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Special Rules of Attribution of Conduct in International Law

Marko Milanovic

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I. INTRODUCTION

An abstract entity, such as the State, can only act through human beings. The terms “attribution” or “imputation” denote the operation whereby the conduct of some human beings, through commission or omission, is regarded in law as that of the State for the purpose of establishing its responsibility for an internationally wrongful act.¹ The codification of the law of State responsibility by the International Law Commission (ILC) in its Articles on State Responsibility (ASR)² led to the systematization of a widely accepted set of secondary attribution rules, which apply by default across the different specialized sub-branches of public international law.³ Together with the existence of a breach of a legal obligation, attribution is one of the constitutive elements of an internationally wrongful act of a State.⁴

Are there any special rules of attribution in international law? Are there, in other words, imputational rules that are not recognized as such in general international law, but are specific to particular branches of international law? The ASR allow for the possibility of sector-specific rules of State

1. As a general matter, throughout the paper I will be referring to the attribution (or imputation) of *conduct*. It is however also possible to use the term “attribution” in referring to the attribution of *responsibility*. This is with regard to a situation in which State A commits an internationally wrongful act, the relevant conduct is not attributable to State B, but responsibility for the internationally wrongful act may nonetheless be attributed to State B pursuant to some other rule, for example, because State B coerced State A. These are cases of indirect responsibility. In order to avoid any confusion, I will, again, not generally be referring to the attribution of responsibility, but solely to that of conduct. For background and general discussions of the distinction, see, for example, Francesco Messineo, *Attribution of Conduct*, in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 60 (André Nollkaemper & Ilias Plakokefalos eds., 2014); James D. Fry, *Attribution of Responsibility*, in *id.* at 98. This study is also confined solely to the attribution of conduct to *States*. For possible special attribution rules in the context of the responsibility of international organizations, see A. DELGADO CASTELEIRO, *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: FROM COMPETENCE TO NORMATIVE CONTROL* (2016) (arguing for a normative control attribution rule applying solely to the European Union).

2. International Law Commission, Report on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Articles of State Responsibility].

3. See *id.* arts. 4–11; see also JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* (2013).

4. See ILC Articles of State Responsibility, *supra* note 2, art. 2.

responsibility. Article 55 ASR, entitled *lex specialis*, provides that the Articles “do not apply where and to the extent that 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.”⁵ In referring to the “conditions for the existence of an internationally wrongful act,” the ILC allowed for the possibility of special rules of attribution since attribution of conduct is one of the elements of an internationally wrongful act, that is, a condition for its existence.⁶

The issue of special rules of attribution was briefly addressed by the International Court of Justice (ICJ) in the *Bosnian Genocide* case, in which the Court rejected the view that such a special rule existed for conduct constituting genocide, while accepting in principle that special rules of attribution could exist in other areas of international law.

The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the “effective control” of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.⁷

5. *Id.* art 55.

6. *See id.* art. 55, cmt. ¶ 6

The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language (“the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State”) which reflects the content of each of Parts One, Two and Three.

7. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 401 (Feb. 26) [hereinafter *Bosnian Genocide*].

Is there any such “clearly expressed” *lex specialis* attribution rule? Even if the ILC and the ICJ have accepted the possibility of their existence in theory, do such rules, in fact, exist in various different areas of international law? And should such rules exist? These are the questions that this article aims to answer. It will attempt to do so, first, by delineating more precisely the scope of the inquiry, examining the distinction between primary and secondary rules, explaining the distinction between ascriptive and attributive rules, and unpacking the notion of a special rule of attribution of conduct in Part II. The article then examines several specific sub-fields of international law in search for special rules of attribution: international humanitarian law in Part III, the law on the use of force in Part IV, and European human rights law in Part V. Finally, the article will look at the normative question of whether special rules of attribution are desirable in Part VI, before concluding in Part VII.

To be clear, the article does not attempt a comprehensive overview of all various sub-branches of international law. This would be an impossible task, at least for a single author within the confines of a journal article (even a very long one). The areas I have chosen to examine are generally those that I have had a deeper interest in and am accordingly more familiar with. Surely there are other good examples and case studies that I have missed. That said, the sample I have examined in this article is a substantial one, and likely a broadly representative one in light of its diverse subject matter. Analyzing that sample allows us to make several general conclusions, which I will foreshadow here. First, that to the extent special rules of attribution exist, they are rare and never uncontroversial. In most situations, as we will see, putative special rules of attribution can be conceptualized differently. Second, in a similar vein, if one wishes to push more strongly for some kind of clarity criterion, as the ICJ did in *Bosnian Genocide*, then the set of possible special rules of attribution may well be reduced to zero. Third, there is a double reason for that. Rules of attribution, perhaps more than any other rules of the law of State responsibility, serve a systemic, unifying function.⁸ And it seems particularly difficult to justify why rules of attribution should vary depending on the context or particular subject matter, for example, why a special rule of attribution should exist for terrorism but not (say) for genocide.

8. See James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 874, 878–79 (2002).

Fourth, we should therefore, to the extent reasonably possible, try to reconcile the various jurisprudential divergences identified below with the ILC attribution framework, so as to minimize the incidence of special rules of attribution, unless there is a very good reason why such a rule should exist. Finally, one particular such reason could be emerging subject-specific State complicity doctrines, which *do* require sectoral adjustment. However, even these doctrines would in most cases not be attributive in nature.

II. SCOPE OF THE INQUIRY

A. *The Distinction between Primary and Secondary Rules Revisited*

Before venturing into the various different sub-areas of international law, it is necessary to deal with several preliminary points. Let us first briefly revisit the distinction between primary and secondary rules of international law, since it is important to clarify how the idea of a special rule of attribution fits into this distinction.

The distinction between primary and secondary rules is taught to students today as a fundamental tenet, a part of international law's basic grammar. But there was a language of international law long before there was any such distinction. We know that the distinction was introduced into the ILC codification project on State responsibility by its then-special rapporteur, Roberto Ago, and that it enabled that project to come to successful fruition.⁹ Adopting the distinction allowed the ILC to avoid numerous subject-specific controversies, for example, with regard to expropriation and the treatment of aliens, which had previously led the Commission to an impasse.¹⁰ In that purely functional or instrumental sense, it was undoubtedly a success.

We do not know, however, where the ILC got the distinction from.¹¹ It is possible, for example, that it was inspired by H.L.A. Hart's distinction between primary and secondary rules in the then freshly-minted *The Concept of Law*.¹² But the ILC's distinction is of a very different kind. For Hart, primary rules govern conduct, while secondary rules govern three interrelated sets of issues in a legal system: the criteria for the validity of a rule, the ways in which

9. See ILC Articles of State Responsibility, *supra* note 2, General Commentary, ¶¶ 1–6.

10. See Daniel M. Bodansky & John R. Crook, *Symposium on the ILC's State Responsibility Articles: Introduction and Overview*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 773, 777–80 (2002).

11. See CRAWFORD, *supra* note 3, at 64.

12. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

rules can change, and the creation and powers of authoritative mechanisms of adjudication.¹³ The ILC's secondary rules are none of these,¹⁴ and in Hart's scheme they would squarely fall within the primary rule category, for example, in specifying the consequences of a State's failure to comply with a duty of conduct, such as reparation.¹⁵

The ILC's idea of a secondary rule is much simpler—a secondary rule is one which has *general applicability* across all or many different sub-areas of international law, and which further applies by default, in the absence of any displacing special rule. The label has no other theoretical basis.¹⁶ Put differently, a secondary rule differs from a primary one because, in the process of the finalization of the ASR, the majority of the then-members of the ILC could agree that most States and other relevant actors would, in turn, agree that the rule in question is generalizable, that is, can be applied across the board, regardless of the subject matter at hand. The rules set out in the ASR are secondary, in other words, in the same way as are most of the rules in the Vienna Convention on the Law of Treaties (VCLT)¹⁷—they apply regardless of whether we are dealing with trade or investment or human rights, but they do so residually, to the extent that the States concerned have not agreed otherwise. And there is simply no inherent content to a set of rules that is widely regarded as being of general applicability. This set will vary and has varied over time.

If we take the ILC's distinction for what it is—borne out of expediency rather than principle,¹⁸ a pragmatic device that enabled its codification project to emerge from gridlock and create a unifying set of rules of general

13. *See id.* at 79–99.

14. *See* Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 447, 491 (2012).

15. In particular, the ILC's rules are not Hartian rules of adjudication. In the vast majority of cases the ASR will be applied outside of any courtroom, since international law does not possess a system of compulsory adjudication.

16. *See* Bodansky & Crook, *supra* note 10, at 780–81

To some degree, 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. What defines the scope of the articles is not their 'secondary' status but their generality: the articles represent those areas where the ILC could identify and reach consensus on general propositions that can be applied more or less comprehensively across the entire range of international law.

See also Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICHIGAN JOURNAL OF INTERNATIONAL LAW 359, 408–12 (2013).

17. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

18. *See* Sloane, *supra* note 14, at 491.

applicability that can promote the cohesion of the international legal system—we can then appreciate its usefulness.¹⁹ But there is little point in engaging with this distinction further, or in agonizing over whether some particular rule should properly be qualified as being primary or secondary in nature, or as something mixed. This is not an exercise that is, in my view, genuinely helpful. For the purpose of this article, which examines *special* rules of attribution, we simply have to acknowledge that the idea of a special secondary rule is a contradiction in terms, since the very idea of a secondary rule, in the ILC sense of the term, is one of general applicability.

B. *Special Rules of Attribution Defined*

As a phenomenon, attribution rules are by no means unique to international law. They are needed in any legal system that provides a measure of subjectivity or personality to abstract, fictional legal persons, who can in the real world act only through the medium of human beings. Municipal legal systems will therefore also have various kinds of ascriptive rules and principles that translate rules addressing legal persons to rules addressing natural persons, who are in some capacity acting on behalf of the legal person. Such rules will obviously vary in their content and detail from system to system, and will vary between different types of legal persons. But again, any legal system that recognizes the distinct personality of abstract legal entities such as the State, a corporation, a charity, a religious organization, a political party will have to have such rules of ascription or translation.

These rules will define when the legal person is *responsible* for the wrongful conduct of a natural person acting on its behalf—for instance, under what circumstances a corporation will be liable for a tort, administrative offense, or (in some systems) crime committed by its employees, officers, or board members. These rules will *also* define who, and under what circumstances, will be authorized to undertake legal transactions on behalf of the legal entity—for instance, conclude contracts, receive goods, issue invoices, and file tax returns. For example, a lowly sales agent working for Apple will be authorized to conclude a contract with a customer for the sale of a single iPhone, but more important contracts will need to be concluded on Apple's behalf by higher-ranking employees. While all reasonably developed legal systems will have to have such ascriptive rules, which in effect anchor an abstract legal entity to the real world, I am not aware of any system in which

19. See Crawford, *supra* note 8, at 876–78.

such rules are unified or codified in a single instrument. Rather, they will vary from field to field, context to context, usually depending on the typology of legal persons within the given system.

International law is no different. Any time a State does something, it is actually a person, a human being, who does this.²⁰ Any rule of international law that vests powers, rights, or duties with the abstraction known as the “State,” or regulates relationships between States, has to contain further express or implied rules that translate powers, rights, or duties of States to those of human beings acting on their behalf. This is *not* the case simply with the law of State responsibility, but is true across the entirety of international law, even if the operation of these rules is most often so implicit and uncontroversial that we do not pay it much attention.²¹

For example, the law of treaties has rules defining which individuals can, through their actions, express the State’s consent to be bound by a treaty.²² Similarly, but less clearly, the *jus ad bellum* has rules as to which State officials can provide valid consent to another State to exercise the use of force on the former’s territory.²³ The law of immunities sets out different categories of State officials who enjoy varying levels of immunity from the jurisdiction of other States and does the same concerning different types of objects or assets, such as embassy buildings or funds belonging to a central bank.²⁴ The

20. See ILC Articles of State Responsibility, *supra* note 2, art. 2, cmt. ¶ 5.

21. See also Andre Nollkaemper, *Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility*, in *THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY – A NEED FOR CHANGE?* 133, 139–41 (Neils M. Blokker & Nico J. Schrijver eds., 2005).

22. See VCLT, *supra* note 17, art. 7.

23. See, e.g., CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 100–07 (4th ed. 2018); Max Byrne, *Consent and the Use of Force: An Examination of ‘Intervention by Invitation’ as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen*, 3 *JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW* 97 (2016) (discussing, for example, who can express consent to a foreign intervention on behalf of a State and whether the consent has to be expressed publicly or can also be given in secret).

24. For an extensive discussion, see Christina Binder & Stephan Wittich, *A Comparison of the Rules of Attribution in the Law of State Responsibility, State Immunity and Custom*, in *SECONDARY RULES OF PRIMARY IMPORTANCE* (Gábor Kajtár, Başak Çali and Marko Milanovic eds.) (forthcoming).

doctrine of sources examines the diverse types of State officials who are capable of contributing to State practice and *opinio juris* for the purpose of customary law formation.²⁵

Common to all of these rules of international law is that they attach the “State” label to various persons or objects in the real world. This is a feature that they share with the rules on attribution of conduct in the law of State responsibility. The key difference between them, however, is in the *purpose* for which the ascription to a State is being made. The attribution rules of the law of State responsibility impute certain conduct, consisting of an action or omission of a human being or a group of human beings, to the State for the purpose of establishing *its responsibility for an internationally wrongful act*. That responsibility, once established, has a distinct content: the duties to cease the wrongful act if it is continuing, to provide assurances and guarantees of non-repetition, and to provide full reparation for any injury caused.²⁶ Other ascriptive rules attach the State label to persons, their conduct, and relations in the real world for *some other purpose*, for example, the power to conclude treaties, contribute to the formation of custom, or benefit from privileges and immunities, which do *not* entail responsibility for a wrongful act.²⁷

Gábor Kajtár has incisively examined the distinction between the two types of ascriptive rules, categorizing them as attribution in a narrow sense (to establish State responsibility) and in a broader sense (for any other purpose).²⁸ While this distinction is analytically sound, the terminology is potentially confusing simply because it is unconventional.²⁹ In this article, the term attribution of conduct will, therefore, be used solely in the narrow, State responsibility sense. I will generally use the terms ascription or ascriptive rules to denote the wider category of rules that ascribe or attach the State label to a person, object, or legal construct for a purpose *other* than establishing State responsibility.

25. See, for example, the ILC’s draft conclusions on identification of customary international law. International Law Commission, Report on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 124–30 (2018).

26. See ILC Articles of State Responsibility, *supra* note 2, arts. 30–31.

27. See ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION 70–71 (2017).

28. Gábor Kajtár, *Fragmentation of Attribution in International Law*, in SECONDARY RULES OF PRIMARY IMPORTANCE, *supra* note 24.

29. *But see* Nollkaemper, *supra* note 21, at 140 (noting that like Kajtár, Nollkaemper uses the term attribution more broadly).

An important issue to be discussed further below is precisely to what extent do different branches of international law implicitly rely on the attribution rules of the law of State responsibility for purposes other than the establishment of State responsibility for a wrongful act. For example, when State A accuses State B of committing an armed attack against it through proxy non-State actor C, so that A would have the right to exercise self-defense against B pursuant to Article 51 of the U.N. Charter,³⁰ a key conceptual question is whether A is thereby necessarily claiming that the conduct of C is attributable to B in the narrow, State responsibility sense of the word.

We can now have a clear definition of a *special* rule of attribution of conduct that will be used in the remainder of this article: a rule that attributes the conduct of a person to a State for the purpose of establishing its responsibility for an internationally wrongful act, that is dependent on the primary rule being applied, and that diverges from the general rules of attribution of conduct codified by the ILC. Other kinds of ascriptive rules, the purpose of which is *not* the establishment of State responsibility, are not special rules of attribution as defined above.³¹

In short, if the primary rule being applied contains not only a description of the conduct that is capable of violating the obligation in question, but also, as part of that description, expressly or implicitly, identifies specific persons whose conduct will on some basis be regarded as that of the State, then we potentially have a special rule of attribution. This will be the case, however, only if the purpose of this ascription of conduct to the State is to render the State responsible for an internationally wrongful act, that is, a violation of its obligations, and if there is a genuine divergence between this attribution rule and the ILC's ASR.³²

30. U.N. Charter art. 51.

31. *Cf.* ILC Articles of State Responsibility, *supra* note 2, ch. 2, cmt. ¶ 5.

The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. . . . Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government.

32. *See id.* art. 55, cmt. ¶ 4 (“For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”).

C. Positive and Negative Special Rules of Attribution

Logically, there can be two types of special attribution rules: positive or negative. A positive special attribution rule would *expand* the circle of natural or legal persons whose conduct is attributable to the State beyond the circle of such persons identified by the general attribution rules codified in the ASR. A negative special attribution rule, by contrast, would *restrict* the applicability of one of the attribution rules in the ASR and narrow the circle of persons whose conduct would be regarded as that of the State in comparison to the general rules. Positive special attribution rules are probably more consequential than the negative ones, and the detailed analysis of the various substantive areas of international law in the remainder of the article will tend to focus on such rules.

Whether positive or negative, the special rule must modify the attribution element of an internationally wrongful act, and *not* the substantive obligation potentially being breached, and requiring, or prohibiting, certain conduct. This is the case even though, as explained above, the special attribution rule by definition depends on that specific primary obligation. That distinction can be a very fine one, since the drafters of particular treaties—especially those concluded long before the ILC’s work on the ASR had finished—may well have written provisions which can plausibly be interpreted as collapsing attribution into a definition of required or prohibited conduct.

This last point is most evident from a small number of trade and investment cases that directly considered the existence of *lex specialis* in the sense of Article 55 ASR, and effectively applied negative special rules of attribution. The first such case is the arbitral award in *UPS v. Canada*,³³ brought under the North American Free Trade Agreement (NAFTA).³⁴ The claimant in that case argued that Canada had violated its obligation to provide the claimant’s investment with the required standard of treatment under Articles 1102–05 NAFTA. The key issue in the case was whether Canada Post, a State-owned enterprise established by statute and with a legal personality distinct from the government under Canadian law, was bound to comply with the treatment rules in Articles 1102–05 NAFTA, that is, whether it acted on behalf of Canada as a State party to the treaty. This is arguably a question of attribution, and the claimant argued that the conduct of Canada Post would

33. *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, (May 24, 2007).

34. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 INTERNATIONAL LEGAL MATERIALS 289 (1993).

be attributable to Canada under either Article 4 ASR (State organ) or Article 5 ASR (entity empowered to exercise elements of governmental authority).³⁵ Canada, on the other hand, argued that NAFTA creates special rules of attribution that exclude the applicability of those in the ASR, and in the alternative that the conduct of Canada Post was not attributable to Canada under the ASR.³⁶

In its award, the Tribunal considered that Articles 1502–03 NAFTA, which impose a regime of positive obligations on States parties with regard to private and governmental monopolies and State enterprises, exclude the applicability of the attribution rules in Articles 4 and 5 ASR to entities such as Canada Post. Indeed, the Tribunal expressly framed its holding in terms of *lex specialis* per Article 55 ASR, effectively creating a negative special rule of attribution on the basis that applying the general ASR attribution rules would lead to nonsensical outcomes under NAFTA.³⁷ The same approach was followed in a subsequent NAFTA case against Canada that also dealt with a State-owned enterprise, the Ontario Power Authority.³⁸

Second, there is the World Trade Organization (WTO) litigation in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*. An issue presented in that case was whether there was a subsidy by China in the sense of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which requires the existence of a financial contribution by a government that confers a benefit on the recipient. In particular, under Article 1.1(a)(1)(iv) of the SCM Agreement, “there is a financial contribution *by a government or any public body* within the territory of a Member” when “*a government* makes payments to a funding mechanism,

35. *United Parcel Service*, *supra* note 33, ¶¶ 45–53.

36. *Id.* ¶¶ 54–56.

37. *Id.* ¶¶ 59–63.

Chapter 15 [NAFTA] provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case.

Id. at 62.

38. *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, ¶ 362 (Mar. 24, 2016) (Perm Ct. Arb. 2016) (“[T]he Tribunal concludes that Article 1503(2) [NAFTA] constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles.”); *see also id.* ¶ 365.

or *entrusts or directs a private body* to carry out one or more of the type of functions . . . which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.”³⁹

The drafting of this provision thus required the WTO Panel and the Appellate Body to disentangle the relationship between four concepts: (1) a government; (2) a public body; (3) a wider concept of government that includes the first two; and (4) a private body entrusted or directed by a government to carry out certain functions. On their face, these relationships resemble attribution rules, and the parties inevitably raised the question of how these concepts related to the attribution rules in the ASR.

For the Panel, a “public body” was any entity under the State’s control. This notion was not limited to entities vested with the exercise of governmental authority, and State ownership was the primary criterion of control.⁴⁰ With regard to the ASR, the Panel concluded that they are not relevant for the interpretation of the terms of the SCM Agreement since that Agreement constituted a *lex specialis*, and did so after expressly invoking Article 55 ASR:

We view the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of “government” for purposes of the Agreement, as well as when “private” actors may be said to be acting on behalf of “government”. This has precisely to do with “the content or implementation of the international responsibility of a State” for purposes of the SCM Agreement, a further indication that the Draft Articles are not relevant to interpreting Article 1.1 of the SCM Agreement.⁴¹

The Panel thus clearly thought that the SCM Agreement created special rules of attribution, whether positive or negative. But the Panel did not engage with the question of how these rules actually differed from those in the ASR, which it simply wanted to render irrelevant. The upshot of the Panel’s analysis was that the conduct of a State-owned enterprise would *ipso facto* be attributable to the State under Article 1.1. of the SCM Agreement, which is (without more) not the case under the ASR.⁴²

39. Agreement on Subsidies and Countervailing Measures art 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (emphasis added).

40. Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 8.69, 8.73, WTO Doc. WT/DS379/R (adopted Mar. 25, 2011).

41. *Id.* ¶ 8.90.

42. See ILC Articles of State Responsibility, *supra* note 2, art. 5, cmt. ¶ 3.

The approach of the Appellate Body was somewhat different. Unlike the Panel, the Appellate Body considered the ASR to be relevant for the purpose of interpreting Article 1.1 of the SCM Agreement as relevant rules of international law under Article 31(3)(c) VCLT. In particular, it thought that the concept of “public body” in Article 1.1. of the SCM Agreement coincided “with the essence” of the attribution rule in Article 5 ASR.⁴³ It also disagreed with the Panel’s view that an entity owned by the government would *ipso facto* qualify as a public body.⁴⁴ The Appellate Body also addressed the *lex specialis* point by holding that it was beyond doubt that it was the SCM Agreement, rather than the ASR, that was to be applied, but that Article 55 ASR was silent as to the issue of whether the ASR attribution rules can be taken into account in interpreting the SCM Agreement.⁴⁵ The upshot of the Appellate Body’s analysis thus seems to be—but not unambiguously so—that Article 1.1 of the SCM Agreement does contain attribution rules, but that there is perhaps no divergence between these rules and those in the ASR, because the Agreement and the Articles can be interpreted harmoniously.

Third, this brings us to the investment arbitration in *Al Tamimi v. Oman*.⁴⁶ Like the previous cases, this one also concerned the relationship between a State and a State-owned enterprise. Under the terms of the U.S.-Oman Free Trade Agreement, the relevant obligations incumbent upon a State party applied to “a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.”⁴⁷ The Tribunal considered this provision to contain an attribution rule,⁴⁸ and then, expressly invoking Article 55 ASR,⁴⁹ held that it was on the one hand potentially *broader* than the attribution rule in Article 5 ASR as it

The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

43. Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 310, 312–13, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011).

44. *Id.* ¶ 320.

45. *Id.* ¶ 316.

46. *Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award, (Nov. 3, 2015).

47. U.S.-Oman Free Trade Agreement art. 10.1.2, U.S.-Oman, Jan. 19, 2006, <https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>.

48. *Al Tamimi v. Oman*, *supra* note 46, ¶ 319.

49. *Id.* ¶ 321.

was not confined solely to the exercise of governmental authority but extended to delegated regulatory and administrative authority as well,⁵⁰ while, on the other hand, it was *narrower* than other attribution rules in the ASR since it excluded attribution based solely on State control over the enterprise, for instance under Article 8 ASR.⁵¹ The same treaty provision was, in effect, held to contain both positive and negative special rules of attribution.

The Tribunal's conclusions are at the very least debatable. The line between regulatory, administrative, and *other* governmental authority, at least to me appears non-existent; that rule seems to be no different in substance than the one in Article 5 ASR. The express inclusion of such an attribution rule by converse implication does not, as a matter of some kind of logical necessity, exclude the applicability of other ASR attribution rules. It seems that the Tribunal was led to this conclusion because it thought that under the ILC scheme the State ownership of an enterprise would *ipso facto* lead to attribution under Article 8 ASR, a result that it thought unreasonable under the circumstances. But this is plainly an error. Article 8 ASR requires State instructions, direction, or control over the *specific conduct* of a non-State actor. A State ownership interest in that actor does not suffice; the State must *use* that interest to exercise control over the specific conduct in question.⁵²

Be that as it may, the cases examined above are all broadly similar. They all dealt with the relationship between States and State-owned public enterprises, a matter that is obviously of central importance in areas such as trade and investment. That centrality might, potentially, justify departures from general attribution rules. I will address in more detail below how the European Court of Human Rights has had to address similar issues when dealing with the conduct of State-owned enterprises and State responsibility under the European Convention on Human Rights (ECHR).⁵³ And in all these cases there was specific language in the treaties that resembled attribution rules, and whose relationship with the ASR attribution rules the relevant tribunal had to understand—although it is questionable whether we are in fact

50. *Id.* ¶ 324.

51. *Id.* ¶ 322.

52. See ILC Articles of State Responsibility, *supra* note 2, art. 8, cmt. ¶ 6 (“[W]here there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.”) (emphasis added).

53. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; see also *infra* Section V.D.

dealing here with the wider category of ascriptive rules, rather than with attribution in the State responsibility sense of the term. Whether each of these tribunals reached the right outcome in that regard is for my present purposes beside the point.⁵⁴ Rather, the key point here is that all of them, with the possible exception of the WTO Appellate Body, thought they were applying special rules of attribution, and clearly said so.

D. “Clearly Expressed” Lex Specialis

Recall now the ICJ’s dictum in *Bosnian Genocide* that rules of attribution “do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.”⁵⁵ As noted above, if such a clear statement requirement was taken at its fullest, the set of special rules of attribution could possibly be reduced to zero. To my knowledge, there is no example of a *genuinely clear* expression of such a rule in a treaty text. The trade and investment examples we have just looked at are *not* clear in that sense—the text of the relevant treaties could easily be interpreted harmoniously with the ASR or as not creating attribution rules at all. Indeed, even the ILC struggled to provide examples of special attribution rules in its ASR commentary, while accepting that such rules could exist.

Thus, the ILC noted that a “particular treaty might impose obligations on 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 in chapter II [ASR].”⁵⁶ The footnote supporting this sentence then states the following:

Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, only applies to torture committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. “federal clauses,” allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. UNESCO Convention

54. On this point, see also Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 617, 628–29 (2013).

55. *Bosnian Genocide*, *supra* note 7, ¶ 401.

56. ILC Articles of State Responsibility, *supra* note 2, art. 55, cmt. ¶ 3.

for the Protection of the World Cultural and Natural Heritage, United Nations).⁵⁷

Neither of the two examples mentioned by the ILC is actually a special rule of attribution as defined above. This is because both examples, when looked at more deeply, vary the scope of State obligations in the sense of Article 2(b) ASR, and not the attribution of conduct per Article 2(a) ASR.

Federal clauses simply limit the scope of State obligations under treaties that include them for matters that, under domestic constitutional law, fall within the remit of the federal units.⁵⁸ However, the conduct of these federal units remains attributable to the State, even if it is incapable of violating the obligations at issue. For example, under Article 34 of the UNESCO Convention, which the ILC cites, the scope of the obligations of a State (for example, the United States) towards other States parties is reduced with regard those provisions of the Convention which, as a matter of U.S. constitutional law, need to be implemented by the federal units (for example, the state of Texas).⁵⁹ But the conduct of the authorities of Texas remains attributable to the United States, as *de jure* organs per Article 4 ASR. No special rule of attribution was created or used here. The United States might escape State responsibility for what would otherwise be a violation of the UNESCO Convention not because the conduct in question committed by Texan officials is inattributable to it, but because the *scope of its obligations* towards other States parties is reduced for matters within the authority of Texas by reference to U.S. domestic law.⁶⁰

The ILC's first example, the Convention against Torture (CAT), is similarly misplaced, as is its statement that the Convention lays down rules that are "probably narrower than the bases for attribution of conduct" in the ASR. The Convention does no such thing. It simply defines the concept of

57 *Id.* at 140 n.820.

58. See generally Marko Milanovic, *The Spatial Dimension: Treaties and Territory*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES 186, 197–98 (Christian J. Tams, Antonios Tzanakopoulos & Andreas Zimmermann eds., 2014).

59. Article 34(b) of the UNESCO World Heritage Convention provides that with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons 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 States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption. Convention Concerning the Protection of the World Cultural and Natural Heritage art. 34(b), Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

60. Cf. ILC Articles of State Responsibility, *supra* note 2, art. 4, cmt. ¶¶ 8–10.

“torture” for the purpose of the Convention itself, and requires either that it be committed by a public official or other person acting in an official capacity, or at the instigation or with the consent or acquiescence of such a person.⁶¹ In other words, the Convention only covers “official” torture, and thus limits the scope of obligations that States have under it. “Non-official” torture is simply not torture under the Convention, no matter how barbarous and conscience-shocking the act, regardless of the fact that all other definitional elements of torture might be satisfied. Other human rights treaties do not define torture in this way, and hence allow for purely “private” acts to be covered, for example, through the State’s positive obligation to prevent such acts.⁶² But again no special rule of attribution is being used here that would be either more restrictive or more expansive than the secondary, general rules articulated in the ASR.⁶³

Put differently, had the CAT included a rule that said: “States parties shall not commit torture. States parties shall not be responsible for torture carried out in the absence or default of the official authorities,” this would have been a *negative* special rule of attribution, which would have excluded the application of the rule set out in Article 9 ASR. Similarly, had the CAT included a provision that said: “States parties shall not commit torture. They shall be responsible for torture which their public officials acquiesced in,” this would be a possible *positive* special rule of attribution, since mere acquiescence in a wrong committed by a third party does not suffice for attribution of conduct under the ASR.⁶⁴ But this is not what the CAT says. Rather, in Article 1 it restrictively defines the concept of torture, which requires “official” involvement (a requirement that is ascriptive without modifying the attribution element of a wrongful act), and then imposes a variety of obligations on States parties. The main such duties, set forth in Article 2, are the

61. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

62. See also MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 77–79 (2008).

63. Cf. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, which defines the concept of enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.” International Convention for the Protection of All Persons from Enforced Disappearance art. 2, Dec. 20, 2006, 2716 U.N.T.S. 3. Again, State authorization, support, or acquiescence are not special rules of attribution, but definitional elements of the offense that the State is obliged to prevent.

64. For more on this point, see *infra* Section V.C.

positive obligation to prevent torture so defined, and the obligation under Articles 4 and 5 to proscribe and punish torture as a criminal offense in the State's own domestic law.⁶⁵

We can clearly see how Article 1 CAT does not contain any special rules of attribution by examining the recent judgment of the U.K. Supreme Court in *R v. TRA*.⁶⁶ The issue in that case was whether the criminal offense of torture in U.K. domestic law, which incorporated the public official requirement from Article 1 CAT, could cover acts of torture committed by a member of an armed rebel group that was administering territory. The Supreme Court decided, by four votes to one, that the term "person acting in an official capacity" was sufficiently broad to include individuals acting on behalf of de facto authorities administering territory whose conduct was clearly *not* attributable to the State.⁶⁷ Whether the Court's conclusion is correct or not ultimately does not concern me here.⁶⁸ Rather, my only point is that the Court was interpreting the notion of "torture" in Article 1 CAT, a primary rule relevant for the content of obligations imposed on the State, without

65. In other words, the negative State obligation *not* to commit torture is actually not explicit in the CAT. In this respect, the CAT is similar to the Genocide Convention, which in Article 1 obliges States to prevent genocide but does not expressly require them not to commit it through their own organs or agents. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. In the *Bosnian Genocide* case, the ICJ, however, held that the negative obligation was necessarily implicit in the positive one. *Bosnian Genocide*, *supra* note 7, ¶ 166.

66. *R v. TRA* [2019] UKSC 51 (Eng.).

67. *Id.* [75]–[81].

The fact that UNCAT is a human rights treaty imposing obligations in international law on the contracting States is not a good reason for limiting the scope of that offence to conduct attributable to the State itself. It does not follow that the reference in the Convention to public officials and those acting in an official capacity must be taken to refer to State actors as opposed to non-State actors.

Id. [28].

It is, of course, correct that UNCAT is binding on the Contracting States in international law and that it does not itself impose obligations on individuals. Rather, it imposes on each State party an obligation to create and enforce in its domestic law an offence which conforms with the definition in article 1. However, it is not possible to derive from this the conclusion that torture within article 1 is limited to conduct attributable to the State as suggested by the appellant.

Id. [43].

68. See also Katharine Fortin, *R v TRA: Article 1 of the Convention Against Torture and the Public Official Requirement*, EJIL:TALK! (Nov. 20, 2019), <http://www.ejiltalk.org/r-v-tra-article-1-of-the-convention-against-torture-and-the-public-official-requirement/>.

referring to any kind of special attribution criterion. Again, the Court considered the conduct of the individual concerned to have qualified as torture even though it was *not* attributable to a State on any basis.

To conclude, while accepting the possibility of special rules of attribution, the ILC provides no good example of one such example.⁶⁹ But it is still possible that such rules do exist, the ICJ's insistence on their clear expression notwithstanding. Reasonably clear expressions of special rules of attribution could emerge from State or institutional practice in interpreting a conventional or customary legal regime. Such a regime—say that of the ECHR or the WTO—might not use a special attribution rule on its face, but could do so implicitly, as authoritatively interpreted by the European Court or the WTO Appellate Body. Therefore, the ICJ's clarity requirement, while sensible in principle, should not be so high as to remove any realistic possibility that it can be satisfied through various kinds of subsequent practice.

That said, the clarity requirement—which is simply an expression of the unifying, systemic value of having a codified set of generally applicable attribution rules—does call for rigor in assessing possible candidates for special attribution rules in at least two aspects. First, if there are alternative possible conceptualizations of a candidate rule as being something other than an attribution rule, such an alternative should be explored, and it should generally be preferred unless there is a good reason to the contrary. Second, in assessing the practice of an authoritative body, such as an international court, a key aspect of the inquiry must be whether that body actually regards the candidate rule, through its jurisprudence, as being a *lex specialis* rule of attribution of conduct. Is, in other words, the body in question aware of any divergences in approach when compared to the general rules of attribution, and how does it conceptualize them?

In a very few cases, like the trade and investment ones examined above, the international tribunal expressly acknowledged divergences from the general attribution rules and conceptualized them as *lex specialis*. Most frequently, as will be discussed, such divergences are not acknowledged, let alone properly theorized jurisprudentially. In yet other situations, the divergence may be acknowledged, but the body in question claims that its own interpretation is the *correct* view of the *generally applicable* rules of attribution. Such cases of fragmentation are therefore not really about *special* rules of attribution but about disagreements about the content of the *general* rules.

69. Similarly, in his treatise on State responsibility Crawford refers only to the example of federal clauses given by the ILC, but not to the CAT. CRAWFORD, *supra* note 3, at 105 n.43.

E. Actions and Omissions, Negative and Positive Obligations

A final preliminary point: an inquiry into special rules of attribution of conduct must be rigorous in defining the conduct being attributed. That conduct can consist either of action (commission) or inaction (omission).⁷⁰ An action is capable of breaching a negative obligation, that is, one that requires a State to refrain from a certain action. An omission can breach a positive obligation, that is, one that requires a State to perform a certain action. This is a fairly elementary point, but international case law is replete with examples of courts and other institutions not clearly distinguishing between positive and negative obligations, and consequentially between the attributions of omissions or actions.

Such confusion is endemic in some branches of international law that will be examined, such as international human rights law. The European Court of Human Rights is particularly fond of saying that the “boundaries between the State’s positive and negative obligations under the Convention do not lend themselves to precise definition.”⁷¹ Of course, this is not entirely true. It is not that the boundary between positive and negative obligations, or omissions and actions, is incapable of being precisely defined. Rather, it is that the Court does not think it desirable to do so.⁷² The issue is not whether actions and omissions can be distinguished, but whether the distinction is normatively relevant, that is, makes some kind of moral or legal difference in how the State’s behavior will be evaluated in that particular context. The distinction often is *very* relevant, in both domestic and international law, and feeds into other considerations, such as causality, fault, or a more generalized, intuitive assessment of degrees of blameworthiness for wrongful conduct.⁷³ And often, as would be expected, the legally wrongful conduct is a composite or sequence of numerous actions and omissions.

70. See ILC Articles of State Responsibility, *supra* note 2, art. 2, cmt. ¶ 4.

71. *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 293, ¶ 50.

72. This is a standard position in contemporary human rights law, most scholars of which consider that the distinction between positive and negative obligation is normatively too crude, especially in the context of socioeconomic rights. See, e.g., Ida E. Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 HUMAN RIGHTS LAW REVIEW 81 (2005).

73. All of which are perennial issues in legal and moral philosophy. See, e.g., MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* (2009) (arguing that absences or omissions cannot be causative and that negative duties are stricter than positive duties); see also F.M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1493 (1994); Jonathan Schafer, *Disconnection and Responsibility*, 18 LEGAL THEORY 399 (2012).

This article will make every effort to precisely define the conduct attributed to the State in any given case, and the nature of the obligation that the State is potentially violating. As we will see, however, there will be quite a few examples in which such clarity will be difficult to achieve.

F. Conclusion

To sum up this preliminary discussion, a special rule of attribution is one that attributes the conduct of a person or persons to a State for the purpose of establishing its responsibility for an internationally wrongful act, that is dependent on the primary rule being applied, and that diverges from the general rules of attribution of conduct codified by the ILC. A rule that modifies the breach of State obligations element of an internationally wrongful act under Article 2(b) ASR, and not the attribution element per Article 2(a) ASR, is not a special rule of attribution. This is most clearly the case, for example, with rules prescribing positive obligations for States vis-à-vis the conduct of third parties. Further, a rule that ascribes the conduct of a person or persons to a State for a purpose *other* than the establishment of State responsibility is also not a special rule of attribution, although, as will shortly be evident, there clearly are instances in which the State responsibility attribution rules are used for such other, alternative purposes.

The ICJ's insistence on the clear expression of any *lex specialis* should not be taken too far. Doctrinally, there is no bar to their existence. Special rules of attribution could emerge from State and institutional practice, rather than exclusively from a clear statement in a treaty text. As we will see when analyzing the *jus ad bellum*, it is perfectly possible for the existence of special rules of attribution to be at least one possible route to outcomes generally accepted as lawful—for example, that the United States was entitled to invade Afghanistan after the 9/11 terrorist attacks in the exercise of the right of self-defense. First, however, we shall look at IHL, which has traditionally been a fertile ground for discussing issues of attribution, specifically with regard to relationships between States and non-State armed groups.

III. INTERNATIONAL HUMANITARIAN LAW

A. The “Overall Control” Test

Let us now turn to the “overall control” test famously set down by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case,⁷⁴ in which the ICTY initiated a jurisprudential conflict with the ICJ. This is a well-known story that I will not delve into here in depth. Briefly, the ICTY was confronted with the issue of how to classify the armed conflict in Bosnia between the forces of the Bosnian government and the Bosnian Serb separatists, who were greatly supported in their effort by the Federal Republic of Yugoslavia (FRY).⁷⁵ The Appeals Chamber ruled that a *prima facie* non-international armed conflict between a State and a non-State actor could become internationalized, that is, be treated as an international armed conflict, if the conduct of the non-State actor was *attributable* to some other State as a matter of the secondary rules of State responsibility. For that purpose, the Appeals Chamber fashioned the “overall control” test of attribution, while rejecting the ICJ’s approach to attribution in the *Nicaragua* case⁷⁶ as excessively strict.⁷⁷

There is an intuitive appeal to the *Tadić* approach. Logically, if we are looking at whether there is an armed conflict *between* States through proxy non-State actors, it is perfectly reasonable to say that a non-State actor acts on behalf of a State if its conduct is attributable to the State. However, as argued at length elsewhere,⁷⁸ the Appeals Chamber’s approach was problematic for two basic reasons. First, it misinterpreted the ICJ’s *Nicaragua* judgment as setting out only *one* test of attribution, that of effective control, and thought that this single test was unreasonable and impracticable. Indeed, it

74. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999).

75. A lot hinged on that classification issue. The orthodox position at the time was that there was no individual criminal responsibility whatsoever in non-international armed conflicts. The ICTY ultimately departed from that position, but even so, the range of war crimes in international armed conflicts was and remains wider than in non-international armed conflicts. See, e.g., Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 265 (1996).

76. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27) [hereinafter *Nicaragua*].

77. See *Tadić*, *supra* note 74, ¶¶ 88–145, especially ¶ 131.

78. See Marko Milanovic, *State Responsibility for Genocide*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 553, 575–81 (2006).

would be so, had the ICJ not set out *two* tests of attribution in its judgment—that of complete dependence, operating at a general level and seeking to attribute *all* of the acts of a non-State actor to a State, and that of effective control, seeking to attribute *specific* acts controlled by the State.⁷⁹ Second, it is undesirable to use secondary rules of attribution to determine the scope of application of the primary rules of IHL. Rather, it is upon IHL to fashion an ascriptive test that determines when the relationship between a State and a non-State actor is such that a NIAC is to be internationalized—and that test may well be that of overall control.⁸⁰

In its 2007 *Bosnian Genocide* merits judgment, the ICJ rejected the overall control test in the context of attribution, finding that it was too loose to fit that particular purpose. However, the Court left open the possibility that the test is valid for the IHL-specific purposes of qualifying a conflict:

This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining—as the Court is required to do in the present case—when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that

79. See also Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 493 (2009).

80. For more on this topic, see Milanovic, *supra* note 78, at 584–85; see also Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 669 (2007).

State's responsibility for a specific act committed in the course of the conflict.⁸¹

The ICJ has the better of this argument. Again, I do not disagree that there is an intuitive appeal to the *Tadić* approach.⁸² A test for the internationalization of an armed conflict, which asks the questions whether the conflict is being fought *between* two States, is necessarily ascriptive in nature, in that it attaches the State label to some object or person in the real world. But that link need not be attribution as a matter of State responsibility. As a distinct body of primary rules, IHL can adopt its own solution regarding the link between a State and a non-State actor that would suffice for internationalization of a conflict, especially because the issue is the triggering of the applicability of a whole regulatory (sub-) regime. Doing so allows us to take into account the specific needs of the IHL context while avoiding affecting the general rules of attribution, which are to be applied in other contexts, by considerations that are not necessarily systemic in nature.⁸³

By its nature, the overall control test is actually quite similar to the ICJ's complete dependence and control test, in the sense that they both look at the relationship between the State and the non-State actor at a higher, more abstract level.⁸⁴ If satisfied, the complete dependence test equates a non-State actor to a State organ, albeit *de facto* rather than *de jure*, so that all of the conduct of that actor becomes attributable to the State, per Article 4(2) ASR.⁸⁵ In the absence of such complete control, however, the conduct of

81. *Bosnian Genocide*, *supra* note 7, ¶¶ 404–05.

82. See also Marina Spinedi, *On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 829 (2007).

83. Like the ICJ, the ILC thought that the ICTY's overall control test was inappropriate as an attribution rule in the law of State responsibility. See ILC Articles of State Responsibility, *supra* note 2, art. 8, cmt. ¶ 5.

84. See also Talmon, *supra* note 79, at 501, 507.

85. Under the ASR, a State organ “includes any person or entity which has that status in accordance with the internal law of the State.” ILC Articles of State Responsibility, *supra* note 2, art. 4, cmt. ¶ 11 (emphasis added). The ILC *Commentary* is clear that this formulation captures *de facto* organs which lack such status under the State's internal law: “A State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word ‘includes’ in paragraph 2.” *Id.* cmt. at 42; see also *Bosnian Genocide*, *supra* note 7, ¶ 392

[P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look

the non-State actor will only be attributable to the State if that State effectively controls the specific wrongful conduct, per Article 8 ASR. The overall control test is, however, significantly less demanding than the complete control test, which is precisely why the ICTY favored it, and the ICJ disfavored it.

On the other hand, while the ICJ thought that overall control was inappropriate as a secondary standard of attribution, it was prepared to accept the possibility—without so ruling—that the test could operate as a *primary* rule of IHL for the purpose of conflict classification. This, again, would be an ascriptive, but not an attributive rule. If such was the case, a non-State actor could be under the overall control of an intervening State so as to internationalize the conflict, but not all of its conduct would be attributable to that State as a matter of the law of State responsibility. Thus, for example, the conflict between Bosnia and the Bosnian Serbs could be treated as an international armed conflict between Bosnia and the FRY, because the FRY exercised overall control over the Bosnian Serbs. However, the FRY would not *ipso facto* be responsible for all breaches of IHL committed by the Bosnian Serb forces. The specific conduct in question would still need to be attributable to the FRY under the ASR rules for State responsibility to arise.

The International Criminal Court (ICC) has subsequently used the overall control test to classify an armed conflict in the *Lubanga* and *Katanga* cases. In the *Lubanga* Pre-Trial Chamber decision on the confirmation of charges,⁸⁶ delivered a month before the ICJ's *Bosnian Genocide* judgment, the Chamber approvingly cited *Tadić* and applied the overall control test as determining when a non-State actor is “acting on behalf of” an intervening State, but did not expressly use the term “attribution” or refer to the law of State responsibility.⁸⁷ At trial, the Trial Chamber endorsed the Pre-Trial Chamber's approach but again did so without using the term “attribution” or referring to the law of State responsibility.⁸⁸ The appeals judgment in *Lubanga* did not

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 by choosing to act through persons or entities whose supposed independence would be purely fictitious.

86. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges (Jan. 29, 2007).

87. *Id.* ¶¶ 210–11.

88. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 541 (Mar. 14, 2012).

touch on this issue.⁸⁹ In *Katanga*, the Trial Chamber approvingly cited the *Lubanga* trial judgment, again without doing so in terms of attribution,⁹⁰ as did the Trial Chambers in the *Bemba*⁹¹ and *Ntaganda*⁹² cases.

The extant ICC jurisprudence has clearly embraced the overall control test, although the Appeals Chamber is yet to pronounce on the issue. It is unclear, however, on which conceptual basis the Court has done so, that is, whether, like the ICTY, it regards overall control as a rule of attribution, or whether, like the ICJ, it regards it as a primary rule of IHL determining the classification of armed conflicts. The terminology of attribution and State responsibility is studiously avoided. Indeed, the ambiguity of the ICC's position is likely deliberate. That ambiguity allows the Court to use the settled jurisprudence of the ICTY for the purpose of conflict classification, while not characterizing the overall control test as a rule of attribution similarly allows it to avoid a jurisprudential conflict with the ICJ.⁹³

On the other hand, there is one authoritative institution that has expressly disagreed with the ICJ—the International Committee of the Red Cross (ICRC). In its 2016 *Commentary on the First Geneva Convention*,⁹⁴ which discusses Common Articles 2 and 3 of the four Geneva Conventions and the definitions of the various thresholds of armed conflict, the ICRC is explicit in both that the overall control test should be used for conflict classification *and* that this is a test of attribution in the sense of the law of State responsibility. In other words, the ICRC is in full agreement not only with the outcome of *Tadić* but also with its conceptual basis. Thus, the ICRC argues that

89. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 A 5, Appeals Chamber Judgment (Dec. 1, 2014).

90. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment, ¶ 1178 (Mar. 7, 2014).

91. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment, ¶ 130 (Mar. 21, 2016).

92. Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 128 (July 8, 2019).

93. Thus, in *Katanga*, *supra* note 90, ¶ 1178 n.2737, the Trial Chamber gives a neutral (neither approving nor disapproving) cite to the ICJ's discussion of control tests in the *Bosnian Genocide* judgment. In *Ntaganda*, again in a footnote, the Chamber noted that the ICJ "has applied a different test in this respect" to determine State responsibility. *Ntaganda*, *supra* note 92, ¶ 727 n.2253. The *Bemba* judgment does not cite the ICJ at all.

94. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD (2016) [hereinafter ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION].

the test that is used to identify the relationship between a group of individuals and a State for the purposes of the classification of a conflict under humanitarian law should be the same as the one used to attribute an action carried out by private individuals (or a group of private individuals) to a State under international law of State responsibility.⁹⁵

Further,

In order to classify a situation under humanitarian law when there is a close relationship, if not a relationship of subordination, between a non-State armed group and a third State, the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, *including for the purpose of attribution*. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency. Additionally, recourse to the overall control test enables the assessment of the level of control over the *de facto* entity or non-State armed group as a whole, and *thus allows for the attribution* of several actions to the third State. Relying on the effective control test, on the other hand, might require reclassifying the conflict with every operation, which would be unworkable. Furthermore, the test that is used must avoid a situation where some acts are governed by the law of international armed conflict *but cannot be attributed to a State*.⁹⁶

Unlike the studiously ambiguous ICC, therefore, the ICRC quite clearly disagrees with the ICJ's *Bosnian Genocide* holding that overall control could be a primary rule of IHL, but not a secondary rule of attribution. Rather, the ICRC fully endorses *Tadić*, and considers that overall control can be and must be used both for conflict classification and for attribution. Its argument is instrumental, in the sense that it considers the effective control test, with its focus on specific conduct, to be unworkable for the purpose of conflict classification. In particular, the ICRC is keen to avoid a responsibility gap, a situation in which some conduct of the non-State armed group is governed by the law of international armed conflict but is not directly attributable to the State.

Again, in my view, the ICJ/ILC position is to be preferred over the ICTY/ICRC one. The coupling of State responsibility with the IHL issue of

95. *Id.* ¶ 268.

96. *Id.* ¶ 271 (emphasis added).

conflict classification is both unnecessary and likely to have undesirable spill-over consequences outside of IHL.⁹⁷ It is true that the effective control test is impracticable for conflict classification, but this is not what this test was designed to do anyway. It is for primary (ascriptive) rules to provide workable solutions for their own specific problems. The concern about a responsibility gap is an understandable one, but conceptually it can be overcome relatively simply. If a non-State armed group commits violations of IHL while under the overall control of a State, even if the conduct of the group is not attributable to the State, the State would still be responsible for failing to ensure respect for IHL. There would in fact be no gap—the State’s responsibility would just be conceptualized as a failure to comply with a positive obligation.⁹⁸

However, for the purpose of this article, it is *irrelevant* whether it is the ICJ or the ICTY/ICRC view that is right. This is because neither of these positions regards overall control as an *IHL-specific rule of attribution*. Under the ICJ view, overall control *is* an IHL-specific rule, but is *not* a rule of attribution. The rule is not being used for State responsibility purposes, but is rather a primary, ascriptive rule. Under the ICTY/ICRC view, overall control *is* a rule of attribution, but is not specific to IHL. Indeed, *Tadić* was expressly predicated on the idea that one needed to apply *general* secondary rules of State responsibility to classify the conflict.⁹⁹ Its entire argument is about how the ICJ was mistaken and too strict in its interpretation of the same general rules.

In short, under either theory overall control is not a *lex specialis* attribution rule in the sense of Article 55 ASR. It is either a special primary conflict classification rule of IHL or a general rule of attribution: *tertium non datur*. And this is also the position in academic commentary. To my knowledge,

97. See also KUBO MAČÁK, INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW 44–47 (2018); Talmon, *supra* note 79, at 513–15.

98. See Common Article 1 of the 1949 Geneva Conventions. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see also 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 144, at 509 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (ensuring respect for international humanitarian law is an *erga omnes* obligation).

99. *Tadić*, *supra* note 74, ¶¶ 98, 105.

there is only one scholar who has argued—and at that simply by way of assertion—that overall control is a special rule of attribution.¹⁰⁰ Such a view is unsustainable because it contradicts the logical predicates of the two opposing positions examined above. It is only the vague ICC jurisprudence that could be interpreted to support this view, but that jurisprudence should be discounted precisely on account of its vagueness.

B. Belonging to a Party and Membership in its Armed Forces

This brings me to the second possible IHL-specific rule of attribution that might emerge from the interplay of several different provisions of the Third Geneva Convention (GC III) and Additional Protocol I (AP I). Article 4 GC III defines the category of persons protected by that Convention: prisoners of war. It does so by reference to six particular groups of individuals; of concern to us here are the first two. First, Article 4(A)(1) covers “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”¹⁰¹ Second, Article 4(A)(2) covers other irregular forces that do *not* “form part” of State armed forces:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging to a Party to the conflict* [emphasis added] and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following [four further conditions].¹⁰²

Third, Article 43(1) AP I provides in the relevant part that the

armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for

100. See Remy Jorritsma, *Where General International Law meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts*, 23 JOURNAL OF CONFLICT & SECURITY LAW 405, 429–31 (2018).

101. GC III, *supra* note 98, art. 4(A)(1).

102. *Id.* art. 4(A)(2).

the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.¹⁰³

Members of a State's armed forces as defined above enjoy combatant status, pursuant to Article 43(2) AP I. Finally, under Article 91 AP I: "[a] Party to the conflict *which violates* the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It *shall be responsible* for all acts committed by persons forming part of its armed forces."¹⁰⁴

The key issue here for our purposes is simply this—whether the notion of a State's "armed forces" under Article 43(1) AP I, for whose acts it "shall be responsible" under Article 91 AP I, includes persons whose conduct would *not* be attributable to the State under the general rules of attribution codified in the ASR. If such were the case, then Article 91 AP I would be a *lex specialis*, treaty-based rule of attribution, imputing conduct specifically for the purpose of State responsibility for violations of the Geneva Conventions and AP I.

Several lines of argument could potentially lead to such a result. These arguments generally work by linking the interpretation of Article 43(1) AP I to Article 4(A)(1) and 4(A)(2) of GC III. If Article 43(1) AP I was read relatively narrowly, to cover the same class of individuals as Article 4(A)(1) GC III, that is, a State's "official" armed forces, designated as such in the State's internal law, plus any militias or volunteer corps incorporated into these forces, then no attribution issue arises, since these persons would be de jure or de facto State organs per Article 4 ASR. If, however, the concept of "armed forces" in Article 43(1) was broader than that and included irregular forces that "belong to" a State party per Article 4(A)(2) GC III, then a possible discordance with the attribution rules in the ASR may arise, since the "belonging to" criterion could be read more expansively.

For example, the ICTY Appeals Chamber in *Tadić* connected the "belonging to" criterion to its overall control test, holding that belonging to under Article 4(A)(2) GC III is equated with overall control.¹⁰⁵ That position is incongruent with that of the ICRC. The Pictet *Commentary* to GC III considered that it was

103. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(1), June 8, 1977, 1125 U.N.T.S. 3.

104. *Id.* art. 91 (emphasis added).

105. *Tadić*, *supra* note 74, ¶¶ 94–95.

essential that there should be a “de facto” relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.¹⁰⁶

The 2009 ICRC *Interpretative Guidance on Direct Participation in Hostilities* endorsed this wider view, which requires no exercise of control of any kind, while adding that the “belonging to” requirement would certainly be satisfied if the conduct of the armed group was attributable to a State under the law of State responsibility.¹⁰⁷ This, however, conversely implies that there will be *some* cases in which an armed group *belongs to* a State, but its conduct is *not* attributable to the State. Finally, in a footnote in its 2016 *Commentary on the First Geneva Convention*, the ICRC expressed the view that Article 4(A)(2) GC III does not incorporate a control requirement however framed: “Article 4(A)(2) of the Third Convention refers to such a relationship of subordination but describes it in a factual way and does not necessarily require the exercise of control over the group.”¹⁰⁸

Note that Article 4 GC III is a definitional provision that stipulates categories of individuals entitled to prisoner of war status. It is not a rule of conflict classification, which was the issue in *Tadić*, but one that regulates the status of individuals in the power of the enemy. Clearly, this rule is ascriptive in nature in that it attaches the State label to a category of individuals, but it does so to define their entitlement to protection as prisoners of war, rather than for State responsibility purposes. Reading rules of attribution into such a provision is not necessary to achieve its protective aims.¹⁰⁹ But however Article 4(A)(2) GC III is interpreted, the key question for us, again, is in the link frequently made between this provision and Article 43(1) AP I, and the

106. See COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 57 (Jean Pictet ed., 1960); see also Katherine Del Mar, *The Requirement of ‘Belonging’ under International Humanitarian Law*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 105 (2010) (arguing persuasively that the belonging to test is different in kind and less strict than the overall control test).

107. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 23 (Nils Melzer ed., 2009) [hereinafter ICRC, INTERPRETATIVE GUIDANCE].

108. ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 94, ¶ 267 n.107. However, the paragraph in which the footnote is found uses language that could imply that “belonging” is a test of attribution.

109. See generally Del Mar, *supra* note 106.

further onwards link to Article 91 AP I. The ICRC is explicit, for example, that in its view the Article 43(1) AP I definition will include all irregular forces that “belong” to a party in the sense of Article 4(A)(2) GC III, and that therefore distinctions between regular and irregular forces are no longer necessary.¹¹⁰ Such also appears to be the position in most academic commentary.¹¹¹

In short, if this seemingly majority position was to be accepted, irregular forces which “belong” to a party, that is, “which are under a command responsible to that Party for the conduct of its subordinates,” will constitute the armed forces of the State in the sense of Article 43(1), even though not all of the conduct of these forces would necessarily be attributable to the State under the secondary rules codified in the ASR. The question then becomes what precisely is the effect of Article 91 AP I, under which a State “shall be responsible for all acts committed by persons forming part of its armed forces.” One possibility would be that Article 91 constitutes a *lex specialis* rule of attribution—if an individual is classified as a member of a State’s armed forces under IHL, however exactly these rules of IHL are to be interpreted, then the conduct of that individual will *ipso facto* become attributable to the State by virtue of Article 91 AP I, regardless of whether attribution would have occurred under the ASR. For example, the conduct of an armed group that fights on behalf of a State only with the State’s tacit agreement, which would otherwise not suffice for attribution under the ASR, would now become attributable to the State pursuant to Article 91 AP I.¹¹²

But that is not the only possible reading of Article 91. In fact, that Article is an almost verbatim reproduction of a much older text, Article 3 of the 1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land.¹¹³ The ILC’s conceptual framework of State responsibility was many

110. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 98, r. 4, at 14; see also ICRC, INTERPRETATIVE GUIDANCE, *supra* note 107, at 22 (“all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party”).

111. See, e.g., Dapo Akande, *Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities*, 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 180, 183–85 (2010); Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 65, 85, at ¶ 304 (Dieter Fleck ed., 2d ed. 2008).

112. See Del Mar, *supra* note 106 at 121; Sondre T. Helmersen, *The Classification of Groups Belonging to a Party to an International Armed Conflict*, 6 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 5, 14–16 (2015) (acknowledging such a possibility).

113. Convention No. IV Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 (“A belligerent party which violates the provisions of

decades in the future. It would be simply anachronistic to read the text of the Hague Convention, or for that matter, the text of AP I, as incorporating modern-day conceptions of attribution, let alone idiosyncratic, IHL-specific rules of attribution.

Article 91 is much more sensibly read as encompassing a more holistic conception of State responsibility, which could then be disaggregated if necessary in line with the ILC's framework. For example, that a State is "responsible" in the sense of Article 91 AP I for the conduct of a group that is a part of its armed forces need not necessarily mean that the conduct of that group was directly attributable to the State. It could just as easily mean that the State is responsible for failing to properly supervise the group and ensure respect for IHL, that is, for failing to discharge a positive obligation of due diligence.¹¹⁴

This is in fact exactly what the 1987 ICRC *Commentary* on AP I does:

In international law the conduct of any organ of the State, whether military or civilian, constitutes an act of State, provided that it acted in its official capacity, regardless of its position, whether superior or subordinate. Thus the same applies to any member of the armed forces, without prejudice to the personal responsibility which he may incur, since a member of the armed forces is an agent of the State or of the Party to the conflict to which he belongs. Such responsibility even continues to exist when he has exceeded his competence or contravened his instructions. It can be imputed not only for acts committed by a person or persons who form part of the armed forces, as this provision lays down, but also for possible omissions. As regards damages which may be caused by private individuals, i.e., by persons who are not members of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.¹¹⁵

the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”)

114. *See Del Mar*, *supra* note 106, at 121–23.

115. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1039–40, ¶ 3660 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

There is no mention here of any *lex specialis* rule of attribution. Rather, the *Commentary* speaks of the attribution of conduct on the part of the armed forces as if these forces were de jure organs of the State. For everything else, that is, the conduct of private individuals, it speaks of the State's responsibility for failing to exercise due diligence. There is no indication here of any desire to depart from the standard framework of State responsibility, no matter how that framework is defined.

Importantly, the same tendency can be observed in the ICRC's Customary IHL Study. Rule 149 is dedicated to State responsibility for violations of IHL. But all that rule does is replicate relevant ASR rules of attribution.¹¹⁶ Neither the text of the rule, nor its commentary mentions any IHL-specific rules of attribution. On the contrary, the commentary to the rule treats the armed forces as a State organ, much in the same way as the 1987 ICRC *Commentary on the Additional Protocols*: “[t]he armed forces are considered to be a State organ, like any other entity of the executive, legislative or judicial branch of government. The application of *this general rule of attribution* of responsibility to international humanitarian law is reflected in the four Geneva Conventions.”¹¹⁷ Therefore, to the extent that irregular armed forces are neither de jure nor de facto organs of a State, because they either do not possess such status under the State's domestic law or are not factually completely dependent on and controlled by the State, their conduct cannot be attributed to the State, unless some other attribution rule in the ILC's ASR could apply.¹¹⁸ Quite simply, the better view is that Article 91 AP I was never meant to be, and is not, a *lex specialis* rule of attribution.

C. Conclusion on Special Rules of Attribution in IHL

In sum, the analysis above has shown that neither the overall control test articulated by the ICTY in *Tadić* nor the rule contained in Article 91 AP I

116. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 98, r. 149, at 530.

A State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

117. *Id.* at 530–31 (emphasis added).

118. See also Andrew Clapham, *The Concept of International Armed Conflict*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 3, 17–19 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

constitute special rules of attribution. The ICTY and the ICRC see the overall control test as a rule of attribution of general applicability, while the ICJ sees it as an IHL-specific primary rule, but on neither account is it a *lex specialis* attribution rule. Similarly, while Article 91 AP I could be more plausibly seen as an instance of such a rule, on a closer look, this does not seem to be its purpose, and it is generally not perceived as such. This, in short, means that there are arguably no IHL-specific rules of attribution.

And this makes sense. A *lex specialis* attribution theory for violations of IHL by armed groups acting on behalf of a State would encounter serious problems of principle. For example, if overall control were seen as an IHL-specific attribution rule, the conduct of an armed group under the overall control of a State would *not* be attributable to the State if the breach of an international obligation concerned *was not one of IHL*, that is, if the obligation stemmed from some other branch of international law. This could be the case with primary rules operating side-by-side with IHL in armed conflicts, such as customary human rights law. Consider also, for example, crimes against humanity or genocide committed by members of armed groups, atrocities that can be committed in both peacetime and in armed conflicts. It would make no sense for violations of IHL to be more easily attributed to a State, and for these equally serious breaches of international law, often occurring in parallel, to be subject to the more restrictive rules of attribution of general applicability. Such arbitrary outcomes should be avoided, and the easiest way of doing so is to accept that there are no IHL-specific rules of attribution.

Similarly, concerns about responsibility gaps that motivate the ICRC's position that tests for conflict classification should fully align with those for State responsibility, and its consequent disagreement with the ICJ regarding the content of attribution tests used to establish State responsibility, can be accommodated by resort to the positive obligation of States to ensure respect for IHL in all circumstances.¹¹⁹ In other words, a State relying on proxy non-State armed groups while keeping them at arm's length might be able to avoid the attribution of some of the misconduct of these groups to it. But it

119. As articulated in Common Article 1 of the four Geneva Conventions, *supra* note 98 and 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 98, r. 139, at 495; r. 144, at 509.

will not be able to avoid its responsibility for failing to prevent such misconduct, unless it can demonstrate that it exercised due diligence in that regard.¹²⁰ Again, no responsibility gap would occur.

This brings us to the *jus ad bellum*, where there are also two possible candidates for a *lex specialis* rule of attribution, again in the context of the relationship between the State and non-State actors—first, with regard to the definition of aggression, and second, with regard to the attributability of armed attacks committed by non-State actors to a State.

IV. *JUS AD BELLUM*, NON-STATE ACTORS, AND TERRORISM

A. *Definition of Aggression*

The two potential *jus ad bellum*-specific rules of attribution are related. They both concern the relationship between a State and a proxy non-State armed group, through which it is attacking another state. If, in other words, the issue is whether there has been an aggression or an armed attack *by a State* when that State is using a proxy non-State actor, it is only natural to consider the relationship between the State and the non-State actor in terms of attribution, that is, there would be (indirect) aggression or armed attack by a State when the conduct of the non-State actor was attributable to it. What else could it mean for a State to commit an armed attack against another State than for the attack to be attributable to it?¹²¹ This is especially the case because both aggression and armed attack immediately qualify as internationally wrongful acts, unlike, for example, the issue of qualification of armed conflict in IHL, which implies no wrongfulness as such. We therefore easily slip into a mode of thinking that implicitly creates direct links between the law on the use of force and the law of State responsibility, and creates further unintended consequences down the line.¹²² As will be shown, it not logically necessary, however, for the *jus ad bellum* to directly incorporate attribution

120. For an extensive discussion of the positive obligation to ensure respect, see Robin Geiß, *The Obligation to Respect and to Ensure Respect for the Conventions*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY*, *supra* note 118, at 111.

121. See Nollkaemper, *supra* note 21, at 141, 145, 150–51.

122. See, e.g., *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶ 51 (Nov. 6) (“[I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States has to show that attacks had been made upon it *for which Iran was responsible.*”) (emphasis added).

tests from the law of State responsibility, although it could do so if States so wished it.¹²³

In 1974 the U.N. General Assembly adopted Resolution 3314 (XXIX) on the definition of aggression (DoA Resolution).¹²⁴ This Resolution was adopted to guide Security Council deliberations on aggression—which it never managed to achieve—but is widely regarded as authoritative, despite many controversies about some of its formulations.¹²⁵ Article 3(g) of the annex to the Resolution containing the definition provides that “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [in Article 3(a)-(f)], or its substantial involvement therein” shall qualify as acts of aggression.¹²⁶

In *Nicaragua*, the ICJ not only held that this definition reflected customary international law, but the Court also used it to determine whether an armed attack occurred in the sense of Article 51 of the Charter, effectively treating the concepts of aggression and armed attack interchangeably.¹²⁷ Let us assume *arguendo* that this definition, precisely as formulated, does in fact reflect customary international law, or is an authoritative interpretation of the U.N. Charter. The question then for our purposes is whether Article 3(g) contains any *lex specialis* rule of attribution.

As stated, that question is clearly somewhat anachronistic. The DoA Resolution was drafted almost thirty years before the conclusion of the ILC’s codification project on State responsibility, and its drafters almost certainly did not think in terms of the distinction between general and special rules of attribution. Moreover, while in *Nicaragua* the ICJ extensively discussed rules of attribution with respect to U.S. responsibility for the conduct of the *contra* rebels, it did not refer to attribution in the context of its examination of the DoA Resolution.

That said, some of the language of Article 3(g) could plausibly be interpreted as referring to attribution rules. This is certainly the case with the

123. *But see* Nollkaemper, *supra* note 21.

124. G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974).

125. For an extensive analysis, see TOM RUY, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 127–38 (2010).

126. G.A. Res. 3314 (XXIX), *supra* note 124, art. 3(g).

127. *Nicaragua*, *supra* note 76, ¶ 195. Recall that the equally authentic French language version of Article 51 uses the term “*agression armée*” for armed attack. *See also* RUY, *supra* note 125, at 127–29.

reference to the “sending by or on behalf of a State” of armed bands.¹²⁸ That language could reasonably be squared with Articles 4 and 8 ASR—a State “sending” armed bands to attack another States is presumably doing so either by using the non-State actor as a de facto organ, or by giving the armed bands instructions, or by exercising direction or control over them.¹²⁹ It cannot, however, be excluded that the instructions given to the non-State actor might not cover all of the relevant conduct of the non-State actor.

More problematic is the reference to the State’s *substantial involvement* in the aggressive conduct of the armed group. In principle, such involvement need not involve *any* element of control but could be akin to a complicity relationship.¹³⁰ Yet, again, attribution under the ASR would arise only if the non-State actor was completely controlled by and dependent on the State, per Article 4(2) ASR, or was instructed to or effectively controlled in committing a specific action, per Article 8 ASR. Mere *involvement*, however exactly defined, would not suffice. It is therefore possible that a State can commit aggression in the sense of Article 3(g) of the DoA Resolution by being involved in the conduct of non-State actors for which it would *not* be responsible under the attribution rules of the ASR.¹³¹ Thus, to avoid a responsibility gap, Article 3(g) could, on one view, arguably be regarded as a *jus ad bellum*-specific rule of attribution per Article 55 ASR.¹³²

128. See RUYs, *supra* note 125, at 383–88 (canvassing the drafting history of Article 3(g), and concluding that the “sending” part of the formula involved those acts of the armed bands for which the State was directly responsible).

129. See KIMBERLY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 26–27 (2011); Nollkaemper, *supra* note 21, at 153–54; RUYs, *supra* note 125, at 408–14; see also OLIVIER CORTEN, THE LAW AGAINST WAR 446, 450 (2010).

130. In the context of the drafting of the DoA Resolution, the “substantial involvement” criterion was a finely crafted compromise between those States who wished to restrictively define aggression as a purely inter-State concept and those who wished to capture more indirect forms. The substantiality criterion meant to cover situations of State involvement, which are *less* than ‘sending,’ but more than organizing, assistance, or support. See RUYs, *supra* note 125, at 388–90. This is also why in *Nicaragua*, the ICJ, while relying on Article 3(g) to define the cognate concept of armed attack, ruled that a State providing weapons or logistical support to armed bands would be violating the prohibition on the use of force in Article 2(4) of the U.N. Charter, but would not be committing an armed attack in the sense of Article 51 thereof. See *Nicaragua*, *supra* note 76, ¶ 195.

131. See RUYs, *supra* note 125, at 408–18 (noting that substantial involvement, while not a traditional imputability criterion, could perhaps cover situations of overall control).

132. See TRAPP, *supra* note 129, at 27 (“[T]he ‘sending by or on behalf of a State of armed bands . . . [or] substantial involvement therein’ must be interpreted as a *lex specialis* threshold for attributing the aggression carried out by the armed bands to the state sending them.”); see also Nollkaemper, *supra* note 21, at 147; Erika de Wet, *The Invocation of the Right to*

But that view, while plausible, is not the only possible understanding of the nature of Article 3(g). That provision could just as easily be seen as a *primary* rule of the law on the use of force, doing exactly what it says on the box—defining the concept of aggression.¹³³ Thus, a State *commits aggression* if it sends a non-State actor to engage in armed violence against another State, or is substantially involved in the non-State actor’s conduct. But this does not necessarily mean that *every* act or omission of that non-State actor becomes attributable to the State. Rather, the conduct attributed to the State is that of its own de jure organs—the act of “sending” or the acts constituting “substantial involvement.”¹³⁴ If the State commits these acts through its own organs, it will also be regarded as having committed aggression. In practice, the distinction between the first and the second reading of Article 3(g) might not make much difference in terms of, for example, the reparation owed to the victim State stemming solely from the violation of the prohibition on the use of force. The State’s responsibility for any other violations of international law committed by the non-State actor will depend on the application of the attribution rules in the ASR, and the ICJ’s two control tests in particular. My only point here is that, even if it is taken at face value, Article 3(g) can easily be read as not creating any special rules of attribution.¹³⁵ By its nature it would be no different than, for example, the rule in Article 3(f), whereby a State commits aggression if it allows its territory to be used by a third State for aggression against another. That rule must be non-attributive, in that while they would both be qualified as aggressors, the conduct of the third State actually committing attacks against another would *not* be attributed to the assisting State that, for example, allowed its airports to be used to perform the attacks.¹³⁶

Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution, 32 LEIDEN JOURNAL OF INTERNATIONAL LAW 91, 103 (2019); André de Hoogh, *Restrictivist Reasoning on the Ratione Personae Dimension of Armed Attacks in the Post 9/11 World*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 19, 31 (2016).

133. See also Nicholas Tsagourias, *Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 801, 815 (2016).

134. Cf. CORTEN, *supra* note 129, at 446 (noting that “[a substantially involved State] is then directly responsible for the act constituting the engagement, without any need to impute to it actions by private persons”).

135. *But see id.* at 450, 454 (stating that Article 3(g) “plainly constitutes a *lex specialis*,” but without clearly explaining how it does so). Accordingly, my understanding of Corten’s position is in fact that no special attribution rule is necessary, but that he is rather referring to the content of the relevant primary State obligations.

136. See also MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* 142–44 (2015).

B. *Armed Attacks by Non-State Actors*

This brings us to the second possible special rule of attribution in the *jus ad bellum*, which concerns more directly the concept of an “armed attack” in the sense of Article 51 of the U.N. Charter. The basic issue here is whether, in providing for the victim State’s entitlement to self-defense “if an armed attack occurs” against it, on a proper interpretation Article 51 implicitly requires that the armed attack be committed *by a State*.¹³⁷ If it does, the question then is how such a State authorship requirement is to be legally delineated, and, in particular, whether it incorporates any attribution standard from the law of State responsibility.

Self-defense against attacks by non-State actors has, of course, been one of the major controversies of modern international law, especially since the 9/11 terrorist attacks, and has divided scholars and States into two basic camps (painting with a very broad brush).¹³⁸ First, there are the restrictivists, who have historically formed the mainstream or majority camp.¹³⁹ They resist what they see as unwarranted attempts by certain powerful States to create a more permissive regime of unilateral use of force. They insist that Article 51 of the Charter is inter-State in nature, just like the prohibition on the use of force in Article 2(4) thereof. An armed attack can, in that view, only be committed *by a State*. Thus, according to one line of thinking, State A could validly intervene on the territory of State B against non-State actor C, which attacked A from B’s territory, only if C *acted on behalf of* B, that is, if C’s conduct was *attributable* to B.¹⁴⁰

Second, there is the historically smaller, but increasingly more vocal, expansionist camp. These scholars and States believe that Article 51 does not impose any requirement that the armed attack that can give rise to a claim of self-defense has to be committed by a State, or specifically to be attributable to it. For the expansionists, A can intervene on B’s territory against C if C

137. It does not do so explicitly.

138. See, e.g., Marko Milanovic, *Accounting for the Complexity of the Law Applicable to Modern Armed Conflicts*, in *COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE* 33 (Christopher Ford & Winston S. Williams eds., 2019).

139. For an account of the evolution of the majority-accepted restrictivist position, see Christian J. Tams, *The Use of Force against Terrorists*, 20 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 359, 362–73 (2009).

140. See also RUYSS, *supra* note 125, at 413 (noting that an armed attack by a State means that the conduct is attributable to the State); Tams, *supra* note 139, at 368 (finding that “[f]or there to be armed attack in the sense of art 51 of the Charter] the direct attack by a non-State actor had to be attributed to another State under rather stringent rules on attribution”).

committed an armed attack and it is *necessary* to intervene on B's territory to end the attack, or (possibly) to prevent future attacks.¹⁴¹ There are differences within the expansionist camp on the precise conditions under which self-defense can lawfully be exercised in such circumstances. One prominent theory holds that A can intervene on B's territory if B is unwilling or unable to prevent C's attack on A¹⁴²—but the expansionists all agree that no attribution link between B and C is required for A to be able to lawfully act in self-defense.¹⁴³

The divide between the restrictivists and the expansionists hinges on the proper interpretation to be given to Article 51, in light of its text, purpose, and subsequent State practice, specifically as to whether Article 51 implicitly incorporates a State authorship requirement. It is clear that restrictivist discourse was dominant during the Cold War, with the expansionists gaining traction after 9/11.¹⁴⁴ As the situation currently stands, the tension between the two camps is, in my view, formally irresolvable.¹⁴⁵ A number of different positions are plausible within a positivist argumentative framework. What position one takes is normally aligned with one's policy preferences (that is, whether one regards interventions against non-State actors without the permission of the territorial State as, in principle, a good idea, and subject to what constraints). Few lawyers think that such uses of force are generally unwise but are still legally permissible, or that they are practically necessary but are regrettably unlawful.¹⁴⁶

This indeterminacy is largely a function of the deliberate ambiguity with which many States have acted in this area. For example, with regard to the 9/11 attacks, the United States made statements that could support the view that the conduct of Al-Qaeda was attributable to the State of Afghanistan,

141. See, e.g., Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARVARD INTERNATIONAL LAW JOURNAL 41 (2002); Kimberly N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-state Terrorist Actors*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 141 (2007).

142. See Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012). For a critique, see Olivier Corten, *The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 777 (2016).

143. There are of course many other ideological and formalistic differences within the expansionist camp.

144. For an overview of recent State practice, see de Wet, *supra* note 132, at 94–103.

145. See Marko Milanovic, *Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum*, EJIL:TALK! (Feb. 21, 2010), <http://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>; see also RUYSS, *supra* note 125, at 485–89.

146. See also RUYSS, *supra* note 125, at 514.

but also statements that would require no such attribution.¹⁴⁷ Israel behaved similarly with respect to its actions against Hezbollah on the territory of Lebanon.¹⁴⁸ The indeterminacy is compounded by the studious silence of most other States.¹⁴⁹ But even when the silent majority speaks, it does so with much ambiguity.¹⁵⁰

For the purpose of our inquiry into *lex specialis* rules of attribution, however, the key point is this: if the expansionist camp is right, then no attribution link of any kind needs to exist between the State in whose territory a non-State actor is operating to attack another State and that actor.¹⁵¹ And if no such link is needed, then there is no need for any *special* rule of attribution.

If, on the other hand, the restrictivist camp is correct, then we have a problem. There have been at least *some* instances of self-defense against non-State actors operating in the territory of another State that were widely regarded as lawful by the international community, but for which it is not possible to attribute the conduct of the non-State actor to the territorial State under the rules codified in the ASR. The paradigmatic example is of course Afghanistan after 9/11. The response of the United States in self-defense was regarded virtually universally as lawful.¹⁵² Yet, on the other hand, it is difficult, if not impossible, to attribute the 9/11 attacks to Afghanistan under the ASR.¹⁵³ Al-Qaeda was neither a *de jure* nor *de facto* organ of Afghanistan, nor did the then-Taliban government of Afghanistan in any real way

147. See Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 905 (2002); see also Tams, *supra* note 139, at 381.

148. See Milanovic, *supra* note 145; see also RUYs, *supra* note 125, at 450–57.

149. On this point, see Paulina Starski, *Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility*, 4 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 14 (2017).

150. See the 2014 declaration of the Non-Aligned Movement (comprising a majority of U.N. member States), to the effect that “consistent with the practice of the United Nations and international law, as pronounced by the ICJ, Article 51 of the U.N. Charter is restrictive and should not be re-written or re-interpreted.” Chargé d’affaires a.i. of the Islamic Republic of Iran to the UN, Letter dated 1 August 2014 from the Chargé d’affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, annex I, ¶ 25.2, U.N. Doc. A/68/966-S/2014/573 (Aug. 19, 2014). Whatever the (restrictive) spirit might have been behind this statement, one can read whatever one wants into it, which is probably the whole point.

151. See also RUYs, *supra* note 125, at 490.

152. See *id.* at 436, 439.

153. See Milanovic, *supra* note 145, at 584; RUYs, *supra* note 125, at 440. *But see* Nolkaemper, *supra* note 21, at 156–57 (discussing (rare and unpersuasive) attempts in the literature to attribute the conduct of Al-Qaeda to Afghanistan under the ASR rules of attribution).

instruct or control Al-Qaeda. And if that is right, and an attribution link was necessary per the view of the restrictivists, then 9/11 had to be attributed to Afghanistan under some special rule of attribution. Such a potential rule was in fact articulated by the Bush administration, which argued that States *harboring terrorists* were as guilty as the terrorists.¹⁵⁴

Simply *harboring* a terrorist group would not suffice for the attribution of that group's conduct to the State under the ASR—the State could only be held responsible for its own conduct of failing to prevent the group's attacks on some other State. But again, if the restrictivists are right that Article 51 imposes an attribution requirement, and if the U.S. invasion of Afghanistan in response to 9/11 is to be regarded as a lawful exercise of self-defense, then the only logical conclusion is that there exists a *jus ad bellum*-specific or terrorism-specific rule of attribution (however exactly one defines terrorism), which attributes to a territorial State the conduct of (terrorist) armed groups that it harbors or otherwise aids and assists.¹⁵⁵

Descriptively, from a positive law standpoint, such a position is plausible; that is, it falls within the range of available options within the currently under-determined legal framework. And it is possible that States might push the law further in this direction, opting to solidify harboring or some similar variant of a special attribution rule. That said, such solidification to me seems both unlikely and undesirable. The fundamental problem with this position is, yet again, that it is difficult to see what could possibly justify having a *jus ad bellum*-specific or terrorism-specific attribution rule. For example, why should a State harboring a terrorist or aggressive non-State actor be responsible for violations of the *jus ad bellum* committed by that actor, while a State harboring an actor committing genocide or crimes against humanity would

154. See Ratner, *supra* note 147; RUYs, *supra* note 125, at 443–44.

155. See Nollkaemper, *supra* note 21, at 158 (arguing that harboring or toleration could not be a general rule of attribution, but could be *lex specialis* for terrorism or the law on the use of force); Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 83 (2003) (arguing that a harboring rule may be evolving as a *general* rule of attribution, but that this is undesirable and that self-defense against terrorist non-State actors should be dealt with by primary rules). For other possible variants of a special rule of attribution, see RUYs, *supra* note 125, at 491 n.658; Tams, *supra* note 139, at 384–87 (arguing that Article 51 does require attribution, but that the State aiding and abetting of terrorist conduct by non-State actors would be a *jus ad bellum*-specific rule of attribution); Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 563 (2017) (arguing for complicity as an attribution rule, but not as a special rule of attribution).

not be so responsible?¹⁵⁶ From the standpoint of the law of State responsibility, such distinctions do not appear tenable—harboring a wrongdoing non-State actor should either be a *general* attribution rule or not be an attribution rule at all. And it is, at best, unhelpful for arguments about the desirable scope of the right of self-defense to devolve into arguments about the attribution rules of State responsibility.¹⁵⁷ One upside of the expansionist position is precisely that this link between the *jus ad bellum* and attribution is severed from the very first step.¹⁵⁸

C. Conclusion on Special Rules of Attribution in the Law on the Use of Force

As we have seen, the modern *jus ad bellum* could plausibly be read as creating two *lex specialis* rules of attribution, one in the context of the definition of aggression, and the other in the context of armed attacks by non-State actors, but the existence of these two rules is far from certain. Even if the precise formulation of the definition of aggression in the General Assembly's DoA Resolution is regarded as legally binding, the references to a host State *sending* an armed group against a victim State, or the former's *substantial involvement* in the group's activities, could be seen as reflecting a primary rule defining the concept of aggression, rather than as a special rule of attribution. Similarly, it is only if the restrictivist camp is right that Article 51 imposes an attribution requirement, and if we also accept that on a number of occasions actions taken in self-defense were regarded as lawful even when the ASR attribution requirements were not met, that we could reasonably say that a

156. See also Milanovic, *supra* note 78, at 584.

157. See Tsagourias, *supra* note 133, at 806–08.

158. The major downside of the expansionist position, of course, is that it facilitates the unilateral resort to force in international relations, which can be more easily justified through self-defense in the absence of a State authorship (or involvement) criterion. Under the expansionist view the necessity criterion would have to do most of the work in preventing abusive invocations of self-defense. See, e.g., Trapp, *supra* note 141, at 146–47, 155; de Wet, *supra* note 132, at 104. The restraining power of necessity aside, it is an undeniable fact that States that have resorted to expansionist justifications for their own uses of force in self-defense in recent years will find it more difficult to criticize other States for making similar arguments. Consider, for example, the relatively muted reactions by Western States to Turkey's incursion into Kurdish-controlled parts of Syria in October 2019, which Turkey had justified using the language of self-defense, even though such a claim was hardly arguable even on a relatively expansive conception of self-defense. See Claus Kress, *A Collective Failure to Prevent Turkey's Operation 'Peace Spring' and NATO's Silence on International Law*, EJIL:TALK! (Oct. 14, 2019), <https://www.ejiltalk.org/a-collective-failure-to-prevent-turkeys-operation-peace-spring-and-natos-silence-on-international-law/>.

special harboring rule of attribution would need to exist in the law on the use of force. As explained above, as a matter of (under-determined) positive law, that is a plausible position to take. But such a special attribution rule is difficult to justify normatively, and no resort to such a rule would be necessary if the expansionist position that Article 51 of the Charter does not require an armed attack to be committed by a State were to be adopted.

Even so, it is important to observe a measure of evolution in the positions of the mainstream restrictivist camp. Witness, for example, the recent “Plea against the abusive invocation of self-defense as a response to terrorism,” an effort spearheaded by Professor Olivier Corten (by any account an arch-restrictivist¹⁵⁹) and signed by almost two hundred fifty scholars of international law.¹⁶⁰ Among several important points (many of which should be, at least in principle, uncontroversial), the Plea states that:

In accordance with article 51 of the Charter, the use of force in self-defence on the territory of another State is only lawful if that State *bears responsibility* for a violation of international law *tantamount* to an “armed attack.” This may occur either where acts of war perpetrated by a terrorist group *can be attributed* to the State, *or* by virtue of *a substantial involvement of that State in the actions of such groups. In certain circumstances, such involvement may result from the existence of a direct link between the relevant State and the group.* However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State’s territory without its consent. Such an argument finds no support either in existing legal instruments or in the case law of the International Court of Justice. Accepting this argument entails a risk of grave abuse in that military action may henceforth be conducted against the will of a great number of States under the sole pretext that, in the intervening State’s view, they were not sufficiently effective in fighting terrorism.

Finally, self-defence should not be invoked before considering and exploring other available options in the fight against terrorism. The international legal order may not be reduced to an interventionist logic similar to that prevailing before the adoption of the United Nations Charter. The purpose

159. See CORTEN, *supra* note 129, at 15–27.

160. A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism, <http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme/> (last visited Sept. 17, 2020). The signatories include, *inter alia*, Georges Abi Saab, Philip Alston, Hilary Charlesworth, Eric David, Pierre-Marie Dupuy, Christine Gray, Robert Kolb, Martti Koskenniemi, Tom Ruys, and Marco Sassòli.

of the Charter was to substitute a multilateral system grounded in cooperation and the enhanced role of law and institutions for unilateral military action. It would be tragic if, acting on emotion in the face of terrorism (understandable as this emotion may be), that purpose were lost.¹⁶¹

Note how the restrictivist position's consistent rejection of the "unable" prong of the unable or unwilling test and its insistence on the *responsibility* of the territorial State is nonetheless softened by other language. The violation for which the territorial State needs to be responsible must be *tantamount* to an armed attack, but it need not be responsible for the armed attack itself. The violation can be attributable to the territorial State, *or* that State can be "substantially involved" in the actions of the terrorist group. Such involvement *in certain circumstances may result from direct links* between the State and the group. Note the "or" here—the drafters of the Plea (and perhaps to a lesser extent those who signed it) clearly did *not* consider "substantial involvement," the standard from the DoA Resolution, to be a *lex specialis* rule of attribution.¹⁶²

Thus, the restrictivist mainstream has itself evolved over the years and is hardly free from complexity and ambiguity. How the trend towards a more expansive interpretation of Article 51 will ultimately consolidate cannot, of course, be known today, and depends in the final analysis on extra-legal considerations. And the same goes for the existence of any *jus ad bellum*-specific rules of attribution, which are logically necessitated by some of the restrictivist positions articulated above.

The current indeterminacy aside, we can say that, while the existence of *jus ad bellum*-specific rules of attribution cannot be excluded, it is unlikely that they will consolidate in the long run. The expansionist position does not require the existence of any special rules of attribution. Even the restrictivists, for whom Article 51 requires that an armed attack be committed *by a State*, can develop their understanding of that (ascriptive) primary norm so that it means something *other* than the attribution of the conduct of the non-State actor constituting the armed attack. It could include, for example, a non-attributive substantial involvement therein as a distinct doctrine of State complicity. This would enable both the expansionists and the restrictivists to

161. *Id.* (emphasis added).

162. See also Olivier Corten, *A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, EJIL:TALK! (July 14, 2016), <https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/>.

pursue their respective agendas for the *jus ad bellum* without causing unintended ripple effects in the law of State responsibility and without disrupting the general applicability of its attribution rules.¹⁶³ Under the expansionist view, the State from whose territory an armed attack is emanating may not have committed any international wrong.¹⁶⁴ It may simply be *unable* to prevent armed attacks by non-State groups, but it would still have to tolerate a defensive use of force on its territory by the victim State if this was the only way of repelling the attacks.¹⁶⁵ If the territorial State is able but unwilling to prevent the attacks, it will be responsible for its failure to prevent, but not for the attacks themselves, that is, the conduct of the non-State actor will not be attributable to it as a matter of State responsibility. Under the evolving restrictivist view, substantial involvement by the territorial State in the conduct of a non-State actor may qualify the attack as an armed attack by that State, but it would not create an attribution link as a matter of State responsibility. This would be an ascriptive rule in the wider sense, but not an attributive one. In other words, the State would be responsible for its own conduct of facilitating the armed attack, possibly for violating Article 2(4) of the Charter and the principle of non-intervention, but the attack itself would not be attributed to it. Therefore, under either view, the United States would have been entitled to act in self-defense on the territory of Afghanistan after 9/11, without the 9/11 attacks necessarily being attributable to Afghanistan as a matter of the law of State responsibility.

V. EUROPEAN HUMAN RIGHTS LAW

A. *The European Court and the Law of State Responsibility*

This Part examines whether any *lex specialis* rules of attribution exist in a regional sub-branch of international human rights law, the system of human

163. See also Kimberly N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1049 (2009); Milanovic, *supra* note 78, at 584; RUY, *supra* note 125, at 492–93; Jean d’Aspremont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 1089, 1124–30 (2010).

164. See RUY, *supra* note 125, at 375–77.

165. More moderate positions along the expansionist-restrictivist spectrum could thus require *some* internationally wrongful act by the host State as a prerequisite for a self-defense claim against it, for example, supporting or failing to prevent the activities of the non-State entity committing the armed attack from its territory, without requiring the attribution of the armed attack itself. See, e.g., Nollkaemper, *supra* note 21, at 161–65.

rights protection under the ECHR, as overseen by the European Court of Human Rights. Obviously one could look for special rules of attribution in other regional systems as well or within the universal U.N. system of human rights protection. But I have chosen to focus on the ECHR for a number of reasons—because of the copiousness and complexity of the European Court’s case law, because it is the system I am most familiar with, and because I needed to narrow my inquiry to make it feasible within the confines of an article. In short, I make no claim to comprehensiveness of coverage concerning human rights law. Nonetheless, the European example is, in my view, an instructive one.

No special rule of attribution exists in the text of the ECHR. My inquiry, therefore, is whether the ECHR, *as interpreted by the European Court*, contains *lex specialis* rules of attribution. That question can be unpacked into three more specific lines of inquiry. First, as a matter of fact, does the Court actually employ special rules of attribution? Second, do the Court’s judges *think* they are employing special rules of attribution, taking into account the implications of such a position, or rather do they think they are employing rules of general applicability but are, in reality, misunderstanding or misapplying them? Third, *should* the Court be employing special rules of attribution? The first two lines of inquiry are more descriptive, the third more normative, but they are hard to disentangle in practice.

The Court’s relationship with the general law of State responsibility has long been a fraught one, even after the final codification of the ASR by the ILC. This is partly because the Court might not be entirely sure about what it is doing as a conceptual matter, but cares the most about reaching the right result in a given case; partly because most of its judges are not international lawyers and have little specialized knowledge in or professional and cultural attachment to the law of State responsibility; and partly because whatever its internal understanding might be, the Court frequently fails to properly explain what it is doing.

Two (related) problems have proven to be particularly vexing in practice. The first is the persistent confusion in the Court’s case law between the notion of State jurisdiction in Article 1 ECHR and State responsibility. Second is the fact that the Court frequently fails to properly articulate whether it is holding the relevant State responsible for *doing* something or for *failing to do* something, that is, whether the conduct being attributed is one of action or

omission, and whether the obligation being breached is a negative or a positive one.¹⁶⁶

On the first point, we should recall that the European Court and other human rights bodies have produced an extensive body of case law on the extraterritorial application of human rights treaties.¹⁶⁷ The European Court's case law, in particular, has been the richest and the most varied, but also one plagued with inconsistencies and uncertainties. In *Al-Skeini*,¹⁶⁸ the Court took to heart much of the criticism levied against some of its earlier cases, most of all *Bankovic*,¹⁶⁹ in which the Court controversially held that the ECHR would not apply to individuals killed by aerial bombing outside the borders of the State using force. The *Al-Skeini* Grand Chamber tried to set its conceptual approach on a sounder footing, and reaffirmed and clarified the two basic models of State jurisdiction: the spatial model (jurisdiction as effective overall control by a State over an area or territory in which the victim of the alleged human rights violation is located)¹⁷⁰ and the personal model (jurisdiction as an exercise of authority or control by State agents over the victim).¹⁷¹ In the years after *Al-Skeini*, the European Court has demonstrated a tendency towards a clearer, more factual, and more expansive approach towards the question of the Convention's extraterritorial application

166. See especially James Crawford & Amelia Keene, *The Structure of State Responsibility under the European Convention on Human Rights*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW* 178 (Anne van Aaken & Iulia Motoc eds., 2018).

167. See generally EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004); MARK GIBNEY & SIGRUN SKOGLY, UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (2010); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2009); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011); KAREN DA COSTA, THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES (2012). Among dozens of scholarly articles, see especially John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISRAEL LAW REVIEW 72 (2007); Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 ISRAEL LAW REVIEW 503 (2007).

168. *Al-Skeini and Others v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99; see also Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUROPEAN JOURNAL OF INTERNATIONAL LAW 121 (2012).

169. *Bankovic and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

170. *Al-Skeini*, *supra* note 168, ¶¶ 138–39.

171. *Id.* ¶¶ 133–37.

and the interpretation of the jurisdiction clause in its Article 1, in line with the case law of other human rights bodies.¹⁷²

The key difference between Article 1 jurisdiction and attribution of conduct is that jurisdiction is the threshold criterion for the existence of legal obligations, that is, a prerequisite for the existence of a breach of the ECHR under Article 2(b) ASR, and *not* a criterion of attribution under Article 2(a) ASR. The focus of the control tests under Article 1, which superficially resemble the language of control tests for attribution purposes, is on control over the victim of the human rights violation or the place where they are located, *not* on control over the actor that committed the violation.¹⁷³ Thus, conduct violating human rights can occur within a State's jurisdiction but not be attributable to it (for example, homicide or torture by private persons within the State's territory), or be clearly attributable to the State while not manifestly being within its jurisdiction (for example, an overseas drone strike by the State's armed forces).

But while in *Al-Skeini* the Court properly distinguished between State jurisdiction and attribution,¹⁷⁴ many of its cases before and since have failed to do so. The Court's confusion between jurisdiction and responsibility is most evident in cases such as *Loizidou*¹⁷⁵ and *Ilaşcu*,¹⁷⁶ where the Court examined the relationship between a State party to the ECHR and a separatist entity in another State party in *Loizidou* (Turkey and the Turkish Republic of Northern Cyprus (TRNC)) and *Ilaşcu* (Russia and Transnistria). The Court often confused the two concepts by using hopelessly imprecise terminology, for example, by talking about the *responsibility* of State parties *under Article 1*—as if that Article set standards of responsibility—or by saying that a respondent State's responsibility *was engaged* (whatever that may mean exactly).¹⁷⁷

172. See also Marko Milanovic, *Jurisdiction, and Responsibility: Trends in the Jurisprudence of the Strasbourg Court*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW, *supra* note 166, at 97.

173. See MILANOVIC, *supra* note 167, at 51.

174. See *Al-Skeini*, *supra* note 168, ¶ 130.

'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which gives rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

See also *id.* ¶ 135.

175. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (Preliminary Objections) [hereinafter *Loizidou Preliminary Objections*].

176. *Ilaşcu and Others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179.

177. See also MILANOVIC, *supra* note 167, at 41–53.

It has thus been exceedingly difficult for outside observers to understand what the Court was actually doing in such cases, for example, whether the respondent States in cases such as *Loizidou* and *Ilaşcu* were found directly responsible for the conduct of non-State actors whose conduct was *attributable* to them, or rather *for their own* failure to prevent such conduct by third parties.¹⁷⁸ Thus, the ICTY Appeals Chamber in *Tadić* regarded the European Court's reference to Turkey's effective overall control over Northern Cyprus for the purpose of establishing Article 1 jurisdiction as an attribution test, which it used to support its overall control test.¹⁷⁹

When Russia's counsel in *Catan*,¹⁸⁰ a sequel to *Ilaşcu and Others v. Moldova and Russia*, pointed out the ambiguities in the Court's approach and its possible inconsistency with attribution tests devised by the ICJ and endorsed by the ILC, the Grand Chamber of the Court responded with a commendable, if somewhat disingenuous holding, that "the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law."¹⁸¹ The Court subsequently reaffirmed that holding verbatim in *Jaloud*.¹⁸² Despite its protestations to the contrary, the Court has, in fact, frequently "equated" jurisdiction and attribution, or at least it had never explained how the two were distinct.

The Court's inability to properly distinguish between jurisdiction and attribution, between conduct constitutive of jurisdiction and conduct constitutive of the human rights violation, and between breaches of positive and negative obligations, leads to our inability to accurately describe what the Court is doing or thinks it is doing in some very difficult and complex cases. Contrary to what is suggested by two concurring judges in *Jaloud*, attribution is *never* a "non-issue" in human rights cases.¹⁸³ For a State to be responsible for any violation of the Convention, the conduct of some human being has to be attributed to that State. Again, there is no way that a State can act except through individuals or groups of individuals, and the conduct of these individuals must be assigned in law to the State (whether we call this process attribution, imputation, something else, or do not give it a name at all). What is true is that in the vast majority of Strasbourg cases, perhaps as much as 99

178. For more on this point, see *infra* Section V.C.1.

179. *Tadić*, *supra* note 74, ¶ 128.

180. *Catan and Others v. Moldova and Russia*, 2012-V Eur. Ct. H.R. 309.

181. *Id.* ¶ 115.

182. *Jaloud v. Netherlands*, 2014-VI Eur. Ct. H.R. 229, ¶ 154.

183. *Id.* at 318, ¶ 7 (concurring opinion by Spielmann, J., joined by Raimondi, J.).

percent of cases, the attribution issue is not explicitly *raised* by the parties or by the Court, since on the facts of the case the answers to the attribution inquiry are *obvious*: the conduct which violates human rights is that of the State's de jure organs, per Article 4 ASR. When, for example, Italy is found responsible because Italian courts unduly delay a trial, or Bulgaria is found responsible because the Bulgarian police kill an unarmed fugitive, nobody really bothers with an attribution inquiry or invokes the ILC Articles. But the attribution inquiry is nonetheless still done *sub silentio*, since without it there can be no State responsibility for an internationally wrongful act.

The triviality of the attribution inquiry in the vast majority of Strasbourg cases thus compounds the Court's inability to properly articulate itself in the genuinely difficult cases. Bearing this in mind, let us now look at three possible candidates for ECHR-specific rules of attribution. The first is a possible negative rule of attribution per the "ultimate authority and control" test that the Court devised and applied in the *Behrami* case.¹⁸⁴ Second, the Court's jurisprudence regarding non-State entities that survive by virtue of another State's support, and its case law on the acquiescence or connivance of States in the conduct of third parties. Third, is the Court's case law on the relationship between States and public enterprises. I will deal with each in turn.

B. *Behrami, Al-Jedda, and a Negative Rule of Attribution*

In *Behrami*, the Court held that the conduct of international peacekeeping contingents in Kosovo was not attributable to the troop-contributing States, but solely to the United Nations, since the U.N. Security Council exercised "ultimate authority and control" over the peacekeeping operation, even if it delegated operational control to NATO.¹⁸⁵ Consequently, because none of the conduct at issue in the case was attributable to any of them, the ECHR States parties with troop contingents in Kosovo could not be held responsible for any human rights violations there.¹⁸⁶

The *Behrami* ultimate authority and control test was, on the one hand, a *positive* attribution rule because certain conduct was attributed to the United Nations as a separate international legal person. On the other hand, it was a *negative* attribution rule, as the same conduct was simultaneously *not* attributed

184. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, App. Nos. 71412/01, 78166/01 (2007) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-80830>.

185. *Id.* ¶¶ 133, 141.

186. *Id.* ¶ 152.

to the troop-contributing States, whose armed forces would otherwise be their de jure organs. Both aspects of the *Behrami* test, and the chain of reasoning on which it was predicated, were severely criticized in the literature.¹⁸⁷ In particular, the Court confused issues of attribution and that of the scope of a peacekeeping mandate authorized by the Security Council, including questions of any delegation of powers, and it failed to properly engage with the ILC's then on-going codification work on the responsibility of international organizations. Similarly, the Court failed to consider the possibility that the same conduct could be attributable to more than one international legal person, for example, both to an international organization, such as the United Nations or NATO, and to a State.¹⁸⁸

The Court's reasoning and the outcome that it reached were expressly disavowed by the ILC in its final commentaries to its Articles on the Responsibility of International Organizations.¹⁸⁹ And in the subsequent *Al-Jedda* case, the Court retreated somewhat from *Behrami* and openly acknowledged the possibility of dual or multiple attribution of conduct.¹⁹⁰ However, it never overruled *Behrami*, applying it in several cases dealing with the conduct of international civilian or military missions in Bosnia and Kosovo.¹⁹¹

Thus, the *Behrami* ultimate authority and control test persists in a kind of "undeath." The European Court still relies on it in a very limited set of situations, while other international institutions and domestic courts do not use it, either by expressly saying that it is wrong or by distinguishing it on more

187. See, e.g., Aurei Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUMAN RIGHTS LAW REVIEW 151 (2008); Kjetil M. Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 509 (2008); Marko Milanovic & Tatjana Papić, *As Bad As It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law*, 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 267 (2009).

188. See *supra* note 187.

189. *Report of the International Law Commission to the General Assembly*, 66 U.N. GAOR Supp. No. 10, at 90–93, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 58–60, U.N. Doc. A/CN.4/SER.A/2011/Add.1 (Part 2); see also Giorgio Gaja (Special Rapporteur), *Seventh Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/610, at 10–12 (Mar. 27, 2009).

190. *Al-Jedda v. United Kingdom*, 2011-IV Eur. Ct. H.R. 305, ¶ 80.

191. See, e.g., *Kasumaj v. Greece*, App. No. 6974/05 (2007) (ECtHR), <http://echr.ketse.com/doc/6974.05-en-20070705/view/>; *Berić and Others v. Bosnia and Herzegovina*, App. No. 36357/04 etc. (2007) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-83109>.

or less persuasive grounds.¹⁹² But for our purpose, the correctness of the test is beside the point. What matters is that in *Bebrami* the Court never said that its ultimate authority and control test is some kind of ECHR-specific rule. On the contrary, the Court's entire chain of reasoning in *Bebrami* consisted of a misapplication of *general* rules of international law, whether those of the law of international responsibility or the law of international organizations. In such circumstances, we cannot reasonably say that this is *lex specialis* in the sense of Article 55 ASR. Although it is only the European Court that is using this rule, there is no indication that the Court itself considers this rule to be based in the Convention, as opposed to general international law.

C. *Survival of a Non-State Entity and Acquiescence or Connivance in the Act of a Third Party*

This brings us to two better candidates for an ECHR-specific rule of attribution, the survival of a non-State entity by virtue of State support, and the acquiescence or connivance of a State in the conduct of a third party.

1. Origins

The European Court first articulated both tests in the 2001 inter-State case of *Cyprus v Turkey*,¹⁹³ which, like *Loizidou* before it, dealt with the situation in Northern Cyprus and human rights violations committed by the authorities of the separatist TRNC. Recall that it was in *Loizidou* that the Court first defined the spatial conception of Article 1 jurisdiction, but also failed to distinguish clearly between jurisdiction as a threshold criterion for the applicability of the Convention and the attribution of conduct. At the preliminary objections stage of *Loizidou* the Court thus pronounced that:

Bearing in mind the object and purpose of the Convention, the *responsibility of a Contracting Party may also arise* when as a consequence of military action—

192. See, e.g., *Al Jedda v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC (HL) 332 (appeal taken from Eng.); Hof's-Gravenhage, The Hague, May 7, 2011, Case No. 200.020.174/01 (2011), *Nuhanović v. Netherlands*, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011:BR5388&showbutton=true> (English trans.); HR Sept. 6, 2013, Case No. 12/03324 (2013), *Netherlands v. Nuhanović*, <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003324.pdf> (English trans.).

193. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1 (2001).

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.¹⁹⁴

The Court was here interpreting the notion of jurisdiction in Article 1 ECHR.¹⁹⁵ But it is unclear whether it was also attributing to Turkey, the State exercising control of an area outside its national territory, *all of the conduct* of the “subordinate local administration” (the TRNC), or whether Turkey was simply being held responsible for failing to comply with its own positive obligation to secure Convention rights in such an area, that is, the conduct being attributed was one of omission by the State’s own organs.

The Court then compounded this confusion at the merits stage. Under the general heading of “imputability,”¹⁹⁶ the Court first held

As regards the question of imputability, the Court recalls in the first place that in its above-mentioned *Loizidou* judgment (preliminary objections) . . . it stressed that under its established case-law the concept of “jurisdiction” under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, *in conformity with the relevant principles of international law governing State responsibility*, that the responsibility of a Contracting Party could 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.¹⁹⁷

The Court thus completely conflated imputability (or attribution) as a matter of the international law of State responsibility and the Article 1 ECHR notion of jurisdiction. It then proceeded to hold that:

194. *Loizidou Preliminary Objections*, *supra* note 175, ¶ 62 (emphasis added).

195. See ECHR (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

196. *Loizidou v. Turkey*, App. No. 15318/89, ¶ 52 (1996) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-58007>.

197. *Id.* ¶ 52 (emphasis added).

It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, 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 engaged in active duties in northern Cyprus (see paragraph 16 above) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, *entails her responsibility for the policies and actions of the “TRNC”* Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention. . . . *Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.*¹⁹⁸

Again, on the one hand, the Court seems to be attributing the conduct of the TRNC to Turkey, while on the other hand, it speaks of the extraterritorial extension of Turkey’s (positive) obligations to an area under its control. It is manifest that the Court does not want to rule on whether Turkey directed or controlled specific actions undertaken by the TRNC authorities, as Article 8 ASR and the ICJ’s effective control test of attribution would require. But it is unclear whether the Court is simply attributing all of the conduct of the TRNC to Turkey, or whether Turkey is being held responsible for failing to secure the rights and freedoms set out in the Convention—although the explicit reference to imputability in the merits judgment in *Loizidou* would seem to support the former explanation more than the preliminary objections judgment.

Then, five years later, came the judgment in *Cyprus v. Turkey*. Here the Court reaffirmed its *Loizidou* approach, but also refined it with two innovations without precedent in the Court’s earlier case law. First, it held that:

It is of course true that the Court in the *Loizidou* case was addressing an individual’s complaint concerning the continuing refusal of the authorities to allow her access to her property. However, it is to be observed that the Court’s reasoning is framed in terms of a broad statement of principle as regards Turkey’s general responsibility under the Convention for the policies and actions of the “TRNC” authorities. Having effective overall control over northern Cyprus, *its 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.*

198. *Id.* ¶ 56 (emphasis added).

It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and *that violations of those rights are imputable to Turkey*.¹⁹⁹

The Court's holding was made in response to a series of arguments by the parties regarding the imputability of the conduct of TRNC authorities to Turkey.²⁰⁰ The Court was thus arguably *imputing* the violations of Convention rights to Turkey *even if* these violations were perpetrated by TRNC authorities because the TRNC "survives by virtue" of the support given to it by Turkey. Again, the Court's reasoning is not a model of clarity, especially because of the use of ambiguous formulations such as that State responsibility *cannot be confined* or *must be engaged*. It is still possible to read this judgment as essentially being about Turkey's failure to discharge its positive obligation to secure human rights, but it is even more plausible to read it as holding that the conduct of the TRNC was directly attributable to Turkey, on the basis that it was surviving by virtue of Turkey's support.

This brings us to the Court's second innovation.

The Court concludes, accordingly, and subject to its subsequent considerations on the issue of private parties . . . that the matters complained of in the instant application fall within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention and *therefore entail the respondent State's responsibility under the Convention*. . . . As to the applicant Government's further claim that this "jurisdiction" must also be taken to extend to the acts of private parties in northern Cyprus who violate the rights of Greek Cypriots or Turkish Cypriots living there, the Court considers it appropriate to revert to this matter when examining the merits of the specific complaints raised by the applicant Government in this context. It confines itself to noting at this stage that *the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention*. Any different conclusion would be *at variance with the obligation contained in Article 1 of the Convention*.²⁰¹

Note, again, the conflation between Article 1 jurisdiction and State responsibility, and the use of formulations such as that responsibility may be

199. *Cyprus v. Turkey*, *supra* note 193, at 25 (emphasis added).

200. *See id.* at 22–23.

201. *Id.* at 25–26 (emphasis added).

engaged. And again, two readings of this holding are possible: either the conduct of private individuals in which Turkey had “acquiesced or connived” is being attributed to Turkey, or Turkey is being held responsible for failing to secure Convention rights per its Article 1 jurisdiction. The former is more likely than the latter; after all, positive obligations could be violated simply because of a lack of due diligence, which is *prima facie* less demanding a standard than “acquiescence or connivance.”

Both of these new concepts—the survival of a non-State separatist entity by virtue of a State’s support and the State’s responsibility on account of its acquiescence or connivance in the conduct of a third party—have been repeatedly referred to by the Court in subsequent case law. Both can plausibly be read as setting out rules of attribution, even though other readings are possible. Similarly, both can plausibly be read as setting out *special* rules of attribution, since neither formula has an obvious equivalent in the ASR. Let us now look at how each has fared after *Cyprus v. Turkey*.

2. The Survival Formula in Subsequent Case Law

In later cases, the survival formula always appears in conjunction with the effective overall control of an area test of Article 1 jurisdiction, specifically when a local non-State actor administers that area. There will obviously be cases of extraterritorial effective overall control of an area in which the controlling State acts directly, without any assistance from proxy non-State actors. But whenever such an actor exists, the Court invokes some variation of the “survives by virtue” of State support formula. It may also mention the formula when recapitulating the general principles of its case law. The Grand Chamber of the Court has done so in the following cases:

- (1) *Bankovic*,²⁰² *Al-Skeini*,²⁰³ *Jaloud*,²⁰⁴ *Hassan*²⁰⁵—recapitulating general principles, with the spatial model of Article 1 jurisdiction *not* being applied on the facts of the case and with no presence of a subordinate local non-State actor;

202. *Bankovic*, *supra* note 169, ¶ 70.

203. *Al-Skeini*, *supra* note 168, ¶ 138.

204. *Jaloud*, *supra* note 182, ¶ 139.

205. *Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1, ¶ 74.

- (2) *Ilaşcu*,²⁰⁶ *Catan*,²⁰⁷ and *Mozer*²⁰⁸—concerning Russia’s control over Transnistria/Transdnistria in Moldova;²⁰⁹
- (3) *Chiragov*²¹⁰—with regard to Armenia’s control over Nagorno-Karabakh in Azerbaijan;²¹¹ and
- (4) *Güzelyurtlu*²¹²—the most recent affirmation of the principle, again with regard to Turkey and the TRNC.²¹³

It is very likely that the Court will again use the formula in its pending inter-State case between Georgia and Russia, which will consider Russia’s relationship to the separatist regimes in South Ossetia and Abkhazia.²¹⁴ The Court will probably do the same in inter-State and individual cases concerning Russia’s relationship to separatist actors in Eastern Ukraine. Russia’s control over Crimea, on the other hand, is exercised directly.

The “survives by virtue of State support” formula is now a well-established part of Strasbourg jurisprudence, but it has no independent existence. It is essentially an aspect of or an appendage to the Court’s spatial conception of Article 1 jurisdiction per the effective overall control of an area test when the State is exercising such control over that area through a “subordinate” local actor. The formula is explainable either as an articulation of the over-

206. *Ilaşcu*, *supra* note 176, ¶ 316, 382, 392.

207. *Catan*, *supra* note 180, ¶¶ 106, 111, 120.

208. *Mozer v. Moldova and Russia*, App. No. 11138/10, ¶¶ 98, 157, 217 (2016) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-161055>.

209. For a chamber case on Transnistria using the survival formula, see *Ivanțoc and Others v. Moldova and Russia*, App. No. 23687/05, ¶ 115 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-107480>.

210. *Chiragov and Others v. Armenia*, 2015-III Eur. Ct. H.R. 135, ¶¶ 168, 186.

211. For a Chamber case on Nagorno-Karabakh using the survival formula, see *Muradyan v. Armenia*, App. No. 11275/07, ¶¶ 125–26 (2016) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-168852>.

212. *Güzelyurtlu and Others v. Cyprus and Turkey*, App. No. 36925/07, ¶ 179 (2019) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-189781>.

213. For chamber cases on Northern Cyprus using the survival formula, see *Djavit An v. Turkey*, 2003-III Eur. Ct. H.R. 231, ¶ 22; *Solomou and Others v. Turkey*, App. No. 36832/97, ¶ 47 (2008) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-87144>; *Kallis and Androulla Panayi v. Turkey*, App. No. 45388/99, ¶ 26 (2009) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-95297>; *Kyriacou Tsiakkourmas and Others v. Turkey*, App. No. 13320/02, ¶ 150 (2015) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-155000>.

214. *Georgia v. Russia* (No. 2), App. No. 38263/08 (2011) (ECtHR), <http://hudoc.echr.coe.int/fre?i=001-108097>. For the sake of full disclosure, I briefly advised the Georgian government in the written proceedings stage of the case.

arching positive obligation to secure human rights in areas under State jurisdiction or as a rule of attribution. The repeated ritualistic reaffirmations of the principle by the Grand Chamber have not conclusively clarified its nature, nor have they dispelled the confusion between jurisdiction and responsibility stemming from *Loizidou* and *Cyprus v Turkey*. Recent cases such as *Catan* and *Chiragov* clearly applied the survival formula in the context of establishing jurisdiction in the sense of Article 1,²¹⁵ but it is *not* clear whether in so finding the Court was also of the view that *any* conduct of the subordinate local administration was *ipso facto* directly attributable to the State exercising spatial jurisdiction.

3. The Acquiescence and Connivance Formula in Subsequent Case Law

Things are different, however, when it comes to the Court's second innovation in *Cyprus v Turkey*, the "engaging" of a State's responsibility with regard to the conduct of actors which it has acquiesced or connived in.²¹⁶ Unlike the survival formula, acquiescence and connivance does have an independent existence, as will be seen below, in a limited number of (quite important) cases. In fact, and again unlike with the survival formula, the Court did not invent the acquiescence and connivance language entirely out of whole cloth in *Cyprus v Turkey*. That language first appears a few years before—but not as any kind of formalized test—in several individual cases brought against Turkey, all of which concerned allegations of violence against persons of Kurdish origin at the hands of private individuals, rather than the Turkish

215. Thus, in *Catan* the Court's analysis using the survival language comes under headings on general principles relevant to Article 1 jurisdiction and to the application of these principles to the facts. *Catan*, *supra* note 180, ¶¶ 102–23. The Court's ultimate conclusion is simply that the applicants fell within Russia's jurisdiction. *Id.* ¶ 123. The Court does not use terms such as imputation or attribution. And, as we have seen, the Court refers to the ICJ's *Bosnian Genocide* judgment and notes that while the ICJ judgment dealt with the issue of attribution, in the

instant case, however, the Court is concerned with a different question, namely whether facts complained of by an applicant fell within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. As the summary of the Court's case-law set out above demonstrates, the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law.

Id. ¶ 115.

216. For an expanded and more detailed version of this argument, see Marko Milanovic, *State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights*, in *SECONDARY RULES OF PRIMARY IMPORTANCE*, *supra* note 24. The draft is available at <https://ssrn.com/abstract=3454007>.

State. In these cases, which were first dealt with by the European Commission on Human Rights and then by the Court, the approach of the two Strasbourg institutions was identical in three ways. First, the direct violation of human rights (for example, the killing) could not be attributed to the State. Second, Turkey nonetheless was held liable for failing to fulfill its positive obligation of protection. Third, passing references were made to the Turkish authorities' knowledge of, or acquiescence or connivance in, the violation, either when summarizing the applicants' arguments or in the context of the analysis of Turkey's positive obligations.²¹⁷ It is clear that, prior to *Cyprus v. Turkey*, the Commission and the Court did not consider acquiescence or connivance as a test of attribution, but looked at situations in which the State acquiesced or connived in human rights violations by third parties through the prism of positive obligations.

But then, as we have seen, in *Cyprus v. Turkey* the Court was not as careful in distinguishing between negative and positive obligations, holding rather ambiguously that "the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention."²¹⁸ However, the Court did nothing with this language on the facts of the case. Acquiescence or connivance was raised by the applicant Cypriot government with regard to violence committed by Turkish settlers in Northern Cyprus against Greek Cypriots,

217. See *Özgür Gündem v. Turkey*, 2000-III Eur. Ct. H.R. 1, ¶¶ 38, 40–46, 67; *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 1, ¶¶ 1, 57, 68. Further, in *Kılıç*, the court stated:

In the present case, it has not been established beyond reasonable doubt that any State agent or person acting on behalf of the State authorities was involved in the killing of Kemal Kılıç. . . . The question to be determined is whether the authorities failed to comply with their positive obligation to protect him from a known risk to his life.

Id. at ¶ 64; see also *Mahmut Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, ¶¶ 1, 74, 80, 91. See especially *id.* ¶ 87, where the Court stated:

In the present case, the Court recalls that it has not been established beyond reasonable doubt that any State agent was involved in the killing of Hasan Kaya. There are, however, strong inferences that can be drawn on the facts of this case that the perpetrators of the murder were known to the authorities. . . .

The question to be determined by the Court is whether in the circumstances the authorities failed in a positive obligation to protect Hasan Kaya from a risk to his life.

See also *id.* ¶ 91 ("Furthermore, the authorities were aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces.").

For another Kurdish case with a similar fact pattern, see *Akkoç v. Turkey*, 2000-X Eur. Ct. H.R. 389, ¶¶ 74, 79, 83.

218. *Cyprus v. Turkey*, *supra* note 193, ¶ 81.

but the Court ultimately ruled that this conduct was outside the scope of the case.²¹⁹ In short, the reference to the engagement of State responsibility based on acquiescence or connivance was both clearly inspired by prior Kurdish cases against Turkey and entirely *obiter* in *Cyprus v. Turkey* itself.

After *Cyprus v. Turkey*, the Court has used the acquiescence or connivance formula in four types of cases. First, in two leftover Kurdish cases against Turkey, which are in material respects identical to the cases examined above.²²⁰ Second, in numerous judgments in which either the Grand Chamber or a Chamber uses the acquiescence or connivance language when recaptulating its earlier case law, normally by referring expressly to *Cyprus v. Turkey*. But it does so without applying the formula in any meaningful way to the facts of the case, because, for instance, the conduct at issue was committed by *de jure* State organs.²²¹ Third, in a cluster of four cases dealing with hate-motivated crimes, two of which dealt with Jehovah's Witnesses in Georgia, and two with members of the LGBT community in Georgia and Romania. In these cases, like in the Kurdish cases before them, the Court generally used the acquiescence or connivance language in the context of a positive obligation analysis.²²²

Finally, and most importantly, the Court used the acquiescence or connivance formula in a series of cases dealing with extraordinary rendition in

219. *Id.* ¶ 73; *see also id.* ¶¶ 130–31.

220. *See* *Avşar v. Turkey*, 2000-III Eur. Ct. H.R. 83, ¶¶ 404, 406, 411–15; *Uçar v. Turkey*, App. No. 52392/99, ¶¶ 3, 98, 99, 102, 107 (2006) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-73187>.

221. *See* *Solomou and Others v. Turkey*, App. No. 36832/97, ¶ 49 (2008) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-87144>; *Moldovan and Others v. Romania*, App Nos. 41138/98 and 64320/01, ¶ 94 (2005) (ECtHR), <http://hudoc.echr.coe.int/fre?i=001-69670>; *Lăcătuș and Others v. Romania*, App. No. 12694/04, ¶ 83 (2012) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-114513>; *Khalikova v. Azerbaijan*, App. No. 42883/11, ¶ 140 (2015) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-157964>; *Burlya and Others v. Ukraine*, App. No. 3289/10, ¶¶ 119, 129 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-187508>; *Ilaşcu, supra* note 176, ¶ 318; *Sindicatul "Păstorul cel Bun" v. Romania*, App. No. 2330/09, ¶¶ 76–80 (2013) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-122763>.

222. *See* *Begheluri and Others v. Georgia*, App. No. 28490/02, ¶¶ 3, 98, 111–12, 118–21, 145, 163–65, 174 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-146769>; *Tsartsidze and Others v. Georgia*, App. No. 18766/04, ¶¶ 78, 86–87 (2017) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-170349>; *Identoba and Others v. Georgia*, App. No. 73235/12, ¶ 77 (2015) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-154400>; *M.C. and A.C. v. Romania*, App. No. 12060/12, ¶ 124 (2016) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-161982>.

the “war on terror.”²²³ The Court set the foundations of its approach to such cases in its 2012 Grand Chamber judgment in *El-Masri v. Macedonia*²²⁴ and then followed up in four very significant Chamber judgments brought by the same two applicants against Poland, Lithuania, and Romania, three European countries which hosted so-called Central Intelligence Agency (CIA) “black sites” in which high-value detainees were coercively interrogated.

The applicant in *El-Masri* was arrested in Macedonia, detained by Macedonian agents in a hotel in Skopje for several weeks, and then transferred to a CIA rendition team at Skopje airport where he was severely mistreated. From there, he was taken to a U.S. detention facility in Afghanistan. With regard to the mistreatment, in particular, the Court noted that it

must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team *is imputable to the respondent State*. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State *must be regarded as responsible* under the Convention for acts performed by *foreign officials on its territory with the acquiescence or connivance of its authorities* (see *Ilaşcu and Others v. Moldova and Russia* . . . , § 318 . . .).²²⁵

This paragraph has many moving parts. First, the Court framed its inquiry as being about the *imputation*, that is, attribution, of the mistreatment of the applicant to Macedonia, even though it was carried out by U.S. agents. In the next sentence it talks about these acts being done “in the presence” of Macedonian officials and within its jurisdiction. And from there, it draws the conclusion that Macedonia “must be regarded” as responsible for acts of foreign officials committed with its acquiescence or connivance. Note also that the citation to *Ilaşcu* is a sleight of the judicial hand—the cited paragraph of *Ilaşcu* talks about acquiescence or connivance in the acts of *private individuals*, not those of foreign officials, as do all other cases referring to acquiescence or connivance prior to *El-Masri*.

The *El-Masri* Grand Chamber very much seems to have used the acquiescence or connivance formula as an attribution test, whereas prior cases

223. A term used by U.S. President George W. Bush following the 9/11 attacks against the United States. See President George W. Bush, *Waging and Winning the War on Terror*, THE WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/infocus/achievement/cha_p1-nm.html (last visited Sept. 17, 2020).

224. *El-Masri v. Former Yugoslav Republic of Macedonia*, 2012-IV Eur. Ct. H.R. 263.

225. *Id.* ¶ 206 (emphasis added).

employing this terminology used it in the analysis of a State failure to fulfill positive substantive or procedural obligations. In *El-Masri*, in other words, the Court is not holding Macedonia responsible for *failing to protect* the applicant from mistreatment by U.S. agents, but is attributing that conduct to Macedonia itself. The Court thus concluded that

such treatment amounted to torture in breach of Article 3 of the Convention. The respondent State must be considered *directly responsible* for the violation of the applicant's rights under this head, since its agents *actively facilitated the treatment* and then *failed to take any measures* that might have been necessary in the circumstances of the case to prevent it from occurring.²²⁶

Note, again, how the Court's analysis mixes in several different concepts—it talks about Macedonia's *direct responsibility*, which implies that the torture was attributable to it, then talks about Macedonia *facilitating* the torture, which looks like a complicity rule of some kind, and then moves to its *failure to take preventive measures*, which is the language of a positive obligation.

In sum, the conceptual basis of the Court's approach in *El-Masri* is a constantly shifting one. Arguably, the Court regarded Macedonia's behavior towards the applicant as so egregious that it was not content to treat it solely from the standpoint of a failure to fulfill positive obligations. It, therefore, reached for the acquiescence or connivance formula to fashion a more direct attribution test with overtones of complicity.

But the Court did not stop there. Moving to the issue of the arbitrary deprivation of the applicant's liberty, the Court found Macedonia responsible not only for the period of detention in Macedonia itself, but *also* for his subsequent detention at the hands of U.S. authorities. To reach this outcome, however, the Court did *not* resort to the acquiescence or connivance formula. Instead, it found:

In such circumstances, the Court considers that it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5. In this connection the Court reiterates that Article 5 of the Convention lays down an obligation on the State not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful inter-

226. *Id.* ¶ 211 (emphasis added).

ference with those rights to everyone within its jurisdiction The Macedonian authorities *not only failed to comply with their positive obligation to protect the applicant* from being detained in contravention of Article 5 of the Convention, *but they actively facilitated* his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that *the responsibility of the respondent State is also engaged* in respect of the applicant's detention between 23 January and 28 May 2004²²⁷

Again, the Court does not want to frame the issue as one of compliance with positive obligations but effectively creates a complicity rule—if an ECHR State party *actively facilitates* arbitrary detention by another State (such facilitation requirement definitely being satisfied by the transfer of a detainee, but not necessarily being limited to it), which itself need not be an ECHR State party, the entire continuing act of arbitrary detention will be attributed to it.

The *El-Masri* Grand Chamber clearly and unambiguously held Macedonia responsible for the torture inflicted on the applicant by CIA agents and for “the entire period of his captivity” in Afghanistan at the hands of U.S. authorities.²²⁸ It did so unanimously, despite the fact that the attribution of the relevant conduct does not align clearly with any of the rules in the ILC's ASR, which are mentioned in the judgment only in a section setting out relevant international legal documents and are never referred to in the Court's reasoning.²²⁹ Such was apparently the unanimity within the Court that neither of the separate opinions in the case addressed any of these issues.

As noted above, the Court followed up on *El-Masri* in two pairs of Chamber cases dealing with the deprivation of liberty and ill treatment of Al-Qaeda high-value detainees in CIA black sites Eastern Europe and their subsequent rendition. Each pair was decided by the same Chamber on the same day, unanimously and without separate opinions. In the first pair, *Al-Nashiri v. Poland*²³⁰ and *Husayn (Abu Zubaydah) v. Poland*,²³¹ the Court at first glance faithfully followed *El-Masri*, reaffirming that “in accordance with its settled case law, the respondent State must be regarded as responsible under the

227. *Id.* ¶ 239 (emphasis added).

228. *Id.* ¶ 241.

229. *Id.* ¶ 97.

230. *Al Nashiri v. Poland*, App. No. 28761/11 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-146044>.

231. *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-146047>.

Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.”²³²

There is, however, a greater degree of ambiguity in the Chamber’s analysis than in *El-Masri* about whether the conduct of U.S. agents is being directly attributed to Poland.²³³ Much of it would be consistent with a theory of positive obligations. The Court avoids the terminology of attribution or imputation, while the ASR are again simply cited *en passant*.²³⁴ When we compare the operative paragraphs of each judgment, in particular the references to Poland’s *complicity* and its *enabling* the misconduct of U.S. authorities, it becomes clearer that the *Al Nashiri/Abu Zubaydah* Chamber’s theory of the case was more one of wrongful assistance or complicity than of direct responsibility, in addition to violations of positive obligations.²³⁵ And the same terminology and outcome appear in the two subsequent rendition cases against Lithuania and Romania, decided by a different Chamber of the Court, which reproduced verbatim the reasoning of the *Al Nashiri/Abu Zubaydah* Chamber rather than attempting to follow the *El-Masri* Grand Chamber more closely.²³⁶

In sum, the analysis above allows us to have a clearer picture of the evolution of the acquiescence or connivance formula in Strasbourg case law. First, in the Kurdish cases before the European Commission, and then the

232. *Al Nashiri*, *supra* note 230, ¶ 452; *see also Husayn (Abu Zubaydah)*, *supra* note 231, ¶ 449.

233. *Al Nashiri*, *supra* note 230, ¶ 517; *see also Husayn (Abu Zubaydah)*, *supra* note 231, ¶ 512.

234. *Al Nashiri*, *supra* note 230, ¶ 207; *see also Husayn (Abu Zubaydah)*, *supra* note 231, ¶ 201.

235. This is also evident from the Court’s analysis of the Article 5 ECHR detention issue, with regard to which it noted:

The rendition operations had therefore largely depended on *cooperation, assistance an active involvement of the countries* which put at the USA’s disposal their airspace, airports for the landing of aircraft transporting CIA prisoners and, last but not least, premises on which the prisoners could be securely detained and interrogated. While, as noted above, the interrogations of captured terrorist suspects was the CIA’s exclusive responsibility and the local authorities were not to be involved, *the cooperation and various forms of assistance of those authorities*, such as for instance customising the premises for the CIA’s needs, ensuring security and providing the logistics *were the necessary condition* for the effective operation of the CIA secret detention facilities.

Al Nashiri, *supra* note 230, ¶ 530 (emphasis added); *see also Husayn (Abu Zubaydah)*, *supra* note 231, ¶ 524.

236. *See Al Nashiri v. Romania*, App. No. 33234/12, ¶¶ 594, 676–77, 690, operative ¶¶ 5, 6 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-183685>; *Abu Zubaydah v. Lithuania*, App. No. 46454/11, ¶¶ 581, 641–42, 656, operative ¶¶ 6, 7 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-183687>.

Court, the formula was used solely in the analysis of the respondent State's compliance with its substantive and procedural positive obligations. The language initially appeared in the applicants' pleadings and was then taken aboard by the ECHR institutions. It is clear that at the time the formula was not used as an attribution test. Second, the first time this language was framed as a proto-attribution test was in the Grand Chamber judgment in *Cyprus v. Turkey*, in which it was actually not applied to the facts. Third, the acquiescence or connivance reference in *Cyprus v. Turkey* then gets repeatedly reaffirmed in subsequent cases. Again, however, that language was not applied as an attribution test, but is generally used in the context of positive obligations. Fourth, *El-Masri* is a genuine turning point. The Grand Chamber arguably attributed the torture and subsequent detention of the applicant at the hands of U.S. agents to Macedonia, using the language of acquiescence or connivance for the former, and of active facilitation for the latter. Moreover, the Grand Chamber for the first time used the language of acquiescence or connivance with regard to the conduct of third-State officials rather than that of private individuals. Finally, the four rendition cases after *El-Masri* appeared to give that judgment a subtly different conceptual reading, as laying down rules of State responsibility for *complicity* in the wrongful conduct of a third State, rather than directly attributing that conduct to the assisting State. All of that said, the absence of a full and clear explanation of what the Court is exactly doing (and why) is pervasive throughout this jurisprudence.

4. Outlook

Recall that my purpose here is to answer three distinct but related questions. First, does the European Court, as a matter of fact, use special rules of attribution of conduct? Second, does it *think* that this is what it is doing? And third, if so, *should* it use such rules? The preceding analysis tried mainly to answer the first, more descriptive question as clearly and accurately as possible.

We have so far examined two plausible candidates for *lex specialis* rules of attribution in the Court's jurisprudence. First, that the conduct of a non-State actor operating in an area under the State's control, and thus within its jurisdiction, will be attributed to the State if the actor "survives by virtue" of the State's support. Second, that the conduct of a non-State actor or of a third State will be attributed to a State if it acquiesces or connives in that conduct. As we have seen, the Court's reasoning is full of ambiguities, and it

does not clearly engage with the ILC's ASR and the jurisprudence of the ICJ. Each of the tests, as applied in a series of cases, has multiple possible conceptual bases. The descriptive question of whether the Court uses special rules of attribution cannot, as matters stand, be answered with certainty. But we can consider what the options are, and what their upsides and downsides would be.

If the "survives by virtue" test is seen as an element of analysis in the context of the State's overarching positive obligation to secure Convention rights to individuals within its spatial jurisdiction, that is, within an area under its control, then the conduct being attributed to the State is one of omission of its own organs—their failure to ensure that a subordinate non-State actor acting in that area or administering it does not violate these rights. The point of the reference would be to underscore that, on account of the strong links between the State and the separatist regime it is supporting, this obligation would apply with a greater degree of intensity—and more exacting judicial scrutiny—than with regard to the conduct of other private actors that may violate human rights in that area. If such an interpretation were adopted, there would be no inconsistency with the views of the ILC and the ICJ.

If, on the other hand, the "survives by virtue" test was seen as a rule of attribution, then all of the conduct of that subordinate local administration would be imputed to the State. Such an approach clearly would be inconsistent with that of the ILC Articles and of the ICJ in the *Bosnian Genocide* case. The survival test would effectively be a substitute for de facto organ status under Article 4(2) ASR and the ICJ's complete dependence test, much like overall control in *Tadić*. But if such was the case, the basic problem is not only that the European Court has applied the survival test with far less *evidential* rigor than either the ICJ or the ICTY,²³⁷ but also that it would be difficult even to imagine a justification that could warrant an attribution test of this nature *specific* to the ECHR or human rights law. In other words, one can easily criticize the ICJ's complete dependence test as being too strict in its requirements, but, if so, then it is too strict *across the board* in international law, not just in the ECHR-specific context. It would make no sense, for example, to attribute to Turkey only ECHR violations committed by the TRNC, but not any other violations of international law. Bearing this in mind, as well as the European Court's express disavowal in *Catan* and *Jaloud*

237. Cf. the relative ease with which the Court in *Chiragov* found that Armenia was in control of Nagorno-Karabakh and that the local authorities survived by virtue of Armenia's support. *Chiragov*, *supra* note 210.

of an intention to articulate a test of State responsibility,²³⁸ the better view is that the survival test should be regarded as an element of analysis regarding the positive obligations of a State exercising control over an area.

When it comes to the acquiescence or connivance formula, again if it is seen as an aspect of a positive obligations analysis, as the Court clearly regarded that formula in the vast majority of cases in which it was actually applied, then there would be no inconsistency with the responsibility framework of general international law as set out by the ILC and the ICJ. But while *Cyprus v. Turkey* could possibly accommodate such an interpretation, if not without effort, this is not the case with *El-Masri* and its progeny, where the Court was quite clearly doing something else.

If, therefore, acquiescence or connivance in the conduct of a third party was seen as a rule of attribution, the problem is that neither of these concepts is recognized as such in general international law.²³⁹ The ASR require more than acquiescence for the conduct of a third party to be attributed to the State—it either has to instruct, direct, or control such a party to commit the act in question²⁴⁰ or acknowledge and adopt the conduct as its own.²⁴¹ On the other hand, acquiescence or consent *can* be a definitional element of a primary rule by which it is characterized as wrongful. For example, the definition of torture in Article 1 CAT requires pain and suffering to be “inflicted 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

Connivance similarly does not figure as such in the ASR. But it is worth unpacking that idea a bit. Even at a purely textual level, connivance implies culpable, active assistance to a third party committing a wrongful act that goes beyond the mere acquiescence in such an act, that is, some kind of

238. *Catan*, *supra* note 180, ¶ 115; *Jaloud*, *supra* note 182, ¶ 154.

239. See Crawford & Keene, *supra* note 166, at 189.

240. ILC Articles of State Responsibility, *supra* note 2, art. 8.

241. *Id.* art. 11. Acquiescence in the conduct of a third party, that is, a State’s express or tacit consent of the conduct, could also serve a completely different purpose under Article 20 of the ASR as a circumstance precluding wrongfulness. Conduct by State A that would otherwise adversely affect the rights of State B, and would thus be wrongful, would not be regarded as such if State B consented to it, for example with regard to a use of force on its territory. This is in fact precisely how the consent of the territorial State operates in rendition cases. If the territorial State *consents* to a rendition operation, it cannot then claim that the operation breached its sovereignty, which it otherwise would have. But the territorial State has no capacity to consent to the violation of human rights which accrue to the relevant individual directly—such a rendition would be a violation of human rights law even if it was not a violation of the territorial State’s sovereignty, because of its consent.

242. Convention against Torture, *supra* note 61, art. 1 (emphasis added).

theory of complicity. Recall that this is exactly how the Court used it in the four rendition cases following *El-Masri*, in which it also employs the language of facilitation. And there is a (much discussed) analogue to such a concept in Article 16 ASR, which prohibits aid and assistance by one State to another that is committing an internationally wrongful act. The precise contours of Article 16 are controversial, particularly concerning the mental element of the rule.²⁴³ But they are also to some extent beside the point for the present discussion. What matters here is that complicity issues in international law have progressively become more acute over the years, across different sub-fields, have inspired some rigorous scholarship, and have arisen or are likely to arise in a variety of different scenarios.²⁴⁴

For our purposes, the key point is that nothing prevents the European Court and other human rights bodies from developing their own complicity doctrines. Such doctrines can account for the specificities of the human rights context better than the rule in Article 16. They can, for example, quite sensibly cover complicity in the wrongful conduct of non-State actors, unlike the purely inter-State rule in Article 16.²⁴⁵ Indeed, until *El-Masri*, the Court applied the acquiescence or connivance formula *only* in the context of relationships between States and non-State actors. They can use different mental elements. They can cover complicity in the wrongful conduct of third States, regardless of whether they were parties to the ECHR or not, as was the case in the Court's rendition judgments looked at above.

In some circumstances, such complicity doctrines could be *imputational*, in the sense that the accomplice is regarded as equally legally and morally

243. While the text of Article 16(a) provides that the assisting State will be responsible if it assists the wrongdoing State “with knowledge of the circumstances of the internationally wrongful act,” the commentary to the provision, says that “aid or assistance must be given with a view to facilitating the commission of that act,” that is, it *prima facie* sets out some kind of intent or purpose requirement. See ILC Articles of State Responsibility, *supra* note 2, art. 16(a) and art. 16, cmt. ¶ 3.

244. See generally HELMUT P. AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* (2011); VLADYSLAV LANOVOY, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* (2016); see also JACKSON, *supra* note 136; HARRIET MOYNIHAN, *AIDING AND ASSISTING: CHALLENGES IN ARMED CONFLICT AND COUNTERTERRORISM* (2016), <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>.

245. While the text of Article 16 is expressly confined to inter-State aid and assistance, in *Bosnian Genocide*, the ICJ used it by analogy to interpret the meaning of prohibited complicity in genocide under the terms of the Genocide Convention, which does extend to complicity in the conduct of non-State actors. See *Bosnian Genocide*, *supra* note 7, ¶ 420.

liable as the principal.²⁴⁶ In other circumstances, that need not be the case, as with the rule in Article 16 ASR.²⁴⁷ An imputational complicity doctrine could, however, be tantamount to a special attribution rule, and would thus probably be harder to justify.

In short, *El-Masri* and its progeny could be seen as one of the points of emergence of a new State complicity doctrine in human rights law. Acquiescence and connivance could, but need not, be conceptualized as a special rule of attribution of conduct in the sense of Article 55 ASR. This is an outcome to be preferred both in terms of descriptive accuracy and to preserve coherence in the rules of attribution.²⁴⁸ What Macedonia, Poland, Lithuania, and Romania *actually did* was *not* mistreat or subsequently deprive the applicants of their liberty; what they *did* was *assist* the United States in committing such misconduct, through their consent to the U.S. presence on their territories, the provision of their facilities, permitting the passage of rendition flights, and the like. The complicity framework provides a better fit for assessing the wrongfulness of the conduct of the assisting States, and the acquiescence or connivance formula should best be seen in that light.

D. *The ECHR and Public Enterprises*

1. Generally on the Attribution of Conduct of State-Owned Enterprises

This brings us to the Court's engagement with public, State-owned enterprises,²⁴⁹ where we again might find candidates for special rules of attribution. Under the ILC Articles, the fact that the State *owns* a company is in and of itself insufficient to attribute all of the conduct of that company to the State. The mere fact of State ownership does not turn a company, which has a separate legal personality under the State's domestic law, into a *de jure* organ of the State. The company's conduct will only be attributable to the State if it exercises elements of governmental authority per Article 5 ASR; if it is so completely dependent on and controlled by the State as to become a *de*

246. See, e.g., JACKSON, *supra* note 136, at 10–47, 86–88.

247. See ILC Articles of State Responsibility, *supra* note 2, art. 16, cmt. ¶ 10 (“In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State.”).

248. See also JACKSON, *supra* note 136, at 197.

249. The following discussion will use the terms State-owned or public company, enterprise, or corporation interchangeably.

facto organ per Article 4 ASR; if its specific conduct is done on the instruction, direction, or control of the State, per Article 8 ASR; or if the State acknowledges and adopts such conduct as its own, per Article 11 ASR.²⁵⁰ For example, the conduct of the BBC would generally not be attributable to the United Kingdom, even though the British public broadcaster is State-owned, since the U.K. government does not, in fact, exercise control over the BBC, either generally or with regard to specific conduct, and the BBC is not empowered by domestic law to exercise elements of governmental authority.²⁵¹

We have already seen above how the attributability of the conduct of public enterprises has been a particularly vexing issue in international investment arbitration.²⁵² Under the ECHR, this problem first arose in the context of the admissibility of complaints brought by State-owned enterprises against the State.

2. Admissibility of Claims by Public Enterprises under Article 34 ECHR

Article 34 of the Convention provides that the Court “may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.”²⁵³ The issue concerning State-owned enterprises is whether they qualify as a “non-governmental organization” capable of being a victim of human rights violations by the State. The Convention, as interpreted by the Court, does not permit component parts of the State to bring claims against it. For a public enterprise to be able to do so, it must not form part of the State as such, as we will see.

The first cases in which such an issue arose were decided by the now-defunct European Commission. Under the Commission, the cases were few and far between and were generally decided with brief, conclusory reasoning,

250. See ILC Articles of State Responsibility, *supra* note 2, art. 5, cmt. ¶ 3; art. 8, cmt. ¶ 6.

251. For discussions of the attributability of the conduct of State-owned enterprises, see Jaemin Lee, *State Responsibility and Government-Affiliated Entities in International Economic Law*, 49 JOURNAL OF WORLD TRADE 117 (2015); Judith Schönsteiner, *Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters*, 40 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 895 (2019).

252. See *supra* Section II.C.

253. ECHR, *supra* note 53, art. 34 (emphasis added).

without the articulation of any clear criteria.²⁵⁴ The Court's first foray into these issues was in the 2003 Chamber admissibility decision in the *Radio France* case.²⁵⁵ According to the Court:

[T]he category of "governmental organisation" includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.²⁵⁶

Applying these criteria, the Court decided that Radio France, the national radio broadcaster, was a non-governmental organization, essentially because while it was State-owned and entrusted by legislation with a public mission, it enjoyed editorial independence and institutional autonomy, and did not exercise a monopoly.²⁵⁷ At no point in the Court's reasoning did it refer to the ILC's work on State responsibility, or mention terms such as attribution or imputation.

The *Radio France* criteria were then repeatedly reaffirmed and applied in subsequent cases,²⁵⁸ with some variations and additions. Thus, for example,

254. See Consejo General de Colegios Oficiales de Economistas de España v. Spain, App. Nos. 26114/95 & 26455/95 (1995) (Eur. Comm'n H.R.), <http://hudoc.echr.coe.int/eng?i=001-87067>; RENFE v. Spain, App. No. 35216/97 (1995) (Eur. Comm'n H.R.), <http://hudoc.echr.coe.int/eng?i=001-87755>.

255. *Radio France and Others v. France*, 2003-X Eur. Ct. H.R. 463. But see the slightly earlier case of *Smits et al.*, in which the Court without any detailed discussion dismissed a part of the application brought by a Chamber of Commerce, finding that it was "an agency subordinate to the Government, set up by law and invested with authority to implement law [and] therefore a governmental organisation exercising public authority." *Smits et al. v. Netherlands*, Art. 34 of the Convention, ¶ 1, App. Nos. 39032/97, 39343/98, 39651/98, 43147/98, 46664/99, 61707/00, (2001) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-22864>.

256. *Radio France*, *supra* note 255, ¶ 26.

257. *Id.*

258. See, e.g., *Österreichischer Rundfunk v. Austria*, ¶ 53, App. No. 35841/02 (2006) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-78381>; *Ukraine-Tyumen v. Ukraine*, ¶¶ 26–27, App. No. 22603/02 (2007) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-83421>; *Unedic v. France*, ¶¶ 54–58, App. No. 20153/04 (2008) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-90350> (French); *Chamber of Commerce, Industry and Agriculture of Timișoara (No. 2) v. Romania*, App. Nos. 23520/05 etc., ¶¶ 14–17 (2009) (ECtHR),

in *Islamic Republic of Iran Shipping Lines v. Turkey* the Court held that “public corporations under the strict control of a State are not entitled to bring an application” in order “to prevent a Contracting Party [from] acting as both an applicant and a respondent party before the Court.”²⁵⁹ It also noted that “public-law entities can have the status of a ‘non-governmental organisation’ in so far as they do not exercise ‘governmental powers’, were not established ‘for public-administration purposes’ and are completely independent of the State.”²⁶⁰

The *Radio France* approach, which includes a whole set of variable and contextual criteria whose conceptual foundations and relative weight are not easy to determine, has become a *jurisprudence constante* of the Court. But even more notable for our purposes is how the Court then transplanted these criteria from the admissibility context to something entirely different, when analyzing State liability for the debts of state-owned enterprises.

3. Debts of State-Owned Companies

In its case law under Article 6 ECHR (the right to a fair trial) and Article 1 of Protocol 1 to the ECHR (the right to property),²⁶¹ the Court set out the basic principle that a State has the positive obligation to ensure that the judgments of its domestic courts are executed and that any outstanding debts under these judgments are paid.²⁶² That obligation will, however, have a different intensity depending on whether the debt is owed by a private entity or by the State itself. In the former scenario, the State only has to take reasonable steps and act diligently to ensure that the private debts are paid. In the latter, the State must pay the debt in full, or there will be a violation of Article 1 of Protocol 1; lack of funds does not excuse the State, although it might

<http://hudoc.echr.coe.int/eng?i=001-93540> (French) (noting that these cases are more or less straightforward applications of the *Radio France* criteria).

259. *Islamic Republic of Iran Shipping Lines v. Turkey*, 2007-V Eur. Ct. H.R. 327, ¶ 81.

260. *Id.*; see also *Transpetrol, A.S., v. Slovakia*, App. No. 28502/08, ¶¶ 60–79 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-107743> (applying the *Radio France* criteria, but finding that the company exhibited mixed characteristics, and then deciding the case on the basis that the application should be inadmissible because the company’s interests were indistinguishable from those of the State); *State Holding Company Luganskvugillya v. Ukraine* App. No. 23938/05 (2009) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-91343>.

261. ECHR, *supra* note 53, art. 6; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

262. See, e.g., *Immobiliare Saffi v. Italy*, 1999-V Eur. Ct. H.R. 73, 93.

exceptionally justify a delay in payment.²⁶³ This immediately raises the question of the extent of a State's liability for the unpaid debts of State-owned enterprises, which the Court has dealt with in a series of cases.

In *Mykhaylenky*, the applicants were owed salary arrears by a State-owned company that carried out construction work in the Chernobyl evacuation area.²⁶⁴ The company was eventually liquidated by the State, and no execution was possible on its assets, which were contaminated by radiation. In proceedings before the Court, the government argued that it could not be held liable for the company's debts since the company was a separate legal person under domestic law.²⁶⁵ In that regard, the Court considered that the State had not demonstrated that the company "enjoyed sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions (see, *mutatis mutandis*—and with reference to Article 34 of the Convention—*Radio France and Others v. France* . . .)."²⁶⁶ The Court then buttressed its conclusion by noting the strict control that the State exercised over the Chernobyl area and the company's activities and assets, saying that "these elements confirm the public nature of the debtor company regardless of its formal classification under domestic law" and that the State should be held liable for the company's debts "in the special circumstances of the present case, despite the fact that the company was a separate legal entity."²⁶⁷

And so the Court, through a nicely placed *mutatis mutandis*, imported the criteria from *Radio France* (decided only a year before) for an entirely different purpose. Instead of establishing whether a State-owned company could sue the State in Strasbourg, the criteria were now used to determine whether the State was liable for the debts of a company in its ownership. The contextual, multi-factorial *Radio France* criteria were also condensed into what seems like a presumption that a State is liable for the debts of State-owned companies despite their separate legal personality unless it shows that the company enjoyed sufficient institutional and operational independence. As articulated

263. See, e.g., *Sanglier v. France*, App. No. 50342/99, ¶ 39 (2003) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-65662> (French); *Burdov v. Russia*, 2002-III Eur. Ct. H.R. 317, 326; *Kesyan v. Russia*, App. No. 36496/02, ¶ 65 (2006), (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-77578>.

264. *Mykhaylenky and Others v. Ukraine*, 2004-XII Eur. Ct. H.R. 153.

265. *Id.* ¶ 41.

266. *Id.* ¶ 44.

267. *Id.* ¶ 45.

here, they resemble an attribution rule—“responsibility under the Convention for its acts and omissions”—although neither attribution nor the ASR is mentioned.

The *Mykhalenky* judgment was then applied in several cases, despite its own qualifier of the “special circumstances” of that judgment. Some cases dealt with the debts of Ukrainian State-owned enterprises.²⁶⁸ One dealt with a State-owned company in Moldova;²⁶⁹ another with a Russian State-owned company;²⁷⁰ yet another with so-called “unitary” enterprises in State or municipal ownership in Russia;²⁷¹ and yet another with the peculiar situation of enterprises in “social ownership” in the former Yugoslavia that were in the process of privatization.²⁷² These cases are all broadly similar in their reasoning, which is generally quite cursory. They all refer only to *Mykhalenky*, and not to *Radio France*; and they all use the brief *Mykhalenky* formula of sufficient institutional and operational independence from the State, rather than the more elaborate *Radio France* criteria. They all proceed from the presumption that a State is liable for the debts of State-owned companies unless the State demonstrates that the company was sufficiently independent. None of these cases mention that these tests stem from the Court’s Article 34 ECHR jurisprudence, just as none of them mention attribution or the ASR.

The culmination of this line of cases is the *Yershova* judgment, which again concerned the liability of Russia for the debts of a municipal “unitary” enterprise.²⁷³ Here Russia argued in significant detail that the company at issue was distinguishable from the enterprise in *Mykhalenky* and that the Court should not find it liable for the company’s debts.²⁷⁴ The Court was

268. See, e.g., *Chernobryvko v. Ukraine*, ¶¶ 23–24, App. No. 11324/02 (2005) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-70365>; *Kucherenko v. Ukraine*, App. No. 27347/02, ¶ 25 (2005) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-71677>; *Lisyanskiy v. Ukraine*, ¶¶ 19–20, App. No. 17899/02 (2006) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-73023>.

269. *Cooperativa Agricola Slobozia-Hanesi v. Moldova*, ¶¶ 18–19, App. No. 39745/02 (2007) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-79992>.

270. *Shlepkov v. Russia*, ¶ 24, App. No. 3046/03 (2007) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-79303>.

271. *Grigoryev and Kakaurova v. Russia*, ¶¶ 35–36, App. No. 13820/04 (2007) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-80063>.

272. *R. Kačapor and Others v. Serbia*, ¶¶ 97–98, App. Nos. 2269/06 etc., (2008) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-84365>.

273. *Yershova v. Russia*, App. No. 1387/04 (2010) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-98130>.

274. *Id.* ¶¶ 48–51.

also compelled to respond with significantly more detailed reasoning, now articulating the relevant test as follows:

In deciding whether the municipal company's acts or omissions are attributable under the Convention to the municipal authority concerned, the Court will have regard to such factors as the company's legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities (see, *mutatis mutandis*, *Radio France and Others v. France* . . .). The Court will notably have to consider whether the company enjoyed sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention for its acts and omissions (see *Mykhalenko and Others* . . . and, *mutatis mutandis*, *Shlepkin v. Russia* . . .).²⁷⁵

After an extended analysis,²⁷⁶ the Court thus concluded that

given in particular the public nature of the company's functions, the significant control over its assets by the municipal authority and the latter's decisions resulting in the transfer of these assets and the company's subsequent liquidation, . . . the company did not enjoy sufficient institutional and operational independence from the municipal authority.²⁷⁷

Note how in *Yershova* the Court not only cited both *Radio France* and *Mykhalenko* but also, for the first time in its jurisprudence, framed its inquiry as one into whether the "company's acts or omissions are *attributable* under the Convention to the municipal authority concerned," and thus to the State. The word "attribution" made an appearance here, referring not just to *debts*, but also to a company's *conduct*, that is, its acts or omissions. The Court did not, however, refer to the ILC Articles.

4. Towards an Attribution Rule

While the overwhelming majority of cases relying on *Radio France* and *Mykhalenko* did so for the purpose of establishing the State's liability for the *debts* of State-owned companies, one somewhat confusing, outlier case be-

275. *Id.* ¶ 55.

276. *Id.* ¶¶ 56–61.

277. *Id.* ¶ 62.

fore *Yershova* (not cited in that judgment) arguably did so to attribute conduct. In *Novoseletskiy*,²⁷⁸ the applicant claimed to have been prevented from occupying and using his flat by the actions of a State-owned educational establishment. The right at stake in the case was the right to respect for one's home under Article 8 ECHR. Citing *Radio France* and *Mykhalenky*, the Court concluded that this establishment was “perform[ing] ‘public duties’ assigned to it by law and under the supervision of the authorities” and accordingly did not accept the respondent State's arguments “seeking to deny any State liability for the [establishment's] acts and omissions.”²⁷⁹ In other words, the Court seemed to have attributed the relevant conduct to the State, although again, it did not use the term. Confusingly, however, it ultimately found the State responsible for violating a *positive* obligation under Article 8, rather than a negative one.²⁸⁰

Then, six months after *Yershova*, the same Chamber of the Court decided *Saliyev*, another case against Russia, but again one that was *not* about liability for the debts of public enterprises.²⁸¹ Rather, the applicant in that case published a critical article in a newspaper owned by the local municipality, which apparently got a frosty reception among the local powers-that-be. The editor-in-chief of the newspaper ordered that the copies of the issue that were distributed for sale be withdrawn and destroyed. The applicant claimed that this constituted a violation of his freedom of expression under Article 10 ECHR, which prohibits unjustified interferences with this freedom “by a public authority.”²⁸²

In its judgment, the Court relied on *Radio France* (but not on *Mykhalenky*) to determine that the newspaper and its editor acted on behalf of the municipality, which in turn was a State authority.²⁸³ The Court thus concluded that the “the independence of the newspaper was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property” and that “in the circumstances the editor-in-chief implemented the general policy line of the municipality and acted as its agent.”²⁸⁴

278. *Novoseletskiy v. Ukraine*, 2005-II Eur. Ct. H.R. 115.

279. *Id.* ¶ 82.

280. *Id.* ¶ 89.

281. *Saliyev v. Russia*, App. No. 35016/03 (2010) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-101179>.

282. ECHR, *supra* note 53, art. 10.

283. *Saliyev*, *supra* note 281, ¶¶ 64–70.

284. *Id.* ¶¶ 67–68.

This reference to agency again resembles a standard of attribution of conduct. This resemblance is also evident from the Court's conclusion that there *was* an interference with the applicant's freedom of expression "by a public authority," that is, that there was a violation of a negative obligation.²⁸⁵

5. Going to the Grand Chamber

Then, in 2012, this whole complex set of issues first reached the Court's Grand Chamber. In *Kotov*, the applicant complained under Article 1 of Protocol 1 to the Convention that he was unable to obtain the money owed to him because of the liquidation of a private bank in which he had a deposit, due to the bank's insolvency.²⁸⁶ The applicant's claim was not that the State was responsible for the insolvency of a private bank. Rather, the applicant claimed that the court-appointed liquidator misused his authority in such a way that the applicant was not able to obtain the money he should have obtained in the liquidation process, in violation of domestic law.

The case, in other words, turned around Russia's responsibility for the conduct of the liquidator. Thus, the government argued, in particular, that he "acted as a private person and not as a State agent."²⁸⁷ The Grand Chamber recapitulated its earlier case law, including *Radio France, Mykhaylenky*, and *Yershova*, noting these cases were unclear as to whether liquidators could be a "public authority,"²⁸⁸ and stating, "the case-law on the legal status of insolvency liquidators requires some clarification."²⁸⁹ The Court then held that the issue to be examined was whether "the liquidator can be considered to have acted as a State agent,"²⁹⁰ before concluding:

It would appear that the liquidator, at the relevant time, enjoyed *a considerable amount of operational and institutional independence*, as State authorities did not have the *power to give instructions to him* and therefore could not directly interfere with the liquidation process as such. The State's involvement in the liquidation procedure resulted only from its role in establishing the legislative framework for such procedures, in defining the functions and the

285. *Id.* ¶ 70.

286. *Kotov v. Russia*, App. No. 54522/00 (2012) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-110023>.

287. *Id.* ¶ 91.

288. *Id.* ¶ 97.

289. *Id.* ¶ 98.

290. *Id.*

powers of the creditors' body and of the liquidator, and in overseeing observance of the rules. It follows that the liquidator *did not act as a State agent*. Consequently, the respondent State *cannot be held directly responsible for his wrongful acts* in the present case. The fact that a court was entitled to review the lawfulness of the liquidator's actions does not alter this analysis. . . . The Court must, however, also examine whether the respondent State breached any positive obligations in the present case.²⁹¹

It seems manifest that the Court was conducting an attribution of conduct analysis, even though it did not use the term. This is clear from the Court's holding that the liquidator did not act as a State agent; thus, the State could not be *directly* responsible for his wrongful acts and that the case should therefore be examined from a positive obligations standpoint.²⁹² The reference to operational and institutional independence, of course, comes from *Mykhalenky*. Most notably, this is the first time in this entire series of cases that the Court acknowledged the existence and relevance of the ILC Articles, which it cited under the heading "relevant international and domestic law and practice," quoting parts of the ILC commentary that deal with attribution under Article 5 ASR.²⁹³ However, in its reasoning, the Court never actually engages with the ASR nor explains their specific relevance. In particular, the Court did not apply the requirements of Article 5—whether has an entity been empowered by domestic law to exercise elements of governmental authority—to the facts of the case.

The Grand Chamber's second foray into this set of issues was in the hugely complex *Ališić* case,²⁹⁴ which concerned the liability of the successor States of the former Yugoslavia for defaulted "old" foreign currency savings deposits made by individuals before Yugoslavia's dissolution in its socially-owned banks. This was, in other words, and despite its many complications, a debts case *à la Mykhalenky*. In its judgment, the Court basically followed the previous Chamber jurisprudence that a State would be held liable for the

291. *Id.* ¶¶ 107–08 (emphasis added).

292. It is also notable that while the Chamber that first heard the case unanimously considered the liquidator to have been a "public authority" so that his actions engaged the negative obligations of the State (*id.* ¶¶ 70–72), the Grand Chamber was virtually unanimous that the liquidator was not a State agent and that only positive obligations were relevant. The majority of the Grand Chamber held that the relevant positive obligations were discharged, five judges disagreed (but did not dispute that the liquidator was not a State agent), while one judge considered the case to be inadmissible *ratione temporis*.

293. *Id.* ¶¶ 30–32.

294. *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and Former Yugoslav Republic of Macedonia*, 2014-IV Eur. Ct. H.R. 213.

debts of a State-owned company, even if that company had separate legal personality when the company does not enjoy sufficient institutional and operational independence from the State.²⁹⁵ Having done so, the Court concluded that Slovenia was responsible for the debts of the socially-owned bank that had been headquartered in Slovenia and that Serbia was similarly responsible for the debts of the bank headquartered there, even if these debts were towards creditors in other former Yugoslav States. The other successor States bore no such liability.²⁹⁶

6. Outlook

To summarize, the analysis above has shown that there have been three basic types of cases in which the Court has dealt with the relationship between States and State-owned companies. First, there are the Article 34 ECHR cases, starting with *Radio France*, in which the Court is deciding whether a State-owned enterprise has standing to bring an application. Second, there are the cases in which the Court is deciding whether a State is liable for the debts of a State-owned company and the non-execution of any domestic judgment about such a debt. In such cases, the Court applies the *Mykhalenky* presumption that a State *is* liable for the debts of such companies unless it can demonstrate that the company enjoys “sufficient institutional and operational independence” from the State. That test is applied with varying degrees of contextual sensitivity and corresponding detail in the reasoning. Third, there are a very small number of cases, such as *Kotov*, in which the sufficient institutional and operational independence test is (in some variant) used to attribute conduct rather than a debt.

As we have seen above, there is a common thread going through these three lines of cases, but each continues to maintain its separate existence, that is, they have not been entirely subsumed into one another. Thus, there are still new cases in which the Court engages in a “pure” Article 34 ECHR standing analysis as to whether a public enterprise can bring a claim against the State.²⁹⁷ Interestingly, the Court has recently applied the *Radio France* approach, whose rationale effectively was that a State should not be both the

295. *Id.* ¶¶ 114–15.

296. *Id.* ¶¶ 116–17.

297. *See, e.g.,* *Východoslovenská Vodárenská Spoločnosť, A.S. v. Slovakia*, ¶¶ 30–38, (2013) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-123029>; *Zastava It Turs v. Serbia*, ¶¶ 19–23 (2013) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-119268>; *JKP Vodovod*

applicant and the respondent in the same case, to cases in which a *foreign* public enterprise is suing the State.²⁹⁸ For example, it ruled that the Croatian Chamber of Economy did not have standing against Serbia²⁹⁹ and that a Slovenian State-owned bank did not have standing against Croatia.³⁰⁰ Currently pending before the Grand Chamber of the Court is an inter-State case brought by Slovenia against Croatia,³⁰¹ effectively a sequel to the *Ališić* case on “old” Yugoslav foreign currency savings, in which the key issue is whether the Slovenian bank can have *rights vis-à-vis* Croatia, even though as a “governmental organisation” it did not have *standing* against Croatia under *Radio France*.³⁰²

Similarly, there are still *Mykhaylenky*-type cases about State liability (or not) for the debts of State-owned companies.³⁰³ Crucially, for our purposes, these two lines of cases are *not* about special rules of attribution of conduct. They *do* deal with ascriptive rules in the wider sense, in that they attach the State label to legal constructs such as a company or a debt. But they do not attribute *conduct* for the purpose of establishing State responsibility. The standing jurisprudence under Article 34 ECHR manifestly does not do so.

Kraljevo v. Serbia, ¶¶ 21–29, App. Nos. 57691/09, 19719/10 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-187909>.

298. The first such case was actually *Islamic Republic of Iran Shipping Lines v. Turkey*, *supra* note 259, in which the Court found that the State-owned foreign company had standing under Article 34.

299. Croatian Chamber of Economy v. Serbia, ¶¶ 30–38, App. No. 819/08 (2017) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-173851>.

300. Ljubljanska Banka D.D. v. Croatia, ¶¶ 50–55, App. No. 29003/07, (2015) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-154983>.

301. Slovenia v. Croatia, App. No. 54155/16 (ECtHR). *See* Press Release, Grand Chamber to Examine Inter-State Case Brought by Slovenia Against Croatia Concerning Repayment of Debts, ECHR Doc. No. 439 (Dec. 19, 2018).

302. For more background and discussion, see Janja Hojnik, *Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR*, EJIL:TALK! (Oct. 17, 2016), <https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/>; *see also* Igor Popović, *For Whom the Bell of the European Convention on Human Rights Tolls? The Curious Case of Slovenia v. Croatia*, EJIL:TALK! (Dec. 5, 2019), <https://www.ejiltalk.org/for-whom-the-bell-of-the-european-convention-on-human-rights-tolls-the-curious-case-of-slovenia-v-croatia/>.

303. *See, e.g.*, Marinković v. Serbia, ¶¶ 36–42, App. No. 5353/11 (2013) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-127124>; Abelman and Others v. Russia, ¶¶ 24–33, App. No. 16418/10 (2017) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-174679>; Fomenko and Others v. Russia, ¶¶ 171–80, App. No. 42140/05 (2019) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-197137>; Kuzhelev and Others v. Russia, ¶¶ 115–25, App. Nos. 64098/09 etc. (2019) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-196677>.

When properly interpreted, the case law on the debts of State-owned enterprises does not do so either.

A debt is not conduct—it is an *obligation*, a duty to act (pay money) and such an obligation need not arise from any wrongful act (for example, it could result simply from a loan). The conduct being attributed (albeit implicitly) in cases such as *Mykabaylenky* is still that of the State’s own de jure organs—their failure to ensure the enforcement of the judgments of domestic courts, not the conduct of the relevant company through which the debt was incurred (for example, the conclusion of a contract) or its failure to pay its debt. What happens in such cases, however, is that the positive obligation to ensure that enforcement is transformed from one of conduct (for the debts of private individuals or companies) to one of result (for the debts of State entities, however defined).

In other words, it is only in the third line of cases, such as *Novoseletskiy* (the right to private life and respect for one’s home), *Saliyev* (the right to freedom of expression), and *Kotov* (the right to property), that the Court is actually attributing, in the sense of the law of State responsibility, the putative human rights-violative conduct of a State-owned enterprise or entity to the State on the basis that it is not sufficiently institutionally and operationally independent from the State. There appears to be no such case post-*Kotov*. But in one notable debt case,³⁰⁴ which again dealt with “unitary” municipal enterprises in Russia, the Court not only framed its inquiry as one into whether the debts of the company are *attributable* to the State,³⁰⁵ but also expressly cited Articles 5 and 8 ASR³⁰⁶ and apparently thought that its approach was consistent with Article 8.³⁰⁷ The Court did so even though, again, the rule in Article 8 ASR is about the attribution of specific *conduct* of a non-State actor to a State, not that of an *obligation* (as discussed above).

The principal descriptive questions that I have sought to answer are whether Court is, in fact, using special rules of attribution of conduct, that

304. *Liseytseva and Maslov v. Russia*, App. Nos. 39483/05, 40527/10 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-146774>.

305. *Id.* ¶¶ 152, 176, 184, 207.

306. *Id.* ¶¶ 128–130.

307. *Id.* ¶ 205

Accordingly, in order to decide on the operational and institutional independence of a given municipal unitary enterprise having the right of economic control, and in line with its earlier case-law . . . the Court has to examine the actual manner in which State control was exercised in a particular case. In the Court’s view, this approach is consistent with the ILC’s interpretation of the aforementioned Article 8 of the Articles on State Responsibility.

diverge from the ASR, and whether that is what the Court thinks it is doing. Neither question can really be answered with any degree of confidence.

On the first point, we do not know what the differences are between the Court's "institutional and operational independence" test (or tests) if used for attribution purposes, and the ASR. This is because the Court's approach is highly contextual, inconsistent, and frequently unreasoned. In the vast majority of cases in which the test is being applied, it is not really about the attribution of conduct for State responsibility purposes. Judging from the attributive variant of the test in cases such as *Kotov*, we can say that it is not a close equivalent to either Article 5 or 8 ASR, because it does not focus exclusively on the legal empowerment of the company to exercise elements of governmental authority (even if sometimes the Court's analysis resembles such a concept), or because it does not focus on control over a specific act. The *Mykhalenky* test's closest equivalent might actually be the ICJ's de facto organ complete dependence test, as applied in *Nicaragua* and *Bosnian Genocide*. But while the ICJ has held that test to be very demanding,³⁰⁸ the European Court starts from the presumption that the conduct of State-owned companies is attributable to the State even if they lack organ status under domestic law, unless it can be shown that the company is institutionally and operationally independent.

As to whether the European Court *thinks* it is departing from the ASR or is misapplying the ASR, that question cannot be answered simply because the Court does not seriously engage with the ASR. The vast majority of the cases that we have looked at do not even mention the ILC Articles, while those that do simply cite them without explaining what (if anything) the Court is doing with them. It could be, for example, that the Court thinks that the ASR rules, as applied to State-owned companies, are too strict for ECHR purposes. But if that is the case, the Court should say so. It could also be that the Court thinks its judgments are consistent with the ASR. But again, if that is the case, the Court should say so.

The Court's failure to properly engage with the ILC Articles can lead it to needlessly complicate relatively simple questions. Consider, for example, the basic rule in Article 7 ASR on the *ultra vires* conduct of State organs or persons empowered to exercise elements of governmental authority, which will remain attributable to the State even if the person exceeds authority or

308. *Bosnian Genocide*, *supra* note 7, ¶ 393 (“[T]o equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as ‘complete dependence.’”).

contravenes instructions, so long as the relevant person acted in an official capacity.³⁰⁹ Thus, the conduct of say a State soldier who murders or rapes a civilian will still be attributable to the State even if such conduct was committed against the express orders of the soldier's superior or in violation of domestic law.³¹⁰

The European Court has dealt with such *ultra vires* conduct in several judgments. To do so effectively, it could simply routinely cite and apply Article 7 ASR, but that is not what it does.³¹¹ Rather, the Court simply started improvising. In a case in which an off-duty intoxicated policeman in uniform used his service gun to shoot someone in a bar, the Court, instead of applying an Article 7 ASR analysis, held that “[i]n order to establish whether a State can be held responsible for the unlawful actions of its agents taken outside their official duties, the Court needs to *assess the totality of the circumstances* and consider the nature and circumstances of the conduct in question.”³¹² On the facts, the Court thought that the key consideration was the State's *failure* to properly assess whether the specific policeman was fit to be recruited and equipped with a weapon and, for *that reason*, attributed his conduct to the State.³¹³ The Court did not, as Article 7 would require, determine simply whether the police officer was still acting in his official capacity or not, despite being off-duty.³¹⁴

The Court compounded this confusion in later cases. For example, in *Reilly* the applicant was a former soldier who claimed that he was subjected

309. ILC Articles of State Responsibility, *supra* note 2, art. 7

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

310. *See id.* art. 7, cmt. ¶ 2.

311. *See, for example, Enekidze and Girgylani* concerning the killing of an individual by off-duty police officers that the Court did not attribute to the respondent State because “the perpetrators were not acting in the exercise of their official duties.” While that holding could charitably be read as applying the Article 7 ASR standard, although it is never mentioned, the Court also added that attribution was unwarranted because the perpetrators’ acts “were so flagrantly abusive,” a misguided rule which could mean that, for example, war crimes could never be attributed to the State. *Enekidze and Girgylani v. Georgia*, ¶¶ 289–90, App. No. 25091/07 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-104636>; *see also Gorovenky and Bugara v. Ukraine*, ¶ 31, App. Nos. 36146/05, 42418/05 (2012) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-108572>.

312. *Sašo Gorgiev v. Former Yugoslav Republic of Macedonia*, 2012-III Eur. Ct. H.R. 181, ¶ 48 (emphasis added).

313. *Id.* ¶ 52.

314. *See* ILC Articles of State Responsibility, *supra* note 2, art. 7, cmt. ¶¶ 7–8.

to sexual abuse by his superior in the military.³¹⁵ Such behavior would obviously be *ultra vires*. But again, instead of applying Article 7 ASR, the Court held, using a “totality of the circumstances” approach, that the superior’s behavior was not imputable to the State *because the victim had opportunities to complain that he had not used*.³¹⁶ Although the applicant had expressly invoked Article 7 ASR, the Court rather surprisingly held that the ILC Articles “are not pertinent, concerning as they do internationally wrongful acts.”³¹⁷ But the applicant’s claim was *precisely* that the ill-treatment he had suffered constituted an internationally wrongful act, that is, a breach of his rights under Article 3 ECHR.

Not only did the Court unnecessarily invent a nebulous “totality of the circumstances” test for the attribution of *ultra vires* acts,³¹⁸ in two recent cases, it appeared to use such a test as a general, all-purpose attribution rule. Thus, in *V.K.*,³¹⁹ a case that concerned the ill-treatment of children at the hands of nursery school teachers, the Court first invoked *Reilly* and the “totality of the circumstances” language for attributing *ultra vires* acts,³²⁰ and then held:

The Court reiterates that whether a person is an agent of the State for the purposes of the Convention is defined on the basis of a multitude of factors, none of which is determinative on its own. The key criteria used to determine whether the State is responsible for the acts of a person, whether formally a public official or not, are as follows: manner of appointment, supervision and accountability, objectives, powers and functions of the person in question (see *Kotov v. Russia . . .*).³²¹

As demonstrated above, *Kotov* did not provide a general attribution test, but rather focused on the attribution of the conduct of State-owned enterprises, in particular on whether they enjoyed sufficient institutional and operational independence from the State. It is unhelpful (to say the least) to

315. *Reilly v. Ireland*, App. No. 51083/09 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-147533>.

316. *Id.* ¶¶ 53–56.

317. *Id.* ¶ 55.

318. For other cases employing the same approach, see *Basenko v. Ukraine*, ¶¶ 78–90, App. No. 24213/08 (2015) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-158881>; *see also* *Voykin and Others v. Ukraine*, ¶¶ 85–91, App. No. 47889/08 (2018) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-181877>.

319. *V.K. v. Russia*, App. No. 68059/13 (2017) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-171778>.

320. *Id.* ¶ 174.

321. *Id.* ¶ 175.

articulate a test that looks at a “multitude of factors, none of which is determinative on its own.” It is also completely unnecessary. There are already the general attribution rules in the ILC Articles, chief among them the organ status test in Article 4. There is simply no need for the Court to improvise and invent wide-ranging, Convention-specific attribution rules, especially for issues that have long-settled, reasonably clear solutions. And again, the Court in *V.K.* did not even mention the ILC Articles.³²²

E. Overall Evaluation

There are many inconsistencies and uncertainties in the European Court’s approach to the law of State responsibility. In particular, the Court’s lack of engagement with the ILC Articles is lamentable. That said, as I explained above, there is no need whatsoever for consistency between ascriptive rules used for purposes other than the establishment of State responsibility and the attribution rules in the ASR. If the Court wants to devise its own rules for the admissibility of claims by State-owned companies under Article 34 ECHR, that is fine. If the Court wants to devise its own rules for what counts as a State debt for purposes of the Convention, which the State concerned will have to pay in all circumstances, that too is fine. Conceptually there is no need for such rules to align with the general attribution standards of State responsibility, that is, the definition of the State, and who gets to act on its behalf may be subject to very different considerations.³²³ This is precisely the case, for example, in U.K. law, where section 6 of the Human Rights Act 1998 (HRA) imposes domestic legal obligations of compliance with the Convention on all actors that qualify as “public authorities,” a concept which is

322. On the facts, the Court found the conduct of the teachers to have been attributable to the State because of the school’s provision of a public service, very strong institutional and economic links to the State, and because its independence was limited by State regulation. *See id.* ¶ 181. The Court subsequently used the same language, expressly citing *V.K.*, when attributing the conduct of a municipality-owned security company to the State. *See Chernega and Others v. Ukraine*, ¶¶ 126, 128–32, App No. 74768/10 (2019) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-193877>.

323. *See* ILC Articles of State Responsibility, *supra* note 2, ch. 2, cmt. ¶ 5. (“[T]he rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government.”).

(extremely) vaguely defined but clearly does *not* trace the attribution rules of the international law of State responsibility.³²⁴ Again, that is perfectly fine.

But when the Court *is* attributing the conduct of a State-owned enterprise to establish State responsibility for a wrongful act, deviations from the ILC Articles would require at least some level of justification. As we have seen, the Court's case law provides no such justification. It is especially unsettling to observe failures to engage with the ASR on relatively straightforward matters, such as the improvisation of the "totality of the circumstances" test the Court has used for the attribution of *ultra vires* acts, or the use of *Kotov* by some Chamber judgments to fashion superfluous general attribution standards. Thankfully, the vast majority of the Court's judgments that deal with human rights violations by corporate actors do so from the standpoint of positive obligations, where the conduct being attributed is the State's omission to protect an individual against the corporate actor.³²⁵ Such cases raise no issues of inconsistency with the ASR.

The Court's awareness of the problems with its conceptualization of the relationship between the law of State responsibility and the ECHR was apparent in *Catan* and *Chiragov*, two of the key Grand Chamber cases discussed in the context of the survival and acquiescence and connivance tests. In *Catan*, it was Russia, one of the respondent States, which pushed back against the Court's reasoning in *Ilaşcu*, referring expressly to the ICJ's demanding

324. Human Rights Act 1998, c. 42, § 6(3) (Eng.). That section of the Human Rights Act (HRA) defines as public authorities any court or tribunal, and "any person certain of whose functions are functions of a public nature." That definition, focusing on the nature of the function, is *prima facie* broader than the organ status rule in Article 4 ASR, and does not expressly require empowerment to exercise governmental authority as per Article 5. Section 6(3) of the HRA, however, excludes Parliament from the definition in order to preserve the principle of parliamentary sovereignty and avoid any implication that Parliament is, as a matter of domestic law, bound to observe the Convention. Under Article 4 ASR, Parliament would obviously be an organ of the United Kingdom. The jurisprudence of U.K. courts on the scope of Section 6 HRA is also confusing and inconsistent, but that is not our issue here. For more on this point, see *YL v. Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95; JOINT COMMITTEE ON HUMAN RIGHTS, THE MEANING OF PUBLIC AUTHORITY UNDER THE HUMAN RIGHTS ACT, 2006–7, HC 410 (UK), <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf>.

325. In various different contexts, see, for example, *Hatton and Others v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 189; *Öneriyıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 79; *Wilson, National Union of Journalists and Others v. United Kingdom*, App. Nos. 30668/96, 30671/96, 30678/96 (2002) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-60554>; *Eweida and Others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, 36516/10 (2013) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-115881>.

attribution jurisprudence.³²⁶ It is to this argument that the Court responded, implausibly, by saying that the “test for establishing the existence of ‘jurisdiction’ under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under international law.”³²⁷ The matter was not, however, touched upon further in any separate opinions, as was also the case in *El-Masri*.

In *Chiragov*, by contrast, the issue of attribution of conduct was canvassed extensively in the judges’ separate opinions. Judge Motoc appeared to consider that the European Court was applying a type of *lex specialis* of State responsibility.³²⁸ Judge Gyulumyan thought that the Court was amalgamating the concepts of Article 1 jurisdiction and State responsibility, and argued for a strict separation of the two and adherence to the ICJ’s attribution tests.³²⁹ Judge Pinto de Albuquerque lamented the Court’s lack of rigor in proving Armenia’s control over Nagorno-Karabakh,³³⁰ as did Judge Ziemele, who also questioned whether the Court was applying “different standard of attribution of responsibility than the one in international law and whether more or less the same standard should determine jurisdiction.”³³¹ And it was, in fact, Judge Ziemele who presided over the *Al Nashiri/Abu Zubaydah* Chamber that, as we have seen, pushed the Court’s approach in *El-Masri* more towards a complicity paradigm.

By contrast, looking at the Court’s jurisprudence on the relationship between States and State-owned enterprises, we could see that almost all of these cases were decided by Chambers, with minimal involvement by the Grand Chamber. And almost all of them related to a handful of member States in Eastern Europe. It may well be that the Court in these cases did not get the assistance it needed from counsel versed in general international law and that these issues did not get the attention and resources they needed from the judges and Registry lawyers. There was minimal engagement with the work of the ILC, and no real discussion of any of these issues in the judges’ separate opinions.

In sum, there is just no way to be sure which precise theory of responsibility most of the judges of the European Court would embrace in concep-

326. See *Catan*, *supra* note 180, ¶¶ 75–76, 96.

327. *Id.* ¶ 115.

328. *Chiragov*, *supra* note 210, at 229–33, ¶2 (separate opinion by Motoc, J.).

329. *Id.* at 268–69, ¶¶ 88–95 (dissenting opinion by Gyulumyan, J.).

330. *Id.* at 283–99, ¶¶ 17–37 (dissenting opinion by Pinto de Albuquerque, J.).

331. *Id.* at 90–91, ¶ 10 (partly concurring, partly dissenting opinion by Ziemele, J.).

tualizing the survival test, the acquiescence or connivance test, or the institutional and operational independence test. There probably is no such theory. It does seem evident, however, that some of the judges are becoming aware that there is, on the one hand, a possible problem in the incongruence between the Court's methodology and that of the ILC and the ICJ, and, on the other, a definite problem in the lack of clarity in the Court's reasoning. But it is also evident that there is no critical mass of concern on the bench since these problems continue to persist. Whether the Court's pending cases on Russia's relationship to non-State actors in Georgia and Ukraine will help resolve some of these issues remains to be seen.

VI. SHOULD SPECIAL RULES OF ATTRIBUTION EXIST?

The analysis of the three different areas of international law above has demonstrated that there are few genuinely good candidates for special rules of attribution. In IHL, the overall control test for conflict classification is clearly not a special attribution rule. It is either a primary ascriptive rule of IHL or a general attribution rule, with the former view to be preferred. On the other hand, Article 91 AP I, in conjunction with other norms of IHL, could plausibly be read as setting out a special attribution rule, but it could even more plausibly be read otherwise. In the *jus ad bellum*, special rules of attribution could exist as part of customary law defining indirect aggression or as an implicit part of the definition of armed attack in Article 51 of the U.N. Charter. Their existence cannot be excluded or confirmed with certainty, for example, with regard to the harboring of terrorist non-State actors, essentially because of the indeterminacies plaguing the *jus ad bellum*. But they are not necessary for most interpretative outcomes that States and scholars may want to reach in the law on the use of force.

As far as European human rights law is concerned, the survival test could plausibly be interpreted as being attributive in nature. The better view, however, is that it is an appendage of the Article 1 ECHR jurisdiction analysis. As for the acquiescence and connivance test, in most cases it was not used attributively, but in *El-Masri* it clearly was. But as I explained, that test could better be conceptualized as part of an emerging ECHR-specific complicity doctrine. And with regard to the European Court's jurisprudence on State-owned enterprises, most cases clearly do not deal with attribution in the State responsibility sense, but with ascriptive issues more broadly. It is only in a very few cases, such as *Kotov*, that the Court was using its sufficient institutional and operational independence test to attribute conduct.

This account is, I believe, as descriptively accurate as is possible. But the bigger question is a normative one—*should* special rules of attribution exist? In my view, there are six basic reasons why such rules are generally undesirable, even if doctrinally they are perfectly possible.

First, the ILC's general attribution rules are, broadly speaking, good enough. Leaving their formal grounding in State practice and *opinio juris* aside, their "fit" with the problem that they seek to solve—connecting human beings to the State for the purpose of establishing the State's responsibility for a wrong – is descriptively accurate. They align with our moral intuitions about culpability and fair labeling. The ILC's rules leave no obvious accountability gaps, they are coherent, and strike a reasonable balance between rigor on the one hand, and open-endedness and flexibility on the other.

Second, the *generality* of the ILC's rules is their core idea. I do not at all mean to suggest that one cannot reasonably disagree with the ICJ's and the ILC's approach to attribution, for example, by saying that their various control tests are too strict, or that the content of the relevant customary rule is not exactly as formulated in the ASR. But it is difficult to see how that disagreement can be *sectoral*, rather than general – if (say) the ICJ's control tests are too strict, they are too strict across the board, not in some specific areas of international law.

Third, and relatedly, adopting special attribution rules (rather than disagreeing with the ILC on the scope of the general attribution rules) can lead to entirely arbitrary results. This is particularly true in situations in which an actor, whose conduct is being attributed to a State, is engaging in a series of actions or omissions that could simultaneously be characterized as violations of several different branches of international law. The same conduct can, for example, be a violation of investment law and of human rights law. Violations of IHL are frequently committed in parallel with human rights violations, and so on. If the factual relationship between the State and the relevant actor remains constant, it makes little sense to attribute only some of the actor's wrongful conduct to the State, depending solely on how the violation is sectorally qualified.

Fourth, and again as a consequence of their general ambition, the ILC rules serve a unifying function in the international legal system. Like, *inter alia*, the rules of the law of treaties, they are the glue that binds the whole system together and prevents its fragmentation. They are, of course, residual and can be departed from, but that departure requires at least some level of justification. This is why it is particularly unfortunate to observe the tendencies in the jurisprudence of the European Court to ignore the work of the

ILC or create ad hoc approaches to problems that have ready-made, long-standing solutions. The examples concerning the attribution of *ultra vires* acts are particularly instructive in that regard. Again, I am not saying that fragmentation can never be justified. But if the general rules are fit for purpose, we should consciously try to avoid any unnecessary inconsistencies.

Fifth, in that regard, the fact that many legal regimes impose not only *negative* but also varied and wide-ranging *positive* obligations on States is a major reason why special attribution rules are unnecessary. In human rights law, IHL, and investment law, among other legal fields, a State can be responsible for its omissions and its failure to prevent or suppress wrongdoing by actors whose conduct falls below the attribution threshold. Such positive obligations can be tailored to the context and respond to their specific needs. It is thus generally unnecessary, for example, to create IHL-specific attribution rules, if a given State will nonetheless be responsible for failing to ensure respect for IHL by an armed non-State actor.

Sixth, and finally, it is crucial to reiterate the importance of the distinction between ascriptive and attributive rules. When IHL establishes whether there is an armed conflict between two States acting through non-State proxies, or when the European Court decides whether a State-owned enterprise has standing to sue the State, we are talking about ascriptive, not attributive rules. Their purpose is not to determine State responsibility for a wrongful act. Such rules need not trace the general attribution rules in the law of State responsibility, because they may deal with entirely different considerations. Thus, for example, we have no problem in saying that a lowly village police officer is incapable of binding the State to a treaty but that if he tortures someone, that conduct will be attributable to the State. Sector-specific issues—be it the required degree of State involvement for an armed attack in the *jus ad bellum*, or the liability of States for the debts of State-owned enterprises—can be resolved through primary, sector-specific ascriptive rules, without causing ripple effects in the law of State responsibility.

In short, consistency with the general attribution framework should be preferred, unless there are particularly strong reasons that outweigh the factors explained above. Only exceptionally would special rules of attribution be justified. Obviously, if the text of a treaty, or the bulk of State practice and *opinio juris*, directly compel the existence of a special attribution rule, these normative considerations are less relevant. But I am not aware of any such example. In all of the cases we have examined there was significant interpretative leeway as to whether a special attribution rule in fact exists, and that immediately brings concerns about its justifiability to the fore.

As a matter of principle, special attribution rules might be normatively justified only when the architecture of positive and negative obligations under a particular regime is such that applying the general attribution rules would lead to undesirable or impracticable outcomes. For example, the absence or insufficient development of positive obligations within a regime might create accountability gaps that could incentivize resort to positive special attribution rules, which would go beyond those in the ASR. Very burdensome negative obligations, on the other hand, might incentivize resort to negative attribution rules, which restrict the applicability of those in the ASR. We have observed this, for example, in the two NAFTA cases examined above.³³² On the other hand, looking back at the European Court's case law, the overarching role of positive obligations under the ECHR makes special attribution rules entirely unnecessary both in the context of the survival test and the conduct of subordinate local non-State entities and in the context of the conduct of State-owned enterprises. The same goes, as I have explained, for the positive obligation to ensure respect for IHL.

VII. CONCLUSION

Are there any special rules of attribution in international law? Answering this question depends on what exactly one is looking for, on how the definitional criteria for such a rule are set, and on the level of clarity that one requires. A special rule of attribution, as defined in this study, is a rule that attributes the conduct of a person or persons to a State for the purpose of establishing that State's responsibility for the relevant conduct as an internationally wrongful act.³³³ Such rules of attribution are part of a wider set of ascriptive rules that link the legal construct of the State to persons or objects in the real world, or to other legal constructs. But the purpose of all these other rules is *not* the establishment of State responsibility.³³⁴ A special rule of attribution refers only to potentially wrongful conduct, consisting either of action or of omission. For it to be *special*, it needs to vary depending on the specific subject-matter area of international law, and it needs to deviate from the general rules of attribution as codified in the ILC Articles. Such a rule can be positive, in the sense that it expands attribution beyond the rules articulated in the ASR, or negative, in the sense that it excludes or narrows down some of the attribution rules in the ASR. One, of course, might disagree with how the ILC

332. *See supra* Section II.C.

333. *See supra* Part II.

334. *See supra* Section II.B.

has formulated any given attribution rule, but then the disagreement is about the scope of the *generally* applicable rules of attribution, not about the existence of a special rule. This is the case for example, with the ICTY's framing of its overall control test³³⁵ or with the European Court's ultimate authority and control test set forth in *Bebrami*.³³⁶ Similarly, the purported special attribution rule has to modify the attribution element of an internationally wrongful act, not the scope of the substantive obligation at issue.

The ICJ has insisted that any such rules must be clearly expressed. That is a sensible requirement, because normatively it is hard to justify why attribution should vary in relation to the nature of the wrongful act in question. But that clear expression requirement should not be taken so strictly so as to effectively make special attribution rules an impossibility.³³⁷

The analysis above has canvassed several different areas of international law in search of candidates for special rules of attribution. I have touched upon some areas, such as trade and investment law, only briefly³³⁸—there is likely plenty of other possible candidates there.³³⁹ I have looked at other areas in more depth—the *jus ad bellum*, IHL, and the ECHR. Obviously there are plenty of other sub-fields of international law that I have not examined at all, from other human rights regimes,³⁴⁰ to the law of the sea,³⁴¹ or to space

335. *See supra* Section III.A.

336. *See supra* Section V.B.

337. *See supra* Section II.D.

338. *See supra* Section II.C.

339. *See, e.g.*, Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY JOURNAL OF INTERNATIONAL LAW 142 (2010) (discussing Article 22(1) of the Energy Charter Treaty).

340. *See, e.g.*, Human Rights Committee, *Mohammed Alzery v. Sweden*, ¶ 11.6, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006) (using acquiescence as an attribution rule); *Velásquez Rodríguez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 173 (July 29, 1988) (referring to State support and acquiescence in the context of a positive obligations analysis); *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 120–23 (Sept. 15, 2005) (vacillating between several different conceptual bases of State responsibility, including arguably attribution on account of the State's collaboration, acquiescence, and tolerance in the conduct of non-State actors); *see also* JACKSON, *supra* note 136, at 190–99.

341. *Cf.* Article 139 of the U.N. Convention on the Law of the Sea as a possible candidate. United Nations Convention on the Law of the Sea art. 139, Dec. 10, 1982, 1833 U.N.T.S. 397.

law.³⁴² But again, although the sample I have looked at is a limited one, it is still instructive for several reasons.

First, we have seen that there is arguably no example of States *expressly agreeing* to a special attribution rule, that is, one that can be so characterized beyond any doubt. Therefore, the issue is normally going to be whether any of the rules States have agreed to that are *not* obviously special rules of attribution can be so characterized after further inquiry, taking into account the practice of States or of institutions that States have endowed with interpretative authority. Second, we have seen that there are numerous examples of treaty provisions, especially those that impose some kind of negative obligation of restraint, which in defining the scope of the obligation contain some kind of express or implied State-ascriptive reference. For instance, they might prohibit subsidies *by a government*³⁴³ or unjustified interferences with human rights *by a public authority*.³⁴⁴ That type of language can naturally lead a court or tribunal to think in terms of attribution, and, depending on the context and text of the relevant provisions, either to attempt to harmonize their approach with the attribution rules in the ASR and avoid any inconsistency (as the WTO Appellate Body has done) or argue that the relevant instrument constitutes some kind of *lex specialis* (for instance with the NAFTA tribunals).³⁴⁵ Third, while natural, that intuitive leap is not necessarily legally or logically warranted. Such cases generally deal with the wider category of ascriptive rules, rather than with those of attribution of conduct for responsibility purposes. We have seen, for example, how it is perfectly possible for IHL to contain a set of ascriptive rules that define when an armed conflict is being fought *between* States, but for these rules *not* to constitute special rules of attribution.³⁴⁶ Similarly, we have seen in the *jus ad bellum* that even if one accepts the restrictivist position that Article 51 of the U.N. Charter requires that an armed attack be committed *by a State*, this State authorship requirement need not be equated with attribution for State responsibility purposes, for example, it could encompass situations of non-attributive substantial involvement of the State in a non-State actor's attack.³⁴⁷

342. Cf. Article VI of the Outer Space Treaty as another possible candidate. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. VI, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

343. Cf. Agreement on Subsidies and Countervailing Measures *supra* note 39, art 1.1.

344. Cf. ECHR, *supra* note 53, arts. 8, 10.

345. See *supra* Section II.C.

346. See *supra* Sections III.A and III.C.

347. See *supra* Sections IV.B and IV.C.

Taken together, all of this means that there are few genuinely good candidates for special rules of attribution. As I have explained, the ICTY's overall control test is not such a rule, but is either an ascriptive (but non-attributive) primary rule of IHL or a generally applicable rule of attribution. And Article 91 AP I likewise contains no special attribution rule but encompasses a more holistic conception of responsibility, which includes that for omissions with regard to the wrongful conduct of State-affiliated armed groups.³⁴⁸ Similarly, the *jus ad bellum* most likely contains no special rule of attribution either, whether under expansionist or restrictivist theories.³⁴⁹ In particular, the harboring of terrorist groups, while a plausible candidate for a special attribution rule, is both difficult to normatively justify in such terms and legally and logically unnecessary.

The ECHR, as interpreted by the European Court, is a more complicated case. Some concepts deployed in the Court's jurisprudence may resemble attribution rules in the language used, but clearly do not constitute such rules—this is particularly the case with the spatial conception of State jurisdiction under Article 1 ECHR as effective overall control of an area.³⁵⁰ Other concepts are more plausible candidates for *lex specialis* attribution rules, especially the notions that the State bears responsibility for the conduct of a non-State actor that survives by virtue of the State's support, that the State will be responsible for the conduct of third parties committed with its acquiescence or connivance, and that a State will be responsible for the conduct of State-owned enterprises that do not enjoy sufficient institutional and operational independence. As I have explained, however, the precise conceptual basis of these tests is difficult to determine, because the Court does not explain what it is doing (and why) clearly and rigorously enough, and because it does not seriously engage with the ILC Articles.

The ambiguity in the Court's methodology is probably best explained through the interplay of several factors. First, the attribution inquiry is completely obvious in the vast majority of cases before the Court because the conduct at issue is one of *de jure* State organs. Second is the routine elision of the distinction between negative and positive obligations, and wrongful actions and omissions in the Court's case law. Third, most judges of the Court, are, by their training and their socialization, not international lawyers, but domestic lawyers. Fourth, as a consequence, that many of the judges

348. *See supra* Section III.C.

349. *See supra* Section IV.C.

350. *See supra* Section V.A.

therefore have a *habit of not thinking about attribution*, even if attribution is nominally an issue to be resolved in every single case. That habit of not thinking about attribution then inevitably creates a potential for methodological sloppiness and divergence from the ASR and general international law, whether deliberate or not and whether justified or not. Finally, the sloppiness and ambiguity may also have some redeeming virtues, as they enable the Court to reach outcomes that it wants to reach without overtly antagonizing or disagreeing with authoritative institutions of public international law, such as the ICJ and the ILC. Indeed, a cynic might say that the European Court can achieve through vagueness what the ICTY Appeals Chamber in *Tadić* could not achieve through open and principled disagreement.

That said, the Court's vagueness also comes at great costs in terms of clarity, certainty, and predictability. I am not saying that we should fetishize consistency with general international law, or at least with the mainstream or institutionally accepted articulations of that law by the ICJ and the ILC. It is right and proper that the mainstream is challenged. But any such deviation or challenge needs to be carefully thought through and its implications fully considered. It is, I think, fair to say that this has not been the case so far with regard to the jurisprudence of the Strasbourg Court. And the Court would still be able to reach some of the just results that it wants to reach even if its approach rested on firmer and more principled conceptual foundations, such as a theory of complicity.

It is here that its acquiescence or connivance test shows the most promise. It is also here where we clearly are in need of area-specific, sectoral rules. By their nature, complicity rules must always strike a balance. They must reduce harmful risks that assistance will be provided to wrongdoing actors without unduly inhibiting cooperation between States (and non-State actors) serving other purposes that potentially advance general welfare. It is perfectly conceivable that due to the importance of the values and interests they seek to protect, human rights law or IHL might have more demanding complicity rules than those in general international law (per Article 16 ASR) or in other sub-fields of international law, such as the law of the sea, investment, or trade. In any event, bearing in mind the limited number of cases in which it has appeared, the acquiescence or connivance-as-complicity rule can only be characterized as embryonic, and as one in need of further clarification and development.

That said, complicity doctrines, ECHR-specific or otherwise, do not need to be attributive, and it is probably best if they are not attributive. As

we have seen, States and entities empowered by States to exercise interpretative authority³⁵¹ may fashion special rules of attribution if they so desire. But the bar for justifying such rules is high.³⁵²

351. *See generally* Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law*, 55 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 343 (2017).

352. *See supra* Part VI.