

Concurrent Responsibilities under the European Convention on Human Rights

The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities

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'The Court has established jurisdiction in respect of the Netherlands. It is not called upon to establish whether the United Kingdom, another State Party to the Convention, might have exercised concurrent jurisdiction.' (*Jaloud v The Netherlands* App no 47708/08 (ECtHR, 20 November 2014) para 153).

1. Introduction

There has been an increase, as of late, in the number of cases in which more than one State at a time exercises effective control over the same people and, hence, in which those numerous States can exercise concurrent jurisdiction over the same human right holders.¹ What this means is that States can increasingly acquire concurrent

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¹ Interestingly, there has been an increase of circumstances in which this has occurred, or can occur, but not necessarily of cases so decided by the ECtHR, for reasons I will explain in this chapter. When the chapter refers to decisions of the ECtHR, therefore, it is often in order to examine their sets of facts and their potential, and not necessarily how they were decided in the end.

human rights duties towards the same people and, in turn, concurrent responsibilities in case of violation of their duties.

A first set of cases are those in which one State or more exercises extraterritorial jurisdiction over a territory over which, at the same time, another State exercises territorial jurisdiction. Examples abound in practice, ranging from peace operations abroad² to military occupation.³ The second group of cases derives from the increasingly transnational circumstances of certain people, and in particular from circumstances in which the same people move from the territorial jurisdiction of one State to that of another—physically or virtually. Examples are numerous and include renditions,⁴ trafficking,⁵ voluntary or forced migration and deportation,⁶ and cyberactivity.⁷ A third group of cases stems from interstate cooperation and pertains to the coordinated territorial jurisdiction of many States (and sometimes even an international organization) under a common institutional umbrella. These are cases that occur in particular in the context of joint State activities, each over its own territory, under the terms of an international agreement⁸ or within an international organization;⁹ an example is the European Union (EU)¹⁰ the jurisdiction of which may itself overlap with one or many of its member States.

² See, eg *Hassan v The United Kingdom* App no 29750/09 (ECtHR, 16 September 2014); *Jaloud v The Netherlands* App no 47708/08 (ECtHR, 20 November 2014).

³ See, eg *Loizidou v Turkey* App no 15318/89 (ECHR, 18 December 1996) ECHR 1996-VI 2216; *Ilaşcu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004); *Catan and Others v The Republic of Moldova and Russia* [GC] App nos 43370/04, 8252/05, and 18454/06 (ECtHR, 19 October 2012); *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 16 June 2015); *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 16 June 2015).

⁴ See, eg *El-Masri v The Former Yugoslav Republic of Macedonia* [GC] App no. 39630/09 (ECtHR, 13 December 2012); *Al Nashiri v Poland* App no 28761/11 (ECtHR, 24 July 2014).

⁵ See, eg *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010).

⁶ See, eg *MSS v Belgium and Greece* [GC] App no 30696/09 (ECtHR, 21 January 2011).

⁷ See, eg *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015). See for a discussion, Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 *Harvard International Law Journal* 81.

⁸ See, eg *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 June 1992); *Sari and Çolak v Turkey* App nos 42596/98 and 42603/98 (ECtHR, 4 April 2006).

⁹ See, eg *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v Ireland* [GC] App no 45036/98 (ECtHR, 30 June 2005); *Behrami and Behrami v France and Saramati v France, Germany and Norway* App nos 71412/01 and 78166/01 (ECtHR, 2 May 2007); *Al-Jedda v The United Kingdom* [GC] App no 2702/08 (ECtHR, 7 July 2011); *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012); *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 26 November 2013).

¹⁰ Because the accession of the EU to the ECHR has now been stalled by the CJEU's negative opinion (Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU* (CJEU, 18 December 2014)), this chapter focuses on States solely and their jurisdiction, duties, and responsibilities under the ECHR. A lot of what is discussed in the chapter does apply to international organisations, however, once they have what it takes to acquire human rights jurisdiction and human rights duties (see, eg, Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution' (2015) 32 *Social Philosophy & Policy* 244; Samantha Besson, 'Individual and State Liability for an International Organization's Responsibility—The Challenge of Fairness Unveiled' (2017) VI/1 *Italian Journal of Legal Philosophy* 51). Then, the issues raised by concurrent human rights jurisdictions, duties, and responsibilities of States and international organizations will most likely become a core concern of international human rights law. On the different types of potential duty-bearers under international human rights law and their concurrence with duty-bearing States, see also Wouter Vandenhoe and Willem van Genugten, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime' in Wouter Vandenhoe (ed), *Challenging Territoriality in Human*

The recent increase in the number of cases of concurrent jurisdiction raises new questions for international human rights law, and especially for the European Convention on Human Rights (ECHR).¹¹ In particular, these cases raise questions about how one should articulate the concurrent effective control and hence jurisdictions of different States, how one should specify and allocate their concurrent duties stemming from this concurrence of jurisdiction, and, finally, how one should attribute and then allocate concurrent responsibilities when concurrent duties have been violated.

These three issues arise as consecutive questions in the European Court of Human Rights' (ECtHR's) reasoning in any human rights case implicating more than one State. Of course, concurrent jurisdiction will not necessarily give rise to concurrent duties, on the one hand, and concurrent duties will not necessarily give rise to concurrent responsibilities, on the other. However, in some cases of concurrent responsibilities, the jurisdiction of the States in question and their duties are concurrent, thus making the three questions not only relevant per se, but relevant to address in connection to one another. Understanding how human rights jurisdictions, duties, and responsibilities should be articulated in cases of concurrence is also a pressing issue in terms of global justice more generally.¹² Indeed, what is at stake in these cases are the duties owed to an individual human right holder out of a given set of circumstances, and the remedies that arise from their violation to rectify the situation, and this should be a concern for all the duty-bearing States if there are more than one. More particularly, the specification and allocation of the human rights duties at stake for each State will depend on how many States exercise jurisdiction over the same people at the same time, the threats they pose to the latter's protected interests, and the States' respective capacities to protect the individuals. Subsequently, the responsibilities to cease the violation, and to prevent and remedy it, need to be coordinated among the responsible States to avoid overburdening one of the States with reparations at the advantage of others (unjust enrichment) or, conversely, to the disadvantage of the victim of the human rights violation whose full injury may not be compensated in the end.

Importantly, despite being connected in human rights reasoning, the three issues (jurisdictions, duties, and responsibilities), and the three corresponding albeit distinct

Rights Law—Building Blocks for a Plural and Diverse Duty-Bearer Regime (Routledge 2015); Wouter Vandenhoe, 'Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime' in Wouter Vandenhoe (ed), *Challenging Territoriality in Human Rights Law—Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015).

¹¹ This chapter focuses exclusively on ECHR law. It is the international human rights system whose interpretation of the notion of jurisdiction, whether territorial or extraterritorial, is the most advanced, and many analogies can be drawn in other international human rights regimes. See also Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857, 860–61; Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 10).

¹² On this issue, see Samantha Besson, 'La Pluralité d'États Responsables—Vers une Solidarité Internationale' (2007) 1 *Revue Suisse de Droit International et de Droit Européen* 13, 26; Samantha Besson, 'La Responsabilité Solidaire des Organisations Internationales et des États—Une Institution Négligée' in Alain Supiot (ed), *La Responsabilité Solidaire* (Collège de France 2018).

roles of 'control' in their respective assessment,¹³ should be carefully distinguished conceptually and kept separate as three distinct steps in the analysis. Of course, many primary duties in international law are specified by reference to previous responsibilities (secondary duties), thus blurring the idea that primary duties are necessarily specified *ex ante*. All the same, too often in the past, the issues of jurisdiction, duties, and responsibilities have been conflated in the ECtHR's case law at the price of clarity on the exact implications of concurrent jurisdiction for the allocation not only of human rights duties, but also of responsibilities. This has been the case, for instance, with the conflation between the assessment of the State's control over the individual right holders needed for jurisdiction to be established, and of the control over individual agents required for the attribution of their conduct to the State, whether this occurs when assessing that State's jurisdiction or when establishing its responsibility at a later stage.¹⁴ The same may be said about the conflation between the assessment of the control needed for State jurisdiction to arise and of the control required for the State to acquire positive duties, and hence responsibilities, in the case that these duties are violated.¹⁵ Of course, this can be explained by the ambivalent role of the notion of 'control' in the reasoning pertaining to all three questions or steps. Addressing these three questions together in the present chapter can hopefully contribute to clarifying not only their ties, but also their differences.

This question of concurrent or 'shared' responsibilities¹⁶ is *en vogue* among international lawyers.¹⁷ Studies of the subject in international human rights

¹³ Human rights 'jurisdiction' *qua* effective control is to be distinguished from: (i) the competence or title of a State in international law ('jurisdiction' in general international law); (ii) the right to judge of a tribunal or a State; (iii) the effective control necessary to acquire positive duties (of diligence); (iv) the effective control over organs (Articles 4–5 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)) or private agents (Article 8 ARSIWA) required for the attribution of conduct in the context of international responsibility. See also Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 866–68.

¹⁴ See, most recently, the confusions in *Chiragov* (n 3) paras 186 and 201 or in *Jaloud* (n 2) paras 154–55. For a critique, see the concurring opinion of Judge Spielmann in *Jaloud* (n 2) paras 3–7; the concurring opinion of Judge Motoc in *Jaloud* (n 2). See also Marko Milanovic, 'Jurisdiction, Attribution and Responsibility in *Jaloud*' (EJIL: *Talk!* 11 December 2014) <<http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>> accessed 5 April 2016; Marko Milanovic, 'The Nagorno-Karabakh Cases' (EJIL: *Talk!* 23 June 2015) <<http://www.ejiltalk.org/the-nagorno-karabakh-cases/>> accessed 5 April 2016; Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?' (2014) 53 *The Military Law and the Law of War Review* 287; Crawford and Keene, in this volume.

¹⁵ See, eg, *Sargsyan* (n 3) para 140.

¹⁶ 'Concurrent responsibilities' are understood here as stemming from the contribution of many States to the same injury, (i) whether this occurs through the violation of the same duty or not, and (ii) through the same wrongful act or not. When concurrent responsibilities are caused by the same wrongful act, they are usually referred to as 'shared responsibilities' *stricto sensu*, even though the latter term is sometimes used to refer to all kinds of concurrent responsibilities independently of the wrongful act. For reasons of clarity, I will be referring to concurrent responsibilities in this chapter. Note, of course, that the 'responsibilities' at stake in this chapter are remedial responsibilities arising from the breach of an international human rights law duty and not the unallocated *ex ante* 'responsibilities for human rights' that arise from international human rights law: on the distinction, see the discussion in section 3 and Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 10).

¹⁷ See, eg, John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale Journal of International Law* 225; Besson, 'La Pluralité d'Etats

law¹⁸ and in ECHR law¹⁹ remain scarce, however. So too does the ECtHR's case law, for it has remained extremely cautious in the matter; this is quite surprising given the number of its cases raising the issue.²⁰ The aim of this chapter is to consider the conformity of the ECHR regime of concurrent responsibility with the general international law of responsibility.²¹ Unlike other areas of international-responsibility law addressed in this volume,²² however, it is not clear that there is much general international law on concurrent responsibility outside of specific regimes—besides Article 47 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), of course, which applies to the ECHR *qua* relevant secondary rules on concurrent responsibility, albeit within the limits of the *lex specialis* principle. It may be better, therefore, to turn things the other

Responsables' (n 12); Roger P Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 *Pepperdine Law Review* 233; André Nollkaemper and Dov Jacobs 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359; André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law—An Appraisal of the State of the Art* (CUP 2014); Annemarieke Vermeer-Künzli, 'Invocation of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law—An Appraisal of the State of the Art* (CUP 2014); Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law—An Appraisal of the State of the Art* (CUP 2014); Besson, 'La Responsabilité Solidaire' (n 12).

¹⁸ See, eg, Vandenhole, 'Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime' (n 10); Wouter Vandenhole, 'Obligations Extraterritoriales des Droits de l'Homme: Bilan et Perspectives/Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward' (2013) 5 *Journal Européen des Droits de l'Homme/European Journal of Human Rights* 804, 827ff; Ashfaq Khalfan, 'Division of Responsibility amongst States' in Malcolm Langford et al (eds), *Global Justice, State Duties—The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012).

¹⁹ See, eg, Benedetto Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004); Caitlin A Bell, 'Reassessing Multiple Attribution: the International Law Commission and the *Behrami* and *Saramati* Decision' (2010) 42 *New York University Journal of International Law and Politics* 502; Maarten den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 *Journal of International Dispute Settlement* 361; Maarten den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) 60 *Netherlands International Law Review* 411.

²⁰ Of course, some of these questions have already given rise to (largely pre-emptive) solutions with respect to the European Union. See, eg, Articles 1(4) and (6) and Article 3(7) of the 2013 Draft Accession Agreement (DAA) between the EU and the ECHR and the *ex ante* exclusion of, respectively, concurrent jurisdiction of the EU and its member States under the ECHR, the joint attribution of conduct to them, and (in part, at least) the allocation of their shared responsibilities by the ECtHR.

²¹ See *Banković and Others v Belgium and Others* [GC] App no 52207/99 (ECtHR, 12 December 2001) para 57: 'The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty.'

²² See Crawford and Keene in this volume; Malcolm D Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility* (n 19).

way around and consider concurrent-responsibility law under the ECHR itself as developing the general international law of State responsibility on the very particular and controversial issue of concurrent responsibility.²³ In fact, the few basic principles and conditions of concurrent responsibility available in general international law are such that, as I will argue, the ECHR is one of the few contexts in which they could be fulfilled. All this makes it even more important, therefore, for the ECtHR to actively monitor developments on concurrent jurisdictions, duties, and responsibilities in its regime of international responsibility.

The structure of my argument in this chapter is four-pronged. After a few reminders about the notion and role of jurisdiction in international human rights law, the chapter discusses concurrent human rights jurisdictions, concurrent human rights duties arising from concurrent human rights jurisdictions, and concurrent responsibilities in the case of violation of concurrent human rights duties.

2. Human Rights Jurisdiction in a Nutshell

A few reminders about the notion of human rights jurisdiction under Article 1 ECHR are in order because jurisdiction sets the framework in which the concurrence of jurisdictions is conceptualized and, in turn, conditions the emergence of concurrent duties and, possibly, concurrent responsibilities.

Human rights jurisdiction under Article 1 ECHR is pivotal to the application of the ECHR. ECHR rights apply and give rise to duties, provided there is a relationship of jurisdiction between their potential right holders and their potential duty bearers, ie, between some private parties and one (or more) State Party (and perhaps the EU one day).²⁴ In a nutshell, and based on the ECtHR's case law, jurisdiction may be defined as (i) effective, (ii) regular, and (iii) normative control by the State over a person—whether she is a national, a resident, or neither.^{25 26}

²³ See, on the strategic interpretation of the rules of international-responsibility law by the ECtHR, Evans (n 22) 160; Crawford and Keene in this volume. See also den Heijer, 'Shared Responsibility' (n 19).

²⁴ Generally, one may consider that the applicability of EU fundamental rights already depends on the jurisdiction of the EU and that the latter can be both territorial and extraterritorial. Of course, the issue is not addressed expressly in the EU Fundamental Rights Charter. It follows, however, indirectly from Articles 1(4) and (6) of the 2013 DAA. See also Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 10).

²⁵ See *Al-Skeini and Others v The United Kingdom* [GC] App no 55721/07 (ECtHR, 7 July 2011) paras 75–76.

²⁶ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 862–66 and 872–76. See, more generally, Vandenhoe, 'Extraterritorial Human Rights Obligations' (n 18); Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 Chinese Journal of International Law 639; Malcolm Langford, Wouter Vandenhoe, Martin Scheinin, and Willem van Genugten (eds), *Global Justice, State Duties—The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2012); Marko Milanovic, *Extraterritorial Application of Human Rights Treaties—Law, Principles, and Policy* (OUP 2011); Olivier de Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic Yearbook of International Law 185.

In terms of scope, jurisdiction is 'territorial' when it applies inside the State's national boundaries and on its territory. Its jurisdiction can also be 'extraterritorial', however, when it applies outside of those boundaries and on another State's territory—including territory without an international title and, hence, without jurisdiction in the general international-law sense of the term.²⁷ Extraterritorial jurisdiction is exercised either through 'personal' control over a certain person or group of people who become human right holders²⁸ or through 'spatial' control over a territory outside national territory and hence over the people situated on that territory.²⁹ The overall preference given to personal over spatial jurisdiction in the case law on extraterritorial jurisdiction may be explained by reference to the conceptual and normative complexity of extraterritorial spatial control and, hence, ambivalence about a form of 'territoriality in extraterritoriality'.

Jurisdiction is best understood as a threshold concept: it is not gradual, even if the control that constitutes it can be, so that, once a certain degree of effective control has been reached, there is jurisdiction and ECHR rights apply. Above that threshold, when control varies, the duties and responsibilities may also, but not jurisdiction itself, provided that a minimal degree of effective control was given in the first place—this is even presumed in some cases, as we will see. When that minimal effective control is lost at a later stage, however, two situations should be distinguished. In the case of extraterritorial jurisdiction, the loss of control implies the loss of jurisdiction *tout court* and the loss of the extraterritorial human rights duties it gave rise to. In the case of territorial jurisdiction, however, jurisdiction is not lost through the loss of effective control, but the corresponding human rights duties that arise from it are affected. They are 'limited', according to the ECtHR, to the positive duty to regain effective control so as to be able to bear the other human rights duties again, on the one hand, and to the positive duty to take measures to ensure respect for other individual human rights, on the other.³⁰

The evidence needed to establish or disestablish effective control, and hence jurisdiction, varies depending on whether jurisdiction is territorial or extraterritorial. Territorial jurisdiction is presumed: there is a presumption of control of a State over all people situated in its national territory.³¹ The degree of evidence it takes to rebut

²⁷ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 868–70. See, eg, *Jaloud* (n 2) para 142.

²⁸ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 874–76. See, eg, in the case of a security patrol: *Al-Skeini* (n 25) paras 137 and 142; in the case of detention: *Hassan* (n 2) para 76; or, in the case of a checkpoint: *Jaloud* (n 2) para 152; *Pisari v Moldova and Russia* App no 42139/12 (ECtHR, 19 October 2015).

²⁹ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 874–76. See, eg, in the case of the Turkish occupation in Cyprus: *Loizidou* (n 3) paras 56–57; and, in the case of the support given by Armenia to the (territorial) administration of the Nagorno-Karabakh Republic on Azerbaijan territory: *Chiragov* (n 3) para 186.

³⁰ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 862–64. See, eg, *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) paras 137–39; *Ilaşcu* (n 3) paras 329–31; *Catan* (n 3) paras 109–10; *Sargyan* (n 3) paras 130–31 and 139–49.

³¹ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 865 on the ambivalent normative *cum* descriptive dimensions of jurisdiction and their implications for the presumption and, arguably, why it is so hard to rebut.

that presumption is also very high in practice.³² Extraterritorial jurisdiction, by contrast, has to be established positively outside of a State's own territory. Moreover, the practice shows that the threshold of evidence is quite low.³³ This applies both to extraterritorial personal control and to extraterritorial spatial control, the latter being easier to establish comparatively, but more rarely granted for the political reasons mentioned before. The latter implies, indeed, the return of a certain degree of 'territoriality in extraterritoriality', but without reference to official State boundaries this time. Its perpetuation, especially through the protection of a legal institution like human rights jurisdiction, may threaten official State boundaries in the long term.³⁴ This, in fact, explains why discussions about the potential extension of the rebuttable presumption of jurisdiction to extraterritorial-spatial jurisdiction, especially when territorial control is authorized by international law, are usually met with circumspection.³⁵

3. Concurrent Jurisdictions

Concurrent jurisdictions, ie, the concurrence of more than one State's jurisdiction over the same people and, hence, human right holders, can occur in various constellations.

Most of the cases pertain to the concurrence of the territorial and extraterritorial jurisdictions of different States over people who are controlled by those States at the same time, eg, in the case of military occupation.³⁶ However, one could also conceive of the concurrence of territorial jurisdictions of different States whose distinct control over their territory enables them to control the same people in transnational circumstances in which these people move, either physically or virtually (due, for example, to cyberactivity, renditions,³⁷ trafficking,³⁸ or migration).³⁹ Finally, one could imagine the concurrence of extraterritorial jurisdictions of different States controlling people at the same time in a foreign territory, eg, in the case of multilateral peace operations abroad.⁴⁰ As a matter of fact, all three constellations can overlap.⁴¹

³² See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 876–78. See, eg, *Ilascu* (n 3) paras 329–30; *Catan* (n 3) paras 109–10; *Sargsyan* (n 3) paras 130–31 and 139–49.

³³ See, eg, *Chiragov* (n 3) paras 168–86 on the evidence required to establish extraterritorial jurisdiction, especially in contrast with the evidence required to rebut the presumption of territorial jurisdiction in *Sargsyan* (n 3) paras 131, 140, and 148. For a critique, see Milanovic, 'The Nagorno-Karabakh Cases' (n 14), and the partly concurring, partly dissenting opinion of Judge Ziemele in *Chiragov* (n 3) para 5.

³⁴ Some authors go as far as to refer to 'extraterritorial States' in this context, eg, Vandenhole, 'Extraterritorial Human Rights Obligations' (n 18) 833.

³⁵ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 877. See also Antal Berkes, 'The Nagorno-Karabakh Conflict Before the European Court of Human Rights: Pending Cases and Certain Forecasts on Jurisdiction and State Responsibility' (2013) 52 *The Military Law and the Law of War Review* 379, 419–33.

³⁶ See, eg, *Loizidou* (n 3); *Ilascu* (n 3); *Catan* (n 3); *Sargsyan* (n 3).

³⁷ See, eg, *El-Masri* (n 4); *Al Nashiri* (n 4). ³⁸ See, eg, *Rantsev* (n 5).

³⁹ See, eg, *MSS* (n 6). ⁴⁰ See, eg, *Hassan* (n 2) paras 78–79; *Jaloud* (n 2).

⁴¹ See, eg, *Al-Saadoon and Mufdhi v The United Kingdom* App no 61498/08 (ECtHR, 2 March 2010).

Depending on the degree of control exercised in these different constellations of jurisdiction, the relations between the different States' jurisdictions can vary. In some cases, the control of one State is exercised in the place of another that has lost effective control (one may refer to this as 'complementary jurisdiction'),⁴² whereas in other cases the States' respective degrees of control may all be effective on the same territory (one may refer to this as 'joint jurisdiction'), or in their respective territories (one may refer to this as 'competing jurisdiction').⁴³ The first case is likely to be more common. Indeed, State jurisdiction, like political and legal authority, is in principle exclusive (of that of another State)—at least when it is territorial because of its claim to be legitimate.⁴⁴ As a matter of fact, the different States' degrees of control and hence of jurisdiction may be actively coordinated by the respective States so as to complement one another,⁴⁵ including through delegation or a lease, for instance.

There are conceptual and practical obstacles barring the road to the recognition and development of concurrent jurisdictions under ECHR law.

Conceptually, the idea of concurrent jurisdictions⁴⁶ is in tension with the unicity that is required among the conditions for the legitimate authority of a State and its laws from a human rights perspective and hence from a democratic perspective.⁴⁷ The reason lies in the mutual ties between democracy and human rights in the ECHR system. In principle, indeed, ECHR rights are approached as the rights of the members of a democratic community⁴⁸ and are the rights that constitute the equal political status of their right holders. What this implies, in turn, is the unicity of the democratic community as a guarantee that its subjects, and by extension their rights, can be equal.⁴⁹ This explains why the duality, or even the plurality, of jurisdictions seems to be in contradiction at first with (the unicity of) human rights and democracy.

This democratic and egalitarian dimension of ECHR rights actually explains the importance given to the unicity of jurisdiction in human rights practice. This

⁴² See, eg, *Ilascu* (n 3) paras 329–30; *Catan* (n 3) paras 109–10.

⁴³ See, eg, *Hassan* (n 2) para 78; *Jaloud* (n 2) para 153.

⁴⁴ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 864–66 and 878.

⁴⁵ See, eg, the United Kingdom and the United States in *Hassan* (n 2) paras 78–79; or the Netherlands, the United Kingdom, and Iraq in *Jaloud* (n 2) paras 149–51.

⁴⁶ This conceptual unease starts, in fact, with using the plural of 'jurisdiction'.

⁴⁷ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 882–23 and 864–66.

⁴⁸ See, eg, *Zdanoka v Latvia* [GC] App no 58278/00 (ECtHR, 16 March 2006), para 98. See, on human rights and democracy under the ECHR, Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 863–64, 866 and 882–83. More generally, the identity between the States' jurisdiction and that of their peoples and the latter's importance in the case of regime change have been confirmed by the United Nations Human Rights Committee in its General Comment no 26 (8 December 1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1 para 4.

⁴⁹ See esp *Mathieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECtHR, 2 March 1987) paras 52–54; *Sejdić and Finci v Bosnia and Herzegovina* [GC] App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009) para 50. On human rights and federalism, see Samantha Besson, 'Le Droit International et Européen des Droits de l'Homme et la Forme Politique Fédérale—Je t'aime, moi non plus' in Samantha Besson and Eva Maria Belser (eds), *La Convention Européenne des Droits de l'Homme et les Cantons—Die Europäische Menschenrechtskonvention und die Kantone* (Schulthess 2014).

is, for instance, how one could read the general positive duty of Moldova to regain effective control despite Russia's extraterritorial control and jurisdiction on its territory.⁵⁰ This is also how one could explain the possibility for the exceptional limitation of the human rights duties of a State of territorial jurisdiction like Moldova: it is temporarily 'compensated' by the extraterritorial jurisdiction of Russia.⁵¹ Conversely, human rights unicity is also how one could interpret the lack of recognition of Serbia's (apparently extraterritorial) jurisdiction in Kosovo.⁵²

Practically, too, there are some obstacles to the recognition of the concurrent jurisdictions of different States under the ECHR. Most of them are related to the procedural requirements for the admissibility of a case before the ECtHR.⁵³

First, all States whose jurisdiction is at stake should be parties to the ECHR. This is a first consequence of the indispensable third-party rule.⁵⁴ It has been invoked in the cases *Behrami* and *Saadi* regarding non-ECHR States Parties.⁵⁵ Interestingly, however, the principle has not been applied too strictly by the ECtHR in Article 3 ECHR extradition or expulsion cases⁵⁶ or in international organizations cases.⁵⁷ This is because what is at stake is the respect of the ECHR by the main State of jurisdiction and not the actual responsibility of another third-party State or an international organization, thus enabling the Court to assess the lawfulness of the latter's conduct, if it is necessary to establish the responsibility of a State Party to the Convention. Secondly, all States whose jurisdiction is at stake should be parties to the individual procedure before the ECtHR. This is easy to remedy by the applicants, of course. However, in practice, this has not been done often,⁵⁸ mainly due to the different admissibility conditions to establish each State's jurisdiction, and especially the effectiveness of the control each of them exercises over the victim.⁵⁹ As a result, the main procedural obstacle to

⁵⁰ See *Catan* (n 3) paras 109–10 and 145. See also, more recently, *Sargsyan* (n 3) paras 130–31 and 139–49.

⁵¹ See *Sargsyan* (n 3) para 148: '[t]he acceptance that the territorial State had only limited responsibility under the Convention was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention' (emphasis added).

⁵² See *Azemi v Serbia* App no 11209/09 (ECtHR, 5 November 2013) paras 46–49.

⁵³ See den Heijer, 'Procedural Aspects' (n 19).

⁵⁴ See *Case of the monetary gold removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Question) [1954] ICJ Rep 19, para 32; nuanced in *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90, paras 102–5.

⁵⁵ See, eg, *Behrami* (n 9) para 67; *Saadi v Italy* [GC] App no 37201/06 (ECtHR, 28 February 2008) para 126. See also Besson, 'La Pluralité d'Etats Responsables' (n 12) 15–16; den Heijer, 'Shared Responsibility' (n 19).

⁵⁶ See, eg, *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) paras 86–88; *Saadi* (n 55) para 121; *MSS* (n 6) para 342.

⁵⁷ See, eg *Behrami* (n 9) para 67; *Banković* (n 21) para 31; *Matthews v The United Kingdom* App no 24833/94 (ECtHR, 18 February 1999) para 33.

⁵⁸ Notable exceptions where all States of jurisdiction were put on the stand include: *Banković* (n 21); *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and The United Kingdom* App no 56672/00 (ECHR, 10 March 2004) ECHR 2004-IV 331; *Mohammed Hussein and Others v The Netherlands and Italy* App no 27725/10 (ECtHR, 2 April 2013).

⁵⁹ See, eg, *Tugar v Italy* (1995) 83-A DR 26; *Aziz v Cyprus, Greece, Turkey and The United Kingdom* App no 69949/01 (ECtHR, 23 April 2002).

the consideration of concurrent jurisdictions in these cases is, once more, the indispensable third-party rule, applied this time with respect to other States Parties to the ECHR.⁶⁰

Independent of these conceptual and practical hurdles, it is easy to observe that the recognition of the concurrent jurisdictions of States by the ECtHR has been rarer in practice than expected, even when it was possible procedurally. More precisely, most cases actually decided on that basis have been cases of competing territorial jurisdictions.⁶¹ Cases of concurrence between territorial and extraterritorial jurisdictions have been much rarer.⁶² Finally, there have been no cases of concurrent extraterritorial jurisdictions so far, despite the fact that the Court explicitly entertained the possibility in *Jaloud*.⁶³ Actually, most cases in which the issue of concurrence of jurisdictions has been explicitly raised recently, albeit to no avail for procedural reasons as explained before, are cases in which, on the one hand, one of the States of jurisdiction was not a State Party to the ECHR⁶⁴ or not a party to the procedure before the ECtHR,⁶⁵ or, on the other hand, cases involving an international organization, eg, the EU or the United Nations (UN), that is a non-party to the ECHR.⁶⁶

What this means is that many discussions of jurisdiction in the ECtHR's case law could be said to have been unduly biased against a particular State when the concurrent jurisdiction of other States was at play but was not considered. It is not certain that the ECtHR's assessment of the duties and responsibilities of a given State of jurisdiction would have been the same had the duties and responsibilities of other States of jurisdiction been assessed at the same time. The sole State of jurisdiction may be said to have been unfairly burdened by the recognition and allocation of its human rights duties and responsibilities, for it is the only one that could be recognized and allocated those duties and responsibilities ultimately. This may explain, for instance, the generous recognition of the extraterritorial jurisdiction of some States Parties when the State of territorial jurisdiction was not a party to the Convention.⁶⁷ One may say the same about the recognition of the territorial or extraterritorial jurisdiction of States Parties that are members of an international organization that cannot exercise jurisdiction and that does not incur duties and responsibilities on that basis under the ECHR.⁶⁸

⁶⁰ See, eg, *Hess v The United Kingdom* (1975) 2 DR 72.

⁶¹ See, eg, *MSS* (n 6); *Rantsev* (n 5). ⁶² See, eg, *Ilaşcu* (n 3); *Catan* (n 3).

⁶³ See, eg, *Jaloud* (n 2) para 153: 'The Court has established jurisdiction in respect of the Netherlands. It is not called upon to establish whether the United Kingdom, another State Party to the Convention, might have exercised concurrent jurisdiction' (emphasis added).

⁶⁴ See, eg, *El-Masri* (n 4); *Al-Jedda* (n 9); *Hassan* (n 2).

⁶⁵ See, eg, *Jaloud* (n 2).

⁶⁶ See, eg, *Behrami* (n 9); *Al-Jedda* (n 9); *MSS* (n 6).

⁶⁷ See, eg, for Macedonia (and not the United States) in the context of extraordinary renditions and black sites: *El-Masri* (n 4); for the United Kingdom (and not the United States) in the context of military prisons: *Hassan* (n 2).

⁶⁸ This is how one can explain decisions like *Al-Jedda* (n 9) for the United Kingdom (and not the United Nations) in the context of military intervention.

4. Concurrent Duties

State jurisdiction is the trigger for the application of human rights. Since the jurisdiction of a given State over a certain person gives rise to human rights duties of that State towards that person, one may venture that the concurrent jurisdictions of many States over the same person can give rise to many human rights duties towards that same person. One may then consider the different States of jurisdiction's duties as concurrent too.⁶⁹

It is true that so-called concurrent ECHR duties can arise separately as distinct human rights duties owed by each respective State of jurisdiction to its right holders under their respective relationship of jurisdiction. This is a consequence of the exclusive and, hence, separate nature of political and legal authority in general and, hence, of the different States' jurisdiction even when their respective jurisdictions are concurrent. Human rights duties are unilateral duties owed by each State on its own: they are not owed collectively as multilateral duties.⁷⁰ However, because they are owed to the same right holders in the same context, issues pertaining to their relationship in their respective specification and allocation arise in practice. The concurrence of jurisdiction can affect the type and content of human rights duties that arise to the extent that their concurrence implies a concurrence of effective control of the same right holders and, hence, a concurrence of threat to, or impact upon, the right holders' protected interests. This is also true in the case that one of the States of concurrent jurisdictions has lost effective territorial control to another: the former State has positive duties to regain control and to adopt measures to ensure that other human rights duties arise in relation to the human rights duties of the State of extraterritorial jurisdiction exercising effective control over its territory and the same people.⁷¹

The concurrence of human rights duties can be of three kinds. The first kind of concurrent duties are 'competing duties' arising out of the parallel and distinct (equivalent) effective control and jurisdiction by all States at hand. This will usually be the case when their respective jurisdictions are territorial and each State is exercising it over its own territory.⁷² The second kind of concurrent human rights duties are 'joint duties' arising concurrently out of joint effective control and jurisdiction by the States in question. This will usually be the case when one of the States exercises extraterritorial jurisdiction hand in hand with the State of territorial jurisdiction,⁷³ but also when many States are exercising extraterritorial jurisdiction

⁶⁹ For example, the Iraqi, British, and Dutch soldiers in *Jaloud* (n 2) or the British or American soldiers in *Hassan* (n 2).

⁷⁰ One should distinguish these duties being owed to all other States (*erga omnes*) from their being owed by all of them (*omnium*). See also Samantha Besson, 'Science without Borders and the Boundaries of Human Rights: Who Owes the Human Right to Science?/Une Science sans Frontière face aux Frontières des Droits de l'Homme—Qui est Débiteur du Droit de l'Homme à la Science?' (2015) 4 *Journal Européen des Droits de l'Homme/European Journal of Human Rights*, Special issue on the Human Right to Science 462; Samantha Besson, 'The Sources of International Human Rights Law' in Samantha Besson and Jean d'Aspremont (eds), *Oxford Handbook on the Sources of International Law* (OUP 2017).

⁷¹ See, eg, *Ilaşcu* (n 3) para 331; *Catan* (n 3) paras 145–47; *Sargisyan* (n 3) paras 130–31 and 139–49.

⁷² See, eg, *MSS* (n 6); *Rantsev* (n 5). ⁷³ See, eg, *Jaloud* (n 2).

together.⁷⁴ Finally, concurrent human rights duties may also be 'complementary duties' arising out of different degrees of effective control and jurisdiction by the States in question. This can be the case when territorial and extraterritorial jurisdictions concur and one State has lost effective control to another State⁷⁵ or delegated some of its authority to another State.⁷⁶

Importantly, however, all the usual types of human rights duties, ie, (positive and negative) duties (to respect, protect, and fulfil), can arise in principle from State jurisdiction. These duties merely depend on the type and degree of effective control over the right holders. This applies independently from the territorial or extraterritorial nature of jurisdiction.⁷⁷ It would be wrong, therefore, to assume that, in the case of concurrence between territorial and extraterritorial jurisdictions, the latter could only give rise to negative duties. It is true that the kind of effective control needed for positive human rights duties to arise is often more difficult to establish when a State's jurisdiction is extraterritorial, but this eventuality is by no means excluded.⁷⁸

Two questions need to be addressed when facing concurrent human rights duties under the ECHR: first, the allocation of concurrent human rights duties, and second, the democratic legitimacy of the allocation process.

First, with regards to concurrent ECHR duties, depending on whether the human rights duties are the same or not, their allocation raises different questions.

If the duties arising out of concurrent jurisdictions are of different types (eg duties to either respect, protect, or fulfil), the allocation will not be necessary.⁷⁹ They will complement each other as they usually do: their allocation can abide by the principles used to allocate them within a single jurisdiction. The duties to respect are complemented by the duties to protect and fulfil.⁸⁰ That complementarity⁸¹ is at play, for instance, in the case of the State of (territorial) jurisdiction's general positive duties to regain effective control when it has been lost:⁸² these duties fit well with those of the other State of (extraterritorial) jurisdiction due to its generality and institutional content.⁸³ If, on the contrary, the duties that arise concurrently towards

⁷⁴ See, eg, *Hassan* (n 2). ⁷⁵ See, eg, *Ilaşcu* (n 3) para 331; *Catan* (n 3) paras 145–47.

⁷⁶ See, eg, *Jaloud* (n 2) paras 149–51.

⁷⁷ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 878–79. See, eg, *Al-Skeini* (n 25) para 137; *Jaloud* (n 2) paras 226–28.

⁷⁸ See, eg, *Jaloud* (n 2) paras 226–27.

⁷⁹ See also Vandenhoele, 'Extraterritorial Human Rights Obligations' (n 18) 827–30.

⁸⁰ See Samantha Besson, 'The Allocation of Anti-poverty Rights Duties—Our Rights, but Whose Duties?' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System—Duties to the World's Poor* (CUP 2013), referring to Henry Shue, *Basic Rights* (2nd edn, Princeton University Press 1996) 59, 61, and 173.

⁸¹ See *Sargisyan* (n 3) para 148: '[t]he acceptance that the territorial State had only limited responsibility under the Convention was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention' (emphasis added).

⁸² See, eg, *Catan* (n 3) para 145; *Sargisyan* (n 3) para 131.

⁸³ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 865–66; Samantha Besson, 'Human Rights and Constitutional Law—Patterns of Mutual Validation and Legitimation' in Rowan Cruft, Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

the same people are the same, eg, the same duties to respect, protect, or fulfil, the lack of common institutions or procedures to allocate the duties together makes their respect in practice not only often impossible, but also makes the burden on the single duty-bearing State, or even on each duty-bearing State, difficult to justify as a result. This in turn raises questions about the exact scope and content of these duties unless one can approach their allocation jointly. 'Ought implies can' indeed.

The ECtHR's case law does not provide us with much information about how the allocation of concurrent ECHR duties should take place. The concurrent ECHR duties of every State of jurisdiction are discussed separately and their allocation is not coordinated.⁸⁴ When it is coordinated, it has only been by reference to the generality of the positive duty to regain jurisdiction that is treated as a different and complementary kind of duty.⁸⁵ The ECHR duties whose allocation comes closer to being coordinated in the ECtHR's case law are actually vested in a single State at a time: each ECHR State indeed bears positive duties to protect right holders against threats to their rights, including against the threats posed by other States of jurisdiction.⁸⁶ This makes the latter's duties redundant, therefore, and their concurrent duties irrelevant to settling the case in the end.⁸⁷

Of course, the reasons for the scarcity of case law on the issue are easy to gather. The allocation of ECHR duties is a matter for the internal discretion of States Parties. Even when the ECtHR has the power to review that allocation, its case law pertains to an allocation internal to States, and between its domestic authorities. Indeed, ECHR duties are unilateral (State by State) duties and are not held collectively or multilaterally (together by States).⁸⁸ Finally, even if the ECtHR were to review the internal allocation of human rights duties of all States of jurisdiction, subsidiarity would protect the democratic institutional set-up of every State, for the latter belongs to its margin of appreciation.

A ready-made solution to coordinate the allocation of concurrent human rights duties owed by States under the ECHR is to identify a general positive duty of all States of concurrent jurisdiction to allocate human rights duties among themselves. This implies, in particular, a duty to set up institutions and procedures to do this once they have acquired concurrent jurisdiction over the same people. That duty could be derived from States of jurisdiction's general positive duty to allocate human rights duties institutionally among their internal domestic authorities.⁸⁹ It applies particularly strongly to the State of territorial jurisdiction, for reasons related to the priority of that form of jurisdiction discussed in the first section, in cases where the concurrence of jurisdiction is effective (eg, in cases of joint jurisdiction), and

⁸⁴ See *MSS* (n 6); *Rantsev* (n 5).

⁸⁵ See *Ilaşcu* (n 3); *Catan* (n 3).

⁸⁶ See *MSS* (n 6).

⁸⁷ These positive duties are an important feature of the ECtHR's case law (eg, in *Al Nashiri* (n 4) para 517, by contrast to *El-Masri* (n 4) para 223). In the case of violation, they pre-empt having to work through the attribution of conduct of another State at a later stage in the responsibility reasoning (see also *Costello-Roberts v The United Kingdom* App no 13134/87 (ECtHR, 25 March 1993), paras 150, 157, and 162). See, eg, *Ilaşcu* (n 3) paras 392–93.

⁸⁸ See indirectly: *Sari and Çolak* (n 8) paras 91–92 and 96.

⁸⁹ See Besson, 'The Allocation of Anti-poverty Rights Duties' (n 80); Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 863–65.

especially when the concurrent jurisdiction of other States on its territory is consensual (eg, when it has been acquired through invitation or lease). Finally, when the States of concurrent jurisdictions are acting under an institutional umbrella, such as through an international organization, their positive duties to use that institutional framework, not only to act but also to respect their concurrent human rights duties, are easy to justify based on each State's general positive duty to organize itself institutionally so as to respect human rights. This duty is complemented in this context by the duty of diligence that binds all States that join an international organization whose membership may prevent them from abiding by their ECHR duties.⁹⁰ Note that this duty is independent from the existence of human rights duties of the international organization itself.

A further justification for this general positive duty of States of concurrent jurisdiction to coordinate the allocation of concurrent human rights duties among themselves may be found in the democratic and egalitarian dimension of human rights, and the ECHR in particular, as I explained before. Human rights are equal rights of their right holders and should therefore be specified and allocated together and through an egalitarian procedure in which all can participate. This legitimacy concern cuts both ways, however, which brings me to the next point.

Secondly, with regards to the legitimacy of the allocation of concurrent ECHR duties, the institutions or procedures established to coordinate the allocation of concurrent human rights duties can conflict with the democratic institutions and procedures of the State of (territorial) jurisdiction. This applies even when its institutions are weak or non-existent because it has lost effective control. Indeed, each State of territorial jurisdiction has a general positive duty to strengthen its institutions and authority. The existence of competing institutions and procedures to allocate concurrent human rights duties with other States of (extraterritorial) jurisdiction may prevent it, therefore, from respecting its other human rights duties and, accordingly, may be counterproductive in the long run for its democratic development.⁹¹ One may, therefore, argue that priority should be given, in the allocation of concurrent human rights duties, to the duties of the State of (territorial) jurisdiction based on the priority of its democratic duties and the subsidiarity of the other States of jurisdiction's duties.

Finally, it is important to emphasize that the concurrent human rights duties at stake in this section should not be conflated with States' 'responsibilities for human rights'. These are collective or multilateral responsibilities of all States (and other international subjects)⁹² that arise from international and European human rights law independently of effective control and jurisdiction.⁹³ They include

⁹⁰ See, eg, *Waite and Kennedy v Germany* ECHR 1999-I 393, para 67; *Al-Dulimi* (n 9) para 114.

⁹¹ See Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 882–83.

⁹² On their allocation among the various responsibility bearers, see Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 10); Besson, 'The Allocation of Anti-poverty Rights Duties?' (n 80). See also Monica Hakimi, 'Distributing the Responsibility to Protect' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015).

⁹³ See for a discussion of their differences, Besson, 'Le Droit International et Européen des Droits de l'Homme et la Forme Politique Fédérale' (n 49); Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights' (n 10).

responsibilities to prevent or protect against human rights violations by other States (of jurisdiction) and, as a result, apply outside of their bearers' territorial jurisdiction, and without requiring extraterritorial jurisdiction of the responsibility-bearing States. Responsibilities for human rights differ from human rights duties in three ways. First, they are grounded in States' capacity to act and not in jurisdiction. Secondly, they are not directed towards, and hence not owed to, the right holders but to all States. Finally, unlike human rights duties of States of jurisdiction, responsibilities for human rights have a content that compels cooperation with those very States of jurisdiction to help them prevent or remedy human rights violations under their jurisdiction.⁹⁴ They are, in other words, complementary to human rights duties *stricto sensu* and not concurrent with them. They should not, as a result, be conflated with concurrent human rights duties arising from concurrent jurisdiction.⁹⁵ Nor should they be conflated with the secondary duties or remedial responsibilities arising out of the violation of these (primary) concurrent human rights duties. The latter constitute the next point.

5. Concurrent Responsibilities

In the case that many States exercise concurrent jurisdiction and acquire concurrent ECHR duties on that basis, the violation of the latter by some or all the States of jurisdiction could give rise to concurrent responsibilities.

Concurrent responsibilities are understood here as the responsibilities stemming from the contribution of many States to the same injury (i) whether this occurs through the violation of the same duty or not, and (ii) through the same wrongful act⁹⁶ or not.⁹⁷ When concurrent responsibilities are caused by the same wrongful act, they are usually referred to as 'shared responsibilities' *stricto sensu*, even though the latter term is sometimes applied to refer to all kinds of concurrent responsibilities independently of the nature of the wrongful act.⁹⁸ Importantly, if there is no common injury to the same human right holder, responsibilities for the different injuries will arise as well, albeit not *qua* concurrent responsibilities as understood in this section.

⁹⁴ See, eg, Articles 55–56 UN Charter; Article 2(1) International Covenant on Economic, Social, and Cultural Rights (ICESCR).

⁹⁵ Vandenhoe, 'Extraterritorial Human Rights Obligations' (n 18) 825, 828, and 831; Olivier de Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084; Margot E Salomon, 'How to Keep Promises: Making Sense of the Duty among Multiple States to Fulfil Socio-Economic Rights in the World' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015); Hakimi, 'Distributing the Responsibility to Protect' (n 92).

⁹⁶ The same wrongful act is a single, albeit collective, act and not a series of identical but separate acts.

⁹⁷ See, eg, Besson, 'La Pluralité d'Etats Responsables' (n 12) 7–11; d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' (n 17) 211–13.

⁹⁸ See, eg, Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 17) 366–68; André Nollkaemper and Ilias Plakokefalos, 'Conclusions: Beyond the ILC Legacy' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law—An Appraisal of the State of the Art* (CUP 2014). See also Besson, 'La Pluralité d'Etats Responsables' (n 12).

In the case of violation of concurrent duties stemming from concurrent jurisdictions, concurrent responsibilities are more likely to arise than in other cases.⁹⁹ States of concurrent jurisdiction are indeed more likely to exercise their effective control together and, hence, to cause the same injury. This may be through the same wrongful act or omission and with respect to a violation of the same human rights duties, but not exclusively. In any case, even if the wrongful act and the duty violated are the same, causation can vary greatly between States.¹⁰⁰ Of course, it is important to emphasize again that concurrent responsibilities need not arise at all, and, conversely, they could arise independently of concurrent jurisdictions and/or concurrent duties.

Two implications of the concurrent character of responsibilities in the general law of international responsibility should be discussed: first, the attribution of the illegal conduct and/or responsibility to the different States; and, secondly, the allocation of responsibilities and, in particular, of reparations between them.

First, the attribution of conduct (direct attribution) and/or responsibility (indirect attribution) to many States in cases of contribution to the same injury can lead to the multiplication of responsible States and should be understood accordingly.

The attribution of both conduct (Articles 4–11 ARSIWA) and responsibility (Articles 16–19 ARSIWA) can be either distinct or joint. As a result, one may identify three types of concurrent responsibilities: (i) the attribution of conduct to each of the States can be distinct (Articles 4–5 ARSIWA), as can the attribution of responsibility in cases of assistance of one to the other (Article 16 ARSIWA).¹⁰¹ As a result, concurrent responsibilities by distinct attribution of conduct and/or responsibility may be referred to as 'competing responsibilities'¹⁰²; (ii) the attribution of conduct may also be 'joint' by reference to the joint dual or plural¹⁰³ effective control of the same agents by the States of jurisdiction (Article 8 ARSIWA). Concurrent responsibilities by joint attribution of conduct may therefore be referred to as 'joint

⁹⁹ See also Vandenhoe, 'Extraterritorial human rights obligations' (n 18) 830–33.

¹⁰⁰ See d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 211–13.

¹⁰¹ Note that the reasoning of the ECtHR in *El-Masri* (n 4) para 223 about 'acquiescence or connivance' of the authorities of one State to that of another on the former's territory comes close to fitting the distinct attribution of responsibility under Article 16 ARSIWA, but not quite, and goes further than the International Law Commission had in mind with Article 16 ARSIWA. In *Al Nashiri* (n 4) para 517, however, the Court reverted to an Article 3 ECHR reasoning *à la Soering* (*Soering* (n 56) paras 86–88), without any further reference to the attribution of conduct or responsibility of a State to another and to 'acquiescence and connivance'. On this question, see Crawford and Keene in this volume; André Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (EJIL: *Talk!* 24 December 2012) <<http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>> accessed 5 April 2016.

¹⁰² The distinction between competing, joint, and cumulative responsibilities does not necessarily match that between competing, joint, and complementary duties presented in the previous section. The latter need not all be violated by the same States and the control at stake need not be the same either.

¹⁰³ See, eg *Al-Jedda* (n 9) para 84; *The State of the Netherlands v Hasan Nuhanovic* App no 12/03324 (Supreme Court of the Netherlands, 6 September 2013) para 5.9. In contrast, see *Behrami* (n 9) para 140.

responsibilities'. This excludes, for instance, cases of delegation of effective control to another State (Article 6 ARSIWA), in which one State acts for the other; (iii) the attribution of responsibility itself may be regarded as joint in cases of control or coercion exercised by one State upon another State (Articles 17–18 ARSIWA). Concurrent responsibilities by joint attribution of responsibility may be referred to as 'cumulative responsibilities'.

So far, the ECtHR has been reluctant to proceed with the joint attribution of concurrent conduct or responsibilities to many States of jurisdiction at the same time. This is not surprising, for the cases tried have been either situations triggered by competing and distinct wrongful acts,¹⁰⁴ or instances in which there has been a delegation of effective control to one State by the other.¹⁰⁵ To date, as a result, there have been no cases of joint attribution of conduct to two or more States,¹⁰⁶ or of complementary attribution of responsibility to another State.¹⁰⁷ Recent developments in the recognition of joint dual or plural effective control under Article 8 ARSIWA may provide ground for hope regarding the former, however. As to the latter, the Court has not yet referred to the relevant provisions in ARSIWA on the attribution of responsibility and does not formulate these issues clearly along those lines either. Interestingly, in cases in which a joint attribution of responsibility could have been possible, the Court has decided against it by reference to the respective individual duties of the States of concurrent jurisdiction and, albeit unconvincingly, the corresponding need for an individual attribution of conduct to each State.¹⁰⁸

Secondly, the allocation of responsibilities and, in particular, reparations between many States in the case of contribution to the same injury can prove difficult. Concurrent responsibilities or secondary duties, whether of cessation, reparation, or non-repetition, may be allocated in either a distinct or a joint fashion.¹⁰⁹ This applies whether or not the attribution of conduct and/or responsibility to the different States, as discussed before, was distinct or joint.

The principle for the allocation of responsibilities is individual and distinct (independent) responsibility. Responsibilities are allocated to each responsible

¹⁰⁴ See, eg, *Rantsev* (n 5); *Stojkovic v France and Belgium* App no 25303/08 (ECtHR, 27 October 2011) paras 55–56. See also *Ilascu* (n 3) paras 352, 385, and 393.

¹⁰⁵ See, eg, *Drozd and Janousek* (n 8) para 96; *Hassan* (n 2) para 78. For a discussion of the consequences of the exclusive nature of the attribution under Article 6 ARSIWA for concurrent responsibilities, however, see the joint dissenting opinions of Judges Pettiti, Valticos, and Lopes Rocha and of Judges MacDonald, Bernhardt, Pekkanen, and Wildhaber in *Drozd and Janousek* (n 8). See also Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility' (n 14) for a reading of *Jaloud* (n 2) in the light of Article 6 ARSIWA and Article 7 Articles on the Responsibility of International Organisations (ARIO) and the notion of 'unified command', albeit with respect to the United Nations and not to the United Kingdom in this case.

¹⁰⁶ See, eg, *Husein* (n 58); *Hess* (60).

¹⁰⁷ See, eg, *Stephens v Malta* (no 1) App no 11956/07 (ECtHR, 21 April 2009) paras 51–52.

¹⁰⁸ See *Sari and Çolak* (n 8) paras 91–92, and 96, despite its reference to 'joint responsibility' of Denmark and Turkey.

¹⁰⁹ This section focuses on the secondary duties or responsibilities of reparation. On the others, see d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 215–17. Of course, 'just satisfaction' under Article 41 ECHR does not amount to reparation *stricto sensu*. Nor is the existence of an injury *stricto sensu* needed in ECHR responsibility law either. An analogy with reparations in general international law still holds, however.

State in proportion to its share in the contribution to the injury (Article 42 ARSIWA). More specifically, the apportionment can be made according to the causal link between each State's wrongful act and the injury, the stringency of the violated duty, and/or the gravity of the violation.¹¹⁰ There is an exception, however, in general international responsibility law: joint and several responsibility, ie, a responsibility that is individual but solidary or undivided. According to this principle, each responsible State can be called to remedy the whole injury for all the others (Article 47(1) ARSIWA).¹¹¹ This only applies, however, in the case that the injury was caused by the same wrongful act, ie, a single, albeit collective, act and not a series of identical but separate acts, whether this occurs through the joint attribution of conduct or responsibility. The justification for this is, first, the complex causality between single, collective, wrongful acts and the injury, and the argument that it is not easily amenable *ex post* to proportionate allocations of responsibilities¹¹² and, secondly, the correlation that one can make between being able to act wrongfully together and being able, later on, to coordinate in order to repair the injury together. Provided joint and several responsibility applies, internal rights of recourse should then be available in order to avoid overburdening one of the responsible States and favouring the others (Article 47(2)(b) ARSIWA). There should also be protection against unjust enrichment by the injured State or, by extension, injured individual (Article 47(2)(a) ARSIWA).

In the case of concurrent responsibilities of States under the ECHR, as I have understood them in this section, one could argue for the generalization of the rule of joint and several responsibility.¹¹³ This could, of course, apply to cases in which there has been a single wrongful act, which could often be the case in the context of concurrent human rights jurisdictions and duties, as I explained before. It suffices to think here of the responsibilities incurred through a joint military operation of many States outside their territories,¹¹⁴ or of the action of the civil administration jointly run by the State of territorial jurisdiction and another State of extraterritorial jurisdiction.¹¹⁵

¹¹⁰ See also d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 217ff.

¹¹¹ On other special and more generous customary or conventional regimes of joint and several responsibility outside of general international law, see Besson, 'La pluralité d'États responsables' (n 12) 14–22; d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 245–46.

¹¹² In short, causality may be exclusive, parallel, complementary or aggregate, and cumulative or indissociable. The latter is the most difficult when it comes to the apportionment of responsibilities, and the alternative criteria of apportionment are not satisfactory (eg, the 'adequate cause' or 'equivalence principle' discussions). See for further details, d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 222–32.

¹¹³ Scope precludes addressing the remaining procedural questions, however, that are not addressed under Article 47 ARSIWA and, in particular, the issue of the liberation of other responsible States once one of them has provided a full reparation, and the issue of the grounds for the internal rights of recourse between responsible States if it cannot be causality because it is too complex (potential alternatives are the adequate cause or the equivalence principle but also, arguably, and by analogy to Article 39 ARSIWA, the various grounds of attribution of responsibility in case of joint attribution of responsibilities). See also Besson, 'La Pluralité d'États Responsables' (n 12) 24–5.

¹¹⁴ See, eg, *Banković* (n 21).

¹¹⁵ See, eg, *Jaloud* (n 2).

However, one may also argue for joint and several responsibility to be extended to all cases of concurrent responsibilities for violations of ECHR rights, even when there is no single wrongful act, provided causality is complex (eg. in cases of cumulative causality).¹¹⁶ There are three justifications for extending the joint and several responsibility principle in this way.

First of all, as I argued before, there is a general positive duty upon all States of concurrent jurisdiction to set up institutions or procedures in order to coordinate the allocation of their concurrent ECHR duties. This duty to coordinate pertains very well to circumstances of consensual complementary jurisdiction or effective joint jurisdiction. This applies especially when the breach occurs in the institutional context of an international organization like the UN, the EU, or the North Atlantic Treaty Organisation (NATO). In this case, an international institutional framework is already in place and could not only coordinate the implementation of the concurrent human rights duties of States, as I explained before, but also the allocation of their concurrent responsibilities.¹¹⁷ Secondly, the ECtHR has compulsory jurisdiction to allocate responsibilities *ex post* and, possibly, to set internal rights of recourse between the responsible States if needed. These two arguments actually correspond to the elements missing in other regimes of international law and are usually invoked to limit the generalization of joint and several responsibility despite its greater justice for the victim of violations of international law. What applies in most other cases is indeed, first, the lack of international institutions to coordinate the duties and action on the international plane and, secondly, the absence of international tribunals with compulsory jurisdiction to allocate the responsibilities and internal rights of recourse.¹¹⁸ Finally, one should note that the victims of the violation of the ECHR are individuals and not States. This makes the justice issue even more pressing for the allocation of human rights responsibilities than it is for interstate responsibilities.

So far, the ECtHR has been reluctant to proceed with the joint allocation of concurrent responsibilities and, especially, of reparations. In most cases, the Court has applied the principle of individual and distinct or independent responsibility.¹¹⁹ This principle has been used even in the case that the injury was caused by the same wrongful act. The Court addresses the responsibility of each State of jurisdiction independently and by reference to its distinct respective jurisdiction and duties. The ECtHR then proceeds with the ordering of reparations for the distinct injuries constitutive of the single injury,¹²⁰ or for proportionate shares of the same injury.¹²¹

There are various practical reasons one may identify for the Court's reluctance. First, there have been very few cases of recognition of concurrent jurisdictions, as

¹¹⁶ See, for a similar argument pertaining to 'co-perpetration', d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 241–4.

¹¹⁷ See, eg, Article 3(7) DAA. See also Maarten den Heijer and André Nollkaemper, 'A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights' (2014) SHARES Briefing Paper <<http://www.sharesproject.nl>> accessed 4 April 2016.

¹¹⁸ See Besson, 'La Pluralité d'États Responsables' (n 12) 5–7. See also d'Argent, 'Reparation, Cessation, Assurances and Guarantee of Non-Repetition' (n 17) 244–49.

¹¹⁹ *Ilaşcu* (n 3) paras 352, 385, and 393; *Stojkovic* (n 106) paras 55–56.

¹²⁰ *Rantsev* (n 5) paras 404–11; *MSS* (n 6) paras 341–48. ¹²¹ *Ilaşcu* (n 3) paras 484–90.

I explained before, especially between two or more States of extraterritorial jurisdiction or between a State of territorial jurisdiction and a State of extraterritorial jurisdiction. Those cases, when they were brought to trial, have usually been turned into one single territorial case or into an Article 3 ECHR case *à la Soering*.¹²² True, there are still a few test cases to come. These include, in particular, cases in which ECHR States Parties have participated in an international organization's peace mission abroad *à la Jaloud*. As a matter of fact, the EU's accession (and, in particular, Article 3(7) Draft Accession Agreement (DAA) 2013) could have brought another series of test cases had it taken place along the lines of the 2013 DAA. A second reason lies in the broad notion of positive duties developed by the ECtHR. General positive duties of States to protect include, according to the Court and as I explained before, duties to protect against other States' interventions, thus turning potential concurrent duties into a single State's duties.¹²³ A third explanation may be found, as I indicated before, in the fact that most of the cases tried have been either cases of competing and distinct wrongful acts, or cases of delegation of effective control to one State by the other.¹²⁴ Neither of these cases could therefore be submitted *stricto sensu* to the principle of joint and several responsibility.

A fourth explanation is the principle of remedial subsidiarity and, more particularly, the deferral of the *restitutio in integrum* to States Parties (Article 46(1) ECHR). Of course, the Court may grant just satisfactions (Article 41 ECHR), but even these remain subsidiary and based on equity. Generally, the prevalence of non-pecuniary reparations in the individual or general measures issued by the Court makes it difficult to expect more specificity on the allocation of reparations. Finally, one should also mention the lack of procedures before the ECtHR for the organization of internal rights of recourse between responsible States once one of them has provided full reparation for the victim's injury. Arguably, however, other States could file an interstate application,¹²⁵ if needed, or raise the issue before the Committee of Ministers.

6. Conclusions

For a long time, the debate about jurisdiction, territorial or extraterritorial, in the ECHR has pertained to its notion, conditions, and related duties. It has now reached the issue of the normative implications for States' duties and responsibilities in circumstances in which many States exercise concurrent jurisdiction.

In response to this new challenge, the present chapter has discussed how one should articulate the concurrent effective control and hence jurisdictions of different States, how one should specify and allocate their concurrent duties stemming from this concurrence of jurisdiction, and, finally, how one should attribute and then allocate their concurrent responsibilities when concurrent duties have been

¹²² *Soering* (n 56) paras 86–88.

¹²³ *MSS* (n 6) para 342.

¹²⁴ *Rantsev* (n 5); *MSS* (n 6); *Drozdz and Janousek* (n 8).

¹²⁵ See, eg, *Cyprus v Turkey* [GC] App no 25781/94 (ECtHR, 10 May 2001).

violated. Thereby, the chapter also contributed, hopefully, to the disentanglement of some of these issues whose relationship to the elusive notion of State 'control' has often led the ECtHR to conflation. More generally, it should have shown how much of the ECtHR's practice has promoted, and could promote even further, the development of the still largely underexplored regime of concurrent or 'shared' responsibility in general international law.

The main conclusion one may draw from this chapter's discussion is that the ECtHR's position on these issues is still unsettled. Its largely 'case-by-case' approach needs to be reformed. The concurrent jurisdiction of States is rarely recognized, especially in cases in which two or more States exercise concurrent extraterritorial jurisdiction. Most cases that have been tried so far pertain to the concurrence of territorial jurisdictions and some, more rarely, to the concurrence between territorial and extraterritorial jurisdictions. When concurrent jurisdiction is considered by the Court, however, it is usually in order to identify at least one responding State, the others being usually either non-States Parties or an international organization, at the price arguably of a certain bias. Even when concurrent jurisdiction is recognized, moreover, every single State's jurisdiction is approached as being distinct. In turn, the same may be said about how the Court approaches both the States' respective duties and their respective responsibilities, in cases of violation, as being independent and distinct from one another, even when they have caused the same injury. Sometimes, the Court even eludes the issue by favouring the positive duties of one single State of jurisdiction, usually of territorial jurisdiction, over those of others, thereby pre-empting the question of the concurrence of responsibilities at the same time.

This raises serious issues of justice in the allocation of duties and responsibilities, both for the individual victims of human rights violations and for the States of concurrent jurisdiction. Different States bore concurrent ECHR duties towards the same human right holders in a given context, thereby making their concurrence a key element in a fair and legitimate allocation of duties. Furthermore, different States contributed to the same injury, whether it is through the same wrongful act or not, and whether through a breach of the same ECHR duties or not, thereby making their concurrent responsibilities a central feature of a fair allocation of responsibilities and especially of reparations. This chapter's argument has been that, because ECHR States Parties are parties to the same human rights instrument, they have a positive duty to coordinate institutionally in order to allocate not only their concurrent duties but also, later on, their concurrent responsibilities. Because they are submitted to the compulsory jurisdiction of the ECtHR, moreover, the latter can help them in doing that and then allocate internal rights of recourse if needed *ex post*. This last point actually strengthens the argument for applying the principle of joint and several responsibilities to the responsibilities of States of concurrent jurisdiction.

Of course, some of the issues raised by concurrent jurisdictions, duties, and responsibilities in the human rights context are not easy to solve. How, for instance, should we reconcile the unicity of the democratic subject and human right holders protected by the ECHR with the duality or plurality of effective jurisdictions, human

rights duty-bearers, and legitimacy providers?¹²⁶ How, in a next step, should we work out the deterritorialization of democracy itself induced by the extraterritoriality of human rights? Hence, most probably, the pockets of resistance in favour of territorial jurisdiction one observes in the ECtHR's extraterritoriality case law, ie, what I have called remnants of 'territoriality in extraterritoriality'. One should mention, in particular, the priority given to personal over spatial control in the establishment of extraterritorial jurisdiction, the greater weight given to the State of territorial jurisdiction over the State of extraterritorial jurisdiction in the evidentiary process, the priority given to the general (positive) duties of the State of territorial jurisdiction over the specific duties of the State of extraterritorial jurisdiction including in case of loss of effective control, and the priority of the responsibilities of the State of territorial jurisdiction over those of the State of extraterritorial jurisdiction.

Clearly the issue of concurrent jurisdictions, duties, and responsibilities in the ECHR will not go away, and certainly not by *fiat* as the Court tried to do in *Jaloud*. The increase of extraterritorial activity, transnational circumstances, and interstate institutional cooperation will create many new cases to come. Furthermore, as I have argued in this chapter, due to its compulsory jurisdiction the ECtHR is by far best situated to address them.

¹²⁶ See, eg, Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 11) 882–84.