SYSTEMIC INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS: CREEPING FRAGMENTATION OF STATE RESPONSIBILITY

KOLUPAEVA A., POLSHAKOVA V., SANTALOVA A., ULANOVA D.

Anna Kolupaeva — Lead consultant, Intellectual Property Rights Court, Moscow, Russia (ankolupaeva@mail.ru).
ORCID: 0009-0005-0504-4613.

Victoria Polshakova — Expert in public international law, Moscow, Russia (polshakovavv@yandex.ru). ORCID: 0009-0008-8121-839X.

Anastasia Santalova — Expert of the information and analytical group, "Operational Services Centre" JSC, Moscow, Russia (nastyasant@mail.ru). ORCID: 0009-0008-1335-2247.

Daria Ulanova — Lawyer, "SGS-Group" LLC, Moscow, Russia (ulanovaa.darya@gmail.com). ORCID: 0009-0008-7196-011X.

Abstract

The article discusses how the European Court of Human Rights (hereinafter — ECtHR, the Court) influences the way the European Convention on Human Rights (hereinafter — ECHR, the Convention) is systematically interpreted in the context of state responsibility. The article highlights that interpretation of the Convention and general principles of state responsibility is crucial for holding states accountable, ensuring justice for victims, and upholding the credibility and coherence of international law. For this reason, it is essential for the Court to carefully interpret the ECHR within the broader context of international law. The authors believe that one of the most practical strategies to analyse this issue is through determining the consistency of the European Court of Human Rights' approach to state responsibility issues, elaborated through its case-law, with general customary rules of international law. It can be effectively performed through the lens of three fundamental problems: jurisdiction and attribution interaction problem; issues of state responsibility for the acts of international organisations, paying special attention to peace-keeping operations; and third-state responsibility problem. The analysis shows that the Court creates its own criteria, often conflicting with each other, by ignoring established general rules of international law on state responsibility. Lastly, the authors show that while the Court often acts as a lawmaker, it should create the law in a unified way to apply it fair and equally for the purposes of human rights protection. It is not the states and their particular interests that should govern the application of law by the Court. In the end, the authors come to the conclusion that the policy behind the Court's decisions is not only predominantly inconsistent with the general customary rules of international law and the object and purpose of the Convention, but also results in the creeping fragmentation of the international law on state responsibility.

Key words

systemic interpretation, state responsibility, human rights, attribution, international organisations, peace-keeping operations, third-state responsibility

Citation: Kolupaeva A., Polshakova V., Santalova A., Ulanova D. Systemic Interpretation of the European Convention on Human Rights and its Protocols: Creeping Fragmentation of State Responsibility // Zhurnal VSHÉ po mezhdunarodnomu pravu (HSE University Journal of International Law). 2023. Vol. 1 № 4. P. 5–17.

https://doi.org/10.17323/jil.2023.19785

Introduction

For years now, the failure of international law to protect people globally continues to remain at the very heart of conflict and mass atrocities in many places around the world. With 27 global conflicts still ongoing,[1] the question of to what extent and under what conditions the application of the European Convention on Human Rights by the European Court of Human Rights takes into account the general law of state responsibility, is crucial as the breadth of human rights protection depends on the answer to this very question.

Interpretation and application of the ECHR and general law of state responsibility for the purposes of establishing state's responsibility are indispensable for restoring justice and protecting the victims, as well as for re-establishing credibility and consistency of international law. For this reason, the importance of

[1] *Global Conflict Tracker. Council on Foreign Relations.* URL: https://www.cfr.org/global-conflict-tracker (accessed: 26.02.2024).

systemic interpretation of the ECHR by the Court, which requires taking into account relevant rules of international law while interpreting a treaty,[2] cannot be overlooked.[3]

Yet, with every cherry comes a bite: despite the commitments, and taking into account the widely recognised and broadly researched technical reasons behind interpretational discrepancies and inconsistency of the ECHR case-law that includes, *inter alia*, the multiplicity of judges compositions, competition of legal schools and approaches within the Court, the lack of effective ways to resolve arising collisions,[4] it appears to be quite difficult for the interpretation to stay out of the realm of politics. Thus, there arises the following question: is the policy behind the ECtHR consistent with systemic interpretation of the ECHR in the area of state responsibility, and is it consistent with the general customary law?

The present paper is different from other works which examined the role of state responsibility in interpretation of the ECHR[5] since authors suggest looking at this problem from the perspective of constitutionalist approach to international law,[6] and presuppose that a common interest of humanity should extend beyond the interests of states by consequently limiting the sovereignty of the latter through the process of decision-making conducted by international judges. Thus, it is only reasonable to draw inspiration from the approach of M. Koskenniemi, who once stated that "being an international lawyer has not just involved taking a 'critical' attitude towards the international system but doing so from the perspective of the idea of law as the expression of the 'social'".[7] Another distinction of the paper is, consequently, the critical examination through the lens of social values.

To demonstrate the problem from within, three main sections are identified, revealing the underlying problems of the Court's reasoning most vividly. First, whether the ECtHR provides proper distinction between two concepts of international law — "jurisdiction" and "attribution" in the course of its case-law. Second, whether the state is responsible for the acts of international organisations and, in particular, the acts of its troops conducting peace-keeping operations under an international organisation's mandate. And finally, should the third state which has not irrevocably committed an international wrongful act, be held responsible for certain actions?

To further uncover these issues, an assessment of the ECtHR ability to protect human values in the area of state responsibility by providing comprehensive comparison of the ECtHR case-law approach with customary law rules provisions codified in Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter — ARSIWA, Articles)[8] and Articles on the Responsibility of International Organisations (hereinafter — ARIO) is conducted.[9]

1. Extraterritorial state responsibility: jurisdiction and attribution

The present paragraph is aimed to reveal by analysing the ECtHR case-law one of the most challenging problems in terms of the ECtHR systemic interpretation[10] that is the relationship between attribution and jurisdiction. The mentioned problem acquires special significance in cases involving extraterritorial acts. As was stressed by J. Crawford and A. Keen: "The Court's misunderstanding of the interactions between

---

2 United Nations. Vienna Convention on the Law of Treaties. 23 May 1969. 1155 U.N.T.S. 331. Article 31(3)(c).

3 Koskenniemi M. *Fragmentation of International Law. Difficulties Arising from Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission. Yearbook of the International Law Commission. 2006. Vol. II. Part 2. P. 175–184.

4 Albuquerque P., Wojtyczek K. *Judicial Power in a Globalized World.* Berlin : Springer International Publishing, 2019; Pirola F. *Between Deference and Activism: The ECtHR as a Court on States or a Court on Rights? Exploring the ECtHR Interpretative Tools*. Université Côte d'Azur; Università degli studi di Milano. Milan : Bicocca, 2023; Repetto G. *The Constitutional Relevance of the ECHR in Domestic and European Law.* Cambridge, UK : Intersentia, 2013. P. 137–187; Tzevelekos V. *The Use of Article 31 (3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology-Between Evolution and Systemic Integration //* Michigan Journal of International Law. 2010. Vol. 31. P. 621.

5 Crawford J., Keene A. *The Structure of State Responsibility under the European Convention on Human Rights // The European Convention on Human Rights and General International Law* / ed. by A. Aaken, I. Motoc. New York, NY, USA : Oxford University Press, 2018. P. 34; Šturma P. *State Responsibility and the European Convention on Human Rights*. Czech Yearbook of Public & Private International Law. 2020. Vol. 11. P. 11; Evans M. *State Responsibility and the European Convention on Human Rights: Role and Realm // Issues of State Responsibility before International Judicial Institutions* / ed. by M. Fitzmaurice, D. Sarooshi. The Clifford Chance Lectures. Portland, OR, US : Hart Publishing, 2004. P. 139–160.

6 Verdross A. *Constitution of International Legal Community.* 1926; Peters A. *Fragmentation and Constitutionalization // Oxford Handbook of the Theory of International Law* / ed. by A. Orford, F. Hoffmann. Oxford, UK : Oxford University Press, 2016.

7 Koskenniemi M. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge, UK : Cambridge University Press. 2005.

8 International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts. G.A. Res 56/83. 12 December 2001.

9 International Law Commission. Draft Articles on the responsibility of international organizations. G. A. Res. 66/10. 2011.

10 Vienna Convention on the Law of Treaties. Article 31(3)(c).

jurisdiction and attribution has the potential to threaten both the coherence of the secondary rules on state responsibility and the Court's own jurisprudence".[11]

The crux of the jurisdiction and attribution relationship problem lies in quite contradictory decisions by the ECtHR. The Court emphasises the integral role of attribution in establishing jurisdiction, as well as stressing their separability in some cases,[12] and in others — presumes attribution existent as consequences of jurisdiction.[13]

The idea of attribution inalienability when establishing jurisdiction appears to be quite reasonable, as attribution stipulates any link between the author of the internationally wrongful conduct and the state that made the author of such conduct responsible for it.[14] Hence, this is the attribution that should be established first, to provide the basis link between the extraterritorial act and the state.

Under Article 1 of the ECHR, parties are obliged to secure the rights and freedoms to everyone within their jurisdiction. Hence, the presence of state jurisdiction is the core criterion of the ECHR application. Yet, this criterion is not territorial, but rather functional: "When territorial jurisdiction is mentioned, it should therefore not be understood to mean that jurisdiction is territorial in nature, but only that territory is used as shorthand for the function of jurisdiction".[15]

To exercise extraterritorial jurisdiction, the assessing criteria elaborated by the ECtHR's case-law should be presented. For the first time the Court in *Loizidou v. Turkey*[16] in 1996 established that a Contracting Party could exercise jurisdiction over both a person and an entire territory that is under its effective control. However, the Court is quite cautious about the issue of extraterritorial jurisdiction. In 2001, the *Banković* decision appeared to reframe the notion of jurisdiction in an absolutely restrictive manner. The Court stated that the Convention's application is primarily territorial and that the exercise of extraterritorial jurisdiction is exceptional.[17] After a decade, the ECtHR returned to its approach set in the *Loizidou v. Turkey* case. The *Al-Skeini*[18] judgment of 2011 clearly defined the possibility to establish extraterritorial jurisdiction by breaking down the exercise of extraterritorial jurisdiction into two categories: under spatial basis (territorial control) and/or personal basis (personal control).[19] Territorial control is present when a state exercises *de facto* effective control over an area abroad directly, through the Contracting State's own armed forces, or indirectly, through a subordinate local administration,[20] while personal control is exercised when a state carries out control over individuals. The Court identified specific situations when such personal jurisdiction may arise including when exercised through diplomatic and consular agents, when state agents exercise public powers on another state's territory and, most contentiously, when an individual is brought into a state's jurisdiction through the use of force.[21] These two criteria of territorial and/or personal control presence when establishing jurisdiction should be seen as complementary, but not as alternatives, as state jurisdiction is always personal.

Hence, in contrast to attribution that provides for any link between the author of the internationally wrongful act and the state that made it responsible for such an act, the jurisdiction requires control (territorial and/or personal) to be presented between the state in question and an individual. Only by establishing a clear link between the extraterritorial act and the state, through an attribution test, can personal and/or spatial jurisdiction be established. The notions of jurisdiction and attribution are separate and should not be mixed. Nevertheless, the Court at the same time elaborates its own approach to the jurisdiction and attribution interaction. The approach is based on the mere presumption of attribution as a consequence of jurisdiction.

---

11 Crawford J., Keene A. *Op. cit.* P. 190.

12 ECtHR. *Behrami and Saramati v. France* and *Saramati v. France*, *Germany and Norway* (dec.). Application nos. 71412/01 and 78166/01. Judgment of 2 May 2007; ECtHR. *Drozd and Janousek v. France*. Application no. 12747/87. Judgment of 26 June 1992.

13 ECtHR. *Loizidou v. Turkey* (Preliminary Objections). Application no. 15318/89. Judgment of 23 March 1995; ECtHR. *Cyprus v. Turkey* [GC]. Application no. 25781/94. Judgment of 10 May 2001.

14 International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts. G.A. Res 56/83. Article 2.

15 Besson S. *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To* // Leiden Journal of International Law. 2012. Vol. 25. № 4. P. 863.

16 ECtHR. *Loizidou v. Turkey* (Preliminary Objections). §62.

17 ECtHR. *Banković and Others v. Belgium and Others*. Application no. 52207/99. Judgment of 12 December 2001. §67.

18 ECtHR. *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07. Judgment of 7 July 2011. §138–140.

19 Milanovic M. *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford University Press, 2011. P. 118–120, 173.

20 ECtHR. *Al-Skeini and Others v. the United Kingdom*. §138.

21 *Ibid*. §133–137.

In this regard, the *Loizidou v. Turkey* case that introduced the concept of effective control requires more detailed consideration. The case concerned an applicant who, since the Turkish invasion in 1974, was not allowed to access her real estate in occupied Northern Cyprus where Turkey established its local administration — the Turkish Republic of Northern Cyprus (hereinafter — TRNC). Turkey denied that its agents were exercising jurisdiction, claiming that the acts fell within the jurisdiction of the TRNC and were attributable to its agents.[22] The ECtHR stated that "...the responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".[23] In accordance with the Court it was sufficient that Turkey exercised effective control of the area outside its own territory, thereby such conduct is *prima facie* attributable to Turkey and constitutes jurisdiction.[24]

At the merits phase, it was found that "...it is not necessary to determine whether <…> Turkey actually exercises detailed control over the policies and actions of the authorities of the TRNC. It is obvious from the large number of troops engaged in active duties in Northern Cyprus <...> 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".[25] Hence, the ECtHR recognised that Turkey is responsible for its conduct merely through presumption of its control. Providing no attribution test the Court comes to the following conclusion: Turkey is responsible for violations committed as the violations in question fall under Turkey's jurisdiction. These principles concerning jurisdiction by means of control over an area have since been confirmed in the case of *Cyprus v. Turkey*[26] and most other cases concerning the situation in Northern Cyprus.[27]

Tending to application of such an approach that mixes two completely different concepts of jurisdiction and attribution the Court contributes to resistant inconsistency of its case-law in the area of state responsibility with general international law. It is obvious that the general law test of effective control, which has been established in the absence of ARSIWA, is broader than the one provided by the International Court of Justice (hereinafter — ICJ) in the *Nicaragua* case.[28] Moreover, it appears that the exercise of control in accordance with the general law test is linked to individuals, as well as stipulated by the ECtHR, while the Court in the *Loizidou* case ties effective control with the territory.

The Court continued to apply its approach elaborated in 1996 within the scope of the *Loizidou v. Turkey* case to the *Ilaşcu et al. v. Moldova and Russia* case of 2004.[29] However, the ECtHR provided some modifications to its way of reasoning. The complaint against Moldova and Russia concerned a situation which occurred on Moldovan territory.[30] The Court established that Moldova had lost control over a part of its territory (Transdniestria), and had therefore limited its jurisdiction.[31] From Russia's perspective the case was extraterritorial, the ECtHR did not invoke the criterion of territorial control but held that the authorities of the Moldavian Republic of Transdniestria remained under the effective authority of the Russian Federation, and in any event it survived by virtue of the military, economic, financial and political support given to it by the Russian Federation.[32] It should be mentioned that in contrast to the *Loizidou v. Turkey* case, the fact of occupation was not established in *Ilaşcu et al. v. Moldova and Russia.*[33] This is one of the main reasons why the modifications to the established approach were essential.

In the present case, the Court considered the issue of responsibility separately,[34] stepping aside from its presumption of responsibility applied in the *Loizidou v. Turkey* case and found both Moldova and Russia responsible. Nevertheless, the modifications to the ECtHR approach presented in the *Ilaşcu et al.*

---

22 ECtHR. *Loizidou v. Turkey (Preliminary Objections)*. §47.
23 *Ibid*. §62.
24 *Ibid*. §63.
25 ECtHR. *Loizidou v. Turkey (Merits)* [GC]. Application no. 15318/89. Judgment of 18 December 1996. §56.
26 ECtHR. *Cyprus v. Turkey* [GC]. §69.
27 See, ECtHR. *Lordos et al. v. Turkey*. Application no. 15973/90. Judgment of 2 November 2010; ECtHR. *Varnava et al. v. Turkey* (Grand Chamber). Application nos. 16064/90 et al. Judgment of 18 September 2009.
28 ICJ. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*. Judgment. I.C.J. Reports 1986. P. 14. §115.
29 ECtHR. *Ilaşcu et al. v. Moldova and Russia* [GC]. Application no. 48787/99. Judgment of 8 July 2004.
30 *Ibid*. §2.
31 *Ibid*. §333.
32 ECtHR. *Ilaşcu et al. v. Moldova and Russia* [GC]. §392.
33 *Ibid*. §335.
34 *Ibid*. §310–331.

v. Moldova and Russia case are quite insignificant to become a contribution to the development of a stable ECtHR approach consistent with the general international law on state responsibility.

In *Catan and Others v. Moldova and Russia*, another case concerning the situation in Transdnistria, the Court relied on the conclusions reached primarily in the *Ilaşcu et al. v. Moldova and Russia* judgment, notwithstanding that the facts of the case at hand concerned later period of time and the military situation in the region has significantly changed.[35] It held 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".[36] This decision was suggested as a replacement to general international law by *lex specialis* ECHR law. It likewise gave rise to a *"Catan exception"*: "<…> where the fact of <...> *domination* [emphasis added] over the territory is established, it is not necessary to determine whether the contracting state exercises detailed control over the policies and actions of the subordinate local administration".[37] Hence, the Court expressed its complete refusal to deal with the rules of attribution, and subsequently applied the presumption elaborated in the *Loizidou v. Turkey* case assuming responsibility of Russia based on its established jurisdiction.

Other two cases related to the violation of the ECHR in Nagorno-Karabakh Autonomous Oblast (hereinafter — NKAO) are parallel merits judgments in *Sargsyan v. Azerbaijan* and *Chiragov v. Armenia.* Both cases concerned a number of displaced indigenous people who had fled from the NKAO. Both respondent states contested the question of state jurisdiction under Article 1 of the ECHR.[38]

Eventually, the Court again made a quasi-attribution analysis continuing the *Loizidou v. Turkey* approach. It stated: "Armenia <…> has had a significant and decisive influence over the "NKR" <…> In other words, the "NKR" and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention".[39]

In *Chiragov v. Armenia,* the district of Lachin, where the applicants lived, was attacked during the armed conflict. The applicants alleged that both Nagorno-Karabakh and the Republic of Armenia troops were at the origin of the attacks.[40] The Armenian Government stated that Armenia did not participate in the events, but that military action was carried out by the defence forces of Nagorno-Karabakh and volunteer groups.[41] The Court raised the question of attribution applying the *"Catan exception*", as, formally, the NKAO remained part of Azerbaijan.[42] Hence, the Court in accordance with its elaborated approach merely established that Armenia exercised effective control over territory and did not see a need to provide any link to individuals. Subsequently, it held Armenia directly responsible for its positive obligations[43] under the ECHR on the basis of the established jurisdiction of Armenia. In accordance with Judge A. Gyulumyan's opinion: "In so doing the Court has indirectly lowered to an unprecedented level the threshold for the responsibility of states for the acts of third parties and has also contributed to the fragmentation of international law".[44]

In the parallel case *Sargsyan v. Azerbaijan* the respondent state claimed that the village of Gulistan was part of its territory and it was occupied with its own military forces; however, these forces were surrounded by Armenia.[45] Azerbaijan claimed that it should not exercise jurisdiction over this area, because it was "rendered inaccessible by the circumstances".[46] The Court applied the presumption of jurisdiction: "Even in exceptional circumstances, when a state is prevented from exercising authority over

---

35 ECtHR. *Catan v. Moldova and Russia* [GC], Application nos. 43370/04, 8252/05 and 18454/06. Judgment of 19 October 2012. §117.

36 *Ibid*. §115.

37 *Ibid.* §106.

38 ECtHR. *Sargsyan v. Azerbaijan (Merits).* Application no. 40167/06. Judgment of 16 June 2015; ECtHR. *Chiragov and Others v. Armenia (Merits)*. Application no. 13216/05. Judgment of 14 December 2011.

39 *Ibid.* §186.

40 ECtHR. *Chiragov and Others v. Armenia (Merits)*. §19.

41 *Ibid*.

42 *Ibid*. §168–171.

43 For the first time the ECtHR confirmed the existence of positive obligations of a state to provide protection under the ECHR at *Costello-Roberts v. the United Kingdom*. Application no. 13134/87. Judgment of 25 March 1993; See, e.g.: ECtHR. *O'Keefe v. Ireland*. Application no. 35810/09. Judgment of 28 January 2014; ECtHR. *Storck v. Germany*. Application no. 61603/00. Judgment of 16 June 2005; ECtHR. *Kotov v. Russia* [GC]. Application no. 54522/00. Judgment of 3 April 2012; ECtHR. *Liseytseva and Maslov v. Russia*. Application nos. 39483/05 and 40527/10. Judgment of 9 October 2014.

44 ECtHR. *Chiragov and Others v. Armenia (Merits)*. The Dissenting Opinion of Judge Gyulumyan.

45 ECtHR. *Sargsyan v. Azerbaijan (Merits)*. §123.

46 *Ibid.* §146.

part of its territory, due to military occupation by the armed forces of another state, acts of war or rebellion or the installation of a separatist regime within its territory, it does not cease to have jurisdiction within the meaning of Article 1 of the Convention".[47] However, the presumption concerned only positive obligations: "in such a case where the state was prevented from exercising its authority in part of its territory, its responsibility would be limited to discharging positive obligations under the ECHR".[48]

One of the latest and the most complicated cases was *Georgia v. Russia (II)* as it concerned armed confrontation. Raising the question of jurisdiction, the Court divided the analysis of the armed conflict in Georgia into two temporally distinct phases: before the ceasefire of 12 August 2018 (the active phase of the hostilities) and after the ceasefire (occupation).[49] According to the ECtHR: "[I]n the event of military operations — including, for example, armed attacks, bombing or shelling — carried out during an international armed conflict one cannot generally speak of effective control over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area. This is also true in the present case".[50] The Court stated that jurisdiction in this case cannot arise from effective control of an area, meaning that it can arise only if extraterritorial state agent authority and control over individuals is proven.[51] It came to the conclusion that: "[T]he very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no effective control over an area as indicated above, but also excludes any form of 'state agent authority and control' over individuals".[52] Moreover, the Court added that the case cannot be seen as an opportunity to expand its case-law on jurisdiction because of "the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict)".[53]

Nevertheless, nothing prevented the Court from considering that extraterritorial jurisdiction can exist in other situations if different scenarios were to be brought before the Court.[54] Thus, the Court recognising itself unable to establish jurisdiction under its *lex specialis* law could have made an attempt to invoke the attribution test under ARSIWA as it was definitely possible to refer the case to its Article 8 (test of control) to establish its jurisdiction under the systemic interpretation rules. Furthermore, it should be considered that in *Georgia v. Russia (II)*, the armed conflict occurred entirely within the legal space of the Convention: not only both Russia and Georgia are parties to the Convention, but also all the military operations under scrutiny occurred on Georgian territory.

All in all, it is clear that the Court shows inconsistency of international law by seeking to exercise unlimited power as a policymaker. It develops its own criteria of state responsibility in order to provide *lex specialis* ECHR law, yet its own decisions quite frequently contradict each other. Turning a blind eye to the already existing general rules of international law on state responsibility, enshrined in ARSIWA or derived from ICJ and other international bodies' legal practice the Court fails to provide adequate protection of human values, as it has happened in *Georgia v. Russia (II),* and consequently suffers setbacks performing its original functions. As a result, it acts against the ECHR object and purpose of protecting human rights and freedoms of individuals within the jurisdiction of each state party.

2. State responsibility for acts of international organisations. Peace-keeping operations

International organisations (hereinafter — IOs) are not parties to the Convention. Thus, formally, the ECtHR does not have jurisdiction over IOs but over the group of states. Even if the conduct may be attributed to the IO, this does not obligatory imply the responsibility of the IO or its member states under the ECHR.[55] Adding to the complicated interplay between ARSIWA and ARIO, the ECtHR seems to be elaborating its own way of addressing this issue.[56] Therefore, it is necessary to examine the possibility to hold IOs responsible in the Court's policy.

---

47 ECtHR. *Sargsyan v. Azerbaijan (Merits)*. §127.
48 *Ibid*. §131.
49 ECtHR. *Georgia v Russia (II) (Merits)*. Application no. 38263/08. Judgment of 21 January 2021. §105, 145.
50 *Ibid*. §126.
51 *Ibid*. §127.
52 *Ibid*. §137.
53 *Ibid*. §141.
54 ECtHR. *Georgia v Russia (II) (Merits).* Jointly partially dissenting opinion of Judges Yudkivska, Wojtyczek and Chanturia. §6–8.
55 Šturma P. *Op. cit*. P. 6.
56 *Ibid*.

It is particularly challenging to divide IO's and states' responsibility for actions of the ECHR member states' troops operating under the IO's mandate extraterritorially conducting peace-keeping operations. Such responsibility is analysed separately as a specific part of the problem.

2.1. State responsibility for acts of international organisations

Generally, the main challenges before the Court include the issue of international cooperation, the threshold for violation of conventional rights and the specific range of actions to be held accountable. The landmark *Waite and Kennedy* case demonstrated that the ECHR enables states to meet their international obligations not to "thwart the proper functioning of IOs and <...> extending and strengthening international cooperation".[57] This premise was first set forth in *M & Co v. Germany*.[58] Thus, joining IOs and accepting other obligations is not inconsistent with the ECHR if such IOs provide protection equivalent to the Convention's human rights protection.[59]

In *Bosphorus v. Ireland* the ECtHR also presupposed that IOs provide such equivalent protection.[60] Therefore, "a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization".[61] Nevertheless, this presumption does not work if "the protection of Convention rights [is] manifestly deficient".[62] In such cases the concerns of international cooperation are outweighed by the ECHR.[63] Besides, a state remains fully responsible "for all acts falling outside its strict international legal obligations".[64] In this case the Court, dealing with an act of the EU member state implementing the UN Security Council (hereinafter — UNSC) resolution, established that Ireland did not exceed the UNSC requirements[65] and the protection of the applicant's rights was not "manifestly deficient".[66] Thus, the state should not bear the responsibility.[67]

Furthermore, the Court has not clearly defined the specific actions of the state to bear the responsibility.[68] There must be "an action," i.e. direct or indirect state intervention in a dispute.[69] However, the threshold used is quite low.[70]

In general, the Court does not rely on ARSIWA, while attempting to develop its proper approach, which even affects some of ARIO Articles.[71] Even though it often refers to state responsibility rules enshrined in ARSIWA, its decisions are usually inconsistent with them. Overall, the ECtHR's practice on the state responsibility for IO's incapability to provide an adequate remedy is still vague as no violation by a state has been established in the analysed cases.[72] This policy leaves victims without an effective remedy and may impede their right to fair trial, which definitely contradicts the ECHR object and purpose.

2.2. Peace-keeping operations

The UNSC is primarily responsible for "maintaining international peace and security".[73] Thus, even though peace-keeping operations are not expressly mentioned in the UN Charter, they are among the often-used UNSC tools to fulfil its responsibility.[74] Conducting such an operation requires a mandate (authorisation) from the UNSC. There are different models of receiving it. It may be received by an IO (for instance, by

---

57 ECtHR. *Waite and Kennedy v. Germany* [GC]. Application no. 26083/94. Judgment of 18 February 1999. §72.
58 ECtHR. *M. & Co. v. Germany.* Application no. 13258/87. Judgment of 9 February 1990. P. 138.
59 Šturma P. Op. cit. P. 6.
60 ECtHR. *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* [GC]. Application no. 45036/98. Judgment of 30 June 2005. §155–156.
61 *Ibid*. §156.
62 *Ibid*.
63 *Loizidou v. Turkey (Preliminary Objections).* Application no. 15318/89. Judgment of 23 March 1995. §75.
64 ECtHR. *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* [GC]. Application no. 45036/98. 30 June 2005. §157.
65 *Ibid*. §158.
66 *Ibid*. §166.
67 *Ibid*. §167.
68 Crawford J., Keene A. *Op. cit.* P. 184.
69 ECtHR. *Boivin v. 34 Member States of the Council of Europe* (dec.). Application no. 73250/01. Judgment of 9 September 2008.
70 Ryngaert C. *The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations* // International & Comparative Law Quarterly, 2011, 60(4). P. 1004; ECtHR. *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v. The Netherlands* (dec.). Application no. 13645/05. Judgment of 20 January 2009; ECtHR. *Gasparini v. Italy and Belgium* (dec.). Application no. 10750/03. Judgment of 12 May 2009.
71 *ARIO*. Articles 17, 61.
72 Ryngaert C. *Op. cit*. P. 998, 25; Crawford J., Keene A. *Op. cit*. P. 185.
73 United Nations. *Charter of the United Nations*. 24 October 1945. 1 UNTS XVI. Article 42.
74 Gill T., Fleck D. *The Handbook of the International Law of Military Operations*. Oxford University Press, 2018. 2nd ed. P. 153; *Mandates and the legal basis for peacekeeping*. *United Nations Peacekeeping*. URL: https://peacekeeping.un.org/en/mandates-and-legal-basis-peacekeeping (accessed: 03.04.2023).

regional and sub-regional agencies such as NATO), consisting of other states or by member states or their coalition.[75]

In cases involving authorisation for an IO the chain of establishing a responsible state is lengthening. The main challenges here consist of choosing the necessary control test and establishing the compatibility *ratione personae* with the ECHR provisions.

In *Behrami and Saramati v. France* and *Saramati v. France, Germany and Norway*[76] the ECtHR did not find France responsible for the actions of French troops conducting the operation of NATO in Kosovo. It relied both on ARIO[77] and ARSIWA.[78] According to ARIO, "the conduct of <...> an organ or agent of an IO that is placed at the disposal of another IO shall be considered <...> an act of the latter organization if the organization exercises effective control over that conduct".[79] In such a case "the decisive question" is "who has effective control".[80]

However, then the Court stipulated that the determining factor was whether "the UNSC retained ultimate authority and control so that operational command only was delegated".[81] Thus, the ECtHR concentrated on "ultimate authority" instead of the extent to which NATO and the respondent states actually had effective control. The Court found that in *Saramati* "the UNSC retained ultimate authority and control".[82] In *Behrami* also "the impugned inaction was 'attributable' to the UN".[83] Therefore, the ECtHR eliminated NATO and/or respondent states' liability even though in *Saramati* the "effective command of the relevant operational matters was retained by NATO".[84] Finally, the Court established that the complaints were "incompatible *ratione personae* with the provisions of the Convention"[85] taken into account the *Monetary Gold* principle.[86]

Consequently, shifting the control and potential responsibility to UNSC which cannot be evaluated from the point of establishing the responsibility and subsequent ramifications for victims, their right to fair trial and effective remedy was violated. Moreover, this creates the worrisome prospect that a state may establish an IO which has "ultimate authority and control" for the operations of the state's armed forces to avoid responsibility even though the state retains effective control.[87] However, states "cannot avoid responsibility by creating an IO".[88] Thus, this decision was criticised due to its incorrect application of state responsibility rules. According to Special Rapporteur G. Gaja, otherwise the ECtHR would have ruled that "the conduct of national contingents allocated to KFOR had to be attributed either to the sending state or to NATO".[89] By failing to address the issue of multiple liability, the Court may have created a "loophole in which Convention-Contracting States acting under UN authority are not held liable for their Convention obligations".[90] In the *Berić and Others v. Bosnia and Herzegovina* case the Court adhered to its previous approach establishing that the High Representative's conduct is attributable to the UN.[91]

The ECtHR's approach in *Al-Jedda* seemed to be changed. The applicant, an Iraqi-British citizen, was interned during three years on the grounds of suspected terrorism by the UK forces conducting security missions in Iraq within the Multinational Force authorised by the UNSC.[92] This case illustrates the second

---

75 Abashidze A., Vidineyev D. *Who Sends Peacekeepers and How*? // RIAC, 2 June 2014. URL: https://russiancouncil.ru/en/analytics-and-comments/analytics/who-sends-peacekeepers-and-how/ (accessed: 03.04.2023).

76 ECtHR. *Behrami and Saramati v. France and Saramati v. France, Germany and Norway* (dec.). Applications no. 71412/01 and 78166/01. Judgment of 2 May 2007.

77 *ARIO*. Article 7 (the same as Article 5 of Draft Articles on the responsibility of international organizations, 2004); ECtHR. *Behrami and Saramati v. France and Saramati v. France, Germany and Norway* (dec.) §30–31.

78 *ARSIWA*. Article 6; ECtHR. *Behrami and Saramati v. France and Saramati v. France, Germany and Norway* (dec.), §34.

79 *ARIO*. Article 7.

80 ECtHR. *Behrami and Saramati v. France and Saramati v. France, Germany and Norway* (dec.). §31.

81 *Ibid*. §133.

82 *Ibid*. §140.

83 *Ibid*. §143.

84 ECtHR. *Behrami and Saramati v. France and Saramati v. France, Germany and Norway* (dec.). §140.

85 *Ibid*. §152.

86 *Ibid*. §153.

87 Crawford J. *State Responsibility: The General Part.* Cambridge University Press, 2013. P. 199–200; Milanović M., Papić T. *As Bad as It Gets: the European Court of Human Rights's Behrami and Saramati Decision and General International Law* // International & Comparative Law Quarterly, 2009. Vol. 58. № 2. P. 267–268.

88 Brownlie I. *The Responsibility of States for the Acts of International Organizations // International Responsibility Today* / ed. by M. Ragazzi Brill Nijhoff, 2005. P. 361.

89 ILC. Giorgio Gaja, Special Rapporteur, Seventh Report on Responsibility of International Organizations. UN Doc A/CN.4/610, 27 March 2009.

90 *Ibid.*

91 ECtHR. *Berić and Others v. Bosnia and Herzegovina* (dec.). Application no. 36357. Judgment of 16 October 2007, §29.

92 ECtHR. *Al-Jedda v. the United Kingdom* [GC]. Application no. 27021/08. Judgment of 7 July 2011. §9–15; UN Security Council, *Security Council resolution 1511 (2003) [on authorizing a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq].* S. RES, 1511(2003); UN Security Council, *Acting on*

model of receiving a peace-keeping mandate. The Court established that both “ultimate authority and control” and “effective control” tests were satisfied: the UNSC “had neither effective control nor ultimate authority and control over <...> the Multinational Force and that the applicant’s detention was not, therefore, attributable to the UN”.[93] The ECtHR did not treat these tests individually, not concluding which is exactly applicable. Finally, the Court unanimously concluded that the “detention was attributable to the respondent state and that the applicant fell within [its] jurisdiction”.[94] Moreover, there actually was a violation of Article 5(1).[95] Thus, the Court ordered the respondent to make payments to the applicant.

In both *Behrami and Saramati* and *Al-Jedda* actual control may be regarded as exercised by the UNSC.[96] However, the results were different. This may be caused by the different history of the UN involvement, which affected the control chains in Iraq.[97] Another explanation may be in the ECtHR aspirations to harmonisation with general international law.[98] However, the Court did not explicitly overturn the previous approach, keeping the “ultimate authority and control” test which is not grounded in the state responsibility law.

In the *Jaloud* case[99] the Netherlands were not considered as the “occupying power”, unlike, for instance, the UK in *Al-Jedda*. The respondent took part in the Stabilization Force in Iraq within the Multinational Division South-East, commanded by the UK. So, the control chain was lengthened even more. In this case a member of the Dutch soldiers’ unit assigned to Iraq to investigate an earlier incident fired at a vehicle that did not stop at a security checkpoint.[100] The Court relied upon ARSIWA[101] and the *Genocide* case of ICJ,[102] endorsing the effective control test. Finally, the Court found “the responsibility of the Netherlands”.[103] Thus, it ordered the respondent to make payments to the applicant.[104] Sometimes this decision was seen as ambiguous.[105] However, there were opinions that this case demonstrated the wish of the ECtHR to integrate general international law principles in the Court’s jurisprudence. Besides, it generally affirms a broader approach to the extraterritorial application of the ECHR.[106]

Overall, the ambiguity of the ECtHR’s own policy stems from the fact that in the longer chain, including two IOs, the UNSC is recognised as having control, and in the shorter chain — the state. It might possibly be explained by the evolution of the Court’s policy over time to the interpretation of the ECHR which is more consistent with general state responsibility rules, including ARSIWA, ARIO and ICJ decisions. Nevertheless, in some cases victims are deprived of their rights to fair trial and to effective remedy. This policy may be based on the Court’s wish to contribute to maintaining peace in the world. Nevertheless, such a goal should be balanced with the necessity to secure human rights and freedoms, the object and purpose of the ECHR, which may be seen in the more recent cases.

3. Third-state responsibility

Within the context of a wrongful act committed by two or more states, the question always arises: which state is responsible for certain actions, especially when a third state has not irrevocably committed an international wrongful act. In this situation the Court has broad discretion, which might depend on political motives. From the authors’ point of view it means that imputing responsibility to the state quite usually depends on what state it is, and not on the fact whether the state committed a wrongful act or not.

Iraq’s Request, Extends ‘For Last Time’ Mandate of Multinational Force // UN Press, 18 December 2007. URL: https://press.un.org/en/2007/sc9207.doc.htm (accessed: 03.04.2023).

93 ECtHR. *Al-Jedda v. the United Kingdom* [GC]. § 84.

94 *Ibid*. § 118 (3).

95 *Ibid*. § 118 (4).

96 Larsen K. *Attribution of Conduct in Peace Operations: the Ultimate Authority and Control Test* // EJIL. 2008. Vol. 19. № 3. P. 509–531.

97 Crawford J. *Op. cit.* P. 188.

98 Fink M. *The European Court of Human Rights and State Responsibility*. The European Court of Human Rights and Public International Law: Fragmentation or Unity. Baden-Baden : Nomos ; Wien : Facultas, 2014. P. 117.

99 ECtHR. *Jaloud v. The Netherlands* [GC]. Application no. 47708/08. Judgment of 20 November 2014.

100 *Ibid*. § 10–16.

101 ARSIWA. Articles 2, 6, 8; ECtHR. *Jaloud v. The Netherlands* [GC]. § 98.

102 ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)*. Judgment. I.C.J. Reports 2007. P. 43; ECtHR. *Jaloud v. The Netherlands* [GC]. § 97.

103 ECtHR. *Jaloud v. The Netherlands* [GC]. § 155.

104 *Ibid*. § 241(5).

105 Šturma P. *Op. cit*. P. 9.

106 Motoc I., Vasel J. *The ECHR and Responsibility of the State: Moving Towards Judicial Integration-A View from the Bench,* 2018. P. 206–207.

One of the most controversial cases is *El-Masri v. the former Yugoslav Republic of Macedonia*,[107] which concerns the responsibility of a third state for aid or assistance in the commission of an internationally wrongful act — responsibility of a state in connection with the act of another state, under the rule provided in Article 16 of ARSIWA. The case involved participation of Macedonia in an incident of extraordinary rendition. The Court narrowed the provisions and rules on the responsibility of a third state for violations carried out on its territory but by another state and did not apply Article 16.

The Court stated that the Macedonian authorities were "directly responsible" for the U.S. Central Intelligence Agency (hereinafter — CIA) subsequent torture of the German citizen K. El-Masri because the officials of Macedonia had "actively facilitated and failed to prevent those operations" of transferring the German citizen into the CIA's custody at Skopje Airport. Further, the Macedonian authorities "actively facilitated his subsequent detention in Afghanistan".[108] In fact, the torture was directly committed by the United States, while Macedonia only assisted the wrongful act, however, the ECtHR did not address this participation of Macedonia from the perspective of aid or assisting in violation of human rights. Instead, the Court found that Macedonia was directly responsible for a violation of its positive obligation under Article 3 (prohibition of torture) of the ECHR as well as Article 5 (unlawful detention) for the entire period of captivity of Mr. El-Masri, i.e., not only for the actions in the hotel in Skopje but also for the subsequent captivity in Afghanistan.[109] Therefore, the Court created the acquiescence or connivance standard of the responsibility attribution.

Furthermore, the Court mentioned several relevant Articles of ARSIWA, however, it did not suggest the attribution of assistant responsibility to Macedonia.[110] The Court's approach leads to the conclusion that if a state hands over a person to another state in the knowledge that the person was tortured, and stands by when that torture happens, it bears responsibility for the torture itself,[111] and that would be extremely unreasonable. The motive of this could be the role of the USA within the international community. The USA is a great power, and the Court potentially chose the way to distribute the direct responsibility to Macedonia in the context of the case. It is a political decision leading to the non-compliance of the Court activity with the ECHR object and purpose — to protect human rights.

The same principle of acquiescence or connivance was mentioned in the case of *Al Nashiri v. Poland,*[112] where the Court did not make a distinction between the attribution to a respondent state of the acts of private individuals and the acts of agents of a foreign state. However, it then emphasised Poland's responsibility for its own violations, rather than attribution of acts committed by another state. Therefore, it is a slightly softer approach to third-state responsibility.

By contrast, another interesting case is *Makuchyan and Minasyan v. Azerbaijan and Hungary.*[113] It concerns the situation, when the Azerbaijani officer imprisoned by Hungary (because of the killing of one victim and the preparation of the murder of the other) was then transferred to its homeland and after that was immediately pardoned, promoted and awarded. The ECtHR found the application admissible with regard to both Hungary and Azerbaijan. As a result, the Court afterwards came to the conclusion that both countries did not violate Article 2 of the ECHR. It large-scale discussed the provisions of Article 11 of ARSIWA, as well as the ICJ cases within the question of acknowledgment and adoption of criminal acts by the Hungarian actions. However, the ECtHR decided that this fact had not been convincingly demonstrated since the officer acted not on behalf of the state body.[114] In addition, Hungary could be responsible for transferring the officer without obtaining proper assurances that he would continue serving his prison sentence in Azerbaijan. It entailed potential violations of Article 2 procedural obligations.[115] However, the Court found violation of the procedural part of Article 2 of the ECHR by Azerbaijan, but not by Hungary, again possibly because of the political motives and Hungarian political weight. At the same

---

107 ECtHR. *El-Masri v. the former Yugoslav Republic of Macedonia* [GC]. Application no. 39630/09. Judgment of 13 December 2012.

108 *Ibid*. §171.

109 Šturma P. *Op. cit*. P. 3–18.

110 Crawford J., Keene A. *Op. cit*. P. 180.

111 Nollkaemper A. *The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?* Ejil Talk // 12 December 2012. URL: https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/ (дата доступа: 13.04.2023).

112 ECtHR. *Al Nashiri v. Poland*. Application no. 28761/11. Judgment of 24 July 2014.

113 ECtHR. *Makuchyan and Minasyan v. Azerbaijan and Hungary*. Application no. 17247/13. Judgment of 26 May 2020.

114 Šturma P. *Op. cit*. P. 3–18.

115 Milanovic M., Papic T. *Case Note on Makuchyan and Minasyan v. Azerbaijan and Hungary* // American Journal of International Law. 2021. № 115. P. 4.

time, the mentioned case should be evaluated positively since it shows the ability and willingness of the ECtHR to apply general international law.

As a matter of substance, the cases concerned by the ECtHR are quite serious because they involve violations of basic constitutional rights of people — especially, torture or other breaches of the ECHR. Therefore, it is fundamentally important to evaluate the facts independently of the politics. For now, from the authors' subjective point of view, the Court takes a decision based on the political interests of developed states which play a great role within the international context. This approach does not comply with the origin object and purpose of the ECHR. In some cases, the state responsibility rules have not been applied, since the Court developed its own rule to hold a third state responsible for the acts of another state on its territory, and narrowly applied the ECHR provisions only. Hence, as the Court in fact acts as a lawmaker, it should create the law in a unified way to apply it fair and equally in order to protect human rights and to limit state sovereignty. It is not the states and their particular interests that should govern the application of law by the Court. Nevertheless, more recent cases show the reliance on third-state responsibility rules by the Court has frequented. It is important to apply the relevant provisions not only of ECHR, but ARSIWA and other international law rules to come to a justifiable decision on the state responsibility, and to protect human rights.

Conclusion

The ECtHR conducts its own policy in applying systemic interpretation of the ECHR in the area of state responsibility often violating human rights which is not in accordance with its object and purpose. It seems that today the Court has set a course for unlimited policymaking through exercising its function as the ECHR's interpreter. Even though the Court often refers to state responsibility rules, its decisions are for the most part inconsistent with the general principles of international law in the area of state responsibility. Apparently, the ECtHR does not tend to harmonise international law, but to evolve its unique area of law.

First, the Court, developing its own criteria of state responsibility in order to create *lex specialis* ECHR law, becomes unable even to provide consistency of its own decisions and causes serious discrepancies with general international law on state responsibility. Second, the ECtHR seems to try not to hinder the proper functioning of IOs and the enforcement of international cooperation, often leaving victims without an effective remedy and impeding their rights to fair trial as a whole. In case of peacekeeping operations, victims may also be deprived of their rights due to the Court's wish to contribute to maintaining peace in the world. Third, from the authors' point of view, the Court appears to take a decision based on the political interests of developed states which play a great role within the international context, that leads to unjustifiable decisions on state responsibility, and violations of the rights of third states. Overall, the policy behind the Court is not only predominantly inconsistent with the general customary rules and the object and purpose of the Convention but also results in the creeping fragmentation of the international law on state responsibility.

СИСТЕМНОЕ ТОЛКОВАНИЕ ЕВРОПЕЙСКОЙ КОНВЕНЦИИ ПО ПРАВАМ ЧЕЛОВЕКА И ПРОТОКОЛОВ К НЕЙ: «ПОЛЗУЧАЯ» ФРАГМЕНТАЦИЯ ПРАВА МЕЖДУНАРОДНОЙ ОТВЕТСТВЕННОСТИ ГОСУДАРСТВ

КОЛУПАЕВА А.Н., ПОЛЬШАКОВА В.В., САНТАЛОВА А.В., УЛАНОВА Д.Р.

Колупаева Анна Никитична — ведущий консультант, Суд по интеллектуальным правам, Москва, Россия (ankolupaeva@mail.ru). ORCID: 0009-0005-0504-4613.

Польшакова Виктория Владимировна — эксперт по международному публичному праву, Москва, Россия (polshakovavv@yandex.ru). ORCID: 0009-0008-8121-839X.

Санталова Анастасия Вадимовна — эксперт информационно-аналитической группы, АО «Центр эксплуатационных услуг», Москва, Россия (nastyasant@mail.ru). ORCID: 0009-0008-1335-2247.

Уланова Дарья Романовна — юрист, ООО «СГС Групп», Москва, Россия (ulanovaa.darya@gmail.com). ORCID: 0009-0008-7196-011X.

Аннотация

В статье рассматривается проблема влияния политики Европейского Суда по правам человека (далее — Суд) на системное толкование им Европейской конвенции по правам человека (далее — ЕКПЧ) в области ответственности государств. В статье подчеркивается, что толкование ЕКПЧ и общих международных принципов ответственности государств имеет решающее значение для привлечения государств к ответственности, обеспечения правосудия для жертв нарушений прав человека, а также поддержания авторитета и согласованности международного права. По этой причине важно, чтобы Суд давал широкое толкование ЕКПЧ. Авторы считают, что одним из наиболее практичных методов изучения этого вопроса является определение соответствия подхода Суда к вопросам международной ответственности государств, выработанного в его прецедентном праве, обычным нормам международного права. Эффективное исследование данного вопроса возможно только через призму трех фундаментальных проблем: взаимодействие понятий «юрисдикция» и «присвоение» (вменение); ответственность государств за действия международных организаций, особенно в контексте миротворческих операций; ответственность третьих государств. Анализ показывает, что, игнорируя устоявшиеся общие нормы международного права об ответственности государств, Суд разрабатывает собственные критерии, которые зачастую противоречат друг другу. Наконец, авторы подчеркивают, что Суд, выступая в роли нормотворца, должен создавать и применять право справедливо и единообразно в целях защиты прав человека, а не государств и их отдельных интересов. Авторы приходят к выводу, что политика, лежащая в основе решений Суда, не только не соответствует обычным нормам международного права, объекту и цели ЕКПЧ, но и приводит к «ползучей» фрагментации международного права об ответственности государств.

Ключевые слова

системное толкование, ответственность государств, права человека, присвоение (вменение), международные организации, миротворческие операции, ответственность третьих государств

Для цитирования: Колупаева А. Н., Польшакова В. В., Санталова А. В., Уланова Д. Р. Системное толкование Европейской конвенции по правам человека и Протоколов к ней: «ползучая» фрагментация права международной ответственности государств // Журнал ВШЭ по международному праву (HSE University Journal of International Law). 2023. Т. 1. № 4. С. 5–17.

https://doi.org/10.17323/jil.2023.19785

References / Список источников

Albuquerque P., Wojtyczek K. (2019) Judicial Power in a Globalized World. Berlin: Springer International Publishing.

Besson S. (2012) The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to. Leiden Journal of International Law, vol. 25, no. 4, pp. 857–884.

Brownlie I. (2005) The responsibility of states for the acts of international organizations. In: Ragazzi M. International Responsibility Today. Brill Nijhoff, pp. 355–362.

Crawford J. (2013) State responsibility: The General Part. New York, USA: Cambridge University Press.

Crawford J., Keene A. (2018) The structure of state responsibility under the European Convention on Human Rights. In: The European Convention on Human Rights and General International Law. Vol. 1. New York, USA: Oxford University Press.

Evans M. (2004) State Responsibility and the European Convention on Human Rights: Role and Realm. In: Fitzmaurice M., Sarooshi D. (eds.) Issues of State Responsibility before International Judicial Institutions. The Clifford Chance Lectures, Hart Publishing, vol. 7, pp. 139–160.

Fink M. (2014) The European Court of Human Rights and State Responsibility. The European Court of Human Rights and Public International Law: Fragmentation or Unity. Baden-Baden: Nomos; Wien: Facultas.

Gill T., Fleck D. (2018) The handbook of the international law of military operations. New York, NY, US: Oxford University Press.

Koskenniemi M. (2005) From Apology to Utopia: The Structure of International Legal Argument. Cambridge, UK: Cambridge University Press.

Koskenniemi M. (2006) Fragmentation of International Law. Difficulties Arising from Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission. Yearbook of the International Law Commission, vol. II, part 2, pp. 175-184. Larsen K. (2008) Attribution of conduct in peace operations: the ultimate authority and control test. European Journal of International Law, vol. 19, no. 3., pp. 509–531.

Milanovic M. (2011) Extraterritorial application of human rights treaties: law, principles, and policy. Oxford University Press.

Milanović M., Papić T. (2009) As bad as it gets: the European Court of Human Rights's Behrami and Saramati decision and general international law. International & Comparative Law Quarterly, vol. 58, no. 2., pp. 267–296.

Milanovic M., Papic T. (2021) Case Note on Makuchyan and Minasyan v. Azerbaijan and Hungary. American Journal of International Law, no. 115., pp. 294–301.

Motoc I., Vasel J. (2018) The ECHR and Responsibility of the State: Moving Towards Judicial Integration-A View from the Bench.

Peters A. (2016) Fragmentation and Constitutionalization. In: Orford A., Hoffmann F., Clark M. (eds.) The Oxford handbook of the theory of international law. Oxford, UK: Oxford University Press.

Pirola F. (2023) Between Deference and Activism: The ECtHR as a Court on States or a Court on Rights? Exploring the ECtHR interpretative tools. Université Côte d'Azur, Università degli studi di Milano, Bicocca.

Repetto G. (2013) The constitutional relevance of the ECHR in domestic and European law. Cambridge-Antwerp-Portland: Intersentia.

Ryngaert C. (2011) The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations. International & Comparative Law Quarterly, vol. 60, no. 4, pp. 997–1016.

Šturma P. (2020) State responsibility and the European convention on human rights. Czech Yearbook of Public & Private International Law, vol. 11, pp. 3–18.

Tzevelekos V. (2010) The Use of Article 31 (3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology-Between Evolution and Systemic Integration. Michigan Journal of International Law, vol. 31, no. 3., pp. 621–690.

Verdross A. (1926) Constitution of International Legal Community. J. Springer.