[18] See e.g. Art 4(1) Rome Statute of the International Criminal Court (ICC Statute).
[19] Art 104 UN Charter.
[20] See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 178, holding that 'the capacity [for the UN] to bring an international claim' depends on the organization having 'international personality'.
[21] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 179. The Court further found that the international legal personality of the UN was objective and thus opposable to non-member States such as Israel (which at the relevant time was not yet a member State of the UN); see *ibid*, 184–85.
[22] See e.g. ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* (1999) para 66, where the Court held that the UN could, in principle, be held to issue compensation for damages as a result of acts performed by the UN or by its agents acting in their official capacity.

the existence of subjective rights and obligations,[23] international legal personality will be understood to mean that an actor has: (1) international rights and the capacity to invoke the responsibility of another actor when these rights are violated; and (2) international obligations, and the capacity to violate these obligations leading to the actor's responsibility.

Rights (or obligations, for that matter) must be regarded as *international* if in substance they are laid down in, or follow from, a recognized source of international law, regardless of domestic law, and if this conferral is based on the recognition that the rights in question belong to the actor and are owed to him by another actor with international legal personality. The question of whether there exists an international right, however, should in any case not be confused with the capability of invoking this right in a legal procedure. It is possible to have a right as a matter of substance yet to be deprived of a procedural remedy (e.g. because no international court has jurisdiction over the matter, or because of a lack of *locus standi*), and the lack of jurisdiction is without prejudice to the existence or scope of the underlying substantive rights and obligations, and the capacity of an international legal person to possess them.[24] Conversely, the availability of an international claims procedure of course presupposes the former; the actual capacity to claim a right in international law is premised on having that right in the first place.[25] Thus, what matters for the characterization of a claim as international, is that the procedure is available because of international law, and that it involves invoking a right conferred by international law.

C. Original and Derived International Legal Personality

The concept of international legal personality does not operate in a binary manner. International law does not treat States and various types of non-State actors alike; as will be shown below, there are various shades or degrees in which international

[23] The notion of international legal personality extends beyond rights and duties (and the capacity to claim those rights or be held responsible for a violation of these duties), and it is common to find additional indicia of international legal personality, such as the enjoyment of law-making capacity or privileges and immunities. However, the role (if any) of attribution rules within the context of law-making and immunities will not be addressed in this thesis; see Chapter 1, Section F and the sources cited there.

[24] See e.g. ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (2006) para 67, where the Court held that Rwanda's reservation to Art IX of the Convention on the Prevention and Punishment of the Crime of Genocide (a compromissory clause giving the Court jurisdiction for disputes relating to the interpretation and application of the Convention) was of a procedural nature, without affecting the scope of substantive obligations under the Convention.

[25] Malanczuk (1997) 101. The bringing of a claim means using any of the 'customary methods recognized by international law for the establishment, the presentation and the settlement of claims'; see ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 177.

legal personality is manifested. The question is not so much "to be or not to be" an international legal person, but rather to establish the degree of such personality as enjoyed by a particular actor, in a given set of circumstances.[26] As the Court observed in *Reparation for Injuries*: 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'[27] Consequently, international legal personality is a relative notion, which means that the various actors that enjoy it differ in terms of the scope of the rights (which can be claimed) and obligations (which can be violated) that are incumbent on them.

It is thus useful to distinguish here between actors with original and derived international legal personality (or, in German, *geborene und gekorene Völkerrechtssubjekte*[28]). States are the most important subjects of international law and possess original international legal personality.[29] Non-State actors such as individuals (or groups of individuals), on the other hand, may have a certain measure or degree of international legal personality but only in so far as this is based on or derived from international law, and thus ultimately the consent of States.[30] These non-State actors enjoy international personality, including international rights and obligations, in such measure and for such purpose — e.g. in respect of a particular treaty or legal regime — as is recognized and conferred by States or the international community as a whole.

C.1. From a Traditional to a Modern Notion of Responsibility in International Law

[26] Malanczuk (1997) 93; Shaw (2014) 143.
[27] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 178.
[28] See e.g. Von Arnauld (2014) 47.
[29] See e.g. East African Court of Justice (EACJ), *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) para 19 ('international law is derived from international treaties and conventions, and typically demarcated States as the main subjects thereof'); Community Court of Justice of the Economic Community of West African States (ECCJ), *David v. Ambassador Uwechue* (2010) para 42 ('States are … the principal subjects of international law'); African Commission on Human and Peoples' Rights (ACionHPR), *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006) para 135 ('the State [is] the primary subject of international law'). See also Crawford (2010a) 17, noting that States are the 'primary subjects' with rights and duties under international law.
[30] See e.g. EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) para 19 ('individual persons are increasingly becoming recognized subjects of international law [as international law] imposes certain duties upon States with regard to such persons … subject to the existence of specific provision therefor in an international treaty.'). See also African Court on Human and Peoples' Rights (ACtHPR), *Umuhoza v. Rwanda* (2016), Individual opinion of Judge Ouguergouz, para 16 (noting that under the ACtHPR Protocol individuals and NGOs have become 'derivative or secondary subjects of international law, in as much as their international subjectivity has been conferred on them by the will of African States, original or primary subjects of international law').

Today, one would say that a State has full or original international legal personality.[31] States have the widest measure of international rights and duties as possibly provided for by international law. In their international relations States are sovereign, independent, and equal. They are entitled to territorial integrity and to decide freely on their political, economic, social and cultural system without interference in any form, including the use of force or other forms of unlawful intervention by another State.[32] International rights pertaining to a State exist by virtue of its existence as a State, and, in general, do not require that the State claims them or takes practical measures to assure their continued enjoyment.[33] States also have the capacity to bring forward international claims (or be claimed against) for the vindication of those rights, even though actually doing so is subject to the consent of both States to a dispute.[34] As treaties and customary international law constitute a web of bilateral and multilateral relationships, rights of States can be conceptualized as counterparts of obligations that other States owe to them, and vice versa.[35] States enjoy the rights inherent in full sovereignty but, at the same time, they have the obligation to respect the personality and rights of other States, failing which they can be held responsible under international law.

For a long time, it was a fundamental principle that 'the King can do no wrong'[36] (or: *princeps legibus solutus est*[37]). This maxim can be understood to have at

[31] See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 180, noting that a State 'possesses the totality of international rights and duties recognized by international law'.

[32] See e.g. UNGA Resolution 2131 (XX) of 21 December 1965, 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty', UN DOC A/RES/2131(XX) (1965); UNGA Resolution 2626 (XXV) of 24 October 1970, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', UN Doc A/RES/2625(XXV) (1970); UNGA Resolution 36/103 of 9 December 1981, 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States', UN Doc A/RES/36/103 (1981).

[33] For this general rule, see e.g. Art 4 Montevideo Convention: 'States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possess to assure its exercise, but upon the simple fact of its existence as a person under international law.'

[34] See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) 177–78, noting that the capacity to bring international claims 'certainly belongs to the State' and that a State can submit claims to a tribunal only with the consent of the States concerned.

[35] See e.g. ILC, *Second report on State responsibility, by Roberto Ago, Special Rapporteur: The origin of international responsibility*, UN Doc A/CN.4/233 (1970) para 46: 'The correlation between a legal obligation on the one hand and a subjective right on the other admits of no exception. [T]here are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects.'

[36] Blackstone (1765–1769) 238–39: 'Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong. … The King, moreover, is not only incapable of doing wrong, but ever of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.'

[37] Justinian (530–533) Book One, Title 3, Heading 31, 13: 'The Emperor is not bound by statute'. See also Fellmeth and Horwitz (2009) 229, defining this as a 'largely defunct maxim meaning that a

least two meanings. On a substantive level, it means that the King (or Head of State) is above the law and cannot do wrong. A second, procedural understanding is that even if the King could conceivably act in violation of the law there is no legal remedy against this,[38] whether by judicial action in the courts of the State itself or in the courts of another State. State responsibility is the very negation of the maxim 'the King can do no wrong'.[39] The principle that States are responsible under international law for their wrongful acts and thus answerable to those to whom these obligations are owed solidified through State practice and international case law in the late nineteenth century and beginning of the twentieth century. As held by single Arbitrator Max Huber in the case of *Island of Palmas*, '[s]overeignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[40] This internal dimension of sovereignty is complemented by an external one, which allows States to subject themselves to legal obligations.[41] The possibility of incurring of responsibility may then be seen as the bargain for the exclusive, internal territorial jurisdiction of States, and as necessary implication of their external sovereignty and the ability for States to subject themselves to legal limitations on their freedom to act vis-à-vis other equally independent States.

On a fundamental level, State responsibility in international law confirms (or follows from) legal notions such as State sovereignty and equality. As observed by Roberto Ago, '[t]he obverse of sovereignty is the possibility of asserting one's rights, but the reverse is the duty to fulfil one's obligations.'[42] The fact that States have a capacity to assert rights and to invoke the responsibility of other States for violations thereof, is to accept those States themselves may also be subject to obligations which they are under a duty to fulfil.[43] State responsibility is thus a corollary of State sovereignty and of the law itself. A modern legal expression of this is laid down in the

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sovereign State or its government may not be hailed before a tribunal to answer for its actions or policies'.

[38] Seidman (2015) 396.

[39] See e.g. ILC, *Summary record of the 371st meeting*, UN Doc A/CN.4/SR.371 (1956) para 33 (Scelle): '[T]he principle that "The King can do no wrong" had disappeared in favour of the principle of the responsibility of the State towards the individual and its general responsibility to the international community.' For the opposite view, see *Summary record of the 372nd meeting*, UN Doc A/CN.4/SR.372 (1956) para 4 (François), arguing that the maxim did not mean that the King could not commit illegal acts, but merely that such acts could not be attributed to the King or State, but only to the advisers of the King or the organs of the State.

[40] Permanent Court of Arbitration (PCA), *Island of Palmas (or Miangas) (the Netherlands v. United States)* (1928) 838.

[41] See Permanent Court of International Justice (PCIJ), *S.S. Wimbledon (United Kingdom, France, Italy and Japan v. Poland)* (1923) 25: '[T]he right of entering into international engagements is an attribute of State sovereignty.'

[42] ILC, *Third report on State responsibility, by Roberto Ago, Special Rapporteur: The internationally wrongful act of the State, source of international responsibility*, UN Doc A/CN.4/246 and Add.1–3 (1971) para 79.

[43] See *ibid*, para 76: 'It is impossible to visualize a State possessing international personality but not having international obligations; and if it has such obligations, it may logically violate them as well as carry them out.'

Friendly Relations Declaration (1970), which provides that sovereign equality and Statehood not only implies certain rights, but also the obligation 'to respect the *personality* of other States,' as well as the duty 'to comply fully and in good faith with their international obligations'.[44] The idea that the King or the State can do no wrong in law has slowly grown to become obsolete,[45] instead giving way to a system of State responsibility that is based on legal accountability for the violation of international rules binding on States.

Lassa Oppenheim wrote in 1912 that since international law 'is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law'.[46] By that time, it had thus become accepted practice that States could be held responsible for violating their international obligations. Yet, the essence of States as the sole actors with international legal personality also entailed that individuals (or other non-State actors, for that matter) fell outside of the purview of international law. The legal position of having rights that could be claimed, and duties for which one could be held responsible, was essentially reserved to States only. In other words, international responsibility was confined to the responsibility of one State towards another State (or group of States).[47] The traditional notion of international responsibility was thus primarily concerned with achieving the undisturbed co-existence of internally independent self-serving States, without much regard for the legal position of ordinary human beings.[48]

Over time, the system of international law developed from a traditional system into a modern one. In 1928, the Permanent Court of International Justice (PCIJ) held that as a general matter of law, treaties could grant rights to individuals if this followed from the intentions of the States parties.[49] The case concerned the unique situation of the relationship between the authorities of the Polish Railway Administration and officials from the Free City of Danzig who pursuant to Article 100 of the Treaty of Versailles of 1919 had passed into its service after the City's establishment in 1920,. The Court held:

> It may be readily admitted that, according to a well established principle of international law … an international agreement, cannot, as such, create direct

[44] UNGA Resolution 2625 (XXV) of 24 October 1970, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', UN Doc A/Res/25/2625(XXV) (1970) (emphasis added).
[45] But see, for a domestic take on this, the claim by then United States President Nixon that 'when the President does it that means that it is not illegal' and that a decision of the President 'enables those who carry it out, to carry it out without violating a law'; see Nixon–Frost Interview Nr 3, *The New York Times*, 20 May 1977.
[46] Oppenheim (1912) 19.
[47] Crawford (2010a) 24, describing the traditional notion of international responsibility as 'quintessentially an inter-State issue'. See further Pellet (2010a) 3–6.
[48] For a discussion of the traditional function of international law as a law of co-existence and its modern development into a law of co-operation, see generally Friedmann (1964).
[49] PCIJ, *Jurisdiction of the Courts of Danzig (Advisory Opinion)* (1928).

> rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.[50]

The rights in question — rights of action by Danzig officials against the Polish Railways Administration for the recovery of pecuniary claims — were not only protected through national courts, but also (indirectly) through an international mechanism that placed the constitution of the Free City under the guarantee of the League of Nations, with a High Commissioner entrusted with dealing with disputes in first instance, and a right of appeal to the League Council.[51]

Although this statement of the PCIJ was perhaps revolutionary and controversial at the time, subsequent practice has confirmed that individuals can indeed be direct rights-holders and duty-bearers under international law, and, moreover, that these rights and obligations are enforceable not only by national courts, but also international ones.[52] Nowadays, human rights law confers rights and the capacity to claim these before international judicial (and quasi-judicial) courts and bodies.[53] The conferral of international rights (and thus a certain measure of international legal personality) in this area of law means that individuals no longer have to rely on the mechanism of diplomatic protection, which is the legal operation by which the State of nationality invokes the responsibility of another State for an injury caused by an internationally wrongful act of the latter State to a person, with a view to the implementation of such responsibility.[54] Moreover, the development of international criminal law has resulted in a system in which individuals can be held responsible when they breach obligations imposed by international law. To contextualize the relevance of attribution rules from State responsibility law in disputes involving non-State actors, the following Sections turn to human rights protection in global and (sub-)regional regimes (Sections C.1.a and C.1.b) and individual obligations and criminal responsibility with a specific focus on war crimes and other serious violations of the law pertaining to IACs (Section C.1.c).

C.1.a. Human Rights Protection in Global Human Rights Treaties and in the African, American and European Systems

[50] PCIJ, *Jurisdiction of the Courts of Danzig (Advisory Opinion)* (1928) 17–18.
[51] Art 103 Treaty of Versailles; Art 39 Convention concluded between Poland and the Free City of Danzig.
[52] For an in-depth study of the rights and duties of individuals in international law, see Parlett (2013).
[53] International investment law is the second branch of international law that confers rights on individuals. For reasons explained in the Introduction the standard and function of attribution rules in this domain will not be discussed here; see Chapter 1, Section C.
[54] ILC, *Draft articles on diplomatic protection, with commentary*, YB ILC 2006-II(2) 26 para 50, Art 1.

Nine global human rights treaties have been developed under the auspices of the UN.[55] These international agreements grant a possibility for individuals to complain about a violation of their rights under the relevant treaty.[56] For the treaties that include this mechanism of so-called individual communications, States have the option to recognize the jurisdiction of a quasi-judicial human rights supervisory body (a committee) to accept and examine individual complaints. Such an acceptance can take place by way of becoming party to a separate protocol,[57] or by way of a declaration.[58] Before the committee to which the complaint is submitted can examine the merits, it must first be established that the complaint is admissible so as to fall within the relevant committee's jurisdiction.

Human rights treaties concluded in Europe, Africa and the Americas supplement the global human rights treaties and offer an additional layer of protection on a regional level.[59] Pursuant to these treaties, States have the obligation to secure rights to everyone within their jurisdiction,[60] and they must provide effective remedies before national authorities to those whose rights are violated.[61] Any failure to do so constitutes a ground for State responsibility. The vast majority of these human rights pertain to individuals, but the European Convention on Human Rights (ECHR) recognizes that some of these rights are also enjoyed by legal persons established under domestic law, including NGOs and corporations. For example, Article 2 (1) of the (First) Protocol to the ECHR provides that every 'natural or legal person' is entitled to the peaceful enjoyment of his possessions.[62]

With respect to these treaties and the possibility for individuals to complain about violations suffered by them, two types of systems may be distinguished. The

[55] The nine global human rights treaties are: International Covenant on Civil and Political Rights (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of Persons with Disabilities (CRPD); International Convention for the Protection of All Persons from Enforced Disappearance (CPED); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); International Covenant on Economic, Social and Cultural Rights (ICESCR); and Convention on the Rights of the Child (CRC).
[56] Art 77 ICMW provides for an individual complaints procedure but at the time of writing this mechanism has not yet entered into force.
[57] See e.g. Art 1 (First) Optional Protocol to the ICCPR and the Art 2 Optional Protocol to the CEDAW.
[58] See e.g. Art 22 CAT and Art 14 ICERD.
[59] See the substantive rights as laid down in Arts 1–14 European Convention on Human Rights (ECHR), Arts 3–26 American Convention on Human Rights (ACHR), and Arts 2–24 AfCHPR. The rights as laid down in these treaties are complemented by separate treaties and protocols dealing with specific types of substantive rights and/or specific rights-holders.
[60] See Art 1 ECHR, Art 1 ACHR, and Art 1 AfCHPR.
[61] See Art 13 ECHR, Art 25 ACHR, and Art 26 AfCHPR.
[62] Art 2(1) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Under the AfCHPR and ACHR legal persons as such are generally not deemed to be the beneficiaries of the system of regional human rights protection. With regard to the latter, see Inter-American Court of Human Rights (IACtHR), *Titularidad de Derechos de las Personas Juridicas en el Sistema Interamericano de Derechos Humanos (Advisory Opinion)* (2016).

first system is that of a one-tier system with compulsory jurisdiction as exists in Europe, where since November 1998 (with the entry into force of Protocol 11[63]) individuals have the right to submit complaints to the ECtHR.[64] The element of compulsory jurisdiction of the ECtHR lies in the fact that States accept the jurisdiction of the Court *ipso facto* by virtue of being a party to the ECHR, the Court's constituent instrument.

The second is a two-tier system in the Americas and Africa whereby individuals can submit their complaint to a quasi-judicial commission.[65] If after examining the complaint the commission in question finds it admissible and disclosing a violation, a report on the merits will be drawn up with recommendations to remedy the situation. If a State fails to comply with the recommendations in the report, the commission may bring the case to the relevant human rights court, but only if the State concerned has recognized the court's competence.[66] In addition, in the African system States can make a separate declaration accepting the competence of the African Court on Human and Peoples' Rights (ACtHPR) to receive cases from individuals following non-compliance with the recommendations in the report of the African Commission on Human and Peoples' Rights (ACionHPR).[67] Consequently, the American and African systems entail optional jurisdiction by a court, as it requires the filing of a declaration (as for the Inter-American Court of Human Rights [IACtHR]), accession to a separate Protocol (as for the ACtHPR for cases brough by the ACionHPR), or a combination of both (as for the ACtHPR for cases brough by individuals).

C.1.b. Human Rights Protection in the African Sub-Regional Systems of the Economic Community of West African States and the East African Community

African Regional Economic Communities (RECs) such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC) are established with the primary aim of economic integration and the liberalization of

[63] Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms abolished the previously existing European Commission of Human Rights (ECionHR) and introduced an entirely judicial compliance system with compulsory jurisdiction exercised by a full-time Court.
[64] Art 34 ECHR.
[65] See Arts 33(a) jo. 44 ACHR (in respect of individual complaints to the Inter-American Commission on Human Rights [IACionHR]) and Art 30 jo. 55 African Charter on Human and Peoples' Rights (ACHPR) (in respect of individual complaints to the ACionHPR).
[66] See Arts 33(b) jo. 61 and 62 ACHR (in respect of the IACtHR) and Arts 1 jo 5(1)(a) ACtHPR Protocol (in respect of the ACtHPR). On 1 July 2008, a protocol was signed to merge the ACtHPR and the Court of Justice of the African Union into a new, single judicial body — the African Court of Justice and Human Rights. At the time of writing, the protocol is not yet in force for lack of the required number of ratifications.
[67] See Arts 5(3) jo. 34(6) ACtHPR Protocol.

trade and commerce.[68] Nevertheless, RECs play a discernible role in the advancement and protection of human dignity, which, in turn, serves the integrity of the institution's legal order and is conducive to an environment in which trade can flourish.[69] In other words, a failure to respect and protect human rights is considered as an obstacle to regional integration.[70] As noted by John Eudes Ruhangisa, former Registrar of the East African Court of Justice (EACJ), 'for any regional court to be seen as an integrating institution, it has *inter alia* to facilitate the integration process through the recognition of the rights of individuals'.[71] The judicial organs of the RECs discussed in this Section adjudicate human rights disputes, complementary to the continental system of the African Charter on Human and Peoples' Rights (ACHPR) and its judicial organs — the ACionHPR and the ACtHPR — within the institutional structure of the AU. In fact, the track record of the judicial organs of the RECs discussed here shows that they are utilized not so much for deciding on purely economic disputes as for the purpose of holding governments accountable for human rights abuses.

ECOWAS was originally set up in 1975 as a regional organization with as its main objective the realization of economic integration.[72] Against the background of military conflicts and political and economic tension in the 1980s and 1990s, however, the ECOWAS Authority of Heads of State and Government decided to re-evaluate the organization's focus by adopting an all-inclusive approach that embraces peace, security and human rights concerns.[73] Accordingly, a broader vision of mandate of ECOWAS was put in place when in 1993 the Member States adopted a revised version of the constituent treaty of the organization. The Revised ECOWAS Treaty not only stipulates the fundamental principle that the Member States 'declare their adherence

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[68] See Killander (2018) paras 10–31 and 45–52.

[69] For instance, regional integration organizations commonly require respect for human rights as a condition for the accession of new member States, either explicitly (see e.g. Art 3(3)(b) Treaty for the Establishment of the East African Community (EAC Treaty); Art 49 jo. 2 Treaty on European Union) or implicitly (see e.g. Arts 2(2), 4(g) jo 5(3) Revised Treaty of the Economic Community of West African States [Revised ECOWAS Treaty]). Conversely, a gross and systematic disregard of human rights in breach of the constituent treaty of the organization can lead to sanctions, such as suspension of membership or even expulsion; see e.g. Arts 146(1) and 147(1) EAC Treaty; Art 77(1) Revised ECOWAS Treaty.

[70] See e.g. EACJ, *Sebalu v. Secretary General of the East African Community and Others* (2011) para 93, where the Court held that 'regional integration [would] be threatened [if] human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse'. See also EACJ, *Mohochi v. Attorney General of Uganda* (2013) para 37, where the Court held that in the EAC the principles of good governance and respect for human rights are 'foundational core and indispensable to the success of the integration agenda'. On the emergence of the relevance of human rights protection in African subregional economic integration, see further Ebobrah (2010; Ebobrah (2019b) 289–93; Musungu (2003).

[71] Eudes Ruhangisa (2017) 244. See also Possi (2018) 33. Within a different institutional context, see Cuyvers (2017), explaining how fundamental human rights protection in the European Union grew as the level of European integration intensified.

[72] See e.g. Art 12 Treaty of the Economic Community of West African States (Original ECOWAS Treaty), which provided for the progressive realization of a customs union among member States.

[73] See Odinkalu (2009) 584–86; Alter et al (2013) 743–45.

[to the] recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights,'[74] it also establishes the Community Court of Justice of the Economic Community of West African States (ECCJ) as standing judicial organ with a mandate to interpret the Treaty and settle disputes between Member States or between one or more Member States and Community institutions.[75]

In accordance with the provisions of ECOWAS Protocol A/P.1/7/91,[76] the Court was initially only open to Member States and Community institutions.[77] Non-State actors had no direct access to appear as applicants, for instance to claim that their community or human rights were violated.[78] This situation changed with the adoption in 2005 of a Supplementary Protocol,[79] which significantly widened the personal and material jurisdiction of the ECCJ.[80] In practice, since 2005 the ECCJ 'has virtually become a human rights court,'[81] rather than a court to oversee economic integration and the establishment of a common market. Indeed, the ECCJ Supplementary Protocol confers the Court jurisdiction 'to determine case [sic] of violation of human rights that occur in any Member State'[82] and confers *locus standi* to 'individuals on application for relief for violation of their human rights'.[83] The term 'individuals' is understood to include NGOs[84] as well as corporations.[85]

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[74] Art 4(g) Revised ECOWAS Treaty. A reference to the ACHPR is also contained in the preamble and in Art 56(2) (on co-operation in political and legal affairs).

[75] See Arts 6(1)(e) and 15 Revised ECOWAS Treaty. Arts 4(1)(d) jo. 11 Original ECOWAS Treaty already envisaged the establishment of an ECOWAS Tribunal, but a judicial organ was not established until the 1990s.

[76] ECOWAS Protocol A/P.1/7/91 on the Community Court of Justice of the Economic Community of West African States (ECCJ Protocol).

[77] See Art 9 ECCJ Protocol.

[78] This was made clear in the first judgment of the ECCJ, *Olajide v. Nigeria* (2004) para 62: 'Applicant [a businessman, RJ] cannot bring proceedings other than as provided in Article 9(3) of the [ECCJ] Protocol [and thus] cannot bring the proceedings against his Country or Member State which by law is saddled with the responsibility of instituting proceedings *on his behalf*' (emphasis added). Accordingly, individual cases of human rights violations could only be brought before the Court through the exercise of diplomatic protection, leaving the harmed individual 'obscured behind the scenes erected by the States'; Sall (2019) 158. See further Alter et al (2013) 747–53.

[79] ECOWAS Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English Version of the Said Protocol (ECCJ Supplementary Protocol).

[80] See Ebobrah (2019a) paras 5 and 14–21; Ukaigwe (2016) 74–76, 183–84.

[81] Sall (2019) 157. See also Ebobrah (2019a) para 17, noting that from 2005 to 2018 only individuals, NGOs, corporate bodies and (in a handful of cases) ECOWAS Community staff have invoked the jurisdiction of the Court; no case has been initiated by applicants of the type as originally envisaged by the ECCJ Protocol, i.e. the Member States, the President of the ECOWAS Commission and Community organs and institutions.

[82] Art 9(4) ECCJ Protocol, as amended by Art 3 Supplementary ECCJ Protocol.

[83] Art 10(d) ECCJ Protocol, as amended by Art 4 Supplementary ECCJ Protocol.

[84] See e.g. ECCJ, *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) and Others v. Nigeria and Others* (2014), paras 58–62.

[85] See e.g. ECCJ, *National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) v. Côte d'Ivoire* (2009) paras 23–24.

As far as the Court's jurisdiction *ratione materiae* is concerned, the Revised ECOWAS Treaty and the ECCJ Protocol (as amended) are peculiar in that they do not explicitly contain a catalogue of rights that individuals may invoke. Guided by Article 20 ECCJ Protocol which in turn refers to Article 38 Statute of the International Court of Justice (ICJ Statute),[86] the Court has consistently held that it has jurisdiction to entertain *any case* of an alleged human rights violation in Member States, provided that the Member State in question is a party to the international (or regional) human rights instrument in which the violation can be accommodated.[87] Accordingly, the Court's subject-matter jurisdiction is much wider than the ACHPR and encompasses other regional and international human rights treaties to which a State is party. This gives the Court a huge judicial potential to entertain a variety of human rights grievances within West Africa.[88]

Like ECOWAS, the EAC has been set up as a regional economic and political integration organization.[89] The EACJ ensures that member States and Community institutions adhere to law in the interpretation and application of the Treaty for the Establishment of the East African Community (EAC Treaty).[90] With respect to human rights, the EAC Treaty provides that the achievement of the objectives of the EAC by the member States shall be governed by the *fundamental* principle of 'good governance including adherence to … the rule of law … as well as the recognition, promotion and protection of human and peoples [sic] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.[91] In the same vein, through Article 7(2) EAC Treaty on *operational* principles governing 'the practical achievement of the objectives of the Community,' the member States 'undertake to abide by the principles of good governance, including … the rule of law … and the maintenance of universally accepted standards of human rights'.[92] The majority of cases brought by individuals to the EACJ touch on community principles such as good governance, the rule of law and human rights; only very few cases deal with trade and commercial matters.[93]

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[86] Art 20(1) ECCJ Protocol, as renumbered by Art 5 Supplementary ECCJ Protocol, provides that the Court 'shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure. It shall also apply, as necessary, the body of laws as contained in Article 38 of the Statutes [sic] of the International Court of Justice.' As noted by Ukaigwe (2016) 45, the word 'shall' creates a perfunctory effect, instead of merely a discretion. See in this connection also ECCJ, *David v. Ambassador Uwechue* (2010) para 41: 'As an international court with jurisdiction over human rights violation [sic], the court cannot disregard the basic principles as well as the practice that guide the adjudication of the disputes on human rights at the international level.'

[87] See e.g. ECCJ, *Capehart Williams Sr. and Paykue Williams v. Liberia and Others* (2015) 17–18; *Alade v. Nigeria* (2012) para 25.

[88] Sall (2019) 156.

[89] See Art 5(2) EAC Treaty, which provides that the member States undertake to realize 'a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation'.

[90] Art 9(1)(e) jo. 23(1) EAC Treaty.

[91] Art 6(d) EAC Treaty.

[92] The almost verbatim repetition could make one wonder about the rationale for the dichotomy between fundamental principles and operational principles; see Kamanga and Possi (2017) 204–05.

[93] Possi (2018) 21 and 30–32.

The EAC Treaty grants access to the EACJ to any person who is resident in an EAC member State alleging Treaty infringement or challenging the lawfulness of any act, regulation, directive, decision or action of a member State or an institution of the Community.[94] Despite the numerous references to human rights in the EAC Treaty,[95] however, the EACJ is not furnished with an explicit human rights mandate. As Article 27(2) EAC Treaty stipulates, the Court 'shall have … human rights … jurisdiction as will be determined by the Council at a suitable subsequent date' by way of a Protocol. No such Protocol extending the competence of the EACJ to human rights disputes has been concluded to date.[96] Nevertheless, human rights litigation has found its way into the competence of the EACJ through 'the craft of judicial interpretation,'[97] or one might even say, through judicial activism.[98]

The landmark case by which the EACJ started to assume jurisdiction over human rights violations in an indirect manner, is *Katabazi and Others v. Secretary General of the East African Community and Attorney General of Uganda*, decided in 2007. The Applicants in this case had been arrested and charged with treason. The High Court of Uganda granted bail to the suspects, but this was effectively made impossible by Ugandan security forces who surrounded the High Court building and re-arrested the suspects for the same facts despite bail. Subsequently, the Constitutional Court of Uganda ordered the release of the suspects, but without success. The suspects applied to the EACJ. At stake was the question of whether Uganda violated Articles 6, 7(2) and 8(1)(c) EAC Treaty by interfering with the High Court process and failure to comply with the judgment of its Constitutional Court.[99] The EACJ held that in the absence of a Protocol envisaged under Article 27(2) EAC Treaty, 'this Court may not adjudicate on disputes concerning violations of human rights *per se*'.[100] The EACJ then held after analysing in detail the objectives of the Community and its fundamental and operational principles, that it 'will not abdicate from exercising its jurisdiction of the interpretation under Article 27(1) *merely because the Reference includes allegations of human rights violations*'.[101] The EACJ

[94] Art 30(1) EAC Treaty. The term 'person' encompasses natural and legal persons; see EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) para 18.
[95] In addition to Arts 6(d) and 7(2), human rights references can be found in Art 3(3)(b) (on respect for human rights as one of the prerequisites for accession to the EAC) and Art 123(3)(c) EAC Treaty (on respect for human rights in the common foreign and security policy of the organization). See further Possi (2015) 196–99.
[96] For an overview of the so far unsuccessful attempts to confer an explicit human rights jurisdiction on the EACJ by way of a Protocol, see Possi (2018) 9–14; Luambano (2018) 78–80.
[97] Otieno-Odek (2017) 484.
[98] Possi (2015) 202.
[99] Art 8(1)(c) EAC Treaty provides that the member States shall 'abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty'.
[100] EACJ, *Katabazi and Others v. Secretary General of the East African Community and Attorney General of Uganda* (2007) para 34.
[101] *Ibid*, para 39 (emphasis added). Art 27(1) EAC is a general clause, conferring on the Court 'jurisdiction over the interpretation and application of this Treaty'.

concluded that Uganda had acted in violation of the rule of law, a principle not limited by the jurisdictional constraint of Article 27(2) EAC Treaty.[102]

Accordingly, victims of human rights violations have begun to construe their complaints as infringements of the principles of good governance or the rule of law as laid down in Articles 6(d) and 7(2) EAC Treaty, in order to 'bypass the human rights jurisdictional confinement'[103] contained in Article 27(2) EAC Treaty. Nowadays, the EACJ appears to exercise jurisdiction over human rights complaints also if the complaint is solely focused on such an allegation, without being grounded in a separate and distinct cause of action such as good governance or the rule of law.[104]

C.1.c. Individual Obligations and Criminal Accountability

As explained in a memorandum drawn up by the UN Secretary-General in 1949, 'positive law has recognized the individual as endowed, under international law, with rights the violation of which is a criminal act'.[105] Individuals are subject to international obligations in particular in the area of international criminal law and IHL.[106] The possibility of individuals violating certain fundamental norms of international law was expressly confirmed following World War II, when two international criminal tribunals were set up by the victorious Allies for the trial and punishment of the major war criminals of the European Axis and the Far East. The Charters provided that the tribunals had jurisdiction over natural persons for three different violations of international law, namely crimes against peace (i.e. aggression), war crimes, and crimes against humanity,[107] thereby confirming the

[102] *Ibid*, para 57. See also EACJ, *Rugumba v. Secretary General of the East African Community and Attorney General of Rwanda* (2011), in which the Court found a violation of Arts 6(d) and 7(2), noting that the reference to the ACHPR was 'not merely decorative of the Treaty but was meant to bind Partner States' (at para 38).
[103] Mbembe Binda (2017) 112.
[104] See e.g. EACJ, *Democratic Party v. Secretary General of the East African Community and Others* (2015) paras 57–66; Possi (2018) 22–23. However, it has been noted that the EACJ is not very precise when it comes to defining the precise cause of action that enables it to exercise jurisdiction, often making only general reference to 'the principles' in Arts 6(d) and 7(2) EAC Treaty, suggesting that the applications are reviewed against those principles taken as a whole; see Milej (2018) 111.
[105] UNGA, *Memorandum of the Secretary-General*, *supra* note 14, para 30. See also ILC, *First report on international responsibility, by Francisco V. García Amador, Special Rapporteur*, UN Doc A/CN.4/96 (1956) para 57: 'International law is not now concerned solely with regulating relations between States, for one of the objects of its rules is to protect interests and rights which are not truly vested in the State.'
[106] Some international duties or obligations may exist under regional human rights law. Art 32 (1) ACHR provides that 'every person has responsibilities to his family, his community, and mankind,' and Arts 27–29 AfCHPR contains similar duties in relation to family, work, the society and the nation as a whole, and add a general prohibition of discrimination. However, the exact interpretation and application of these duties is unclear, and there is no mechanism in place to enforce these rules on an international level. These rules will not be further examined in this thesis
[107] Art 6 IMT Charter; Art 5 IMTFE Charter.

principle that international law imposes certain obligations on individuals, the violation of which leads to individual criminal responsibility. Indeed, in its judgment the International Military Tribunal famously held that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[108]

The principles underpinning the IMT were subsequently affirmed by the UN General Assembly (UNGA),[109] the ILC,[110] and later formed the foundation for the work of other international criminal tribunals such as the Chapter VII-based *ad hoc* tribunals for Rwanda and for the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia, ICTY), the treaty-based permanent International Criminal Court (ICC), and various hybrid tribunals. With some variations among them, their statutes confer jurisdiction to adjudicate claims that a person is to be held responsible for the commission of international crimes, namely genocide, crimes against humanity, war crimes (i.e. grave breaches of the four Geneva Conventions of 1949 and other serious violations of the laws or customs of war), and/or aggression.[111]

The material jurisdiction of international criminal courts is narrowly defined. This can be especially observed in the context of armed conflicts, where the statutes of the various international criminal courts and tribunals often differentiate between IACs and non-international armed conflicts (NIACs), and include fewer crimes under the latter heading than under the former. A consideration of an accused person's criminal responsibility thus cannot take place without a determination that the conduct in question amounts to a crime as statutorily defined, including if necessary, a determination of the legal nature of the armed conflict.

D. The Applicability of the Articles on State Responsibility to Disputes involving a Non-State Actor

As discussed above, modern international law is no longer solely concerned with the rights and obligations of States. Nowadays, individuals enjoy human rights protection and they are subject to rules in the field of international criminal law. This begs the question whether or not ARSIWA is relevant and applicable to such disputes or procedures, or alternatively, whether ARSIWA is merely concerned with inter-State disputes. In this Section, the text and commentary to ARSIWA will be

[108] International Military Tribunal (1946) *Trial of the Major War Criminals*, 223.
[109] UNGA Resolution 95 (I) of 11 December 1946, 'Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal', UN Doc A/Res/1/95(I) (1946).
[110] ILC, *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, YB ILC 1950-II, 374.
[111] See e.g. Arts 5–8 ICC Statute; Arts 2–5 Statute of the ICTY, annexed to UN Security Council Resolution 827 of 25 May 1993, UN Doc S/RES/827 (1993) (as amended).

scrutinized in detail and a distinction will be made between the applicability of Part One ARSIWA on the one hand, and Parts Two and Three ARSIWA on the other (Section D.1.). Subsequently, an interesting and rather exceptional case of the ECtHR will be examined in which the Court denied the application of ARSIWA to a dispute involving an Applicant who suffered sexual abuse by the hands of his superior while serving in the armed forces (D.2.). Lastly, it will be argued that, despite the traditional inter-State perspective, the attribution rules in ARSIWA are relevant on a number of levels in human rights disputes and international criminal procedures involving war crimes and other serious violations of the law pertaining to IACs (D.3.). The crux of the matter is that for human rights violations and crimes committed in IACs, it is indispensable for substantive and jurisdictional purposes to attach conduct to a State as the primary subject of international law from which the legal personality of other actors is derived. This is the domain of attribution rules.

D.1. The Scope of Application of the Articles on State Responsibility: Part One versus Parts Two and Three

International law rests 'on a variety of distinctions between public and private worlds'.[112] In principle, international law does not address relations between private actors, nor is it concerned with matters that essentially fall within a State's domestic jurisdiction.[113] In the international law of State responsibility, this public/private distinction operates *inter alia* through the principles of attribution.[114] As a general rule, State responsibility arises when the conduct of public actors such as State officials or other entities empowered to exercise governmental authority is in breach of the State's international obligations; the conduct of private actors, whether resulting in harm or not, falls outside of the purview of State responsibility law. Although ARSIWA does contemplate certain situations in which the conduct of non-State actors is attributed to the State, these situations remain exceptional and underline the existence of a general rule that, in principle, private conduct is not directly attributable to the State.[115]

[112] Charlesworth (1995) 243.
[113] Art 2(7) UN Charter.
[114] Chinkin (1999) 387. See also Caron (1998) 128 ('rules of attribution are thus a set of trans-substantive rules that delineate one of the potential boundaries of State responsibility'); ILC, *First report on State responsibility, by James Crawford, Special Rapporteur*, UN Doc A/CN.4/490 and Add. 1–7 (1998) para 154 ('rules of attribution play a key role in distinguishing the "State sector" from the "non-State sector" for the purposes of responsibility'); Condorelli and Kress (2010) 224 ('the process of attribution exercise a real substantive influence on the definition of the "State sector"').
[115] See ECtHR, *Tagayeva and Others v. Russia* (2015) para 581: 'the conduct of private persons is not as such attributable to the State'. See also Higgins (1995) 153; Part One, Chapter II ARSIWA, commentary para 3.

For most of its part, ARSIWA reflects the traditional, horizontal State-to-State perspective of the international legal system.[116] In light of the predominantly public and horizontal perspective of ARSIWA, it has been argued that the Articles do not deal sufficiently with the position of individuals and other non-State actors as rights-holders in international law. Edith Brown Weiss, for example, argues that by 'largely ignoring the practice in which individuals and non-State entities are invoking State responsibility, the Commission produced articles that, however noteworthy, are to some extent out-of-date at their inception'.[117] In order to determine whether this assertion holds true in general or whether it should be qualified, it is necessary to take a closer look at the various parts of ARSIWA and assess their scope of application.

Part Two of ARSIWA (i.e. Articles 28 to 41 ARSIWA) addresses the content of State responsibility. According to Article 33 (1) ARSIWA, these rules impose obligations (of cessation, non-repetition, reparation for injury, etc) on the responsible State. These obligations 'may be owed to another State, to several States, or to the international community as a whole'.[118] As the savings clause of Article 33 (2) ARSIWA explains, Part Two as a whole does not apply — 'is without prejudice' — to rights 'which may accrue directly to any person or entity other than a State'.[119] Another significant area of regulation in ARSIWA that signifies its traditional inter-State perspective is Part Three (i.e. Articles 42 to 54 ARSIWA), which as a whole addresses the implementation of State responsibility. Part Three, Chapter I stipulates that State responsibility can be invoked by another State, be it an injured State under Article 42 ARSIWA, or another interested State under Article 48 ARSIWA.[120] As the commentary explains, the rules in Part Three do not deal with the invocation of State responsibility by persons or entities other than States.[121]

[116] For a critical analysis of the state-centred perspective of ARSIWA and its failure to reflect the international system of the twenty-first century, see Chinkin (1999); Brown Weiss (2002).

[117] Brown Weiss (2002) 816. See also Bodansky and Crook (2002) 775: 'One important development in the law of international responsibility that the Articles do not attempt to codify, much less progressively develop, is the growing importance of non-State actors as holders of international rights and obligations.' As admitted by Crawford, these matters were excluded primarily for reasons of completing the project on time, and out of fear that otherwise the acceptability of the text as a whole could have been endangered; see Crawford (2002a) 888.

[118] Art 33(1) ARSIWA.

[119] See also Art 28 ARSIWA, commentary para 3: 'Part Two … does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State.'

[120] Invoking State responsibility means 'taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal'; see Art 42 ARSIWA, commentary para 2. The remainder of Part Three (i.e. Arts 49–54) is devoted to countermeasures, i.e. measures which are taken by one State (the injured State) in order to induce compliance on the part of another State (the responsible State). Here too, the inter-State perspective is leading; the Articles do not contemplate the possibility that countermeasures be taken by non-State actors.

[121] Art 33 ARSIWA, commentary para 4. See also Part Two, Chapter I ARSIWA, introductory commentary para 2: '[A]rticle 33 specifies the scope of [Part Two], both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue

Accordingly, Parts Two and Three of ARSIWA — concerning the content and invocation of State responsibility — do not apply to disputes involving a non-State actor.

Part One, however, is of general application. After all, Article 1 ARSIWA, which provides that the commission of an internationally wrongful by a State act entails the responsibility of that State, covers 'all international obligations *of* the State and not only those owed *to* other States'.[122] Moreover, Article 12 ARSIWA stipulates that a breach of a State's international obligation occurs when State conduct runs counter what is required by such obligation, 'regardless of its origin or character'.

Quite possibly, the most unequivocal confirmation of the applicability of ARSIWA to human rights disputes has come from the EACJ in the *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* case. The details of this case and the Court's examination of ARSIWA in light of the merits will follow later in another Chapter.[123] For now, however, it is worth highlighting how the EACJ disagreed with the arguments of the Respondent that the application of the ILC Articles was restricted to inter-State disputes.[124] After a lengthy analysis of its own jurisdiction as laid down in the EAC Treaty, ARSIWA, the commentary to ARSIWA, and the underpinning distinction between primary and secondary rules of international law, the Court concluded:

> [T]he EAC Treaty does make provision for complaints by natural or juridical persons to this Court as outlined in Article 30(1) thereof, and thus recognizes them as subjects of international law in its legal regime. [W]ithin the EAC legal regime the Treaty is the primary instrument that outlines the obligations of [member States]. The ILC Articles, on the other hand, are supplementary rules intended to enable this Court determine the culpability of [member States] for the acts or omissions of their organs. … [T]he said Articles do apply to a dispute brought against a Partner State by a person resident in the Community.[125]

Thus, as carefully explained by the EACJ in *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda*, the rules of ARSIWA do not apply exclusively to traditional horizontal inter-State disputes. It is left to primary rules of international law (for example, those in the field of investment protection or, as discussed in this thesis, human rights law) to determine if and to what extent non-State actors are entitled to *invoke* State responsibility, and what the *content* of such responsibility would be.[126] That said, an internationally wrongful act is an indispensable condition

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directly *to persons or entities other than States*, are not covered by Parts Two or Three of the articles' (emphasis added).

[122] Art 28 ARSIWA, commentary para 3 (emphasis in original).

[123] See Chapter 4, Sections C.1.c and C.2.

[124] EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) para 11.

[125] *Ibid*, para 21.

[126] See *ibid*, para 19, holding that the recognition of individuals as participants in international law is 'subject to the existence of specific provision therefor in an international treaty. In the absence of such

for the establishment of State responsibility of any kind. Reliance on the generally applicable rules in Part One — including the rules on attribution — forms part of that exercise, regardless of the identity of the claimant: State, international organization, individual, company, or whichever subject of international law endowed with international rights opposable to the relevant State.[127] It is thus important to make a distinction between Parts Two and Three of ARSIWA (which apply, as a matter of customary international law, to inter-State disputes only), and Part One of ARSIWA, which 'applies to all the cases in which an internationally wrongful act may be committed,'[128] such as those against persons in the context of international human rights law.

Human rights courts have generally recognized the relevance of State responsibility law to human rights disputes.[129] Nevertheless, the recognition that State responsibility law applies to human rights disputes (as well as the affirmation that ARSIWA represent customary international law) does not provide any answer to the question of whether human rights courts recognize that this particular field of law knows any *lex specialis* rules on attribution of conduct. This will be examined in the two following Chapters, dealing with the practice of human rights courts. But before turning to those cases in which the human rights court in question recognizes and applies State responsibility law, it is necessary to take a closer look at a curious case in which the court in question found ARSIWA to be of no relevance for the dispute at hand.

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provision, an individual person cannot bring a complaint; only a State of which s/he is a national would be mandated to complain of a violation before an international tribunal.' It should be added that this would not be a case of *lex specialis* in the sense of Art 55 ARSIWA, for the simple fact that there is no normative conflict or inconsistency between Parts Two and Three (*inapplicable* as they are) and rules of primary international law governing content and invocation of State responsibility.

[127] But see, in the field of international investment law, the odd case of International Centre for Settlement of Investment Disputes (ICSID), *Wintershall Aktiengesellschaft v. Argentina* (2008). In this case, the Applicant alleged that Argentina by means of certain legislative and executive actions failed to comply with various rights and guarantees granted to German investors under the Argentina–Germany Bilateral Investment Treaty (e.g. right to receive a fair and equitable treatment, full protection and legal security). When considering the relevance of ARSIWA to the dispute at hand, the tribunal contended that it 'contains no rules and regulations of State Responsibility vis-à-vis non-State actors' (at para 113). This part of the judgment has been criticized inasmuch it does not adequately recognize the fact that, in the absence of a *lex specialis*, Part One of ARSIWA is of general application to inter-State and mixed disputes alike; see e.g. Crawford (2010b) 130; Wittich (2017) 825.

[128] Art 28 ARSIWA, commentary para 3.

[129] Explicit statements to this effect can be found especially in the case law of the ECCJ, see e.g. *Chief Onwuham and Others v. Nigeria and Imo State Government* (2018) 24 (where the Court held in the clearest of terms that '[i]t is trite that the rules of State responsibility applies [sic] to international human rights law'); *Okomba v. Benin* (2017) 20; ECCJ, *Col. Dasuki (Rtd) v. Nigeria* (2016) 27; *Konte and Diawara v.Ghana* (2014) para 32. See also ACtHPR, *Request for Advisory Opinion by the Coalition for the International Criminal Court and Others* (2015), Dissenting Opinion of Judge Ouguergouz, para 19: 'the protection of human rights … is based on international law and is by definition irrigated by that law … in terms of subjects, sources, *international responsibility* and peaceful settlement of disputes' (emphasis added).

D.2. Sexual Abuse in the Army: The Curious Case of *Reilly v. Ireland* at the European Court of Human Rights

The case of *Reilly v. Ireland* is worth analysing in some detail because it is the only case decided by the ECtHR where the Court outright rejected the applicability of the attribution rules in ARSIWA to the case at hand.[130] The Applicant, Reilly, was a gunner in the Irish Army who in the course of his six years of service had been the victim of a series of sexual assaults by his superior officer, a Sergeant Major (referred to by his initials as P.D.). The Applicant claimed *inter alia* that the Respondent State was responsible for torture or inhuman or degrading treatment, in violation of Article 3 ECHR. The Applicant's claim under this Article concerned its substantive limb (i.e. direct responsibility for the sexual abuse itself, and, alternatively, indirect responsibility as a result of the State's negligence to protect and further prevent) and its procedural limb (i.e. responsibility for failure to carry out an effective investigation after the fact). The analysis here will be confined to the Applicant's first claim under the substantive limb of Article 3, namely the direct responsibility of Ireland as a result of the sexual abuse by P.D. being attributable to it.

Applicant's main argument in favour of direct responsibility — invariably referred to by the Court as vicarious liability, in contradistinction to direct negligence, which already set the stage for how it perceived the case — was the official, military context of the case. Relying expressly on Articles 4 and 7 ARSIWA, the Applicant argued that a denial of direct responsibility would be incompatible with the Convention and amounted to a lack of accountability for most of the acts of State agents and to an immunity from suit of the State itself.[131] Specifically with respect to the military context, Applicant pointed out that all instances of abuse took place in the office of P.D. and under his authority, and that the Minister's power of appointment to the military hierarchy 'must be paired with responsibility in law for any abuse of authority carried out by persons so appointed'.[132] The government, on the other hand, claimed that P.D.'s position as a superior officer was insufficient to attribute his conduct the State and that the sexual abuse was committed by P.D. in his personal capacity. More generally, the government adopted the position that the ARSIWA were not relevant, given that domestic courts had applied the standard principles of vicarious liability and negligence and had found that, on the facts of the case, P.D.'s actions could not be imputed to the State.[133]

With regard to the facts, the Court agreed with the Applicant that 'in light of their sexually abusive nature and the hierarchical context in which they occurred' the acts perpetrated by the superior officer constituted degrading treatment appearing to fall within the material scope of Article 3 ECHR.[134] However, the Court rejected

[130] ECtHR, *Reilly v. Ireland* (2014).
[131] *Ibid*, para 50.
[132] *Ibid*, para 51.
[133] *Ibid*, paras 46 and 49.
[134] *Ibid*, para 42.

the Applicant's position and followed the Government's argument on the question of (non-)attribution and direct responsibility. The Court held that the Applicant 'prayed in aid the ILC's Articles on State Responsibility, but these are not pertinent, concerning as they do internationally wrongful acts'.[135] Consequently, the Court found that the sexually abusive conduct by P.D. could not be regarded as an act for which the State bore any direct responsibility.[136]

The Court's conclusion on non-attribution is a remarkable one, which can be only explained (though certainly not justified, as will be explained below) by its rejection of the relevance and applicability of ARSIWA. Had the Court properly applied Articles 4 and 7 ARSIWA as invoked by the Applicant, it would almost certainly have arrived at the conclusion that the conduct of P.D. could indeed be considered as an act of the Respondent State. After all, P.D. was a member of the State's armed forces and thus a person with the status of State organ under international law in the sense of Article 4 ARSIWA. Moreover, P.D. committed his acts of sexual abuse in his own office, wearing his uniform, during working days at the army base, and P.D. was able to do so because of his position as superior officer and his actual or apparent authority vis-à-vis the Applicant (a subordinate), which was something the Court noted, albeit to support the opposite conclusion of non-attribution.[137] In other words, P.D. acted under the cover of his status and using means placed at his disposal on account of that status,[138] making his conduct an *ultra vires* act that is attributable to the State under (Article 4 in conjunction with) Article 7 ARSIWA, despite the fact that P.D. may have exceeded his authority or contravened his instructions under domestic law.

Instead of following the attribution rules from ARSIWA, the Court displayed a great measure of deference to not only the factual but also the *legal* findings by Irish courts and their application of domestic law principles governing vicarious liability. Indeed, the Court invoked circumstances that would have no place whatsoever in an examination under Articles 4 and 7 ARSIWA. For instance, to support the finding of a lack of attribution (and thus the lack of direct responsibility), the Court pointed out that the sexual abuse was a flagrant violation of military law and that the Applicant was 'a physically strong man who had competed, internationally, in boxing'.[139] These considerations may be relevant in an assessment of whether there is a *breach* of an international obligation of the State.[140] However, they certainly have no bearing on the question of *attribution* of conduct for the purpose of establishing State

[135] *Ibid*, para 55.
[136] *Ibid*, para 56.
[137] As the Court found, 'the abuse was perpetrated by a commanding officer who *exploited his authority and control* [over a person who] was in a subordinate position'; see *ibid*, para 54, emphasis added.
[138] Cf Art 7 ARSIWA, commentary paras 5 and 6.
[139] ECtHR, *Reilly v. Ireland* (2014), paras 54 and 55.
[140] See e.g. ECtHR, *Labita v. Italy* (2000) para 120, where the Court found that an assessment of the minimum level of severity under Art 3 ECHR is relative and 'depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.

responsibility under international law. Rather than interpreting and applying the Convention in accordance with the rules and principles of international law (including the rules of attribution in the law of State responsibility), the Court chose to apply the common law test for the vicarious liability of employers (here: the Army, and thus the State) for the acts of their employees (here: P.D.), and then came to the conclusion that the State could not be held directly responsible for the sexual abuse at the hands of a State agent.[141] By rejecting the relevance of internationally recognized attribution rules, the Court thus essentially downgraded the Applicant's grievances into a (horizontal) labour dispute, with the scope of obligations imposed on the State reduced to due diligence obligations to protect and investigate (i.e. obligations of means), to the exclusion of the obligation to respect (i.e. an obligation of result).

The ECtHR's conclusion that the ARSIWA were 'not pertinent, concerning as they do internationally wrongful acts'[142] essentially puts the cart before the horse, given that the Applicant invoked its attribution rules *precisely in order to claim* that such an internationally wrongful act had taken place. There is nothing out of the ordinary about the Applicant's argument on this matter. After all, the rules in ARSIWA do not merely address the consequences of wrongfulness (i.e. Parts Two and Three), but also the existence of an international wrongful act by the State (i.e. Part One).

It is not entirely clear why the Court chose to reject the applicability of ARSIWA. One reason for the Court disapproving the application of ARSIWA might be that the dispute was one in which State responsibility was claimed for the conduct of a superior State agent (P.D.) towards a subordinate State agent (Reilley). Yet, there is absolutely nothing in the Convention to suggest that a State agent or employee is deprived of human rights protection in relation to the State as his employer, or that negative obligations no longer apply.[143] In fact, there are a number of cases in which the ECtHR found a State directly responsible for the conduct of its agents towards other (subordinate) State agents. For example, in the somewhat similar case of *Zalyan and Others v. Armenia*,[144] Applicants complained that they had been ill-treated by their superior officers in the army while assigned to serve in Nagorno-Karabakh. Although the complaint was rejected for lack of evidence, there is nothing in the case that suggests that members of the military are necessarily deprived of

[141] In the remainder of the decision, the Court rejected the second claim under the substantive limb of Art 3, i.e. the claim that the Respondent State failed to take reasonable measures to prevent or detect sexual abuse in the armed forces. The Court also rejected the claim under the procedural limb of Art 3, i.e. the claim that the Respondent State failed to comply with its procedural obligation to investigate the allegations and, if necessary, punish the perpetrator. The claims under Arts 8, 13 (in conjunction with Art 3 and 8) and 6 ECHR were summarily rejected as manifestly ill-founded.
[142] ECtHR, *Reilly v. Ireland* (2014) para 55
[143] State employees may not always enjoy the same breadth and scope of Convention rights at the level of *substantive* law as "ordinary" individuals. See e.g. Art 11(2) ECHR (on restrictions of the freedom of assembly and association enjoyed by civil servants), and the discussion in Schabas (2015) 522–23. See also Art 4(3)(b) ECHR, which excludes compulsory military service from the notion of forced labour.
[144] ECtHR, *Zalyan and Others v. Armenia* (2016).

human rights protection vis-à-vis the State they serve, or that a State cannot commit such violations through the acts of its State agents. In fact, the detailed examination in *Zalyan and Others v. Armenia* of the merits and of Armenia's *direct* responsibility for the acts of (rather than merely the State's passivity towards) ill-treatment, suggests precisely the opposite.[145]

Another reason for the rather surprising — and for the Applicant unfortunate — outcome in *Reilley*, might be that the ECtHR framed the allegation of sexual abuse as a tort claim, not as a human rights violation. This is a peculiar and ultimately faulty approach. The international responsibility of a State relies on the conduct being characterized as an act of the State and in breach of *international* law.[146] It could be argued that international responsibility is to some extent analogous to domestic responsibility in areas of tort,[147] and indeed, the same conduct could very well give rise to claim in international human rights law *as well as* a domestic claim of tortious liability.[148] That said, this analogy cannot be taken too far. Human rights allegations before international courts are not subject to the law of torts, and States are in no position to avail themselves of tort law defences that exist in domestic law.[149]

The fact that human rights courts are generally not receptive to arguments (or defences) based on tort law is illustrated very well by other cases. Consider, for example, the *Wing Commander Kwasu v. Nigeria* case before the ECOWAS Court of Justice (ECCJ). In this case, the Applicant sued Nigeria because his son drowned after being pushed in the water by a State agent during a swimming exercise at the Nigerian Defence Academy. Before admission to the Academy, the Applicant's son had signed a consent form, agreeing not to claim compensation for any injury or death

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[145] See ECtHR, *Zalyan and Others v. Armenia* (2016) paras 251–63. The Court did find a violation of the procedural obligation under Art 3 ECHR to carry out an effective investigation; see *ibid*, para 277. For other cases in which a human rights court assumes jurisdiction to establish *direct* State responsibility for human rights violations by a superior State agent towards a subordinate, see e.g. ECCJ, *El Tayyib Bah v. Sierra Leone* (2015) (dismissal from Police force); ECCJ, *PTE Akeem v. Nigeria* (2014) (arbitrary arrest and detention after allegations of theft of army material); ECCJ, *Wing Commander Kwasu v. Nigeria* (2017) (drowning after being pushed in the water during military training exercise); IActHR, *Gutiérrez and Family v. Argentina* (2013) (Assistant Commissioner of the police shot by fellow policemen in an attempt to thwart an investigation into corruption by public officials). These cases are examined in more detail in Chapter 4.

[146] See in this respect also Arbitral Award, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *affair* (1990) para 75, holding that international law does not know distinctions such as those that exist in national law (e.g. between contractual or tortuous responsibility) and that it merely matters whether State has violated an *international* obligation incumbent on it: 'any violation by a State of any obligation, of whatever origin, gives rise to State responsibility'.

[147] See e.g. Crawford (2002a) 878, observing that the international law of responsibility comprises areas 'that — in terms of domestic analogies — may be seen as like those of contract and tort'.

[148] As exemplified by the litigation in the United States under the Alien Tort Stature; see generally Fletcher (2008).

[149] See also Schabas (2015) 838, noting that the Court 'does not function like a mechanism for establishing tort or civil liability in a domestic legal system'.

that may occur in the course of the training.[150] When the case came before the ECCJ, the Respondent State argued that the case was effectively an action for negligence in tort law, and that the waiver signed by the Applicant's son enabled the Respondent to claim the tort defence of *volenti non fit injuria.*[151] Because the case was one of tort law, the Respondent State argued, the ECCJ was deprived of jurisdiction and the application had no cause of action before it.[152] The Court, however, disagreed, holding that '[t]his is not a tort claim but a human rights violation' as the Applicant alleged that the death of his son occurred in violation of Article 4 ACHPR.[153] It added for the sake of clarity that consent to training coupled with the undertaking not to maintain an action in the event of injury 'is not an invitation to murder, suicide or any other malfeasance'.[154] By rightly recognizing the Applicant's complaint as a human rights violation, the ECCJ effectively opened the door for not only the application of substantive human rights norms but also the international law of State responsibility and its attribution rules;[155] something which the ECtHR failed to do altogether in the *Reilly* case.

D.3. The Applicability of Attribution Rules from the Articles on State Responsibility in Human Rights and Humanitarian Law

The commissions and courts in all three regional human rights systems have subscribed to the idea that a human rights violation exists when the conduct in question is attributed to the State and in breach of the relevant human rights treaty. Thus, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the ACioHPR held that '[a]ny impairment of [the rights provided by the ACHPR] which can be attributed under the rules of international law to the action or omission of any public authority' gives rise to responsibility on the part of the State to whom the public authority belongs.[156] Likewise, in *Castillo González et al. v. Venezuela*, the IACtHR held that a State is internationally responsible 'for acts or omissions that violate the human rights recognized in the [American Convention on Human Rights (ACHR)] and that

[150] ECCJ, *Wing Commander Kwasu v. Nigeria* (2017) 5.
[151] The Latin maxim can be translated as 'A person who consents is not injured'. This is a principle according to which a party who consents to receive a harm or to risk receiving a harm cannot claim to be the victim of an offense after the expected harm results; see Fellmeth and Horwitz (2009) 295.
[152] ECCJ, *Wing Commander Kwasu v. Nigeria* (2017) at 5, 13 and 15–16.
[153] At 16–18. See also EACJ, *Prof Nyongo and others v. Kenya and Others* (2007), para 30: 'A reference under Article 30 [EAC Treaty] should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community.'
[154] ECCJ, *Wing Commander Kwasu v. Nigeria* (2017) 18.
[155] The analysis of the ECCJ of whether the conduct of an official of the Nigerian Defence Academy could be attributed to Nigeria is examined in Chapter 4, Section C.1.c.
[156] ACionHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006) para 142

can be attributed [to it] under international law'.[157] The ECtHR was even more clear in its judgment in *Likvidējamā p/s Selga v. Latvia and Lūcija Vasiļevska v. Latvia*, where it observed that the conditions of attribution and breach 'form a cornerstone of State responsibility under international law'.[158] Thus, there is strong support for the idea that a human rights violation like any other violation of international law requires the fulfilment of the two constituent elements of an internationally wrongful act as laid down in Article 2 ARSIWA.[159]

In other words, the conduct that gives rise to a human rights violation must be that of the State *ratione personae*. Yet, this merely answers the question of the applicability of State responsibility law for human rights violations *stricto sensu*.[160] Occasionally, it needs to be determined as a preliminary matter whether the conduct complained of is at all subject to human rights law, especially when the impugned conduct takes place outside the respondent State's territory. This is a question of extraterritorial application of human rights. As will be examined in more detail later,[161] a human rights treaty applies extraterritorially in respect of territory or victims that are subject to a State's control. Or, in other words, if the territory or victim in question is subject to a State's jurisdiction.[162] Thus, in order to speak of a human rights violation for which a State is responsible, it is essential that the conduct complained of — be it an act or omission — is an act of the State so as to constitute a violation committed by that State. Moreover, outside a State's own territory it is essential to determine that the territory or victim is controlled by the State against which the complaint is lodged. Where the territory or victim in question is under the control of State agents, no serious difficulties will arise with respect to attribution. However, where the territory or victim is under the control of actors potentially acting on behalf of a State, this needs to be solved first, which is a question of attribution pursuant to the law of State responsibility.

With respect to violations of IHL in the context of IACs, attribution rules from the law of State responsibility play a somewhat similar role. IACs by definition

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[157] IACtHR, *Castillo González et al. v. Venezuela* (2012) para 110 and fn 51 (citing Art 2 ARSIWA). See similarly IACtHR, *Gutiérrez and Family v. Argentina* (2013) para 78 and fn 163 (defining a violation of the ACHR as an 'unlawful act [that] is attributed to it' and citing Art 2 ARSIWA).

[158] ECtHR, *Likvidējamā p/s Selga v. Latvia and Lūcija Vasiļevska v. Latvia* (2013) para 95 jo. 64–65.

[159] ECCJ, *Konte and Diawara v. Ghana* (2014) para 28. See also the rather awkward formulation in ECCJ, *Okomba v. Benin* (2017) 21–22, where the Court held that 'the question as to whether there has been an internationally wrongful act depends first, on the requirements of obligation which is said to have been breached, and secondly, whether the State party or the organs or agents or officials committed the breach which the State party should be held responsible of the action' and citing ECCJ, *Aminu v. Government of Jigawa State and Others* (unpublished; the present author has been unable to retrieve the text of this judgment/decision despite several requests addressed to the ECCJ Registry).

[160] This is the subject of examination in Chapter 4.

[161] See Chapter 5.

[162] For instance, Art 2 ICCPR provides that States parties must respect and ensure the rights recognized in that treaty 'to all individuals within its territory and subject to its jurisdiction'. Some global human rights treaties do not have such a restriction in terms of the substantive rights but nevertheless restrict the right of individual complaints to victims subject to a State party's jurisdiction; see e.g. Art 2 Optional Protocol to the CEDAW.

involve two opposing States. Yet, States may not only engage in such conflicts directly, i.e. through the involvement of their own armed forces, but also indirectly by way of using non-State actors as proxy forces. Thus, whether an accused can be held criminally responsible for IHL violations in IACs depends essentially on whether, pursuant to State responsibility attribution rules, the belligerent actions on both sides are regarded as belligerent actions of States. This, too, is the domain of attribution rules.

E. Conclusion

This Chapter explained that international law was traditionally perceived as a system that only took States into account. States were the only actors with international legal personality, and only States had rights and obligations towards other States. In this traditional system, international responsibility as a mechanism to resolve disputes about rights and obligations was essentially limited to State responsibility, without any involvement of individuals.

The modern notion of international responsibility, however, is no longer purely inter-State but extends to non-State actors, who enjoy a certain measure of international legal personality that derives from the will of States or the international community as a whole. Indeed, human rights law is a prime example of an area where individuals enjoy substantive rights for which they hold can a State responsible through international judicial or quasi-judicial procedures, such as those available before the Human Rights Committee, the ECtHR or the ECCJ. Moreover, individuals have certain obligations in the area of international criminal law for which they can be prosecuted before international criminal tribunals such as the ICC and the ICTY.

The emergence of actors with derived international legal personality has implications within the area of international responsibility. As this Chapter demonstrated, the rules on State responsibility as codified in ARSIWA are for the most part geared towards solving inter-State disputes. Thus, the rules on content (i.e. Part Two ARSIWA) and implementation (i.e. Part Three ARSIWA) apply solely to disputes between States. However, the rules on what constitutes an internationally wrongful act (i.e. the rules on attribution and breach of an international obligation, to be found in Part One) apply to all types of disputes in which the State is held responsible. The rules of attribution set forth in Articles 4 to 11 ARSIWA provide the link between factual conduct and the State as an international legal person. Thus, conduct will only be considered as an internationally wrongful act on the part of the State if the conduct in question is legally attributed to the State in question.

Within the sphere of treaty-based human rights law, the legal process of attribution is of crucial importance given the fact that only States are bound by such treaties. In other words, unless it can be established that harmful conduct is an act

of the State, no international responsibility will arise, and victims will have no procedures to resort to for the purpose of invoking their rights. Yet, attribution rules are not merely relevant for a determination of State responsibility *stricto sensu*. Especially when the impugned conduct takes place outside a State's own territory, it needs to be examined first whether a human rights treaty is at all applicable extraterritorially as a result of the territory or victim abroad being under a State's control. If the territory or victim in question is under the control of State agents, no serious difficulties will arise with respect to attribution. However, where the territory or victim is under the control of actors potentially acting on behalf of a State, this needs to be resolved first as a preliminary matter, which is a question of attribution pursuant to the law of State responsibility. Thus, questions of attribution play a fundamental role in attaching conduct to a State as international legal person with obligations in human rights law.

In modern international law, individuals do not only have rights but also obligations. International criminal law is a regime that places obligations on individuals who can be prosecuted before and convicted by international criminal tribunals. Whether an accused can be held criminally responsible for IHL violations in IACs depends essentially on whether, pursuant to State responsibility attribution rules, the belligerent actions on both sides are regarded as belligerent actions by or on behalf of States. This, too, is the domain of attribution rules. Consequently, even though the regime of international criminal law applies to individuals and not to States themselves, it is nevertheless crucial to attach conduct to States as belligerent parties in order to be able to prosecute and convict a person for crimes committed in IACs.

CHAPTER 4 ATTRIBUTION OF CONDUCT AND STATE RESPONSIBILITY IN HUMAN RIGHTS CASE LAW

A. Introduction

This Chapter examines how human rights courts (and, to a lesser extent, quasi-judicial human rights treaty bodies) deal with the attribution of conduct for the purpose of establishing a State's responsibility. More precisely, it will be analysed whether these courts follow the rules or principles as laid down in Articles 4 to 11 of the Articles on the Responsibility of States for Internationally Wrongful Acts[1] (ARSIWA, or the Articles) or apply a *lex specialis* regime to consider certain conduct as an act of the State. The focus here will thus be on the *standard* of attribution. In other words, which factual and legal circumstances do human rights courts deem relevant in determining whether certain conduct must be considered as an act of the State?

The cases discussed in this Chapter involve a wide variety of situations and actors. As will be shown, human rights courts have engaged in an analysis of attribution of conduct in cases where the State organ in question was a low-ranking official, acted outside of their competence (*ultra vires*), or acted in a purely private capacity. In other cases the official capacity of a State official was not in question but the respondent State nevertheless denied responsibility because the official had already been prosecuted at the national level. More problematically, however, are situations where the conduct complained of did not originate from a State organ but from a person or entity outside the State's formal apparatus. For instance, human rights courts have undertaken an examination of attribution of conduct in cases where a victim complained of treatment in a privatized detention facility, or where a victim claimed to have been prosecuted on the basis of inadmissible or fraudulent evidence produced by a forensic pathologist employed by a third State. Moreover, this Chapter will also examine rare cases in which a human rights court dealt with allegations of conduct taking place in the absence of official authorities, conduct of insurrectional movements, or conduct acknowledged and adopted by the State as its own. In each of these cases, the human rights court in question had to examine whether or not the State could be held responsible for this.

This Chapter is structured as follows. First, it will be analysed to what extent human rights law as a special legal regime interacts with the customary international law of State responsibility as laid down in ARSIWA (Section B). Subsequently, a large

[1] International Law Commission (ILC), *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77.

number of cases will be analysed in which human rights courts engage with the attribution provisions of ARSIWA or otherwise provide insights on the legal operation of attribution of conduct but without mentioning ARSIWA by name (Section C). Lastly, this Chapter will offer a number of critical reflections on the interplay between attribution, breach and human rights violations as internationally wrongful acts (Section D). Here, special attention will be devoted to the order in which the elements of attribution and breach need to be examined, as well as situations that appear to blur the distinction between these two elements.

B. The Relationship between Customary International Law and International Human Rights Law: A Matter of Systemic Integration or *Lex Specialis*?

Special regimes have attracted a considerable amount of attention in legal discourse against the background of the proliferation of international courts and tribunals and the development of distinct, fragmented — or compartmentalized — areas of law.[2] The regime of human rights treaties forms such a special branch of law. For one, human rights treaties are 'more than mere reciprocal engagements' between the States parties for their own interests, given that individuals and not States parties are the main beneficiaries of human rights.[3] Moreover, substantive human rights treaty provisions have an *erga omnes partes* character, which enables each State party to a human rights treaty to invoke the responsibility of another State party even without being directly injured by the violation.[4] Human rights treaties are also

[2] See e.g. ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi)*, UN Doc. A/CN.4/L.682 and Corr.1 (2006) para 7: 'It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also lead [sic] to its increasing fragmentation — that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.' On the phenomenon of fragmentation of international law, see further *ibid*, paras 5–45. On fragmentation and human rights law, see Craven (2000).

[3] European Court of Human Rights (ECtHR), *Ireland v. United Kingdom* (1978) para 239. See also International Court of Justice (ICJ), *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* (1951) 23 ('in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'); Inter-American Court of Human Rights (IACtHR), *Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75) (Advisory Opinion)* (1982) para 29 ('human rights treaties … are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States'). For the non-reciprocal nature of human rights law, see also Art 50(1)(b) ARSIWA, which provides that countermeasures (reprisals) may not affect the performance of obligations for the protection of fundamental human rights.

[4] See e.g. Art 33 European Convention on Human Rights (ECHR). This is reflected in Art 48(1)(a) ARSIWA, which provides that non-injured States may invoke the responsibility of another State if the obligation breached is owed to a group of States including the non-injured State, and is established for

special in the sense of having dedicated mechanisms of oversight by international or regional courts or other bodies, which are often directly accessible by individuals who claim to be a victim.[5] And, more generally, human rights treaties have in common that they derive from, express and sustain human dignity.[6]

Yet, no sub-field of international law is truly self-contained in the sense of being completely detached from customary international law.[7] Human rights law does not operate in clinical isolation from other sources of international law, including customary international law.[8] Then, if not a completely self-contained regime, how does the interpretation and application of human rights law interact with the (customary) law of State responsibility and, more specifically for the purposes of thesis, its provisions devoted to the attribution of conduct?

The justification for relying on rules of (conventional or) customary international law outside the corpus of human rights treaties lies in the principle of systemic integration, as laid down in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. This principle holds that treaties must be interpreted by taking into account 'any relevant rules of international law applicable in the relations between the parties'.[9] The reference to 'any relevant rules of international law' is generally understood to encompass treaties as well as customary international law.[10] Human

the protection of a collective interest of the group. Certain human rights obligations are obligations *erga omnes*, i.e. owed to the international community as a whole; see ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)* (1970) paras 33–34. This is reflected in Art 48(1)(b) ARSIWA.

[5] On this, see Chapter 3, Sections C.1.a and C.1.b. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (1986) para 267, recognizing the special nature of human rights monitoring and enforcement.

[6] See e.g. the American Convention on Human Rights (ACHR), preambular para 2 ('essential rights … based upon attributes of the human personality'). See also African Charter on Human and Peoples' Rights (ACHPR), preambular para 5; International Covenant on Civil and Political Rights (ICCPR), preambular paras 1 and 2; International Covenant on Economic, Social and Cultural Rights (ICESCR), preambular paras 1 and 2. The text of the ECHR is silent on human dignity but the ECtHR has declared it the very essence of the Convention; see *Goodwin v. United Kingdom* (2002) para 90.

[7] The term "self-contained" was used by the ICJ in *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (1980) para 86, holding that that the rules of diplomatic law constitute a 'self-contained regime' that has primacy over rules of State responsibility in customary international law. For a critical analysis as to whether or not human rights law forms a self-contained regime, see Simma (1985) 129–35 (concluding that the idea of human rights law as a fully self-contained regime is 'unconvincing and dangerous for the effectiveness of international human rights law'; at 135); Simma and Pulkowski (2006) 524–29. See also ILC, *Fragmentation report*, *supra* note 7, para 152(5) (calling the notion of self-contained regime misleading as 'there is no support for the view that anywhere general law would be fully excluded'); Crawford (2002a) 880.

[8] For a study of the impact of human rights law on general international law, see Kamminga and Scheinin (2009). The relationship between the ECHR and general international law is explored in Van Aaken and Motoc (2018).

[9] Art 31(3)(c) Vienna Convention on the Law of Treaties.

[10] Fitzmaurice (2013) 749.

rights courts have relied on this rule 'as a bridge to a wider context'[11] beyond the textual terms of the relevant conventions themselves.

The relevance of the principle of systemic integration is widely recognized in human rights law and case law. Although the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) Rules of Court are silent on rules of interpretation and external sources of applicable law, the Court has frequently relied on Article 31(3)(c) to find that the principles underlying the Convention cannot be interpreted and applied in a vacuum and that account must be taken of the relevant rules and principles of international law to interpret the ECHR so far as possible in harmony with other rules of international law.[12] The continental African human rights system explicitly acknowledges the relevance of customary international law as an interpretive aid in Article 61 African Charter on Human and Peoples' Rights (ACHPR), which provides that the African Commission on Human and Peoples' Rights (ACionHPR) shall consider, 'as subsidiary measures to determine the principles of law … customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine'.[13] The Inter-American Court of Human Rights (IACtHR) equally recognizes the validity of the other rules of international law for the interpretation and application of its provisions.[14]

Notwithstanding the interpretive value of the principle of systemic integration, though, human rights courts also have to be mindful of the fact that the instruments they interpret and apply are not ordinary multilateral treaties. As noted by Martin Scheinin, the idea that human rights derive from human dignity could serve as an 'overarching interpretive principle'.[15] Indeed, human rights courts have repeatedly held that in interpreting their constituent instruments, regard must be had to their special non-reciprocal character and the object and purpose those instruments seek to achieve. The ECtHR, for instance, has characterized the ECHR as a 'special

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[11] *Ibid*, 764.
[12] See e.g. ECtHR, *Golder v. United Kingdom* (1975) para 35; ECtHR, *Loizidou v. Turkey (Merits)* (1996) para 43; ECtHR, *Demir and Baykara v. Turkey* (2008) paras 67 and 85; ECtHR, *Jones and Others v. United Kingdom* (2014) para 195. On the use of systemic integration in ECtHR case law, see further Schabas (2015) 37–45.
[13] This provision applies *mutatis mutandis* to the African Court on Human and Peoples' Rights (ACtHPR); see Art 2 ACtHPR Protocol. As for the ECCJ, see Art 20(1) ECCJ Protocol, as renumbered by Art 5 Supplementary ECCJ Protocol, mandating the Court to apply all sources of law as contained in Art 38 Statute of the International Court of Justice (ICJ Statute). The legal instruments of the East African Community (EAC) are silent on the role or application of customary law, but the East African Court of Justice (EACJ) has underscored the importance of Arts 31 and 32 Vienna Convention on the Law of Treaties; see e.g. EACJ, *Modern Holdings (EA) Limited v. Kenya Ports Authority* (2009) paras 24–25.
[14] See e.g. ACHR, preambular para 3, referring to principles in international instruments 'worldwide as well as regional in scope'. See further the references to external sources of international law in Arts 27(1), 29(d) and 46(1)(a) ACHR.
[15] Scheinin (2013) 529. For a more sceptical take on this, see Carozza (2013) 358, arguing that in general human dignity is only used rhetorically, without any meaningful role in the formulation or justification of decisions by interpreting human rights bodies.

[treaty] for the collective enforcement of human rights and fundamental freedoms,'[16] emphasizing that the Convention is 'a constitutional instrument of European public order (*ordre public*)'.[17] The IACtHR has gone perhaps even further in its teleological *pro homine* approach, holding that when interpreting the American Convention on Human Rights (ACHR), 'it is always necessary to choose the alternative that is most favourable … to the human being'.[18]

These considerations of the special nature of human rights treaties point towards the possibility of interpreting and applying human rights treaties as a *lex specialis*, in deviation from what would ordinarily follow pursuant to the principle of systemic integration. It may very well be, for example, that human rights law as a particular branch of public international law contains rules or solutions that differ from those as laid down in the customary international law on State responsibility, and that this is recognized through case law. This possibility is clearly contemplated by Article 55 ARSIWA, which provides that the rules of ARSIWA, including its provisions on attribution, do not apply where and to the extent that special rules of international law provide otherwise. In that sense, the Articles are not only general, they are also residual,[19] being applicable only insofar as they are not deviated from by primary rules of international law.

The tension between a harmonious interpretation and an autonomous interpretation of human rights instruments is occasionally very much discernible in case law. For instance, in *Avsar v. Turkey* the ECtHR held that responsibility under the Convention 'is based on its own provisions which are to be interpreted and applied on the basis of the *objectives of the Convention* and in light of the *relevant principles of international law*'.[20] Similarly, in *Mapiripán Massacre v. Colombia*, the IACtHR found that the ACHR 'constitutes *lex specialis* regarding State responsibility' because of its special nature of a human rights treaty,[21] only to hold subsequently that 'any abridgment of the human rights recognized by the Convention that may be attributed, *according to the rules of international law*, to actions or omissions by any public authority constitutes an act attributable to the State'.[22] While the complete avoidance of any tension between a harmonious and autonomous interpretation of human rights treaties may be unavoidable, it poses certain fundamental challenges. Most prominently, it is often difficult to know the state of the law when the relevant court does not express whether it holds a State responsible on the basis of customary international law or on the basis of a *lex specialis* rule as found in human rights

[16] See e.g. ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (1995) para 70; ECtHR, *Mamatkulov and Askarov v. Turkey* (2005) para 100.
[17] See e.g. ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (1995) para 75; ECtHR, *Al-Skeini v. United Kingdom* (2011) para 141.
[18] IACtHR, *Mapiripán Massacre v. Colombia* (2005), para 106.
[19] ARSIWA, general commentary para 5.
[20] ECtHR, *Avşar v. Turkey* (2001) para 284 (emphasis added).
[21] IACtHR, *Mapiripán Massacre v. Colombia* (2005) para 107.
[22] *Ibid*, para 108 (emphasis added).

treaties operating within their own institutional, procedural and substantive environment.

C. Standards for the Attribution of Conduct in Human Rights Case Law

This Section explores the question of whether the various human rights courts follow the attribution rules and principle as laid down in ARSIWA, or whether they adopt and apply *lex specialis* rules of attribution for the purposes of holding a State responsible under international law. This overview is not exhaustive and cannot possibly cover all instances where attribution of conduct was at stake. Therefore, this Section will concentrate on cases in which human rights courts explicitly adopt, reject, consider or otherwise engage with provisions of ARSIWA, as well as on pertinent cases that offer meaningful insights on the legal operation of attribution of conduct but without mentioning ARSIWA by name. Where human rights courts have adopted a position that *prima facie* deviates from the standards of attribution in ARSIWA, a further reflection will take place in order to assess whether this concerns an example of a *lex specialis* test of attribution or, rather, whether this deviation can be explained on other grounds.

As explained in the foregoing Chapters, State conduct may take the form of an act or an omission. In this Section, the emphasis lies for the most part on *acts*, where State responsibility is based on tangible action attributed to the State and in a breach of its negative obligations (rules which impose an obligation not to do something). In the field of human rights law, such rules are usually called obligations to respect, in that they require States to refrain from action that would interfere in the exercise of rights of individuals. Question of attribution of conduct play a prominent role with regard to negative obligations because the conduct that gives rise to a violation may be that of a State organ, but also that of other persons or entities whose behaviour is considered an act of the State.

The notion of act can be contrasted with *omissions* or instances of inaction,[23] where State responsibility follows from the violation of positive obligations (rules which require a State to do something).[24] In human rights law, the latter are usually characterized as obligations to protect or obligations to ensure respect, closely associated with the concept of due diligence, which will be examined in a less detailed fashion separately in this Chapter.[25]

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[23] On the relevance and consequences of the distinction between acts and omissions in State responsibility law, see Latty (2010).

[24] On the distinction between positive and negative obligations in human rights law, see Shelton and Gould (2013).

[25] See *infra* Section D.2.a.

C.1. State Organs (Article 4 ARSIWA)

By way of introduction, it may be noted that the General Comments/ Recommendations[26] as issued by various human rights treaty bodies broadly and unequivocally support the position that the conduct of State organs, of all branches and all levels of governance, is attributable to the State. Some of the General Comments/Recommendations address this matter in fairly general terms. For instance, the Human Rights Committee states in General Comment No 36 that the right to life requires States parties to 'organize all State organs and governance structures through which public authority is exercised' in a manner consistent with the need to respect and ensure the right to life.[27] Other General Comments/Recommendations state in more concrete terms that a State may be directly responsible for all branches of government (executive, legislative and judicial) and governmental authorities at whichever (national, regional or local) level.[28] And yet others stress specifically that where the implementation of a human right is delegated to local or regional authorities, the State remains directly responsible for their conduct.[29] With one exception,[30] none of these documents expressly cite Article 4 ARSIWA, but the language employed in these non-binding but authoritative documents follows the standard of attribution of conduct as laid down in Article 4 without any discernible deviation in the form of a *lex specialis*.

Indeed, the fact that a State is responsible for the conduct of the organs that make up a State's apparatus is almost a truism. Human rights courts sometimes do

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[26] The legal status of General Comments and General Recommendations is explained in Chapter 1, Section E.2. General Comments by the Committee against Torture will be discussed separately; see *infra* Section D.2.b.

[27] Human Rights Committee, *General Comment No 36 (Right to life)*, UN Doc CCPR/C/GC/36 (2018) para 19.

[28] See Human Rights Committee, *General Comment No 31 (Nature of the general legal obligation)*, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004) para 4. See also Human Rights Committee, *General Comment No 34 (Freedoms of opinion and expression)*, UN Doc CCPR/C/GC/34 (2011) para 7; Committee on Economic, Social and Cultural Rights, *General Comment No 20 (Non-discrimination)*, UN Doc E/C.12/GC/20 (2009) para 14; Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, UN Doc E/C.12/GC/24 (2017) para 47; Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 (Core obligations under Article 2)*, UN Doc CEDAW/C/GC/28 (2010) para 39; Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender-based violence)*, UN Doc CEDAW/C/GC/35 (2017) para 26; Committee on the Rights of the Child, *General Comment No 6 (Treatment of unaccompanied and separated children outside their country of origin)*, UN Doc CRC/GC/2005/6 (2005) para 13; Committee on the Rights of the Child, *General Comment No 16 (Impact of the business sector)*, UN Doc CRC/C/GC/16 (2013) para 10.

[29] See Committee on Economic, Social and Cultural Rights, *General Comment No 15 (Right to water)*, UN Doc E/C.12/2002/11 (2003) para 51; Committee on Economic, Social and Cultural Rights, *General Comment No 19 (Right to social security)*, UN Doc E/C.12/GC/19 (2007) para 73.

[30] See Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender-based violence)*, *supra* note 28, para 22, dealing with the conduct of a State's organs and officials 'in executive, legislative and judicial branches' and citing Art 4 ARSIWA.

not even bother to ground this by way of a formal argument and simply seem to take it for granted without reference to a legal instrument or case law to support such conclusion. For instance, in the *El Tayyib Bah v. Sierra Leone* case, the Community Court of Justice of the Economic Community of West African States (ECCJ) examined whether Sierra Leone could be held responsible for the conduct of a Police inspector general who dismissed the Applicant without offering an opportunity to be heard or defend himself.[31] Without any further explanation, the Court held that the acts committed by agents of Sierra Leone in denying the Applicant the right to a hearing before his dismissal are attributed to the State 'under the general principles of State responsibility'.[32] Thus, the ECCJ considered the dismissal as an act of the Respondent State without, however, elaborating on the legal standard that is applicable with respect to State agents or organs, apart from the non-committal reference to general principles.

Conversely, rather than examining whether the conduct in question is that of a State organ or other State entity, human rights courts occasionally hold that the actor that is said to have violated human rights, is a non-State actor. The thought behind this is the mutually exclusive nature of the categories of State actors on the one hand, and non-State actors on the other. Such a "reverse" perspective was adopted by the ACionHPR in the case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.[33] In this case, the Applicant argued that the government of Zimbabwe engaged in a campaign of terror and violence and that the Zimbabwe Liberation War Veterans Association and supporters and members of the governing political party Zimbabwe African National Union/Patriotic Front unlawfully occupied commercial farms while acting with endorsement and support of the government. Instead of examining whether the Veterans Association and the ruling political party could be considered State organs or otherwise acting on behalf of the State, the ACionHPR approached this from a different angle, holding that they were 'organizations outside the government or state structures and as such, non-State actors'.[34] On that basis, the Commission found that Zimbabwe could not be held directly responsible for the conduct of members and supporters of the Veterans Association and the political party, proceeding its examination with the question of whether the Respondent State had complied with its positive due diligence obligations to prevent, protect against and sanction private conduct.[35]

There are, however, many instances where human rights courts offer an elaborate analysis with respect to the attribution of conduct by State organs. This takes the form of either literally referring to ARSIWA or using language that is

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[31] ECCJ, *El Tayyib Bah v. Sierra Leone* (2015).
[32] *Ibid*, 16
[33] ACionHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006).
[34] *Ibid*, para 140. In the decision, this issue was analysed in paras 137–41 as 'Issue Two: Are the Zimbabwe African National Union Patriotic Front – ZANU (PF) and the Zimbabwe Liberation War Veterans Association (war veterans) non-State actors?'.
[35] See *ibid*, paras 142–87. In the final analysis, the ACionHPR held that the Respondent State complied with its positive obligations concerning the violence perpetrated by the non-state actors.

clearly inspired or taken from ARSIWA but without mentioning the instrument by name. Human rights courts offer a detailed examination of the standard of attribution especially in cases where a respondent State alleges that the its agent or organ acted outside of their instructions or if it concerned conduct by a lower or local authority.

C.1.a. Police, Security and Military Forces

In the case of *Gutiérrez and Family v. Argentina*, the IACtHR examined a complaint brought on behalf of an Assistant Commissioner of the Buenos Aires Police who was shot and killed while investigating cases of corruption, smuggling, fraud, drug-trafficking, and unlawful association of public officials.[36] The investigation into the events that led to his death was corrupted and involved *inter alia* the fraudulent collection of evidence and witness intimidation. Gutiérrez' next of kin brought a case to the Inter-American Commission on Human Rights (IACionHR) (which, in turn, filed the case before the Court), alleging a violation of the right to life as protected by Articles 4 (in respect of Gutiérrez) and the right to judicial protection and personal integrity per Articles 5, 8, and 25 ACHR (in respect of the family members).

The Court held that it is a principle of international law that the State is directly responsible for the conduct of 'its agents carried out in their official capacity — even if they are acting outside the limits of their competence, and regardless of their rank'.[37] Based on the direct and circumstantial evidence, the Court found that State agents had taken part in the extrajudicial execution of Gutiérrez, which it found a 'particularly serious' breach of Art 4(1) ACHR because it involved a 'direct violation of human rights by State agents'.[38] The Court also found that by the conduct of its agents, the Respondent State had failed to comply with the right to judicial protection through an effective and impartial investigation and with the right to personal integrity.[39] To underline the seriousness of the matter, the Court added that 'reaching any other conclusions than the attribution of responsibility to the State for the extrajudicial execution of Mr. Gutiérrez, would signify allowing the State to shield itself behind the ineffectiveness of the criminal investigation in order to exempt itself from responsibility'.[40] The case does not explicitly refer to Article 4 ARSIWA, but it is evident that the reasoning of the IACtHR follows the relevant standard of attribution as laid down in the Articles (of which it cites only Article 2[41]) in order to

[36] IACtHR, *Gutiérrez and Family v. Argentina* (2013).
[37] *Ibid*, para 76, citing IACtHR, *Velásquez Rodríguez v. Honduras* (1988) para 173 and IACtHR, *Barrios Family v. Venezuela* (2011) para 45.
[38] *Ibid*, paras 90 and 92.
[39] *Ibid*, paras 134 and 146.
[40] *Ibid*, para 133.
[41] *Ibid*, at para 78 fn 163.

hold Argentina directly responsibility for the murder of Mr. Gutiérrez, in violation of Article 4(1) ACHR.

The ECCJ has addressed the question of the attribution to the State of conduct by domestic law enforcement officers and the military in a great number of cases. One of its most important cases in terms of precedential value and the lengthy analysis of the matter is *Konte and Diawara v. Ghana*.[42] Two uniformed police officers on duty had forcefully taken Applicants' trailer with motorcycle parts and sold them to an unknown person. The police officers were charged and convicted for armed robbery in a domestic criminal trial but no compensation was granted to Applicants for their losses. When the Applicants brough the case to the ECCJ, the Respondent State argued that it could not be held responsible for the actions of the police officers who acted for their own gain.

The ECCJ undertook a remarkably elaborate analysis of relevant rules and cases, citing *inter alia* two arbitral awards, one Permanent Court of International Justice (PCIJ) case, one International Court of Justice (ICJ) case, as well as the equivalent of Article 4 ARSIWA as contained in the second report of Special Rapporteur Ago.[43] Following this analysis, the Court disagreed with the Respondent State, holding that 'the conduct of an organ of a State [or] of a territorial entity … shall be considered as an act of the State under international law'.[44] For the sake of completeness, the ECCJ also rejected the Respondent State's argument that it cannot be responsible for the conduct of low-ranking police officers, holding that it does not matter whether a State organ holds a superior or subordinate position in the organization of the State.[45] The ECCJ followed the precedent set by *Konte and Diawara* in a number of subsequent cases involving the police and/or the military, thereby consolidating its reasoning and the reliance therein on the standard of attribution as set forth in Article 4 ARSIWA.[46]

In *Chia and Others v. Nigeria and Attorney General of Nigeria*, the ECCJ again considered it a well-established rule of international law that the conduct of the

[42] ECCJ, *Konte and Diawara v. Ghana* (2014).
[43] *Ibid*, paras 30–35.
[44] *Ibid*, para 38. See also *ibid*, para 34, noting that 'the two policemen were the servants of the [Respondent State] at the time the acts were committed and the rights of the Applicants were violated by their action'. See further *ibid*, para 43(4) and (5).
[45] *Ibid*, para 36.
[46] See e.g. ECCJ, *Adamu and Others v. Nigeria* (2019) 11 (a State is directly responsible 'under international law [for conduct by] its internal institutions, however they are defined by its domestic law'); ECCJ, *Chief Onwuham and Others v. Nigeria and Imo State Government* (2018) 25 ('Acts of State agents are attributable to the State.'); ECCJ, *Okomba v. Benin* (2017) 21–22 ('conduct of any organ is act of State'); *Col. Dasuki (Rtd) v. Nigeria* (2016) 28 ('for the purpose of international law the State consists of different organs with different functions and is treated as a unit so that the action of any of its organs is considered the action of that single legal entity'). In each of these cases, the ECCJ cited with approval the earlier reasoning on attribution and State responsibility from its *Konte and Diawara v. Ghana* judgment (2014).

police, being a State organ, is regarded as an act of that State.[47] The case concerned a family father who was taken and arbitrarily killed by police officers. There is, however, one ground on which this judgment and its interpretation and use of attribution rules can be singled out for some critique. The ECCJ engaged in an attribution analysis in respect of the perpetrators of the killing when assessing the Applicants' complaint under the procedural limb of the right to life (i.e. the right to an effective investigation).[48] This is unnecessary, given that the obligation to investigate does not depend on the identity of the perpetrator or their link to the State. After all, the State has an obligation to investigate killings, regardless of whether they are committed by State agents or by non-State actors.[49]

Another ECCJ case that invites a minor point of criticism for its use and application of attribution rules in respect of police and other law enforcement agencies is *Njemanze and Others v. Nigeria*.[50] This case dealt with the arbitrary arrest, detention and verbal abuse of alleged prostitutes by police officers working in a collaborative effort with the Abuja Environmental Protection Board. The latter is an agency that, the Court held, is empowered by law to cooperate with the police in the fight against prostitution.[51] The ECCJ found it undisputed that the police and officials of the Environmental Protection Board were agents of the State when carrying out the impugned conduct and held that the Respondent State was 'responsible for the acts of its agents' that violated Applicants' rights.[52] It is a bit odd, though, that the Court did not clearly distinguish in its analysis between the acts of the police on the one hand, and those of the Board on the other. Nor did it mention Article 5 ARSIWA, under which the conduct of Board officials could have been assessed separately, given that it was empowered by law to exercise elements of governmental authority, apparently not just for the protection of the environment as its name suggests but also for the purpose of rounding up women suspected of prostitution. Nevertheless, its treatment of the status of the police forces is completely in line with Article 4 ARSIWA, to which it referred indirectly by way of citing its precedent in *Konte and Diawara v. Ghana*. Accordingly, like the cases examined before, there is no discernible *lex specialis* test of attribution of conduct in human rights law as far as the police or military are concerned.

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[47] ECCJ, *Chia and Others v. Nigeria and Attorney General of Nigeria* (2018) 15, 19 and 29, citing ECCJ, *Konte and Diawara* (2014) and adding that a State is directly responsible for the conduct of all branches of the government, as well as 'all other public or governmental authorities of all levels'.
[48] See *ibid*, 28–30.
[49] See ACionHPR, *General Comment No 3 (Right to life)*, Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, held from 4 to 18 November 2015 in Banjul, The Gambia, paras 2, 7, 9, 15 and 38. See also ACionHPR, *Egyptian Initiative for Personal Rights and Interights v. Egypt (II)* (2011) paras 155 and 163; IACtHR, *Velásquez Rodríguez v. Honduras* (1989) para 177; IACtHR, *Gutiérrez v. Family v. Argentina* (2013) para 97; ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) para 154.
[50] ECCJ, *Njemanze and Others v. Nigeria* (2017).
[51] See *ibid*, 16.
[52] See *ibid*, 39, citing ECCJ, *Konte and Diawara v. Ghana* (2014).

C.1.b. Domestic Courts

In *Konaté v. Burkina Faso*, the African Court on Human and Peoples' Rights (ACtHPR) examined whether the Respondent State was responsible for the sentencing to imprisonment and a fine by the High Court of Ouagadougou. The High Court had imposed the sentence on a person for charges of defamation, public insult and contempt of court, after he had published three articles that were critical of Burkina Faso's public prosecutor.[53] This judgment was upheld by the Court of Appeal. The ACtHPR found that the sentences pronounced were disproportionate to the aim pursued and, citing Article 4 ARSIWA, held that this conduct '[fell] squarely' on the Respondent State.[54]

The East African Court of Justice (EACJ) performed an attribution analysis in respect of domestic courts in two human rights cases, both dealing with the acts of courts at the apex of the judicial organization of the State in question.[55] In the first of these cases, a request for provisional measures in *Basajjabalaba and Basajjabalaba v. Attorney General of Uganda*, the EACJ examined an order by Uganda's Constitutional Court to resume a criminal trial before the High Court despite having granted a temporary injunction to the Applicants.[56] Relying on Article 4 ARSIWA, the EACJ held it a '[w]ell established principle that States parties may be held responsible for all actions of State organs, including judicial organs'.[57] On this basis, the EACJ found that the conduct of the Constitutional Court could be scrutinized to determine compliance with human rights law and that the Applicants 'would *prima facie* [have] a cause of action' before the EACJ.[58] It must be noted that the use of the term '*prima facie*' here should not be seen to detract from the conclusions by the EACJ on the issue of attribution. The conduct as such was not merely *prima facie* attributable to the State. Rather, '*prima facie*' is the jurisdictional threshold for the indication of provisional measures, meaning that the EACJ will exercise its jurisdiction of interim protection only if an applicant is able to show that they put forward a case with a reasonable probability of success.[59]

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[53] ACtHPR, *Konaté v. Burkina Faso* (2014).
[54] *Ibid*, para 170 and fn 36.
[55] See also EACJ, *East African Civil Society Organisations Forum (EACSOF) v. Attorney General of Burundi and Others* (2019) paras 20–22, where the Court relied on Art 4 ARSIWA, finding that States are 'unequivocally … responsible for the conduct of their judicial organs'. The case was brought by NGOs that claimed that by endorsing the legality of participation of a presidential candidate in national election the Constitutional Court of Burundi had acted in violation of the constitution, the Arusha Accords and consequently the Treaty for the Establishment of the East African Community (EAC Treaty).
[56] EACJ, *Basajjabalaba and Basajjabalaba v. Attorney General of Uganda* (2019).
[57] *Ibid*, paras 30–32.
[58] *Ibid*, para 33. The Court eventually found that there was no imminent risk of irreparable harm and thus declined to grant interim relief (see paras 42 jo 37).
[59] See e.g. EACJ, *Anyang' Nyong'o and Others v. Attorney General of Kenya and Others* (2006) para 23.

The EACJ applied the same reasoning in the case of *Desire v. Attorney General of Burundi*.[60] The Applicant in this case complained that the Burundi First Instance Court had not properly recognized the legal and probative value of attested affidavits concerning the sale of parcels of land, and allegedly had not offered Applicant a proper opportunity to be heard. The judgment was upheld by the Court of Appeal and the Supreme Court. The EACJ agreed with the Applicant's legal arguments that were based on Article 4 ARSIWA, which 'unequivocally [holds] States responsible for the conduct of judicial organs'.[61] Nevertheless, the EACJ seemed to backtrack from this position in a subsequent part of the judgment. It did so as a result of mixing up the question of attribution of conduct with the separate issue of whether there is a breach of an international obligation. The Court held that actions of domestic courts 'are attributable to a Partner State … *only* where they constitute blatant miscarriage of justice'.[62] In other words, here the EACJ made the attribution of judicial conduct dependent on whether or not their actions amount to a violation of international law.

Ultimately, though, relying *inter alia* on the Bangalore Principles of Judicial Conduct, the EACJ found that the Burundi Constitutional Court had acted in 'blatant disregard for due process of law and universal standards of judicial practice' and that the impugned decision of the Supreme Court amounted to conduct attributable to Burundi under Article 4 ARSIWA.[63] With that in mind, the EACJ most likely did not intend to make attribution depend on the lawfulness of the conduct, and merely meant to say what should be obvious; that judicial conduct (attributable as it is under customary international law codified in Article 4 ARSIWA) constitutes a breach of an international obligation — and thus an internationally wrongful act — only when done in disregard of international standards of justice.[64]

In *Capehart Williams Sr. and Paykue Williams v. Liberia and Others*, the Applicants complained to the ECCJ that their conviction for murder by a Liberian court was based on what in the Applicants' view amounted to inadmissible and sub-standard evidence.[65] As far as the conduct of the Liberian judicial branch was concerned, the ECCJ held that the State 'as an entity of international law … assumes responsibility' for the conduct of State officials or component parts of government including the judiciary, who 'are mere agents whose acts are attributable to their State in international law'.[66] With respect to the merits, the ECCJ did not find that Liberia violated the Applicants' human rights because the arrest, detention and

[60] EACJ, *Desire v. Attorney General of Burundi* (2016).
[61] *Ibid*, para 31, referring with approval to the Applicant's arguments as spelt out in paragraphs 28 and 29; see also para 42.
[62] *Ibid*, para 36 (emphasis added).
[63] *Ibid*, paras 41–42.
[64] As the EACJ did rightly observe in *ibid*, para 34, holding that 'judicial decisions of national courts … may only be categorized as *wrongful* acts for the purpose of state responsibility where they reflect blatant, notorious and gross miscarriages of justice' (emphasis added).
[65] ECCJ, *Capehart Williams Sr. and Paykue Williams v. Liberia and Others* (2015).
[66] *Ibid*, 19.

sentencing was done in accordance with due process.[67] The Applicants also complained about the conduct of the second Respondent State (Ghana), but this will be examined in the subsequent Section dealing with State organs put at the disposal of another State.[68]

The notion that a State is responsible for local courts (as well as other local authorities) was explicitly addressed in the individual communication of *Coleman v. Australia*, decided by the Human Rights Committee.[69] The author of the communication had been arrested by officers of the Queensland police and convicted and sentenced in the Townsville Magistrates Court for giving a public political speech without a permit that was required by a council bylaw. Without relying expressly on ARSIWA, the CCPR found that 'both on ordinary rules of State responsibility and in light of article 50 [International Covenant on Civil and Political Rights, ICCPR], the acts and omissions of constituent political units and their officers are imputable to the State [and] acts complained of are thus appropriately imputed *ratione personae* to State party, Australia'.[70] As to the merits, the Human Rights Committee found a violation of Article 19(2) ICCPR because the State's actions amounted to a disproportionate restriction of the freedom of speech.[71]

Finally, the *Čikanović v. Croatia* case provides a noteworthy case in which the ECtHR cites Article 4 ARSIWA within the context of a dispute concerning the acts of a domestic court.[72] In this case, a county court denied the Applicant's claim against a municipality (i.e. the Applicant's former employer) for salary arrears solely because he had failed to seek enforcement of an earlier judgment delivered by a municipal court. The Applicant claimed that this practice amounted to a breach of the right to a fair hearing under Article 6(1) ECHR. The ECtHR held that it is well-established in its case-law that a person who obtains a final and enforceable judgment against the State cannot be required by domestic courts to subsequently resort to enforcement proceedings in order to have it executed, and that this principle 'applies with equal force' in situations where the Applicant has obtained judgment against local authorities.[73] The ECtHR added that 'the hierarchy between different organs of the State is not relevant while examining an application before it,' finding that its case-

[67] See *ibid*, 20–30.
[68] See *infra* Section C.3.
[69] Human Rights Committee, *Coleman v. Australia* (2006).
[70] *Ibid*, para 6.2. Art 50 ICCPR provides that the provisions of the Covenant 'shall extend to all parts of federal States without any limitation or exceptions'. See also Committee on the Elimination of Racial Discrimination, *Koptova v. Slovakia* (2000) para 6.6: 'municipal councils [are] public authorities for the purposes of the implementation' of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), thereby rejecting the Respondent State's argument (at para 4.8) that municipalities are not public authorities or public institutions, and considering as irrelevant the fact that municipalities are independent self-governing territorial units of Slovakia.
[71] Human Rights Committee, *Coleman v. Australia* (2006) para 7.3.
[72] ECtHR, *Čikanović v. Croatia* (2015).
[73] *Ibid*, para 53.

law was 'in line with customary international law in this sphere reflected in [Article 4 ARSIWA]'.[74]

It suffices here to note that even though the conduct giving rise to the violation of Article 6(1) was a decision of a domestic court, this case does not articulate any standard of attribution of conduct with respect to judicial organs (be it *lex specialis* or otherwise). Instead, this case offers an example of the ECtHR using attribution rules from ARSIWA in support of a certain specific interpretation and application of a primary rule — Article 6(1) ECHR — according to which individuals must not be obliged to resort to enforcement proceedings against the State (understood as including its territorial units) in order to obtain repayment of debt.

C.1.c. Other State Organs

In the case of *Ogwuche ESQ v. Nigeria*, the Applicant complained to the ECCJ about the conduct of agents of the Economic and Financial Crimes Control Commission (a special prosecutorial office with respect to money laundering and terrorism financing), which seized and impounded Applicant's license to practice law and law school diplomas.[75] This effectively prevented him from continuing his work before national courts. The ECCJ recalled that 'in a plethora of cases' it has been held that a State is responsible for the actions or inactions of its agents,[76] and it found Nigeria directly responsible for the conduct of its agents in the Commission.[77] The ECCJ did not specifically explain why it considered the Commission to be a State organ, but this seems to have been properly taken for granted given its powers as a specialized federal law enforcement agency.[78]

The case of *Wing Commander Kwasu v. Nigeria* is another case decided by the ECCJ that deals with an atypical State organ.[79] The Applicant's son was an army recruit who drowned after an officer from the National Defence Academy pushed him in the water during a swimming exercise, despite protests by the recruit that he could not swim and without any measures being taken to ensure his safety. Referring explicitly to Article 4 ARSIWA, the Court held that '[a]ll actions of institutions or officials of States are imputed to a State as its own conduct,'[80] finding a violation of Article 4 ACHPR by the Respondent State on account of the act of causing death by

[74] *Ibid*, para 53 jo. 37.
[75] ECCJ, *Ogwuche ESQ v. Nigeria* (2018).
[76] *Ibid*, 34–35 (citing ECCJ, *Konte and Diawara v. Ghana* (2014)).
[77] See *ibid*, 35–36.
[78] A full list of the Commission's powers and areas of enforcement is found in the Economic and Financial Crimes Commission (Establishment) Act of 2004, listed on the website, where it is also explained that the EFCCC is a 'key agency of government'; see https://efccnigeria.org/efcc/about-efcc/the-establishment-act.
[79] ECCJ, *Wing Commander Kwasu v. Nigeria* (2017).
[80] *Ibid*, 25.

drowning and the omission to carry out an effective investigation.[81] Here, too, the ECCJ did not analyse the precise status of the National Defence Academy under the Respondent State's national law, but the conclusion that an educational institution of the military constitutes a State organ is hardly surprising.

In *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda*, the EACJ considered whether the Kigali City Abandoned Property Management Commission was a State organ.[82] The Property Commission is set up by the Kigali city administration as a body responsible for the management of abandoned property. At one point, the Property Commission decided that the tenants in the Union Trade Centre mall had to redirect their rental payments to the Commission, with the effect that the latter effectively took over the management of the mall to the detriment of its rightful owner, Union Trade Centre Ltd. The Applicant company that owned the mall brought two arguments to hold Rwanda directly responsible for this act. First, it argued that the Commission was a State organ within the scope of Article 4 ARSIWA, and second, that it was empowered to exercise elements of governmental authority within the meaning of Article 5 ARSIWA.[83] The Respondent State denied both contentions, arguing that the *de facto* expropriation by the Commission could not be attributed to it.[84]

The EACJ held that there was no indication that the Property Commission was designated as a State organ in the laws of Rwanda. Consequently, it could not be considered a *de jure* organ of the State within the sense of Article 4 ARSIWA.[85] However, the Court did find that the Commission was empowered to exercise elements of governmental authority; this will be analysed in the next Section, pertaining to Article 5 ARSIWA.

C.2. Other Persons or Entities Empowered to Exercise Governmental Authority (Article 5 ARSIWA)

The most prominent case concerning the attribution of conduct of entities empowered to exercise governmental authority is *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda*, decided by the EACJ.[86] The facts of the case and the Court's conclusion that the Kigali City Property Commission was not a State organ under Article 4 ARSIWA have already been explained in the previous Section.[87] With respect to Article 5 ARSIWA, the EACJ held that the Property Commission's conduct of effectively taking over the UTC mall to the detriment of its owners was an act by

[81] See *ibid*, 28.
[82] EACJ, *Union Trade Centre Ltd (UTC) v. Rwanda* (2014).
[83] *Ibid*, para 10.
[84] *Ibid*, paras 6–7.
[85] *Ibid*, paras 22 and 24.
[86] EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014).
[87] See *supra* Section C.1.c.

an entity empowered to exercise governmental authority. As a result of this, the Court found that the Respondent State became responsible for the impugned actions insofar as they fell within the scope of the conferred authority.[88] The Court based its conclusion explicitly on Article 5 ARSIWA,[89] together with a close reading of Rwandan law (which explicitly assigns the management of abandoned property to the State) and the fact that within the city of Kigali this competence was conferred on the Property Commission.[90] The EACJ particularly stressed the fact that this empowerment was done by law (as Article 5 ARSIWA requires), holding that the internal laws of Rwanda were 'pivotal' to its conclusion on attribution.[91] In an interesting procedural twist, the EACJ concluded its analysis by observing that the case 'largely gravitated around issues of State responsibility' for the conduct of decentralized organs which had not previously been adjudicated by it.[92] In light of this finding, the Court held that it would deviate from the general rule of procedural law that a litigant who loses on merits must pay the costs incurred by successful defendant, and it decided that each party would have to bear its own costs.[93]

One might wonder, however, whether the management and collection of rent is genuinely an act of exercise of governmental authority,[94] i.e. *acta jure imperii*. The commentary to Article 5 ARSIWA states that the conduct of an entity to a State occurs only if it concerns governmental authority 'and not other private or commercial conduct in which the entity may be engaged,'[95] i.e. *acta jure gestionis*. At the same

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[88] EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) paras 37 and 39. See the extensive analysis of this matter in *ibid*, paras 25–39.

[89] See *ibid*, paras 33 and 34. The standard of attribution of Art 5 ARSIWA is equally recognized in the case law of the ECCJ, see *Adamu and Others v. Nigeria* (2019) 11 (in an *obiter dictum*: a State is responsible for conduct of 'entities and persons exercising governmental authority'); ECCJ, *Konte and Diawara v. Ghana* (2014) para 38 (in an *obiter dictum*: a State is responsible for conduct of an 'entity empowered to exercise elements of governmental authority').

[90] EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014) paras 35–37. To be precise, the Court held that the case presented a hybrid of Arts 4 and 5 ARSIWA, as the Commission was empowered to exercise governmental authority (Art 5) as a result of the acts of the city administration of Kigali, which itself was a local government unit and thus a State organ (Art 4); see *ibid*, para 37.

[91] *Ibid*, para 33. See also *ibid*, para 37, adding that the decentralization of provincial, and local government units would not negate the Respondent State's responsibility for the conduct of the Property Commission. As for the merits of the case, the EACJ held in the final analysis that it was unable to draw a conclusion that due process had been violated or that the principles enshrined in the EAC Treaty had been breached; see *ibid*, para 57.

[92] *Ibid*, para 64.

[93] *Ibid*, para 65.

[94] On the distinction between *acta jure imperii* and *acta jure gestionis* within the context of State immunity against foreign State adjudicative jurisdiction, see ICJ, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (2012) paras 59–91. A question that was not addressed by the ICJ but deserves further reflection is whether the dividing line between governmental authority and commercial activity for the purposes of State immunity runs along the same path as it does for the purpose of attribution under Art 5 ARSIWA.

[95] Art 5 ARSIWA, commentary para 5 gives the example of a railway company and makes a distinction between the exercise of conferred police powers (which would be attributed to the State) and the sale of tickets or the purchase of rolling-stock (which would not). Note that this distinction would not play

time, it is admittedly very difficult to state in the abstract what exactly constitutes governmental authority for the purpose of attribution under Article 5. As the commentary concedes, these are questions of the application of a general standard to varied circumstances, indicating some criteria of relevance to such a determination, such as the way the powers are conferred and the purpose for which they are exercised, all taking into account the society, its history and traditions.[96]

Either way, the EACJ approached this problem in the *Union Trade Centre Ltd (UTC)* case with due regard to the Articles and its commentary by focusing on the fact that the empowerment of authority occurred through an act of national law, which considered the management of abandonment property as a State function that was delegated to a local authority.[97] On this basis, the collection of rent would fall within the conferred authority as an indispensable element of managing property. However, had the Property Commission carried out commercial transactions wholly unrelated to the exercise of its (housing management) mandate, this would surely not have been regarded as conduct that falls on the State.

The standard of attribution in Article 5 ARSIWA is also recognized in several General Comments/Recommendations by human rights treaty bodies. For instance, in General Recommendation No 35 on gender-based violence the Committee on the Elimination of Discrimination against Women explicitly cites Article 5 ARSIWA in support of the position that 'under general international law' a State is directly responsible for conduct of private actors 'empowered by the law of that State to exercise elements of governmental authority, including private bodies providing public services, such as health care or education, or operating places of detention'.[98]

There is, however, one General Comment that at first sight appears to deviate from the standard of attribution in Article 5 ARSIWA. In General Comment No 2 on

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a role had the Property Commission been considered a State organ, given that all conduct of a State's organs, whether governmental or commercial, is attributed to it; see Art 4 ARSIWA, commentary para 6.

[96] Art 5 ARSIWA, commentary para 6. See also Momtaz (2010) 244, pointing out the difficulty of adopting a criterion to identify entities that would come within the scope of Art 5 ARSIWA.

[97] As the EACJ noted, Art 3 of Law No 28 of 2004 relating to the Management of Abandoned Property assigns the management of abandoned property as a function of the State, while Art 11 of the same Law establishes a Property Commission in each province and the city of Kigali.

[98] Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender-based violence)*, *supra* note 28, para 24. See also *ibid*, para 26, addressing conduct 'under governmental authority by privatized governmental services'. See further Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 28, para 11(b) (a State is directly responsible for conduct of business entities that are 'empowered under the State party's legislation to exercise elements of governmental authority' and citing Art 5 ARSIWA in support); Human Rights Committee, *General Comment No 35 (Article 9)*, UN Doc CCPR/C/GC/35 (2014), para 8 (when private individuals or entities are 'empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence' to Art 9 ICCPR). The General Comment that addresses State responsibility under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for the operation of privatized detention centres is discussed separately; see *infra* Section D.2.b.

the rights of migrant workers in an irregular situation,[99] the Committee on Migrant Workers states the following in a passage that is worth reproducing in full:

> The Committee considers that administrative detention of migrant workers should, as a rule, take place in public establishments. Privately run migrant detention centres pose particular difficulties in terms of monitoring. States parties cannot absolve themselves of their human rights obligations by contracting out the detention of persons to private commercial enterprises. If States parties delegate such functions to private companies, they must *ensure respect* for the rights of detained migrant workers, as provided for under article 17 of the [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ICMW].[100]

Article 17 ICMW deals with the rights of migrant workers and family members in detention. The crux of the matter is that the General Comment acknowledges the possibility that a State delegates the power of detention to private entities, but that the State's obligation in this scenario is merely to 'ensure respect' for the ICMW. Thus, rather than following the standard of attribution from Article 5 ARSIWA (which would hold the State directly responsible for privatized detention, with an accompanying obligation *to respect*), the General Comment seems to rule out that the conduct of a private detention facility is considered an act of the State. After all, as the term 'ensure respect' implies,[101] the State in question would only have positive obligations towards the detained migrant workers. On this reading, General Comment No 2 of the Committee on Migrant Workers may indeed pronounce a *lex specialis* rule of attribution in deviation from the rule of customary international law that is laid down in Article 5 ARSIWA. In fact, on this reading the relevant paragraph of General Comment No 2 would constitute an outright negation of this standard of attribution.

On the other hand, such a major departure from customary international law should not be assumed too lightly. It may very well be that the Committee never intended to articulate a *lex specialis* attribution rule by its use of the terms 'ensure respect' in a way that is completely out of touch with General Comments/Recommendations issued by other human rights treaty bodies on the issue

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[99] The term 'migrant workers and their family members in an irregular situation' refers to individuals who are not authorized to enter, to stay or to engage in a remunerated activity in the State of employment; see Art 5(b) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).

[100] Committee on Migrant Workers, *General Comment No 2 (Migrant workers in an irregular situation and members of their families)*, UN Doc CMW/C/GC/2 (2013) para 39 (emphasis added).

[101] Cf International Tribunal for the Law of the Sea (ITLOS), *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Seabed Disputes Chamber* (2011) para 112: 'The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on the mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law.'

of delegation and exercise of governmental authority.[102] First of all, in the remainder of General Comment the Committee on Migrant Workers is not very precise in its terminology and uses 'ensure respect' in the context of complying with a negative obligation.[103] Moreover, such a position would be at great variance with case law of human rights courts on the issue of privatized or delegated powers of detention.

Thus, in the case of *Bureš v. Czech Republic*, decided by the ECtHR,[104] the Applicant complained that during his detention in a sobering-up centre the medical staff had used restraining belts without medical justification or regular checks. Under Czech law, sobering-up centres are public bodies established by regional self-governing units that are entitled by law to hold persons under the influence of alcohol or another drug who cannot control their behaviour.[105] The Respondent State argued that the medical staff were not State agents as defined by its domestic law and that their acts could not be attributed to the State.[106] Relying on Articles 4 and 5 ARSIWA as relevant international law, the ECtHR found that even if the medical staff were not State agents they nevertheless performed 'governmental authority of detention'.[107] Accordingly, the State was held to be directly responsible for the use of restraints on the Applicant in the sobering-up centre, in breach of the State's negative obligations under Article 3 ECHR to refrain from inhuman and degrading treatment.[108] With this in mind, it is the present author's view that General Comment No 2 of the Committee on Migrant Workers does not contain a *lex specialis* standard of attribution of conduct in relation to privatized detention facilities, let alone a negation of this standard altogether.

C.3. State Organs at the Disposal of Another State (Article 6 ARSIWA)

In *Capehart Williams Sr. and Paykue Williams v. Liberia and Others*, the ECCJ addressed not only a State's responsibility for the conduct of its own courts,[109] but also the problem of responsibility for the conduct of an organ put at a State's disposal

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[102] See the General Comments/Recommendations cited *supra* note 98.
[103] See especially Committee on Migrant Workers, *General Comment No 2 (Migrant workers in an irregular situation and members of their families)*, *supra* note 100, para 19, which states that State parties 'shall *respect* the *prohibition* of discrimination by *ensuring* that their laws, regulations and administrative practices do not discriminate against migrant workers and members of their family' (emphasis added).
[104] ECtHR, *Bureš v. Czech Republic* (2012).
[105] *Ibid*, para 76.
[106] *Ibid*, para 67.
[107] *Ibid*, para 77 jo. para 54, citing Arts 4 and 5 ARSIWA, which the ECtHR 'largely considered to contain rules of customary international law'.
[108] *Ibid*, paras 75–79 and 106. In addition to a substantive violation of Art 3 ECHR, the Court also found that the State failed to carry out an effective investigation, in violation of the procedural limb of Art 3; see *ibid*, paras 122–33.
[109] See *supra* Section C.1.b.

by another State.[110] It may be recalled that in this case a Liberian court convicted the Applicants based on what the latter considered inadmissible and sub-standard evidence. The crucial piece of evidence that formed the basis of the Applicants' conviction was an autopsy report drafted at the request of Liberia by Dr. Hernandez, who was a forensic pathologist employed as a State agent by Ghana. With regard to the allegation that Ghana, the lending State, violated the Applicants' human rights through the conduct of its forensic pathologist sent to Liberia, the ECCJ held:

> [I]it is obvious [that Liberia] invited [Ghana] to assist in carrying out some assignments with regard to the case. [Ghana] is neither the originator of the case nor did she in any manner whatsoever contribute to the violation … At best, [Ghana] merely acted as an agent to a named principal [Liberia]. The principle of the law of agency provides that as long as an agent acts within the ambit of his conduct, actual, usual or ostensible, the principal answers for any act the agent committed. [Ghana] who merely answered the call of Liberia for assistance, should [not] be joined in this suit. It is condemnable, irresponsible and devoid of any logic and reason.[111]

The language in this part of the judgment bears very close similarities to the standard of attribution under Article 6 ARSIWA. In effect, the ECCJ held that if a State organ of one State (here: Dr. Hernandez of Ghana) is placed at the disposal of another State (Liberia), the latter is responsible for the conduct of the organ of the former State. Accordingly, even though Article 6 ARSIWA was invoked by neither the Applicants nor the Court, the outcome in this case in terms of attribution is wholly in line with the standard of attribution in respect of organs placed at the disposal of another State. The forensic pathologist was, after all, an organ of Ghana, acting 'with the consent [and] for the purpose of the receiving State,'[112] which was Liberia. If this impression is correct, then the Court was right to hold that the conduct in question was exclusively attributed to the receiving State.[113]

On the other hand, the facts of the case do not disclose enough details to warrant the conclusion that the standard of attribution from Article 6 ARSIWA was applied or followed, even if only implicitly. An affirmative answer to this question depends on two further conditions being met. First, Article 6 ARSIWA requires that the transferred State agent must be acting in the exercise of elements of *governmental authority* of the receiving State.[114] The fact that Dr. Hernandez was a State agent in her home State is not dispositive, as State agents may be transferred

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[110] ECCJ, *Capehart Williams Sr. and Paykue Williams v. Liberia and Others* (2015).
[111] *Ibid*, 20. Note that the ECCJ did not hold that it was deprived of jurisdiction *ratione personae* over Ghana; it merely scolded the Applicants for suing Ghana in a case where, in view of the Court, no violations by Ghana could be identified.
[112] Art 6 ARSIWA, commentary para 2.
[113] See Art 6 ARSIWA, commentary para 1, explaining that the organ from the sending State 'acts *exclusively* for the purpose of and on behalf of [the receiving] State and its conduct is attributed *to the latter alone*' (emphasis added).
[114] Art 6 ARSIWA, commentary para 5.

to another State to perform non-governmental tasks.[115] The second condition to be fulfilled under Article 6, is that the transferred agent must fall under the *exclusive* authority of the receiving State, without being amenable to receiving instructions or authority from the sending State.[116] If, on the basis of the underlying facts, the forensic pathologist was sent to Liberia merely to assist the latter while still remaining under the authority of Ghana, then the ECCJ either wrongly held Ghana to bear no responsibility at all or articulated a *lex specialis* test of attribution in respect of State organs put at the disposal to another State. Again, the case does not contain enough details to draw any specific conclusions in this regard.

The standard of attribution in Article 6 ARSIWA was marginally addressed by the ECtHR, in the case *Big Brother Watch and others v. the United Kingdom*.[117] The case concerned the mass electronic surveillance and intelligence sharing regime by which United Kingdom authorities request and receive intelligence from foreign Governments, most notably the United States. The Court noted that the interceptions themselves took place outside the jurisdiction of the United Kingdom and were not attributable to it under international law.[118] The ECtHR added that if the interceptions had been carried out by foreign intelligence agencies 'placed at the disposal' of the United Kingdom and 'acting in exercise of elements of [its] governmental authority,' the responsibility of the Respondent State would have been engaged.[119] There was, however, no suggestion in the facts that United States agencies were place at the disposal of the United Kingdom, and the Court accordingly limited its examination to the receipt of the intercepted material and its storage and use by the intelligence services of the United Kingdom itself.[120]

C.4 *Ultra Vires* Conduct by State Organs and Other Persons or Entities Empowered to Exercise Governmental Authority (Article 7 ARSIWA)

[115] Think of military or police forces that are sent to a neighbouring State to assist the latter in cleaning up oil spills washed up on the beach.

[116] Art 6 ARSIWA, commentary paras 2–3. See also ECtHR, *Drozd and Janousek v. France and Spain* (1992). The Applicants in this case had been convicted to a prison sentence by an Andorran court composed of Spanish and French judges. On the matter of attribution, the ECtHR held that the French and Spanish judges did not 'exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain' (at para 96). Accordingly, the Court held that that the judges in question were put at the disposal of Andorra and could no longer engage the responsibility of the Respondent States. This case will be examined further in Chapter 5.

[117] ECtHR, *Big Brother Watch and others v. the United Kingdom* (2018). This case is not yet final. On 4 February 2019, the Grand Chamber Panel accepted the Applicants' request that the case be referred to the Grand Chamber.

[118] *Ibid*, para 420.

[119] *Ibid*, referring to Art 6 ARSIWA.

[120] *Ibid*, para 421.

Questions of attribution of conduct often arise when a respondent State claims that it is not responsible because the State organ in question acted outside of its competence as defined by domestic law. Alternatively, a State may seek to deny responsibility because a State organ acted for its own private gain, acted without the knowledge of its superiors, or because the person in question has already been held personally liable in the course of a criminal or administrative procedure. It may be recalled that according to Article 7 ARSIWA, the conduct of a State organ is an act of the State even if the organ in question acts outside of its competence of instruction (i.e. if it acts in public capacity but *ultra vires*). On the other hand, purely private conduct by a person who happens to be a State organ is not attributed to the State and thus cannot lead to direct responsibility of the latter.

The ECCJ has clearly subscribed to idea that *ultra vires* conduct by State organs must be regarded as an act of the State. In *Chia and Others v. Nigeria and Attorney General of Nigeria*, already introduced earlier,[121] the ECCJ thus considered it a well-established rule of international law that the conduct of any State organ is regarded as an act of that State even if 'the organ or official acted contrary to orders, or exceed its authority under internal law'.[122] One minor point of criticism can nevertheless be raised in connection with some of the phrasing of this judgment. At one point, the Court held, in what at first sight appears to be a deviation from Article 7 ARSIWA, that for attribution of the conduct of State organs (*in casu* police forces) it is *irrelevant* whether or not conduct is committed in official capacity.[123] In the present author's view, this is incorrect and should be seen as an oversight rather than *lex specialis*, especially because the ECCJ cited, in full, a relevant paragraph from *Velásquez-Rodríguez v. Honduras* in which the IACtHR did in fact require that conduct take place in an official capacity for it to be attributed.[124] The fact that this is likely an unintentional error in the judgment also follows from the fact that the ECCJ ultimately found that the '[t]he [official] capacity in which this act was carried

[121] See *supra* Section C.1.a.

[122] ECCJ, *Chia and Others v. Nigeria and Attorney General of Nigeria* (2018) 15. See also ECCJ, *Konte and Diawara v. Ghana* (2014) para 34 (holding that a State is responsible 'even if it did not specifically order the conduct concerning its servants and even if its servants acted in ways clearly beyond what they were ordered to do'); ECCJ, *Chief Onwuham and Others v. Nigeria and Imo State Government* (2018) 25 (concerning police and military forces who demolished a family's house and destroyed all their property, holding that a State is directly responsible for conduct of State organs 'in the course of their employment whether authorized or not'); ECCJ, *Ogwuche ESQ v. Nigeria* (2018) 34–35 (citing IACtHR, *Velásquez-Rodríguez v. Honduras* (1988) with approval to support the position that a State is responsible 'for the exuberant actions or inactions of its agents').

[123] *Ibid*, 15, holding that '[a] State cannot take refuge on the notion that the act or omissions were *not* carried out by its agents in their official capacity' (emphasis added). In the same vein, see *ibid*, 29, holding that 'the conduct of any organ of the State carried out whether in their official capacity *or not* is the act of the State' (emphasis added).

[124] *Ibid*, 29, citing IACtHR, *Velásquez-Rodríguez v. Honduras* (1988) para 170, which holds that 'under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law'.

out is … not in dispute'.[125] In other words, for purposes of attribution the ECCJ did ultimately require that the conduct took place within an actual or at least apparent official capacity, as is also required by Article 7 ARSIWA..

The ECCJ has likewise recognized the converse situation that the conduct by State organs undertaken in a purely *private* capacity cannot be attributed to the State. The leading case on this matter is *Sunday v. Nigeria*.[126] The Applicant in this case suffered burns when her fiancé, a Corporal in the Nigerian police force, threw boiling oil over her in the course of domestic abuse. She complained to the ECCJ *inter alia* that the assault itself constituted gender discrimination and that she was deprived of an effective remedy in court. On the point of gender discrimination, the ECCJ held as follows that the State could not be implicated:

> La nature rigoureusement privée des actes critiqués, le cadre même de leur commission — le foyer du couple — interdisent tout rattachement avec la puissance publique. Le fiancé de la requérante agissait en dehors de son travail, en hors, bien entendu, de toute habilitation légale.[127]

Accordingly, the ECCJ held that given the private nature and circumstances of the assault, it did not give rise to direct State responsibility for gender discrimination. Thus, at stake here was not a situation of a State agent acting *ultra vires* but rather a person (who just so happened to be a State agent) acting in personal capacity for which the State cannot bear direct responsibility. The ECCJ, however, did find the State indirectly responsible for its failure to offer an effective remedy, given that the husband was not thoroughly questioned and the case file had been misplaced and essentially neglected by the judicial authorities.[128] The outcome of this case is completely in line with Article 7 ARSIWA, which excludes private conduct from the notion of act of the State. That said, the judgment might be criticized because the Court failed to assess Nigeria's responsibility for its possibly unlawful failure to protect the Applicant. In other words, after a finding of non-attribution the ECCJ ceased its analysis with respect to the assault, without inquiring any further whether or not Nigeria had exercised due diligence in complying with its positive obligations to prevent a private party from infringing on the rights of another private party.[129]

A more problematic *ultra vires* case before the ECCJ concerns *Kokou and Others v. Togo*.[130] The Applicants were beaten and/or killed by the police in the course of violent incidents during election period, and the Togolese judicial authorities refused to institute an inquiry into the Applicants' complaints within a reasonable time. With regard to the cases of physical assault, the Respondent State argued that

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[125] *Ibid*. See also ECCJ, *Njemanze and Others v. Nigeria* (2017) 39, where for purposes of attribution the Court confirmed the relevance of the actual or at least apparent official capacity under which a State organ acts (citing IACtHR, *Velásquez-Rodríguez v. Honduras* (1988)).
[126] ECCJ, *Sunday v. Nigeria* (2018).
[127] *Ibid*, 5.
[128] See *ibid*, 6–9.
[129] This will be analysed later in more detail; see *infra* Section D.2.a.
[130] ECCJ, *Kokou and Others v. Togo* (2013).

even if the alleged facts were attributable to the law-enforcement agents and security forces of the Togo, the State may not be held automatically accountable for their acts, because 'the State may not be systematically held vicariously liable for offences committed by its officers, when an officer acts *ultra vires* with obvious ill intent, he commits an offence for which he is personally liable, independently of his assigned official duty'.[131] The Court admitted that there might have been sufficient factors to enable it to conclude that Togo is internationally responsible for the conduct of the police agents.[132] Nevertheless, it decided to adopt a 'pragmatic approach whereby appropriate importance is accorded to the proximity between the charges made and the judge at the domestic level'.[133] Consequently, it declared this part of the complaint inadmissible — the Application being 'premature' — since the criminal procedures at the national level were still pending.[134]

From a procedural point of view, one might criticize such an approach as being inconsistent with the Court's case law. After all, unlike most other human rights courts, the exhaustion of domestic remedies is not required before bringing a case to the ECCJ.[135] Here, it seems to have been the case that the ECCJ exercised a large measure of judicial restraint because the judges feared that to pronounce on the charges of beatings and/or killings would improperly interfere with Togo's transitional justice processes and the ongoing work of its Truth, Justice and Reconciliation Commission.[136] That said, from a State responsibility perspective, the Court did not explicitly follow the Respondent State's argument of non-attribution of *ultra vires* conduct (which would be in deviation from Articles 4 and 7 ARSIWA and the ECCJ's own case law as outlined above). Thus, this case does not constitute precedent for a *lex specialis* standard of attribution.

Another case that addresses the fine dividing line between (attributable) *ultra vires* conduct and (non-attributable) private conduct by a State organ is *Makuchyan and Minasyan v. Azerbaijan and Hungary*, decided by the ECtHR.[137] In the course of a three-month NATO-organized English language course in Hungary, an Azerbaijani military officer (referred to as R.S.) used an axe that he bought in a store to decapitate

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[131] *Ibid*, paras 32–33.
[132] *Ibid*, at para 37.
[133] *Ibid*, para 39.
[134] *Ibid*, at paras 37–42.
[135] Art 10(d) ECCJ Protocol, as amended by Art 4 ECCJ Supplementary Protocol provides that individuals can bring cases for human rights violations on two conditions: it shall (i) not be anonymous, and (ii) not be made whilst the same matter has been instituted before another international court for adjudication. The Court has held repeatedly that the rule of exhaustion of domestic remedies is not applicable and that it does not consider the lack of such condition as 'a lacuna which must be filled within the practice of the Court'; see ECCJ, *Koraou v. Niger* (2008) para 45. In the latter case, as well as in many others, the ECCJ exercised jurisdiction even though the case was still pending at the national level.
[136] On the Truth, Justice and Reconciliation Commission, see *ibid*, paras 59–64. In the second part of the judgment, the Court found a violation of the right to be heard within a reasonable time; see *ibid*, paras 65–66.
[137] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020).

and kill an Armenian officer and fellow course participant in his sleep. R.S., who argued that he had been provoked and mocked by his victim, was tried for murder and convicted to a life sentence in Hungary. Following a request by Azerbaijan, he was subsequently transferred to his home country to serve the remainder of his sentence there, but immediately upon return in Azerbaijan he was released as a result of a presidential pardon. This was contrary to the assurances given by Azerbaijan that R.S. would serve the remainder of his sentence there. The hero's welcome that R.S. was accorded in Azerbaijan not only involved a presidential pardon; he also received a promotion to the rank of major during an official ceremony, a payment of salary arrears covering the eight years he spent in Hungarian detention, and he was offered an apartment for his own personal use by the State housing fund. Moreover, a special section had been set up on the website of the President of Azerbaijan where high-ranking Azerbaijani officials and other individuals expressed their appreciation and support for the actions of R.S. and for his release and pardon.

The Applicants in this case claimed a number of violations. For the present purposes, however, it is sufficient to limit the examination to the Applicants' claim that Azerbaijan was directly responsible for the murder in violation Article 2 ECHR on the right to life. The Applicants based their claim of direct responsibility on the fact that the murder had been committed by a State agent,[138] as well as on the fact that by glorifying and rewarding his actions the Azerbaijan had acknowledged and adopted the murder by R.S. as its own. The latter argument of acknowledgment and adoption and the Court's analysis on this point will be examine later in this Chapter.[139] With respect to the former argument (i.e. direct responsibility because R.S. was a State agent) Azerbaijan denied any direct responsibility, arguing that the nature of his crime was too remote from R.S.'s official status.[140]

The ECtHR held that although he was a member of the Azerbaijani military forces, R.S. 'was not acting in the exercise of his official duties' when the killing took place.[141] As the ECtHR explained, the crime was committed as a result of 'the private decision [of R.S.] to kill [the Armenian officer] during the night and outside of training hours'.[142] The Court does not cite or otherwise refer to Articles 4 and/or 7 ARSIWA, but its short analysis on this point follows the standard of attribution as laid down in ARSIWA. R.S. was in Hungary to attend a language course when he carried out the murder at night time. He was not acting in official capacity as a military officer and he had not used any means or authority at his disposal by virtue of his membership of the Azerbaijani armed forces. This was, in other words, not a case of an 'organ of a

[138] See *ibid*, paras 74, 96 and 101.
[139] See *infra* Section C.6.
[140] *Ibid*, para 105.
[141] *Ibid*, para 111.
[142] *Ibid*, para 112.

State [acting] in that capacity,'[143] but of private conduct without any actual or apparent authority of an individual who just happens to be a State organ.[144]

Problems of *ultra vires* conduct were also central in the case of *Konte and Diawara v. Ghana* before the ECCJ,[145] which has already been discussed before in the examination of police officers as State agents.[146] In this case, the Respondent State raised a two-fold *ultra vires* defence before the ECCJ to deny responsibility. First, it claimed it could not be held responsible for actions of the police officers as they were acting privately and not acting as State agents on official duty and that their superiors neither instructed nor were aware of the officers' actions. Second, the State argued that by the trial and conviction of the officers the State had fulfilled its obligations to protect Applicants' human rights.[147] The ECCJ held that regardless of whether it holds a subordinate or superior position, the conduct of an organ of a State or of a territorial entity, 'such organ having acted in that capacity, shall be considered as an act of the State under international law even if … the organ exceeded its competence according to internal law or contravened instructions concerning its activity'.[148] Applying this to the facts of the case, the Court concluded that the officers in question were wearing their uniforms and performing apparently like police officers on duty, so as to make Ghana directly responsible for their actions, in violation of Article 14 ACHPR, despite the fact that they had acted contrary to instructions and they had already had been tried and convicted by national courts.[149]

Mention must also be made of the Views adopted by the Human Rights Committee in the case of *Sarma v. Sri Lanka*,[150] the only instance where a human rights treaty body in its Views explicitly refers to ARSIWA attribution rules. The author of the communication complained that in the course of a military operation his son was abducted by a Corporal in the Sri Lankan Army. The Respondent State denied responsibility, arguing that the relevant officers were unaware of the Corporal's conduct and of the abduction of the author's son, that his conduct was illegal under national criminal law (which he was indicted but not yet tried for), and that abduction was 'distinctly separate and independent' from the search operation carried out by the Army in the relevant location at the same time.[151] The Committee,

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[143] Art 7 ARSIWA.
[144] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) para 119, holding that 'the impugned acts were so flagrantly abusive and so far removed from R.S.'s official status as a military officer that, on the facts of the case, his most serious criminal behaviour cannot engage the State's substantive international responsibility.'. Cf Art 7 ARSIWA, commentary para 7, which makes a distinction between *ultra vires* conduct of a State organ (attributable to the State under Arts 7 jo. 4 ARSIWA) and 'cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals'.
[145] ECCJ, *Konte and Diawara v. Ghana* (2014).
[146] See *supra* Section C.1.a.
[147] See ECCJ, *Konte and Diawara v. Ghana* (2014) paras. 12, 13, 18, 27–28.
[148] *Ibid*, para 38. See also *ibid*, paras 34, 36 and 43(4).
[149] See *ibid*, paras 39 and 43(5).
[150] Human Rights Committee, *Sarma v. Sri Lanka* (2003).
[151] *Ibid*, paras 7.4 and 7.9.

however, sided with the author of the communication, holding that 'it is irrelevant … that the officer [of] the disappearance acted *ultra vires* or that superior officers were unaware of the actions taken by that officer'.[152] Accordingly, relying expressly on Article 7 ARSIWA in conjunction with Article 2(3) ICCPR, the Human Rights Committee found that Sri Lanka was directly responsible for the disappearance, in violation of Articles 7 (in respect of the son) and 9 ICCPR (in respect of the son and the author).[153]

C.5. Instructions, Direction or Control of a State (Article 8 ARSIWA)

In the case of *Adamu and Others v. Nigeria*, the ECCJ analysed the Applicants' complaint that military forces killed their father through the use of excessive force during a raid on the family's house. The Applicants also complained that the police failed to investigate the murder despite the perpetrators being known.[154] The Court held that a State is directly responsible under international law for the conduct of its internal institutions and entities empowered to exercise governmental authority, as well as for the conduct by persons 'acting under the direction or control of the state'.[155]

Based on an examination of the facts such as the use of military uniforms and equipment, the ECCJ concluded that 'this area was under state responsibility […] therefore a violation occasioned by persons acting under the direction or control of the state against a citizen will render the state liable'.[156] The ECCJ continued by holding that even if act is not attributed to it, a State can still be responsible if it 'fails to exercise due diligence in preventing or responding to the violation'.[157] The ECCJ finally concluded that the Respondent State 'negligently allowed the violation, warranting liability for failing to adduce relevance to the unlawful and justified killing of a man' and found that the State violated the right to life of the Applicants' father.[158] Moreover, because the investigation into the murder was ineffective, the Court also found that the State had violated the procedural limb of the rights to life.[159]

Of all EECJ cases described in this Chapter, this one is arguably the least convincing in terms of how the Court applied the attribution rules to the facts. For one, it is unclear what it meant by the observation that 'the area was under State responsibility'.[160] Furthermore, it was clear from the evidence and the facts as that the killing was carried out by the Respondent State's own military forces. Considering

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[152] *Ibid*, para 9.2.
[153] *Ibid*, fn 19.
[154] ECCJ, *Adamu and Others v. Nigeria* (2019).
[155] *Ibid*, 11.
[156] *Ibid*, 12.
[157] *Ibid*, 13.
[158] *Ibid*, 13.
[159] *Ibid*, 13–14.
[160] *Ibid*, 12.

that the military is a State organ, there was thus no need whatsoever to assess whether the conduct came from 'persons acting under the direction or control of the State'.[161] It was also unnecessary, for the same reason, to find that the Respondent had 'negligently allowed' the killing,[162] as if the breach consisted of a violation of a due diligence obligation. Thus, even though the it did correctly identify the standards of attribution as laid down in Articles 4, 5 and 8 ARSIWA, the ECCJ fell short of actually applying the proper standard to the case at hand.

The ACionHPR has also addressed attribution as a result of the State exercising direction or control over non-State actors, but it did so in a rather unclear manner. In the case *Egyptian Initiative for Personal Rights and Interights v. Egypt (II)*, the Commission examined whether the Respondent State was responsible for gender-based violence and other physical assaults against demonstrators by supporters of then President Mubarak's ruling National Democratic Party and police and security officers.[163] The Commission held that a State could be in violation of the ACHPR for acts of non-State actors 'if it [sic] complicit in the violations alleged, has *sufficient control* over those actors, or fails to investigate those violations'.[164] The Commission, however, did not elaborate on the level of control that would be required for the State to be held directly responsible. In the final analysis, it found that the Respondent State had violated human rights law as a result of the participation of (or at the very least the passiveness of or toleration by) the police and security forces combined with the State's failure to prevent, investigate and prosecute. Thus, the notion of 'sufficient control' was used here arguably to signal that the police and security forces were in a position to stop the assaults but failed to do so, rather than pronouncing a vaguely-defined standard of attribution under Article 8 ARSIWA.

The issue of conduct under the direction or control of the State is also addressed in General Comment No 24 of the Committee on Economic, Social and Cultural Rights, which addresses States' obligations in the context of business activities. Here, the Committee determines that a State is directly responsible for the conduct of business entities 'if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue,' relying explicitly on Article 8 ARSIWA.[165] The requirement that the direction or control must extend 'in fact' to 'the particular conduct' appears to suggest

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[161] *Ibid*.
[162] *Ibid*, 13.
[163] ACionHPR, *Egyptian Initiative for Personal Rights and Interights v. Egypt (II)* (2011).
[164] *Ibid*, para 156 (emphasis added). Subsequently, the Commission found (at para 166) that the assaults were perpetrated 'by state actors, and non-state actors under the control of state actors' and that the State failed to take measures of prevention, investigation and prosecution.
[165] Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 28, para 11(a). See also Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender based-violence)*, *supra* note 28, para 24, citing Art 8 ARSIWA in support of the position that 'under general international law' a State is responsible for the conduct of non-State actors 'acting on the instruction or under the direction or control of that State'. State responsibility under the CAT for non-State actors under a State's direction or control is discussed separately; see *infra* Section D.2.b.

an approval by the Committee of the effective control test as found in customary international law and advocated in the commentary to Article 8 ARSIWA, rather than overall control as pronounced by the International Criminal Tribunal for the former Yugoslavia (ICTY) as a *lex specialis* test.[166]

C.6. Absence of Official Authorities, Insurrectional Movements, and Acknowledgment and Adoption by the State (Articles 9 to 11 ARSIWA)

There is very little case law in human rights courts on the standards of attribution laid down in Articles 9 to 11 ARSIWA. This is not surprising, given that the relevant Articles deal with situations that occur only rarely.[167]

In the case of *African Commission on Human and Peoples' Rights v. Libya*, the ACtHPR engaged with the question of State responsibility for conduct carried out in the absence of the official authorities.[168] The facts of the case are as follows. In November 2011, the National Transitional Council (NTC), at the time internationally recognized as the Libyan government) detained Saïf Al-Islam Kadhafi — son of the ousted dictator Colonel Muammar Kadhafi — in a secret location without access to family or legal representation, without being charged with an offence and without being brought before a competent court. The ACionHPR argued that Libya was responsible for violations of Articles 6 (right to liberty and security) and 7 (right to have one's cause heard) ACHPR. The Respondent State did not offer any meaningful defence and ignored provisional measures adopted in 2012, 2013 and 2015, following which the ACtHPR took the unprecedented decision of rendering judgment in default pursuant to Article 55 of the ACtHPR Rules of Court.

With respect to Libya's responsibility, the ACtHPR held that the Respondent State was responsible for the NTC's 'action as well as its acts of omission,'[169] citing Article 9 ARSIWA in support.[170] The Court was not altogether ignorant to the

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[166] Cf. Art 8 ARSIWA, commentary para 3, which states conduct is attributable to a State under this provision 'only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation'. See also *ibid*, commentary para 7, where it is made clear that State control must relate to the actual conduct in question. The standards of effective and overall control are examined in more detail in Chapter 5.

[167] This is expressly acknowledged by the ILC with respect to Art 9 (see commentary para 1) and Art 10 (see commentary para 4). As for Art 11 ARSIWA, see ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) para 114, noting that 'the case law on this particular issue is scarce and … further developments may therefore be expected in this area'.

[168] ACtHPR, *African Commission on Human and Peoples' Rights v. Libya* (2016).

[169] *Ibid*, para 49.

[170] *Ibid*, para 50. On Art 9 ARSSIWA, see also Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 28, para 11(b), noting that a State is directly responsible for the conduct of business entities 'if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities'.

difficulties in the country, but added that despite the 'exceptional political and security situation prevailing in Libya since 2011, the Libyan State is internationally responsible for ensuring compliance with and guaranteeing' the human rights enshrined in the ACHPR.[171] Accordingly, the Court found that the Libya had violated Articles 6 and 7 ACHPR.[172]

The treatment of attribution and the application of Article 9 ARSIWA raises some comments. First, it might be asked whether it had not been more appropriate for the ACtHPR to apply Article 10 ARSIWA. Article 10, after all, concerns the conduct of insurrectional or other revolutionary movements, and the NTC was the successor regime after Colonel Kadhafi was driven out of power. Yet, the successful character of the NTC's overthrow of the former government is precisely the reason why Article 10 ARSIWA is not relevant here. By the end of 2011, the NTC was already internationally recognized as the *de facto* Libyan government, so the conduct giving rise to the allegations was not the conduct of an 'insurrectional or other movement which *subsequently* becomes the new government'.[173] In other words, Article 10 would have been applicable only had the violations taken place before the NTC became Libya's government, which was not the case here. Consequently, the ACtHPR was right not to focus on Article 10 ARSIWA.

However, and this is the second comment, it is less convincing that the ACtHPR chose to focus on Article 9. In the present author's view, Article 4 ARSIWA was the relevant standard of attribution in this case, not Article 9, given that a *de facto* government *is* a State organ.[174] So, in a certain paradoxical manner, the Court's application of Article 9 ARSIWA essentially negates the status of the NTC as a *de facto* government of the State. Either way, the invocation of Article 9 does lend credence to the authority of the standard articulated in it, even though the Court's decision to apply it to the facts of the case remains doubtful.

Lastly, it is not completely clear for *which* conduct Libya was held responsible. Was it a case of direct attribution for the acts of the TNC,[175] or was it rather Libya's failure to exercise due diligence in its positive obligations to protect individuals within its jurisdiction from human rights abuses?[176] This question was also raised in

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[171] ACtHPR, *African Commission on Human and Peoples' Rights v. Libya* (2016) para 77.
[172] *Ibid*, paras 85 and 97.
[173] Art 10 ARSIWA, commentary para 1, concerning the scope of application of the Article (emphasis added). See also *ibid*, para 5: 'where the movement *achieves its aims* and … installs itself as the new government of the State … it would be anomalous if the *new regime* could avoid responsibility for conduct *earlier* committed by it' (emphasis added).
[174] See Art 9 ARSIWA, commentary para 4: 'A general *de facto* government … is itself an apparatus of the State, replacing the one [here: the Kadhafi regime, RJ] which previously existed. The conduct of the organs of such a government is covered by Article 4 rather than Article 9.' See also Cahin (2010a) 255, arguing that the principle in Art 4 ARSIWA is 'perfectly transposable' to highly structured movements or *de facto* governments (giving the example of the former Taliban regime in Afghanistan).
[175] As suggested by the phrasing of paragraphs 49–50 of the Judgment and the Court's reliance on ARSIWA for the attribution of the acts of the NTC to Libya.
[176] As suggested by the Court's finding that Libya was 'internationally responsible for *ensuring* compliance with and guaranteeing' the ACHPR (at para 77, emphasis added).

the Separate Opinion of Judge Ouguergouz, who stated that the ACtHPR should have laid emphasis on the obligations imposed on the Respondent State under Article 1 ACHPR,[177] recalling that States have negative obligations as well as positive obligations.[178] Judge Ouguergouz does not reflect any further on this, apart from expressing the concern that the ACtHPR seems to have simply endorsed the allegations in the submissions of the Applicant, which, in his view, is exactly what must be avoided in a default procedure under Article 55 Rules of Court.[179] Judge Ouguergouz' comments are a pertinent reminder that international courts and tribunals occasionally do not sufficiently distinguish between the responsibility for attributable conduct, and their responsibility as a result of a failure to comply with their due diligence obligations.

The only human rights case engaging with Article 11 ARSIWA is *Makuchyan and Minasyan v. Azerbaijan and Hungary*, decided by the ECtHR.[180] It may be recalled that this case involved an Azerbaijani military officer (R.S.) who used an axe to decapitate and kill an Armenian officer in his sleep during a three-month NATO-organized English language course in Hungary. As noted earlier in this Chapter,[181] the Court did not follow the Applicants' claim that Azerbaijan was directly responsible for the conduct of R.S. despite being a State organ, given the fact that R.S. acted in a purely private capacity and thus did not act *ultra vires*. The Applicants argued alternatively that Azerbaijan was directly responsible for the murder because by glorifying and rewarding his actions Azerbaijan had acknowledged and adopted the murder by R.S. as its own.[182] With respect to this argument, the ECtHR undertook a remarkably elaborate analysis of the legal status and standard of attribution of Article 11 ARSIWA and its commentary.

The ECtHR started by noting that 'the current standard under international law [of attribution of conduct as per Art 11 ARSIWA] sets a very high threshold for State responsibility'.[183] Applying this standard to the facts of the case, the ECtHR found that Azerbaijan certainly approved and endorsed the impugned conduct.[184] However, the Court held that the Respondent State could not be said to have fulfilled the further (cumulative) conditions under Article 11 ARSIWA of clear and

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[177] ACtHPR, *African Commission on Human and Peoples' Rights v. Libya* (2016), Separate Opinion of Judge Ouguergouz, para 11.
[178] *Ibid*, para 12.
[179] See *ibid*, para 28 and Judge Ouguergouz' preceding analysis of the obligation for the ACtHPR to satisfy itself that the allegations are 'founded in fact *and in law*'.
[180] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020). On Art 11 ARSIWA, see further Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 28, para 11(c), noting that a State is directly responsible for the conduct of business entities 'if and to the extent that the State party acknowledges and adopts the conduct as its own'.
[181] See *supra* Section C.4.
[182] See *ibid*, paras 74, 96 and 101.
[183] *Ibid*, para 112. Here, the ECtHR refers back to paras 34–34 of the judgment, where Art 11 ARSIWA and pertinent parts of its commentary are cited as relevant international legal materials.
[184] See *ibid*, paras 115–17.

unequivocal acknowledgment and adoption of the act as its own.[185] According to the Court, rather than assuming responsibility for the killing by R.S., the acts of Azerbaijan could be interpreted as being aimed at 'addressing, recognizing and remedying R.S.'s adverse personal, professional and financial situation' as a result of the criminal proceedings in Hungary, which the Azerbaijani authorities perceived as flawed.[186]

In its analysis in respect of acknowledgment and adoption of conduct, the ECtHR clearly recognized that the standard of attribution in Article 11 ARSIWA, read together with its commentary, represents 'the current standard under international law'.[187] That said, one might debate whether the Court correctly applied the law to the facts of the case, even if it recognized the proper legal standard of attribution of conduct to begin with.

First of all, the Court did acknowledge that the Respondent State's actions 'could be perceived as an important step in the process of legitimizing and glorifying R.S.'s actions,'[188] and that the presidential pardon and other measures led to his virtual impunity in the sense of nullifying the sentence imposed in Hungary and treating him *de facto* as a wrongfully convicted person[189]. Thus, a reasonable argument could be made that by its words and deeds Azerbaijan had in fact not only approved and endorsed but also acknowledged and adopted the conduct of R.S. as its own.[190] Indeed, there is a certain contradiction on the part of Azerbaijan (and followed by the ECtHR) in arguing that the nature of the crime was abusive, illegal and too remote from his official status for the purpose of attribution, while rewarding the very same conduct by promoting the perpetrator in military rank so as to enable R.S. to continue his status as State official.

The second ground on which one might question the Court's approach, is that it considered 'of importance' for its analysis under Article 11 ARSIWA that the act of murder was a purely private act 'and not related, whether directly or indirectly, with any State action' at the time of commission.[191] In other words, the ECtHR saw the (in

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[185] See *ibid*, para 118. See also *ibid*, para 113: '[I]n order to assuredly establish that there has been a violation by the State of Azerbaijan of Article 2 [ECHR] under its substantive limb, those cumulative conditions and the threshold that has to be reached under [Art 11 ARSIWA] require that it be convincingly demonstrated that, by their actions, the Azerbaijani authorities not only "approved" and "endorsed" the impugned acts … but also "clearly and unequivocally" "acknowledged" and "adopted" these acts "as their own" within the meaning of those terms, as they are interpreted and applied under international law.'

[186] *Ibid*, para 118.

[187] *Ibid*, para 112. See also *ibid*, para 114, where the ECtHR notes that its assessment takes place in light of 'the existing rules of international law, as elaborated in the ILC Commentary and applied by international tribunals'.

[188] *Ibid*, para 217.

[189] *Ibid*, paras 172 and 220.

[190] See also *ibid*, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para 4, *inter alia* arguing that the decision to provide salary arrears in an effort to compensate R.S. 'clearly goes beyond statements of approval or endorsement'.

[191] *Ibid*, para 118.

its view) private nature of the acts in question as relevant for a determination that the State had not acknowledged and adopted the conduct as its own for the purposes of Article 11 ARSIWA. This is rather odd. Whether or not conduct is considered as private conduct unrelated to official capacity is relevant for a determination of attribution under Articles 4 to 7 ARSIWA, but not under Article 11. Article 11 ARSIWA is relevant *precisely* in those cases where the conduct in question is not otherwise attributable to the State,[192] e.g. in situations where the conduct in question is that of a private individual or a State organ acting in private capacity. Thus, contrary to what the Court appears to say here, the private nature of the murder does not in any way prevent it from falling within the scope of Article 11 ARSIWA.

Be that as it may, far from constituting or expressing a *lex specialis*, the Court's examination of the actions by Azerbaijan and its conclusion that acknowledgement and adoption were lacking is a clear endorsement of the (relatively strict) standard of attribution as laid down in Article 11 ARSIWA and elaborated through its commentary,[193] rather than a pronouncement of a *lex specialis* test.

Finally, the situation in Article 11 ARSIWA, in which a State acknowledges and adopts *conduct* as its own, must be distinguished from the situation in which a State acknowledges *responsibility* for a given set of events pursuant to the terms of a specific human rights treaty. The former is a matter of attribution of conduct governed by the secondary rules of State responsibility, whereas the latter is concerned with the assumption of certain specific legal effects under substantive and procedural rules of human rights law. An example of a provision under which States may accept international responsibility for human rights violations can be found in the Rules of Procedure of the IACtHR. According to Article 52(2) IACtHR Rules of Procedure, a State may acknowledge (or 'acquiesce') to the claims of an applicant, in which case the Court either decides on appropriate reparations or continues the consideration of the case on the merits if that is in the interests of justice.[194]

It is important to stress that Rule 52(2) IACtHR Rules of Procedure regulates the specific application and legal effects of the IACHR regime (i.e. acceptance of responsibility), rather than the question of attribution of conduct. That said, it is not always easy to disentangle attribution of conduct and attribution of responsibility, especially where the disputing parties have different ideas as to the material and personal scope and legal effects of the acknowledgment.

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[192] See Art 7 ARSIWA, commentary para 1, noting that this provision deals with conduct 'that was not or may not have been attributable to [a State] at the time of its commission'.

[193] See ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) para 118, where the Court notes that it sees 'no reason or possibility' to depart from Art 11 ARSIWA.

[194] Art 52(2) IACtHR Rules of Procedure provides: 'If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case, the Court, after hearing the opinions of the other parties to the case whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.' Art 54 provides further that notwithstanding the existence of an acknowledgment of responsibility or a friendly settlement, the Court may continue its consideration of the case bearing in mind its responsibility to protect human rights.

This can be can be illustrated well by the *Mapiripan Massacre* case.[195] The case revolved around an armed group, the *Autodefensas Unidas de Colombia*, which had tortured and killed approximately 50 civilians while acting in collaboration and with the acquiescence of State agents. In proceedings before the IACtHR, the State filed a brief in which it 'acknowledge[d] its international responsibility' for violations of Articles 4(1), 5(1) and (2), and 7 (1) and (2) ACHR 'in connection with the facts that took place in Mapiripan between July 15 and 20, 1997'.[196] The Court decided it would continue with the merits of the case notwithstanding the State's acknowledgement of responsibility, *inter alia* because there continued to be a dispute between the parties as to the legal effects of the acknowledgement and the scope of the facts covered by it.[197] Indeed, the State claimed that the acknowledgement under the Rules of Procedure only covered the conduct of its agents (which the State agreed was directly attributable to it), but it denied direct responsibility for the conduct of the armed group (though admitting that it remained responsible for its omissions vis-à-vis such groups).[198] The Commission and the victims' representatives, however, argued that the conduct of the armed group *was* directly attributable to the State, mainly in light of the latter's policy of tolerance, complicity and lack of investigation.[199]

The case raises complicated questions in terms of the fine line between the elements of attribution and breach of an international obligation to which this Chapter returns later.[200] For now, however, it suffices to note how the Court clarified the function of an Article 52(2) declaration in relation to State responsibility in the framework of the Convention. The IACtHR held that in view of its special nature as a human rights treaty, the ACHR 'constitutes *lex specialis* regarding State responsibility' and that therefore, 'attribution of international responsibility to the State, as well as the scope and effects of the acknowledgment … must take place in light of the Convention itself'.[201] On the merits, the Court considered that, in light of the State's (active) involvement and (passive) acquiescence, Colombia was to be held responsible for the acts of the *Autodefensas Unidas de Colombia*.

Certain elements of the Court's reasoning point in the direction of a *lex specialis* rule of attribution by considering the conduct of the armed group as the State's own conduct as a result of the latter's collaboration and direction. Other elements, however, suggest that State responsibility was based on a failure to act,

[195] IACtHR, *Mapiripan Massacre v. Colombia* (2005).
[196] *Ibid*, paras 33, 34 and 37.
[197] *Ibid*, paras 61–69.
[198] See on this point the very detailed submissions by the Respondent State in *ibid*, para 97, including the argument that the ACHR does not constitute *lex specialis* on the attribution of conduct (at para 97(c)(iii)) and the citation of Arts 8, 9 and 11 ARSIWA as customary international law (at para 97(d))
[199] See *ibid*, paras 98–99 (Commission) and 100 (victim's representatives), and in particular para 100(c): 'Acquiescence by the State undoubtedly has significant legal value in this proceeding [but] given its partial nature, it does not encompass facts such as … the death or disappearance of the victims or the level of connivance and complicity that existed between the paramilitary and members of the Security Forces in carrying out the massacre.'
[200] See *infra* Section D.2.
[201] *Ibid*, para 107.

which would be something that operates at the level of the primary obligation breached. Either way, this case does not serve as a precedent of, or a *lex specialis* rule in deviation from, Article 11 ARSIWA, given the difference in nature between attribution of conduct and the acknowledgment of responsibility under Article 52(2). The acknowledgment or acquiescence of responsibility under Article 52(2) Rules of Procedure as a *lex specialis* rule is a procedural device that operates at the level of content and implementation of State responsibility.[202] It is not necessarily concerned with attribution of conduct. At the same time, attribution of responsibility under Article 52(2) and attribution of conduct may be closely related because there can be a dispute between the parties as to whether a particular conduct is considered an act of the State under Articles 4 to 11 ARSIWA and thus covered by the acknowledgment of facts and the IACionHR's report on the merits, which together constitute the basis of responsibility.[203]

D. Critical Reflection: Attribution, Breach and Internationally Wrongful Acts in Perspective

The case law of human rights courts as discussed so far demonstrates that human rights courts tend to follow the standards of attribution as laid down in Articles 4 to 11 ARSIWA. Nevertheless, it is appropriate now to take a close look at some of the cases in order to analyse how the notions of attribution and breach relate to each other within the specific context of human rights violations as internationally wrongful acts. Thus, in what follows, a critical reflection will be offered with respect to the order of the elements of attribution and breach in the determination of internationally wrongful acts in general, and human rights violations specifically (D.1.). The Section that follows critically analyses human rights cases which blur the distinction between attribution of conduct and the breach of an international obligation of the State (D.2.).

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[202] See *ibid*, para 65, where the IACtHR explains that it is exercising its inherent authority for the international juridical protection of human rights by establishing whether an acknowledgment of international responsibility by a respondent State provides sufficient basis under the ACHR to continue or discontinue hearing the merits and establishing reparations and costs. See also *ibid*, para 122, where the Court notes that by accepting responsibility under IACtHR Rules of Procedure, the respondent State could no longer validly exclude from the content of its declaration any of the points acknowledged, as this would make the previously made acknowledgment 'devoid of content, and would lead to a substantial contradiction with some of the facts that it has acknowledged'.

[203] See also IACtHR, *Gutiérrez and Family v. Argentina* (2013) paras 21–22, where the Court explained that it must relate acknowledgments made by the State to the 'nature and severity of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,' and that a continued examination of a case is necessary if it has not been determined clearly which acts are committed by State agents and in relation to which responsibility is acknowledged by a respondent State pursuant to the IACtHR Rules of Procedure.

D.1. The Order of the Elements of Attribution and Breach in the Determination of State Responsibility for Human Rights Violations

As explained earlier,[204] a State commits an internationally wrongful act for which it is internationally responsible if certain conduct is attributable to it, and if such attributable conduct — as an act of the State — constitutes a breach of any of its international obligations.[205] The fact that the element of attribution must be examined *before* the element of breach finds support in international case law. In *Tehran Hostages*, for example, the ICJ held that following the establishment of the relevant facts (e.g. conduct) it had to determine, firstly, whether the conduct could be ascribed to Iran, and secondly, whether such conduct as compatible with any rules of international law applicable to Iran.[206] In the *Nicaragua* case, the ICJ also followed this "three-step approach" of establishing the facts, attributing conduct a State, and determining whether there had been breach of an applicable international legal obligation.[207]

However, this notion of the attribution of *conduct* is not always adequately recognized in case law of human rights courts. In fact, occasionally these courts speak of the attribution of a *breach* or even the attribution of *responsibility*, as if a breach and international responsibility can be established in the abstract at the level of non-State actors or even State agents, without first connecting the conduct to a State. Take, for instance, the case of *Ogwuche ESQ v. Nigeria* discussed above,[208] where the ECCJ found that State agents had acted in such way as to violate the Applicant's rights.[209] Then, in the final substantive part of the judgment, under the heading 'State Responsibility,' the Court engaged in an analysis of whether these violations can be attributed to State.[210] The same approach of establishing the existence of a human rights violations and only subsequently turn to the question of attribution can be found in a variety of other cases.[211]

In the literature, it has also been argued that the sequence of analysis in matters of State responsibility is not necessarily in the order of the subjective element of attribution followed by the objective element of breach. For example, relying on the

[204] See Chapter 2, Sections C.1.a and C.1.b.
[205] Arts 1 and 2 ARSIWA.
[206] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980) para 56.
[207] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) paras 57 and 116.
[208] See *supra* Section C.1.c.
[209] ECCJ, *Ogwuche ESQ v. Nigeria* (2018) 18–33.
[210] *Ibid*, 34–36.
[211] See e.g. ECCJ, *Adamu and Others v. Nigeria* (2019) 11 (a State is responsible 'provided the breach is attributable to the state'); ECCJ, *Ugwuaba v. Senegal* (2019) 22 (defining the conditions for an internationally wrongful act as an 'unlawful act [and] the imputability of the unlawful act to the agents of the State'); ECCJ, *Chief Onwuham and Others v. Nigeria and Imo State Government* (2018) 11–25; ECCJ, *Okomba v. Benin* (2017) 8–24.

example of organized armed groups committing violations of international humanitarian law (IHL), Pierre-Marie Dupuy submits that it is very well possible to determine the existence of a breach of international law *before* looking into the question of attribution.[212] And there is indeed some support for this approach. In *Bosnian Genocide*, the ICJ first addressed the question of a breach of the prohibition on genocide,[213] and only subsequently it entertained the Applicant State's allegation that these acts of genocide could be attributed to the Respondent State.[214]

However, one should not read too much in this specific case. The ICJ's order of analysis in *Bosnian Genocide* was possible or even appropriate for a number of reasons, given the specific nature of the claims that were brought against the Respondent State. First, it could be argued that it served a particular historical purpose, namely to put the committed atrocities on record.[215] Furthermore, the obligation to prevent any given event (including genocide) can only be breached if is established that the facts that ought to be prevented have actually occurred, hence the necessity of examining the manifestation of genocide.[216] More importantly, though, it is perfectly possible to determine in the abstract whether genocide (or, in the example given by Dupuy, a war crime in the context of a non-international armed conflict [NIAC]) has taken place. After all, this concerns an international crime, which by its very nature is committed by individuals regardless of any attribution of the same conduct to a State.[217]

In order to grasp the necessity of analysing the question of attribution before turning to the question of a breach of an international obligation (including obligations under human rights law), it is worth exploring how the International Law Commission (ILC) discussed these matters. The first Special Rapporteur for the project, Francisco V. García-Amador, was of the opinion that in matters of responsibility it was possible and even necessary to determine whether there had been a breach of an international obligation *before* entering into the question of attribution.[218] Indeed, there is some support for this approach in case law. In *Dickson Car Wheel Company (United States) v. Mexico*, the arbitrators from the Mexico–

[212] Dupuy (2009).
[213] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) paras 245–376.
[214] See *ibid*, paras 377–415.
[215] See Stern (2010) 202.
[216] As for genocide, see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 431, with reference to the general rule as laid down in Art 14(3) ARSWIA.
[217] See IMT, *Trial of the Major War Criminals Before the International Military Tribunal* (1948): 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' See also Art 58 ARSIWA.
[218] ILC, *Fifth report on international responsibility, by Francisco V. García Amador, Special Rapporteur: Responsibility of the State for injuries caused in its territory to the person or property of aliens – Measures affecting acquired rights (continued) and constituent elements of international responsibility*, UN Doc A/CN.4/125 (1960) paras 66 and 69.

United States General Claims Commission found that for a State to be responsible under international law 'it is necessary that an unlawful international act be imputed to it'.[219]

This sequence of analysis (i.e. examining breach first and only then attribution) was initially also preferred by the second Special Rapporteur, Roberto Ago. During the Sub-Committee's discussions Angel Modesto Paredes observed that one should first look into the element of attribution.[220] Ago, while admitting that the order in which these two problems are considered was 'perhaps not a vital one,' nevertheless replied that an assessment of the element of breach 'should logically precede' the question of attribution.[221] Thus, in drawing up the report of the conclusions of the Sub-Committee, Ago suggested that an internationally wrongful act occurs as the result of 'imputability to a subject of international law of conduct contrary to an international obligation'.[222] In other words, the element of breach was to be considered *before* turning to the element of attribution.

Interestingly, Ago later changed his mind on this. When discussing his second report (1970), Ago pointed out that the question of attribution had to be analysed *before* turning to the question of breach of an international obligation.[223] This position was repeated when Ago's first set of draft articles were up for adoption at the ILC meeting in 1973. In these discussions Ali Suat Bilge suggested a return to the approach as preferred by García Amador.[224] Ago disagreed, responding that the element of attribution was to be mentioned first in the text, since 'it was necessary to find out whether certain conduct attributable to the State existed before determining whether it constitute failure to comply with an international obligation.'[225]

The commentary to Article 3 as adopted on first reading (providing the definitional elements of an internationally wrongful act) confirms the necessary order of analysis of assessing whether State conduct exists *before* determining whether or not such conduct breaches an international obligation.[226] The issue of the order of the two elements has not been addressed during the discussions of the articles on second reading, in which the (renumbered) Article 2 was retained with the same order of the elements of an internationally wrongful act.

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[219] Arbitral Award, *Dickson Car Wheel Company (United States) v. Mexico* (1931) 678.

[220] ILC, *Report by Roberto Ago, Chairman of the Sub-Committee on State Responsibility*, UN Doc A/CN.4/152 (1963), Appendix I, *Summary record of the 5th meeting*.

[221] *Ibid*.

[222] ILC, *Report by Roberto Ago, Chairman of the Sub-Committee on State Responsibility*, UN Doc A/CN.4/152 (1963) 228.

[223] ILC, *Summary record of the 1081st meeting*, UN Doc A/CN.4/SR.1081 (1970) para 25.

[224] ILC, *Summary record of the 1206th meeting*, UN Doc A/CN.4/SR.1206 (1973) para 20.

[225] ILC, *Summary record of the 1207th meeting*, UN Doc A/SN.4/SR.1207 (1973) para 18.

[226] Draft art 3 as adopted on first reading, YB ILC 1973-II, 179, commentary para 5: '[I]n stipulating that for some particular conduct to be liable to be characterized as an internationally wrongful act, it must first and foremost be conduct attributable to the State'.

With the genesis of the definitional elements of an internationally wrongful acts in mind, it is thus unconvincing to rely on the *Bosnian Genocide* case or the commission of international crimes by individuals to make a more general point about the possibility of reversing the assessment of the two elements of an internationally wrongful act. It is conceptually inappropriate to speak of attribution of a *breach* in the context of State responsibility. As much as a State cannot be responsible without fulfilling the two conditions of an internationally wrongful act (attribution of conduct, and a breach of an applicable primary rule of international law), one cannot establish whether a State has breached its obligations without first looking into the question of attribution.

Indeed, Article 2 ARSIWA, and the normative architecture of ARSIWA as a whole, show that any legal inquiry into State responsibility consists of three steps. The first is a factual one, consisting of determining the conduct at stake, be it an act or omission. The second step is verifying whether that particular conduct is imputable to the State (the question of attribution in Articles 4 to 11 ARSIWA). Once it has been established that certain conduct is genuinely an act of the State, the final step is to analyse whether this conduct, attributable to the State, is in line with what the applicable legal framework requires from the State as addressee of its norms (the question of breach, as addressed in articles 12 to 15 ARSIWA). This applies with equal force to allegations of human rights violations committed by States. In fact, it is highly problematic as matter of substance and methodology for human rights courts to first examine the existence of a human rights violation and only secondly inquire whether this can be attributed to the State concerned. After all, State agents (and non-State actors) are not party to human rights treaties, nor can they, as a matter of law, be said to breach the relevant treaties.[227] In other words, there is no breach to attribute unless the conduct that is claimed to constitute a human rights violation is an act of the State in the first place.

Attribution rules thus serve as a pivotal point between physical acts and the State as a subject of international law in order to determine whether the State has breached an obligation of international law incumbent on it.[228] There is an analytical necessity to examine whether conduct is attributed to a State before looking into the question of whether such conduct violates international law, and the placement of the rules of attribution before the rules on breaches testifies to the proper sequence of analysis. The term "violation of human rights by State agents / non-State actors" (or "breach of human rights by State agents / non-State actors", etc) makes sense only if the term is used colloquially (as in: impairment of the enjoyment of such rights, rather

[227] See e.g. ECCJ, *Capehart Williams Sr. and Paykue Williams v. Liberia and Others* (2015) 19: '[T]he State as an entity in international law … assumes responsibility; officials … or component parts of government are mere agents whose acts are attributable to their States'.
[228] See also Stern (2010) 201, describing the order in which the elements of attribution and breach must be examined 'logical since an act on its own cannot be assessed against the rules of public international law; it is first necessary to ensure that an act is attributable to the State before examining whether that act is in conformity with what is required from that State under international law'.

than there being a breach of a legal obligation),[229] or, insofar as one accepts that individuals are bound by customary human rights law, if the conduct is in breach of international custom (in which case it has no place in a judgment of a human rights court with a mandate to examine compliance with a treaty). That said, conduct that pursuant to attribution rules is considered an act of State need not be, and *very often is not*, in violation of international law. Conversely, the fact that conduct is *not* attributed to a State, does not extinguish the possibilities that this State is internationally responsible, as will be examined in the next Section.

D.2. Blurring the Distinction Between Attribution and Breach

In human rights law it is vital to examine whether or not the conduct that gives rise to a human rights allegation is an act of the State. However, in some cases human rights courts effectively stop their analysis after finding that the conduct at stake is not attributed to the State, without any analysis of compliance with positive obligations of due diligence (Section D.2.a). Another form of blurring the distinction between attribution and breach is the rather complicated Article 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). As will be shown in more detail below (D.2.b.), the ILC perceives this provision as a *lex specialis* rule of attribution. However, an argument will be made here that this provision is better understood as offering a specific formulation of what constitutes a breach, thus operating wholly at the level of primary human rights obligations.

D.2.a. Lack of Attribution and Due Diligence Obligations

As the ILC remarks in its commentary to Article 2 ARSIWA, cases in which State responsibility is grounded in a failure to act 'are at least as numerous as those based in positive acts'.[230] Attribution rules are thus only the starting point for assessing when the conduct of non-State actors leads to State responsibility; for the rest, such responsibility mostly arises as a result of primary rules.[231] Accordingly, a finding of a lack of direct attribution should never be the end of a judicial examination.

This applies with even stronger force in international human rights law, in which States not only have (negative) obligations to abstain from certain conduct through persons or entities whose acts are attributed to it, but also (positive, or due diligence) obligations to prevent that non-State actors behave in ways which would

[229] See e.g. Cerone (2006) 3 fn 6, explaining that the paper uses the term 'human right violation' to refer to conduct that would constitute an impermissible interference with one or more human rights if such conduct were attributed to the State.
[230] Art 2 ARSIWA, commentary para 4.
[231] See e.g. Bodansky and Crook (2002) 790.

infringe on the enjoyment of human beings. One might also refer to these situations as indirect responsibility,[232] given that the act of the private person would merely be 'an external event distinct from the act of the State, this latter act having simply been committed in relation to that event'.[233]

The fact that the non-attribution of conduct does not exhaust the question of State responsibility has been aptly put forward by the IACtHR, in the famous case concerning *Velásquez-Rodríguez v. Honduras*, concerning an enforced disappearance:

> Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and *which is initially not directly imputable to a State* (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, *not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required* by the Convention.[234]

Despite the well-established notion of due diligence obligations in human rights law, in some of the cases examined earlier in this Chapter the court in question failed to assess a State's compliance with its positive obligations to prevent the impairment of human rights by non-State actors.

Take *Sunday v. Nigeria*, where the ECCJ found that the Respondent State was not directly responsible for gender discrimination in respect of a member of its police force who in his private capacity threw boiling oil over his wife.[235] The Court's examination of gender discrimination effectively stopped there and it failed to assess whether the State had lived up to its obligation of *preventing* the act. The ECCJ did find that the State had not complied with the obligation to provide an effective remedy *ex post facto*, but the obligation to prevent gender discrimination and the obligation to provide effective remedies afterwards are separate obligations and may amount to distinct violations.

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[232] The terminological dichotomy between "direct" and "indirect" responsibility was once raised in a request for an advisory opinion from the ACtHPR. Art 58(1) ACHPR enables the ACionHPR to bring to the attention of the AU Assembly communications that reveal the existence of serious or massive violations of human and peoples' rights. A Senegalese NGO requested the Court to issue an advisory opinion on whether this 'involves only the direct responsibility of the State or whether it also applies to the State's indirect responsibility, where the violations in question stem from acts committed by pro-government militia or from the inaction of the State'. The Court, however, did not shed any light on this question, declining to render an opinion on the matter since the NGO was not entitled to seek an advisory opinion from the Court; see *Request for Advisory Opinion by Rencontre Africaine pour la Défense des Droits de l'Homme (Advisory Opinion)* (2017).

[233] Draft article 11 ARSIWA as adopted on first reading, YB ILC 1975-II, 70, commentary para 8.

[234] IACtHR, *Velásquez Rodríguez v. Honduras* (1980) para 172 (emphasis added).

[235] See *supra* Section C.4.

The case of *Koraou v. Niger* is another example where the ECCJ failed to examine the due diligence obligation to protect against discrimination and domestic violence by non-State actors.[236] At the age of twelve, the Applicant was sold to a middle-aged man in context of *wahiya*, a practice whereby a man "acquires" a young girl as "fifth wife" (called a *sadaka*) to serve as domestic servant and concubine. She was held in slavery, enduring subjugation, sexual abuse, forced labour and constraints on her freedom of movement. After almost a decade of exploitation, the man issued the Applicant with a certificate of "emancipation" as a slave, after which the Applicant left. She brought a case to the Civil and Traditional Court of Niger to assert her desire to regain full freedom. The Traditional Court found that there had never been marriage (because there had been no religious ceremony and no dowry was paid) so the Applicant was free to start her life over with a person of her choice. However, this judgment was reversed by High Court of Niger at the request of her former "husband"/"owner" who still claimed to be married with the Applicant, the deed of emancipation notwithstanding. In the meantime, the Applicant had already married someone else, and when her former "husband"/"owner" found out, he filed a case against her for bigamy. The Applicant was convicted by the criminal division of the Konni High Court and subsequently arrested and imprisoned.[237]

The Applicant turned to the ECCJ to complain about discrimination (in violation of Articles 2 and 18(3) ACHPR) and slavery (in violation of Article 5). On discrimination, the ECCJ simply found that '[e]ven if this complaint … is founded, that violation is not attributable to Niger but rather to the man in question'.[238] The ECCJ held that even though the practice of *wahiya* or *sadaka* put the Applicant 'in an unfavourable condition and excluded her from … certain benefits of equal dignity recognized for all citizens,' such discrimination was not attributable to the Respondent State.[239] In this case too, the ECCJ failed to assess Niger's positive obligations to prevent the discrimination of the Applicant after finding that the practice of *wahiya* is not attributable to the Respondent State.[240]

That said, the cases of *Sunday* and *Koraou* are the exception, and in general human rights courts go through great lengths to discuss the possibility of a State breaching its due diligence obligations when the conduct of non-State actors is not attributable to it.

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[236] ECCJ, *Koraou v. Niger* (2008).
[237] This is a simplified but for present purposes sufficiently detailed version of the many legal proceedings that went on at the domestic level. For a full account in respect of the marriage annulment and bigamy proceedings, see *ibid*, paras 15–28.
[238] *Ibid*, para 71.
[239] *Ibid*, 13, operative clause 2.
[240] The ECCJ did, however, find that the Respondent State violated its positive obligations to prevent slavery as a result of its tolerance, passiveness, inaction and the abstention of its judicial authorities in not raising the issue during the legal proceedings on the annulment of the Applicant's marriage; see *ibid*, paras 82–86 and operative clause 3 (at 13).

D.2.b. Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

As explained earlier, Article 55 ARSIWA stipulates that the provisions of ARSIWA, including those on attribution as laid down in Articles 4 to 11 ARSIWA, are without prejudice to special rules of international if such rules deviate from what would otherwise follow according to the regime of the general law of State responsibility. The commentary to Article 55 ARSIWA gives Article 1 CAT as an example of such a *lex specialis* attribution rule.[241] This sub-Section will analyse this provision in more detail by focusing on the material and personal dimensions of the rule in question. Is Article 1 CAT truly an example of a *lex specialis* attribution rule, or does this provision and its interpretation rather involve a specific formulation of what constitutes a breach at the level of primary obligations?

Article 1 CAT defines the act of torture as the infliction of severe mental or physical pain or suffering for certain pre-defined purposes 'by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*'.[242] The exact meaning of torture is of paramount importance, given that a number of other provisions in the Convention depend on the act in question meeting the definition in Article 1.[243] The definition is also a challenging one, because it encompasses (*ratione materiae*) both action and inaction on the part of the State and it defines (*ratione personae*) the actors through whom the State can act in violation of the rule.

Over the years, the Committee against Torture has given more meaning to the *ratione personae* dimension of Article 1 and its phrase 'other person acting in an official capacity'.[244] In General Comment No 2 of 2008, the Committee determined that Article 1 includes the conduct 'of [a State's] officials *and others*, including agents, private contractors, and others *acting in official capacity* or acting on behalf of the State, in conjunction with the State, under its *direction or control*, or otherwise *under colour of law*'.[245] The Committee also held in the same General Comment that the staff in privately-owned detention centres must be considered as 'acting in an official

[241] Art 55 ARSIWA, commentary para 3, fn 865.
[242] Art 1 CAT (emphasis added). The phrase 'or other person acting in an official capacity' was added as a compromise formula because the negotiating delegations could not agree on a State-centred definition (as preferred by e.g. the United States and the United Kingdom) or a definition covering also the acts of private individuals (as preferred by e.g. France and Spain); see Zach (2019) 59.
[243] The purpose-centred definition of torture in CAT is without prejudice to any other source of international law (including customary international law), where torture might be defined differently; see Art 16(2) CAT. Accordingly, the present analysis in this Section is confined to the treaty-based definition of torture as found in Art 1 CAT and does not apply to, for example, the prohibition of torture, inhumane or degrading treatment or punishment as laid down in Art 3 ECHR.
[244] The State's obligations in respect of acts that do not meet the definition of torture are laid down in Art 16(1) jo 10–13 CAT.
[245] Committee against Torture, *General Comment No 2 (Implementation of Art 2)*, UN Doc CAT/C/GC/2 (2008) para 15 (emphasis added).

capacity on account of their responsibility for *carrying out the State function*'.[246] Accordingly, severe pain or suffering inflicted or instigated by any of these persons constitutes the material act of torture for which the State is directly responsible.

Through its General Comments the Committee also elaborated on the modalities of State responsibility for severe pain and suffering at the hands of non-State actors.[247] This has been done (1) by explaining what is meant by the terms of 'consent' and 'acquiescence'; and (2) by including *de facto* quasi-governmental authorities within the personal scope of Article 1 CAT.

As for the meaning of 'consent' and 'acquiescence,' the Committee has determined in General Comment No 2 that if State officials or other persons falling within the personal scope of Article 1 (as defined above) have actual or constructive knowledge that:

> acts of torture or ill-treatment are being committed by [non-State actors] and they fail to exercise due diligence to prevent, investigate, prosecute and punish such [non-State actors] consistently with the Convention, the State bears responsibility and its officials should be considered as *authors, complicit or otherwise responsible* under the Convention for *consenting* to or *acquiescing* in such impermissible acts. … [T]he State's indifference or inaction provides a form of encouragement and/or *de facto* permission.[248]

The introduction of the material element of due diligence in respect of the conduct of non-State actors to some extent alleviates the concerns that might arise out of the relatively narrow personal scope of Article 1. Thus, a State is responsible for the commission of torture under Article 1 when its authorities, in violation of Article 2 CAT, fail to exercise due diligence to prevent pain and suffering at the hands of non-State actors, even if the conduct of the non-State actor itself cannot be attributed to the State under customary international law.

The responsibility of the State for quasi-governmental *de facto* authorities has been addressed by the Committee in a roundabout way, through the third-State obligation as contained in Article 3 CAT. This provision, which is the source of the vast majority of complaints decided by the CAT Committee,[249] prohibits States from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that that person would be subjected to torture (as defined in Article 1 of the CAT). It follows that the prohibition of Article 3 CAT does not apply where the expulsion, return or extradition would expose someone to a risk of severe pain or suffering at the hands of non-State actors without the consent or acquiescence of the State, given that such treatment would not constitute torture in

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[246] *Ibid*, para 17.
[247] Thus, Art 1 CAT is 'capable of a more flexible interpretation than was envisaged by its framers'; see Crawford (1999) 440
[248] Committee against Torture, *General Comment No 2 (Implementation of Art 2)*, *supra* note 245, para 18.
[249] Ammer and Schuechner (2019) 99.

the sense of Article 1.[250] The Committee has held that in certain circumstances acts by non-State actors could fall within this definition, calling for the application of the prohibition contained in Article 3. The leading case here is *Elmi v. Australia*, where the Committee held that:

> [F]or a number of years Somalia has been without a central government [but] some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1.[251]

Thus, in exceptional situations, where and to the extent that a central State authority is lacking, acts by non-State groups exercising *de facto* quasi-governmental authority could fall within the definition of Article 1 CAT. The underlying rationale for this is that where a government is absent (or otherwise unable to prevent), individuals can no longer rely on official governmental forces to protect them. For third States, this means that, pursuant to Article 3 CAT a person cannot be expelled, returned or extradited to territory over which such *de facto* quasi-governmental authority is exercised. In General Comment No 4 of 2017, the Committee against Torture "codified" the *Elmi*-extension.[252]

In order to assess whether Article 1 CAT amounts to a *lex specialis* rule of attribution, it needs to be established whether it deviates from what would ordinarily follow when applying Articles 4 to 11 ARSIWA. In other words, does Article 1 CAT cover more or less conduct than would otherwise follow under ARSIWA? The requirement of 'public official or other person acting in an official capacity' led the

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[250] See e.g. Committee against Torture, *G.R.B.. v. Sweden* (1998) (concerning a risk of pain and suffering at the hands of a non-State entity in Peru); Committee against Torture, *L.J.R.C. v. Sweden* (2004) (concerning a risk of pain and suffering at the hands of a guerrilla group in Ecuador)

[251] Committee against Torture, *Elmi v. Australia* (1999) para 6.5. See also *ibid*, para 6.7, holding that the relevant area of Mogadishu was 'under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services'. The *Elmi*-extension only applies temporarily for as long as a central government is lacking; see Committee against Torture, *H.M.H.I. v. Australia* (2002) para 6.4, where the Committee found that the establishment in 2000 of a Transitional National Government as internationally recognized central government in Somalia extinguished the *Elmi*-extension, with the effect that acts of non-State actors were again excluded from the scope of Art 1 CAT and consequently the prohibition in Art 3 CAT did not apply.

[252] Committee against Torture, *General Comment No 4 (Article 3)*, UN Doc CAT/C/GC/4 (2017) para 30, explaining that States are not to deport individuals 'where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has *no or only partial de facto control*, or whose acts it is unable to prevent or whose impunity it is unable to counter' (emphasis added).

ILC to suggest that Article 1 CAT is a *lex specialis* rule of attribution, given that it is 'probably narrower than the bases of attribution' as found in the ILC Articles.[253] This may very well have been the case back in 2001 when the ILC adopted its commentary, but the scope of Article 1 CAT has been clarified over time and this necessitates a re-examination of the matter.

Taking into account the Committee's interpretations of Article 1 CAT, it appears to be the case that the scope of persons through which the State may commit torture is largely if not wholly identical to what would follow under customary international law as reflected in Articles 4 to 11 ARSIWA. According to the Committee, a State may commit — or incite — the *act* of torture through (1) conduct of public officials and other persons acting in official capacity, even if acting *ultra vires*;[254] (2) conduct under a State's direction or control;[255] and (3) conduct in the absence of default governmental authorities (the *Elmi*-extension[256]). It is true, though, that where General Comment No 2 speaks of authorship, this might suggest that the acts committed by non-State actors are attributed to the State. If this interpretation were correct, this would be a *lex specialis* rule of attribution, given that it "catches" more conduct than Article 11 ARSIWA.[257] However, in the present author's opinion the better view is that this does not concern of rule of attribution at all; the General Comment merely reflects more precisely what behaviour is expected of the State, as a matter of substantive law and its positive obligations of due diligence. A State that fails to exercise due diligence does not become the author of the "act" of inflicting pain or suffering; the State becomes, in line with customary international law, the author of its *own* omission by acquiescence.

The General Comments and the Views adopted by the Committee in individual communications have so far not addressed the conduct of persons or entities falling under the remaining standards of attribution in ARSIWA; Articles 6 and 10. In the present author's view, if a third-State organ is put at the disposal of another State in the sense of Article 6 ARSIWA, it seems reasonable (as matter of *lex ferenda*) to hold the receiving State directly responsible for acts of torture committed by the transferred agent, given that the receiving State will exercise *exclusive* authority and control over the transferred agent.[258] As for conduct by insurrectional movements that subsequently become the new government of a State (Article 10 ARSIWA), the direct responsibility of that State for acts of torture could be justified (again, as *lex*

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[253] Art 55 ARSIWA, commentary para 3 fn 865.
[254] Cf Arts 4, 5 and 7 ARSIWA and Art 1 CAT jo. Committee against Torture, *General Comment No 2 (Implementation of Art 2)*, *supra* note 245, paras 15 ('under colour of law') and 17 ('carrying out the State function').
[255] Cf Art 8 ARSIWA and Art 1 CAT jo. Committee against Torture, *General Comment No 2 (Implementation of Art 2)*, *supra* note 245, para 15 ('under [a State's] direction or control').
[256] Cf Art 9 ARSIWA and Committee against Torture, *General Comment No 4 (Art 3)*, *supra* note 252, para 30.
[257] Art 11 ARSIWA, commentary para 6, explaining that this standard of attribution requires more than mere a failure to act combined with support, endorsement or toleration.
[258] Cf Art 6 ARSIWA, commentary paras 2 and 3.

ferenda), on the basis of the continuity that exists between the insurrectional movement and the new organization of the State.[259] If and to the extent that as a matter of *lex lata* a State could not be held directly responsible for the *act* of inflicting pain and suffering by third-State organs put at its disposal or insurrectional movements that subsequently become the new government, CAT would indeed involve a *lex specialis* rule of attribution, covering less acts than the attribution rules of ARSIWA taken as a whole. Either way, even in the absence of direct attribution, in both scenarios the State could still be responsible for its omissions if it failed to exercise due diligence to prevent, investigate, prosecute and punish the acts by such actors.

E. Conclusion

This Chapter started off by demonstrating that human rights law does not operate in clinical isolation from other areas of international law. Even though human rights treaties have certain peculiar features that distinguishes them from "ordinary" inter-State treaties, human rights courts have recognized the relevance of the principle of systemic integration to interpret their constituent instruments which catalogue the substantive rights and freedoms that individuals can rely on.[260] On this basis, the law of State responsibility and its attribution rules play a vital role in adjudicating human rights disputes.

The objective of this Chapter was further to examine whether human rights courts have followed Articles 4 to 11 ARSIWA when confronted with the question of whether the conduct complained of amounts to a human rights violation or, rather, whether they applied *lex specialis* rules for this purpose. On the basis of the cases examined in this Chapter, it can rightfully be said that human rights courts do not apply any *lex specialis* attribution rules. Even in cases where human rights courts have not referred to the standards of attribution in ARSIWA by name, their examination of whether conduct amounts to an act of the State tends to be exactly in line with what would otherwise follow pursuant to the customary law of State responsibility. Moreover, it was demonstrated that the one human rights provision that is mentioned by the ILC as a *lex specialis* rule of attribution, Article 1 CAT, is most likely not a *lex specialis* rule. This follows from the interpretation and expansion of the scope Article 1 CAT as a result of General Comment Nos 2 and 4 and case law of the Committee against Torture.[261]

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[259] Cf Art 10 ARSIWA, commentary para 5.

[260] This principle is laid down in Art 31(3)(c) Vienna Convention on the Law of Treaties.

[261] See Committee against Torture, *General Comment No 2 (Implementation of Art 2)*, *supra* note 245, paras 15 and 17; Committee against Torture, *General Comment No 4 (Art 3)*, *supra* note 252, para 30; Committee against Torture, *Elmi v. Australia* (1999) paras 6.5 and 6.7. As explained, these General Comments and the *Elmi*-case bring Art 1 CAT in line with Arts 4, 5, 7, 8, 9 and 11 ARSIWA. That said, it remains an open question whether or not the conduct of persons failing within the scope of Arts

Nonetheless, this Chapter has also demonstrated that in certain cases human rights courts struggle with providing the necessary clarity by *prima facie* deviating from Articles 4 to 11 ARSIWA. Thus, the EACJ held in one case that the actions of a domestic court would be 'attributable to a [State] only where they constitute blatant miscarriage of justice'.[262] Later on in the judgment the Court found that the actions of the domestic court were attributed to the Respondent State under Article 4 ARSIWA.[263] With that in mind, it is unlikely that the EACJ pronounced a *lex specialis* attribution rule and merely meant to say that judicial conduct (attributable as it is under customary international law codified in Article 4 ARSIWA) constitutes a breach of an international obligation — and thus an internationally wrongful act — only when done in disregard of international standards of justice.

Another example with a *prima facie* deviation from the attribution rules in ARSIWA can be found in General Comment No 2 of the Committee on Migrant Workers, where it is stated that 'if States parties delegate [detention powers] to private companies, they must *ensure respect* for the rights of detained migrant workers'.[264] The phrasing 'ensures respect' — which is usually used to connote a positive obligation in human rights law — would imply that the actions of privately run detention centres would no longer be considered an act of the State. However, upon further reflection of the (occasionally imprecise) language of General Comment No 2, it was demonstrated that this does not concern a *lex specialis* standard of attribution of conduct in relation to privatized detention facilities, let alone a negation of this standard altogether.

A third case that at first sight appears to deviate from ARSIWA is *Kokou and Others v. Togo*, in which the ECCJ adopt a 'pragmatic approach' to rule out Togo's responsibility for killings by its police officers acting in official capacity.[265] In the present author's view, this was neither a negation of Article 7 ARSIWA nor some form of *lex specialis* attribution test in respect of *ultra vires* conduct.[266] Instead, the approach of the ECCJ seems to have been borne out of concern that pronouncing on Togo's responsibility for beatings and/or killings by its police forces would improperly interfere with Togo's transitional justice processes. Moreover, the reluctance of the ECCJ to pass judgment on the merits might be informed (though not justified[267]) by the fact that criminal proceedings at the national level were still pending.

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6 and 10 ARSIWA constitutes torture within the meaning of Art 1 CAT. There is a reasonable argument *de lege ferenda* that this should indeed be case, but so far this has not been settled in the General Comments or the Committee's case law.

[262] EACJ, *Desire v. Attorney General of Burundi* (2016) para 36.

[263] *Ibid*, paras 41–42.

[264] Committee on Migrant Workers, *General Comment No 2 (Migrant workers in an irregular situation and members of their families)*, *supra* note 100, para 39 (emphasis added).

[265] ECCJ, *Kokou and Others v. Togo* (2013) para 39.

[266] The ECCJ did not explicitly approve the Respondent State's argument (reflected in paras 32–33 of the judgment) of non-attribution of *ultra vires* conduct.

[267] The exhaustion of domestic remedies is not required before bringing a case to the ECCJ; see ECCJ, *Koraou v. Niger* (2008) para 45.

Moreover, sometimes human rights courts recognize the legal value and relevance of the attribution rules of ARSIWA but apply them to the facts of the case in a manner that remains open to doubt. For instance, in *Adamu and Others v. Nigeria*,[268] the ECCJ identified the standards of attribution as laid down in Articles 4 and 8 ARSIWA as relevant law but it fell short of correctly applying them to the case at hand. Given that the case involved killing by the Respondent State's own military forces, it was unnecessary (one might even say, confusing) to assess whether the conduct came from 'persons acting under the direction or control of the State' or to find that the Respondent 'negligently allowed' the killing in question.[269] Similarly, in the very recent case of *Makuchyan and Minasyan v. Azerbaijan and Hungary*,[270] the ECtHR analysed Article 11 ARSIWA and considered this provision to represent 'the current standard under international law' from which it could not deviate.[271] The Court did not find that Azerbaijan had not acknowledged and adopted as its own the killing of an Armenian officer by an Azeri military officer attending a language course abroad. Nevertheless, as this Chapter explained, there is at least a plausible argument to be made that Azerbaijan had in fact not only approved and endorsed but also acknowledged and adopted the conduct of its officer as its own.

Finally, in one case analysed in this Chapter, the human rights court in question identified one of the attribution provisions from ARSIWA as relevant, even though it should have opted for a different one. Thus, in *African Commission on Human and Peoples' Rights v. Libya*, the ACtHPR cited and applied Article 9 ARSIWA in support of its conclusion that the Respondent State was responsible for the conduct of the NTC, which at that time enjoyed international recognition as Libya's government. However, as explained in this Chapter, this was not the correct standard of attribution to be applied, given the fact that a *de facto* government is a State organ falling within the scope of Article 4 ARSIWA.

Accordingly, based on the cases examined in this Chapter, it can be concluded that human rights law knows no *lex specialis* rules on the attribution of conduct. In light of this, applicants are well-advised and on safe grounds to rely on the relevant provisions of ARSIWA when pursuing their case before human rights courts. Human rights courts, on their part, have at their disposal a valuable and authoritative instrument in the form of ARSIWA when holding States responsible for the conduct of State organs acting in official capacity (even if *ultra vires*) or put at their disposal, as well for the conduct of non-State actors coming within the purview of Articles 8 to 11 ARSIWA.

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[268] ECCJ, *Adamu and Others v. Nigeria* (2019).
[269] *Ibid*, 12 and 13.
[270] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020)
[271] *Ibid*, para 112 jo. paras 34–35.

CHAPTER 5 ATTRIBUTION OF CONDUCT IN CASE LAW ON THE TERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

A. Introduction

The previous Chapter analysed the *standard* of attribution that has been used in case law of human rights courts in order to hold a State responsible for the conduct of its organs or that of persons or entities acting on its behalf. In these cases, the territorial application of the human rights treaty as such was uncontested. The topic of this Chapter is different, as it examines the *function* of attribution as a legal operation in determining the territorial application of a human rights convention, to the effect that the relevant court can exercise jurisdiction over violations. The cases considered here are those in which jurisdiction and applicable law is contested by the respondent State, or examined *proprio motu*.

This Chapter will focus on the case law of the European Court of Human Rights (ECtHR).[1] By now, this Court has formed a considerable body of case law with regard to both the extraterritorial application of the European Convention on Human Rights (ECHR, or the Convention), as well as the closely related question of inapplicability of (parts) of the ECHR within a State's own territory.[2] The cases that have touched upon these questions constitute a patchwork of case law. It has been difficult to discern any underlying systematic approach, in particular when the relevant claims concern the alleged responsibility of a State for conduct outside its national territory, or its responsibility with respect to territory over which it has lost control to another State. The ultimate aim of this Chapter is to examine the interaction between the

[1] It is unclear to what extent the human rights obligations of the Economic Community of West African States (ECOWAS) member States have extraterritorial application. The Community Court of Justice of the Economic Community of West African States (ECCJ) is competent to adjudicate disputes concerning human rights violations 'that occur in any member State'; see Art 9(4) ECCJ Protocol as amended by Art 3 Supplementary ECCJ Protocol. Thus, the territory of the fifteen ECOWAS member States delineates the *espace juridique* over which the ECCJ can exercise jurisdiction. There are two ways of interpreting this provision. First, it could mean that human rights violations committed *abroad* by a State fall under the Court's jurisdiction, but only insofar as the violations occur in the *espace juridique* of another member States. Alternatively, it could simply mean that the jurisdictional competence of the ECCJ extends to the *espace juridique* of the fifteen ECOWAS member States, but only for human rights violations that occur within a member State's *own* territory. The Court has not yet pronounced on this issue; see Ebobrah (2019a) para 24. For a critique on the territorial clause in Art 9(4) ECCJ Protocol, see Sall (2019) 194–95. As for the other African sub-regional human rights court, the East African Court of Justice (EACJ), there is no provision that defines the territorial jurisdiction and there is no case law on this matter either.

[2] See generally Coomans and Kamminga (2004); Gondek (2004); Milanović (2011); Da Costa (2012); Blum (2015); Karakaş and Bakirci (2018); Kempees (2020); Mallory (2020).

substantive law as found in the Convention, rules of attribution as found in the law of State responsibility, and the availability of procedural avenues of redress for victims with respect to the enforcement of obligations arising out of the Convention.

As will be shown below, analytically speaking the law of State responsibility, the existence and exercise of a State's jurisdiction, and the jurisdiction of the Court are separate issues, each governed by their own rules of international law. Indeed, the question of application of a human rights treaty (i.e. the question of State jurisdiction and consequently the Court's jurisdiction) are separate in that they form preliminary questions that are without prejudice to the merits.[3] However, even though these issues are conceptually distinct, this does not exclude the possibility that matters of attribution, jurisdiction and responsibility in one way or another relate to each other or have a certain consequential influence over each other. The main goal in this Chapter is then to analyse whether the ECtHR determines the applicability of the Convention by reference to the same standard as is used for establishing State responsibility *stricto sensu*. In other words, is the territorial applicability of the Convention defined through the rules of attribution as found in the law of State responsibility (either the general law of State responsibility, or *lex specialis* rules of attribution), or rather, is this done on the basis of a legal operation that is altogether different from State responsibility law?

This Chapter will first contextualize a number of methodological difficulties and relevant legal terms, i.e. jurisdiction, control and attribution (Section B). This is followed by an examination of the jurisdiction of the Court, with a specific focus on its jurisdiction *ratione personae* and *ratione loci* (Section C). Following this, Section D looks at the presumption of territorial application, as well the exceptions in terms of intra- and extraterritorial application of the Convention. Finally, Section E ties these concepts back together to support the argument that attribution rules from the law of State responsibility play a decisive (though by the Court insufficiently recognized) function in relation to the territorial application of the Convention.

B. In Search of a Sound Methodology for the Determination of State Responsibility in Extraterritorial Situations

The issue of the applicability of human rights treaties is a fundamental one. Simply put, if such a treaty does not apply to the conduct that is alleged to constitute a violation, there will be no breach of that treaty in the first place, and thus no State responsibility. Victims who suffered infringements of their rights will want to turn to human rights courts to have their human rights adjudicated but this requires that the norms those courts monitor are applicable in the first place. The issue is thus not

[3] Coomans and Kamminga (2004) 1.

merely academic food for thought or pedantic nitpicking.[4] This topic is all the more important because States and non-State actors have the potential to pose an enormous threat to the enjoyment of human rights of individuals. Globalization and privatization have resulted in a wider theatre of operations for States that increasingly rely on non-State actors for carrying out State functions or pursuing State policies.[5] For individuals in Europe, the Convention offers a unique mechanism to address alleged human rights violations arising out of such situations. It involves a judicial procedure with direct access for individual victims.[6] Moreover, it entails binding judgments and a built-in enforcement mechanism under the aegis of the Council of Europe.[7] However, for individuals to successfully challenge these acts as a violation of their rights, they first have to overcome the preliminary hurdle of grounding the impugned conduct in the ECHR as applicable normative framework.

Unravelling the relationship between attribution, the scope of a State's jurisdiction, and the jurisdiction of the ECtHR is not an easy task. In situations where the State is alleged to control foreign territory, either directly or indirectly, the Court does not always present clear legal solutions or reasoning when holding a State responsible under the for the conduct of its organs or that of other actors through whom it acts. The other side of the coin — a State's responsibility for what happens on territory it has lost control over — is equally unsettled in case law and has so far received much less attention in human rights courts and legal writing.[8] Indeed, the case law on this topic as accumulated by the ECtHR has attracted severe criticism

[4] See also Lawson (2004) 84: 'The question whether the ECHR applies to armed forces on foreign soil is not a mere toy for academics'. For a contrary position, see ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004), Dissenting Opinion of Judge Kovler, arguing that the notions of responsibility and jurisdiction 'are to an extent autonomous in relation to each other, though it might be objected that the distinction is academic'.

[5] The roles of privatization and globalization and their impact on the prominence of non-State actors in international law have been widely commented on in the literature. See among many sources e.g. International Law Association (Committee on Non-State actors, 2005–2016), *Final Report*, Johannesburg Conference.

[6] See Art 33 ECHR.

[7] See Art 46 ECHR.

[8] See Yudkivska (2018) 135, noting that this is 'an unfairly neglected question that is not sufficiently developed in either the doctrine or the practice of international tribunals … but is important and is bound to grow even more so in the coming year'.

for its inconsistency from the bench itself,[9] but also from domestic courts[10] and academics.[11]

To some extent, the rather unsystematic and haphazard approach of the Court may be explained by the fact that certain highly relevant terms of art have different meanings depending on the context in which they are used.[12] For example, the notion of control plays a role in assessing whether the behaviour of a non-State actor can be attributed to a State pursuant to Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts[13] (ARSIWA, or the Articles), so as to fall within the Court's jurisdiction *ratione personae*. Yet, the term "control" is also used to determine whether a victim is within a State's jurisdiction and thus protected by the substantive rights and freedoms pursuant to Article 1 of the Convention.[14] The term "jurisdiction", in turn, may refer to the above-mentioned reach of substantive obligations imposed by the Convention on a State or, alternatively, to the competence of the Court to take cognizance of complaints alleging violations of these rules. Lastly, the term "responsibility" has been used by the ECtHR to denote the existence of State jurisdiction in the sense of Article 1 ECHR, or state responsibility proper in the sense of having committed an internationally wrongful act.

Another cause of the lack of clarity and predictability in the Court's reasoning with respect to the extraterritorial application of the Convention and situations involving non-State actors is that the Court tends to judge such cases on a need-to-decide basis. In his lengthy, articulate concurring opinion in *Al-Skeini and Others v. United Kingdom*, for example, Judge Bonello laments that the judicial decision-making process in Strasbourg suffers in some ways from internal contradiction and that it has 'squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application'.[15] Indeed, while the Court generally makes a point in recalling its earlier case law, it often does

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[9] See e.g. ECtHR, *Chiragov and Others v. Armenia* (2015), Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, para 2, noting that 'most complex issues in the case are yet again those of jurisdiction and attribution of responsibility [and that the Court's] case-law has been criticised for creating uncertainty or even confusion between those two concepts'. For a contrary position, see Karakaş and Bakırcı (2018) 133, concluding that the Court has generated a 'coherent body of jurisprudence' on Art 1 ECHR.

[10] See e.g. UK House of Lords, *Al-Skeini and Others v. Secretary of State for Defence* (2007), Opinion of Lord Alan Rodger, para 67, criticizing that the Court's judgments and decisions on Art 1 ECHR 'do not speak with one voice'.

[11] See e.g. Crawford and Keene (2018) 198, describing the case law of the ECtHR on matters of extraterritorial jurisdiction and attribution as 'rather ragged and unsystematic'.

[12] See e.g. *ibid*, 190, noting that the 'overlapping terminology and lack of clarity in the Court's reasoning has given rise to much academic debate and considerable confusion'.

[13] International Law Commission (ILC), *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77.

[14] Art 1 ECHR provides that the States parties 'shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I [i.e. Arts 2–18] of this Convention'.

[15] ECtHR, *Al Skeini and Others v. United Kingdom* (2011), Concurring Opinion of Judge Bonello, para 7.

so in a way that creates the false impression that the case at hand fits perfectly in the body of earlier cases. Moreover, it may not always be clear in the Court's reasoning whether for the application of the Convention abroad, or the attribution to a State of certain conduct, a particular set of circumstances such as control over persons or territory is deemed sufficient (leaving open the possibility that other, less-demanding levels of control may do the trick as well) or rather necessary (in which case the identified level of control decisively represents a minimum-level; *a conditio sine quae non*).

As Dominic McGoldrick observed the topic of extraterritorial application, the correct methodology 'will determine what are the right questions and the right answers [and] that what appear to be the right answers are superficially attractive but they are answering the wrong questions'.[16] The present author would like to add that not only are the right questions important but also the correct order in which the Court poses them, the clarity of steps taken in judicial reasoning, as well as consistency in application. It would be expected that the Court, as any judicial dispute settlement body, undertake its function as guardian of the law in a clear, steady, predictable and logical manner. This is important not only from a substantive point of view when trying to analyse the case law by identifying similarities and patterns but also — arguably even more so — from a procedural point of view given that the lack of clarity and predictability regarding the issues addressed in this Chapter may thwart access to justice and form an impediment to reparation for victims of violations of the Convention.

C. Jurisdiction of the European Court of Human Rights

In international adjudication, the term jurisdiction refers to the question whether a court or tribunal can entertain a case and render a binding decision. The scope of a court or tribunal's jurisdiction is invariably regulated and circumscribed by its constituent instrument. In the European system of human rights protection, the Court has jurisdiction to interpret and apply the Convention, in particular in disputes brought to its attention by State parties (i.e. inter-State cases), or by any person, nongovernmental organization or group of individuals claiming to be a victim of a violation of the ECHR (i.e. individual applications).[17] Before proceeding with the merits of a case, however, it must first be ascertained that the case is admissible under the terms of Article 35 ECHR. If (or to the extent that) an application is inadmissible, the Court will not have jurisdiction to examine it in substance and the case will not proceed further.[18]

[16] McGoldrick (2004) 42.
[17] Arts 32–34 ECHR.
[18] Applications can be declared inadmissible in any stage of the proceedings; see Art 35(4) ECHR.

According to Article 35(3)(a), the Court shall declare inadmissible — and thus cease its exercise of jurisdiction with respect to — any application that, *inter alia*, 'is incompatible with the provisions of the Convention or the Protocols'.[19] The scope of obligations owed by the State under the ECHR — and by necessary implication the scope of jurisdiction of the Court[20] — involves four dimensions: jurisdiction *ratione materiae* (the rights in question must be protected by a treaty or protocol to which the State is party), jurisdiction *ratione temporis* (the conduct must have taken place after the entry into force of the treaty), jurisdiction *ratione personae* (the conduct must be that of a State party, i.e. it must be attributed to it), and jurisdiction *ratione loci* (the conduct must occur within a State party's territory and/or jurisdiction). The grounds of incompatibility *ratione personae* and *ratione loci* are thus of essential importance for this Chapter.[21] Consequently, Article 35 ECHR brings together questions of attribution of conduct to a State and the existence of State jurisdiction in terms of Article 1, requiring that both conditions be fulfilled for the Court to be able to exercise its jurisdiction and consider the merits of a case.

D. State Jurisdiction under Article 1 of the European Convention on Human Rights

The ECHR constitutes a binding engagement for all the member States of the Council of Europe. Yet, it does not necessarily follow that each action of the States parties, wherever it may take place, is subject to the normative constraints imposed by it. Article 1 ECHR provides that the States parties shall secure to everyone 'within their jurisdiction' the rights and freedoms defined in Section I.[22] Consequently, the Convention can only be relied on when it is shown that the victim was within the State's jurisdiction. Adopting the terminology of the International Law Commission (ILC_ in its Fragmentation Report,[23] one thus needs to make a distinction between one the one hand the validity of a human rights treaty, and on the other its applicability. The fact that a human rights treaty is *valid* simply means that it is

[19] Art 35 ECHR formally applies to individual applications only. The ECtHR has held that 'this cannot prevent the Court [in inter-State cases] from establishing already at [the] preliminary stage, under general principles governing the exercise of jurisdiction by international tribunals, whether it has any competence at all to deal with the matter laid before it'; see *Georgia v. Russia (II)* (2011) para. 64.

[20] See Schabas (2015) 93: '[T]he scope of the obligations under the [ECHR] is identical to the jurisdiction of the [ECtHR].'

[21] In the ECHR system, the Court does not generally distinguish between jurisdiction and admissibility. Both issues are addressed when the Court makes a ruling that it calls an 'admissibility decision'; see Schabas (2015) 705. Thus, an application that does not fall within the above-mentioned dimensions of jurisdiction, will be declared inadmissible as incompatible with the provisions of the ECHR (or the Protocols) pursuant to Art 35(3)(a).

[22] Art 1 ECHR applies *mutatis mutandis* to the Optional Protocols to the Convention.

[23] ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi)*, UN Doc A/CN.4/L.682 and Corr.1 (2006).

'part of the international legal order,'[24] which is a matter of ratification and entry into force. To say that the Convention is *applicable* means that it 'provides rights, obligations or powers to a legal subject *in a particular situation*'.[25] The validity of the ECHR is regulated by Article 59 ECHR, while the application of it is a question of the existence and scope of State jurisdiction under Article 1 ECHR.

As the Court has held repeatedly, the exercise of State jurisdiction is a necessary condition for a State party to be able to be held responsible for its conduct that gives rise to an allegation of a violation of the Convention.[26] Put differently, Article 1 is a 'threshold criterion'.[27] The meaning of this notion is determinative of the 'scope and reach of the Convention'.[28] If the threshold is met, it triggers the application of the ECHR to the particular circumstances of the case. In this sense, human rights treaties bear similarities with international humanitarian law (IHL), given that the latter also knows a threshold of application. While all States parties to the Geneva Conventions[29] and their Additional Protocols[30] are bound by its provisions from the moment of ratification and entry into force, the vast majority of its provisions become applicable only when the threshold of an international armed conflict (IAC) or a non-international armed conflict (NIAC) has been met.[31]

Questions of State jurisdiction, attribution, breaches and State responsibility have puzzled judges at the ECtHR for years and continue to do so today. Thus in the *Banković* decision, the Court held that the questions of State jurisdiction and whether a person could be considered to have suffered of a violation of ECHR rights for which the State would be responsible, were 'separate and distinct' matters.[32] Yet, in *Andrajeva v. Latvia*, the Court took the position that the concept of State jurisdiction under Article 1 is 'closely linked to that of the international responsibility of the State concerned'.[33] In some cases, the Court appeared to found the existence of State

[24] *Ibid*, para 46 fn 48.
[25] *Ibid* (emphasis added).
[26] See e.g. ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) para 311.
[27] ECtHR, *Al-Jedda v. United Kingdom* (2011) para 74; *Ilaşcu and Others v. Moldova and Russia* (2004) para 311; *Al-Skeini and Others v. United Kingdom* (2011) para 130.
[28] ECtHR, *Banković and Others v. Belgium and Others* (2001) para 65.
[29] See Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention III relative to the Treatment of Prisoners of War; Geneva Convention IV relative to the Protection of Civilian Persons in Time of War.
[30] See Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; Additional Protocol II to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts.
[31] See further Chapter 6.
[32] ECtHR, *Banković and Others v. Belgium and Others* (2001) para 75.
[33] ECtHR, *Andrejeva v. Latvia* (2009) para 56.

jurisdiction merely on 'the relevant principles of international law governing State responsibility,'[34] whereas in others it seemed to be exactly the other way around.[35]

These matters have also troubled academic writers. For instance, Dominic McGoldrick claims outright that 'extraterritorial application is *not* a question of State responsibility' but at the same time admits that there is a 'link between the concepts of jurisdiction and responsibility'.[36] The relationship between human rights law and the law of State responsibility has also been touched upon by Robert McCorquodale, who argues that human rights law may 'require a lower level of control by a state over a non-State actor than that found in general international law'.[37] This possibility is indeed contemplated by Article 55 ARSIWA, which, as already mentioned,[38] envisages that attribution in the law of State responsibility rules do not apply to the extent they are deviated from by *lex specialis* primary rules of international law.[39] However, McCorquodale supports his argument by referring to the International Court of Justice (ICJ) judgment in *Armed Activities in the Territory of the Congo* dealing with extraterritorial application of human rights treaties.[40] In other words, McCorquodale uses a jurisprudential development on (extraterritorial) State jurisdiction (in this case: control over territory) to make a point about the attribution to a State of conduct of a non-State actor, as if the former *necessarily* says anything about the latter, which, as will be shown, is certainly not the case.

The notion of territorial application of human rights law will be examined more closely in the following Sections in order to put matters in perspective and adequately appreciate the function of attribution rules. As will be shown, the concept of State jurisdiction under Article 1 is underpinned by two presumptions. The first holds that everybody within a State's territory falls within its jurisdiction, while the second presumption entails that a State's jurisdiction does not extend outside its national territory.[41] However, the principle of territoriality and the lack of extraterritorial

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[34] ECtHR, *Loizidou v. Turkey (Merits)* (1996) para 52, recalling its earlier judgment of *Loizidou (Preliminary Objections)* (1995) para 62, even though that language did not appear in the preliminary objections judgment. To the contrary, in the latter the Court held that Turkey's State responsibility would have to be decided at the merits stage; see *Loizidou (Preliminary Objections)* (1995) paras 61 and 64.
[35] See e.g. ECtHR, *Ivanțoc and Others v. Moldova and Russia* (2011) para 120, holding that the Applicant fell within the jurisdiction of Russia and that 'its responsibility is *thus* engaged' (emphasis added). This finding was cited with approval in many cases, see e.g. *Sandu and Others v. Moldova and Russia* (2018) para 36.
[36] McGoldrick (2004) 42–43. Here, the author discusses the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR) and not the ECHR.
[37] McCorquodale (2009) 245.
[38] See Chapter 2, Sections C.2.b and D.3. See also Chapter 4, Section D.2.b.
[39] Art 55 ARSIWA.
[40] McCorquodale (2009) 245, citing ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) paras 179–80 and 219–20.
[41] See e.g. ECtHR, *Banković and Others v. Belgium and Others* (2001) paras 61 and 67; *Al-Skeini and Others v. United Kingdom* (2011) para 131.

application must be qualified to account for the fact that jurisdiction is neither equivalent nor limited to the territory of the States parties to the ECHR.[42]

D.1. The Principle of Territoriality: Scope and Exceptions

Regardless of nationality, everyone within the territory of a State party to the ECHR is presumed to be within that State's jurisdiction in the sense of Article 1 ECHR.[43] This presumption prevents that the Convention can be selectively restricted to parts of the territory of States, which would render the effective protection of human rights meaningless and allow discrimination between States parties.[44] Thus, within all of its territory a State must secure the full catalogue of rights and freedoms provided for by the Convention. The obligation under Article 1 to secure the rights and freedoms of the Convention encompasses negative obligations for the State to abstain from violating rights (i.e. obligations of result) and positive obligations to prevent that private actors infringe upon the enjoyment of human rights of other individuals (i.e. obligations of effort). Moreover, regardless of the identity of the individual who infringes human rights, States have the procedural obligation to investigate and prosecute if necessary (obligations of effort as well).

The presumption that the Convention applies in full throughout the whole of a State's territory is difficult to rebut. In the *Assanidze v. Georgia*, the Court examined whether the Respondent State could be held responsible for the acts of its local authorities.[45] The case concerned the Applicant's continued detention by the authorities of the Ajarian Autonomous Republic — a political-administrative region considered in domestic and international law as belonging to Georgia — following a conviction by Ajarian courts, despite having received a pardon for one offence by the Georgian president, and being acquitted for another by the Supreme Court of Georgia. The Court maintained the principle of territoriality and held that the Applicant's detention fell within the jurisdiction of Georgia, despite the fact that in the autonomous region the State 'encounter[ed] difficulties in securing compliance' with the Convention.[46] On the matter of attribution, the Court confirmed its earlier

[42] European Commission of Human Rights (ECionHR), *Cyprus v. Turkey* (1975) 136.
[43] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) para 312; *Assanidze v. Georgia* (2004) para 139. The ECHR does not permit the exclusion of territory from the scope of the Convention, other than through Art 56(1) ECHR; see *Matthews v. United Kingdom* (1999) para 29. According to Art 56(1), a declaration by the State is required to extend the territorial reach of the Convention to any of the non-metropolitan territories for whose international relations it is responsible. An additional declaration by the State is then required to recognize the Court's jurisdiction to receive individual applications; see Art 56(4).
[44] ECtHR, *Assanidze v. Georgia* (2004) para 142.
[45] *Ibid,* para 146.
[46] *Ibid,* paras 143 and 146.

case law that a State is strictly liable for the conduct of its organs,[47] regardless of the national authority to which the conduct in the domestic system is attributed.[48] Thus, the *Assanidze* case makes clear that for purposes of State responsibility under the ECHR, the mere autonomy of a part of the territory of a State is not sufficient to rebut the presumption of the principle of territoriality and the full application of the Convention.

In principle, the Convention is also applicable, with individuals continuing to be within its jurisdiction, when a State has lost control or authority over part of its territory to a third State that, in turn, exercises extraterritorial jurisdiction. This may happen (directly) when through its armed forces a third State becomes an occupying power, or (indirectly) when a third State exercises its authority and control by supporting or controlling local insurgents with a secessionist agenda within the territorial State.[49] The latter situation prevails in Moldova, which is not in control of the territory of the Moldavian Republic of Transdniestria, an unrecognized region with secessionist aspirations that is controlled or at least substantially supported by Russia. In four cases (i.e. *Ilaşcu*, *Ivanțoc*, *Catan*, and *Mozer*), which will be examined in more detail later from the point of view of Russia's responsibility,[50] the Court held that the range of the Convention's substantive obligations is limited in light of the exceptional circumstances that the territorial State faces. Rather than having to ensure the whole of the Convention, the territorial State, Moldova, is merely under 'positive obligations' to take appropriate steps through 'diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law' to ensure respect for the rights guaranteed by the Convention.[51]

According to the Court, this positive obligation encompasses two limbs, namely the obligation to take appropriate measures (1) to re-establish control over its territory (including the obligation to refrain from supporting the State or entity which controls the territory), and (2) to ensure respect for the human rights for those situated in that territory.[52] It is not completely clear, though, why the Court characterizes the obligation to refrain from support as a positive obligation, given that this is clearly a negative one, albeit that it derives from the larger (positive obligation) to re-establish control. It is not at all uncommon in international law for a positive obligation to have a negative dimension.[53] It is also unclear why the Court

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[47] *Ibid,* paras 146 and 149, citing *Ireland v. United Kingdom* (1978) para 159: 'The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected.'

[48] ECtHR, A*ssanidze v. Georgia* (2004) paras 145–46.

[49] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) paras 312 and 333.

[50] See *infra* Section D.3.b.

[51] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) paras 313, 331, 333 and 335. See also *Ivanțoc and Others v. Moldova and Russia* (2012) paras 105–07; *Catan and Others v. Moldova and Russia* (2012) paras 109–10; *Mozer v. Moldova and Russia* (2016) paras 99–100; *Sandu and Others v. Moldova and Russia* (2018) para 35.

[52] ECtHR. *Ilaşcu and Others v. Moldova and Russia* (2004) paras 339–40.

[53] For instance, the obligation for States to prevent genocide (positive obligation) includes the negative obligation to refrain from committing genocide; see ICJ, *Application of the Convention on the*

held, in *Ivanțoc*, that because of its positive obligations Moldova's responsibility 'could not be engaged on account of a wrongful act within the meaning of international law'.[54] After all, should Moldova by omission violate its positive obligations, this would be in breach of the Convention and thus constitute an internationally wrongful act in the sense of Arts 1, 2 and 12 ARSIWA. It is almost as if the Court takes the concept of internationally wrongful *act* too literally, as if it would encompass only action to the exclusion of omission.[55] Nevertheless, the Court held in *Ilaşcu* that Moldova had breached its positive obligations (i.e. under Articles 3 and 5),[56] whereas in *Ivanțoc*, *Catan*, *Mozer* and *Sandu* it found that Moldova had done enough.[57] Thus, what follows from this line of cases is that the scope of substantive obligations that a State has in respect of individuals within its territory under foreign control is closely linked to and ultimately depends on the existence of a controlling third State's extraterritorial jurisdiction. The latter question, it will be shown,[58] depends to a large extent on the attribution of the conduct of individuals through whose actions extraterritorial jurisdiction over foreign territory is exercised.

Matters become more complicated outside a State's own territory. As warned by former Court President Luzius Wildhaber, 'the Convention was never intended to cure all the planet's ills and indeed cannot effectively do so'.[59] At the same time, there is merit in the legal argument that a State cannot be allowed to do abroad what it is prohibited from doing on its own territory.[60] The Convention must therefore be interpreted and applied in a way that balances the legitimate interests of States as well as individuals. Such an interpretation would recognize that States have obligations in respect of situations abroad, but only when this would be reasonable in

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (2007) para 166. In this case, the ICJ was careful to confine itself to determining the scope of obligations arising out of the Genocide Convention without purporting to establish a general rule applicable to all cases where international law imposes an obligation to prevent (at para 429). Indeed, in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia) (Preliminary Objections)* (2019) paras 59–60, the ICJ held that the financing by a State of acts of terrorism is not covered by the scope of the International Convention for the Suppression of the Financing of Terrorism, thus agreeing with the Respondent State's position that the Convention is a 'law enforcement instrument' which does not cover issues of direct State responsibility for financing acts of terrorism.

[54] ECtHR, *Ivanțoc and Others v. Moldova and Russia* (2011) para 105.

[55] While the terminology is perhaps a bit inconvenient, the ILC makes clear that an internationally wrongful *acts* (or: conduct) may consist of actions or omissions; see Art 2 ARSIWA, commentary para 4.

[56] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) paras 448, 453 and 464.

[57] ECtHR, *Ivanțoc and Others v. Moldova and Russia* (2011) para 111; *Catan and Others v. Moldova and Russia* (2012) para 148; *Mozer v. Moldova and Russia* (2016) paras 155, 183, 200 and 216; *Sandu and Others v. Moldova and Russia* (2018) para 88.

[58] See *infra* Section D.3.

[59] Speech given by President Luzius Wildhaber on occasion of the opening of the judicial year of the Court (Strasbourg, 31 January 2002), quoted in Lawson (2004) 116.

[60] See e.g. Karakaş and Bakırcı (2018) 121–22, warning against giving States parties a '*carte blanche* to perpetrate human rights violations … which they cannot perpetrate on their own territory'.

light of the specific facts of a case and the level of influence or control that a State has over what happens.

Early decisions on the admissibility of individual complaints were indicative of the potential for the Convention to apply extraterritorially. For instance, in the case concerning the convicted Nazi war criminal Rudolf Hess who served his sentence in the Allied-controlled Spandau prison in Berlin, the European Commission of Human Rights (ECionHR) held that 'in principle, from a legal point of view, [there is] no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention'.[61] Although the application was declared inadmissible, this statement of principle demonstrates that while the scope of a State's jurisdiction is primarily territorial it is not exclusively so,[62] albeit that extraterritorial application remains, even today, an exceptional matter.[63] Looking at the Court's case law in retrospect, it is possible to discern that the extraterritorial application of the Convention has crystalized along the lines of two models: the personal model and the territorial model.[64] For the application of either model it is not required that the conduct abroad takes place in the territory of another State Party to the Convention (i.e. in the legal space — *espace juridique* — of the Convention).[65]

D.2. Extraterritorial State Jurisdiction under the Personal Model

Pursuant to the personal model, extraterritorial State jurisdiction is established on the basis of the legal or factual relationship between the State and the individual who alleges to be the victim of a human rights violation. The relevant test is whether an individual is under a State's 'authority and control through its agents' operating in another State.[66] The Court's case law offers a number of scenarios in which such authority or control exists, even though it must be admitted that the precise outer limits of this category remain uncertain, in particular when such authority or control is exercised from a distance.

First of all, the personal model is applicable when persons are affected by a State's extraterritorial exercise of *de jure* authority, whether based on a treaty or

[61] ECionHR, *Hess v. United Kingdom* (1975) 73.
[62] See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) para 109, noting that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory'.
[63] ECtHR, *Al-Skeini and Others v. United Kingdom* (2011) para 132.
[64] See e.g. ECtHR, *Al-Skeini and Others v. United Kingdom* (2011) paras 133–39. See further Schabas (2015) 101–04; Milanović (2018).
[65] ECtHR, *Al-Skeini and Others v. United Kingdom* (2011) para 142. This is a departure from *Banković and Others v. Belgium and Others* (2001) para 80, where the Court suggested that the Convention applies in an 'essentially regional context' and that extraterritorial application was limited to the legal space (*espace juridique*) that comprises the sum of the territory of the States parties.
[66] This formulation was used for the first time in ECtHR, *Issa and Others v. Turkey* (2004) para 71.

another source of international law. One of the earliest manifestations of the personal model on this ground can be found in a 1965 decision by the Commission, when a German national complained that German diplomatic and consular staff in Morocco requested the local authorities to expel him from the country. Deciding on the admissibility of the complaint, the Commission held that 'in certain respects, nationals of a Contracting State are within its "jurisdiction" even when domiciled or resident abroad' and that such is the case 'in particular [when] the diplomatic and consular representatives of their country of origin perform certain duties with regard to them'.[67] Thus, when in relation to individuals, diplomatic or consular agents in a host State exercise their functions on behalf of the sending State (e.g. by granting them passports, providing consular assistance in carrying out a court order of the sending State, bringing about their expulsion from the host State, or handing them over to the latter's authorities), these individuals are considered to be within the sending State's extraterritorial jurisdiction.[68] Other recognized exercises of sovereign authority based on international law are judges sitting outside a State's territory but applying their own national laws,[69] or the operation of State schools abroad.[70]

In addition to the exercise by a State of sovereign (*de jure*) authority, the personal model covers situations of *de facto* control, or physical power. A common denominator here is that the victim's freedom of movement is controlled, restricted or negated due to the actions of State agents, bringing the individual within the State's jurisdiction. Thus, when in the context of a law enforcement operation France took into custody a suspect of terrorism in Sudan, the Commission found that, from the time of being handed over to its agents, the Applicant was within French jurisdiction.[71] Other forms of liberty deprivation are internment or detention by a

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[67] ECionHR, *X. v. Germany* (1965). While there are exceptions — e.g. restrictions on the political activities of aliens (Art 16 ECHR) — the enjoyment of the rights and freedoms of the Convention generally does not depend on the nationality of the victim. Consequently, the Commission was right to drop the reference to 'nationals' in subsequent cases involving the (extraterritorial) application of the Convention.

[68] For other cases involving diplomatic and consular agents, see ECionHR, *X. v. United Kingdom* (1977) (on assistance by British consul in Amman in an effort to gain custody of Applicant's daughter after her father had taken her to Jordan); ECionHR, *M v. Denmark* (1992) (on being handed over to host State's police after having entered embassy premises). But see ECtHR, *M.N. and Others v. Belgium* (2020), concerning a humanitarian visa application by a Syrian family at the Belgian embassy in Beirut. Here the Court found that 'at no time did the diplomatic agents exercise *de facto* control over the applicants [who] freely chose to present themselves at the Belgian Embassy in Beirut, and to submit their visa applications there — as indeed they could have chosen to approach any other embassy; they had then been free to leave the premises of the Belgian Embassy without any hindrance'; *ibid*, para 118.

[69] Cf ECtHR, *Drozd and Janousek v. France and Spain* (1992).

[70] See ECtHR, *Gentilhomme and Others v. France* (2002) (on the operation of State schools abroad pursuant to a bilateral treaty arrangement).

[71] ECionHR, *Ramirez Sánchez v. France* (1996). See also ECtHR, *Öcalan v. Turkey* (2005) (on apprehension of Abdullah Öcalan by Turkish security forces operating in Kenya). See further ECtHR, *Issa and Others v. Turkey* (2004). In this case, the Applicants claimed that Turkish forces had entered northern Iraq and arrested and killed Iraqi shepherds. The Court did not find sufficient evidence for the involvement of Turkish soldiers in the operation. However, had such involvement been established

State party in times of IACs or NIACs,[72] or maritime operations where a State party's agents board and assume control over an intercepted vessel.[73]

When it comes to the exercise of physical power without prior arrest or detention, however, the picture becomes less clear. In its case law, the ECtHR appears to take the distance between the victim and the State agent using force as an important criterion. In the *Banković* case, the Applicants complained about an aerial bombardment of the RTS radio and television station in Belgrade, carried out by States participating in NATO Operation Allied Force during the Kosovo war. The Court noted that the Convention is designed to operate in 'an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States' and held that the situation of the Applicants was not comparable to earlier cases in which extraterritorial application was recognized.[74] Consequently, the Court found that there was no jurisdictional link between the victims and any of the seventeen Respondent States.[75]

Subsequent cases appear to have gradually departed from the narrow interpretation of State jurisdiction in *Banković*. In *Isaak*, for instance, the ECtHR accepted the extraterritorial application of the Convention to a person who was beaten to death by Turkish agents in the neutral United Nations (UN) buffer zone separating Greek-Cyprus from Turkish-Cyprus.[76] In *Jaloud* and *Pisari* the Court applied the personal model to individuals who were shot at when approaching or passing through vehicle checkpoints.[77] And, in *Pad* the Court appeared to entertain the possibility that the killing of individuals through helicopter gunfire on foreign territory brought the victims within the Respondent State's jurisdiction.[78] In this case, Turkey admitted that the fire discharged from its helicopters had caused victims but denied that this took place in Iranian territory. Accordingly, the Court did not find it necessary to determine the exact location of the attack.[79] That said, the Court's assessment of case law on extraterritorial application strongly suggests that the

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as a matter of fact, the victims would have been within Turkish jurisdiction as a result of the soldiers' control and authority over them; this interpretation was confirmed in *Al-Skeini and Others v. United Kingdom* (2011) para 136

[72] ECtHR, *Hassan v. United Kingdom* (2014) (on detention in Iraq during active hostilities in the invasion stage); *Al-Saadoon and Mufdhi v. United Kingdom* (2010) (on detention during the occupation of Iraq, followed by transfer to Iraqi authorities during NIAC); *Al-Jedda v. United Kingdom* (2011) (on detention in Iraq during NIAC).

[73] ECtHR, *Medvedyev and Others v. France* (2010). See also *Jamaa and Others v. Italy* (2012) (on transfer of the personnel of an intercepted vessel to the intercepting ship).

[74] ECtHR, *Banković and Others v. Belgium and Others* (2001) para 80.

[75] ECtHR, *Banković and Others v. Belgium and Others* (2001) para 82.

[76] ECtHR, *Isaak v. Turkey* (2006).

[77] ECtHR, *Jaloud v. the Netherlands* (2014) para 153; *Pisari v. Moldova and Russia* (2015). See also *Al-Skeini and Others v. United Kingdom* (2011) paras 149–50, where the Court held that all six victims were considered as being within the jurisdiction of the United Kingdom under the personal model, even though four of them had died in the course of security operations without a prior arrest or detention.

[78] ECtHR, *Pad and Others v. Turkey* (2007).

[79] *Ibid*, para 54.

outcome of the case would be the same, had it actually been proven that the acts took place on Iranian soil. If the location of the attack had been a decisive factual element in the case, one would have expected the ECtHR to look closer into this. After all, the Court must decide (if necessary, on its own motion) whether it has in fact jurisdiction, and whether the case is admissible *ratione personae* and *ratione loci*.

One particular variation to extraterritorial application concerns cross-border situations in which a State acts on its own territory but produces (or has the potential to produce) effects abroad. In the *Soering* case, the ECtHR held that a State Party would violate the Convention if it deports an individual to any other State where the individual would run a substantial risk of torture or inhuman or degrading treatment.[80] A second cross-border case is *Andreou*, in which the Applicant, while standing in Greek-Cypriot territory, was shot by Turkish agents in Turkish-Cypriot territory. The Court held that even though the Applicant sustained her injuries in territory over which Turkey exercised no control, 'the opening of fire on the crowd [took place] from *close range* [and] was the *direct and immediate cause* of those injuries,' such that the Applicant was within Turkish jurisdiction.[81]

These cases of *Soering* and *Andreou* are not concerned with extraterritorial application in the traditional sense.[82] After all, the decision to deport or open fire on someone is taken within a State's own territory. Nevertheless, it remains the case that the State exercises control over the individual by having a decisive effect on his/her enjoyment of human rights; the individual has no free will in the matter, similar to the cases of interception, arrest, and detention as mentioned above. Yet, these cases cause one to wonder how the Court would decide cross-border situations if there is a comparable causal link between the use of force and the injuries sustained, but with a less close range (e.g. through cross-border sniper fire, artillery fire or even ballistic missiles).[83] It is furthermore debatable that a distinction is made between force being used in a cross-border context, and air-to-surface force that is carried out wholly abroad.[84] Future cases will perhaps clarify to what extent the *Banković* decision still reflects today's law, and in what manner considerations of

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[80] ECtHR, *Soering v. United Kingdom* (1989).
[81] ECtHR, *Andreou v. Turkey* (2008) (emphasis added).
[82] ECtHR, *Banković and Others v. Belgium and Others* (2001) paras. 67–68.
[83] Cf ECtHR, *Al-Skeini and Others v. United Kingdom* (2001), Concurring Opinion of Judge Bonello, para 14: 'I resist any helpful schizophrenia by which a nervous sniper is within the jurisdiction, his act of shooting is within the jurisdiction, but then the victims of that nervous sniper happily choke in blood outside it.'
[84] Cf ECtHR, *Assanidze v. Georgia* (2004), Concurring Opinion of Judge Loucaides, arguing that the personal model must be understood to mean 'the possibility of imposing the will of the State on any person [including] any kind of military or other State action on the part of the High Contracting Party concerned in any part of the world'. See also UK High Court of Justice, *Al-Saadoon and Others v. Secretary of State for Defence* (2015) para 107, reasoning that when the lesser use of force of apprehending someone suffices for jurisdiction under Art 1 ECHR, 'it makes no sense to hold that the greater use of force involved in killing someone does not have that effect'. See similarly Caflisch (2017) 194, noting that a State sending troops abroad exercises jurisdiction whenever its troops 'are in control of [a] specific event or situation'.

proximity and causality play a role in the establishment of extraterritorial State jurisdiction.[85]

In any event, as confirmed in *Al-Skeini*, the application of the personal model to extraterritorial conduct qualifies the extent of substantive obligations imposed on the State.[86] Even though the victim abroad may be within the reach of the Convention for the purpose of Article 1, it is not necessary for the State to secure the whole catalogue of rights and individual freedoms. The range of rights and freedoms is proportionate to the level of control. It is, for example, appropriate to expect the State to refrain from violating the right to life or the prohibition of torture, whereas other obligations, such as to ensure the right to education or the freedom of assembly, are less likely to be applicable to persons finding themselves in such situations. Hence, contrary to the Court's all-or-nothing approach in *Banković*, the Convention rights can be 'divided and tailored' with the effect that only rights and freedoms apply that are relevant to the situation of individual concerned.[87]

D.3. Extraterritorial State Jurisdiction under the Spatial Model

Under the territorial or spatial model, the State's exercise of control is relevant as well, but here control exists in relation to an inanimate object, territory, as opposed to a human being (the victim). It is by now established case law that a State's jurisdiction extends when as a consequence of military action it exercises control over territory beyond its national borders. For this particular type of extraterritorial application of the ECHR, it is irrelevant whether the military action leading to territorial control is lawful or not, or whether the State claims title to that territory.[88]

A paradigmatic form of extraterritorial control of territory is belligerent occupation. According to Article 42 of the 1907 Regulations concerning the Laws and Customs of War on Land, territory is considered occupied 'when it is actually placed under the authority of the hostile army [and] extends only to the territory where such

[85] These questions will certainly be at the heart of some upcoming cases that are still to be decided by the ECtHR on the merits, most notably *Georgia v. Russia (II)* (concerning the armed conflict between Georgia and Russia in 2008), *Ukraine and the Netherlands v. Russia* (concerning the downing of MH17 and other alleged human rights violations in Eastern Ukraine) and *Hanan v. Germany* (concerning an airstrike in Afghanistan in 2009 that was ordered by a colonel of the German contingent of the NATO-commanded International Security Assistance Force).
[86] ECtHR, *Al-Skeini and Others v. United Kingdom* (2001) para 137
[87] *Ibid*. This is a clear departure from *Banković and Others v. Belgium and Others* (2001) para 75, where the Court held that the Convention applies in an all-or-nothing manner.
[88] See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* para. 118: 'Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.' See also Raible (2018).

authority has been established and can be exercised'.[89] There is wide agreement that occupation requires the fulfilment of three specific conditions: (1) presence of foreign troops who exercise effective control over the territory, (2) substitution of their authority for that of the territorial State, and (3) lack of valid consent by the territorial State.[90]

The classical example of occupation is where a State's armed forces exercise territorial control so as to constitute an occupying power.[91] Less straightforward, however, are situations that are not "classical" occupations in the sense of continued presence of a State's own armed forces. A State's armed forces may initially be present on and control the territory, but subsequently withdraw after transferring its authority and control to a (pre-existing or newly put in place) local administration. Alternatively, a State may, without ever having had its own "boots on the ground", control or otherwise support a non-State actor, which in turn can be said to exercise territorial control on the State's behalf. These situations have proven to pose difficulties, in particular because the question of occupation (or other forms of territorial control) and consequently the extraterritorial application of the Convention, is often intrinsically tied to the question of attribution. Some of these situations were the subject of proceedings before the ECtHR, notably in cases involving northern Cyprus (with respect to the extraterritorial jurisdiction and responsibility of Turkey), Transdniestria (with respect that of Russia), and Nagorno-Karabakh and the Lachin district (with respect to that of Armenia).

D.3.a. Northern Cyprus

The ECtHR introduced the territorial model for the first time in *Loizidou v. Turkey*. The Applicant in the case, Ms Loizidou, was owner of a number of plots of land located in northern Cyprus. Following the Turkish invasion and subsequent occupation in 1974, she fled to the southern part of the island. She claimed that Turkish forces prevented her from returning to, use and enjoy her property, allegedly in violation of

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[89] Art 42 Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land. This provision represents customary international law, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, paras 78 and 89; ECtHR, *Sargsyan v. Azerbaijan (2015)* paras 94 and 144.

[90] See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* para 173; Ferraro (2012) 143. As a matter of law, it cannot be ruled out that the Convention applies extraterritorially to forms of territorial control other than occupation, see ECtHR, *Jaloud v. the Netherlands* (2014) paras 141–42.

[91] Cases such as *Al-Saadoon and Mufdhi*, *Al-Skeini*, and *Hassan* show that if a person is wounded or killed in occupied territory by a State in the course of security operations or detention, the ECtHR is more likely to apply the personal model, rather than assessing whether the victim falls within that State's jurisdiction under the spatial model, e.g. as a result of the State being an occupying power.

Article 1 of the (First) Protocol to the ECHR (protection of property).[92] In the Preliminary Objections phase the Court considered the arguments by Turkey that the matters complained of did not fall within the latter's jurisdiction, and that its forces were exercising public authority on behalf of the (unrecognized) Turkish Republic of Northern Cyprus (TRNC), which Turkey alleged was not imputable to it. The Court framed this as preliminary objection *ratione loci*,[93] but Turkey's argument on attribution also had a clear nuance of a preliminary objection *ratione personae*.

The ECtHR did not follow Turkey's argument. First, the Court held that it was not yet necessary to pronounce on the actual responsibility of Turkey or on the 'principles that govern State responsibility' in situations of occupied territory.[94] Instead, the Court held that it was only called upon in the preliminary objections stage to examine whether Ms Loizidou's impeded access to her property was capable of falling within Turkey's (extraterritorial) jurisdiction.[95] It then went on to interpret Article 1 of the Convention, holding that:

> The concept of "jurisdiction" [under Article 1 of the Convention] is not restricted to the national territory of the High Contracting Parties. … Bearing in mind the object of the Convention, the 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. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised *directly*, through its armed forces, or through a *subordinate* local administration.[96]

Given that Turkey had acknowledged that the Applicant's loss of access to her property was caused by Turkish forces during the occupation of northern Cyprus and the establishment therein of the TRNC, the Court held that 'such acts are capable' of falling within Turkey's jurisdiction within the meaning of Article 1.[97] Accordingly, it rejected Turkey's objection, while explicitly reserving for the merits the specific question of whether the matters complained of could be attributed to Turkey and give rise to State responsibility under the Convention.[98]

In its judgment on the merits, the Court recalled that in the preliminary objections stage it found that 'in conformity with the relevant principles of international law governing State responsibility … the responsibility of a Contracting Party could … arise when [it exercises] effective control of an area outside its national territory'.[99] In other words, the Court found that the international law of State

[92] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (First Optional Protocol).
[93] See ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (1995) para 55.
[94] *Ibid*, para 61.
[95] *Ibid*.
[96] *Ibid*, para 62 (emphasis added).
[97] *Ibid*, paras 63–64.
[98] *Ibid*, para 64.
[99] ECtHR, *Loizidou v. Turkey (Merits)* (1996) para 52.

responsibility informed its conclusion that effective control of an area is constitutive of State jurisdiction in the sense of Article 1 ECHR. Focusing on whether Turkey could be held responsible under the Convention for the acts of the TRNC, the Court then added:

> It is not necessary to determine whether … Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops … in northern Cyprus that [Turkey's] army exercises *effective overall control* over that part of the island. Such control … entails her responsibility for the policies and actions of the "TRNC" … [Turkey's] obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.[100]

The ECtHR concluded its consideration of this issue by holding that the Applicant's loss of access to her property fell within Turkish extraterritorial jurisdiction and was 'thus imputable to Turkey'.[101]

The *Loizidou* judgments are exemplary for the confusing way in which the ECtHR treats the concepts of attribution, jurisdiction of the State in the sense of Article 1 ECHR, and jurisdiction of the Court. For one, the Court made it unnecessarily complicated for itself by seeking to divorce questions of procedure (admissibility and State jurisdiction) from substance (the merits of the case: the actual violations). When the Court assesses the question of extraterritorial application, such an inquiry often demands an in-depth legal appreciation of the specific factual circumstances of the case, and the various actors involved. Given that it is rather difficult to examine jurisdiction and admissibility distinct from the merits, a better approach would have been to join these objections to the merits, and decide on both in a single judgment.[102] Indeed, in all subsequent cases on extraterritorial application where objections *ratione loci* and/or *ratione personae* are raised, the admissibility of the case is decided together with the merits, or joined with the merits

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[100] *Ibid*, para 56 (references omitted). Note how all of a sudden, the Court speaks of 'effective overall control' instead of 'effective control' that was used earlier in the preliminary objections phase. From the judgment in *Catan and Others v. Moldova and Russia* (2012) onwards, the Court merely speaks of 'effective control' of territory as the relevant criterion for extraterritorial application (at para 106). See further *Chiragov and Others v. Armenia* (2015) paras 168–69; *Mozer v. Moldova and Russia* (2016) para 101.
[101] ECtHR, *Loizidou v. Turkey (Merits)* (1996) para 57.
[102] See e.g. ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (1995), Joint Dissenting Opinion of Judges Gölcüklü and Pettiti, arguing that the Court could not rule on Art 1 jurisdiction without examining the *de jure* and *de facto* situation in northern Cyprus as to the merits. See also *Pad v. Turkey* (2007) para 50 (referring to the Applicants' argument that the burden of proving at the admissibility stage the involvement of Turkey's agents within the territory of Iran would be 'tantamount to having to prove the merits of the case as a precondition to establishing jurisdiction'); Crawford and Keene (2018) 197 (pointing out that joining preliminary objections to the merits makes it 'more likely that the facts will have been fully argued by the time that the ECtHR comes to determine a question of jurisdiction, making it easier to determine attribution then, where it may be required').

where a decision on admissibility *is* taken separately (e.g. where objections on other grounds were raised in addition to *ratione personae* and/or *ratione loci* objections).

More importantly for this Chapter though, is the fact that the ECtHR applies the law of State responsibility in the preliminary objections phase *in order to* determine, at a procedural level, the existence of State jurisdiction, while in the merits phase, at the substantive level, it appears as if the responsibility of Turkey for the acts of the TRNC *follows from* the existence of jurisdiction. The circularity of this reasoning is exacerbated by the use of imprecise language — e.g. 'responsibility … may arise' or 'control [over territory] entails responsibility' — without explaining whether this 'responsibility' refers to the "arising" of obligations under the primary rules of the Convention (in the sense of triggering jurisdiction under Article 1) or State responsibility proper in the sense of having committed an internationally wrongful act.[103]

Related to this, it is rather unclear whether the ECtHR is holding Turkey directly responsible for the acts of the TRNC as a non-State actor whose conduct is attributed to it, or instead whether Turkey is responsible for its failure to exercise due diligence obligations to prevent the infringement of human rights by the TRNC (i.e. indirect responsibility). Thus, while the *Loizidou* judgments for the first time make clear that a State can be held responsible for breaches of the Convention if in the course of military action it comes to control foreign territory by acting through its forces or a subordinate local administration, it falls short of clearly explaining how concepts such as attribution, jurisdiction and responsibility relate to each other.

In *Cyprus v. Turkey (IV)*, the Court had an opportunity to clarify its earlier judgments in *Loizidou*.[104] This case dealt with various allegations brought on behalf of Greek-Cypriots (e.g. missing persons, home and property rights, living conditions in northern Cyprus) and dissident Turkish Cypriots and members of the Gypsy community (e.g. arbitrary arrests, discrimination, ill-treatment). Citing with approval the holding from the merits phase of *Loizidou* that Turkey has 'effective overall control over northern Cyprus,' the Court specified that Turkey's 'responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support'.[105] On this basis, the Court found that the matters complained of fell within Turkish extraterritorial

[103] The diverging use and meaning of the word "responsibility" is not unique to the European human rights system. Consider, among many examples, the doctrine of Responsibility to Protect, as articulated in the 2005 World Summit Outcome (UN General Assembly [UNGA] Resolution 60/1 of 16 September 2005, UN Doc A/RES/60/1 (2005) paras 138–39), which employs the word responsibility in the meaning of obligation in the sense of a primary rule of international law. On the different meanings of the term "responsibility" in the law of the sea, see the helpful and precise observations of the International Tribunal for the Law of the Sea (ITLOS) in *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (Advisory Opinion) (2011) paras. 64–71.
[104] ECtHR, *Cyprus v. Turkey (IV)* (2001).
[105] *Ibid*, para 77.

jurisdiction and 'therefore entail[ed] its responsibility under the Convention'.[106] The Court added that a State's responsibility may *also* be engaged when, with respect to the actions of private parties, a State's authorities '[acquiesce or connive] in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction'.[107]

Given that the latter consideration (i.e. indirect responsibility) is presented as an alternative ground for State responsibility, its earlier mention of State responsibility for acts of the local administration which survives by virtue of Turkish support (i.e. TRNC) must be understood to be one of direct responsibility, namely attribution of the acts of the TRNC to Turkey, based on the existence of the latter's jurisdiction and its provision of support. Yet, this raises a number of questions. For example, what is the decisive factor that underpins this direct attribution? Is it the existence of Turkish extraterritorial jurisdiction as such? Or is it rather the status of the TRNC as a local administration that survives by virtue of crucial Turkish support (i.e. TRNC as *de jure* or *de facto* State organ in the sense of Article 4 ARSIWA, or an entity under the control of Turkey in the sense Article 8 ARSIWA)? More fundamentally, did attribution (and State responsibility) follow from jurisdiction, or was it rather the other way around?

Thus, by failing to explain in unequivocal terms the interaction between the concepts of attribution, jurisdiction and responsibility the northern Cyprus cases cast a shaky foundation for the territorial model. Unfortunately, these precarious cases and their flawed methodology cascaded down in later cases that similarly involved military action, territorial control, and/or occupation.

D.3.b. Transdniestria

Contrary to the factual circumstances underlying the North Cyprus judgments referred to above, the cases dealing with Transdniestria concern a situation in which the troops of one State (Union of Soviet Socialist Republics, now Russia[108]) remain present on the territory of another (Moldova), following the latter's independence from the former. In June 1990, Moldova proclaimed its sovereignty and independence from the Union of Soviet Socialist Republics. Immediately after, a separatist regime declared the independence of the unrecognized Moldovan Republic of Transdniestria (MRT) — a region in the east of Moldova, bordering Ukraine. In November 1990, hostilities broke out between Moldovan forces and MRT separatists, culminating in an armed conflict that lasted until July 1992 when a ceasefire agreement was signed. Both before and after the ceasefire agreement Russia's 14th Army remained present

[106] *Ibid*, para 80.
[107] *Ibid*, para 81.
[108] It should be noted that troops of the Union of Soviet Socialist Republics were present in Moldova but when the former ceased to exists these troops become Russian troops, Russia being considered the successor State in international law.

in MRT, despite the Moldova's repeated requests to withdraw the troops and military equipment. Russia (or 14th Army acting on its behalf, subsequently the ROG) provided the separatists with arms and equipment, participated in the planning of military operations, and sustained the separatist regime through various forms of political and financial support.[109] Instead of Moldova, it was Russia and MRT forces that exercised control over MRT territory.

The complex situation on Moldova has given rise to a number of judgments. In each of these cases, the Applicants claimed that Russia was responsible for violations of the ECHR, on account of its *de facto* control of Transdniestria and the support given to the separatist regime established there.

The Applicants from the first case, *Ilaşcu*, were arrested in Tiraspol (the administrative capital of MRT) in June 1992 by a number of persons, some of whom were wearing the uniforms of the 14th Army, while others wore camouflage gear without insignia. They were detained, in turn, in MRT police headquarters and in the 14th Army garrison headquarters, until they were brought to stand trial before the "Supreme Court of the MRT", which sentenced them to the death penalty (in case of the first Applicant) or substantial terms of imprisonment (in case of the other three Applicants). The Applicants complained that their detention, conviction, and subsequent treatment violated their rights, most notably Articles 3 and 5 ECHR. The ECtHR started by recalling its earlier case law on extraterritorial jurisdiction (most notably *Loizidou (preliminary objections)*, *Loizidou (merits)* and *Cyprus v. Turkey (IV)*), and added that the acquiescence or connivance of a State party's authorities in the acts of private individuals may engage State responsibility especially 'in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community'.[110] On the question of extraterritorial application of the Convention in respect of Russia, the Court found that

> [T]he "MRT", set up in 1991–92 with the support of the Russian Federation, vested with organs of power and its own administration, remains *under the effective authority, or at the very least under the decisive influence*, of the Russian Federation, and in any event … it *survives by virtue of the military, economic, financial and political support given to it* by the Russian Federation.[111]

Consequently, the Court held that there is a 'continuous and uninterrupted link of responsibility' on the part of Russia for the Applicants' fate,[112] such that they fell within the latter's extraterritorial jurisdiction and that its responsibility was 'engaged'.[113] This Court also held that, '[r]egard being had to the principles of States'

[109] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) paras 46, 48–138, 380–82, 390.
[110] *Ibid*, para 318.
[111] *Ibid,* para 392 (emphasis added). See also para 382, for a similar phrasing.
[112] *Ibid*, para 394.
[113] *Ibid*.

responsibility for abuses of authority'[114] it was irrelevant that the Russian Army itself did not participate in the military operations between the Moldovan forces and the MRT separatists.[115] It was also found to be irrelevant that after 5 May 1998 (i.e. the date the Convention entered into force for Russia), agents of Russia did not participate directly in the treatment of the Applicants.[116]

The ECtHR confirmed this finding of extraterritorial jurisdiction by Russia over the MRT in *Ivantoc*, involving the continued detention of two of the Applicants from the *Ilaşcu* case despite the Court's ruling in that case that the Respondent States should ensure their release.[117] As the Court held, by providing weapons and political, financial and economic support to the separatist regime Russia 'continued to enjoy a close relationship' with the MRT, and Russia had continuously failed to prevent the violations or bring to an end the situation brought about by its agents. [118] Thus, the Court held, the Applicants were 'within [Russia's] jurisdiction and its responsibility [was] thus engaged'.[119]

Another case dealing with Russia's responsibility for events taking place in MRT is *Catan*. In this case, the Applicants complained *inter alia* that Article 2 of the First Optional Protocol (right to education) had been violated when authorities of the MRT forced their school to be closed down, due to the education being offered in the "Moldovian" (Moldovan/Romanian) language using the Latin alphabet, rather than the Cyrillic alphabet that was required by the MRT. Russia argued that it did not exercise extraterritorial jurisdiction, given that the territory in question was controlled by a *de facto* government which was not its "organ or instrument" in the sense of the ICJ's holding in *Bosnian Genocide* re completely dependent *de facto* organs.[120] However, according to the ECtHR, *Bosnian Genocide* was not relevant to the different question of jurisdiction, and that 'the test for establishing the existence of [Article 1 jurisdiction] has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law'.[121] As to Article 1 jurisdiction, the Court recalled its factual and legal findings in *Ilascu*, and held that the MRT's 'high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence' over the MRT administration, with the result that the Applicants fell within the jurisdiction of Russia.[122] This finding with regard to Russia's jurisdiction was later confirmed in *Mozer* in which the Applicant was arrested and detained following an

[114] *Ibid*, para 380. The ECtHR refers to Art 7 ARSIWA as a principle of international law that is relevant to the examination of the question of whether the Applicants come within the jurisdiction of Russia; see *ibid*, para 376 jo. 319.
[115] *Ibid*, para 380.
[116] *Ibid*, para 393.
[117] ECtHR, *Ivanţoc and Others v. Moldova and Russia* (2011) paras 116–20.
[118] *Ibid*, paras 117–19
[119] *Ibid*, para 120.
[120] Ibid, para 96.
[121] ECtHR, *Catan and Others v. Moldova and Russia* (2012) para 115.
[122] *Ibid*, paras 122–23.

order by MRT courts, and in *Sandu* where a large group of Applicants complained about restricted access to and use of rented or owned parcels of agricultural land.[123]

A significant distinction between *Ilaşcu* and *Ivanțoc* on the one hand, and *Catan*, *Mozer* and *Sandu* on the other, is the fact that in the latter three cases there was no indication of any direct participation by Russian agents in the measures taken against the Applicants.[124] With respect to Russia's responsibility for the alleged acts, the Court simply sidestepped this by recalling its earlier case law, most notably *Loizidou (Merits)*, holding that, for Russia to be internationally responsible, it was not necessary that it exercise 'detailed control over the policies and actions of the subordinate local administration,' i.e. of the MRT.[125] Thus, the Court found that, Russia violated Article 2 of the First Optional Protocol in *Catan*,[126] Articles 3, 5(1), 8, 9 and Article 13 taken in conjunction with Article 3, 8 and 9 in *Mozer*,[127] and Article 1 and Article 13 in conjunction with Article 1 of the First Optional Protocol in *Sandu.*[128]

D.3.c. Nagorno-Karabakh

Nagorno-Karabakh is a region situated within Azerbaijan, consisting for the most part of ethnic Armenians who wish to be unified with Armenia. On 2 September 1991, a few days after Azerbaijan declared itself independent from Soviet Union, the region of Nagorno-Karabakh announced the establishment of the secessionist Nagorno-Karabakh Republic (NKR). To date, the self-proclaimed independence of NKR is not recognized by the international community. In early 1992, when Azerbaijan and Armenia were admitted to the UN, the lingering conflict escalated into a full-scale war, causing a large number of Azeris — the ethnic minority in NKR — to flee from the area that by then had come under control of ethnic Armenian forces. This included not just NKR, but also a number of surrounding territories, including the district of Lachin, a strip of land that connects NKR and Armenia.[129]

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[123] See ECtHR, *Mozer v. Moldova and Russia* (2016) paras 101–11; *Sandu and Others v. Moldova and Russia* (2018) paras 36–38.
[124] See ECtHR, *Catan and Others v. Moldova and Russia* (2012) para 114; ECtHR, *Mozer v. Moldova and Russia* (2016) para 101.
[125] ECtHR, *Catan and Others v. Moldova and Russia* (2012) para 150; *Mozer v. Moldova and Russia* (2016) para 157; *Sandu and Others v. Moldova and Russia* (2018) paras 89 and 101.
[126] ECtHR, *Catan and Others v. Moldova and Russia* (2012) para 150.
[127] ECtHR, *Mozer v. Moldova and Russia* (2016) paras 158, 184 and 201.
[128] ECtHR, *Sandu and Others v. Moldova and Russia* (2018) para 90.
[129] The situation that is described here no longer reflects the reality on the ground. On 9 November 2020, a ceasefire agreement was signed by Armenia, Azerbaijan and Russia, ending a (new) six-week conflict that broke out on 27 September 2020. For the details of the new *status quo* and the impact of the agreement on the legal status of NKR, see Knoll-Tudor (2020); Miklasová (2020). In the meantime, the ECtHR has been seized by both Azerbaijan and Armenia, with at present three inter-State cases pending in relation to NKR: *Armenia v. Azerbaijan*, *Armenia v. Turkey*, and *Azerbaijan v. Armenia*

The leading case arising out of this situation is *Chiragov v. Armenia*.[130] In this case, Applicants were among this group of internally displaced persons who fled from NKR in 1992. Before the ECtHR, they complained that due to the occupation of the area by Armenia and/or Armenian-backed NKR forces, they were unable to return to their homes and property in Lachin, allegedly in breach of *inter alia* Article 1 of the First Optional Protocol. The Armenian government argued that the matter fell outside of the Court's competence *ratione loci*. Rejecting Armenia's argument the Court followed its line of case law as set out in the northern Cyprus and Transdniestria cases. Thus, the Court took as a point of departure the question of whether Armenia exercises extraterritorial jurisdiction over NKR. The Court held that this depends on whether it has 'effective control' over the territory 'and as a result [it] may be held responsible' for the alleged violations.[131] As a matter of fact, the Court established that Armenian had been significantly involved in the conflict, most notably through its military presence, the provision of military equipment and expertise, as well as various forms of military, political and financial support given to NKR.[132] As a result, the Court held, Armenia has 'a significant and decisive influence' over the NKR, and that the NKR and its administration 'survives by virtue of the military, political, financial and other support given to it by Armenia, which, consequently, exercises effective control' over the territories in question.[133] Accordingly, the Court held that NKR and the surrounding territories fell under the jurisdiction of Armenia.[134] Applying the facts of the case to the applicable law, the Court found that Armenia violated Article 1 of the First Optional Protocol, and Articles 8 and 13 ECHR.[135]

E. The Function of Attribution Rules in Determining the Extraterritorial Application of the Convention

This final Section will demonstrate that the methodological pathway to address State responsibility for violations of the ECHR (including situations involving non-State actors and extraterritorial conduct) follows from the structure of ARSIWA itself. In

(lodged on 27 September 2020, 4 October 2020 and 27 September respectively). So far, the Court has not rendered a decision or judgment with respect to the admissibility or merits of these cases.

[130] ECtHR, *Chiragov and Others v. Armenia* (2015).

[131] *Ibid*, paras 169–70.

[132] *Ibid*, paras 172–85.

[133] *Ibid*, para 186.

[134] *Ibid*. See also ECtHR, *Zalyan and Others v. Armenia* (2016) para 212–15, the Court explicitly endorsed its finding of Armenian extraterritorial jurisdiction. This case addressed allegations of torture and ill-treatment by Armenian officials of three individuals who were drafted in the Armenian army and assigned to serve in NKR. While it does not add anything to the reasoning as set out in *Chiragov*, the case is nonetheless noteworthy given that this is to the author's knowledge the only case in which extraterritorial application based on the territorial model is recognized by the Court vis-à-vis the Applicant's own State.

[135] ECtHR, *Chiragov and Others v. Armenia* (2015) paras 210, 208 and 215.

the context of the Convention, it follows that a State will have committed an internationally wrongful act resulting in its responsibility when certain conduct is attributable to it, and if such conduct constitutes a violation of applicable provisions of the Convention. The two conditions of attribution and breach are cumulative; both need to be satisfied. More importantly, the presence of one condition does not suffice, nor does it entail that the other condition is met *ipso facto*. As a matter of law, the fact that conduct is attributable does not always mean that this conduct generates State jurisdiction. And conversely, the existence of State jurisdiction does not mean that all conceivable conduct taking place subject to that jurisdiction is that of the State.

In cases involving non-State actors in an extraterritorial setting the ECtHR either conflates (or, at the very least, is unable to clearly demarcate) questions of attribution, jurisdiction, and State responsibility.[136] One of the main uncertainties is to what extent attribution rules are relevant (or even decisive) as to the existence of personal or territorial State jurisdiction in the sense of Article 1. As early as 1965, in *X. v. Germany*, the Commission already held that the extraterritorial application of the Convention was the result of an assessment of two parameters: the question of the author of the act (here: consular and diplomatic agents), and the question of the material nature of the act that is claimed to be a violation of the provisions of the Convention (here: performing official duties). In light of this, it is worth to return to some of the cases falling in the personal model in which it was questionable whether the conduct complained of was attributable to the Respondent State(s) in question, to see how this affected the determination of extraterritorial application. These cases are most notably *Drozd and Janousek*, *Behrami and Saramati*, *Al-Jedda*, and *Jaloud*.

In *Drozd and Janousek v. France and Spain*, the Applicants had been convicted to a prison sentence by an Andorran court composed of Spanish and French judges.[137] The Applicants claimed *inter alia* that certain judicial irregularities during their trial did not conform to the requirements set by Article 6 of the Convention. After recalling its earlier case law on the extraterritorial application of the Convention, the ECtHR held that 'the question to be decided here is whether the acts complained of […] can be attributed to France of Spain or both'.[138] The Court answered this question in the negative, given that the French and Spanish judges did not act as national agents but rather were put at the disposal of Andorra, to the effect that their acts were attributable to Andorra, and not France and/or Spain.[139] Thus, in order to assess whether the Applicants were within the French or Spanish jurisdiction, the Court first turned to the issue of attribution; since the acts of the judges were not attributable to Spain or France (*ratione personae*), there was no extraterritorial jurisdiction from the point of view of those two States. *A contrario*, if a State brings an individual before its own judges, applying its own national law but sitting outside

[136] See e.g. Milanović (2011) 41–51; Gondek (2009) 160–68.
[137] ECtHR, *Drozd and Janousek v. France and Spain* (1992).
[138] *Ibid*, para 91.
[139] *Ibid*, paras 96–97. See also Art 6 ARSIWA, commentary para 7.

its territory (as happened for example with the Lockerbie/Pan Am Flight 103 trial, held in the Netherlands[140]), such conduct would be attributable to the State, and the persons affected by this would be within its jurisdiction.[141]

Al-Jedda concerned the internment of an Iraqi civilian in an Iraqi detention facility run by the United Kingdom, which was alleged to be in breach of Article 5 (1) of the Convention.[142] Here too, the applicability of the Convention under Article 1 hinged on an assessment of attribution. The United Kingdom argued that the internment was attributable to the UN, and that the Applicant *therefore* was not within that State's jurisdiction. The ECtHR did not follow the first part of this argument. On the basis of the facts of the case, as well as the text of Security Council Resolutions 1483, 1511 and 1546, the Court found that the Security Council had neither effective control not ultimate authority and control over the acts of the troops of the Multinational Force (in which the United Kingdom participated). The result was that the Applicant's detention was not attributable to the UN but to the Respondent State, and that *consequently* his detention fell within the latter's jurisdiction for the purpose of Article 1 of the Convention. The Court distinguished the situation at hand from its earlier decision in *Behrami and Saramati* and the mandate provided by Security Council Resolution 1244.[143] In that case, the Court concluded that the conduct complained of (i.e. the failure by UNMIK — the UN Interim Administration Mission in Kosovo — to properly supervise de-mining as for Behrami, and detention by KFOR — Kosovo Force — as for Saramati) was exclusively attributable to the UN having ultimate authority and control, given that UNMIK was a subsidiary organ of the UN and that KFOR was exercising powers lawfully delegated under Chapter VII of the UN Charter. As a result of this exclusive attribution, the relevant conduct was not attributable to the States that contributed troops, and the application was declared inadmissible *ratione personae* (obviating the need to entertain the parties' remaining *Banković*-inspired Article 1 arguments pertaining to the admissibility *ratione loci*).

Finally, in *Jaloud* the Applicant complained that the Netherlands had violated the procedural limb of Article 2 of the Convention by not conducting an effective and independent investigation with respect to the use of deadly force against his son who drove through a vehicle checkpoint.[144] The Netherlands disputed that the events complained of fell within its jurisdiction. The vehicle checkpoint in question was

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[140] See Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish trial in the Netherlands (with annexes) (2002) 2062 UNTS 81. By this Agreement, the Netherlands undertook to host a Scottish court, composed of Scottish judges, for the sole purpose of the trial, and that its premises are under the control and authority of the Scottish court (see Arts 1(l), 3 and 6 of the Agreement).

[141] This interpretation is confirmed in ECtHR, *Al-Skeini and Others v. United Kingdom* (2011) para 135.

[142] ECtHR, *Al-Jedda v. United Kingdom* (2011).

[143] ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (2007).

[144] ECtHR, *Jaloud v. the Netherlands* (2014).

located in the province of Al-Muthanna, Iraq. While the province as a whole and the Dutch contingent deployed there were under the operational command of an officer of the United Kingdom, the Netherlands was the only country to provide security in the relevant area and it retained full command over its contingent. In light of this, and referring to Article 6 ARSIWA and paragraph 406 of the *Bosnian Genocide* case dealing with Article 8 ARSIWA, the ECtHR found that the Dutch troops were placed neither at the disposal nor under the exclusive direction or control of any other State. As a result, the Court concluded that the death of the Applicant's son took place within the jurisdiction of the Netherlands, having asserted authority and control over him.

Problematically, these early cases, and the reasoning set forth in them, have been used in cases involving State control over territory, without sufficiently grasping some essential differences between State control over person who claim to be victims, and State control over territory. In situations where an individual abroad is held to be under the authority or control of agents of the State, such as diplomatic and consular staff, members of the armed forces, the police, judges, etc, the material act that gives rise to the existence of extraterritorial jurisdiction (e.g. issuing passports, detention and ill-treatment, or the use of force at close range) is often the *very same conduct* (by the *very same person*) that constitutes the violation. Accordingly, a finding of attribution of the relevant conduct to the State concerned would also suffice to hold that this conduct took place in the exercise of that State's extraterritorial jurisdiction. Conversely, if in these cases a State could successfully claim that the material act was not attributable to it (*ratione personae*), it would by implication also be successful in demonstrating the lack of extraterritorial jurisdiction (*ratione loci*).[145]

In *Jaloud* the ECtHR argued that the test for establishing jurisdiction under Article 1 'has never been equated with the test for establishing a State's responsibility for an internationally wrongful act,'[146] yet this is precisely what appeared to occur in that judgment (and the other three cases mentioned above). The Applicant's argument that his son was within the jurisdiction of the Respondent States was in effect approached by the Court as being a question of attribution. In his concurring opinion, Judge Spielmann argued that attribution was 'ambiguous, subsidiary and incomprehensible'[147] — even a 'non-issue'[148] — to decide the case at hand, given that the main question was one of jurisdiction under Article 1. This critique somewhat misses the point and deserves some nuance. As a matter of law and logic, their conceptual distinct nature does not imply that there is no relationship whatsoever between jurisdiction and attribution. While both questions are subject to different rules of law and different relationships, it does not necessarily follow that it is ambiguous, incomprehensible or irrelevant to examine attribution before turning to

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[145] This may explain why respondent States asserting that an applicant was not in their extraterritorial jurisdiction often do this by denying that the extraterritorial conduct is attributable to the State.
[146] ECtHR, *Jaloud v. the Netherlands* (2014) para 154.
[147] *Ibid*, Concurring Opinion of Judge Spielmann joined by Judge Raimondi, para 5.
[148] *Ibid*, Concurring Opinion of Judge Spielmann joined by Judge Raimondi, para 7.

jurisdiction. After all, it is inconceivable that a certain act, such as detention, brings an individual within the jurisdiction of a State, without that act being considered an act of the State in the first place. It is rather the Court's reluctance to engage in a closer examination of both concepts that has made its case law on this subject incomprehensible.[149]

On the other hand, Judge Spielmann is of course correct to assert that questions of jurisdiction are not the *same* as attribution. Indeed, rephrasing the question of jurisdiction as one of attribution (as the ECtHR appeared to do in *Drozd and Janousek*, *Behrami and Saramati*, *Al-Jedda*, and *Jaloud*) could leave the erroneous impression that attribution of the conduct complained of is in any case sufficient for extraterritorial jurisdiction, which is certainly not the case. Not *all* attributable conduct gives rise to State jurisdiction, as illustrated very well by cases where the applicability of the personal model hinges on the exercise of physical power rather than the exercise of sovereign authority (e.g. *Banković*[150]). After all, the question of attribution refers to the author of the act, and not so much the material nature of the conduct. That said, the more the Court is willing to accept additional categories of material conduct that constitutes jurisdiction under the personal model, the smaller the gap that remains between conduct which is attributable and conduct which is constitutive of jurisdiction. Moreover, in cases of extraterritorial exercise of *de jure* governmental authority by State organs or entities empowered to exercise governmental authority (covered by Articles 4 and 5 ARSIWA), the questions of attribution and jurisdiction essentially come together.

In the spatial model of jurisdiction, things seem to be exactly the other way around. Here, an overarching problem in the Court's case law is the inability to distinguish clearly between attribution of non-State actor conduct, the breach of a positive obligation to act, and effective jurisdictional control over territory. While the cases involving the personal model suffer from the impression that attribution automatically generates jurisdiction, the cases concerning the spatial model appear to imply that jurisdiction generates responsibility. This is difficult to understand, or at the least insufficiently explained by the Court, given that control over territory is something different from control over a perpetrator. As the ICJ held its first contentious case, territorial control exercised by a State does not make it responsible for any unlawful act occurring on such territory (and thus subject to its jurisdiction); such control 'neither involves *prima facie* responsibility nor shifts the burden of

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[149] See also *ibid*, Concurring Opinion of Judge Motoc, para 8, arguing that 'while the present judgment makes progress as regards the applicability of general international law, questions concerning the relationship between general international law and the human rights provided for in Article 1 have still to be clarified'.

[150] In ECtHR, *Banković and Others v. Belgium and Others* (2001), the governments disputed the extraterritoriality of the Convention based on the nature of the material acts (i.e. high-altitude bombardment), without — except for the French government — claiming that the bombardments were not attributable to the States involved.

proof'.[151] But looking at some of the formulations used in the case law setting out the spatial model, it appears as if extraterritorial State jurisdiction implies responsibility for all that happens by the hands of the non-State actor (i.e. the administration of the TRNC, the MRT, or the NKR), even in the absence of the third State exercising detailed control over all their individual actions.

This apparent approach is problematic for at least two reasons. First, it is very difficult to discern any underlying justification for holding a State *responsible* for the actions of local entities when the Court speaks of effective control or decisive influence over the TRNC, the MRT, or the NKR as an *area*, instead of assessing the level of control or influence over the non-State actors as persons or entities, as required by the standard set forth in Articles 4 (re *de facto* State organs) and 8 ARSIWA. A second, related, difficulty is the blurring of the line between attribution of conduct and the failure to exercise due diligence. Cases concerning northern Cyprus, Transdniestria and Nagorno-Karabakh often involve property claims protected under Article 1 of the First Optional Protocol. On this particular provision, the ECtHR has held in *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The Former Yugoslav Republic of Macedonia"* that even though 'the boundaries between the State's positive and negative duties under Article 1 of Protocol No. 1 do not lend themselves to precise definition [the] applicable principles are nonetheless similar'.[152] Accordingly, in that case the Court focused on whether the State's conduct could be justified in view of the principles of lawfulness, legitimate aim and fair balance, regardless of whether that conduct could be characterized an interference (i.e. an attributable act), or a failure to act (i.e. an omission). The particular nature of property claims is another factor that makes extraterritorial application cases involving the spatial model difficult to understand. An examination of situations giving rise to the spatial model should take into account that the attribution of conduct (i.e. territorial control) that is said to generate jurisdiction, is something different from the attribution of conduct (e.g. the use violence, improper judicial proceedings, etc) that is alleged to constitute the violation.

A final consideration relates to the lack of recognition or consideration of attribution rules. The Court displays a tendency of silently applying the principles underpinning ARSIWA but without expressly mentioning them, or, to misapply (e.g. through lowering the standard of attribution) or reject them without offering any justification. Given the wide acceptance of ARSIWA as customary international law, and the inherent tension between the Court's practice of systemic integration and treating the Convention as a constitutional instrument of European public order, it is regrettable that the Court shows such a reluctance to expressly apply, or to reject without motivation, the attribution rules from ARSIWA when establishing State

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[151] ICJ, *Corfu Channel (Albania v. United Kingdom)* (1949) 18. See also ECtHR, *Loizidou v. Turkey (Merits)* (1996), Dissenting Opinion of Judge Bernhardt joined by Judge Lopes Rocha, para 3, noting that Turkey cannot be held responsible 'for more or less everything that happens in northern Cyprus'; cited with approval in *Cyprus v. Turkey (IV)* (2001), Partly Dissenting Opinion of Judge Fuad, para 4.
[152] ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The Former Yugoslav Republic of Macedonia"* (2014) paras 101–02.

responsibility (and the preliminary questions whether conduct is attributable to a State for the purpose of establishing the applicability of the Convention and the existence of a breach *stricto sensu*). This is even more so because some of the language used by the Court — e.g. "effective overall control", or "effective control and decisive influence" — is remarkably close to the test of attribution as laid down in Article 4 (re *de facto* State organs) and Article 8. The cumulative effect of these issues is uncertainty and unpredictability, obscuring the legal foundation of the Court's reasoning. It also has the unfortunate side-effect of diminishing the Court's potential to clarify ARSIWA, to contribute to the crystallization into customary law of those ARSIWA rules which may not yet be deemed to have such status, or, rather, to demonstrate to what extent the Convention system provides for *lex specialis* in deviation from customary international law.

It must be noted, though, that in extraterritorial cases the Court is not only reluctant to engage with the customary law of State responsibility as laid down in ARSIWA. It seems similarly very hesitant to engage with IHL. On the one hand, it is understandable that being a human rights court the ECtHR will not see it fit to pronounce on violations of IHL. On the other, it is difficult to understand that the Court refuses to explicitly engage with IHL provisions such as Article 42 of the 1907 Regulations concerning the Laws and Customs of War on Land (defining belligerent occupation) in cases where this could bolster its arguments and conclusions in respect of a State exercising extraterritorial jurisdiction based on the territorial model.[153]

F. Conclusion

In the context of the ECtHR, a State will have committed an internationally wrongful act, resulting in its responsibility, when certain conduct is attributable to it and constitutes a violation of applicable provisions of the Convention. The conditions of attribution and breach both need to be satisfied and the fact that one condition is met does not suffice, nor does it entail that the other condition is met *ipso facto*. Thus, the fact that conduct is attributable to a State is not necessarily conclusive for the determination of whether such conduct was lawful or not.

The conceptual difference between the applicability of the Convention, and the responsibility for an act that occurs where and to whom the Convention is applicable, means that a finding of whether a State has committed a breach of the Convention actually involves a number of dimensions. The first is one of attribution. Attribution rules serve to tie conduct to an actor with international legal personality, in this case a State Party. But the fact that conduct is attributable says nothing about whether

[153] The Court mentioned Art 42 Regulations concerning the Laws and Customs of War on Land as relevant international law in *Chiragov and Others v. Armenia* (2015) para 96. Nevertheless, as noted in the partly concurring, partly dissenting opinion of Judge Ziemele, there was no further reference to this provision in the Court's assessment and the 'proposed legal weight of the reference to [it] is not at all clear'.

such conduct was lawful or not. This still depends on whether there is a breach of any applicable law. As far as the Convention is concerned, and unlike "ordinary" treaties concluded between States,[154] this latter question actually comprises two sub-questions: the existence of State jurisdiction so as to make the treaty applicable in the first place,[155] and the existence of a breach itself.[156]

If a victim is within a State's territory, the Convention applies, and there is a presumption that it applies in full. However, the (preliminary) question of whether a victim is within the jurisdiction of a State other than the territorial State cannot be answered without resolving the question of whether the *relevant conduct that gives rise to jurisdiction* is an "act of the State" in the first place. In other words, is a victim or territory under control *by a person or entity whose conduct is attributed to the State as a matter of State responsibility law*? If not, the Convention cannot apply. But if it does, the Convention applies, and the next question is whether or not the conduct amounts to a breach. Here too, attribution rules from the law of State responsibility come in play, but it is necessary to keep in mind that in the territorial model the conduct that constitutes a breach (e.g. denial of access to property, denial of privacy, discrimination) is not necessarily the same conduct as that which established extraterritorial jurisdiction in the first place (e.g. territorial control). In such a case, a separate attribution analysis may be required to examine whether the conduct that gives rise to an allegation of a human rights violation is an act of the State. Thus, while it is true that the lack of attribution of conduct to a State precludes the existence of that State's jurisdiction abroad, it does not necessarily follow that the situation falls under Article 1, and consequently under the scope of the Convention, if the relevant conduct *is* attributable. Furthermore, the fact that conduct abroad generates State jurisdiction does not necessarily say anything *se* about the attributability of acts taking place within its extraterritorial jurisdiction.

It would be interesting to see how the Court decides future cases on State responsibility in an extraterritorial setting. The Court will most certainly address these questions in a number of cases lodged in the context of the Russo-Georgian War (August 2008),[157] the Russo-Ukrainian War (2014 up to present),[158] and the recently

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[154] As the ECionHR held in *Cyprus v. Turkey (III)* (1978) para 11: 'These special obligations of a High Contracting Party are obligations towards persons within its jurisdiction, not to other High Contracting Parties.'
[155] Art 13 ARSIWA and Art 1 ECHR.
[156] Art 12 ARSIWA and Arts 2–18 ECHR.
[157] See in particular *Georgia v. Russia (II)*, which concerns allegations of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control. On 13 December 2011, the Court joined to the merits of the case the Russian objection *ratione loci* that it did not exercise jurisdiction in South Ossetia, Abkhazia and the neighbouring regions. A Grand Chamber hearing on the merits was held on 23 May 2018.
[158] See in particular *Ukraine v. Russia (re Crimea)*, which concerns allegations of a pattern ("administrative practice") of violations of the ECHR by Russia in Crimea. A Grand Chamber hearing in this case was held on 11 September 2019.

reignited conflict in Nagorno-Karabakh.[159] It is to be hoped that these cases put the legal appreciation of extraterritorial application on a sounder footing, keeping in mind the interaction between the Convention and customary international law while not losing sight of the special nature of the Convention and the possibility of it providing for *lex specialis* rules on attribution and State responsibility.

[159] The ECtHR has been seized by both Azerbaijan and Armenia in response to the recent six-week conflict that broke out in September 2019. At present, there are three inter-State cases pending in relation to Nagorno-Karabakh: *Armenia v. Azerbaijan*, *Armenia v. Turkey*, and *Azerbaijan v. Armenia* (lodged on 27 September 2020, 4 October 2020 and 27 October 2020 respectively).

CHAPTER 6 ATTRIBUTION OF CONDUCT AND THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO INTERNATIONAL ARMED CONFLICTS

A. Introduction

The previous Chapter examined the function of attribution rules in determining the territorial application of the ECHR. This Chapter explores a different field of law — international humanitarian law (IHL) — but the underlying logic is the same. After all, both human rights law and IHL operate by means of a threshold of application, which is "State jurisdiction" and "(international or non-international) armed conflict respectively. The question that will be explored in this Chapter is thus whether the threshold of application of international armed conflicts (IACs) can or must be met as a result of conduct that is attributed to a State.

The law of armed conflicts, or international humanitarian law (IHL), is only applicable to situations that are properly classified as IACs or non-international armed conflicts (NIACs). Case law of the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY) reveals different judicial attitudes towards questions of State responsibility and IHL, and their mutual relationship, when classifying a situation as IAC or NIAC and thereby determining the law applicable to regulate the behaviour of the warring parties.[1]

It is contested what level of support or control is required for a State to be internationally responsible for the acts of an organized armed group (OAG) if it uses the group as its proxy. Equally unclear is the legal process by which a conflict subject to NIAC law transforms (or internationalizes) into one that is governed by IAC law, in case a State supports or controls an OAG. More specifically, it is disputed whether a NIAC is internationalized as a result of applying primary rules of IHL, or through secondary rules of attribution such as Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA, or the Articles).[2] At a more

[1] IACs are subject to the universally ratified Geneva Conventions I–IV and, should the State concerned have ratified it, the First Additional Protocol to the Geneva Conventions (Additional Protocol I). NIACs, on the other hand, are subject to a more limited set of rules found in common Art 3 Geneva Convention I–IV and, if ratified by the State in question and further conditions are fulfilled, the Second Protocol Additional to the Geneva Conventions (Additional Protocol II).

[2] International Law Commission (ILC), *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77. It may be recalled that Art 8 ARSIWA provides that 'conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'

fundamental level, there is disagreement whether one can speak at all of a clear-cut demarcation between primary and secondary rules.

This raises the question of whether IHL (or the interpretation thereof by international courts and tribunals) involves a *lex specialis* test of attribution of conduct, in deviation from the customary international law of State responsibility as laid down in Article 8 ARSIWA. By exploring the different control tests and their relevance to questions of applicable law and responsibility, this Chapter scrutinizes this conventional wisdom that attribution in light of State responsibility and attribution for the purpose of classification of conflict (and thus individual criminal responsibility under the law of IACs or NIACs) can be subject to two different tests. Through an examination of the symbiotic relationship that exists between the existence of an IAC and the involvement of two States that are equally responsible for acts of the forces fighting on their behalf, this Chapter will show that a *lex specialis* test on the attribution of conduct is indeed part and parcel of IHL.

This Chapter will first outline the concepts of IACs, NIACs, and internationalized conflicts, and presents three possible readings of the extent of fragmentation or conflict between the ICJ and the ICTY (Section B). With arguments specifically derived from the nature of IHL and from the structural design of State responsibility law, this Chapter subsequently argues that IACs involve two States that are responsible for the acts of their forces through which they act, and therefore part of the ICJ's reasoning in the *Bosnian Genocide* case must be rejected (Section C). With that in mind, the Chapter continues by explaining that, given its specific subject-matter jurisdiction over violations of IHL, the ICTY's case law has exercised no influence on the scope and content of attribution rules as found in the customary international law of State responsibility, apart from the recognition that such general rules apply to the extent that they are not deviated from by an applicable *lex specialis*, as indeed found in the body of primary rules of IHL (Section D).

B. International Humanitarian Law and the Classification of Armed Conflicts: Typology and Applicable Law

When dealing with situations of armed conflict and the possibility of individual criminal responsibility for war crimes, it is indispensable to characterize such conflicts as amounting to either an IAC or a NIAC. After all, the characterization of the conflict determines the normative legal framework according to which the acts of the belligerent parties must be assessed. In the absence of an IAC or a NIAC, any violence that may take place is not governed by the rules of IHL. This Section analyses the concepts of IACs, NIACs, and internationalized conflicts. It explains the two most common ways for an IAC to become an internationalized NIAC when there is a direct or indirect involvement of a third State (B.1.). Subsequently, a notorious

line of case law will be examined where the ICJ and the ICTY have come up with diverging positions on whether the internationalization of a conflict occurs by means of the rules of IHL themselves or, alternatively, by means of the rules of attribution of conduct as found in the law of State responsibility (B.2.). The last part of this Section (B.3.) recalls two commonly found readings of the clash between the ICJ and the ICTY on this matter, and adds a third possible (yet less explored) reading that will be explored subsequently in much more detail in the remainder of this Chapter.

B.1. International and Non-International Armed Conflicts, and Indirect Involvement of a Third State

The respective thresholds for the application of IHL have been authoritatively defined by the ICTY. In its decision on jurisdiction in the *Tadić* case, the Appeals Chamber held that an IAC exists 'whenever there is a resort to armed force' between States, and that a NIAC exists as a result of 'protracted armed violence' between States and OAGs or between such groups.[3] This interpretation builds on the rudimentary text found in common Articles 2 and 3 of the four Geneva Conventions by clarifying that the scope of application of IHL is defined by reference to the identity of the parties (*ratione personae*) and the intensity of the violence (*ratione materiae*).[4] The statutory mandate of the ICTY to interpret and apply IHL,[5] taken together with the acceptance by the international legal community of the *Tadić*-criteria for the purpose of defining armed conflicts,[6] may be taken to be determinative of how the application thresholds of IHL are interpreted.

However, matters are not always so black and white. Conflicts may transform from one type to another, or involve a complex web of belligerent relations when more than two parties oppose each other.[7] A particularly difficult scenario takes place when

[3] ICTY, *Prosecutor v. Tadić (Jurisdiction Decision)* (1995) para 70.

[4] Common Art 2 Geneva Convention I–IV stipulates that the Conventions 'shall apply to all cases of declared war or of *any other armed conflict* which may arise *between two or more of the High Contracting Parties*' (emphasis added). Common Art 3 Geneva Convention I–IV applies to any 'case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.

[5] Arts 2 and 3 Statute of the ICTY, annexed to United Nations (UN) Security Council Resolution 827 of 25 May 1993, UN Doc S/RES/827 (1993) (as amended). See also UN Security Council, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (1993) para 34, noting that the ICTY should apply rules of IHL 'which are beyond any doubt part of customary law'.

[6] See e.g. the summary of the debate on the definition of armed conflict in the ILC draft articles on the effects of armed conflicts on treaties, YB ILC 2010-II(2) 169–70 paras 206–13.

[7] As observed in ICTY, *Prosecutor v. Tadić (Jurisdiction Decision)* (1995) para 97: '[T]he large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict.'

a third State, directly or indirectly, becomes involved in an already existing NIAC. One possibility is that in the pursuance of common goals and objectives a third State deploys its armed forces to fight alongside one of the belligerent parties. In such a situation, the third State becomes party to a separate, parallel armed conflict. This conflict will be either a NIAC or an IAC, depending primarily on whether the third State opposes the State in which the NIAC takes place, or the OAG.[8]

A legally more problematic scenario, takes place when such State involvement in a NIAC manifests itself more indirectly. Rather than taking the often politically sensitive decision of introducing boots on the ground, States may decide to provide material or financial support, or otherwise enable, support, control or direct an OAG towards carrying out military operations or gaining military advantages. At first, one may be tempted to think that by such indirect involvement the supporting or controlling State effectively turns the OAG, as an extended arm, into a proxy organ of the State on the same footing as a State's regular armed forces. For purposes of the classification of conflicts and questions of State responsibility, however, it is not at all clear if and when the group can be said to be acting in the name and on behalf of the supporting or controlling State. These situations of indirect involvement, which appear to fall outside of (or rather, in between) the traditional IAC/NIAC paradigm, have been addressed in a line of ICJ and ICTY case law. The interpretation and application by these international courts of IHL and State responsibility law when a third State becomes indirectly involved in a pre-existing NIAC, has provided not only diverging interpretations of the law but also various perceptions as the exact points of difference. Indeed, the case law on this topic has been described as 'the most cited example of the fragmentation of international law'.[9]

The core issue that lies at the foundation of this debate is the relationship (if any) between the primary or substantive rules of IHL and the secondary rules of attribution from the law of State responsibility, in particular Article 8 ARSIWA. More precisely, it is contested what level of support or control is required for a State to be internationally responsible for the acts of an OAG if it uses the group as its proxy. If a State supports or controls an OAG, it is also unclear whether the legal process by which a conflict subject to NIAC law transforms (or internationalizes) into one that is governed by IAC law, is governed by IHL or by State responsibility law. This debate has also triggered the more fundamental question as to whether or not the distinction

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[8] The possibility of a divided application of IAC law in parallel to NIAC law finds broad support in international case law, see in particular ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) para 219; ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 84; International Criminal Court (ICC), *Prosecutor v. Lubanga Dyilo* (2012) para 540. It is also recognized in military legal manuals; see United Kingdom, *The Joint Service Manual of the Law of Armed Conflict* (Ministry of Defence, 2004) para 1.33.6; The Netherlands, *Humanitair Oorlogsrecht: Handleiding – Voorschrift No. 27-412* (Koninklijke Landmacht, 2005) para 0207; United States, *Law of War Manual* (Department of Defense, 2015, updated December 2016) para 3.3.1.2. See further Schindler (1982) 255 and 258; Greenwood (1996) 271; Akande (2012); Wilmshurst (2012) 489.

[9] Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs (29 October 2007), available at www.icj-cij.org/public/files/press-releases/7/14097.pdf.

between primary rules (such as those of IHL) and the secondary rules of State responsibility is as clearly demarcated as envisaged by the International Law Commission (ILC).

B.2. Indirect Involvement of a Third State: The Clash between the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia

In the *Tadić* case the ICTY examined the criminal responsibility of Duško Tadić for crimes committed by the VRS — the Bosnian-Serb army of Republika Srpska, an unrecognized Bosnian breakaway region — in Bosnia-Herzegovina. The indictment included facts taking place after 19 May 1992, i.e. after the JNA — the national army of the Serb-dominated Federal Republic of Yugoslavia — had withdrawn from Bosnia. The ICTY Statute gives the Tribunal jurisdiction over grave breaches committed in IACs,[10] and other violations of the laws and customs of war.[11] Consequently, in order to pass judgment on the criminal responsibility of the accused, the Tribunal first had to classify the armed conflict and thereby determine the applicable law.

To appreciate the factual and legal connection that existed between the conduct of the VRS and the third State (the FRY) — and thus to classify the armed conflict after May 1992 — the Trial Chamber relied on the State responsibility test as set out by the ICJ in *Nicaragua*.[12] In that case, the ICJ assessed whether acts committed by the *contras* in their violent struggle against the government could be attributed to the United States. Despite various forms of involvement (i.e. providing financial and military support, as well as participating in the general planning of military operations),[13] the ICJ answered the question of attribution in the negative because in its view the United States had not exercised the required 'effective control' over the *contras* to deem them to be acting on its behalf.[14]

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[10] Art 2 Statute of the ICTY, *supra* note 5.
[11] Art 3 Statute of the ICTY, *supra* note 5.
[12] ICTY, *Prosecutor v. Tadić (Trial)* (1997) paras 585–95. Earlier, in ICTY, *Prosecutor v. Tadić (Jurisdiction Decision)* (1995) para 72, the Appeals Chamber recognized the possibility that indirect involvement by a third State can internationalize a NIAC but refrained from specifying the requisite nature and degree of involvement.
[13] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) paras 104, 106, 108 and 115.
[14] *Ibid*, para 115. See also *ibid*, Separate Opinion of Judge Ago (concurring) according to whom effective control would have existed if the United States had '*specifically* charged [the *contras*] to commit a *particular* act, or carry out a *particular* task of some kind on behalf of [it]' (at para 16, emphasis added). The effective control test may be traced back to ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (1980) para 58 ('conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact. on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a *specific* operation'; emphasis added). The ICJ later confirmed the effective control test in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005)

Notwithstanding the difference between a finding on State responsibility and the determination of individual criminal liability, the Trial Chamber in *Tadić* felt that at stake was the 'intermediate question as to which part of international humanitarian law to apply to the relevant conduct'.[15] In other words, it regarded attribution rules in State responsibility law — in this case, Article 8 ARSIWA — as *functionally equivalent* for establishing whether a non-State actor could be said to belong to or act on behalf of a third State, with the effect that a *prima facie* NIAC is rendered international. Based on the facts, the Trial Chamber ultimately held that the FRY had not exercised effective control over the VRS, thus the accused could not be found to be guilty of those parts of the indictment that were based on Article 2 ICTY Statute.[16]

When the matter came up again in *Tadić (Appeal)*, the Appeals Chamber followed the Trial Chamber's premise of functional equivalence.[17] However, with respect to OAGs the Appeals Chamber considered the Trial Chamber's effective control test as inappropriate. Instead, it held that the control by a State over an OAG need only be of an overall character and 'must comprise more than the mere provision of financial assistance or military equipment or training [without the need to show] the issuing of *specific orders* by the State, or its direction of *each individual operation*'.[18]

Unlike effective control, which materializes on the tactical level and looks into achieving specific military objectives, overall control thus requires a more general, less-intrusive, level of direction and planning, done at the strategic and operational level of military operations.[19] The *Tadić (Appeal)* judgment eventually set the standard for subsequent ICTY case law, in which the Appeals Chamber consistently confirmed not just the overall control test but also the underlying idea of functional equivalence, finding no cogent reasons to depart from its earlier judgment.[20]

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para 160. Admittedly, although not readily apparent from the judgment or Judge Ago's Separate Opinion, the *Nicaragua* case actually formulated two attribution tests for non-State actor conduct: a test of effective control test and of complete dependency. This Chapter focuses exclusively on the effective control test.

[15] ICTY, *Prosecutor v. Tadić (Trial)* (1997) para 585.

[16] *Ibid*, para 607.

[17] ICTY, *Tadić (Appeal)* (1999) paras 92, 95, 98 and 104.

[18] *Ibid*, para 137 (emphasis added).

[19] Western military doctrine traditionally distinguishes three levels of military operations and planning, from general to specific: strategic, operational, and tactical. The strategic level denotes in a broad way national or coalition objectives, the operational level is concerned with the general planning of campaigns and major operations, and at the tactical level forces are deployed to gain specific military objectives in order to achieve operational and strategic success; see NATO, *Allied Joint Doctrine: Allied Joint Publication (AJP)-01(D)* (December 2010) paras 114–16.

[20] See ICTY, *Prosecutor v. Aleksovski* (2000) para 134; ICTY, *Prosecutor v. Kordić and Čerkez* (2004) para 307; ICTY, *Prosecutor v. Prlić et al* (2017) paras 238, 246 and 282–84. In ICTY, *Prosecutor v. Delalić et al (Appeal)* (2001) para 24, the Appeals Chamber held that 'although the ICJ is the "principal judicial organ" within the UN system to which the Tribunal belongs, there is no hierarchical

The ICJ rejected the ICTY's premise of functional equivalence in *Bosnian Genocide*. It stressed the fact that the ICTY had only been called upon to decide on the classification of armed conflict as a preliminary step in establishing Tadić's individual criminal responsibility, and that by pronouncing on State responsibility thresholds the ICTY 'addressed an issue which was not indispensable for the exercise of its jurisdiction'.[21] As far as the law of State responsibility was concerned, the ICJ rejected the overall control test, holding that Article 8 ARSIWA requires the more demanding effective control test as applied earlier in *Nicaragua*, regardless of whether the controlled entity is an OAG or not. Nonetheless, the ICJ appeared to concede to the Appeals Chamber by suggesting that the overall control test 'may well be … applicable and suitable' for the question of conflict classification.[22] More specifically, the Court contemplated that the degree of a State's involvement required by IHL for an armed conflict to be an IAC 'can very well, and without logical inconsistency' be less than would be required to engage that State's responsibility for a particular act committed during such conflict.[23] This premise of *functional differentiation* (i.e. regarding attribution for State responsibility on one hand, and for classification of conflict on the other, as subject to different rules) allowed the ICJ to reject the overall control test for the purposes of State responsibility, while not explicitly ruling it out for the determination of the existence of an IAC.[24]

It might be added at this point that the overall control test is also applied for conflict classification in judgments of the International Criminal Court (ICC), albeit that the ICC refrains from explaining whether this test is grounded in the general rules of State responsibility law or in the primary rules of IHL.[25] One could argue that by avoiding this question in express terms in its reasoning the ICC has implicitly followed *Bosnian Genocide*'s theory of functional differentiation. On the other hand, should the ICC have found the ICJ's theory convincing, one would expect the ICC to

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relationship between the two courts,' and that the Tribunal is not bound by decisions of other international courts.

[21] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 403.

[22] *Ibid*, para 404.

[23] *Ibid*, para 405.

[24] The ICJ's approach of functional differentiation is reminiscent of some early cases decided by the ICTY, where the Trial Chamber refused to classify an armed conflict by resorting to the *Nicaragua*-test of State responsibility because determining State responsibility is by its very nature different from determining individual criminal responsibility; see *Prosecutor v. Rajić* (1996) paras 25, 32, 37 and 42 (because of Rajić's guilty plea this issue was not addressed in the subsequent proceedings); *Prosecutor v. Delalić et al (Trial)* (1998) paras 230–31 and fn 262 (overturned on appeal, see *Delalić (Appeal)* (2001) paras 23–24).

[25] See ICC, *Prosecutor v. Lubanga Dyilo* (2012) para 541; ICC, *Prosecutor v. Katanga* (2014) para 1178; ICC, *Prosecutor v. Bemba Gombo* (2016) para 130. Furthermore, the Office of the Prosecutor of the ICC applies the overall control test to determine whether the *prima facie* NIAC between Ukrainian armed forces and armed groups in East Ukraine (allegedly supported or controlled by Russia) amounts to an internationalized IAC: see Office of the Prosecutor, *Report on Preliminary Examination Activities 2019* (5 December 2019) para 277, available at www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf.

refer merely to those paragraphs of ICJ (or ICTY) judgments that support overall control for conflict classification plain and simple. But the ICC does more than that; by way of reference it approves the whole line of reasoning from ICTY case law in which the latter *specifically rejects* functional differentiation in favour of applying a single test for both purposes.[26] Thus, it appears as if the ICC approves not only the ICTY's overall control test for conflict classification, but also accepts its underlying rationale of functional equivalence, even if, perhaps for reasons of judicial economy and comity, it may not go as far as to expressly reject the ICJ's reasoning in *Bosnian Genocide*.[27]

The ICTY, the ICC and the ICJ all appear to converge on the suitability of the overall control test for internationalizing a *prima facie* NIAC. This is also the position as reflected in two authoritative commentaries to the Geneva Conventions of 1949.[28] That said, there are fundamental differences in terms of how the ICTY and the ICJ in particular (as well as the commentaries) arrive at that conclusion. According to the ICTY and the updated commentary published by the International Committee of the Red Cross (ICRC),[29] this test stems from the secondary rules of State responsibility, in light of which IHL must be interpreted in order to attribute conduct to a State. Both the ICTY and the ICRC assert that through the exercise of overall control, the members of an OAG become the equivalent of agents of the intervening State and this concept of agency applies with equal force to the questions of classification of conflict and State responsibility. According to the ICJ, on the other hand, the test for internationalizing a NIAC is found in the primary rules of IHL, without prejudice to the secondary attribution rules of State responsibility. This is also the position in the commentary published under the editorship of Andrew Clapham, Paola Gaeta, and Marco Sassòli,[30] which envisages a clear and categorical separation between primary and secondary rules, arguing that 'it is conceptually inappropriate' to use rules belonging to the latter category for the purposes of determining the scope and application of IHL.[31] Pursuant to this school of thought, the more demanding test of effective control from State responsibility law 'suffices, but it need not be necessary'.[32]

[26] See ICC, *Prosecutor v. Lubanga Dyilo* (2012) para 541 fn 1649; ICC, *Prosecutor v. Katanga* (2014) para 1178 fn 2738.
[27] This may also explain why ICC Trial Chamber II, in *Katanga* (2014) para 1178 fn 2737, without taking a definitive position seeks support for the overall control test by referring to utterly irreconcilable holdings as set out in *Tadić (Appeal)* and (not as 'cf' or 'contra' but as 'see also') in *Bosnian Genocide*. The judgments in *Lubanga Dyilo* and *Bemba Gombo* make no mention of *Bosnian Genocide*.
[28] Milanović (2015) 37 para 34; International Committee of the Red Cross (2016a) 98 para 270.
[29] International Committee of the Red Cross (2016a) 96 paras 267–68, 100 para 273.
[30] Milanović (2015) 36–37 paras 31–34.
[31] *Ibid*, 36 para 31. See further Milanović (2011) 43, where the author argues that with respect to IHL 'the same test cannot logically be used to establish both what obligations a State has [i.e. the applicable law, RJ] and whether a breach of that obligation is attributable to it'.
[32] Milanović (2015) 36 para 33. The author further suggests that IHL as a body of primary rules can adopt its own solution regarding the link between a State and a non-State actor required for

B.3. Different Perceptions of the *Nicaragua*, *Tadić*, and *Bosnian Genocide* Line of Case Law

There exist different perceptions of the line of case law described above. Pursuant to one, the cases by the ICJ and ICTY constitute an example of conflicting interpretations of the same rule of customary international law (i.e. Article 8 ARSIWA). Thus, according to the Report on the Fragmentation of International Law, *Tadić (Appeal)* does not suggest overall control to be an exception to the general rule of effective control, but 'it seeks to replace that standard altogether'.[33] According to another view, there may be no contradiction at all, given that the legal issues and factual situation in *Nicaragua* and *Bosnian Genocide* on the one hand, and *Tadić* on the other, were so different; the first two cases dealing with State responsibility, and the last case with individual criminal responsibility for war crimes.[34]

There is, however, another view possible; one that is not or insufficiently considered in the vast amount of literature on this topic.[35] In what follows, it will be argued that, given its specific subject-matter competence, the ICTY has recognized the existence of a *lex specialis* rule of attribution as an exception to the general rule of Article 8 ARSIWA, and that by applying this rule (found within the body of IHL) the ICTY did not deviate from, nor did it exercise any impact on, the customary international law of State responsibility law as far as attribution of conduct is concerned. This follows from the principle of functional equivalence, and the interaction between State responsibility law and IHL for the purpose of the classification of armed conflict.

C. A Rejection of *Bosnian Genocide* in Favour of Legal Methodology and the Protective Function of International Humanitarian Law

internationalization. However, the author fails to provide an actual standard by which a NIAC turns into an IAC, apart from the noncommittal suggestion that overall control 'may' suffice; see *ibid*.

[33] ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi)*, UN Doc A/CN.4/L.682 and Corr.1 (2006) 32 para 50. In the same vein, see Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly (27 October 2000), available at https://www.icj-cij.org/public/files/press-releases/1/3001.pdf, warning that the overall control test in *Tadić (Appeal)* presents 'a serious risk: namely the loss of the overall perspective' and that it endangers the unity of international law.

[34] See e.g. Speech by Judge Rosalyn Higgins, *supra* note 9, arguing that 'given the different relevant contexts' the differences or perception between the ICJ and the ICTY are 'readily understandable and hardly constitute a drama'. This interpretation is reflected as an alternative in ILC, *Fragmentation report*, *supra* note 33, para 50 at fn 52. See also Art 8 ARSIWA, commentary para 5.

[35] See e.g. Meron (2006); Cassese (2007); Spinedi (2007); Talmon (2009); Vité (2009); Del Mar (2010); Condorelli and Kress (2010); Akande (2012); Boon (2014).

In an earlier article the author of the parts of the *OUP Commentary* that were discussed above, Marko Milanović, argued that 'maintaining, as much as possible, a distinction between primary and secondary rules is the only way in which we can preserve a semblance of methodological sanity'.[36] However, it is submitted here that, without prejudice to the analytical and conceptual value of it, this distinction should not be taken to extreme lengths; legal methodology, as well as the protective function of IHL, actually aim towards the recognition of an interaction between these two types of rules. There is such a close connection between attribution of conduct for State responsibility and for the application of IHL that it would be untenable to maintain that both questions are subject to different rules, standards or tests. By having a closer look at the structural design of State responsibility law and the logic and object and purpose of IHL, it will be demonstrated that contrary to what the ICJ held in *Bosnian Genocide*, (secondary) attribution rules can and indeed must be used to determine the scope of application of substantive (primary) rules of international law of IHL.

C.1. The Division between Primary and Secondary Rules of International Law and the Structural Design of State Responsibility Law

The distinction between primary and secondary rules of international law has already been explained earlier in this thesis.[37] For the present purpose, however, it is worth to recall the following. The division between both types of rules took place in the 1960s, after the ILC realized that project had come to a standstill. The distinction between the two sets of rules was borne out of concerns that otherwise the project could not be brought to a successful completion. It was envisaged as a method to delimit (at least, as far as possible) the outer boundaries of the codification project. Letting go of the substantive rules on the treatment of foreigners allowed the ILC to formulate a general matrix of rules, applicable to all types of international obligations, regardless of the source of the obligation or the subjects or interests it seeks to protect, and without the need to undertake the arduous task of codifying a body of substantive international law. Without a doubt the distinction and ensuing separation between primary rules and secondary rules has proved to be a major catalyst in the completion of the State responsibility project. However, the distinction was never meant to be completely absolute or rigorous, and, as shown in Chapter 2, it has attracted criticism even from within the ILC itself. Moreover, in various parts of the ILC Articles the ILC largely failed to adopt the distinction in the strict way as envisaged.

[36] Milanović (2006) 561.
[37] See Chapter 2, Section C.1.b.

The relative interaction between primary and secondary rules — more specifically, the idea of attribution rules having an effect on the applicable law in light of which attributable State conduct is to be assessed — also follows from the structural design of ARSIWA itself. The build-up of ARSIWA shows that any legal inquiry into State responsibility consists of three steps. The first is a factual one, consisting of determining the conduct at stake, be it an act or omission. The second step is verifying whether that particular conduct is attributable to the State (the question of attribution in Articles 4 to 11 ARSIWA). Once it has been established that certain conduct is genuinely an act of the State, the final step is to analyse whether this conduct, attributable to the State, is in line with what the applicable legal framework requires from the State as addressee of its norms (the question of breach, as addressed in Articles 12 to 15 ARSIWA). As much as a State cannot be responsible without fulfilling the two conditions of an internationally wrongful act (attribution of conduct, and a breach of an international obligation), one cannot establish in the abstract whether a State has breached its obligations without first looking into the question of attribution.[38] Attribution rules act as a pivotal point between, on one hand, what happens in the physical world, and on the other, the State as an international legal person subject to normative frameworks designed to regulate State behaviour. Conduct that pursuant to attribution rules is considered an act of State need not be, and often is not, a violation of international law. But one cannot know whether a State commits a breach unless an attribution test is carried out in the first place. Thus, from this point it becomes clear that attribution rules have a permeating effect on primary rules of international law. The attribution of conduct to a State as addressee of the norm triggers the application of such rules of international law to its conduct.

Accordingly, secondary rules as found in the law of State responsibility do not operate in clinical isolation from primary rules of international law, and the conventional wisdom that there is, as such and without qualification, a ‘strict distinction’ between primary rules and secondary rules merits critical reflection. It is appropriate to recognize that taking this catchphrase for granted obscures the practical and legal interaction between both sets of rules. Despite this, *Bosnian Genocide* is grounded in an absolute separation of both types of rules of international law and presents the distinction as an almost unquestionable truth to deny the usefulness or appropriateness of using attribution rules to determine the scope and application of IHL. Doing so seems to attach more importance to the distinction than it was intended to have. As Ulf Linderfalk remarked, the ILC's adoption of the primary/secondary divide cannot be ‘cannot be tantamount to a blanket approval of the primary-secondary rules terminology for all times’.[39] From a useful method of

[38] For the order in which the elements of attribution and breach must be examined, see further Chapter 4, Section D.1.

[39] Linderfalk (2009) 55. In the conclusion the author acknowledges that the introduction of the primary-secondary terminology ‘undoubtedly had some positive legal-political effects’ but he doubts if they outweigh ‘the accompanying legal effects that the terminology entailed for a correct understanding of the international legal system’; *ibid* 72.

project delimitation it is elevated by the ICJ into an irrefutable belief that secondary rules have no effect whatsoever on (the application of) substantive law. Such a belief is at odds with how the distinction came to life in the first place.

C.2. The Requirement of 'Belonging to a Party to the Conflict' and the Principle of Equally Responsible Belligerents

The matter of the relationship between IHL and State responsibility law is a complex one. Not only does it involve an analysis of two types of *rules* (i.e. primary and secondary rules), it also entails an examination of two types of *sources* of international law; treaty law and customary. The definition of IAC must be interpreted contextually, in accordance with the ordinary meaning to be given to it and in light of the object and purpose of IHL. Together with the context account must be taken of State practice, as well as other applicable rules of international law (including customary law, such as reflected in ARSIWA attribution rules), and, as a supplementary means to confirm an interpretation, the preparatory works of the treaty.[40] Given that the term 'any other armed conflict' in common Article 2, in textual terms, is susceptible to multiple interpretations, it is important to arrive at an interpretation that ensures that the object and purpose of IHL is respected, and that its application does not lead to results which are manifestly absurd or unreasonable to the Contracting Parties or the interests IHL seeks to protect.[41]

The ICJ in *Bosnian Genocide* sought to distinguish the case at hand from those dealt with by international criminal tribunals such as the ICTY. The ICJ saw no precedential value in the overall control test because in *Tadić (Appeal)* 'the ICTY was not called upon … to rule on questions of State responsibility, since its jurisdiction is criminal and extends to persons only.'[42] While it is of course true that the ICJ and the ICTY have different subject-matter jurisdictions, this by itself cannot be a sufficient justification for treating a situation of conflict differently, depending on whether the issue at stake is one of State responsibility (essentially civil in nature) or of individual criminal responsibility. After all, such responsibility can only be assessed *after* determining the applicable law in light of which the behaviour of States and individuals must be assessed. Within the context of IHL, the applicable law, in turn, results from the classification of conflict as a preliminary and thus indispensable step of the process of the legal appreciation of a factual situation involving hostilities. The real question, therefore, is not one of individual criminal liability versus State responsibility, but whether the legal process of attribution that defines the identity

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[40] See Arts 31 and 32 Vienna Convention on the Law of Treaties.

[41] See ICTY, *Delalić (Trial)* (1998) para 170, observing that the international community 'can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a *purposive* interpretation of the existing provisions of international customary law' (emphasis added).

[42] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 403.

of the belligerent parties is coterminous with that which results from the State responsibility attribution rules. Only if the answer to this question is no, then it could be said that the ICTY in *Tadić (Appeal)* has adopted a position on 'issues of general international law which do not lie within the specific purview of its jurisdiction'. It is submitted, however, that this question must be answered affirmatively, and this is due to the immutable connection that exists between belligerency in an IAC, and the responsibility that comes with it.

The principle of State responsibility in IHL can be traced back to Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, which provides that a belligerent party in an IAC is 'responsible for all acts committed by persons forming part of its armed forces'.[43] It may be noted that since not all conceivable acts lead to *responsibility* but only those which violate any applicable law, it would be better to speak of a rule which provides that all acts committed by persons forming part of its armed forces are *attributable* to the belligerent State. Article 3 followed from a proposal by the German delegation at the Second Hague Peace Conference. The motivation for this was to 'extend, to the law of nations, in all cases of infractions of the Regulations, the principle of private law according to which the master is responsible for his *subordinates* or *agents*'.[44] The principle is now laid down in Article 91 Additional Protocol I[45] and customary IHL,[46] and encompasses not just a State's regular armed forces as narrowly defined in Article 4(a)(1) of Geneva Convention III (attributable to the State under Article 4 ARSIWA), but also other forces, such as militias and organized resistance movements, who while not forming part of the regular armed forces nevertheless fight as proxies on behalf of the State and consequently 'belong to a Party to the conflict' in the sense of Article 4(a)(2) of that Convention.[47]

In the wake of the Second World War, it had become all too clear how States had tried to evade their obligations by carrying out their policies through an intermediate. The need to ensure full responsibility of States for the acts of the forces through which it acts is required by the fabric of IHL applicable to IACs, which is premised on avoiding a protection- and responsibility gap in relation to those who are

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[43] Art 3 Hague Convention (IV) respecting the Laws and Customs of War on Land.
[44] Scott (1921) 26 (emphasis added).
[45] Art 91 Additional Protocol I.
[46] International Committee of the Red Cross Customary IHL Database, 'Rule 149: Responsibility for violations of International Humanitarian Law', available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule149. See also UN General Assembly) Resolution 60/147 of 16 December 2005, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN Doc A/RES/60/147 (2005), Principle IX; De Preux (1987) 1057; Toman (2009) 665–74.
[47] As noted by two delegations in the explanation of vote on the adoption of what is now Art 91 Additional Protocol I: '[T]he State was responsible for all acts committed by its bodies and not only for acts committed by persons forming part of its armed forces'; see *Summary records of the 46th plenary meeting*, Official Records of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts (Geneva, 1974–1977), Vol VI, CDDH/SR.46, 343–45, paras 23 (Mexico) and 24 (Ecuador).

affected by the effects of warfare. A number of IHL provisions are in fact aimed at preventing such a responsibility gap and protect war victims by ensuring full accountability and responsibility in situations of interstate conflicts, even if those States resort to actors other than their own regular armed forces. In particular, IHL does not allow that a State, through a process of transfer, delegation or outsourcing, rid itself of any liability in respect of protected persons, such as prisoners of war or protected civilians (enemy aliens or inhabitants of occupied territory).[48] Consider, for example, Article 29 of Geneva Convention IV which holds that a party to an IAC is 'responsible for the treatment accorded to [protected persons] by its agents'.[49] This provision is aimed ensuring the continued responsibility of a State for the treatment of enemy aliens and inhabitants of territory occupied by it. The 1958 *ICRC Commentary* to this Convention contextualizes the problem of agency as follows:

> The term "agent" must be understood as embracing everyone who is in the service of a Contracting Party, no matter in what way or in what capacity. It included civil servants, judges, members of the armed forces, members of para-military police organizations, etc. … The nationality of the agents does not affect the issue. … [To remove the difficulty of an Occupying Power] have certain of its decisions carried out by the local authorities, or … set up a puppet government, in order to throw responsibility for crimes, of which it was the instigator … it is necessary to disregard all formal criteria. … If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible … [50]

According to that commentary, the notion of agency must be thus understood as encompassing not only a State's armed forces, but also other 'persons who can, by their acts, involve the State in responsibility'.[51] Admittedly, Article 29 Geneva Convention IV deals with the problem of agency in relation to inhabitants of occupied territory and enemy aliens, and it does not directly answer the question of whether a conflict can be classified or internationalized as per application of secondary rules of attribution. The point is rather that Article 29 clearly signals the aim of IHL to ensure continued responsibility in IACs, even if a State acts through persons or institutions outside the formal structure of the State, and that a State cannot for example

[48] See Art 51 Geneva Convention I, Art 52 Geneva Convention II, Art 131 Geneva Convention III and Art 148 Geneva Convention IV. See also the particular cases covered in Art 12, first para Gene Convention III (detaining power is responsible for prisoners of war), Art 12, second para Geneva Convention III (transfer of prisoners of war to a third State), Art 39 Geneva Convention III (prisoner camp must be under authority of a responsible officer of the detaining State's armed forces), Arts 56 and 57 Geneva Convention III (responsibility of detaining power for labour detachments and prisoners of war put to work for private persons), and Art 45 Geneva Convention IV (transfer of enemy aliens to a third State).

[49] Art 29 Geneva Convention IV.

[50] Pictet (1958) 210–12 (references omitted).

[51] *Ibid*, 211–12. On the concept of agency, see further the discussions of Committee III in Final Record of the Diplomatic Conference of Geneva of 1949 (Geneva, 21 April–12 August 1949), Vol II-A, 642–43, 713–14 and 822.

disassociate itself from its responsibilities as an occupying power (i.e. IAC law) by having its acts carried by local OAGs rather than by its own armed forces.

Bosnian Genocide has separated conflict classification from State responsibility law and submitted the former to a less-demanding test than is required for attribution under the latter. This allows a third State to control an OAG to the extent of being engaged in an IAC (with all concomitant belligerent rights and obligations for the controlling State), but without being responsible towards the territorial State (and its inhabitants) for the specific actions of the proxy force through which the State acts.[52] The functional differentiation from *Bosnian Genocide* that would allow for this is not permitted by IHL.

The principle of equality of belligerents holds that both parties to an IAC have an equal scope of rights and obligations. This can only be ensured if IACs are fought on condition of equal State responsibility.[53] If IAC law applies to an OAG (as a result of the internationalization of a NIAC), then by necessary implication the same body of IAC law applies to the controlling State, as well as the territorial State which opposes the OAG and (*de jure*) the controlling State. It would thus be unacceptable that a territorial State must apply IAC law in relation to OAGs fighting as proxies for a controlling third State, without being able to hold the third State responsible for the acts of the agents of the latter. The principle of functional differentiation from *Bosnian Genocide* effectively undermines the fundamental IAC/NIAC dichotomy by allowing a conflict to be internationalized as a result of a test that does not encompass all belligerent acts. This is contrary to the State sovereignty concerns for matters in the internal domain that motivated States gathered at the Diplomatic Conference in Geneva in 1949 to subject internal conflicts only to a minimum level of international regulation.[54]

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[52] Milanović (2015) 37 para 34.

[53] See ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 94: 'States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict. These then may be regarded as the ingredients of the term "belonging to a Party to the conflict".' See also Jorritsma (2014); Jorritsma (2015).

[54] The problem of aid by third States in NIACs was examined in 1971 during the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The experts agreed that political or economic aid would not modify the qualification of a conflict. At the other end of the spectrum the experts considered that a conflict would be internationalized as a result of third State involvement that is 'sufficiently large to modify the balance of the confronting forces'; see International Committee of the Red Cross (1971), Title II, Chapter 2, 19. The experts mentioned direct intervention (i.e. the actual deployment of troops by the third State) as a particular example. It was submitted by the experts that no distinction should be made between sending armed forces to the insurgents or to the State authorities; In both cases the conflict would have to be considered an international one see *ibid*, 20. As is well known, however, the treaty provisions drafted at the Diplomatic Conference in 1949 treat NIACs fundamentally different

State practice further supports this. For example, the 2015 Law of War Manual of the United States Department of Defense of provides that the requirement of belonging to a party to an IAC means that an OAG is 'acting on the authority of a State,' for example as a result of '[a] State's formal acknowledgement [or] State support and direction to the armed group'[55], both grounds of attribution in the law of State responsibility.[56] Under the Manual, members of an OAG are not to be given the privileges of combatant status, even if they would satisfy the other conditions of Article 4(a)(2) Geneva Convention III, *unless* the OAG acts on the authority of another State. The Manual further explains that the forces covered by Article 4(a)(2) must have the attributes of a State's regular armed forces, including in relation to hierarchy and responsibility,[57] conditions which the Manual notes 'may be understood to reflect a burdens-benefits principle, i.e., the receipt of certain benefits in the law of war … requires the assumption of certain obligations'.[58] This principle applies not just on an individual level (e.g. status of privileged combatant in return for meeting the conditions of Article 4(a)(2) Geneva Convention III), but also on an interstate level.[59]

A clear and unequivocal confirmation of the link between the applicability of IAC law and State responsibility — more precisely, the attribution as per State responsibility law as not just sufficient but also required for the existence of an IAC — can be found in the case of *Kassem and Others* of the Israel Military Court sitting in Ramallah (cited with approval in the Department of Defense Manual[60]). In considering whether an individual could be said to act on behalf of a State, the Military Court held that:

> [In IACs] a "command relationship" should exist between [a] Government and the fighting forces, with the result that a *continuing responsibility* exists of the Government and the commanders of its army for those who fight in its name and on its behalf. … It is the implementation of the rules of war that confers both rights and duties, and consequently *an opposite party must exist to bear*

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from IACs, and the same sovereignty concerns explain why third State intervention on the side of an OAG is nowadays treated differently from intervention on the side of the territorial State.

[55] United States, *Law of War Manual*, *supra* note 8, para 4.6.2.

[56] See also *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, UN Doc A/HRC/3/2 (2006). The Commission found that Israel, Lebanon and Hezbollah were all involved in an IAC from 21 July to 14 August 2006. Lebanon denied responsibility for Hezbollah's actions, while Israel regarded the latter as acts of the sovereign State in which the group is based. According to the Commission, the fact that the national Lebanese Armed Forces did not actively participate in the hostilities did not prevent the application of IAC law to the relations between Israel and Hezbollah, given that Lebanon expressly regarded the latter to act, in the absence of governmental forces present, as a resistance movement and the 'natural expression of the right of the Lebanese people in defending its territory and dignity'. Here, the Commission appeared to apply a test of attribution as found in the law of State responsibility, namely Arts 9 and 11 ARSIWA.

[57] United States, *Law of War Manual*, *supra* note 8, para 4.6.1.3 jo para 4.6.1 fn 142.

[58] *Ibid*, para 4.6.1.

[59] *Ibid*, para 3.6.3.2.

[60] *Ibid*, para 4.6.2 fn 158.

> *responsibility* for the acts of its forces, regular and irregular. [T]he [Fourth Geneva] Convention applies to military forces (in the wide sense of the term) which, *as regards responsibility under International Law*, belong to a State engaged in armed conflict with another State, but it excludes those forces — even regular armed units — which do not yield to the authority of the State and its organs of government. … [In view] of the experience of two World Wars, the nations of the world found it necessary to add the *fundamental requirement of the total responsibility of Governments for the operations of irregular corps* and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war. ….[61]

In this case the Military Court had to consider whether the defendants, members of an organization called the Popular Front for the Liberation of Palestine, were entitled to prisoner of war status. On the basis of the facts, the Court was not prepared to consider the defendants 'irregular forces, i.e., militia and volunteer forces not forming part of the regular national army'.[62] By coming to that conclusion the Court stated categorically that IAC law only applies on the condition of there being forces belonging to a State *as a matter of State responsibility*.[63] In interpreting IHL accordingly, the Court ensured that Israel would not have to accept that rebellious inhabitants turn into privileged combatants (should these individuals meet the other conditions of Article 4(A)(2) Geneva Convention III) by the mere act of the indirect involvement of a third State, *unless* that third State could be held legally responsible for the actions of its proxy force.

As the 1958 *ICRC Commentary* to Geneva Convention IV explains, 'it would seem unjust for individuals to be punished [for the commission of grave breaches of IAC law] while the State in whose name or on whose instructions they acted was released from all liability'.[64] The functional differentiation in *Bosnian Genocide* implies that if the acts of proxy forces are not attributable to it, a third State is under common Article 1 of the Geneva Conventions at the most responsible for a failure to 'to respect and to ensure respect' for IHL.[65] This solution, also advocated by the *OUP Commentary*,[66] expects too much from due diligence obligations as an effective means to prevent and sanction violations of IHL.

[61] Israel Military Court sitting in Ramallah, *Military Prosecutor v. Kassem and Others* (1969) 17 (emphasis added).
[62] *Ibid*.
[63] While the *Kassem and Others* case did not deal with the question of an internationalized NIAC (the applicable law was that of occupation), the underlying rationale of total responsibility applies equally to any situation which raises questions of the applicability of IAC law.
[64] Pictet (1958) 603. Similarly, when introducing at the second Peace Conference what became Art 3 Hague Convention (IV) respecting the Laws and Customs of War on Land, the German delegation warned that if the victims of violations could not demand reparation from the State and were obliged to direct their claims at an individual perpetrator, 'they would fail in the majority of cases to obtain indemnification due to them'; see Scott (1921) 140.
[65] Common Art 1 Geneva Convention I–IV; Art 1(1) Additional Protocol I.
[66] Clapham (2015) 18 para 46.

Due diligence is not a ground for attributing the conduct of a non-State actor to the State; a breach of a due diligence obligation leads to State responsibility for a State's own failure to act in relation to certain acts to be prevented, but not necessarily for the acts themselves (or all injury caused by them). It is understood that a State may be responsible for failure to prevent violations of international law even where it cannot be proved that the violations were committed by State agents.[67] However, the law in this area is far from settled,[68] and such responsibility has mostly been established in cases where the responsible State had failed to take reasonable measures to prevent certain acts taking place on its own territory. As the International Law Association notes, the term reasonableness is difficult to determine *in abstracto*, given that it leaves States much discretion in the choice of means and 'what could be expected from a State cannot be ascertained in general terms.'[69]

Leaving due diligence as the only possibility to establish third State responsibility in relation to IHL violations committed by proxy forces in another State puts a heavy burden of proof on the claimant (be it an individual victim, or the territorial State asserting its own rights) to show that the third State has manifestly failed to take all reasonable measures to prevent those violations, taking place abroad and thus outside of its sphere of immediate and defining influence. Either way, the principle of due diligence cannot be expected to fill a responsibility gap when the primary rules of IHL rule out that such gap exist in the first place.

C.3. Revisiting the Classification of Conflict in *Nicaragua* in Light of *Bosnian Genocide*

The ICJ's suggestion in *Bosnian Genocide* that an OAG and a controlling State are conferred the rights and obligations of IAC law without the latter being responsible for all acts of such proxies also appears be at odds in light of what the Court held earlier in *Nicaragua*. In that judgment, dealing with facts and attribution, the ICJ observed that the lack of effective control meant that the conduct of the *contras* could

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[67] See e.g. Arbitral Award, *Alabama Claims (United States v. United Kingdom)* (1872); Arbitral Award, *British Claims in the Spanish Zone of Morocco (Spain v. United Kingdom)* (1925); ICJ, *Corfu Channel (United Kingdom v. Albania)* (1949); African Commission on Human and Peoples' Rights (ACionHPR), *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* (1995).

[68] See e.g. International Law Association (Study Group on Due Diligence in International Law, 2012–2016), *First Report* (Washington DC Conference, 2014) available through www.ila-hq.org/index.php/study-groups (Due Diligence in International Law > Documents) 12: 'The point of most controversy is how remotely the duty of due diligence [in IHL] extends when the actors engaged in the activity are not direct state actors.' See further Berkes (2018) (on IHL as a source of the concept of due diligence obligations).

[69] International Law Association (Study Group on Due Diligence in International Law, 2012–2016), *Second Report* (Johannesburg Conference, 2016) available through www.ila-hq.org/index.php/study-groups (Due Diligence in International Law > Documents) 9.

not be attributed to the United States. What follows is how the Court later turns to a determination of the applicable law:

> 216. The Court has already indicated (paragraph 115) that the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the contras; accordingly [Nicaragua's submission that the United States is responsible for killing, wounding and kidnapping Nicaragua's citizens] has to be rejected. The question however remains of the law applicable to the acts of the United States in relation to the activities of the contras …
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> …
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> 219. The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". … [T]he actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.

The way how this paragraph is phrased (including the referral back to para 115 of the judgment) suggests a link between attribution and the determination of the applicable law governing the hostilities between the United States, Nicaragua and the *contras*. The application of NIAC law to the acts of the *contras* came after a determination that due to the lack of effective control their behaviour was not attributable to the third State for the purpose of establishing its responsibility.[70] Had the ICJ found that the United States did indeed exercise this level of control over the *contras*, then the conduct of the *contras*, attributable to the United States, would certainly have been assessed in light of IAC rules. And while it is true that correlation here does not necessarily imply causation, the causation could be inferred from the fact the Court did not evaluate whether there was another factor that could have caused the effect of internationalization, for example a lower test (e.g. one found in IHL, as suggested by *Bosnian Genocide*). The Court's suggestion in *Bosnian Genocide* that the overall control test suffices for internationalization effectively contradicts its earlier classification of the conflict between the *contras* in *Nicaragua* as a NIAC. After all, the ICJ found established as a matter of fact that the United States (acting through its agents, such as the CIA or its armed forces) 'gave tactical directives' to carry out certain acts or attacks,[71] 'largely organized the [*contras*],'[72] and '[participated in] the selection of its military or paramilitary targets, and the planning

[70] But see Milanović (2006) 579 fn 129, arguing that the separation by more than a hundred paragraphs of these parts of the judgment is an obvious indication that the Court never used a State responsibility test for conflict classification. The present author submits, however, that the textual separation is simply the result of the way the judgment with its many claims is constructed, turning to facts and imputation (at paras 76–171) before a determination of the applicable law (at paras 172–225), and finally an assessment of the legality of such attributable conduct in light of the applicable law (at paras 226–82).

[71] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (1986) para 104.

[72] *Ibid*, para 108.

of the whole of the operation'.[73] These findings of fact show that the United States was not only assisting the contras with financial or military means, but that its actions also satisfied the second limb of the overall control test, namely having 'a role in organising, coordinating or planning the military actions'.[74]

Although according to the so-called "logic" of *Bosnian Genocide* overall control could turn a pre-existing NIAC into an IAC, in *Nicaragua* the Court nevertheless held that despite this test being met the conflict between the *contras* and their government was an internal one. In *Nicaragua* the multilateral treaty reservation prevented the Court from assessing the responsibility of the United States in light of treaties such as the Geneva Conventions. Because the particular violations of this case allegedly committed by the *contras* (e.g. murder, wounding and kidnapping of civilians) were violations of rules of customary law that are applicable in IACs as well as NIACs, there was no need to classify the conflict; it would not have made any difference had the Court determined that the NIAC in question was indeed internationalized.[75] Nevertheless, one cannot escape the impression that the relationship between attribution, State responsibility and classification of conflict is far closer than suggested in *Bosnian Genocide*, and *Nicaragua* presents a strong indication that attribution rules from the law of State responsibility are not that autonomous in relation to primary rules after all.

D. The Overall Control Test as a *Lex Specialis* Test for the Attribution of Conduct in International Humanitarian Law

The ICTY's application and interpretation of the primary rules of IHL through Article 8 ARSIWA may have caused a certain impact on how this provision is more generally deemed to apply in situations involving OAGs, hostilities taking place in or outside the controlling State's territory, and potentially leading to the situation of an (internationalized) armed conflict. Has the ICTY through use of Article 8 ARSIWA contributed to a change in the general law of State responsibility as laid down in Articles 4 to 11 of ARSIWA? It appears not.

The overall control test as the required test for the purpose of conflict classification is nowadays firmly rooted in ICTY and ICC case law, the bodies with specific subject-matter competence and expertise in armed conflict situations. The

[73] *Ibid*, para 115. See also para 106: '[A] number of military and paramilitary operations by [the contras] were decided and planned … in close collaboration with [the United States]'.
[74] ICTY, Prosecutor v. *Tadić (Appeal)* (1999) para 137.
[75] See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* para 219. According to customary IHL certain behaviour is prohibited in IACs but not, or at least arguably not, so in NIACs; see e.g. Henckaerts and Doswald-Beck (2005). Accordingly, even in cases subject to a multilateral treaty reservation it may sometimes be necessary to classify the armed conflict.

foregoing demonstrates that the ICTY was correct to use a State responsibility test for the purpose of the classification of conflict and thereby establish the subset of primary rules in light of which the lawfulness of the conduct of the actors involved could be assessed. Rights and obligations stemming from IAC law are not applicable to States unless the situation *de jure* involves two opposing States with full responsibility for their regular and irregular forces through which they act. Given this immutable connection between State responsibility and the existence of an IAC under common Article 2, it is indispensable to apply State responsibility attribution rules to establish whether conduct (such as that of an OAG) can be imputed to a State, and thereby trigger the application of IAC law. If the threshold of application for IACs (such as any hostile resort to force, or territorial control amounting to occupation[76]) is met as a result of acts attributable to a State as a matter of State responsibility law, then IAC law applies to that particular conduct, and any such attributable conduct in violation of the applicable law leads to State responsibility.

The alternative solution presented in *Bosnian Genocide* not only allows for an untenable responsibility gap, it is also difficult to see worked out in practice, especially taking into consideration that *Bosnian Genocide* hints, but no more than that, at a test as found in the primary rules of IHL, whereas the ICRC (an organization with widely recognized authority, competence and impartiality in the field of IHL) and the ICTY (an international tribunal with specific subject-matter jurisdiction and acting pursuant to a Security Council resolution under Chapter VII of the United Nations (UN) Charter in accordance with customary international law) have held that there is no such test at all.

On this basis, *Tadić (Appeal)* poses no deviation from customary international law of State responsibility, apart from the reminder that generally applicable rules of attribution do not necessarily apply in every field of international law. It must be recalled that in *Tadić (Appeal)*, the Tribunal held that the overall control test is not valid with regard to individuals or groups not organized in military structures. In relation to these (groups) of persons, the test of effective control remains the proper test.[77] The overall control test from *Tadić (Appeal)* applies in any case only to OAGs, and thus does not represent an all-out challenge to Article 8 ARSIWA and its effective control test. Moreover, the overall control test only applies in relation to acts of hostilities carried out by an OAG and taking place in or possibly giving rise to an armed conflict. Although the ICTY argued against a temporal limitation for the applicability of the overall control test and considered it of general application to

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[76] For the notion of occupation by proxy, see also International Committee of the Red Cross (2016b) 60. See also ICTY, *Prosecutor v. Prlić* (2017) paras 322–25, where the Appeals Chamber confirmed the Trial Chamber's finding that there existed a state of occupation in certain municipalities of Bosnia and Herzegovina, due to Croatia's overall control over HVO (a military group of the Croatian Republic of Herzeg-Bosnia) and HVO's exercise of the requisite degree of territorial control.

[77] ICTY, *Prosecutor v. Tadić (Appeal)* (1999) paras 120, 132 and 137. Consequently, *Tadić (Appeal)* can be reconciled with ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, which involved the actions of an unorganized mob of demonstrators.

OAGs in times of armed conflict or peace,[78] the present author submits that the acts of OAGs clearly taking place in times of peace, cannot be attributed to a State by virtue of a test applied for the purpose of IHL. As far as the ICTY sought to introduce a generally applicable attribution test for OAGs, *Tadić (Appeal)* was indeed pronouncing on matters outside of its subject-matter jurisdiction. Consequently, *Tadić (Appeal)* has had no impact on situations involving for example criminal gangs, drug cartels, etc, whose criminal (not belligerent) conduct must be looked at through the lens of the rules of law enforcement and international human rights law.

E. Conclusion

This Chapter examined whether IHL, and its interpretation by the ICJ and the ICTY, deviates from the customary international law of State responsibility as far as attribution of conduct is concerned. It has been shown that rights and obligations stemming from IAC law are not applicable to individuals or States unless the situation *de jure* involves two opposing States with full responsibility for the regular and irregular forces through which they act. Given this connection between State responsibility and the existence of an IAC under common Article 2, it is necessary to apply attribution rules to establish whether conduct (such as that of an OAG) can be imputed to a State, and thereby trigger the application of rules such as the law of IACs.[79] If the threshold of application for IACs (such as any hostile resort to force, or territorial control amounting to occupation) is met as a result of acts attributable to a State as a matter of State responsibility law, then IAC law applies to that particular conduct, and any such attributable conduct in violation of the applicable law leads to State responsibility.

Unlike what is asserted often, the case law of the ICTY when pronouncing on matters of conflict classification when OAGs are controlled or supported by third States can in fact be reconciled to some extent with what the ICJ held on this point in *Bosnian Genocide*. With its specific subject-matter jurisdiction and authority in the field of IHL, the ICTY was right to determine (consistently[80]) that a NIAC turns into an IAC by reference to attribution rules such as those found in the law of State responsibility. The rule that attribution as per State law determines whether an OAG belongs to a State (and thus an IAC exists) ensures that no such responsibility gap

[78] See ICTY, *Prosecutor v. Tadić (Appeal)* (1999) para 137, which speaks of the control required by international law to be regarded as *de facto* organ of the State *in or outside* the context of an armed conflict.

[79] Given that IHL also seeks to regulate the behaviour of individuals, and not just that of States, IHL is not interstate law in the traditional sense. Nevertheless, States are the primary addressees of its norms and the regime of grave breaches and other IAC war crimes only comes into play once there is an IAC situation, which ultimately depends on States being the belligerent parties.

[80] See e.g. ICTY, *Prosecutor v. Blaškić (Appeal)* (2004) para 170: '[T]he jurisdictional prerequisites for the application of Article 2 of the Statute have been *exhaustively* considered in the jurisprudence of the International Tribunal' (emphasis added).

will exist, and accommodates the concerns of both the territorial State as well as the intervening State by guaranteeing that neither State has IAC rights and obligations unless the OAG fights, in fact and law, under authority and responsibility of a State. At the same time, the ICJ was right as it implied that such rules could stem from or be found within a body of primary rules such as IHL. Consequently, in IACs there is a *lex specialis* standard of attribution in the form of the overall control test with respect to the conduct of OAGs in or giving rise to IACs.[81]

[81] This also appears to be the position of the Netherlands when commenting on ARSIWA, as it welcomed that *for the purposes of State responsibility* 'the words "direction or control" allow for the application of both a strict standard of "effective control", as used [in *Nicaragua*], and a more flexible standard as applied [in *Tadić (Appeal)*]'; see ILC, State Responsibility: Comments and observations received from Governments, UN Doc A/CN.4/515 and Add.1–3 (2001) 50.

CHAPTER 7 CONCLUSION

A. General Remarks

The previous Chapters carefully examined the standard and function of rules on the attribution of conduct in the case law of human rights courts (which for the sake of brevity is here understood to include quasi-judicial human rights bodies), as well as international criminal tribunals addressing violations of international humanitarian law (IHL) in international armed conflicts (IACs). Drawing from the preceding analysis, the aim of this final Chapter is to present conclusions and answer the research questions as posed in the Introduction.

The Articles on the Responsibility of States for Internationally Wrongful Acts[1] (ARSIWA or the Articles) are widely considered to represent the most authoritative and complete codification of the law governing the existence and consequences of internationally wrongful acts committed by States. The Articles have been relied on by parties and adjudicators in numerous cases before international courts and tribunals. Its attribution rules are widely regarded as a reflection of customary international law. Nevertheless, it cannot be denied that the Articles largely reflect the traditional nature of international law, given that the majority of its provisions are formulated for the purpose of inter-State disputes.

In modern international law individuals are recognized to enjoy international rights, most prominently in the field of human rights, but also international obligations, enforced by international criminal tribunals. Human rights law is a specialized field of law that may have its own *lex specialis* provisions when it comes to determining State responsibility. Moreover, international criminal law is not even concerned with establishing State responsibility but only with the criminal responsibility of individuals. Thus, on the one hand, despite their status as customary international law one might be inclined to question or even altogether dismiss the relevance of attribution rules in ARSIWA in disputes before human rights courts and criminal tribunals, and one might be tempted to claim that these bodies should not at all rely on them in the exercise of their judicial functions. On the other hand, human rights law and the law applicable to IACs share a common point of departure, given that both regimes ultimately depend on the involvement of States. The various human rights treaties discussed in this thesis bind States. Consequently, a State can only be responsible for a human rights violation if conduct is attributable to it as an international legal person with obligations in this field of law. Similarly, IACs by definition require the participation of two (or more) States that oppose each other by

[1] International Law Commission (ILC), *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, Yearbook of the International Law Commission (YB ILC) 2001-II(2) 30 para 77.

force. Thus, an individual can only be prosecuted and convicted by international criminal tribunals for war crimes and other violations of the laws applicable to IACs, if the belligerent parties are in fact and in law fighting for or on behalf of two States.

To recall, this thesis aimed at answering the following research questions. The first question is whether these courts and tribunals followed the attribution rules in Articles 4 to 11 ARSIWA as a representation of customary international law or, rather, have they adopted or recognized *lex specialis* rules to determine whether certain conduct constitutes an act of the State? In other words, what is the *standard* of attribution of conduct as used by these courts and tribunals? The second question is whether these courts and tribunals applied attribution rules from the law of State responsibility to determine the applicable law and consequently to enable the exercise of their judicial function? This question is not about the standard of attribution rules but about their *function*.

For analytical purposes and in line with the general structure of this thesis, the following Section will offer concluding thoughts first on the standard (B.1) and function (B.2.) of attribution rules in the case law of human rights courts. The Section that follows (C.) engages with the standard and function of attribution rules in case law of international criminal tribunals when addressing individual criminal responsibility for IHL violations in IACs. Here, the focus will be specifically on cases in which an organized armed group (OAG) is engaged in a non-international armed conflict (NIAC) with the territorial State, and that conflict subsequently transforms into an IAC due to a third State controlling the OAG which is then seen as fighting on the latter State's behalf.

B. The Standard and Function of Attribution Rules in Human Rights Case Law

It is widely recognized in the case law of human rights courts that a human rights violation requires that conduct is attributed to a State and that such conduct is in breach of its international obligations. Thus, notwithstanding the special nature of human rights treaties as conventions that go beyond conferring reciprocal rights and obligations to States, human rights courts have relied on the principle of systemic integration[2] to interpret the relevant conventions by taking into account the customary international law definition of an internationally wrongful act as laid down in Article 2 ARSIWA. Indeed, human rights courts proceed on the assumption that the conditions of attribution and breach are indispensable for holding a State responsible for a human rights violation. However, this starting point does not tell us how human rights courts apply an attribution analysis, or, for that matter, for what

[2] See Art 31(3)(c) Vienna Convention on the Law of Treaties.

purpose. These are questions pertaining to the standard (Section B.1.) and function (B.2.) of attribution of conduct in human rights law.

B.1. The Standard of Attribution Rules in Human Rights Case Law

As this thesis has demonstrated, human rights courts do not employ or recognize a *lex specialis* when it comes to determining whether or not conduct is attributed to a State. In fact, in the cases that were examined in the preceding Chapters, the courts in question have either explicitly treated the attribution rules from ARSIWA as relevant international law or undertook an analysis on attribution of conduct in way that wholly conforms to ARSIWA yet without mentioning the instrument by name.

There is an abundance of case law from human rights courts that recognizes the standards of attribution as laid down in Articles 4 and 5 ARSIWA in respect of State organs or other entities exercising governmental authority.[3] On the basis of the first of these provisions, human rights courts have held States directly responsible for the conduct of State organs such as the police and the military,[4] domestic courts,[5] as well as organs such as a special prosecutor[6] and officers instructing pupils at the

[3] This is also widely recognized in the General Comments/Recommendations as adopted by the various human rights treaty bodies. As for the standard of attribution in Art 4 ARSIWA, see e.g. Human Rights Committee, *General Comment No 31 (Nature of the general legal obligation)*, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004) para 4; Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, UN Doc E/C.12/GC/24 (2017) para 47; Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender-based violence)*, UN Doc CEDAW/C/GC/35 (2017) paras 22 and 26; Committee on the Rights of the Child, *General Comment No 6 (Treatment of unaccompanied and separated children outside their country of origin)*, UN Doc CRC/GC/2005/6 (2005) para 13. As for the standard of attribution in Art 5 ARSIWA, see e.g. Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender-based violence)*, *supra* note 3, paras 24 and 26; Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 3, para 11(b); Human Rights Committee, *General Comment No 35 (Article 9)*, supra note UN Doc CCPR/C/GC/35 (2014), para 8.

[4] See e.g. Inter-American Court of Human Rights (IACtHR), *Gutiérrez and Family v. Argentina* (2013) para 76 (a State is directly responsible for the conduct of 'its agents carried out in their official capacity'); Community Court of Justice of the Economic Community of West African States (ECCJ), *Konte and Diawara v. Ghana* (2014) (citing Art 4 ARSIWA: 'the conduct of an organ of a State [or] of a territorial entity … shall be considered as an act of the State under international law'). Both of these cases dealt with the conduct of members of the police and/or security forces.

[5] See e.g. African Court on Human and Peoples' Rights (ACtHPR), *Konaté v. Burkina Faso* (2014) para 170 (the conduct of the domestic courts '[fell] squarely' on the Respondent State, citing Art 4 ARSIWA); East African Court of Justice (EACJ), *Basajjabalaba and Basajjabalaba v. Attorney General of Uganda* (2019) ('[w]ell established principle that States parties may be held responsible for all actions of State organs, including judicial organs' and citing Art 4 ARSIWA); Human Rights Committee, *Coleman v. Australia* (2006) ('on ordinary rules of State responsibility … the acts and omissions of constituent political units and their officers [including its local courts, RJ] are imputable to the State').

[6] See ECCJ, *Ogwuche ESQ v. Nigeria* (2018) 34–35, recalling that it has held 'in a plethora of cases' that a State is responsible for the actions or inactions of its agents, and finding Nigeria directly

national defence academy.[7] Moreover, human rights courts have recognized that if a State delegates the exercise of governmental functions to a private actor, the State remains responsible under Article 5 ARSIWA for the conduct of the private actor.[8] This is particularly important, given that States increasingly delegate State functions (e.g. detention) to actors or entities outside the State's formal apparatus. In the cases examined in this thesis, human rights courts had no difficulties to rely on the standard of attribution in Article 5 ARSIWA to hold a State directly responsible for human rights violations committed by non-State actors in the pursuit of their delegated governmental functions.

Crucially, the cases examined in this thesis also demonstrate that even if a State organ (or other actor or entity empowered to exercise governmental authority) acted outside of their competence (*ultra vires*), human rights courts have held the State concerned directly responsible.[9] Conversely, human rights courts have also recognized that a State cannot be held directly responsible if a person, who just happens to be a State agent, acts in a purely private capacity.[10]

The cases discussed in this thesis also demonstrate that human rights courts follow the standards of attribution from ARSIWA in less-common or atypical situations. Thus, in *Capehart Williams Sr. and Paykue Williams v. Liberia and Others*,[11] the Community Court of Justice of the Economic Community of West African States (ECCJ) held that the conduct of a forensic pathologist in the service of one State but placed at the disposal of and acting for the benefit of another State, was attributed to the latter for the purpose of examining its responsibility under international law. The ECCJ did not cite or otherwise refer to ARSIWA, but the outcome in this case in terms of attribution is wholly in line with the standard of attribution as laid down in Article 6 ARSIWA.[12]

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responsible for conduct of agents of the Economic and Financial Crimes Control Commission, which is a special prosecutorial office with respect to money laundering and terrorism financing.

[7] See ECCJ, *Wing Commander Kwasu v. Nigeria* (2017) 25, citing Art 4 ARSIWA to hold that '[a]ll actions of institutions or officials of States are imputed to a State as its own conduct'.

[8] See in particular the lengthy analysis of the status and interpretation of Art 5 ARSIWA in EACJ, *Union Trade Centre Ltd (UTC) v. Attorney General of Rwanda* (2014). See also European Court of Human Rights (ECtHR), *Bureš v. Czech Republic* (2012) para 77 jo. para 54, citing Arts 4 and 5 ARSIWA in support of holding the Czech Republic directly responsible for the use of restraining belts in a privatized sobering-up centre.

[9] See ECCJ, *Chia and Others v. Nigeria and Attorney General of Nigeria* (2018) 15 (holding that a State is responsible even if 'the organ or official acted contrary to orders, or exceed its authority under internal law'); Human Rights Committee, *Sarma v. Sri Lanka* (2003) para 9.2. (citing Art 7 ARSIWA and holding that 'it is irrelevant … that the officer [of] the disappearance acted *ultra vires* or that superior officers were unaware of the actions taken by that officer').

[10] See e.g. ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020) para 111 (noting that the conduct complained of 'was not … in the exercise of … official duties'); ECCJ, *Sunday v. Nigeria* (2018) 5 (noting the private nature of the act in question and the lack of any connection with governmental powers).

[11] ECCJ, *Capehart Williams Sr. and Paykue Williams v. Liberia and Others* (2015).

[12] See in particular *ibid*, 20: 'it is obvious it was [Liberia] who invited [Ghana] to assist in carrying out some assignments with regard to the case. … The principle of the law of agency provides that as long

Human rights courts have also recognized that conduct pursuant to a State's exercise of direction or control is attributed to it pursuant to Article 8 ARSIWA. Thus, the Committee on the Elimination of Discrimination against Women relied on this provision in its General Recommendation No 35 concerning gender-based violence, holding that under customary international law 'the acts or omissions of private agents acting on the instruction or under the direction or control of that State' is considered as an act of the directing or controlling State.[13] And in General Comment No 24 concerning business activities, the Committee on Economic, Social and Cultural Rights found that a State is directly responsible 'if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue'.[14] The requirement that the direction or control must extend 'in fact' to 'the particular conduct' appears to suggest an approval by the Committee on Economic, Social and Cultural Rights of the effective control test as found in customary international law and advocated in the commentary to Article 8 ARSIWA, rather than requiring overall control as pronounced as a *lex specialis* test by the International Criminal Tribunal for the former Yugoslavia (ICTY).

Article 9 ARSIWA equally represents a relevant standard of attribution of conduct as recognized in the case law of human rights courts. Thus, in *African Commission on Human and Peoples' Rights v. Libya*, the African Court on Human and Peoples' Rights (ACtHPR) cited Article 9 in support of holding that Libya was internationally responsible for the detention of an individual by the National Transitional Council (NTC, which at the time was internationally recognized as the Libyan government).[15] As explained in this thesis, it would have been more appropriate for the ACtHPR to apply a different standard of attribution, since the NTC was a *de facto* State organ of Libya falling under the scope of Article 4 ARSIWA. Nevertheless, the ACtHPR's reliance on Article 9 does lend credence to the argument

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as an agent [here: the forensic pathologist placed by Ghana at Liberia's disposal, RJ] acts within the ambit of his conduct, actual, usual or ostensible, the principal [here: Liberia, RJ] answers for any act the agent committed.' See also ECtHR, *Big Brother Watch and others v. the United Kingdom (2018)*, para 420, where the ECtHR cited Art 6 ARSIWA to hold that the United Kingdom would be responsible if electronic surveillance had been carried out by foreign intelligence agencies 'placed at [its] disposal' and 'acting in exercise of elements of [its] governmental authority'.

[13] Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 (Gender-based violence)*, *supra* note 3, para 24. See also African Commission on Human and Peoples' Rights (ACionHPR), *Egyptian Initiative for Personal Rights and Interights v. Egypt II* (2011) para 156, holding that a State is responsible for acts of non-State actors if it has 'sufficient control over those actors'; ECCJ, *Adamu and Others v. Nigeria* (2019) 12, holding that 'a violation occasioned by persons acting under the direction or control of the state against a citizen will render the State liable'.

[14] Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 3, para 11(a)

[15] ACtHPR, *African Commission on Human and Peoples' Rights v. Libya* (2016), para 50. See also Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 3, para 11(b), noting that a State is directly responsible for the conduct of business entities 'if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities'.

that this provision provides the relevant standard of attribution in respect of conduct in the absence of official authorities, even if its application to the facts of the case remains open to doubt.

Finally, Article 11 ARSIWA was considered to represent customary international law in the European Court of Human Rights (ECtHR) case of *Makuchyan and Minasyan v. Azerbaijan and Hungary*.[16] In this case the Court held that Article 11, read together with the commentary, provides 'the current standard of international law, from which it saw 'no reason or possibility' to depart.[17] Although the Court decided otherwise, a compelling argument could be made that Azerbaijan had in law and in fact not only approved and endorsed but also acknowledged and adopted the conduct in question as its own. Yet, this concerns the in the present author's view rather questionable application of the law to the facts of the case. Any doubts on this point should not detract from the fact the Court deemed Article 11 to represent customary international law. There is, in other words, no recognized *lex specialis* standard of attribution to consider certain conduct of a non-State actor as an act of the State when the latter acknowledges and adopts the conduct in question.

In light of this, it can be safely concluded that human rights law does not know any *lex specialis* standards when it comes to the attribution of conduct to a State. Consequently, applicants are well-advised and on safe grounds to rely on the relevant provisions of ARSIWA when pursuing their case before human rights courts. Human rights courts, on their part, have at their disposal a valuable and authoritative instrument in the form of ARSIWA when holding States responsible either for the conduct of State organs or other actors exercising governmental authority, or for the conduct of non-State actors when there are sufficient factors to hold that they act on behalf of the State.

B.2. The Function of Attribution Rules in Human Rights Case Law

In human rights cases, the rules of attribution are not only referred to for the narrow purpose of holding a State responsible for certain conduct. As this thesis has demonstrated, attribution of conduct is also relevant for the preliminary question whether the human rights treaty applies at all to the conduct at hand. Given the vast body of case law generated on this topic, this thesis has focused on the case law of the ECtHR in order to examine the function of attribution of conduct in relation to the question of whether the Convention applies at all.

[16] ECtHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020).

[17] *Ibid*, para 118. See also Committee on Economic, Social and Cultural Rights, *General Comment No 24 (Business activities)*, *supra* note 3, para 11(c), noting that a State is directly responsible for the conduct of business entities 'if and to the extent that the State party acknowledges and adopts the conduct as its own'.

Within a State's own territory, this usually does not give rise to many difficulties. After all, everyone within a State's territory is presumed to be within the jurisdiction of that State in the sense of Article 1 European Convention on Human Rights (ECHR). Thus, in the *Assanidze v. Georgia* case,[18] the ECtHR held that for purposes of State responsibility under the ECHR, the mere autonomy of a part of the territory of a State is not sufficient to rebut the presumption of the principle of territoriality and the full application of the Convention.[19] Moreover, as the cases concerning Transdniestria show in respect of the position of Moldova,[20] if a State loses control or authority over part of its territory to another State (or to non-State actors supported or controlled by another State), the territory in question will remain under the jurisdiction of the territorial State. That said, the Court has held that in those situations the range of the Convention's substantive obligations is limited in light of the exceptional circumstances that the territorial State faces, given that it is merely under 'positive obligations' to take appropriate steps through 'diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law' to ensure respect for the rights guaranteed by the Convention.[21] What follows from the cases concerning Transdniestria is that the scope of substantive obligations that a State has in respect of individuals within its territory under foreign control is closely linked to and ultimately depends on the existence of a controlling third State's extraterritorial jurisdiction. The latter question depends often (but not exclusively, as will be explained) on the attribution of the conduct of individuals through whose actions extraterritorial jurisdiction over foreign territory is exercised.

In extraterritorial situations the applicability of the ECHR is often contested by the respondent State in the form of an objection *ratione personae* or an objection *ratione loci*. The case law of the ECHR is rather notorious for its haphazard approach and its reluctance explain clearly its reasoning and the legal authorities it relies on. Nevertheless, the case law from the ECtHR shows that the Convention applies when States parties act extraterritorially in two different situations. Thus, the Convention applies abroad if a State exercises control over individual victims (i.e. the personal model), and if a State exercises control over foreign territory (i.e. the spatial model).[22] In both models, the legal operation of attributing conduct to a State has a crucial function in relation to the applicability of the Convention. What the Court insufficiently recognizes, however, is the fact that if conduct is attributable to a State, this conduct not necessarily gives rise to State jurisdiction in the sense of Article 1

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[18] ECtHR, *Assanidze v. Georgia* (2004).
[19] *Ibid*, paras 143 and 146.
[20] See ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004); *Ivanțoc and Others v. Moldova and Russia* (2012); *Catan and Others v. Moldova and Russia* (2012); *Mozer v. Moldova and Russia* (2016); *Sandu and Others v. Moldova and Russia* (2018).
[21] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (2004) paras 313, 331, 333 and 335. See similarly *Ivanțoc and Others v. Moldova and Russia* (2012) paras 105–07; *Catan and Others v. Moldova and Russia* (2012) paras 109–10; *Mozer v. Moldova and Russia* (2016) paras 99–100; *Sandu and Others v. Moldova and Russia* (2018) para 35.
[22] See e.g. ECtHR, *Al-Skeini and Others v. United Kingdom* (2011) paras 133–39.

ECHR. And conversely, the existence of State jurisdiction does not mean that all conceivable conduct taking place subject to that jurisdiction is that of the State.

Analytically speaking, questions of jurisdiction are not the same as attribution. Nevertheless, the case law of the Court shows that these matters can be closely related especially in the personal model of extraterritorial jurisdiction. In cases such as *Drozd and Janousek v. France and Spain*,[23] *Behrami and Behrami v. France and Saramati v. France*,[24] *Al-Jedda v. United Kingdom*,[25] and *Jaloud v. the Netherlands*,[26] the Court essentially approached the question of jurisdiction in the sense of Article 1 as being first and foremost a question of attribution. Once the Court concluded in *Al-Jedda v. United Kingdom* and in *Jaloud v. the Netherlands* that the impugned acts were attributed to the respondent States in question, it saw no difficulty to hold subsequently that the respondent States were exercising control over the victims. And conversely, when the Court concluded in *Drozd and Janousek v. France and Spain* and in *Behrami and Behrami v. France and Saramati v. France* that the conduct in question was *not* that of the respondent States, this also implied that there was no extraterritorial jurisdiction exercised by them. These cases show clearly that the personal model of extraterritorial jurisdiction can only be exercised by actors whose conduct is attributed to the State. Yet, attribution does not *necessarily* generate State jurisdiction abroad. This is illustrated very well by cases where the applicability of the personal model hinges on the exercise of physical power rather than the exercise of sovereign authority.[27]

In the second model of exterritorial jurisdiction, the Court does not adequately distinguish between State control exercised over a non-State actor through which the State acts (i.e. the question of attribution), and State control exercised over territory (i.e. the question of jurisdiction in the sense of Article 1). Indeed, this thesis has demonstrated that in cases concerning the extraterritorial application of the ECHR in Turkish Republic of Northern Cyprus, the Moldovan Republic of Transdniestria and Nagorno-Karabakh,[28] it appears as if extraterritorial State jurisdiction implies responsibility for all that happens by the hands of the non-State actor (i.e. the administration of the TRNC, the MRT, or the NKR), even in the absence of the third State exercising detailed control over all their individual actions. This is difficult to understand, or at the least insufficiently explained by the Court, given that control over territory is something different from control over a perpetrator.

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[23] ECtHR, *Drozd and Janousek v. France and Spain* (1992).
[24] ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (2007).
[25] ECtHR, *Al-Jedda v. United Kingdom* (2011).
[26] ECtHR, *Jaloud v. the Netherlands* (2014).
[27] See especially ECtHR, *Banković and Others v. Belgium and Others* (2001).
[28] See ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (1995); *Loizidou v. Turkey (Merits)* (1996); *Cyprus v. Turkey (IV)* (2001); *Ilaşcu and Others v. Moldova and Russia* (2004); *Ivanţoc and Others v. Moldova and Russia* (2011); *Catan and Others v. Moldova and Russia (2012)*; *Mozer v. Moldova and Russia* (2016); *Sandu and Others v. Moldova and Russia* (2018); *Chiragov and Others v. Armenia* (2015).

The case law of the ECHR on matters of extraterritorial jurisdiction would be on an analytically sounder footing if the Court had distinguished more clearly between the applicability of the Convention, and the responsibility for an act that occurs where and to whom the Convention is applicable. Both the personal and the spatial model show that a finding of whether a State has committed a breach of the ECHR actually involves a number of dimensions. The first is one of attribution. Attribution rules attach conduct to a State as an actor with international legal personality and human rights obligations. But the fact that conduct is attributable says nothing about whether such conduct was lawful or not. This still depends on whether there is a breach of any applicable law. As far as the Convention is concerned, and unlike "ordinary" treaties concluded between States,[29] this latter question actually comprises two sub-questions: the existence of State jurisdiction so as to make the treaty applicable in the first place,[30] and the existence of a breach itself.[31]

If a victim is within a State's territory, the Convention applies, and there is a presumption that it applies in full. However, the (preliminary) question of whether a victim is within the jurisdiction of a State other than the territorial State cannot be answered without resolving the question of whether the relevant conduct that gives rise to jurisdiction is an "act of the State" in the first place. In other words, is a victim or territory under control by a person or entity whose conduct is attributed to the State as a matter of State responsibility law? If not, the Convention cannot apply. But if it does, the Convention applies, and the next question is whether or not the conduct amounts to a breach. Here too, attribution rules from the law of State responsibility come in play, but it is necessary to keep in mind that in both models of extraterritorial jurisdiction the conduct that constitutes a breach is *not necessarily* the same conduct as that which established extraterritorial jurisdiction in the first place (e.g. territorial control). Thus, a separate attribution analysis may be required to examine whether the conduct that gives rise to an allegation of a human rights violation is an act of the State.

Consequently, while it is true that the lack of attribution of conduct to a State precludes the existence of that State's jurisdiction abroad, it does not necessarily follow that the situation falls under Article 1, and thus under the scope of the Convention, if the relevant conduct *is* attributable. Furthermore, the fact that conduct abroad generates State jurisdiction does not necessarily say anything about the attributability of acts taking place within its extraterritorial jurisdiction. The function of attribution rules from the law of State responsibility is thus to determine whether conduct is in law considered as an act of the State. If conduct is an act of the State, this may determine not only that a State is responsible *stricto sensu*, but also

[29] As the European Commission of Human Rights (ECionHR) held in *Cyprus v. Turkey (III)* (1978) para 11: 'These special obligations of a High Contracting Party are obligations towards persons within its jurisdiction, not to other High Contracting Parties.'
[30] Art 13 ARSIWA and Art 1 ECHR.
[31] Art 12 ARSIWA and Arts 2–18 ECHR.

that the Convention becomes applicable to State conduct abroad, even if that conduct (such as control over a victim or territory) is exercised indirectly through proxies acting on behalf of the State.

C. The Standard and Function of Attribution Rules in Case Law on International(ized) Armed Conflicts

The rules of IHL pertaining to IACs become applicable as soon as force is used between States. However, States do not always resort to force through their own armed forces. As the case law of the International Court of Justice (ICJ) and ICTY shows very convincingly, States may support, direct or control non-State actors to fight on their behalf. In order to be able to speak of an IAC in those situations, one needs to examine the standard and function of attribution rules from the law of State responsibility. The core issue that lies at the foundation of this debate is the relationship (if any) between the primary or substantive rules of IHL and the secondary rules of attribution from the law of State responsibility, in particular Article 8 ARSIWA. More precisely, it is contested what level of support or control is required for a State to be internationally responsible for the acts of an OAG if it uses the group as its proxy. If a State supports or controls an OAG, it is also unclear whether the legal process by which a conflict subject to the law of NIACs transforms (or internationalizes) into one that is governed by IAC law, is governed by the rules of IHL or by State responsibility law.

As this thesis showed, both the ICJ and the ICTY are in agreement that a *prima facie* NIAC is internationalized when a third State exercises overall control over a non-State actor. There are, however, some fundamental differences of opinion between these courts in terms of the legal nature of the process by which such an internationalization takes place. According to the ICTY, the overall control test stems from the secondary rules of State responsibility, in light of which IHL must be interpreted in order to attribute conduct to a State. According to the ICJ, on the other hand, the test for internationalizing a NIAC is found in the primary rules of IHL, without prejudice to the secondary attribution rules of State responsibility. Thus, in the *Bosnian Genocide* case, the ICJ contemplated that the degree of a State's involvement required by IHL for an armed conflict to be an IAC 'can very well, and without logical inconsistency' be less than the effective control that is required under customary international law to engage that State's responsibility for a particular act committed during such conflict.[32]

It has been argued in this thesis that the better view is a combination of the position of the ICTY and the ICJ. The ICTY was right to determine a NIAC had turned into an IAC by reference to attribution rules such as those found in the law of

[32] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) para 405.

State responsibility. At the same time, the ICJ was right as it implied that such rules could stem from a body of primary rules such as IHL. Both positions can be reconciled through the recognition of the overall control test as a *lex specialis* test of attribution of conduct.

There is such a close connection between attribution of conduct for State responsibility and for the application of IHL that it would be untenable to maintain that both questions are subject to different rules, standards or tests. The definition of IACs must be interpreted contextually, in accordance with the ordinary meaning to be given to it and in light of the object and purpose of IHL. This thesis has demonstrated that IACs are fought between States who are responsible for the acts of the forces through whom they act. The position of the ICJ in the *Bosnian Genocide* case has separated conflict classification from State responsibility law and submitted the former to a less-demanding test than is required for attribution under the latter. This allows a third State to control an OAG to the extent of being engaged in an IAC (with all concomitant belligerent rights and obligations for the controlling State), but without being responsible towards the territorial State (and its inhabitants) for the specific actions of the proxy force. This leaves a responsibility gap that is not permitted by IHL, given that both parties to an IAC must have an equal scope of rights and obligations.

Based on the principle of equally responsible belligerents in IACs, this thesis has argued that if the threshold of application for IACs (such as any hostile resort to force, or territorial control amounting to occupation) is met as a result of acts attributable to a State as a matter of State responsibility law, then IAC law applies to that particular conduct, and any such attributable conduct in violation of the applicable law leads to State responsibility. The overall control test as formulated by the ICTY (and approved and applied by the International Criminal Court [ICC], it must be added[33]) concerns a *lex specialis* standard of attribution that deviates from the customary international law rules as laid down in Article 8 ARSIWA. This *lex specialis* standard determines not only when a State is responsible for conduct of OAGs under its control, but it also has a (wider) function in relation to the application of IAC law to the conflict on the ground. The rule that attribution as per State responsibility law determines whether an OAG belongs to a State (and thus an IAC exists), ensures that no such responsibility gap will exist, and accommodates the concerns of both the territorial State as well as the intervening State by guaranteeing that neither State has IAC rights and obligations unless the OAG fights, in fact and law, under authority and responsibility of a State.

[33] ICC, *Prosecutor v. Lubanga Dyilo* (2012) para 541; *Prosecutor v. Katanga* (2014) para 1178; *Prosecutor v. Bemba Gombo* (2016) para 130. Furthermore, the Office of the Prosecutor of the ICC applies the overall control test to determine whether the prima facie NIAC between Ukrainian armed forces and armed groups in East Ukraine (allegedly supported or controlled by Russia) amounts to an internationalized IAC: see Office of the Prosecutor, *Report on Preliminary Examination Activities 2019* (5 December 2019) para 277, available at www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf.

D. Concluding Observation

One of the recurring themes in this thesis was the purportedly strict distinction between primary (substantive) rules of international law and secondary rules on State responsibility law. The distinction was adopted by the International Law Commission (ILC) in the 1960s to separate the State responsibility project as much as possible from the substantive law relating to the treatment of foreigners and their property. Yet, as this thesis demonstrated, the distinction is not absolute as far as attribution rules are concerned. The rules on attribution of conduct (be it customary law or *lex specialis*) have an effect on primary rules of international law which cannot be explained if one holds on too strongly to the alleged distinction. Attribution rules determine whether conduct must be considered as an act of the State for the narrow purpose of holding it responsible, but also for the wider purpose of determining the applicable law. It would be wise, therefore, to lay to rest the purportedly strict distinction between both sets of rules. Given the centrality of States as primary actors with international legal personality, it is in the interest of legal certainty and (potential or actual) victims to acknowledge that the attribution rules from the law of State responsibility have a substantive and procedural dimension in human rights law and IHL.

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SUMMARY

Rules on the attribution of conduct determine whether conduct (be it an action or an omission) is considered an act of the State for the purpose of holding it responsible under international law. If conduct is attributed to the State and in breach of its international legal obligations, the State has committed an internationally wrongful act for which it must make full reparation. By the same token, there will no wrongfulness on the part of the State if conduct is not attributed to it. The law of State responsibility is authoritatively laid down in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles). The ILC regards the law of State responsibility as a framework of so-called "secondary rules" that purportedly do not address or regulate the content, interpretation or application of "primary" (substantive) rules of international law. At the same time, the ILC Articles acknowledge that its provisions, including its attribution rules, offer a general, default regime of international law that is applicable unless deviated from in special fields of law.

This thesis analyses the standard and function of attribution rules in the case law of human rights courts, quasi-judicial human rights bodies, and international criminal courts with jurisdiction over violations of humanitarian law. More specifically, this thesis analyses whether human rights courts on the one hand, and international criminal tribunals when dealing with humanitarian law on the other, have followed the *standards* of attribution as laid down in Articles 4 to 11 of the ILC Articles as a representation of customary international law or, rather, whether these courts and tribunals have adopted or recognized *lex specialis* rules to determine whether certain conduct constitutes an act of the State? Additionally, this thesis examines whether these courts, tribunals and bodies apply attribution rules from the law of State responsibility to determine the applicable law and consequently enable the exercise of their judicial function. The latter is a question of the *function* of attribution rules.

Chapter 2 demonstrates that the distinction between primary (substantive) rules and secondary rules on State responsibility law had originally been devised within a specific context and for the purpose of achieving a particular aim, namely to serve as a method of project delimitation. It also shows that from a theoretical point of view attribution rules may have a substantive dimension, given that they exercise a permeating effect on the scope, content or application of primary rules of international law. The legal operation of attribution rules from the law of State responsibility reveals that the State is considered in law as the true author of factual conduct, which may have implications for the applicable legal framework within which such conduct ought to be assessed (and, consequently, the lawfulness of the conduct itself).

Chapter 3 connects the notion of international responsibility with international legal personality. It explains that international law was traditionally a system that only took States into account. States were the only actors with international legal personality, and only States had rights and obligations towards other States. The modern notion of international responsibility, however, is no longer purely inter-State but extends to non-State actors, who enjoy a certain measure of international legal personality that derives from the will of States or the international community as a whole. This is particularly the case in human rights law (which involves rights for individuals and judicial or quasi-judicial procedures to enforce these rights) and in international criminal law (which involves obligations for individuals which are enforced, *inter alia*, by international criminal tribunals).

This Chapter further shows that the rules on State responsibility as codified in the ILC Articles are for the most part geared towards solving inter-State disputes. The rules on attribution of conduct, however, are of general application and apply to all types of disputes in which the State is held responsible. Accordingly, in human rights disputes, the attribution rules from the ILC Articles are applicable to the extent that human rights law does not provide its own *lex specialis* attribution rules. Moreover, even though the regime of international criminal law applies to individuals and not to States themselves, it is nevertheless crucial to attach conduct to States as belligerent parties in order to be able to prosecute and convict a person for crimes committed in international armed conflicts (which, by definition, involve two or more States opposing each other by force).

Based on an extensive examination of case law of human rights courts and quasi-judicial human rights bodies, Chapter 4 subsequently demonstrated that these courts and bodies do not apply any *lex specialis* attribution rules. Even in cases where human rights courts have not referred to the standards of attribution in the ILC Articles by name, their examination of whether conduct amounts to an act of the State tends to be exactly in line with what would otherwise follow pursuant to the customary law of State responsibility. This Chapter also shows that in some cases human rights courts appear to deviate from Articles 4 to 11 of the ILC Articles, but that such deviation is only apparent upon further reflection of the facts and the legal analysis of the case at hand. Moreover, in very few cases human rights courts have recognized the legal value and relevance of the attribution rules of the ILC Articles but applied them to the facts of the case in a manner that remains open to doubt. Finally, in one case analysed in this Chapter, the human rights court in question identified one of the attribution provisions from the ILC Articles as relevant, even though a different one would have been more appropriate. Accordingly, based on the cases examined in this Chapter and in light of the close analyses provided there, it can be concluded that human rights law knows no *lex specialis* rules on the attribution of conduct.

Chapter 5 turned to the function of attribution rules in relation to the application of human rights law, as well as the exercise of jurisdiction disputes by human rights courts and quasi-judicial bodies with regard to conduct that is alleged to constitute a human rights violation. This Chapter focused on the case of the

European Court of Human Rights, given that this judicial body has generated a vast body of precedents on this topic. The conceptual difference between the applicability of the Convention, and the responsibility for an act that occurs where and to whom the Convention is applicable, means that a finding of whether a State has committed a breach of the Convention actually involves a number of dimensions. The first is one of attribution. Attribution rules serve to tie conduct to an actor with international legal personality, in this case a State party to the European Convention on Human Rights. But the fact that conduct is attributable says nothing about whether such conduct was lawful or not. This still depends on whether there is a breach of any applicable law. As this Chapter shows, this latter question actually comprises two sub-questions: the existence of State jurisdiction in the sense of Article 1 of the Convention so as to make the treaty applicable in the first place, and the existence of a breach itself. If a victim is within a State's territory, the Convention applies, and there is a presumption that it applies in full. However, the (preliminary) question of whether a victim is within the jurisdiction of a State other than the territorial State cannot be answered without resolving the question of whether the relevant conduct that gives rise to jurisdiction is attributed to the State in the first place. This depends on whether a victim or territory is under control by a person or entity whose conduct is attributed to the State as a matter of State responsibility law.

Finally, Chapter 6 turned to the standard and function of attribution rules in international humanitarian law pertaining to international armed conflicts. This body of law is adjudicated by international criminal tribunals with criminal jurisdiction over individuals. This Chapter demonstrated that rights and obligations stemming from the law pertaining to international armed conflicts are not applicable to individuals or States unless the situation *de jure* involves two opposing States with full responsibility for the regular and irregular forces through which they act. Given this connection between State responsibility and the existence of an international armed conflict, it is necessary to apply attribution rules to establish whether conduct (such as that of an organized armed group) can be attributed to a State, and thereby trigger the application of the relevant rules of humanitarian law. If the threshold of application for international armed conflicts (such as any hostile resort to force between States, or territorial control amounting to occupation) is met as a result of acts attributable to a State as a matter of State responsibility law, then the law pertaining to international armed conflicts applies to that particular conduct, and any such attributable conduct in violation of the applicable law leads to State responsibility. This equally means that an individual accused cannot be tried and convicted for war crimes in international armed conflicts, unless the situation involves two parties that fight on behalf of States as a matter of State responsibility law.

IMPACT PARAGRAPH

Rules on the attribution of conduct determine whether conduct (be it an action or an omission) is considered an act of the State for the purpose of holding it responsible under international law. If conduct is attributed to the State and in breach of its international legal obligations, the State has committed an internationally wrongful act for which it must make full reparation. By the same token, there will no wrongfulness on the part of the State if conduct is not attributed to it.

The law of State responsibility is authoritatively laid down in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. These Articles, including the attribution rules therein, offer a general, default regime of international law that is applicable unless deviated from in special fields of law. The main objective of this thesis is to examine whether international courts, tribunals and other (quasi-)judicial bodies dealing with human rights and humanitarian law follow this general regime in their case law or, rather, whether they adopt special solutions to determine if conduct is an act of the State. This thesis also analyses the purpose for which attribution rules are used. Do such rules merely serve to hold a State responsible in the strict sense, or are rules on the attribution of conduct also relevant to establish the applicable international law in light of which conduct must be assessed? And in the latter case, could these rules be used by international courts and tribunals to enable the exercise of their jurisdiction over the conduct in question?

An analysis of the standard and function of attribution rules in human rights and humanitarian law is all the more important as a result of an erosion of the public-private distinction. States increasingly resort to private parties to carry out functions that are traditionally exercised by States. A possible effect of this development is the possibility of evading legal responsibility, given that States are still the most important actors with rights and obligations on the international plane. The lack of clarity with regard to attribution rules in human rights and humanitarian law contributes to a situation in which it is unclear if, and under what circumstance, a State is responsible for the actions of non-State actors. Any uncertainty in this regard may be an incentive for States to resort to non-State actors at the expense of legal protection for those who are adversely affected by such private conduct.

This thesis is intended to be of interest to academics who wish to study the reception of the rules on attribution of conduct in the case law of international courts and tribunals with jurisdiction over violations of human rights and humanitarian law. Moreover, this thesis will assist practitioners who are confronted with situations in which it is unclear whether and on what basis a State can be held responsible for a human rights violation as a result of the conduct of its own organs and agents or non-State actors acting on the State's behalf. One of the conclusions in this thesis is

that in their case law human rights courts and quasi-judicial monitoring bodies do not recognize the existence of any special rules on the attribution of conduct. Accordingly, litigants and adjudicators could apply the findings in this thesis to hold States responsible on the basis of the general rules of attribution as reflected in the Articles drafted by the International Law Commission. This thesis thus offers more certainty and legal clarity for practitioners and actual or potential victims of human rights violations seeking remedy for incurred harm.

With respect to humanitarian law, the importance of the research in this thesis lies predominantly in the area of clarifying the legal regime under which an accused can be held responsible. The statutes of international criminal tribunals distinguish between war crimes committed within the context of an international armed conflicts, and those committed within the context of non-international armed conflicts. Consequently, whether or not an alleged perpetrator can be found guilty of a particular crime depends first and foremost on the classification of armed conflict in which the violation took place. As this research demonstrates, the rules of attribution are of crucial importance in distinguishing international from non-international armed conflicts.

CURRICULUM VITAE

Remy Jorritsma was born on 7 November 1983 in Heerlen, the Netherlands, where he also received his primary and secondary education. He studied at Maastricht University's Faculty of Law where he obtained an LL.B. in *European Law School* (with Dutch “civil effect”) in 2009 and an LL.M. (*cum laude*) in *Globalisation and Law* in 2010. During the summer of 2010 he interned at the Department of International Humanitarian Law of the Netherlands Red Cross.

From 2010 to 2015 Remy worked as a teacher in public international law at Maastricht University. From 2015 to 2020 he was a research fellow at the Department of International Law and Dispute Resolution at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. He joined the Grotius Centre for International Legal Studies of Leiden University as a lecturer in public international law (September 2020 to December 2020) before taking up his current position as a case-processing lawyer at the Registry of the European Court of Human Rights (NLD Unit, Section IV, since January 2021).

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