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INTERNATIONAL LAW OF STATE RESPONSIBILITY AND THE ECHR: SYMBIOSIS OR ESTRANGEMENT?

In recent years, the European continent has been shook by a number of illegal acts of aggression characterized by asymmetric warfare which have significantly undermined security in the region. Utilisation of unorthodox military tactics that weaponise information and heavily employ the use of non-State actors in direct hostilities has put an incremental challenge to many fundamental legal notions under international law and the European Convention of Human Rights (ECHR). This article offers an inductive analysis of the ECtHR's jurisprudence with regards State responsibility in the contested regions which aims to identify a clear pattern based on the Court's reasoning. The article makes reference to the relevant rules under international law of State responsibility and briefly examines their interplay with the ECHR. Particular regard is also given to relevant legal literature, specifically, generalist and Convention-specific authors that have examined similar questions in their contributions. The analysis delineates between salient legal issues such as the position of general international law and its relationship with the ECHR. The article offers an overview of the relevant caselaw and inductive analysis of the approach taken by the Court. One of the main takeaways of the article is that the framework of ARISWA is relevant to the ECHR in so far as it covers the gaps in the Convention as was demonstrated in the analysis of the relevant case-law. Additionally, it appears that the Court has decided to develop its own distinct jurisprudence on State responsibility that in many aspects substantially differs from what is envisaged under ARISWA. The interconnected nature yet distinctly separate function of the frequently confused legal concepts has often resulted in a misunderstanding of the approach adopted by the Court.

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Formulation of the problem. Although the question of the relationship between international law and the ECHR can be a full dissertation topic of its own, this section does not aim to provide a comprehensive analysis but rather a brief outline of their relationship with the focus on the specific context of determination and attribution of State responsibility.

Unsurprisingly, on a number of occasions, the ECtHR has unequivocally confirmed that the Convention, in fact, forms part of public international law [1]. It is not unheard of that the ECtHR referred and relied upon international law and decisions of international courts and tribunals. Moreover, according to the Court's caselaw, the Convention must be interpreted in line with international law [2]. However, the ECtHR has also stated that the Convention enjoys a special character as a human rights treaty and as an instrument of European public order (ordre public) for the protection of individual human beings [3].

The aim of the research is to analyze the issue of State responsibility under the ECHR which has revealed the underlying complexity and ambiguity behind the laws and legal principles involved in attribution of conduct of unrecognized armed groups to a State.

Analysis of recent research and publications. Researches in the context of international law under the issue of State responsibility under the ECHR have been done by such scientists as Amelia Keene, Wildhaber Luzius, Ian Rachynskyi, James Crawford, Marko Milanovic etc. But still there are a lot of legal issues dedicating to the analysis of the case law on state responsibility.

Main results of research. In relation to State responsibility, the ECHR has not been initially conceived for the specific purpose of determining State responsibility but solely as a human rights instrument. In fact, Article 1 ECHR makes no reference to State responsibility, nevertheless, the Court relies on this Article when determining and attributing responsibility of Contracting Parties [4].

Thus, one can argue that in light of such situation the role of international law and specifically ARISWA is reinforced due to the well-developed framework and longstanding practice in terms of determination of State responsibility. As was mentioned previously, ARISWA does not concern itself with the source of the arising obligations and is, therefore, applicable to the ECHR or any other international treaty for that matter [5].

However, the precise role and method of application of ARISWA in the ECHR's jurisprudence is rather ambiguous and controversial. Some authors put forward an argument that the «special character of the ECHR makes the international principles of state responsibility irrelevant to its operation», such reasoning is anchored to the fact that the Convention «goes beyond what is traditionally envisaged under the law of international responsibility» as individuals are able to have direct standing before the Court [6]. Such argument is not without merit as ultimately the issue of the ECHR's applicability to contested territories is not determined by rules of general international law and the precise determination of responsibility is taking place on the basis of Article 1 of the Convention.

That being said, the Court has resorted to relying on the international law of State responsibility on a number of occasions. For instance, in recent cases such as *Kotov*, *Liseyitseva and Malov* and *Al Nashiri* the Court has relied on ARISWA. As to the case of *Kotov*, which revolved around actions of a private bank, the Court has made direct reference to ARISWA, specifically Article 5 in connection to the concept of «parastatal entities» [7].

Most importantly, the Court appeared to delineate between attributing acts of a private body to a State pursuant to Article 5 of ARISWA, and the positive obligations that are separately attached to the State under the ECHR. Admittedly, this appears to suggest two different ways of attributing State responsibility, either through the approach adopted in *Kotov* based on Article 5 ARISWA, or along the lines of *Costello-Roberts* by holding a State directly liable for breaches of its own positive obligations under Article 3 ECHR [8].

Furthermore, in the case of *Liseyitseva and Malov*, the Court has referred to Articles 5 and 8 of ARISWA analogizing *Kotov*[9]. In particular, the ECtHR in its ratio decidendi explicitly relied on Article 8 ARISWA stating that its conclusion «is consistent with the ILC's interpretation of the aforementioned Article 8 of the Articles on State Responsibility». Similarly, in *Al Nashiri* the Court rejected the application of its own rule of third state responsibility in favour of the approach based on ARISWA and primary obligations under Article 3 ECHR [10].

However, there are plenty of examples to the contrary, as in *El-Masri* the ECtHR has held a third State responsible for the acts of another State contrary to Article 16 ARISWA, and in *Behrami* the Court explicitly refused to apply Article 7 ARIO. In *Al Nashiri*, the Court directly references *El-Masri* and the doctrine of third state responsibility, however, in its conclusion the ECtHR emphasises Poland's responsibility for its own breaches of Article 3 ECHR instead of invoking third party responsibility.

What is the underlining semantics behind the Court's decision to rely on third State responsibility in *El-Masri* but to avoid this doctrine in *Al Nashiri* in favour of an approach grounded in Article 16 ARISWA remains largely unclear.

Overall, although the Court has relied in some cases on ARISWA to fill in the gaps, it has decided to develop its own jurisprudence on State responsibility which is distinct and separate from what is envisaged in ARISWA. In particular, the divergences between State responsibility under ARISWA and the ECHR are vividly represented in third State responsibility and positive obligation arising directly from ECHR's provisions themselves.

Also, the so-called notion of «acquiescence or connivance» provides for the State's responsibility under the Convention for the acts of third parties (e.g. private entities) which violate the Convention rights of other individuals within its jurisdiction.

This method of attribution is contrary to what is envisaged under ARISWA and is, in fact, a unique feature of the ECtHR's jurisprudence. Another noteworthy distinction, as argued by such authors as Evans, is present in the «direction or control» test that points to a broader scope of State responsibility under the ECtHR's case-law as compared to Article 8 ARISWA [11].

Evans substantiates such view on the basis of the case of *Tepe v Turkey*,[12] which established attribution of responsibility based on procedural violations without proving beyond reasonable doubt the substantive part relating to the involvement of State agents in the alleged crimes. Hence, the abovementioned cases demonstrate that ECtHR has its own approach to State responsibility that in many instances substantially differs from that of ARISWA.

Admittedly, the Court by developing its own distinct jurisprudence on State responsibility has expanded its control by ensuring application of the Convention rights based on its own legal reasoning but, at the same time, it has wandered off onto thin ice, that is to say, a realm of law which is highly politicised and potentially explosive. Establishing State responsibility for serious violations of human rights, specifically in a military context, will inevitably lead to some difficult choices that might be legally sound but politically controversial. One of the main consequences of such a decision is that it opens the way for interstate and individual applications related to contested territories and armed conflicts around Europe.

Conclusions. One of the main takeaways of the article is that the framework of ARISWA is relevant to the ECHR in so far as it covers the gaps in the Convention as was demonstrated in the analysis of the relevant case law. Additionally, it appears that the Court has decided to develop its own distinct jurisprudence on State responsibility that in many aspects substantially differs from what is envisaged under ARISWA. The interconnected nature yet distinctly separate function of the frequently confused legal concepts has often resulted in a misunderstanding of the approach adopted by the Court.

References

1. Wildhaber, Luzius (2007). The European Convention on Human Rights and International Law. *The International and Comparative Law Quarterly*. p. 220.
2. Case35343/05, *Vasiliauskas v Lithuania*. ECtHR. 2015, 58–59.
3. Case35763/97, *Al-Adsani v United Kingdom*. ECtHR. 2001, 55.
4. Case15318/89, *Loizidou v Turkey (preliminary objections)*. ECtHR.1995, 75.
5. Kavaldjieva, Stefka (2006). Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse. *Georgetown Journal of International Law*, 507.
6. Crawford, James and Keene, Amelia (2018). *The Structure of State Responsibility under the European Convention on Human Rights in Anne van Aaken and Iulia Motoc (eds)*. The European Convention on Human Rights and General International Law (Oxford University Press, 180.
7. Case54522/00, *Kotov v Russia [GC]*. ECtHR. 2012, 19–21.
8. Case 13134/87, *Costello-Roberts v United Kingdom*. ECtHR. 1993. p. 21.
9. Case39483/05 and 40527/10, *Liseytsseva and Maslov v Russia*. EctHR. 2014), 205.
10. Case 28761/11, *Al Nashiri v Poland*. EctHR. 2011, 517.
11. Evans, Malcolm (2004). State Responsibility and the ECHR. In *Malgosia Fitzmaurice and Dan Sarooshi (eds)*. Issues of State Responsibility before International Judicial, 157.
12. Case27244/95, *Tepe v Turkey*. ECtHR. 2003. p. 18–20.

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