Legal persons as bearers of rights under the ECHR[1]

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Contents

[1] This paper is based on a chapter of my doctoral thesis that was published as Lorenz Dopplinger, *Die Grundrechtssubjektivität staatlicher Akteure. Eine rechtsvergleichende Analyse des Grundrechtsverhältnisses* (Wien: Verlag Österreich, 2020).

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I. Introduction

Fundamental rights are typically conceived primarily as rights of individual human beings. At the same time, many legal systems recognize non-human entities as bearers of constitutional rights and even of international human rights. In Austria, for example, legal persons are readily awarded protection by constitutionally guaranteed rights without fundamental opposition. According to the settled case-law of the Austrian Constitutional Court and the prevailing opinion in literature not only private corporations but even State actors such as territorial authorities may be entitled to constitutional rights.[2] In other jurisdictions, however, corporate personhood has increasingly become a highly debated topic, especially in the United States in the wake of recent landmark decisions of the Supreme Court: In Citizens United v. Federal Election Commission,[3] the Court reaffirmed that the free speech guarantee of the First Amendment protection extends to corporations and that corporate independent expenditures constituted protected speech. On this basis, the Court struck down as unconstitutional prohibitions on corporate expenditures in connection with elections. In Burwell v. Hobby Lobby Stores, Inc.,[4] the Court held that a for-profit company as a private employer could invoke the right to religious freedom to deny contraception coverage to its employees based on a religious objection. This ignited controversies which are not confined to courts and legal

[2] See, e.g., VfSlg. 19.961/2015, 20.117/2016 and 20.118/2016 (associations); Verfassungsgerichtshof (VfGH) 25.6.2015, B 705/2013, VfSlg. 20.163/2017 and VfGH 27.6.2017, E 860/2016 (corporations); VfSlg. 18.221/2007 and 18.829/2009 (universities); VfSlg. 2176/1951, 15.988/2000 and 16.039/2000 (chambers); VfSlg. 18.446/2008 and 19.802/2013 (municipalities); VfSlg. 8578/1979, 11.827/1988 and 11.828/1988 (provinces); VfSlg. 9320/1982, 10.305/1984, 13.679/1994, 14.107/1995, 16.826/2003 and 17.981/2006 (federation). The decisions of the Austrian Constitutional Court (VfGH) may be accessed at https://www.ris.bka.gv.at/Vfgh/ by entering the number under which the decision was published in the reports of the case-law (VfSlg. without the year) in the box "Sammlungsnummer". Decisions not (yet) published in the reports may be accessed by entering the case number (e.g., "E 860/2016") in the box "Geschäftszahl". From the literature see, e.g., Walter Berka, Christina Binder and Benjamin Kneihs, *Die Grundrechte. Grund- und Menschenrechte in Österreich*, 2. Auflage (Wien: Verlag Österreich, 2019) pp. 117-124; Johannes Hengstschläger and David Leeb, *Grundrechte*, 3. Auflage (Wien: Manz, 2019) pp. 39-43; Gerhard Strejcek, 'Grundrechtssubjektivität', in Detlef Merten, Hans-Jürgen Papier and Gabriele Kucsko-Stadlmayer (eds.), *Handbuch der Grundrechte in Deutschland und Europa Band VII/1. Grundrechte in Österreich*, 2. Auflage (Heidelberg/Wien: C.F. Müller/Manz, 2014) 139-162, pp. 155-160. For an in-depth analysis of the personal scope of the fundamental rights guaranteed by the Austrian constitution see Dopplinger, 'Grundrechtssubjektivität', pp. 177-227.

[3] *Citizens United v. FEC*, 558 U.S. 310 (2010). The decisions of the United States Supreme Court can be found in the United States Reports, which are published on the website of the Court: https://www.supremecourt.gov/opinions/boundvolumes.aspx.

[4] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

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academic circles[5] but have entered public discourse. When US Senator and then presidential candidate Mitt Romney at the Iowa State Fair in 2011 infamously remarked "Corporations are people, my friend",[6] he met substantial backlash and caused fervent discussions.[7] In particular during the Occupy Wall Street protests, people voiced their opposition, with activists carrying banners proclaiming "End Corporate Personhood" and "Corporations Are Not People".[8] These sentiments fuelled popular movements[9] and were picked up by leading politicians.[10]

Although mostly outside the political limelight, the question if and to what extent legal entities are bearers of rights also arises in the context of international human rights treaties.[11] This question, however, cannot be answered in a uniform way for a number of reasons: First, it is necessary to distinguish between different legal sources, as the personal scope of human rights varies from treaty to treaty. Whereas, on the one hand, the International Covenant on Civil and Political Rights (ICCPR)[12] and the American Convention on Human Rights (ACHR)[13] are restricted to individuals,[14] it

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[5] See, e.g., Dale Rubin, 'Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals' (2010) *Quinnipiac Law Review* 523-584; Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright Publishing Corporation, 2018).

[6] CNN, Romney: Corporations Are People Too, YouTube, 12.8.2011, https://www.youtube.com/watch?v=FxUsRedO4UY (last accessed 8.3.2021).

[7] Ashley Parker, 'Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy, *The New York Times*, 11.8.2011, https://www.nytimes.com/2011/08/12/us/politics/12romney.html (last accessed 8.3.2021).

[8] Susanna Kim Ripken, *Corporate Personhood* (Cambridge: CUP, 2019) p. 2.

[9] See, e.g., Move to Amend's Proposed 28th Amendment to the Constitution that seeks to amend the Constitution of the United States providing that the rights extended by the Constitution are the rights of natural persons only, https://www.movetoamend.org/ (last accessed 8.3.2021).

[10] See, e.g., Elizabeth Warren, who replied: "No, Governor Romney, corporations are not people." (Free Speech TV, Elizabeth Warren - "Corporations are Not People", YouTube, 6.9.2012, https://www.youtube.com/watch?v=Lrz1Kod83ec [last accessed 8.3.2021]).

[11] For a critical view of corporate claims to human rights in the context of international economic law see Turkuler Isiksel, 'The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights' (2016) *Human Rights Quarterly* 294-349.

[12] International Covenant on Civil and Political Rights (ICCPR), 999 United Nations Treaty Series (UNTS) 171.

[13] American Convention on Human Rights (ACHR), 1144 UNTS 143.

[14] Regarding the ICCPR see Human Rights Committee (HRC), General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29.3.2004, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 9. HRC 14.7.1989, *A newspaper publishing company v.*

is universally accepted that the European Convention on Human Rights (ECHR),[15] on the other hand, protects not only natural persons but also legal persons.[16] However, even insofar as the personal scope of application of a given human rights treaty covers legal persons, it is crucial to differentiate precisely between the various rights enshrined in the document. After all, not all human rights are theoretically suitable for invocation by legal entities, as only certain rights are by their "nature" susceptible of being exercised by a legal entity: While it is conceivable that a legal person may invoke the right to the protection of property,[17] the right to a fair trial,[18] the right to freedom of expression,[19] the right to respect for its correspondence[20] or even the right to respect for the home,[21] it can hardly be protected by the right to life,[22]

Trinidad and Tobago, 360/1989; HRC 31.3.1994, *S.M. v. Barbados*, 502/1992, paras. 6.2-6.3; HRC 7.4.1999, *Lanagna v. Australia*, 737/1997, para. 6.2; HRC 26.7.2005, *Mariategui et al. v. Argentina*, 1371/2005, para. 4.3; HRC 31.10.2011, *V.S. v. Belarus*, 1749/2008, para. 7.3. Approvingly, e.g., Piet Hein van Kempen, 'The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?', in Mark Pieth and Radha Ivory (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk. Ius Gentium: Comparative Perspectives on Law and Justice 9* (New York/Dordrecht/Heidelberg/London: Springer, 2011) 355-389, p. 358. For an analysis of the personal scope of the ICCPR see further William A. Schabas, *U.N. International Covenant on Civil and Political Rights. Nowak's CCPR Commentary*, 3rd revised edition (Kehl: N.P. Engel, 2019) pp. 44-45. For the ACHR the restriction to natural persons is clearly stipulated in the treaty. Article 1(2) ACHR states: "For the purposes of this Convention, 'person' means every human being." Further see Inter-American Court of Human Rights (IACHR) 26.2.2016, Advisory Opinion OC-22/16, *Titularidad de Derechos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Treaty Series (ETS) No. 005.

[16] See, e.g., European Court of Human Rights (ECtHR) 16.4.2019, *Editorial Board of Grivna Newspaper v. Ukraine*, 41214/08 and 49440/08, § 69 (violation of Article 6 ECHR) and § 132 (violation of Article 10 ECHR). From the literature see, e.g., Christoph Grabenwarter, *European Convention on Human Rights – Commentary* (München: C.H. Beck, 2014) p. 3 and William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: OUP, 2015) p. 92.

[17] ECtHR 24.11.2005, *Capital Bank AD v. Bulgaria*, 49429/99, § 130; ECtHR 7.6.2018, *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, 44460/16, §§ 86-90.

[18] ECtHR 4.5.2017, *Chap Ltd v. Armenia*, 15485/09; ECtHR 13.2.2020, *Sanofi Pasteur c. France*, 25137/16.

[19] ECtHR 22.5.1990, *Autronic v. Switzerland*, 12726/87, § 47; ECtHR (GC) 7.2.2012, *Axel Springer AG v. Germany*, 39954/08; ECtHR 21.6.2012, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, 34124/06, § 41.

[20] ECtHR 16.10.2007, *Wieser and Bicos Beteiligungen GmbH v. Austria*, 74336/01, § 45.

[21] ECtHR 16.4.2002, *Société Colas Est et al. v. France*, 37971/97, §§ 40-42; ECtHR 14.3.2013, *Bernh Larsen Holding AS et al. v. Norway*, 24117/08, §§ 104-106.

[22] ECtHR (GC) 22.3.2001, *K.-H. W. v. Germany*, 37201/97, § 96.

the prohibition of torture,[23] the right to respect for family life or the right to marry. Finally, a distinction must be made according to the type of legal entity, since not all legal persons are created equal. Rather, non-human entities have a variety of legal forms, possess different powers and perform diverse activities. Despite their substantial differences, companies, trade unions, political parties, associations, churches, media organisations, universities and municipalities might all constitute legal persons, depending on the applicable law.

Against this backdrop, the article seeks to explore the personal scope of a specific international human rights instrument, the ECHR. Since it is universally accepted that the Convention is not restricted to human beings, the main focus lies on the question which legal persons are protected by the rights of the Convention. At the outset, this paper will determine how the Convention defines the group of persons and entities entitled to its rights (II.A). In this context, this contribution will analyse whether certain Convention rights have an exceptionally wide personal scope going beyond the common boundaries of the other Convention rights (II.B). This inquiry will reveal that a legal entity is only afforded protection by the ECHR if it can be considered a "non-governmental organisation" (II.C). Subsequently the notion of "non-governmental organisations" will be further explored: After retracing the development and *status quo* of the relevant case-law (III.A), this paper will show that "non-governmental organisations" are to be understood as conceptual counterparts to the States (III.B) and identify criteria in order to assess the status of a legal entity (III.C).

II. Personal scope of the ECHR

A. Article 1 ECHR as key provision

The key provision defining the personal scope of the Convention is Article 1 ECHR, which delineates the general obligation of the States to respect the rights enshrined in the Convention.[24] The High Contracting Parties shall secure to "everyone within their

[23] European Commission of Human Rights (EComHR) 12.10.1988, *Verein "Kontakt-Information-Therapie" (KIT) and Hagen v. Austria*, 11921/86; ECtHR 12.5.2015, *Identoba et al. v. Georgia*, 73235/12, § 45.

[24] ECtHR 18.1.1978, *Ireland v. United Kingdom*, 5310/71, § 238: "Article 1 (art. 1), together with Articles 14, 2 to 13 and 63 [...], demarcates the scope of the Convention ratione personae, materiae and loci". See further, e.g., Grabenwarter, 'European Convention', p. 2: ("Article 1 determines the personal scope of the ECHR"); Jochen Abr. Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar*, 3. Auflage (Kehl am Rhein: N. P. Engel Verlag, 2009) p. 14.

jurisdiction" the rights and freedoms of the ECHR. The key question for determining the personal scope of the Convention, therefore, is how the broad and indistinct term "everyone" is to be interpreted. The extensive concept of the ECHR becomes apparent in comparison with similar human rights instruments:[25] Under the ICCPR the States undertake to respect and ensure rights to "all individuals within its territory and subject to its jurisdiction".[26] The ACHR is expressly limited to the protection of "human being[s]"[27]. Whereas this comparative view confirms that Article 1 ECHR provides leeway to include both natural and legal persons, the wording certainly is not unequivocal. One of the guiding principles for interpreting the ECHR is that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.[28] It is therefore necessary to examine whether other provisions of the ECHR permit to draw conclusions regarding the personal scope of the Convention.

1. Drawing conclusions from substantive provisions of the Convention

The substantive provisions of the ECHR reveal that legal persons are indeed bearers of Convention rights, at least of certain rights. According to Article 1 sentence 1 of Protocol No. 1[29] "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions". Although this is the sole Convention right that expressly mentions legal persons, one cannot conclude that all other rights are restricted to natural persons: Article 1 sentence 2 of Protocol No. 1 determines the substance of the right to property by stating that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". Here the personal scope of the right to property is defined with the term "no one" that – together with its antonym "everyone" – is used throughout the Convention. It seems plausible that the term may have an equally

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[25] Marius Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection* (Oxford: OUP, 2006) p. 34.

[26] Article 2(1) ICCPR.

[27] Article 1(2) ACHR defines: "For the purposes of this Convention, 'person' means every human being." Further see IACHR 26.2.2016, Advisory Opinion OC-22/16, *Titularidad de Derechos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*.

[28] ECtHR (GC) 6.7.2005, *Stec et al. v. UK*, 65731/01 and 65900/01, § 48; ECtHR (GC) 8.11.2016, *Magyar Helsinki Bizottság v. Hungary*, 18030/11, § 120; ECtHR (GC) 8.7.2019, *Mihalache v. Romania*, 54012/10, §§ 92, 113; ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, §§ 60, 65.

[29] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS No. 009.

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wide meaning when used in other Convention rights. Hence, if "no one" includes legal persons in the case of the right to property, one can assume that other rights defining their personal scope with this same wording potentially protect legal persons too. An indication that legal persons are entitled to Convention rights is further found in Article 10(1) sentence 3 ECHR, which states that the freedom of expression shall not prevent the States "from requiring the licensing of broadcasting, television or cinema enterprises". The wording suggests that the listed enterprises, which are regularly organised as legal persons, may in principle invoke the freedom of expression enshrined in Article 10 ECHR. Thus, the personal scope of Article 10 ECHR, which Article 10(1) sentence 1 ECHR delineates with the term "[e]veryone", includes (certain) legal persons.[30] Again, it seems very plausible that other Convention guarantees using the same wording to determine their personal scope share this broad meaning and, thus, potentially protect legal persons. While the terms "everyone" and "no one" thus include legal persons in certain circumstances, the terms are also used in rights which are clearly restricted to human beings, for example the right to life (Article 2 ECHR)[31] and the prohibition of torture (Article 3 ECHR)[32]. The interpretation of the terms is therefore context-specific: They partly refer to natural persons exclusively and party to both natural and legal persons.

Despite the definite indications that at least some Convention rights protect some legal persons, the text of the substantive provisions leaves open certain questions. In particular, it remains unclear to what extent the ECHR differentiates between different types of legal entities. It seems doubtful whether every legal person without exception is entitled to invoke (certain) Convention rights. In order to gain a better understanding of the personal scope of the Convention, one has to move beyond the substantial part of the ECHR and turn to the provisions regarding its enforcement mechanism.

2. Drawing conclusions from the individual application mechanism

The core provision from which to draw conclusions on the group of entities protected by the Convention in its procedural part is Article 34 ECHR, which guarantees the

[30] ECtHR 22.5.1990, *Autronic v. Switzerland*, 12726/87, § 47: "The Article (art. 10) applies to "everyone", whether natural or legal persons."

[31] ECtHR (GC) 22.3.2001, *K.-H. W. v. Germany*, 37201/97, § 96: "[T]he right to life is an inalienable attribute of human beings".

[32] EComHR 12.10.1988, *Verein "Kontakt-Information-Therapie" (KIT) and Hagen v. Austria*, 11921/86.

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right of individual application.[33] Article 34 ECHR entitles "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto" to lodge an individual application with the European Court of Human Rights (ECtHR). Therefore, an entity must be a victim (or at least credibly claim to be one) in order to lodge an individual application. The provision thus presupposes that the categories of petitioners mentioned in Article 34 ECHR are (potential) bearers of the substantive rights enshrined in the Convention. The equally authentic French version of the Convention makes clear that "persons" within the sense of Article 34 ECHR mean "natural persons", since it uses the term "toute personne physique".[34] In addition to natural persons, "non-governmental organisations" too can invoke Convention rights. The third category of petitioners mentioned in Article 34 ECHR – the "group of individuals" – does not add further entities as bearers of Convention rights, because it is not the group as such that invokes its own rights, but each individual member of the group who exercises their own rights.[35] Hence, Article 34 ECHR reveals that "everyone" within the meaning of Article 1 ECHR includes natural persons and "non-governmental organisations".

3. Beneficiaries of the Convention not entitled to lodge an individual application?

Finally, it remains to be assessed whether other entities are protected by the substantive rights of the ECHR even though they are not permitted to lodge an individual complaint. Theoretically, bearers of substantive rights not permitted to lodge an individual application could fall into one of two groups: One the one hand, they could be entities that, although excluded from the individual application under Article 34 ECHR, can make use of the other main enforcement mechanism foreseen

[33] Schabas, 'European Convention', p. 92 ("The word 'everyone' in article 1 should be read in conjunction with article 34").

[34] The terms of the ECHR are presumed to have the same meaning in both authentic texts, see, e.g., ECtHR (GC) 15.10.2015, *Perinçek v. Switzerland*, 27510/08, §§ 149-150.

[35] Frowein and Peukert, 'Europäische Menschenrechtskonvention', p. 474; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention. Ein Studienbuch*, 6. Auflage (München/Basel/Wien: C.H. Beck/Helbing Lichtenhahn/Manz, 2016) p. 63; Anne Peters and Tilman Altwicker, *Europäische Menschenrechtskonvention* (München: C.H. Beck, 2012) pp. 266-267; Kersten Rogge, 'Art 34 EMRK', in Katharina Pabel and Stefanie Schmahl (eds.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Köln/Berlin/München: Carl Heymanns Verlag, 2004) para. 126.

in the Convention, the inter-State complaint under Article 33 ECHR, i.e., States.[36] On the other hand, they could be entities that benefit from the substantive Convention guarantees without being able to enforce these rights on an international level.

Ultimately, however, neither of these theoretical possibilities is convincing: The inter-State complaint is not intended to enable States to enforce their own rights.[37] Rather, the key purpose of the inter-State application mechanism is to vindicate "the public order of Europe".[38] It serves as a tool for the collective enforcement of human rights.[39] Consequently, according to Article 33 ECHR, "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party". In stark contrast to the individual applicant under Article 34 ECHR, the applicant State is not required to demonstrate any form of particular direct interest when lodging an inter-State application.[40] The ECtHR stresses that even in inter-State cases "it must always be kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily 'injured' by a violation of one or several Convention rights."[41] In this vein, the ECtHR recently pointed out the limits of the inter-State application: The mechanism cannot be used

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[36] Jacques Velu, 'La Convention Européenne des Droits de l'Homme et les Personnes Morales de Droit Public', in *Miscellanea W. J. Ganshof van der Meersch. Studia ab discipulis amicusque in honorem egregii professoris edita, Tome Premier* (Bruxelles: Bruylant, 1972) 589-617, pp. 609-610, Heribert Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* (Karlsruhe: Verlag C.F. Müller, 1958) pp. 87-88 and Hubert Schorn, *Die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten und ihr Zusatzprotokoll in Einwirkung auf das deutsche Recht* (Frankfurt am Main: Vittorio Klostermann, 1965) p. 315 understand the inter-State complaints mechanism as an instrument that *inter alia* allows the States to enforce their own Convention rights.

[37] Luisa Crones, *Grundrechtlicher Schutz von juristischen Personen im europäischen Gemeinschaftsrecht. Eine rechtsvergleichende Untersuchung zum persönlichen Anwendungsbereich der Grundfreiheiten und der Gemeinschaftsgrundrechte* (Baden-Baden: Nomos Verlagsgesellschaft, 2002) p. 100.

[38] EComHR 11.1.1961, *Austria v. Italy*, 788/60.

[39] EComHR 11.1.1961, *Austria v. Italy*, 788/60; ECtHR 18.1.1978, *Ireland v. United Kingdom*, 5310/71, § 239. Schabas, 'European Convention', p. 725. For an in-depth analysis of the collective enforcement functions of the inter-State application see Isabella Risini, *The Inter-State Application under the European Convention on Human Rights. Between Collective Enforcement of Human Rights and International Dispute Settlement* (Leiden: Brill-Nijhoff, 2018) pp. 46-62.

[40] EComHR 11.1.1961, *Austria v. Italy*, 788/60. ECtHR 18.1.1978, *Ireland v. United Kingdom*, 5310/71, § 239. Schabas, 'European Convention', p. 726.

[41] ECtHR (GC) 12.5.2014, *Cyprus v. Turkey*, 25781/94, § 46.

to protect "the rights and interests of a legal entity which does not qualify as a 'non-governmental organisation' within the meaning of Article 34 of the Convention and is therefore not entitled to lodge an individual application."[42] The inter-State application mechanism, therefore, does not reveal any indications that the personal scope of the Convention exceeds the entities mentioned in Article 34 ECHR. The Contracting States are not bearers[43] but guarantors of the Convention rights.

Moreover, there is no indication that the ECHR protects entities without at the same time enabling them to enforce this protection at an international level: Rather, the substantive protection is inherently connected with the possibility to enforce these rights by lodging an individual application.[44] Every entity that is a bearer of Convention rights is listed as a possible applicant in Article 34 ECHR.[45] The *travaux préparatoires* support this view: The final, current wording of the categories of petitioners was chosen "in order not to exclude any person or group of persons from the right of access to the Commission".[46] The wording seeks to list exhaustively the potential bearers of Convention rights. Certainly, it is often stated that Article 34 ECHR is merely a procedural provision[47] and cannot, therefore, restrict the personal

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[42] ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, §§ 60-70.

[43] ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 66.

[44] Ulrich Fastenrath, 'Art 1 EMRK', in Katharina Pabel and Stefanie Schmahl (eds.), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Köln/Berlin/München: Carl Heymanns Verlag, 2012) para. 69.

[45] Grabenwarter, 'European Convention', p. 3 ("Accordingly, Article 34 determines who is subjected to the rights of the Convention"); Jörg Gundel, 'Grundrechtsberechtigte', in Christoph Grabenwarter (ed.), *Europäischer Grundrechteschutz. Enzyklopädie Europarecht Band 2* (Baden-Baden: Nomos Verlagsgesellschaft, 2014) 109-136, p. 126.

[46] Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume 4* (The Hague: Martinus Nijhoff, 1977) p. 38 ("The Committee has, moreover, given a wider definition of those bodies, other than individual persons, who will be qualified to petition the Commission in order not to exclude any person or group of persons from right of access to the Commission."). The preceding draft of the Convention used the wording "any person, or corporate body", see Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Volume 2* (The Hague: Martinus Nijhoff, 1975) p. 280.

[47] General Court of the European Union 29.1.2013, *Bank Mellat*, T-496/10, ECLI:EU:T:2013:39, § 38. Manon Julicher, Marina Henriques, Aina Amat Blai, Pasquale Policastro, 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared' (2019) *Utrecht Law Review* 1-25, p. 9: "Article 34 of the ECHR, however, is a purely procedural provision that only applies before the ECtHR. It does not answer the question of whether and to what extent the (universal) ECHR provisions per se can be invoked by private legal entities or public authorities"; Stefan Storr, 'Das Grundrecht der unternehmerischen Freiheit und öffentliche Unternehmen in der Europäischen Union', in Rudolf Feik and Roland Winkler (eds.),

scope of the substantive rights guaranteed by the Convention. Although this view is technically accurate, it misses the point somewhat: While Article 34 ECHR as such does not determine the material scope of the ECHR, it reflects the broadest possible extent of the substantive guarantees of the Convention. As one of the key provisions[48] of the Convention, Article 34 ECHR is a central point of reference for the – internally consistent and harmonious – interpretation of the rest of the Convention.[49]

B. Do certain Convention rights have an exceptionally wide personal scope?

Sometimes it is assumed in literature that certain rights have an exceptionally wide personal scope and therefore protect even legal entities that in general – i.e., according to the general rules for delineating the scope of the ECHR – are not entitled to Convention rights: In particular, this is argued with regards to the right to a fair trial guaranteed by Article 6 ECHR and the right to property guaranteed by Article 1 of Protocol No. 1.[50]

This opinion is, however, unconvincing. First of all, the text of Article 6 ECHR does not in any way suggest such a particularly extensive personal scope. Quite the contrary, it protects "everyone" and thus uses the typical wording found in many other Convention rights as well as Article 1 ECHR. Hence, Article 6 ECHR is clearly in step with other Convention rights.

On the other hand, Article 1 of Protocol No. 1 ECHR does indeed feature a particular wording in that it expressly mentions "[e]very natural or legal person". This formulation could *prima facie* be construed as encompassing every single legal person, even "governmental organisations".[51] Still, it seems more plausible that

Festschrift für Walter Berka (Wien: Jan Sramek Verlag, 2013) 219-236, p. 233; Velu, 'Convention Européenne', p. 599.

[48] In ECtHR (GC) 4.2.2005, *Mamatkulov and Askarov v. Turkey*, 46827/99 and 46951/99, § 100 the Court held "that the provision concerning the right of individual application (Article 34, formerly Article 25 of the Convention before Protocol No. 11 came into force) is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection" and qualified it as a "key provision" of the Convention.

[49] ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 65.

[50] For Article 6(1), Article 7 and Article 13 ECHR: Michael Goldhammer and Ferdinand Sieber, 'Juristische Personen und Grundrechtsschutz in Europa' (2018) *Juristische Schulung* 22-27, p. 24. See also Volker Röben, 'Grundrechtsberechtigte und -verpflichtete, Grundrechtsgeltung', in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds.), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Band I*, 2. Auflage (Tübingen: Mohr Siebeck, 2013) 253-286, p. 263.

[51] Peter J. Tettinger, 'Zur Grundrechtsberechtigung von Energieversorgungsunternehmen im Europäischen Gemeinschaftsrecht', in Jürgen F. Baur, Peter-Christian Müller-Graff and Manfred

Article 1 sentence 1 of Protocol No. 1 merely exhibits an unusual and, if anything, imprecise wording which is in substance, nevertheless, consistent with the wording "everyone" used in Article 1 ECHR as well as numerous substantive Convention rights. This view is reinforced by Article 1 sentence 2 of Protocol No. 1, which – as already mentioned above – uses the term "no one" to define the personal scope of the right to property. Thus, Article 1 of Protocol No. 1 itself partly utilizes the standard wording that– together with its antonym "everyone" – is found throughout the Convention and thereby establishes a textual convergence with other substantive guarantees of the Convention.

Besides the textual argument, and more crucially, an internally coherent interpretation of the Convention precludes ascribing to the right to property an exceptionally wide personal scope of application. As shown above, it does not fit the architecture of the ECHR to assume that entities are protected by the Convention but barred from enforcing their rights at an international level.[52] It would take very weighty arguments to sever the general inherent link between the substantive protection by the Convention and the international enforcement mechanism, even just for one particular right, in this case the right to property. Such reasons, however, are not apparent. Thus, "governmental organisations", which are not are not permitted to lodge an individual complaint, do not qualify as legal persons within the meaning of Article 1 of Protocol No. 1.

Consequently, a textual and contextual analysis of the ECHR shows that the general limits of the personal scope of the Convention reflected in Article 34 ECHR apply to every single substantive guarantee of the ECHR.

C. Interim result: The ECHR protects natural persons and "non-governmental organisations"

In summary, "everyone" within the meaning of Article 1 ECHR can be subdivided into human beings on the one hand and "non-governmental organisations" on the other. In addition to natural persons, only legal entities that qualify as "non-governmental organisations" within the meaning of Article 34 ECHR are bearers of the rights enshrined in the ECHR.[53] Conversely, Contracting States and legal entities

Zuleeg (eds.), *Europarecht. Energierecht. Wirtschaftsrecht. Festschrift für Bodo Börner zum 70. Geburtstag* (Köln/Berlin/Bonn/München: Carl Heymanns Verlag KG, 1992) 625-640, pp. 633-634 argues that all legal persons are entitled to the right to property under Article 1 of Protocol No. 1.

[52] See above II.A.3.

[53] See ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 66 and the references in f.n. 44 and 45.

qualifying as "governmental organisations" are not protected by the Convention.[54] These limits of the personal scope of the ECHR apply to all Convention rights without exception.

III. What constitutes a "non-governmental organisation"?

The preceding analysis has shown that a legal entity can invoke some rights of the ECHR provided that it is a "non-governmental organisation". Consequently, it is necessary to determine how this term is to be understood. For this purpose, the paper will start by tracing the evolution of the relevant case-law of the Convention bodies. After unearthing its roots, the different strands of the jurisprudence will be identified and structured (III.A). On this basis, the paper will subsequently try to further illuminate the notion of "non-governmental organisations" by, firstly, identifying the States as subjects of international law as their conceptual counterparts (III.B) and, secondly, analysing whether rules of attribution can be imported, *mutatis mutandis*, to serve as criteria for qualifying organisations as either "governmental" or "non-governmental" (III.C).

A. Case-law of the Convention bodies

Over the last decades, the Convention bodies, the ECtHR and the former European Commission of Human Rights (EComHR), have dealt with a plethora of different non-human entities bringing claims before them. When deciding on the admissibility of an individual application, they had to assess whether the applicant entity could be considered a "non-governmental organisation" entitled to lodge an application.[55] Despite gradually developing extensive case-law on this issue, the Convention bodies have never provided a conclusive definition of "non-governmental organisation". Rather, they juxtapose "non-governmental organisations" with "governmental organisations", which are not entitled to lodge an individual application.

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[54] See ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 66.

[55] Before the reform of the Convention with Protocol No. 11 (Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Council of Europe, ETS No. 155) Article 25 ECHR governed the right of individual petition: According to this provision the EComHR may receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the ECHR rights, provided that the High Contracting Party against which the complaint has been lodged recognised the competence of the EComHR to receive such petitions.

The first case in which the EComHR qualified applicants as "governmental organisations" stems from 1974:[56] Sixteen Austrian communes lodged applications complaining that various procedures related to the ending of the communes' independent existence due to a reform of the communal structures violated their rights under the Convention. The EComHR briefly stated "that local government organisations such as communes, which exercise public functions on behalf of the State, are clearly 'governmental organisations' as opposed to non-governmental organisations".[57] The complaints of the communes were therefore dismissed as incompatible *ratione personae* with the provisions of the Convention.

This decision formed the foundation for the following case-law of the Convention bodies consistently qualifying territorial authorities as "governmental organisations". While the result stayed the same, the exact reasoning evolved over time. Like the first decision, subsequent cases focussed on the functions performed by the organisation.[58] These tasks were regularly characterised as "official duties assigned [...] by the Constitution and by substantive law".[59] However, the Convention bodies additionally took account of the legal form, highlighting that the applicants were "public-law bodies" or "public-law authorities".[60] More recently, the focus has shifted to another criterion, namely the powers conferred to the entity: The ECtHR bases the classification as a "governmental organisation" on the fact that the applicant is a

[56] EComHR 31.5.1974, *Sixteen Austrian Communes et al. v. Austria*, 5767/72 et al.

[57] EComHR 31.5.1974, *Sixteen Austrian Communes et al. v. Austria*, 5767/72 et al.

[58] EComHR 8.12.1992, *L'Association des Résidents du Quartier Pont Royal, la commune de Lambersart et al. c. France*, 18523/91 ("la commune, collectivité territoriale exerçant des fonctions officielles au nom de l'Etat") most closely resembles EComHR 31.5.1974, *Sixteen Austrian Communes et al. v. Austria*, 5767/72 et al. The two decisions EComHR 14.12.1988, *Rothenthurm Commune v. Switzerland*, 13252/87 ("local government organisations, such as the applicant commune, which exercise public functions are clearly 'governmental organisations' as opposed to 'non-governmental organisations'") and EComHR 2.12.1994, *Tsomtsos et al. c. Grèce*, 20680/92 ("les organismes de collectivités locales, tels que la commune requérante, qui exercent des fonctions publiques, sont manifestement 'des organisations gouvernementales'") use a very similar wording but do not emphasise that the functions are exercised "on behalf of the State".

[59] This line of reasoning first appears in EComHR 7.1.1991, *Ayuntamiento de M v. Spain*, 15090/89 and thereafter in the following decisions: EComHR 15.9.1998, *Province of Bari et al. v. Italy*, 41877/98; ECtHR 18.5.2000, *Hatzitakis et les Mairies de Thermaikos et Mikra c. Grèce*, 48391/99 and 48392/99; ECtHR 1.2.2001, *Ayuntamiento de Mula v. Spain*, 55346/00; similar ECtHR 3.2.2004, *Gouvernement de la Communauté Autonome du Pays Basque c. Espagne*, 29134/03.

[60] See the decisions listed in f.n. 59.

"public-law entity which shares in the exercise of public authority".[61] Likewise, starting from the late-1990s, the Convention bodies additionally assessed whether the applicant entities' acts could engage the responsibility of a Contracting State under the Convention – if their conduct could trigger the responsibility of a State, they could not be considered as "non-governmental organisations".[62]

The Convention bodies, over time, repeatedly confirmed their restrictive stance and left no room for exceptionally permitting territorial authorities to submit an individual application. They, firstly, made clear that it is irrelevant how domestic law regulates the relationship between the territorial authority and other organs of the State. Accordingly, local and regional authorities such as municipalities or provinces qualify as "governmental organisations" irrespective of the extent of their autonomy vis-à-vis the central organs of the State.[63] Secondly, the ECtHR so far rejected all attempts by applicant territorial authorities to carve out exceptions regarding certain activities: Territorial authorities are classified as "governmental organisations" even if they claim that in the particular situation they merely exercised "private functions" and acted like private actors[64] or were treated as such by (other) authorities[65]. The ECtHR held that applications lodged by territorial authorities were inadmissible even when they concerned acts of the territorial authorities of a "private nature" where they did

[61] ECtHR 23.11.1999, *Municipal Section of Antilly v. France*, 45129/98. Subsequently, this argument appears in ECtHR 26.8.2003, *Breisacher v. France*, 76976/01 and ECtHR 27.9.2007, *Ioannis Karagiannis et al. c. Grèce*, 33408/05.

[62] EComHR 15.9.1998, *Province of Bari et al. v. Italy*, 41877/98; ECtHR 7.6.2001, *Danderyds Kommun v. Sweden*, 52559/99; ECtHR 23.3.2010, *Doşemealtı Belediyesi c. Turquie*, 50108/06; ECtHR 9.11.2010, *Demirbaş et al. c. Turquie*, 1093/08 et al.; ECtHR 6.10.2020, *République démocratique du Congo c. Belgique*, 16554/19, § 18.

[63] EComHR 15.9.1998, *Province of Bari et al. v. Italy*, 41877/98; ECtHR 7.6.2001, *Danderyds Kommun v. Sweden*, 52559/99; ECtHR 3.2.2004, *Gouvernement de la Communauté Autonome du Pays Basque c. Espagne*, 29134/03; ECtHR 23.3.2010, *Doşemealtı Belediyesi c. Turquie*, 50108/06; ECtHR 9.11.2010, *Demirbaş et al. c. Turquie*, 1093/08 et al.

[64] See ECtHR 1.2.2001, *Ayuntamiento de Mula v. Spain*, 55346/00, which concerned proceedings between the applicant Mula Borough Council and private individuals before civil courts regarding property rights. In ECtHR 7.6.2001, *Danderyds Kommun v. Sweden*, 52559/99 the Court qualified the applicant municipality as a "governmental organisation" and stated: "This is the case even if the municipality is claiming that in this particular situation it is acting as a private organ."

[65] In ECtHR 18.5.2000, *Hatzitakis et les Mairies de Thermaikos et Mikra c. Grèce*, 48391/99 and 48392/99 the applicant municipalities claimed their rights were violated by an expropriation of their private property in proceedings where the State treated them just like a regular private individual.

not make use of their public powers.[66] The decisive criterion for their classification as "governmental organisations" is their general competence to exercise public authority, irrespective of the particular act or procedure which is challenged before the ECtHR.[67]

While territorial authorities gave rise to the foundations of the relevant case-law and still can be regarded as centrepiece of "governmental organisations", this category is not limited to territorial authorities but comprises a wide variety of entities. Beyond the settled and clear line of case-law on territorial entities, however, the qualification of the various entities becomes more complicated. The first case in which the Convention bodies qualified an entity other than a territorial authority as a "governmental organisation" concerned a professional chamber: Using the same argument as in early cases concerning territorial authorities the EComHR explained "that the General Councils of Professional Associations are public-law corporations which perform official duties assigned to them by the Constitution and the legislation".[68] Hence, they were "quite clearly not non-governmental organisations".[69] Shortly thereafter, the EComHR classified a public law corporation that ran the State rail network as a "governmental organisation": The Commission noted that "its board of directors is answerable to the Government and that the applicant is [...] the only undertaking with a licence to manage, direct and administer the state railways, with a certain public-service role in the way it does so".[70] Moreover, the corporation's

[66] ECtHR 23.3.2010, *Doşemealtı Belediyesi c. Turquie*, 50108/06; ECtHR 9.11.2010, *Demirbaş et al. c. Turquie*, 1093/08 et al: "La Cour a aussi eu l'occasion de dire que les actes à « caractère privé » des communes, ou les actes pour lesquels elles n'ont pas fait usage de leur pouvoir public, ne peuvent constituer un argument qui permettrait de les considérer comme des « requérants potentiels »; le libellé de l'article 34 est limitatif à cet égard et la situation a été confirmée à maintes reprises par la jurisprudence, telle que rappelée ci-dessus."

[67] ECtHR 23.3.2010, *Doşemealtı Belediyesi c. Turquie*, 50108/06; ECtHR 9.11.2010, *Demirbaş et al. c. Turquie*, 1093/08 et al: "La nature de l'acte concerné n'a donc pas d'incidence sur ce point car une organisation gouvernementale détient toujours une partie de la puissance publique. Lorsqu'elle a examiné la qualité de requérant des organisations publiques, la Cour a toujours retenu comme critère la compétence de celles-ci à exercer la puissance publique, sans égard à l'acte ou la procédure qui est contesté devant elle".

[68] EComHR 28.6.1995, *Consejo General de Colegios Oficiales de Economistas de España v. Spain*, 26114/95 and 26455/95.

[69] EComHR 28.6.1995, *Consejo General de Colegios Oficiales de Economistas de España v. Spain*, 26114/95 and 26455/95.

[70] EComHR 8.9.1997, *RENFE v. Spain*, 35216/97.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 1-46, https://doi.org/10.25365/vlr-2021-5-1-1.

structure and activities were regulated by national law.[71] The ECtHR considered the Chamber of Commerce and Industry for a Dutch province a "governmental organisation exercising public authority", because it was "an agency subordinate to the Government, set up by law and invested with authority to implement law".[72] Conversely, not all public-law bodies were categorized as "governmental organisations": The ECtHR qualified Greek monasteries as "non-governmental organisations", because they did not exercise governmental powers, their objectives differed substantially from those of governmental organisations established for public-administration purposes and they were completely independent of the State.[73]

In 2003, these initial steps were followed by a landmark decision that to this day remains a central point of reference in the case-law of the ECtHR. In *Radio France v. France* the Court recapitulated the previous case-law and articulated general conditions under which entities other than territorial authorities were to be classified as "governmental organisations". The category of "governmental organisations" included "legal entities which participate in the exercise of governmental powers or run a public service under government control".[74] The Court, thus, distinguished two alternative paths that lead to the qualification as a "governmental organisation": the entity either possesses specific powers or it performs specific activities without being sufficiently independent from the government. While the powers as such suffice, the specific activities and the lack of independence must apparently exist cumulatively for an organisation to be qualified as "governmental". The classification requires a comprehensive assessment of the individual entity on a case-by-case basis. To determine whether an entity other than a territorial authority is to be qualified as a "governmental organisation" one must take account of "its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities."[75] Radio France, although it was held by the State and performed public-service missions in the general interest, was qualified as a "non-governmental organisation".[76] The Court stressed that Radio France was essentially governed by

[71] EComHR 8.9.1997, *RENFE v. Spain*, 35216/97.

[72] ECtHR 3.5.2001, *Smits et al. v. Netherlands*, 39032/97 et al.

[73] ECtHR 9.12.1994, *The Holy Monasteries v. Greece*, 13092/87 and 13984/88, § 49.

[74] ECtHR 23.9.2003, *Radio France et al. v. France*, 53984/00, § 26.

[75] ECtHR 23.9.2003, *Radio France et al. v. France*, 53984/00, § 26.

[76] ECtHR 23.9.2003, *Radio France et al. v. France*, 53984/00, § 26.

company law, did not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities, and was subject to the jurisdiction of the ordinary rather than the administrative courts.[77] Moreover, domestic law guaranteed its editorial independence and its institutional autonomy, placed radio broadcasting in a competitive environment, and did not confer a dominant position on Radio France.[78]

Drawing on the criteria formulated in *Radio France*, the ECtHR in subsequent cases examined a wide range of entities. On this basis, the ECtHR qualified the following entities as "governmental organisations": the Vienna Chamber of Medical Doctors[79], the Croatian Chamber of Economy[80], a Turkish public-law University[81], the Democratic Republic of the Congo[82] as well as various State-owned companies[83]. Conversely, the Austrian Broadcasting Corporation[84] and other State-owned companies[85] were classified as "non-governmental organisations" entitled to lodge an individual application.

Of course, the evolution of the jurisprudence did not stop with *Radio France*. While the ECtHR frequently reiterated the principles outlined in *Radio France* in the years thereafter, it partly refined and rephrased the criteria and supplemented them with additional arguments. With regard to companies, the ECtHR specified the following key criteria for determining whether a company qualified as "non-governmental

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[77] ECtHR 23.9.2003, *Radio France et al. v. France*, 53984/00, § 26.

[78] ECtHR 23.9.2003, *Radio France et al. v. France*, 53984/00, § 26.

[79] ECtHR 16.2.2016, *Ärztekammer für Wien and Dorner v. Austria*, 8895/10, §§ 35-45.

[80] ECtHR 25.4.2017, *Croatian Chamber of Economy v. Serbia*, 819/08, §§ 30-39.

[81] ECtHR 28.1.2020, *İhsan Doğramacı Bilkent Üniversitesi c. Turquie*, 40355/14, §§ 35-46.

[82] ECtHR 6.10.2020, *République démocratique du Congo c. Belgique*, 16554/19, §§ 15-20.

[83] ECtHR 27.1.2009, *State Holding Company Luganskvugillya v. Ukraine*, 23938/05 ("a corporation, owned and managed by the State, which participated in the exercise of governmental powers in the area of management of coal industry, having a public-service role in that activity of the State"); ECtHR 2.7.2013, *Východoslovenská vodárenská spoločnosť, a. s. v. Slovakia*, 40265/07, §§ 30-37 (the company was owned by municipalities and carried out their public service role to supply water to the region's inhabitants and collect their sewage); ECtHR 16.10.2018, *JKP Vodovod Kraljevo v. Serbia*, 57691/09 and 19719/10, §§ 23-28 (a water and sewerage company established by a municipality; the ECtHR places special emphasis on the "special nature of the applicant company's activity" – it was the only water and sewerage company in a certain municipality and provided a public service of vital importance for which it used public assets).

[84] ECtHR 7.12.2006, *Österreichischer Rundfunk v. Austria*, 35841/02, §§ 46-53.

[85] ECtHR 22.11.2007, *Ukraine-Tyumen v. Ukraine*, 22603/02, §§ 26-28; ECtHR 13.12.2007, *Islamic Republic of Iran Shipping Lines v. Turkey*, 40998/98, §§ 79-82.

organisation": "the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control)".[86]

Although not expressly breaking with the *Radio France* principles, the Court recently repeatedly highlighted that the key question to determine whether an organisation classifies as "non-governmental" is whether it enjoys "sufficient institutional and operational independence from the State".[87] The original phrasing in *Radio France* would suggest that entities that do not possess governmental powers have to meet two different criteria cumulatively to be considered as "governmental organisation": carry out particular activities ("run a public service") and exhibit insufficient independence ("under government control"). By contrast, the recent formulation focuses primarily on the independence of the entity and relegates the nature of the activity carried out to one of various factors that have to be taken into account when assessing the entity's independence. In this vein, the ECtHR emphasises that none of the factors mentioned in *Radio France* and the subsequent case-law is decisive on its own, but that it is necessary to take into account "all the relevant factual and legal circumstances in their entirety".[88] Instead of a few clear and necessary conditions, the Court opts for an adaptable case-by-case assessment taking into consideration a very wide range of factors. This approach reinforces the Court's flexibility but, of course, is hardly conducive to legal certainty.

Over time, the ECtHR also introduced a new argument in its reasoning: The idea behind the principle that only "non-governmental organisations" could submit an individual application to the Court was "to prevent a Contracting Party [from] acting as both an applicant and a respondent party before the Court".[89] This argument,

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[86] ECtHR 12.5.2015, *Ljubljanska Banka D.D. v. Croatia*, 29003/07, §§ 52-53.

[87] ECtHR 9.4.2013, *Zastava It Turs v. Serbia*, 24922/12, § 22; ECtHR 12.5.2015, *Ljubljanska Banka D.D. v. Croatia*, 29003/07, § 54; similar ECtHR 25.4.2017, *Croatian Chamber of Economy v. Serbia*, 819/08, § 38 ("the Croatian Chamber of Economy does not enjoy a sufficient degree of autonomy from the Croatian Government for it to be considered a non-governmental organisation"); ECtHR 16.10.2018, *JKP Vodovod Kraljevo v. Serbia*, 57691/09 and 19719/10, § 27 (here in a slight variation the Court concluded "that the applicant company does not enjoy sufficient independence from the political authorities"); ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, §§ 64, 78.

[88] ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 63.

[89] This argument first appeared in ECtHR 13.12.2007, *Islamic Republic of Iran Shipping Lines v. Turkey*, 40998/98, § 81 and has since become a permanent fixture of the Courts' case-law, see ECtHR

however, seems misleading in a number of ways: Firstly, the Convention system does not bar Contracting Parties from acting as an applicant in one case and as a respondent in another. On the contrary, Article 33 ECHR explicitly foresees a separate procedure for inter-State applications. The Convention system as a whole, thus, does allow States to act in different roles before the Court. Secondly, if read in a strict sense, the argument could be construed as only preventing "governmental organisations" from bringing an individual application against the particular Contracting Party they are incorporated in. Article 34 ECHR, however, does not exclude only those entities forming a part of the respondent State. Rather, governmental organisations are prevented from lodging an individual application irrespective of the identity of the respondent State. Therefore, the ECtHR has declared inadmissible the applications of the Croatian Chamber of Economy against Serbia[90] and of a company forming part of Slovenia against Croatia[91]. Lastly, the notion of "governmental organisations" is not restricted to entities incorporated in Contracting Parties but also includes entities forming part of States not party to the ECHR.[92]

As shown, the Convention bodies have produced extensive case-law distinguishing "non-governmental organisations" from "governmental organisations". Nevertheless, until this day, its conceptual foundation remains somewhat opaque. The ECtHR has not provided a general conclusive definition of the notion but has confined itself to listing various categories of entities that fall under this term. It is further unclear where the criteria applied by the ECtHR stem from. In general, literature does not offer much to resolve this lack of clarity: Instead of an analysis of the conceptual foundations, one typically encounters elements of the Convention bodies' case-law, sometimes remaining true to the original wording used by the EComHR or the ECtHR, sometimes modifying it slightly.[93]

27.1.2009, *State Holding Company Luganskvugillya v. Ukraine*, 23938/05; ECtHR 15.11.2011, *Transpetrol v. Slovakia*, 28502/08, § 60; ECtHR 2.7.2013, *Východoslovenská vodárenská spoločnosť, a. s. v. Slovakia*, 40265/07, § 32; ECtHR 16.2.2016, *Ärztekammer für Wien and Dorner v. Austria*, 8895/10, § 35; ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 61.

[90] ECtHR 25.4.2017, *Croatian Chamber of Economy v. Serbia*, 819/08, § 38.

[91] ECtHR 12.5.2015, *Ljubljanska Banka D.D. v. Croatia*, 29003/07, § 55.

[92] ECtHR 13.12.2007, *Islamic Republic of Iran Shipping Lines v. Turkey*, 40998/98, § 81; ECtHR 12.5.2015, *Ljubljanska Banka D.D. v. Croatia*, 29003/07, § 55; ECtHR 6.10.2020, *République démocratique du Congo c. Belgique*, 16554/19, §§ 15-20.

[93] See, e.g., Koen Lemmens, 'General Survey of the Convention', in Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human*

Against this backdrop, this paper will in the following analyse the notion of "non-governmental organisations" by, firstly, determining to which conceptual counterpart the opposite term "non-governmental" refers to (III.B) and, secondly, exploring whether rules of attribution can be imported and utilised, *mutatis mutandis*, to determine if an organisation qualifies as either "governmental" or "non-governmental" (III.C).

B. The State as conceptual counterpart

The concept of "non-governmental organisation" under the ECHR has to be interpreted autonomously; its meaning is separate from notions of the respective national law of the Contracting States.[94] The qualification of an entity is independent from its formal classification under domestic law. Its legal status under domestic law – for example its incorporation as a separate legal entity – is not decisive in determining whether it is a "non-governmental" organisation.[95] In international law there is no singular, undisputed definition of "non-governmental organisations"; rather, a multitude of varying notions in different international instruments and frameworks exists.[96] Unlike in (many) other areas of international law, e.g., the United Nations context, "non-governmental organisations" within the meaning of Article 34 ECHR are not limited to non-profit organisations.[97] "Non-governmental organisations" within the meaning of Article 34 ECHR are not defined in contrast to

Rights, Fifth edition (Cambridge/Antwerp/Portland: Intersentia, 2018) 1-78, pp. 48-49; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey. The European Convention on Human Rights*, Seventh Edition (Oxford: OUP, 2017) p. 29; Schabas, 'European Convention', p. 737. For a relatively in-depth analysis see Christoph Schwaighofer, 'Legal Persons, Organisations, Shareholders as Applicants (Article 25 of the Convention)', in Michele de Salvia and Mark E. Villiger (eds.), *The Birth of European Human Rights Law. L'éclosion du Droit européen des Droits de l'Homme. Liber Amicorum Carl Aage Nørgaard* (Baden-Baden: Nomos Verlagsgesellschaft, 1998) 321-331, pp. 323-325.

[94] ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 63.

[95] See, e.g., ECtHR 16.10.2018, *JKP Vodovod Kraljevo v. Serbia*, 57691/09 and 19719/10, § 25; ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 63. Likewise, an entity does not necessarily have to feature legal personality or a corporate status according to national law in order to classify as an "organisation" (see, e.g., ECtHR 29.11.2018, *Stavropegic Monastery of Saint John Chrysostom v. Former Yugoslav Republic of Macedonia*, 52849/09, where the applicant was a religious association without legal-entity status at the national level).

[96] See Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge: CUP, 2005) pp. 36-46.

[97] For the requirement of a non-profit-making aim in various areas of international law including the United Nations and Council of Europe contexts see Lindblom, 'Non-Governmental Organisations', pp. 39-45, 47-48.

other (e.g., commercial) private entities but in opposition to "governmental organisations". The central question is, therefore, what conceptual counterpart the opposite term "non-governmental" refers to.

Although this dichotomy of "non-governmental" and "governmental" is a helpful first step to clarify the notion of "non-governmental organisation", ambiguities remain as the terms "governments" and "governmental" too have various meanings in international law: While in a narrow sense, government is limited to the top executive organs of the State, in its broadest sense, the term comprises all organs of the State, irrespective of their function and their (hierarchical) level in the organisational structure of the State.[98] These diverging notions of "government" are also mirrored in the literature on Article 34 ECHR. On the one hand, "governmental" within the meaning of Article 34 ECHR is read in a narrow sense: In this case, organisations are classified as "non-governmental" provided that they are – broadly speaking – sufficiently independent from the top executive organs of the State.[99] On the other hand, "governmental organisations" are understood in a much wider sense as comprising various forms of public bodies notwithstanding their autonomy vis-à-vis the central organs of the State.[100]

This latter, wide interpretation of "governmental organisations" is applicable to the ECHR: The general well established principle of interpretation that the Convention is to be read as a whole and in a way that promotes internal harmony and consistency also applies to Articles 1, 33 and 34 ECHR.[101] In the spirit of internal coherence, it can be assumed that these provisions all refer to the State as a subject of international law in a broad sense: International law regards the State as a single unit that is subdivided into a multitude of entities, which may or may not have separate legal personality according to domestic law. From the perspective of the ECHR, however, these entities possess no separate legal existence but are absorbed by the State as a

[98] Siegfried Magiera, 'Governments', in Anne Peters (gen. ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2007) paras. 2-3.

[99] See, e.g., Schorn, 'Europäische Konvention', p. 321 who classifies municipalities in their self-governing capacity als "non-governmental organisations". For a narrower notion of "governmental" not referring to the State as a whole see further: Gregor Heißl, 'Grundrechtsträgerschaft juristischer Personen. Systematik in der österreichischen Rechtsordnung' (2016) *Zeitschrift für öffentliches Recht* 215–239, p. 230 and Philipp Lindermuth, 'Der Grundrechtsschutz des Staates und seiner Einrichtungen', in Arno Kahl, Nicolas Raschauer and Stefan Storr (eds.), *Grundsatzfragen der europäischen Grundrechtecharta* (Wien: Verlag Österreich, 2013) 111-127, pp. 114-116.

[100] See, e.g., Schabas, 'European Convention', p. 737.

[101] ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 65.

unitary entity. Just as not only certain State organs are bound by the Convention under Article 1 ECHR but the High Contracting Parties as a whole comprising a variety of entities,[102] inversely all legal entities forming component parts of the States are to be classified as "governmental organisations", which are excluded from the protection afforded by the Convention rights. The State in all its component units is bound but not protected by the Convention rights. The same conclusion is reached from a purely procedural standpoint: The Convention provides for two principal lanes of enforcement that complement each other in order to together form a comprehensive mechanism, the inter-State application under Article 33 ECHR and the individual application under Article 34 ECHR. The respective groups of entities entitled to invoke each instrument do not overlap: "Non-governmental organisations" as potential applicants under Article 34 ECHR are clearly distinct from the States, which are entitled to lodge an inter-State application under Article 33 ECHR, provided that they are parties to the Convention.[103] In the individual application procedure under Article 34 ECHR, the States can act solely as respondents.[104]

The notion of "non-governmental organisations" is, thus, to be construed in opposition to the State as a unitary entity and subject of international law. This leads to the question based on which criteria one has to assess whether a legal entity is to be considered either a component part of a State or a "non-governmental organisation".

C. Attribution as a yardstick

In a growing number of cases, the Court links questions of attribution and of the qualification of legal entities under Article 34 ECHR: When assessing whether an organisation is to be qualified as "governmental" the ECtHR referred to previous

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[102] ECtHR (GC) 18.2.2009, *Andrejeva v. Latvia*, 55707/00, § 56. Schabas, 'European Convention', p. 90; Fastenrath, 'Art 1 EMRK', para. 37; Peters and Altwicker, 'Europäische Menschenrechtskonvention', p. 15.

[103] See, e.g., Schwaighofer, 'Legal Persons', p. 325 f.n. 30 and Lisa Wiesler, *Die Rechtsschutzeinrichtungen nach der Europäischen Menschenrechtskonvention* (Freiburg im Breisgau: K. Müller, 1961) p. 51.

[104] The ECtHR explained that the idea behind the exclusion of "governmental organisations" from the individual application under Article 34 ECHR was "to prevent a Contracting Party [from] acting as both an applicant and a respondent party before the Court" (ECtHR 13.12.2007, *Islamic Republic of Iran Shipping Lines v. Turkey*, 40998/98, § 81; ECtHR 27.1.2009, *State Holding Company Luganskvugillya v. Ukraine*, 23938/05; ECtHR 15.11.2011, *Transpetrol v. Slovakia*, 28502/08, § 60; ECtHR 2.7.2013, *Východoslovenská vodárenská spoločnosť, a. s. v. Slovakia*, 40265/07, § 32; ECtHR 16.2.2016, *Ärztekammer für Wien and Dorner v. Austria*, 8895/10, § 35; ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, § 61).

findings concerning attribution and the responsibility of States.[105] In some cases the ECtHR even expressly argued that the applicant entity was to be considered a governmental organisation because its actions were attributable to the State and could trigger its responsibility.[106] Conversely, when assessing whether the conduct of a certain entity was attributable to the State, the ECtHR has drawn on previous decisions regarding the qualification of organisations under Article 34 ECHR.[107] Thus, while there is a clear convergence of the criteria applied, the ECtHR has not elaborated the relationship between these two areas. The structure and extent of this link stay mysterious. Connections between attribution and the qualification of organisations as "governmental" also appear in literature,[108] but here too the reason and precise form of this connection typically remain vague. This jurisprudence and doctrine raise the question if and to what extent it is possible to use rules of attribution as yardstick for qualifying legal entities and whether it is convincing to do so.

One the one hand, there seems to be a clear connection between attribution and the qualification of organisations under Article 34 ECHR as they both deal with the delimitation of the State using a binary "State" and "non-State" scheme. On the other hand, a closer look reveals considerable differences between the two areas. Certainly,

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[105] ECtHR 27.1.2009, *State Holding Company Luganskvugillya v. Ukraine*, 23938/05; ECtHR 9.4.2013, *Zastava it Turs v. Serbia*, 24922/12, § 22; ECtHR 12.5.2015, *Ljubljanska Banka D. D. v. Croatia*, 29003/07, §§ 52-53; ECtHR 16.10.2018, *JKP Vodovod Kraljevo v. Serbia*, 57691/09 and 19719/10, §§ 26-27.

[106] EComHR 15.9.1998, *Province of Bari et al. v. Italy*, 41877/98; ECtHR 7.6.2001, *Danderyds Kommun v. Sweden*, 52559/99; ECtHR 23.3.2010, *Döşemealtı Belediyesi c. Turquie*, 50108/06; ECtHR 9.11.2010, *Demirbaş et al. c. Turquie*, 1093/08 et al.; ECtHR 6.10.2020, *République démocratique du Congo c. Belgique*, 16554/19, § 18.

[107] ECtHR (GC) 8.4.2004, *Assanidze v. Georgia*, 71503/01, §§ 148-150; ECtHR 30.11.2004, *Mykhaylenky et al. v. Ukraine*, 35091/02, § 44; ECtHR 22.2.2005, *Novoseletskiy v. Ukraine*, 47148/99, § 82; ECtHR 8.4.2010, *Yershova v. Russia*, 1387/04, § 55; ECtHR 21.10.2010, *Saliyev v. Russia*, 35016/03, § 64; ECtHR (GC) 3.4.2012, *Kotov v. Russia*, 54522/00, §§ 93-95; ECtHR 5.2.2015, *Cikanović v. Croatia*, 27630/07, § 53; ECtHR 16.6.2015, *Rafailović and Stevanović v. Serbia*, 38629/07 and 23718/08, §§ 62-63; ECtHR 22.2.2018, *Libert v. France*, 588/13, § 39; ECtHR 29.9.2020, *Balashova and Cherevichnaya v. Russia*, 9191/07, § 32; ECtHR 9.2.2021, *Tokel v. Turkey*, 23662/08, §§ 58-62.

[108] Judith Schönsteiner, 'Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters' (2019) *University of Pennsylvania Journal of International Law* 895-936, p. 917 links attribution and the question whether a State-owned entity has standing under the ECHR. The connection also appears in Hans Christian Krüger and Carl Aage Nørgaard, 'The Right of Application', in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 657-675, p. 666; Frowein and Peukert, 'Europäische Menschenrechtskonvention', pp. 490-491; Schabas, 'European Convention', p. 89.

from a formal perspective attribution for the purpose of State responsibility and the standing of an entity before an international Court are two very different issues. The rules of attribution in the context of State responsibility were developed for a specific purpose and are not intended to apply in all circumstances which require defining the State. Besides, there are more practical challenges: Whereas attribution primarily deals with conduct, Article 34 ECHR requires the classification of organisations. Therefore, the rules of attribution as such are certainly not directly applicable for the qualification of organisations under Article 34 ECHR.

However, against the backdrop of the jurisprudence of the ECtHR and with regard to the nature of the ECHR as a human rights treaty, it seems possible to import in substance certain elements of the rules of attribution and use them, *mutatis mutandis*, as a yardstick for qualifying organisations as either "governmental" or "non-governmental". This transplantation is facilitated by the special character of human rights, which are based on the fundamental "State" and "non-State" dichotomy: While in general State actors are bound by but not entitled to human rights, the opposite is true for non-State, private actors; they are entitled to but not bound by human rights.[109] In principle a legal entity is either bound by or entitled to human rights but not both at the same time. The personal scope of the Convention is shaped by this form of correlation and reciprocal incompatibility. Thus, with some limitations it seems possible to establish a common set of rules for determining the State, which is bound but not protected by the ECHR. Along this line, this paper will argue that a legal entity may be qualified as "governmental" within the meaning of Article 34 ECHR if its conduct is attributable to a State according to certain rules of attribution. To be clear: This paper does not propose a general and direct application of the rules of attribution but a diligent transplantation of particular rules in order to develop common principles for determining the State in the context of the ECHR. If, to what extent, and in which exact way this import is appropriate, depends on the applicable rules of attribution.

The text of the ECHR remains silent on the applicable rules of attribution, neither expressly containing any such rules nor referring to rules of attribution found elsewhere. This suggests that one has to fall back on principles of general international law while paying attention to the special character of the ECHR as a human rights treaty.[110] The International Law Commission (ILC) codified the law of

[109] See in detail Dopplinger, 'Grundrechtssubjektivität', pp. 122-127.

[110] See, e.g., ECtHR (GC) 12.12.2001, *Banković et al. v. Belgium et al.*, 52207/99, § 57: "More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and

State responsibility in its Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA).[111] In this document the ILC sought to systemize widely accepted (secondary) attribution rules which as customary international law[112] apply by default across various areas of international law, *inter alia* in the human rights context.[113] The *lex specialis* principle as formulated in Article 55 ARISWA leaves room for special rules of attribution which exclude the application of the general rules of international law.[114] As mentioned, the text of the Convention does not feature special rules of attribution. It is debateable, however, if the ECHR as interpreted and applied by the ECtHR implicitly follows special rules of attribution deviating from general international law.[115] The relationship between the ECtHR and the general international law of State responsibility can be described as complicated.[116] The ECtHR's engagement with the ARSIWA meanders and typically remains vague.

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applied in a vacuum. 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".

[111] For the ARSIWA with commentaries by the ILC see ILC, Report on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001), reprinted in Yearbook of the ILC, 2001, vol. II, Part Two. The ARSIWA were submitted to the United Nations General Assembly, which took note of them and commended them to the attention of Governments (U.N. Doc. A/RES/56/83 of 12.12.2001). The General Assembly has since repeatedly given consideration to and acknowledged the importance and usefulness of the ARSIWA, see U.N. Doc. A/RES/74/180 of 27.12.2019.

[112] International Court of Justice (ICJ) 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43 qualified Article 4 ARSIWA (§ 385) and Article 8 ARSIWA (§ 398) as reflections of customary international law. See generally James Crawford, *State Responsibility. The General Part* (Cambridge: CUP, 2013) p. 43; Jonas Dereje, *Staatsnahe Unternehmen. Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts* (Baden-Baden: Nomos Verlag, 2016) p. 107 and Kaj Hobér, 'State Responsibility and Attribution', in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: OUP, 2008) 549-583, p. 553.

[113] Marko Milanović, 'Special Rules of Attribution of Conduct in International Law' (2020) *International Law Studies* 295-393, p. 296. The relevance of the ARSIWA is demonstrated by compilations of decisions of international courts, tribunals and other bodies referring to the ARSIWA prepared by the Secretary-General, see, e.g., U.N. Doc. A/71/80/Add.1 of 20.6.2017 and A/74/83 of 23.4.2019.

[114] ARSIWA Commentary Article 55 para. 3 states: "Thus, a particular treaty might impose obligations on a State but define the 'State' for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II." For an overview of the *lex specialis* principle see Crawford, 'State Responsibility', pp. 103-105.

[115] For an in-depth analysis of this question see Milanović, 'Special Rules of Attribution', pp. 342-385.

[116] See Milanović, 'Special Rules of Attribution', p. 343.

Whereas in many cases the Court assessed questions of attribution without even mentioning the ARSIWA, the Court has more recently cited the ARSIWA in a number of cases and apparently sought to reconcile its jurisprudence with the rules enshrined in the ARSIWA[117].[118] Commentators, though, at times criticised the Court for misapplying the rules.[119] While the ECtHR until today has only made timid steps towards the active and explicit integration of the ARSIWA in its case-law, the Court does not fundamentally object to applying attribution rules of customary international law as articulated in the ARSIWA.[120] In the literature too it is widely accepted that general attribution rules of international law in principle apply in the context of the ECHR.[121]

Therefore, it seems expedient to examine to what extent and in what form the attribution rules of the ARSIWA can be imported, *mutatis mutandis*, as a yardstick for the qualification of organisations as "governmental" within the meaning of Article 34 ECHR. Again, as elaborated above, the attribution rules of the ARISWA are clearly not directly applicable for determining whether a legal entity qualifies as "governmental organisation" within the meaning of Article 34 ECHR.[122] However, having regard to the case-law of the ECtHR linking attribution and the qualification

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[117] Regarding the attribution rules of the ARSIWA: ECtHR (GC) 8.7.2004, *Ilaşcu et al. v. Moldova and Russia*, 48787/99, § 319; ECtHR (GC) 3.4.2012, *Kotov v. Russia*, 54522/00, §§ 30-32; ECtHR 9.10.2014, *Liseytseva and Maslov v. Russia*, 39483/05 and 40527/10, §§ 128-130, 205; ECtHR (GC) 20.11.2014, *Jaloud v. the Netherlands*, 47708/08, §§ 98, 151; ECtHR 5.2.2015, *Cikanovic/ v. Croatia*, 27630/07, §§ 37, 53; ECtHR 26.5.2020, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, 17247/13, §§ 34-37, 112-118. The ECtHR has also referred to other provisions of the ARSIWA, recent examples are ECtHR (GC) 29.1.2019, *Güzelyurtlu et al. v. Cyprus and Turkey*, 36925/07, §§ 157-158 and ECtHR (GC) 29.5.2019, *Proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan*, 15172/13, §§ 81-88, 151, 162, 164.

[118] See James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights', in Anne van Aaken and Iulia Motoc (eds.), *The European Convention on Human Rights and General International Law* (Oxford: OUP, 2018) 178-198, pp. 180-184.

[119] Crawford and Keene, 'The Structure of State Responsibility', pp. 183-184.

[120] The complete outlier in this regard is ECtHR 23.9.2014, *Reilly v. Ireland*, 51083/09, § 55.

[121] Fastenrath, 'Art 1 EMRK', para. 35; Melanie Fink, 'The European Court of Human Rights and State Responsibility', in Christina Binder and Konrad Lachmayer (eds.), *The European Court of Human Rights and Public International Law – Fragmentation or Unity?* (Wien: Facultas, 2014) 93-118, pp. 102-105; Schabas, 'European Convention', p. 89; Carmen Thiele, 'Das Verhältnis von Staatenverantwortlichkeit und Menschenrechten' (2011) *Archiv des Völkerrechts* 343-372, p. 354.

[122] ARSIWA Commentary Chapter II para. 5: "Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government."

of organisations under Article 34 ECHR[123] as well as the specific nature of the ECHR as a human rights treaty based on the dichotomy of State actors bound by the ECHR and non-State actors protected by the ECHR,[124] it shall be explored whether the attribution rules of the ARISWA can be used to develop common principles for determining the State for the purposes of the ECHR. This analysis is instructive even if one assumed that the general rules of the ARISWA are or should be selectively modified and/or supplemented by special rules of attribution. The findings regarding the general rules of attribution can be applied to special rules of attribution, provided that the structure of the respective rules is taken into account.

The rules of attribution are located in Chapter II of the ARSIWA, which consists of eight Articles. For the aims of this analysis, one has to differentiate between various categories of rules of attribution: The first category comprises Articles 4 to 7 ARSIWA, which form the "hard core of the doctrine of attribution".[125] They govern the attribution of conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority. The second category contains Article 8 ARSIWA, which concerns the attribution of conduct by other actors that are directed or controlled by a State. The third and last category is made up by Articles 9 to 11 ARSIWA. They contain rules according to which the conduct of non-State entities not acting under the direction or control of the State are nevertheless exceptionally attributed to the State. Article 9 ARSIWA pertains to the factual exercise of governmental authority by private actors in the absence or default of the official authorities. Article 10 ARSIWA deals with the responsibility for the acts of insurrectional movements. Finally, Article 11 ARSIWA governs the situation that a State acknowledges and adopts the conduct of a non-State actor as its own after the event.[126] Not all of these heterogeneous rules of Chapter II of the ARSIWA lend themselves to being repurposed for providing criteria for identifying "governmental organisations" within the meaning of the ECHR.

The attribution rules of the third category are not suitable for the qualification of an organisation as "governmental" as they deal with exceptional cases in which the conduct of private entities is attributed to the State. Thus, if the conduct of an entity

[123] See f.n. 105 et seq.

[124] See f.n. 109.

[125] Crawford, 'State Responsibility', p. 115.

[126] Thus, Article 11 ARSIWA "provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission", see ARSIWA Commentary Article 11 para. 1.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 1-46, https://doi.org/10.25365/vlr-2021-5-1-1.

acting without any form of mandate to act on behalf of the State is attributed to a State on the basis of Article 11 ARSIWA, because the State adopts it as its own *ex post facto*, the entity cannot be considered as "governmental". The same holds true for insurrectional movements in the sense of Article 10 ARSIWA and entities covered by Article 9 ARSIWA.

Whether Article 8 ARSIWA can be used to identify "governmental organisations" is more difficult to answer. First, Article 8 ARSIWA covers different situations:[127] Undisputedly, Article 8 ARSIWA deals with private persons acting on the specific instructions of the State. Furthermore, it covers a more general situation where private persons act under the State's direction or control. While the concept of actual, specific instructions is quite straightforward, the notion of direction or control is more ambiguous. Although Article 8 ARSIWA does not explicitly state the degree of State control required for attribution, the threshold is generally set at "effective control" as formulated by the International Court of Justice (ICJ) in *Bosnian Genocide*.[128] Insofar as a particular act of an entity is attributed to the State under Article 8 ARSIWA because the State instructed, (effectively) directed or controlled this specific conduct,[129] this form of attribution does not allow the entity to be qualified as "governmental". In this case, attribution is based on partial dependence, where only specific acts of a private entity are controlled by the State, but no (further) special link between the entity as such and the State necessarily exists. Consequently, attribution has to be established on a case-by-case basis for specific conduct and acts falling outside the scope of the State's instructions, directions or control are not attributed to the State. If confined to these situations, Article 8 ARSIWA does not lend itself to being imported as a yardstick for the qualification of organisations as "governmental".

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[127] ARSIWA Commentary Article 8 para. 7: "In the text of article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them."

[128] ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, § 400 held: "It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations." According to Crawford, 'State Responsibility', p. 156 the question of the standard of control under Article 8 ARSIWA is now settled in favour of this stringent standard. The effective control test is also applied regularly by international investment tribunals, see, e.g., *Jan de Nul N.V. and Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award, 6.11.2008, paras. 172-173; *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30.11.2011, paras. 8.1.10-8.1.18.

[129] This reading of Article 8 ARSIWA is in accordance with the jurisprudence of the ICJ, see f.n. 128.

The scope of Article 8 ARSIWA, however, is controversial: Sometimes, Article 8 ARSIWA is construed furthermore as a basis for the attribution of the conduct of an entity that is as such (strictly) controlled by the State.[130] In this case, attribution results from the State's general influence over an entity and not (just) in relation to a specific act of the entity.[131] This pertains to formally private entities that lack any real autonomy or independence but are in fact merely instruments of the State. This form of attribution is based on the concept of *de facto* organs of the State, which – although at times treated under Article 8 ARSIWA[132] – is to be located correctly in an entirely different rule of attribution, namely Article 4 ARSIWA.[133] This entanglement of two distinct categories of attribution, private entities in fact acting on the instructions of or under the control of the State on the one hand and the doctrine of *de facto* organs on the other hand, is partly due to the fact that the rules concerning these situations historically developed in close connection, which has led to regular conflation.[134] The ICJ in *Bosnian Genocide* clearly and convincingly distinguished the two categories

[130] See, e.g., Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) 257-280, pp. 265-271; Jörn Griebel and Milan Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia' (2008) *Leiden Journal of International Law* 601-622, p. 614; Fastenrath, 'Art 1 EMRK', para. 45 f.n. 1. For an in-depth overview of different concepts of control as a basis for attribution under the ARSIWA and the notion of *de facto* organs see Dereje, 'Staatsnahe Unternehmen', pp. 107-198 and Kristen E. Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) *Melbourne Journal of International Law* 1-48, pp. 13-23.

[131] For a clear distinction between the two concepts of control over an entity on the one hand and control over a specific conduct on the other hand see, e.g., Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) *International and Comparative Law Quarterly* 493-517, pp. 498-503, who highlights the different objects of control.

[132] See, e.g., Gérard Cahin, 'The Responsibility of Other Entities: Armed Bands and Criminal Groups', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) 331-341, p. 333 and de Frouville, 'Private Individuals', pp. 265-271, who assign the notion of the *de facto* organ to Article 8 ARSIWA.

[133] See Paolo Palchetti, 'De Facto Organs of a State', in Anne Peters (gen. ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2017) para. 10. The ICJ too deals with the question of *de facto* organs under Article 4 ARSIWA, see ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, §§ 391-393.

[134] See Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford: OUP, 2020) pp. 49, 77-78, 83.

and placed the doctrine of *de facto* organs solely under Article 4 ARSIWA.[135] If one restricts the scope of Article 8 ARSIWA, as suggested here, to the attribution of specific conduct of non-State actors that is instructed, directed or controlled by the State, this rule of attribution is not suitable as a yardstick for the qualification of organisations as "governmental".

This leads to the first category of rules of attribution mentioned, which is of most relevance for the present question. The rules in this category focus on the general relationship between an entity and the State, rather than just on a particular act that is being attributed. Here, the relationship between the entity and the State is examined at a general, abstract level.

Article 4 ARSIWA governs the attribution of the conduct of State organs. According to Article 4(1) ARSIWA, "[t]he conduct of any State organ shall be considered an act of that State under international law". State organ is understood in a wide sense and covers all entities which make up the organisation of the State.[136] The internal subdivision of the State does not curtail attribution under international law. The ARSIWA specify that the conduct is attributed to the State "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."[137] State organs within the meaning of Article 4 ARSIWA can be divided into *de jure* organs and *de facto* organs. This is made clear by Article 4(2) ARSIWA, which states that "organ includes [!] any person or entity which has that status in accordance with the internal law of the State." Therefore, while organs of the State are primarily defined *de jure* by domestic law, the notion of organs within the meaning of Article 4 ARSIWA is not restricted to this group. Classifications of internal law form the starting point for assessing which entities constitute organs; they are not, however, the end of the matter.[138] A State cannot evade its international responsibility by simply denying a

[135] ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, §§ 385, 391-393, 396-397.

[136] ARSIWA Commentary Article 4 paras. 1, 11.

[137] Article 4(1) ARSIWA.

[138] Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) 237-246, p. 243.

body acting on its behalf the status as an organ under internal law.[139] Ultimately – as Crawford put it – "international law looks to substance rather than form".[140] This view is shared by the ICJ, which held that "entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument."[141] While Article 4 ARSIWA recognises the concept of *de facto* organs, it does not specify a test for assessing whether an entity is to be classified as such. The ICJ establishes the criteria of "strict control"[142] or "complete dependence"[143] and stresses that the qualification requires "a particularly great degree of State control"[144] but provides little to further elucidate this stringent test. The doctrine of *de facto* organs within the meaning of Article 4 ARSIWA is for example also applied in the practice of international investment tribunals:[145] State-owned enterprises can be considered *de facto* organs despite their separate legal personality under domestic law if they appear as no more than an arm of the State due to an absence of independence.[146] Thus, the qualification as State organ flows from an institutional link between the State and the entity that is characterised by a relationship of such intensity that the entity lacks any real autonomy. Due to the broad spectrum of options States possess for designing

[139] See ARSIWA Commentary Article 4 para. 11; Crawford, 'State Responsibility', pp. 124-125.

[140] Crawford, 'State Responsibility', p. 125.

[141] ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, § 392.

[142] ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, § 391.

[143] ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, §§ 391-393, 395, 397, 399-400, 406. In § 394 the ICJ uses the wording "total dependence".

[144] ICJ 26.2.2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, § 393.

[145] For an analysis of the practice of investment tribunals regarding *de facto* organ status see, e.g., Csaba Kovács, *Attribution in International Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law International, 2018) pp. 112-121.

[146] See, e.g., *Flemingo DutyFree Shop Private Limited v. Poland*, UNCITRAL, Award, 12.8.2016, paras. 425-435. See further de Stefano, 'Attribution', pp. 141-144 and Georgios Petrochilos, 'Attribution', in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford: OUP, 2010) 287-322, pp. 296–99.

their structure, it is not possible to list exhaustively all possible factors that have to be taken into account when ascertaining whether an entity can be considered a State organ.[147] Rather, an overall assessment of the general relationship – both legal and factual[148] – between the State and the entity concerned is necessary to determine the degree of integration in the State apparatus. It is widely recognized, though, that the mere State-ownership of an entity is in itself not sufficient.[149] Regardless of how the threshold is set precisely, one thing is clear: If a sufficiently close relationship between the entity and the State exists, the entity is considered a State organ just like the *de jure* organs defined as such by internal law. Due to the close connection, all conduct of State organs within the meaning of Article 4 ARSIWA is attributed to the State; it is irrelevant whether the conduct of a State organ is classified as commercial or as an act of a private nature.[150] The identity of an entity as State organ suffices in order for its entire conduct to be attributed to the State,[151] including acts *ultra vires*.[152]

The rule enshrined in Article 4 ARSIWA can be imported to serve as a yardstick for the qualification of an organisation as "governmental": Legal entities which classify as State organs within the meaning of Article 4 ARSIWA are to be qualified as "governmental organisations" under the ECHR. They form a component unit of a State and are not protected by the Convention rights. In its results, this approach is essentially in line with the jurisprudence of the ECtHR: Territorial authorities regardless of their autonomy vis-à-vis the central government are State organs within the meaning of Article 4 ARSIWA and according to settled case-law clearly "governmental organisations" within the meaning of Article 34 ECHR.[153] The same

[147] See Kovács, 'Attribution', p. 128, who lists a number of general criteria for identifying State organs, which strongly resemble the criteria used by the ECtHR when assessing whether an entity can be considered a "governmental organisation" (see above III.A).

[148] ARSIWA Commentary Article 4 para. 11: "On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading."

[149] Crawford, 'State Responsibility', p. 118; Milanović, 'Special Rules of Attribution', p. 366; ARSIWA Commentary Article 8 para. 6.

[150] ARSIWA Commentary Article 4 para. 6.

[151] Marko Milanović, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) *Leiden Journal of International Law* 307-324, pp. 312-314.

[152] Article 7 ARSIWA.

[153] See, e.g., ECtHR 23.3.2010, *Doşemealtı Belediyesi c. Turquie*, 50108/06 and ECtHR 9.11.2010, *Demirbaş et al. c. Turquie*, 1093/08 et al., further see above III.A.

holds true for State-owned entities that enjoy separate legal personality under national law: As noted, the (mere) ownership of an entity by the State is as such not sufficient to qualify this entity as a State organ within the meaning of Article 4 ARSIWA.[154] The ECtHR similarly classifies State-owned companies as "governmental organisations" only if they lack sufficient institutional and operational independence from the State.[155] The ECtHR undertakes an overall assessment of the general relationship between the State and the entity in order to determine the degree of its integration in the State apparatus. This overall assessment is comparable to the organ test under Article 4 ARSIWA.

Article 5 ARSIWA too can be transplanted to serve as a yardstick for assessing whether an entity may be considered a "governmental organisation" under the ECHR. According to Article 5 ARSIWA, the conduct of an entity which is not a State organ under Article 4 ARSIWA but which is empowered by the law to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity is acting in that capacity in the particular instance. This rule of attribution is intended to take into account the increasing proliferation of entities other than State organs exercising specified elements of governmental authority.[156] To clarify the scope of this attribution rule, the ILC Commentary illustratively mentions "public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned".[157] A State should not be able to avoid its international responsibility by delegating its powers to other entities. Defining governmental authority is a difficult task, not least because to a considerable part the understanding "depends on the particular society, its history and traditions".[158] Typical examples of governmental authority are powers of detention in the context of prisons and powers in relation to immigration control or

[154] Crawford, 'State Responsibility', p. 118; Milanović, 'Special Rules of Attribution', p. 366; ARSIWA Commentary Article 8 para. 6.

[155] See, e.g., ECtHR 9.4.2013, *Zastava It Turs v. Serbia*, 24922/12, § 22; ECtHR 12.5.2015, *Ljubljanska Banka D.D. v. Croatia*, 29003/07, § 54; ECtHR (GC) 18.11.2020, *Slovenia v. Croatia*, 54155/16, §§ 64, 78 and above III.A.

[156] ARSIWA Commentary Article 5 para. 1.

[157] ARSIWA Commentary Article 5 para. 2.

[158] ARSIWA Commentary Article 5 para. 6.

quarantine.[159] The ILC Commentary lists a number of factors for determining governmental authority within the meaning of Article 5 ARSIWA: "Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise."[160] Hence, the notion of governmental authority within the meaning of Article 5 ARSIWA is flexible. This flexibility becomes apparent for example in the practice of international investment tribunals, which have qualified a wide variety of activities as emanations of governmental authority.[161] The primary focus typically lies on the nature of the powers, distinguishing essentially along the lines of *acta iure gestionis* and *acta iure imperii*;[162] a central question therefore is whether ordinary private parties may engage in such activities.[163] On the other hand, State control is not a necessary prerequisite of Article 5 ARSIWA: The attribution rule applies even if the entity enjoys independence when making use of the conferred authority.[164]

Just as Article 4 ARSIWA, the attribution rule enshrined in Article 5 ARSIWA is characterised by a strong link between the entities covered by the respective rule and the State. While Article 4 ARSIWA concerns a structural integration of the entity into the organisation of the State, Article 5 ARSIWA is based on an intense functional connection with the State resulting from the legal empowerment to exercise elements of the governmental authority.[165] In this case, the special link stems from the delegation of powers unique to the State. Article 5 ARSIWA can therefore

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[159] ARSIWA Commentary Article 5 para. 2; Crawford, 'State Responsibility', p. 129; Momtaz, 'State Organs', p. 244.

[160] ARSIWA Commentary Article 5 para. 6. For an analysis of the criteria see Crawford, 'State Responsibility', pp. 130-132.

[161] See, e.g., de Stefano, 'Attribution', p. 160 and Petrochilos, 'Attribution', p. 300-304, who list various activities that international investment tribunals qualified as emanations of governmental authority.

[162] See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27.8.2009, paras. 120-121; *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18.6.2010, paras. 190, 202.

[163] De Stefano, 'Attribution', pp. 60, 161; Petrochilos, 'Attribution', p. 301 ("Authority that private persons may exercise lawfully by virtue of the general law is not governmental"); Kovács, 'Attribution', p. 186 further lists the purpose of the activity, the manner of the conferral of the functions and the extent of the entity's accountability to the State as relevant criteria.

[164] ARSIWA Commentary Article 5 para. 7.

[165] For the distinction between institutional and functional links see, e.g., Boon, 'Control Tests', p. 13. Crawford, 'State Responsibility', p. 127 opposes the "structural test" of Article 4 ARSIWA and the "functional test of attribution" of Article 5 ARSIWA.

– like Article 4 ARSIWA – be repurposed for qualifying organisations under Article 34 ECHR: Entities whose conduct is attributed to the State under Article 5 ARSIWA may be considered "governmental organisations" within the meaning of Article 34 ECHR. This again is in line with the jurisprudence of the ECtHR according to which legal entities that participate in the exercise of governmental powers are "governmental organisations".[166]

Article 5 ARSIWA differs from Article 4 ARSIWA in that not the entire conduct of entities covered by Article 5 ARSIWA is necessarily attributed to the State. According to the ILC Commentary, the conduct of entities under Article 5 ARSIWA is only to be regarded as an act of the State if it concerns governmental activity; other private or commercial activity in which the entity may engage is not attributed to the State.[167] As an example, the ILC Commentary mentions a railway company to which certain police powers have been conferred: The company's acts will be attributed to the State if they concern the exercise of those powers but not if they concern other activities (e.g., the sale of tickets or the purchase of vehicles).[168] As long as the entity acts in its official capacity, however, all of its conduct, even *ultra vires* acts, will be attributed to the State. This divergence between different spheres of activity is not mirrored in the qualification of organisations under Article 34 ECHR.[169] Under Article 34 ECHR, organisations are assessed in a general, abstract manner and are qualified as either "governmental" or "non-governmental". The ECtHR has made clear that the nature of a particular act which forms the basis for the procedure before the Court, or the fact that the organisation has not made use of its governmental powers but claims that it solely acted like a regular private entity, or that it was treated as such by the authorities, is not relevant.[170] Decisive is, rather, that the entity possesses in general the competence to exercise public powers. As held by the ECtHR, the wording of Article 34 ECHR is restrictive in this regard.[171]

Article 6 ARSIWA, unlike Articles 4 and 5 ARSIWA, is not relevant for the present purpose: Article 6 ARSIWA deals with the situation that an organ of a State is put at the disposal of another State so that the organ may temporarily act for its benefit and

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[166] See above III.A.

[167] ARSIWA Commentary Article 5 para. 5.

[168] ARSIWA Commentary Article 5 para. 5.

[169] See in detail Dopplinger, 'Grundrechtssubjektivität', pp. 164-167.

[170] ECtHR 28.1.2020, *İhsan Doğramacı Bilkent Üniversitesi c. Turquie*, 40355/14, § 38.

[171] ECtHR 28.1.2020, *İhsan Doğramacı Bilkent Üniversitesi c. Turquie*, 40355/14, § 38.

under its authority. Under these circumstances, the conduct of the organ is attributed to the latter State alone.[172] For the qualification of an organisation as "governmental" within the meaning of Article 34 ECHR it is not relevant to which exact State the conduct of the entity is attributed. Entities that classify as State organs are always considered "governmental organisations" regardless of which State their conduct is attributed and against which State a potential individual application under Article 34 ECHR is lodged.[173]

Article 7 ARSIWA does not add anything to the above findings but rather confirms them: The rule deals with unauthorized or *ultra vires* acts of State organs or entities.[174] Article 7 ARSIWA makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions. That Article 7 ARSIWA is only applicable to entities covered by Articles 4 and 5 ARSIWA reflects the fundamental difference between these entities on the one hand and entities covered by Articles 8 to 11 ARSIWA on the other hand. The latter are private entities that have no official capacity, even if some of their acts are attributed to the State.[175] Only the entities covered by Articles 4 and 5 ARSIWA have a sufficiently strong relationship with the State for them to be considered State entities and "governmental organisations" within the meaning of Article 34 ECHR.

This analysis shows that it is possible to transplant certain rules of attribution of general international law to assess whether entities classify as "non-governmental organisations", which are protected by the rights of the ECHR and entitled to lodge an individual application under Article 34 ECHR. At the same time, it has become clear that not all rules of attribution enshrined in the ARSIWA lend themselves to being imported and repurposed in this manner. On this basis, the link between attribution and the qualification of organisations for the purpose of Article 34 ECHR,

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[172] ARSIWA Commentary Article 6 para. 1.

[173] See ECtHR 12.5.2015, *Ljubljanska Banka D.D. v. Croatia*, 29003/07, § 55; ECtHR 25.4.2017, *Croatian Chamber of Economy v. Serbia*, 819/08, § 38; ECtHR 6.10.2020, *République démocratique du Congo c. Belgique*, 16554/19, §§ 15-20 and above III.A.

[174] ARSIWA Commentary Article 7 para. 1.

[175] ARISWA Commentary Chapter II para. 8 states: "Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law." Articles 8 to 10 ARISIWA concern the exceptional circumstances under which the conduct of private entities is attributed to the State (see ARSIWA Commentary Article 8 para. 1, Article 9 para. 4 and Article 10 para. 2).

which remains vague in the jurisprudence of the ECHR,[176] can be placed on a solid foundation. This link establishes common principles for identifying the State under the ECHR and, thus, furthers a coherent concept of Statehood founded on the central assumption that the State is bound but not protected by the rights of the ECHR. Resorting to general attribution rules of customary international law, moreover, fosters consistency within the broader context of international law and counteracts needless fragmentation.

Having said this, the above findings are valuable even if one assumes that special attribution rules exist for the ECHR.[177] In principle, the findings can also be applied to special attribution rules taking into account the structure of the particular attribution rule. Accordingly, a special attribution rule under the ECHR can serve as a yardstick for the qualification of an organisation as "governmental" if it structurally resembles Articles 4 or 5 ARSIWA but not if it resembles Article 11 ARSIWA.

IV. Conclusion

Legal systems around the globe are faced with the question if and to what extent non-human entities can invoke fundamental rights. In Austria, it is essentially undisputed that legal persons are protected by the fundamental rights guaranteed by the Constitution. In some parts of the world (e.g., the US), however, corporate personhood has become a highly controversial issue. For international human rights treaties, the situation is heterogeneous: While some treaties are limited to human beings, others also protect legal entities.

Against this backdrop, this paper explored whether legal persons are bearers of rights under the ECHR. The personal scope of the ECHR is delineated by Article 1 ECHR, which obliges the High Contracting Parties to secure to "everyone within their jurisdiction" the rights and freedoms enshrined in the Convention. A closer look reveals that this *prima facie* very extensive concept is subject to a number of limitations. Some of the Convention rights are *a priori* restricted to natural persons as they relate to certain characteristics that only human beings possess, e.g., the right to life under Article 2 ECHR. Other rights, however, are in principle suitable for protecting non-human entities, e.g., the right to a fair trial under Article 6 ECHR. Nonetheless, not every legal entity is entitled to this latter group of rights. Rather, a

[176] See f.n. 105 et seq.

[177] For this discussion see, e.g., Milanović, 'Special Rules of Attribution', pp. 342-385.

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legal person can only invoke Convention rights if it is a "non-governmental organisation" within the meaning of Article 34 ECHR.

The notion of "non-governmental organisation" remains somewhat vague in jurisprudence and doctrine. Although there exists substantial case-law qualifying entities as "governmental organisations" as opposed to "non-governmental organisations", its foundations and the roots of the applied criteria are opaque. This paper sought to provide a clearer picture. In my opinion, "non-governmental organisations" are to be understood as conceptual counterparts to the States. The points of reference are not, however, the States according to national concepts but the States as unitary entities and subjects of international law, including all their component parts, which may enjoy separate legal personality under domestic law.

Considering the case-law of the ECtHR and with regard to the specific nature of the ECHR as a human rights treaty, it seems possible to import certain elements of the rules of attribution and use them, *mutatis mutandis*, as a yardstick in order to assess whether an entity forms a component unit of the State and therefore classifies as "governmental organisation". The ECtHR links attribution and the qualification of organisations under Article 34 ECHR without elaborating the reasons for or the extent of this connection. In my opinion, this link is supported by the fundamental "State" and "non-State" dichotomy that underlies human rights: While, generally, State actors are bound by but not entitled to human rights, the opposite applies to non-State, private actors. Hence, in principle, a legal entity is either bound by or entitled to human rights but not both at the same time. The personal scope of the Convention is shaped by this form of correlation and reciprocal incompatibility. This allows to develop certain common rules for determining the State which is bound but not protected by the ECHR.

A deeper exploration reveals both the potential and the limits of linking attribution and the qualification of organisations under Article 34 ECHR. In general, the applicable rules of attribution for the ECHR stem from customary international law that was codified by the ILC in the ARSIWA. Certain, but not all, rules of attribution found in the ARSIWA can be transplanted and repurposed to serve as a yardstick for the qualification of organisations as "governmental" or "non-governmental". An entity may be classified as a "governmental organisation" if its conduct is attributed to the State under Articles 4 or 5 ARSIWA. Thus, legal entities that qualify as State organs within the meaning of Article 4 ARSIWA – *de jure* organs as well as *de facto* organs – or as entities empowered to exercise elements of the governmental authority within the meaning of Article 5 ARSIWA can be considered "governmental organisations". The results of this approach are essentially in line with the case-law of

the ECtHR, according to which "governmental organisations" include legal entities which participate in the exercise of governmental powers, run a public service under government control or otherwise do not enjoy sufficient institutional and operational independence from the State.

The connection between the rules of attribution and the qualification of organisations as "governmental" or "non-governmental" explored in this paper serves multiple objectives on various levels: First, it plays an important role within the Convention system. The connection not only provides a clearer conceptual foundation for the qualification of organisations but also contributes to developing common criteria for identifying the State in the context of the ECHR and, hence, establishing a coherent notion of Statehood under the ECHR. These positive effects are achieved even if one assumes that special attribution rules exist for the ECHR, as the findings of this paper can also be applied to special attribution rules, taking into account the structure of the particular attribution rule.

Second, as far as one applies general attribution rules of customary international law, the link has effects beyond the confines of the Convention or even international human rights law in a wider sense. Resorting to general attribution rules anchors the ECHR within the broader context of international law and avoids needless fragmentation. This connection has the potential to become a two-way street: Through a more explicit and thorough integration of the ARSIWA in its case-law, the ECtHR can contribute to the interpretation and evolution of general international law. This would constitute a major step towards consistency between different areas of international law.

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