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Establishing state responsibility in the absence of effective government

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Summary

Establishing State Responsibility in the Absence of Effective Government

The dissertation examines how the rules of establishing state responsibility apply in situations where the government loses effective control over (part of) the state's territory. While the relevant rules are defined by a public/private distinction, with a focus on the government, loss-of-control situations are characterized by an increased role played by private actors. Given this mismatch, the dissertation asks: (1) Under the existing rules of international law, under what circumstances can states be held responsible in connection with private conduct in such situations? (2) Where states are involved in private conduct, how can any remaining accountability gaps be narrowed or even closed? In exploring these questions, the dissertation focuses on three bases of responsibility, corresponding to the extent of the state's involvement in the conduct of the private actor: violation of an obligation to prevent and/or redress private conduct, complicity, and attribution.

As a starting point for further analysis, Chapter 2 sets out the fundamental features of the law of state responsibility – including the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC ARSIWA) – followed by a general overview of remarks on this topic from the literature on 'failed states' in international law.

Chapter 3 then turns to violations of obligations – on the state affected by loss of control – to prevent and/or redress the conduct of a private actor. The dissertation shows that such obligations are widespread in international law – and may even be considered a corollary of the state's sovereignty – operating with a shared standard of due diligence. The due diligence standard is violated where the state (1) knew or should have known of a catalyst event carried out by a private actor, (2) had the means to counteract the event, but (3) failed to use those means. While the loss of control over (part of) the state's territory may affect the availability of means, the state is still under the obligation to use the means that remain at its disposal to counteract catalyst events. This has been explicitly confirmed by the European Court of Human Rights (ECtHR) in a series of cases. It also conforms with the judgment of the International Court of Justice (ICJ) in *Armed Activities*, even if the Court's formulation does unfortunately leave the judgment open to different interpretations.

In many cases, the practical significance of such duties is likely to be limited, as the state may not be able to do much to prevent and/or redress catalyst events in territory beyond its control. That said, the case of

Colombia indicates that different considerations apply to voluntary, rather than forced, withdrawals, which likely require putting in place effective alternative safeguards. Another obstacle to bringing successful cases of this nature is that the burden of proof continues to rest on the applicant, who may not be in a position to know what means were available to the state. This difficulty can be alleviated by partially shifting the burden of proof and creating a presumption of responsibility where the applicant can prove that the respondent state knew of the catalyst event and the state does not provide proof of *any* measures taken in response. But while there are historical antecedents for this approach, it has not been followed in contemporary cases.

In Chapters 4 and 5, the dissertation turns to consider the question of attributing the conduct of private actors to the (affected or a third) state, with the analysis organized according to the rationales used for attribution: factual, functional, legal, continuity- or discretion-based. Examining the factual rationale yields what is, in terms of practical relevance, the most significant finding of the dissertation: although this is not always openly acknowledged by the two courts, both the ECtHR and the Inter-American Court of Human Rights (IACtHR) in effect apply attribution tests with significantly lower thresholds than the ICJ's 'effective control' and 'complete dependence' tests, thus linking a wider range of conduct to the state.

Identifying the content of these tests is complicated by the fact that the reasoning of the two human rights courts is not always clear or distinguishing adequately between attribution and related concepts, such as duties of protection or extraterritorial jurisdiction. Nonetheless, the tests' core features can be described as follows. The IACtHR establishes attribution based on support and/or collaboration at the level of conduct, relying on a rationale that is closer to complicity than (a strict understanding of) agency. The Court sets no clear minimum threshold, but it appears the requisite contribution is something more than an omission, yet does not have to reach a *sine qua non* threshold. The IACtHR has also left the door open to considering collaborative acts by state agents as a violation of the duty to respect, rather than as a basis for attribution. The ECtHR's test, meanwhile, examines whether the private actor 'survives by virtue of' third-state support. This is essentially a test of *sine qua non* support – and the relationship between support and control is not quite clear in the Court's jurisprudence. Furthermore, as the cases before the ECtHR so far have all concerned secessionist entities established with the help of third states, it is not yet clear whether the state's role in the creation of the private actor or the latter's exercise of governmental functions influences the Court's analysis. Like that of the IACtHR, the rationale of the ECtHR is closer to complicity, but since complicity operates at the level of conduct, not actor, the ECtHR's conceptualization falls outside the framework of the ARSIWA. In sharp contrast to the human rights courts' support-based approaches, the ICJ's tests require such close *control* over either the conduct or the actor as to

exclude any autonomy, ensuring that the private actor – generally or in the particular instance – was indeed carrying out the state's will.

The difference in tests reflects differing conceptions of what it means to be acting on the state's behalf, driven by different underlying considerations: safeguarding state sovereignty and not stretching the concept of state responsibility too far (ICJ) or protecting human rights (IACtHR, ECtHR). Still, while the IACtHR has embraced *lex specialis* on attribution, the ECtHR has been much more ambivalent and seems to be in denial of applying its own attribution test. Although the relevant treaties do not include explicit *lex specialis* provisions on attribution, a broader understanding of *lex specialis* based on the human rights *character* of these treaties offers a stronger justification for the courts' approaches. In any case, these tests are likely to remain staples of IACtHR and ECtHR case law, but unlikely to spread beyond the context of their respective treaty regimes. That said, as similar cases continue to be submitted to both the IACtHR and the ECtHR, future jurisprudence could (and should) further clarify the parameters of these tests.

Turning to the functional rationale, the analysis focuses on Article 9 ARSIWA, which attributes the conduct of private persons exercising public functions 'in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority'. While this rule may be the result of progressive development, rather than codification, it was apparently not regarded as controversial by states. Still, given the scarcity of supporting practice, questions arise as to the status of the Article's third requirement: 'circumstances such as to call for the exercise of those elements of authority'. The added value of this third requirement is not entirely clear, either, but it seems to have been intended to filter out cases where the absence of effective government is the cause, rather than the result, of private actors exercising state functions.

Contrary to assertions in the literature, Article 9 ARSIWA continues to apply even where the central government ceases to exist. Furthermore, the logic of this rule can be extended to rebel-run local *de facto* governments, excluded from the ILC's consideration. This can be done by distinguishing between 'personal' and 'unpersonal' acts, where the latter denote simply carrying on providing governmental functions, rather than furthering the cause of the insurrection. Depending on how the ILC's third requirement is viewed, this allows for attribution of unpersonal conduct at least in cases where the local *de facto* government moves into a pre-existing vacuum. Although the extension to local *de facto* governments increases the number of situations where this rule may be applicable, the rationale of functionality constitutes its biggest limitation, as most abuses by non-state actors do not tend to take place in the course of providing routine governmental functions.

Examining the legal rationale likewise shows that the law of state responsibility stretches further than suggested by the literature: the collapse of the central government does not invalidate the state's legal system and,

as a result, does not affect the attribution of the conduct of remaining lower-level state organs. As for co-optation and the official government's continued payment of civil servants operating in areas beyond its control, the decisive element in these cases is the capacity in which the person is acting.

Chapter 5 ends by analyzing the rationales based on continuity and discretion. While Article 10 ARSIWA – allowing for attributing the conduct of successful insurrectional movements – is applicable in theory, the limitations of the rule are such as to render it irrelevant in practice in the situations under consideration. In Article 11 ARSIWA, the decisive element is taking ownership of private conduct in a 'clear and unequivocal' manner, which could also apply retroactively, but the rule's biggest limitation is inherent in its discretionary nature.

Finally, in Chapter 6, the dissertation argues that a rule prohibiting state complicity in the conduct of private actors should be developed in international law; in particular, such a state/non-state complicity rule could be 'read into' treaty provisions on general obligations in human rights and international humanitarian law. The chapter briefly examines (1) how such a rule may be delineated from violations of duties of protection and from attributing private conduct to the state, and (2) whether, in the absence of such a rule, complicity may serve as a basis for attribution. As regards delineation from related categories, complicity may be distinguished from breaches of duties of protection (which are violated by omission) where it is done by action, and through intent, where it is done by omission; and complicity may be distinguished from attribution through the nature of the relationship between the private actor and the state: assistance or agency. Still, the fact remains that the difficulties in establishing a rule of state complicity in the conduct of private actors result in an accountability gap. In order to narrow that gap, the dissertation proposes that – unless and until a state/non-state complicity rule is established – complicity should serve as a basis for attribution where the state's contribution is of a *sine qua non* nature. A *sine qua non* contribution goes beyond what is necessary to establish complicity in the inter-state context and is likely to cross the line from aid and assistance to co-perpetration. In such cases, the ILC commentary to Article 16 ARSIWA already notes that the resulting injury can be concurrently attributed to both responsible states. Applying this reasoning by analogy supplies the foundation for the proposed complicity-based attribution rule.

Overall, the main conclusion of the dissertation is that despite the (often inherent) limitations of the law of state responsibility, it is possible to hold states responsible in many ways for their involvement in the conduct of private actors even in situations characterized by the absence of an effective government. In terms of existing rules: duties of protection continue to apply, even if the state's means may be restricted; Articles 4, 5 and 9 ARSIWA can operate even if the central government completely collapses; co-optation and the continued payment of civil servants enable attribution

if the person acts in an official capacity; and conduct can be retroactively acknowledged and adopted once a new government is in place. In addition, under the factual rationale of attribution, the IACtHR and ECtHR have held states responsible for a wider range of conduct than what would be captured under the ICJ's tests. This departure from the ICJ, however, has not gone unchallenged either in the literature or – more importantly – by states, leaving the status of the human rights courts' attribution tests somewhat uncertain. In order to bolster and complement the existing rules and help narrow the accountability gap, the dissertation proposes that: the burden of proof should be partially shifted in cases concerning duties of protection; that a state/non-state complicity rule should be developed in international law; and that until such a rule is in place, state complicity in the conduct of non-state actors should form a basis for attribution where the state's contribution is *sine qua non*. Furthermore, such a state/non-state complicity rule could be 'read into' treaty provisions on general obligations in human rights and international humanitarian law; and/or the IACtHR and ECtHR may be able to claim *lex specialis* based on the human rights character of these treaties.