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SPECIAL ISSUE ARTICLE

The European Court of Human Rights' Approach to Attributing International Responsibility for Conduct "on behalf of" Another State

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Extended Abstract

Introduction

This article critically examines the approach of the European Court of Human Rights (ECtHR) in attributing international responsibility to states for actions conducted "on behalf of" another state. Against the backdrop of increasing intergovernmental cooperation in areas such as migration control and multinational military operations, the question of accountability for human rights violations has emerged as a pivotal challenge. The primary objective of this study is to evaluate the efficacy of the Court's "exclusive control" doctrine in ensuring state accountability and to identify gaps in its jurisprudence. The central research question asks whether the Court's adherence to the exclusive control criterion, aligned with Article 6 of the International Law Commission's (ILC) 2001 Articles on State Responsibility, sufficiently safeguards human rights in contexts of shared governance or indirect state influence. The hypothesis posits that while this stringent approach ensures legal clarity, it risks creating accountability

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vacuums and necessitates a paradigm shift toward recognizing "shared responsibility" based on effective influence and complementary obligations.

Research Question(s)

How does the ECtHR navigate the attribution of responsibility when states act on behalf of others, and does its reliance on the "exclusive control" test sufficiently uphold human rights accountability under the ECHR?

Literature Review

The theoretical framework of this study is rooted in Article 6 of the ILC’s 2001 Articles, which predicates responsibility on a state’s "exclusive direction and control" over an organ or agent. The ECtHR has consistently applied this principle, as seen in cases like *Jaloud v. Netherlands* and *Al-Skeini v. UK*, where responsibility was attributed to states exercising direct operational and hierarchical control. Conversely, in cases such as *Pad v. Turkey* and *Behrami v. France*, the Court declined attribution due to insufficient institutional integration or exclusive control. Critics, including scholars like Milanović, argue that the Court’s narrow focus on formal control overlooks structural power imbalances and indirect influence mechanisms (e.g., economic coercion or political dependency), enabling states to outsource human rights violations while retaining de facto authority. Alternative frameworks, such as "shared responsibility" and "complementary obligations" (under Article 16 of the ILC Articles), emphasize accountability for states exerting effective influence, even absent direct control. These critiques highlight tensions between legal formalism and the realities of modern transnational governance.

Methodology

This study employs a theoretical and comparative legal analysis of key ECtHR rulings in intergovernmental cooperation cases. Four landmark cases (*X and Y v. Switzerland*, *Xhavara v. Italy and Albania*, *Vearncombe v. UK and Germany*, and *Drozd and Janousek v. France and Spain*) are examined as case studies. These cases are analyzed through the lens of attribution criteria (e.g., exclusive control, institutional integration, and operational authority) and their alignment with the ILC’s principles. Dissenting judicial opinions and scholarly critiques are incorporated to identify unresolved tensions in the Court’s jurisprudence.

Results

The findings reveal the ECtHR’s unwavering reliance on the "exclusive control" threshold for attribution. For instance, in *X and Y v. Switzerland*, the Court attributed responsibility solely to Switzerland, as its authorities enforced domestic laws without delegating sovereign powers to Liechtenstein. Similarly, in *Xhavara v. Italy and Albania*, Italy was held solely accountable for maritime operations, as it retained full operational command despite a bilateral agreement with Albania. However, this approach falters in cases involving indirect control or structural influence. In *Drozd and Janousek*, the Court absolved France and Spain of responsibility for unfair trials in Andorra, despite their constitutional roles as Principality, due to the absence of direct judicial oversight. This decision drew criticism from dissenting judges, who warned of a "responsibility vacuum" enabling powerful states to evade accountability through legal fictions. The study also demonstrates the Court's nuanced recognition of "secondary obligations" in cases of complicity. For example, in *El-Masri v. Macedonia*, North Macedonia was held liable for facilitating CIA renditions, highlighting the distinction between primary attribution and obligations to refrain from aiding violations. While this approach mitigates some gaps, it remains insufficient to address systemic issues arising from indirect governance or coercive influence.

Discussion

The ECtHR's rigid adherence to the "exclusive control" doctrine highlights a fundamental tension in international human rights law: the clash between legal predictability and the need for adaptive accountability mechanisms in an era of complex state interactions. While the Court's formalism ensures consistency and guards against arbitrary attributions, it risks legitimizing structural inequities. For instance, powerful states may exploit legal loopholes to outsource rights-violating operations to subordinate actors or third parties, as seen in *Drozd and Janousek*, where France and Spain evaded accountability despite their constitutional authority over Andorran institutions.

This rigidity also disregards the evolving nature of state influence, where control is increasingly exercised through economic leverage, political dependency, or institutional coercion rather than direct command. Milanović's critique of the Court's blindness to "neo-colonial" dynamics, where states like Italy or the UK exert indirect control through migration agreements or security partnerships, resonates here. The Inter-American Court's advisory opinion on environmental harm, which recognizes extraterritorial responsibility for corporate actions funded by states, offers a counter-model. By contrast, the ECtHR's reluctance to address such indirect influence perpetuates accountability gaps, particularly in transnational contexts like border externalization or privatized detention systems.

The Court's recognition of "secondary obligations" in cases like *El-Masri* and *Al Nashiri v. Romania* signals a partial shift toward holistic accountability. However, this remains reactive and fragmented, focusing on complicity rather than systemic prevention. A more robust framework would integrate the ILC's broader interpretation of "direction and control" (Article 17), which includes coercive inducement, and embrace "shared responsibility" to reflect the interconnectedness of modern governance. For

example, in migration control operations, both funding states (e.g., EU members) and implementing states (e.g., Libya) should bear responsibility for systemic violations, irrespective of direct control.

Conclusion
The ECtHR’s attribution framework, though grounded in clear and predictable principles of international law, faces limitations in addressing the complexities of modern intergovernmental cooperation. While the "exclusive control" criterion safeguards state responsibility coherence, it struggles to ensure accountability in contexts of shared governance, structural influence, or systemic harm (e.g., transnational security cooperation or border control). This study advocates for a paradigm shift inspired by the ILC’s broader interpretation of "direction and control" and the Inter-American Court of Human Rights’ progressive stance on extraterritorial obligations. Recognizing "shared responsibility" and "complementary obligations" would require states to account for effective influence, even without direct operational control, and to prevent human rights violations within collaborative frameworks. Such evolution would align the ECtHR with global human rights trends, close accountability gaps, and strengthen protections in an era of transnational interdependence. Ultimately, balancing legal formalism with pragmatic flexibility is key to achieving equitable accountability under the European Convention on Human Rights. By integrating principles of effective influence and systemic prevention, the Court can uphold its mandate to protect human rights while adapting to the realities of 21st-century governance.

Keywords: Exclusive attribution, complementary obligations, European Court of Human Rights, International Law Commission, responsibility, direction and control.

Introduction

Attributing state responsibility under international law is a discussion based on the principle that a state is accountable for conduct attributable to itself under predefined legal criteria. A complex subcategory of this framework arises when one state acts "on behalf" of another state, as set forth in Article 6 of the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the 2001 Articles). This article stipulates that conduct is attributable to the receiving state only if the relevant organ or agent is placed at its disposal and acts under its "exclusive direction and control" (International Law Commission, 2001, Art. 6, para. 4). Thus, when an organ of State A is placed at the disposal of and under the control of State B and commits a wrongful act, it can be said that State A acts "on behalf of" State B. The European Court of Human Rights (hereinafter the Court) has frequently encountered such scenarios, particularly in cases involving delegated governance, shared jurisdictional authority, or transnational operations.

This form of responsibility is in fact similar to one of the three forms of derived responsibility, namely the situation of "direction and control". These three forms include "aid and assistance", "direction and control", and "coercion", as set forth in the ILC's 2001 Articles. It should also be noted that there are similarities between responsibility for acting on behalf of another state and independent responsibility, in the sense that derived responsibility in fact allows for the imposition of responsibility in respect of another's act, whereas the present matter concerns whether the conduct of a state organ placed at another state's disposal is, under certain conditions, deemed under international law to be an act of the latter state (Setayeshpour & Haddadi, 2017: 775). In effect, when a state exercises effective control or practical authority over an organ of another state, that state will bear independent responsibility for the wrongful act, provided that under Article 6 of the 2001 Articles, that organ acts in the exercise of elements of governmental authority of the state at whose disposal it is placed. Of course, it must be noted that if the transferring state also has obligations in connection with the harm caused, then the issue of derived responsibility arises.

The issue of responsibility for acts performed on behalf of another state has gained particular importance in an era of increasing intergovernmental cooperation, from migration control agreements to multinational military operations. The Court's interpretation of these principles under the European Convention on Human Rights (hereinafter the Convention) has profound implications for human rights accountability, as it determines whether states can evade their obligations by outsourcing authority. Nevertheless, the Court's strict adherence to the "exclusive control" test risks creating accountability gaps, particularly when states exert influence without formal oversight.

This article critically examines the Court's practice on attribution of responsibility in intergovernmental cooperation cases and challenges the Court's stringent application of the "exclusive control" standard. While existing legal scholarship has focused on the formal requirements of the ILC's 2001 Articles (Nollkaemper, 2013: 385–390; Crawford, 2002:94–96), this analysis innovates by introducing the concept of "complementary obligations", referring to duties arising from a state's continuing influence or failure to prevent harm, even when the relevant conduct is formally attributed to another state. By combining the Court's practice with principles of international responsibility, this article advocates for a more nuanced approach that addresses the realities of shared governance.

The main question of this inquiry is how the Court navigates issues of attribution of responsibility when states act on behalf of others, and whether its reliance on the "exclusive control" test sufficiently upholds accountability for human rights under the Convention? The main hypothesis of this study is that the Court's strict adherence to the "exclusive control" criterion, aligned with the 2001 Articles, carries the risk of shielding states from accountability for collaborative acts. A paradigm shifts towards recognizing "shared responsibility", based on complementary obligations and effective influence, is necessary to close accountability gaps and ensure robust human rights protection.

This article draws on theoretical analysis of key Court judgments, including X and Y v. Switzerland, Xhavara v. Italy and Albania, and Drozd and Janousek v. France and Spain, alongside cross-references to the principles set forth in the 2001 Articles and critiques by international law scholars and researchers. The case studies are pursued in discussions of state sovereignty and transnational governance, with particular attention to dissenting opinions that indicate unresolved tensions in this area.

In this inquiry, we will first examine the International Law Commission's approach to the principle of attribution; then we will follow the Court's practice in this regard by analyzing its decisions in four relevant cases. Thereafter, we will address the issue of exclusive attribution and its exception, namely shared responsibility, and finally we will scrutinize the gaps in the Court's prevailing practice and dissenting views.

The "Conceptual Proposition of Acting 'on Behalf' of Another State" in the Practice of the European Court of Human Rights

The European Court of Human Rights applies the attribution principles set forth in Article 6 of the ILC's 2001 Articles very strictly, which requires that conduct be attributed to a state only where the organ placed at its disposal acts under that state's "exclusive direction and control" and is functionally integrated into its administrative framework. The aforementioned principle, confirmed by the International Court of Justice in the Genocide case, indicates that attribution depends on the actual authority of the receiving state over the relevant organ, not formal relations with the transferring state (Application of the Genocide Convention, 2007, para. 392). It should be noted that since the conditions and criteria for this direction and control are not specified in Article 6, one may draw guidance from Article 17, which deals with direction and control of internationally wrongful acts, and discuss the matter accordingly.

As seen in the case of Jaloud v. the Netherlands, the Court has adopted the same approach, where it attributed the conduct of Dutch forces to the Netherlands due to their "complete command" over a checkpoint in Iraq, despite operating within a multinational force. The Court emphasized that the concept of attribution of conduct requires that the organ act "on behalf of" the receiving state, which entails proof of "institutional integration" and "exclusive operational control" (Jaloud v. the Netherlands, 2014, para. 154). Similarly, in Behrami v. France, the Court declined to attribute the acts of "NATO-led KFOR" to France or Norway, because ultimate authority lay with the UN Security Council rather than the contributing states (Behrami and Behrami v. France, 2007, para. 143). The Court stressed that mere participation in international missions is insufficient; rather, the organ must be "subordinate to the hierarchy" of the receiving state (Behr v. Estonia, 2015, para. 97).

Larsen (2012:78) notes that the Court's emphasis on "functional integration" indicates that its practice on attribution accords with the ILC's insistence on "assimilating the organ into the receiving state's machinery", reflecting that body's tendency to present independent responsibility as a fundamental principle. As seen in Al-Skeini v. the United Kingdom, where the "authority and control" of British forces in Iraq was premised on jurisdiction under Article 1 of the Convention, this framework prevents states from evading accountability for their acts by outsourcing authority without relinquishing control (Al-Skeini and Others v. the United Kingdom, 2011, para. 149).

The Court's stringent threshold for attribution prevents dual responsibility unless the transferring state independently violates its own obligations, which indicates the Court's rejection of a distributive accountability approach. In Banković v. Belgium, the Court acknowledged in its judgment that the collective control of NATO states over airstrikes in Serbia does not separately entail their responsibility, because no state exercised "exclusive authority" over the specific operation (Banković et al. v. Belgium et al., 2001, para. 75). This means that in that case the Court considered derived responsibility relevant. Conversely, in Jaloud, the Netherlands' retention of disciplinary and operational control over its soldiers, despite their role in UN-mandated mission, demonstrated the "ultimate authority" necessary for attribution as independent responsibility. In N.D. and N.T. v. Spain, the Court explained that "hierarchical subordination" is a central issue; Spain's Guardia Civil operating in Melilla acted under Spain's command and met the institutional integration criterion for the Court (N.D. and N.T. v. Spain, 2020, para. 112).

This contrasts with the Court's practice in Pad v. Turkey, where cooperation between Iranian border guards and Turkish authorities was not considered sufficient to attribute conduct to Turkey, because their actions lacked the necessary integration with Turkish structures. The joint

operation of Iranian border guards with Turkish authorities did not establish Turkey's jurisdiction under Article 1 of the Convention. Indeed, there was no evidence of "integration into Turkish structures" or Turkish command and control in the matter. The Court therefore declared that mere cooperation between states without the exercise of actual authority is insufficient for attribution (Pad and Others v. Turkey, 2007, para. 54).
Milanović (2020: 23) argues that the Court's focus on "effective control" rather than "ultimate authority" ensures a "bright line" between attributable and non-attributable conduct. Thus, the Court's alignment with the 2001 Articles, as expressed in the ILC's commentary, reinforces the principle that dual attribution and engagement with derived responsibility arise only where both states exercise concurrent control (ILC, 2001, Art. 6, para. 5). In effect, by requiring precise evidence of institutional integration and exclusive authority, the Court protects the integrity of state responsibility under international law (Setayeshpour & Haddadzadeh Shakiba, 2023: 157).

The European Court of Human Rights' Endeavour to Establish the Attribution Criterion for Responsibility for Acting on Behalf of Another State

The "Exclusive Control" Criterion in X and Y v. Switzerland

In X and Y v. Switzerland, the Court clarified fundamental distinctions between delegation of authority and unilateral assumption of control under international responsibility frameworks. The case focused on Switzerland's enforcement of entry bans against residents of Liechtenstein under a bilateral migration agreement. The agreements in force between the two countries provided that the administration of matters relating to the entry, exit, residence, and establishment of foreign nationals was entrusted to Swiss authorities. Switzerland argued that its actions were performed on behalf of Liechtenstein and thus entailed shared responsibility. However, the Court rejected this claim, emphasizing that the Swiss authorities acted exclusively under "Swiss domestic law" without distinction between domestic functions and those relating to Liechtenstein. The Court (X. and Y. v. Switzerland, 1981, para. 16) declared: The Swiss Aliens Police acted exclusively in accordance with

Swiss law ... there was no delegation of Liechtenstein's sovereign powers, but rather the existence of powers was assumed by Switzerland.

In this regard, it appears that on the one hand, bilateral agreements alone do not transfer sovereign authority, and on the other, the practical application of domestic law indicates exclusive control. This reasoning is consistent with the ILC's 2001 Articles, particularly Article 6, which attributes conduct to a state only where the organ acts under its "exclusive direction and control" (ILC, 2001, Art. 6, para. 4). By adhering to its legal framework, the Court preserved Switzerland's ultimate authority and negated any attribution of conduct to Liechtenstein. The Court's approach reflects its later practice in Jaloud, where the Netherlands' retention of operational and disciplinary control over soldiers in Iraq (despite UN mandate) eindicated "ultimate authority" (Jaloud v. the Netherlands, 2014, para. 152).

The Court's insistence on legal and functional integration between the organ and the relevant state as prerequisites for attribution highlights the broader principle that mere cooperation or delegated functions are insufficient unless the receiving state integrates the organ into its own administrative apparatus. This is in harmony with cases such as Pad v. Turkey, where cooperation between Turkish and Iranian border guards lacked operational integration of the relevant organ into Turkish command structures, thus precluding attribution (Pad and Others v. Turkey, 2007, para. 54). The Court's decision in X and Y also reinforces the 2001 Articles' requirement of "exclusive control" (ILC, 2001, Art. 8, para. 5) and demonstrates the Court's alignment with customary international law principles, rejecting distributive responsibility in favor of clear and hierarchical state accountability.

The "du facto Control" Criterion in Xhavara and Others v. Italy and Albania

The case of Xhavara and Others v. Italy and Albania shows that the Court adheres to the principle of "attribution based on practical control" in cases involving shared jurisdictional arrangements. In 1997, Italy conducted a maritime interdiction operation in Albania's territorial waters under a bilateral treaty aimed at curbing illegal migration. The applicants, survivors of a collision caused by an Italian navy vessel, alleged violations of Article 2 (right to life) and Article 3 (prohibition of torture) of the Convention. The Court declared the application inadmissible for lack of jurisdiction ratione personae with respect to Albania, holding that Italy bore "sole responsibility" for the conduct of its naval forces. The Court emphasized that while Albania had consented to Italy's presence under the treaty, Italy exercised "independent operational command" without Albanian oversight (Xhavara et al. v. Italy & Albania, 2001, para. 3). The Court (Xhavara et al. v. Italy & Albania, 2001, para. 4) stated: The cooperation agreement did not create any form of joint authority ... Italian vessels acted under the exclusive direction of their own authorities, which had full control over the methods and means employed.

This reasoning is also aligned with Article 6 of the 2001 Articles. The Court's rejection of shared responsibility here highlights its insistence on "concrete evidence of hierarchical or operational authority" as a prerequisite for attribution, rather than mere territorial or diplomatic consent.

Some scholars have interpreted Xhavara as a landmark in delimiting state accountability in joint border control regimes. Milanović (2020: 142) argues that the Court's focus on de facto control ensures that states cannot "outsource Convention obligations through treaties without transferring operational command". This accords with the Court's later practice in Hirsi Jamaa and Others v. Italy, where Italy was held responsible for interceptions of migrants in international waters because it exercised "continuous and exclusive control" over those intercepted (Hirsi Jamaa et al. v. Italy, 2012, para. 81). Similarly, in Medvedyev v. France, the Court emphasized that the interception of a vessel on the high seas by France constituted the exercise of "complete and exclusive control" sufficient to establish jurisdiction for Convention obligations (Medvedyev et al. v. France, 2010, para. 67).

Thus, the Court's decision in Xhavara reinforces the broader trend in its jurisprudence that attribution depends on "practical authority over specific acts", not abstract legal arrangements. As the ILC's commentary on the 2001 Articles (2001, Art. 6, para. 2) explains, "conduct of an organ placed at the disposal of a state by another state is only attributable to the former state if that organ acts in connection with the latter state's machinery." By dismissing Albania's responsibility despite its territorial sovereignty, the Court affirmed that compliance with the Convention cannot be diluted through broad or formal delegations of authority.

The "Exercise of Practical Authority" Criterion in Vearncombe v. the United Kingdom and Germany

The case of Vearncombe and Others v. the United Kingdom and the Federal Republic of Germany emphasizes the principle that "historical or political ties, such as occupation, do not automatically create shared responsibility under the European Convention on Human Rights without direct operational control". In this case, the applicants, residents of West Berlin, alleged that noise pollution from a British military firing range violated their rights under Article 8 of the Convention (right to respect for private life). The European Commission of Human Rights (hereinafter the European Commission) rejected the complaint against Germany and declared that the United Kingdom, as the occupying power under the Potsdam Agreement after World War II, bore sole responsibility. The European Commission emphasized that the firing range operated under "exclusive British military jurisdiction" and Germany had no authority to regulate the activities of that installation (Vearncombe et al. v. the UK & FRG, 1989, para. 1). The European Commission (Vearncombe et al., 1989, para. 1) concluded that: The United Kingdom's authority in this area arose not from any delegation of German sovereignty, but from its status as an occupying power under international law ... Germany cannot be responsible for acts outside its legal and operational control.

This reasoning is consistent with the ILC's 2001 Articles, which distinguish between de jure sovereignty and de facto control. Article 5 of the 2001 Articles provides that conduct is attributable to a state only where the entity in question exercises "governmental authority" on its behalf (ILC, 2001, Art. 5, para. 2). The European Commission's refusal to involve Germany highlights the necessity of "concrete evidence of operational authority" as a prerequisite for attribution, even in contexts of shared territorial or political history.

Some scholars have interpreted Vearncombe as an example of reinforcing the Convention's focus on "effective control over specific acts" rather than abstract legal or historical links. As Milanović (2020: 89) notes, "the Commission's decision demonstrates that occupation, while conferring certain jurisdictional prerogatives, does not diminish the occupying power's responsibility for its own acts." This principle was later affirmed by the Court in Al-Skeini, where the United Kingdom was held responsible for human rights violations in Basra, Iraq, on the basis of "effective control" as an occupying power (Al-Skeini, 2011, para. 149). Likewise, in Banković, the Court rejected claims of extraterritorial jurisdiction against NATO states for airstrikes in Serbia, emphasizing that "jurisdiction under Article 1 of the Convention is primarily territorial" unless a state exercises "public powers" through direct control (Banković, 2001, para. 71).

Thus, the Court's decision in Vearncombe reinforces a legal framework in which attribution of conduct depends on the exercise of "practical authority", not political status. As the ILC's commentary on the 2001 Articles (2001, Art. 6, para. 4) states, "conduct of a state organ ... is attributable to that state even if it acts outside its territory". In effect, by absolving Germany of responsibility, the European Commission affirmed that compliance with the Convention cannot be vicariously imposed through cooperative institutions or dispersed historical or territorial coalitions.

The "Direct Operational Control" Criterion in Drozd and Janousek v. France and Spain

The case of Drozd and Janousek v. France and Spain demonstrates the Court's strict adherence to the principle that attribution under Article 1 of the Convention requires direct operational control, not abstract or institutional influence (influence lacking actual and practical exercise of authority). The applicants, convicted by a court in Andorra composed of French and Spanish judges, alleged violations of Article 6 (right to a fair trial). The Court unanimously declared the application inadmissible and held that the judges acted under Andorran law "within their jurisdiction as Andorran judges" and that France and Spain exercised "no supervisory role" over judicial proceedings (Drozd & Janousek v. France & Spain, 1992, para. 110). The Court in this case (1992, para. 110) emphasized: The Convention does not require Contracting Parties to impose their standards on third states ... responsibility under Article 1 is limited to acts that occur within a state's own jurisdiction.

This reasoning of the Court also accords with Article 6 of the 2001 Articles and the ILC's commentary thereon. The majority of the Court rejected the applicants' argument that France and Spain, as Principality of Andorra, bore responsibility for ensuring compliance with the Convention, and emphasized (1992, para. 110) that "jurisdiction is not synonymous with political influence". Thus, the decision demonstrates the Court's reluctance to attribute responsibility on the basis of formal or historical relations lacking "concrete evidence of control over specific acts". This principle was later confirmed in Ilascu v. Moldova and Russia, where Russia's practical control over the Transnistrian region gave rise to responsibility (Ilascu et al. v. Moldova & Russia, 2004, para. 392).

Dissenting judges took the view that the unique constitutional role of France and Spain as Principality created a "positive obligation to ensure that Andorran courts complied with Convention standards" (Drozd & Janousek v. France & Spain, 1992, Joint Dissenting Opinion, para. 5). This minority view, invoking the "overarching influence" of the Principality, paralleled arguments seen in later cases such as Al-Skeini, where the exercise of authority based on occupation gave rise to jurisdiction (Al-Skeini, 2011, para. 149). However, as seen in Banković, the more restrictive approach of the majority in Drozd reflects the Court's broader reluctance to extend jurisdiction to "indirect or structural power" (Banković, 2001, para. 71).

Hence, in all the above cases it is clear that in the matter of attribution of responsibility, the Court, for better protection of human rights, prefers the existence of a practical relationship of "effective control" or "exercise of practical authority" over formal or apparent legal relations, i.e., a "formalistic" approach. Some scholars in this field have criticized this approach. Milanović (2020: 178) argues that the Court's judgment in Drozd, by ignoring the "legal" authority of the Principality to appoint Andorran judges, creates a "legal fiction" that may entail a duty to prevent systemic violations of fair trial. In contrast, Higgins (1994: 62) defends the majority's restraint, noting that "extraterritorial jurisdiction should remain exceptional to preserve state consent as the foundation of the Convention".

Thus, the Court's decision in Drozd crystallizes a continuing tension in the Court's practice: whether jurisdiction under Article 1 should reflect "effective control" or "joint legal authority". As the ILC's commentary on the 2001 Articles explains, "attribution depends on actual control, not formal status", a position consistently supported by the Court.

Exclusive Attribution and the Exception of Shared Responsibility

The Court shows a preference for "exclusive attribution" of responsibility, which reflects the principles set forth in the ILC Articles. Under this framework, wrongful conduct is attributed solely to the exercise of practical control over the act in question; as expressed by the Court in Al-Skeini, where the United Kingdom was deemed solely responsible for violations due to its effective control as an occupying power in Iraq (Al-Skeini, 2011, para. 149).

Here again we see that the Court's practice aligns with the principles set out in Article 6 of the 2001 Articles. As also observed in Banković, where attribution to NATO states for airstrikes in Serbia was avoided in the absence of their "effective control" over the relevant territory, the Court has consistently rejected distributive responsibility based on abstract authority (Banković, 2001, para. 71). However, where a state independently breaches subsidiary obligations, such as failing to prevent violations by another state in its territory, the Court recognizes shared responsibility. For example, in El-Masri v. Macedonia, that state was held responsible for its complicity and involvement in the CIA rendition operation, because it "facilitated the applicant's torture by handing him over to US authorities despite knowledge of the risk" (El-Masri v. FYROM, 2012, para. 211). This is consistent with Article 16 of the 2001 Articles, which prohibits states from aiding or assisting internationally wrongful acts (ILC, 2001, Art. 16, para. 3). The Court's practice thus draws a narrow path: attribution remains exclusive to the controlling state, but subsidiary obligations (e.g., non-cooperation) may give rise to parallel responsibility.

The Court's nuanced approach is evident in Drozd, where the majority absolved France and Spain of responsibility for Andorran court decisions, but at the same time indicated that enforcement of unfair judgments might entail responsibility (Drozd & Janousek, 1992, para. 110). This illustrates the distinction between "primary attribution" (exclusively to the acting state) and "secondary obligations" (e.g., refraining from enforcing unlawful acts). As Milanović (2020: 202) notes, "shared responsibility arises not from attribution itself, but from a state's independent failure to discharge its negative duty to avoid complicity in wrongful conduct". This principle of "enforcement liability" has been applied in later cases such as Pellegrini v. Italy and Avotins v. Lithuania (Van Hoek, 2018: 429; Hess, 2015: 178-180).

Similarly, in Al Nashiri v. Romania, Romania was held responsible not for the United States' infliction of torture, but for its own failure to prevent it on its territory, by hosting secret CIA detention facilities (Al Nashiri v. Romania, 2018, para. 674; Bianchi, 2019: 441). The ILC's commentary on the 2001 Articles reinforces this, noting that "a state's knowledge of the circumstances" of another state's wrongful conduct entails a duty to refrain from cooperation (ILC, 2001, Art. 16, para. 5).

Nevertheless, it seems important to note that even if the specific conduct of an organ placed at another state's disposal falls outside the immediate sphere of influence of the transferring state, the transferring state may still retain ultimate authority over that organ, or may adopt a more general and indirect approach to the other state's activities. In this regard, it is essential to note that the rule of exclusive attribution does not necessarily prevent the transferring state from incurring international responsibility for its own acts or omissions in connection with conduct attributable to the other state. Indeed, a state to which specific conduct cannot be directly attributed may nonetheless incur responsibility for acts performed on the occasion of, or in relation to, that conduct; for example, if the state is passive in relation to the unlawful conduct of another state occurring in its territory. Thus, the rule of exclusive attribution does not automatically preclude multiple responsibilities: the transferring state may still incur responsibility for its own separate acts in relation to the functioning of the lent organ.

Therefore, the Court's practice strikes a balance between the exclusive attribution model, in other words, the principle of independent responsibility set forth in the ILC's 2001 Articles, and the pragmatic recognition of joint duties under the Convention, while ensuring that states cannot escape accountability by outsourcing violations, and at the same time maintaining the primacy of "effective control" as the threshold for attribution.

Gaps and Dissenting Views

The Court's insistence on "exclusive direction" as a prerequisite for attribution has attracted sustained criticism for overlooking structural power imbalances that enable states to exercise practical control while evading accountability. In Drozd, dissenting judges challenged the majority's refusal to involve France and Spain as Co-Princes of Andorra, arguing that the Constitution inherently obligated the states to ensure "respect for fundamental rights" within institutions under their authority (Drozd & Janousek, 1992, Dissenting Op., para. 5). The dissenting judges (1992, para. 7) emphasized: Absolving states simply because they refrain from daily interference ... ignores the reality of their pervasive legal authority to shape institutions and norms.

This criticism aligns with the foundational work of Roberto Ago on state responsibility, which warns that a superficial focus on operational control risks legitimizing "indirect domination through legal or political structures" (ILC, 2001, Art. 17, para. 2). The dissenting logic in Drozd is echoed in Cyprus v. Turkey, where Turkey was held responsible for human rights violations in Northern Cyprus due to its "overall control" despite delegating administration to local authorities (Cyprus v. Turkey, 2001, para. 77). In contrast, the restrictive jurisdiction framework of the majority in Drozd created what some have termed a "responsibility vacuum", enabling powerful states to outsource rights-violating actions while retaining structural authority (De Schutter, 2016: 214; Hakimi, 2018: 718; Gondek, 2009: 225-228).

The Court's refusal to address indirect influence is particularly problematic in contexts of economic coercion or political dependency. As Milanović (2020: 205) notes, the Court's practice "does not take into account neo-colonial relations in which states exercise control through financial leverage rather than direct command". For example, in Al-Skeini, the Court recognized the United Kingdom's responsibility in Iraq on the basis of territorial occupation (Al-Skeini, 2011, para. 149), but has yet to address cases where states exercise control through civilian means, such as conditioning aid on compliance with political positions.

This gap contrasts with the Inter-American Court's approach in its advisory opinion on Environment and Human Rights, which held states responsible for extraterritorial harm arising from corporate activities they financially supported (Environment and Human Rights, 2017, para. 104; Knox, 2020: 1; Boyd, 2017: 145-148). The Court's over-reliance on the effective control or practical authority test in attribution also overlooks the ILC's broader concept of "direction and control" under Article 17 of the 2001 Articles (ILC, 2001, Art. 17, para. 6). The Commission's approach in this regard is that the state exercising direction and control is considered responsible for the entire act committed; for example, "Bruno Simma is among prominent jurists who consider that the state or international organization under direction and control is not deemed responsible for the entire act committed" (Haddadi & Setayeshpour, 2021: 11). Another view in this regard holds that the state under direction and control is also responsible for the entire act, which in some legal systems is interpreted as joint and several liabilities. It should also be noted that the only difference between the concept set out in Article 17 of the 2001 Articles concerning direction and control of another state and Article 18 thereof concerning coercion of another state to commit a wrongful act lies in the degree and threshold of exercise of direction and control. If this degree is such that the state under direction and control is effectively deprived of its own will, then the issue of coercion arises (Haddadi & Setayeshpour, 2021: 12). In a brief reference to the difference between these two approaches, it can be said that in the first approach, "judicial decision-making is a rule-based activity, and in an extreme model, the judge is nothing but an operator of a large machine. From their perspective, adjudication is a systematic and logical act in which the judge applies legal principles and rules to a case in a deductive manner" (Mojtahedzadeh, 2023: 91). But the main features of the second approach, namely legal realism, "include a focus on universal shared values, protection of cultural diversity, and broad applicability in various contexts and subjects" (Mojtahedzadeh, 2023: 99).

As long as the Court does not grapple with these structural dynamics, its attribution framework risks perpetuating what the dissenters in Drozd called "governance without responsibility", allowing powerful states to wield influence while avoiding accountability for systemic violations.

Conclusion

The European Court of Human Rights' practice on state responsibility, particularly in cases concerning acts performed "on behalf of" another state, reflects strict adherence to the principle of "exclusive direction and control" set forth in Article 6 of the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts. This framework requires concrete evidence of hierarchical or operational authority to attribute conduct to a state, with emphasis on functional integration and direct direction of specific acts. Cases such as X and Y v. Switzerland, Xhavara v. Italy and Albania, and Drozd and Janousek v. France and Spain demonstrate the Court's insistence on formal and operational attribution criteria, ensuring clarity in the causal relationship between the wrongdoing state and the wrongful act, and preventing diffuse or distributive accountability. By aligning with the ILC's emphasis on "effective control", the Court has protected state sovereignty while rejecting responsibility based on abstract political or historical ties, as observed in Vearncombe v. the United Kingdom and Germany and Banković v. Belgium.

Nevertheless, this approach has attracted significant criticism for overlooking "structural power imbalances" and indirect influence. Dissenting opinions in cases such as Drozd and scholarly critiques, including those of Milanović and Olivier De Schutter, argue that the Court's rigid focus on "exclusive direction" risks legitimizing accountability gaps. For instance, states can outsource rights-violating actions through treaties or economic coercion while retaining practical control, as illustrated in El-Masri v. Macedonia (complicity in CIA wrongful acts) and Al Nashiri v. Romania (hosting secret detention facilities). The Inter-American Court's broader approach in its advisory opinion on Environment and Human Rights, which recognizes responsibility for extraterritorial harm arising from activities of statelinked corporations, stands in stark contrast to the European Court's reluctance to address indirect domination.

The Court's practice highlights the tension between "legal formalism", meaning strict adherence to the formal appearance of international legal rules and excessive reliance on clarity of causal relations between wrongdoer and wrongful act, and "practical accountability", meaning a result-oriented approach to protecting and ensuring the implementation of human rights. While the Court's adherence to the ILC's framework ensures its grounding in international law, it risks perpetuating a "responsibility vacuum" in contexts of shared governance or neo-colonial influence. To address this, a paradigm shift towards recognizing "complementary obligations" and shared responsibility is necessary. This entails acknowledging states' duties to prevent harm arising from their influence or complicity, even in the absence of direct operational control, as suggested by the ILC's broad interpretation of "direction and control" in Article 17 of the 2001 Articles. Such an evolution would align the Court with progressive human rights trends and ensure robust protection against systemic violations in an era of transnational governance and interdependence.

Another noteworthy point is that, as stated, the Court's practice has applied the criteria of "exclusive direction and control" across diverse cases, but due to the different nature of complex legal and operational scenarios, as well as the historical and political contexts of each matter, it has drawn on various terminology in articulating these criteria. In its documents, the Court has used terms and phrases such as "exclusive control", "practical control", "exercise of practical authority", "direct operational control", and other similar concepts as appropriate to each case, the common denominator of all being the concept of "exclusive direction and control" which is also the criterion set out in Article 6 of the 2001 Articles.

Ultimately, it can be said that while the strict attribution criteria in the Court's practice provide appropriate legal certainty, they must evolve to address the realities of modern state cooperation. Striking a balance between formal principles and the pragmatic recognition of "effective influence" will be crucial to closing accountability gaps and upholding the Convention's promise of universal human rights protection.

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