

Establishing state responsibility in the absence of effective government Varga, A.

Citation

Varga, A. (2020, June 16). Establishing state responsibility in the absence of effective government. Meijers-reeks. Retrieved from https://hdl.handle.net/1887/121972

Version: Publisher's Version

License: License agreement concerning inclusion of doctoral thesis in the

Institutional Repository of the University of Leiden

Downloaded from: https://hdl.handle.net/1887/121972

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle http://hdl.handle.net/1887/121972 holds various files of this Leiden University dissertation.

Author: Varga, A.

Title: Establishing state responsibility in the absence of effective government

Issue Date: 2020-06-16

Establishing State Responsibility in the Absence of Effective Government

Establishing State Responsibility in the Absence of Effective Government

PROEFSCHRIFT

ter verkrijging van de graad van Doctor aan de Universiteit Leiden, op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker, volgens besluit van het College voor Promoties te verdedigen op dinsdag 16 juni 2020 klokke 10.00 uur

door

Andrea Varga

geboren te Székesfehérvár, Hongarije

in 1985

Promotoren: prof. dr. N.J. Schrijver

prof. dr. F. Baetens (University of Oslo, Norway, and

Universiteit Leiden)

Promotiecommissie: prof. dr. R.A. Lawson

prof. dr. H. Duffy

prof. dr. P.A. Nollkaemper (Universiteit van Amsterdam)

prof. dr. C.J. Tams (University of Glasgow, UK)

Lay-out: AlphaZet prepress, Bodegraven Printwerk: Ipskamp Printing

© 2020 A. Varga

Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets in deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand of openbaar gemaakt, in enige vorm op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Het reprorecht wordt niet uitgeoefend.

No part of this publication may be reproduced, stored in a retrieval system, made available or communicated to the public, in any form or by any means, without the prior permission in writing of the publisher, unless this is expressly permitted by law.

Acknowledgements

Writing this dissertation has been a fascinating journey, but also a long and often difficult one – and I am thankful for the support of many people along the way.

I would like to thank my supervisors, Freya Baetens and Nico Schrijver, for their guidance and especially their patience with me, as the years went by and at some point it must have seemed to them that I might never finish. (At least that is certainly how *I* felt at times.)

Early on in Budapest, Tamás Molnár's teaching helped me realize just how interesting international law could be in the first place. Later, at Leiden and Cambridge, countless chats with colleagues – and sometimes visitors – about whatever legal problem was weighing on my mind have been invaluable. Thanks in particular to Gábor Kajtár for challenging my thinking on issues I took for granted. I also found my time as a visiting scholar at Columbia University, supported partly by the Leiden University Fund, enriching in many ways.

I would like to thank my colleagues not only for thought-provoking discussions and professional advice, but also for their kindness and support. At Leiden, they made the transition from student to colleague as easy as possible, welcoming me with open arms and giving me a sense of belonging. Thank you all for the many great Friday drinks, a chance to switch off and talk about non-work-related things. At Cambridge, I felt like a member of the Lauterpacht community even after my work there officially ended. I owe special thanks to the wonderful group of PhD candidates at Leiden, as well as the Red Cross team at Cambridge, who welcomed me as if I was one of their own. My *paranimfen*, Teresa Cabrita and Vid Prislan: I do not even know where to begin, you have been amazing in so many ways.

I am incredibly grateful to my friends, both within and outside academia. Throughout the years and across different countries, you have been there for the good times and the bad, with a much-needed talk, hug or laughter whenever I was frustrated, stressed or doubting myself. I am very lucky to have you all in my life.

Finally, I would like to thank my family, and especially my parents, who have always encouraged me to follow my dreams and who have never for one second stopped believing in me. Without you, I would never have gotten this far. Köszönöm.

Table of Contents

Ac	KNOV	VLEDGEMENTS		V
Таі	BLE O	f Contents		VII
Lis	T OF	Abbreviations		XI
1	Inti	RODUCTION		1
	1.1	Objective and Delin	nitation of Subject	1
		Basic Concepts	,	6
			s, Affected States and Accountability:	
			ations on Terminology	6
			and the Absence of Effective Government:	
		A Working De		7
			Overly) Narrow Definitions Used in the	
			ng Literature	10
			g Forward an Alternative Definition	12
			between Effectiveness, Legitimacy and	
		Legality	, 8	16
		0 ,	iveness and Legality in Statehood	18
			iveness and Legitimacy in Governments	20
			iveness and Legality/Legitimacy in State	
			onsibility	22
	1.3	Structure and Metho		25
		1.3.1 Structure	0,	25
		1.3.2 Methodology		26
		07		
2	Тне	STARTING POINT: TH	IE CURRENT STATE RESPONSIBILITY REGIME	
	AND	THE EXISTING LITER	ATURE	37
	2.1	The Process and Res	sult of the ILC's Codification	37
	2.2	State Responsibility	and the Absence of Effective Government:	
		Views from the Lite		41
3	Тне	State's Duty to Pr	OTECT IN THE ABSENCE OF EFFECTIVE	
	Gov	ERNMENT		47
	3.1	Introduction		47
	3.2	Sovereignty as a Ge	neral Duty to Maintain Order	47
			ns to Prevent / Redress (Private) Conduct	50
		3.3.1 Inter-State Ob		53
			is-à-vis International Organizations	54

VIII Table of Contents

		3.3.3	Obligations vis-a-vis Individuals and Domestic Legal	
			Persons	55
			3.3.3.1 Human Rights Law	55
			3.3.3.2 Investment Law	59
		3.3.4	The Shared Standard of Due Diligence	60
	3.4		Exactly is Required of the State? The Role of Knowledge,	
			Diligence, and Fault	61
			The State Knew or Should Have Known	63
			and It Should Have Acted with Due Diligence	69
			3.4.2.1 The Institutional Requirement	71
			3.4.2.2 The Effectiveness of Control in General	76
			3.4.2.2.1 The ICJ's Non-examination in Armed	
			Activities on the Territory of the Congo	76
			3.4.2.2.2 The Intra-territorial Presumption of	, 0
			Jurisdiction at the ECtHR	81
			3.4.2.3 The Role of Causation in Particular	92
			3.4.2.4 In the Absence of Control: A Question of Means,)_
				102
	35	Possi		108
	0.0		Applicability Based on Effective Control, Rather Than	100
		0.0.1		109
		352	An Excessive Burden on the State?	113
		0.0.2	3.5.2.1 Decisions of the African Commission of Human	110
			and Peoples' Rights	113
			3.5.2.1.1 Commission Nationale des Droits de	110
			l'Homme et des Libertés / Chad	114
			3.5.2.1.2 Association of Victims of Post Electoral	117
			Violence & INTERIGHTS / Cameroon	115
			3.5.2.2 Concluding Remarks	118
	3.6	Conc	luding Remarks	118
	5.0	Conc	idding Kemarks	110
4	Атт	RIBIT	ING THE CONDUCT OF PRIVATE ACTORS I: THE FACTUAL	
+			E AND THE STANDARDS OF CONTROL UNDER ARTICLES 4	
		8 AR		121
				121
				124
	1.2		Military and Paramilitary Activities in and against	141
		1.2.1	Nicaragua	125
		422	Prosecutor v. Duško Tadić	126
			The ILC Articles of State Responsibility	130
			Bosnian Genocide	132
			Concluding Remarks	135
	4.3		ering the Threshold for Attribution to the Affected State:	100
	1.0		urisprudence of the Inter-American Court of Human	
		Right	•	137
			Blake v. Guatemala	138
		1.0.1	Dunce v. Guntellum	100

Table of Contents	IX

		4.3.2	The Colombian Cases: 19 Merchants, Rochela, Pueblo Bello, Ituango, Mapiripán, Operation Gene	esis,	
		4.3.3	Yarce, Vereda La Esperanza and Omeara Carrasca The Venezuelan Cases: Ríos, Perozo, and Castill		139
			González		157
		4.3.4	Concluding Remarks		158
			4.3.4.1 The Threshold for Attribution		158
			4.3.4.1.1 Attribution Through Omission	as a	
			Minimum Threshold?		161
			4.3.4.1.2 Comparing the IACtHR's Appro	oach to	
			Other Tests		166
			4.3.4.2 Blurring the Line between Attribution	and	
			the Duty to Protect under the ACHR		168
			4.3.4.3 An Alternative Construction? The Cou	ırt's	
			Approach in Omeara Carrascal		168
		_	4.3.4.4 Summarizing the IACtHR's Approach		171
	4.4		ering the Threshold for Attribution to Third State		
			urisprudence of the European Court of Human		172
		4.4.1	The Northern Cyprus Cases: Loizidou and Cyp	rus v.	1.70
		4.4.0	Turkey		172
			The Transdniestria Cases: <i>Ilaşcu</i> and <i>Catan</i>	C	179
			Nagorno-Karabakh: <i>Chiragov</i> and Subsequent	Cases	192 199
	15		Concluding Remarks luding Remarks		206
	4.0		(A Lack of) Judicial Dialogue		206
			A Uniform (Set of) Test(s)?		208
			Lex Specialis in Human Rights Law?		212
			Different Conceptions of What It Means to Act	on the	414
		1.0.1	State's Behalf	, on the	223
5	Атт	RIBUT	ING THE CONDUCT OF PRIVATE ACTORS II: THE FU	NCTIONAL,	
	LEG	AL, Co	ONTINUITY- AND DISCRETION-BASED RATIONALES		229
			duction		229
	5.2	The F	Functional: Is Article 9 ARSIWA 'Tailored for Sit	uations	
		of Sta	nte Failure'?		231
		5.2.1	The Origin of Article 9: Codification or Progre	ssive	
			Development?		233
			The Conditions of Article 9 ARSIWA		240
		5.2.3	What the ILC Did Not (Sufficiently) Address:	Local	
			De Facto Governments		251
			Concluding Remarks		262
	5.3		Legal: 'State Collapse', Co-optation, and Articles	s 4 and 5	
		ARSI		(0	265
		5.3.1	Remaining Low-Level Organs in the Event of	State	265
			Collapse'		265

X	Table of Contents
	

		5.3.2	The Involvement of Other Actors: Integration, Co-Optation, and the Continued Payment of Civil	
			Servants	271
			Concluding Remarks	275
	5.4	Artic	oactive Effect: Some Remarks on the Operation of cles 10 and 11 ARSIWA	275
			Article 10 ARSIWA and the Rationale of Continuity	275
			Article 11 ARSIWA and the Question of Retroactivity	277
	5.5	Conc	cluding Remarks	283
6	Sta	те Со	MPLICITY IN ACTS PERPETRATED BY PRIVATE ACTORS	287
	6.1		duction: The Need for a Complicity Rule	287
			reen the Duty to Protect and Attribution: A Brief History	293
	6.3		ele 16 ARSIWA and Its (Possible) Non-State Analogy	296
		6.3.1	Distinguishing Complicity from Duties to Protect:	299
		622	The Problem of Complicity by Omission Distinguishing Complicity from Attribution and the	299
		0.3.2	Possibility of Complicity-based Attribution	307
	6.4	Conc	cluding Remarks	317
	0.1	Conc	ruding remarks	517
7			ions and Outlook: Narrowing the Accountability	
	Ga			321
Su	MMA	RY		335
Sa	MEN	VATTIN	ng (Summary in Dutch)	341
Ar	PENI	oix: Ai	RTICLES 4-5, 7-11 AND 16 ARSIWA	347
Lis	ST OF	Treat	ties and Other Agreements	349
Lis	ST OF	Cases	5	351
Вп	BLIOC	RAPH	Y	363
CT	DDIC	TTT TTN 4	Vitae	389
$-\iota$	KKIC	OLUM	VIIAE	309

List of Abbreviations

AC Appeals Chamber

ACHR American Convention on Human Rights

ACommHPR African Commission on Human and Peoples' Rights
ARSIWA Articles on the Responsibility of States for Internationally

Wrongful Acts

AUC Autodefensas Unidas de Colombia (United Self-Defense

Forces of Colombia)

CIA Central Intelligence Agency

CoE CDDH Council of Europe, Steering Committee for Human Rights

DMZ demilitarized zone

DRC Democratic Republic of the Congo
ECHR European Convention on Human Rights
ECommHR European Commission of Human Rights
ECtHR European Court of Human Rights

FARC Fuerzas Armadas Revolucionarias de Colombia (Revolu-

tionary Armed Forces of Colombia)

FRY Federal Republic of Yugoslavia

FYROM Former Yugoslav Republic of Macedonia

HRC Human Rights Committee HRW Human Rights Watch

HV Hrvatska Vojska (Croatian Army)

HVO Hrvatsko Vijeće Obrane (Croatian Defence Council) IACHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

ICCPR International Covenant on Civil and Political Rights

ICG International Crisis Group ICJ International Court of Justice

ICRC International Committee of the Red Cross

ICTY International Criminal Tribunal for the former Yugoslavia

ICU Islamic Courts Union

IHL international humanitarian law ILC International Law Commission ISIS Islamic State in Iraq and Syria IUSCT Iran-US Claims Tribunal

LTTE Liberation Tigers of Tamil Eelam
MRT Moldavian Republic of Transdniestria
NGO non-governmental organization
NKR Nagorno-Karabakh Republic

XII $List\ of\ abbreviations$

OSCE Organization for Security and Co-operation in Europe

Permanent Court of International Justice PCIJ

TC Trial Chamber

TRNC Turkish Republic of Northern Cyprus

United Kingdom United Nations UK UN

UNMIK United Nations Mission in Kosovo

US **United States**

VJ

Vojska Jugoslavije (Yugoslav Army) Vojska Republike Srpske (Army of the Republika Srpska) VRS