Establishing state responsibility in the absence of effective government

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4 Attributing the Conduct of Private Actors I: The Factual Rationale and the Standards of Control under Articles 4 and 8 ARSIWA

4.1 Introduction

Having discussed state responsibility for failure to prevent or redress 'catalyst events' carried out by private actors, the next two chapters turn to address cases where the degree of state involvement in the conduct of such actors is so high as to render that conduct itself attributable to the state. In doing so, these two chapters are organized according to the rationales underpinning attribution, namely:

(1) the factual: no official legal link to the state, but state control or support of the private actor;
(2) the functional: the exercise of governmental functions by a private actor;
(3) the legal: remaining *de jure* organs and private actors linked to the state through co-optation;
(4) the continuity-based: successful insurgents becoming the government;
(5) the discretion-based: acknowledgement and adoption of private conduct by the state.[1]

1 See also F. Finck, 'L'imputabilité dans le droit de la responsabilité internationale: Essai sur la commission d'un fait illicite par un État ou une organisation internationale', *PhD Dissertation, University of Strasbourg* (2011) [on file with author], 135, observing that formal (legal), functional, and material (factual) links supply the three main grounds for attribution; cf. O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 257, at 261.

Since these scenarios are delineated on the basis of the applicable rationale for attribution, the structure of the chapters departs from the classification followed in the ARSIWA on one particular point: although Article 4 ARSIWA covers both *de jure* and *de facto* organs, both the method and the rationale of attributing the conduct of the latter show greater similarity with control-based attribution under Article 8 ARSIWA.[2] From an analytical perspective, it is thus best to split the methods used for attributing *de jure* and *de facto* organs from each other.

This chapter addresses the factual scenario – i.e. control-based attribution (including that of *de facto* organs) under Articles 4 and 8 ARSIWA – which has generated not only the biggest volume of jurisprudence, but also the most controversy over the years. Chapter 5, meanwhile, covers the functional, legal, continuity- and discretion-based rationales.

Relying on a narrow definition of 'state failure', authors tend to immediately dismiss the possibility of control-based attribution, arguing that in situations of 'state failure' there is simply no government which could

2 Cf. Finck, 'L'imputabilité', 152. As indicated by its phrasing, the scope of Article 4 ARSIWA is not limited to organs designated as such under domestic law, and the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits, Judgment of 26 February 2007, 2007 ICJ Reports 43, has formally classified *de facto* organs as falling under the same Article in paras. 385, 390-395. In addition to the text of Article 4(2) ARSIWA, see also ARSIWA Commentary to Article 4, para. 11 (though the ILC itself does not use the term '*de facto* organ'). Meanwhile, human rights courts apply a framework that does not rely on the ARSIWA; accordingly, they do not apply either category, see Sections 4.3 and 4.4 below. This is not to say that the designation of *de facto* organ under Article 4 ARSIWA, as opposed to a person or group under state control in the sense of Article 8 ARSIWA, is irrelevant. The consequences of the categorizations are different: all conduct of a person or entity found to be a *de facto* organ under Article 4 ARSIWA – carried out in that capacity – will be attributable to the state, without the need to establish attribution for each act or omission separately, as would be the case under Article 8; see Section 4.2.4 below. This theoretically includes *ultra vires* conduct (as Article 7 ARSIWA applies to Articles 4-5 ARSIWA), although the ICJ's standard is so stringent that the question of such conduct simply does not arise. Furthermore, C. Kress, 'L'organe de facto en droit international public: Réflexions sur l'imputation à l'état de l'acte d'un particulier à la lumière des développements récents' (2001) 105 *Revue générale de droit international public* 93, at 135-136, argues against applying Article 7 to any *de facto* organ (broadly understood, including conduct attributable under Article 8 ARSIWA); while A.J.J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *British Yearbook of International Law* 255, at 281-286, argues for extending Article 7 even to the conduct of agents/agencies under Article 8 ARSIWA.

exercise control over private actors.[3] Yet where governments do exist, it is in fact quite common for them to act through persons, groups or entities with whom they have little or no formal connection: where the government lacks the resources to exercise control over the state's entire territory, or wants to keep its distance from a certain situation, it often relies on paramilitary groups to act as proxies. Organizing the population into 'civil patrols' or encouraging the formation of 'self-defense groups' has been a particularly common strategy by Latin-American states facing insurrections – but as illustrated by the example of the Janjaweed in Sudan, or the Shiite militias operating in Iraq, the phenomenon occurs far beyond Latin-America.[4] Similarly, third states may use the opportunity created by the affected state's loss of control to extend their influence through proxy forces (those same Shiite militias in Iraq are backed by Iran, for instance); or they may even decide to use armed groups as a destabilizing force (as the US did with the *contras*).

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3 See G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Nijhoff, 2004), 276-77; R. Geiss, *"Failed states": Die normative Erfassung gescheiterter Staaten* (Berlin: Duncker & Humblot, 2005), 260-261, argues that effective control is lacking 'by definition' ('definitionsgemäß') in such cases, and attribution could not even be established with overall control as a test; G. Cahin, 'L'état défaillant en droit international: quel régime pour quelle notion?', in: *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 177, at 203; P. Pustorino, 'Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law' (2010) 53 *German Yearbook of International Law* 727, at 749-750; F. Leidenmühler, *Kollabierter Staat und Völkerrechtsordnung: zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (Wien: Neuer Wissenschaftlicher Verlag, 2011), 523. D. Thürer, 'Der Wegfall effektiver Staatsgewalt: "The Failed State"', in: D. Thürer, M. Herdegen & G. Hohloch, *Der Wegfall effektiver Staatsgewalt: 'The Failed State' (The Breakdown of Effective Government)* (Heidelberg: C.F. Müller, 1996), 9 and H. Schröder, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Baden-Baden: Nomos, 2007) do not even consider the issue.

4 See Section 4.3.2 below on the paramilitaries in Colombia; on the civil patrols in Guatemala, also featuring in IACtHR jurisprudence, see e.g. J-M. Simon, *Civil Patrols in Guatemala* (New York: Americas Watch Committee, 1986); on the Janjaweed, see e.g. HRW, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, December 2005, https://www.hrw.org/sites/default/files/reports/darfur1205webwcover.pdf; and Enough Project, *Janjaweed Reincarnate: Sudan's New Army of War Criminals*, June 2014, https://enoughproject.org/files/JanjaweedReincarnate_June2014.pdf; on the Shiite militias' complex links to Iran and Iraq, see ICG Middle East Report No. 188, *Iraq's Paramilitary Groups: The Challenge of Rebuilding a Functioning State*, 30 July 2018, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/188-iraqs-paramilitary-groups-challenge-rebuilding-functioning-state. See also generally D. Francis (ed.), *Civil Militia: Africa's Intractable Security Menace?* (Aldershot: Ashgate, 2005).

Under what circumstances is the conduct of such groups attributable to the state? In the absence of any formal (legal) link, the emphasis is placed on the factual relationship between the private actor and the state. What kind of factual relationship is then necessary for the state to incur responsibility for the conduct of the non-state actor? The most commonly recurring factors have been support, creation, control, planning, instructions, and direct participation by the state, but the requisite degree of support and/or control in particular has been a matter of quite some contention over the decades, with different courts setting different standards for attribution. In fact, some of these attribution thresholds are so low – or based on factors other than control – that the state's involvement cannot properly be described as exercising 'control' over the private actor in question. In such cases, speaking of *control*-based attribution may admittedly be slightly misleading. Nonetheless, for the sake of simplicity, 'control-based attribution' will be used as a shorthand throughout this chapter (and the rest of the dissertation) to describe this type of attribution.[5]

With this in mind, the following sections analyze the three main strands of jurisprudence on the subject: firstly, the strict standard(s) of the ICJ, adopted by the ILC but directly challenged by the ICTY Appeals Chamber (all of this case law concerning control by third states); secondly, the work of the IACtHR, requiring a much lower threshold than the ICJ *vis-à-vis* affected states; and thirdly, the case law of the ECtHR, which has addressed situations of control by third states, and also applied lower thresholds than the ICJ.[6] In light of these different standards, the chapter concludes by examining whether any common features may be identified in them; whether they can be reconciled some other way; and to what extent they are justifiable as departures from the ILC/ICJ framework – with this latter discussion continued in Chapter 6, in light of the complicity-like approaches adopted by human rights courts.

4.2 Setting the Scene: The *Nicaragua* and *Tadić* tests

Any discussion of control-based attribution tests must begin with a review of the cases which have defined the debate for the past decades: the ICJ's *Nicaragua* judgment from 1986, the ICTY Appeals Chamber's 1999 verdict

5 In the same vein, 'control tests' or 'control-based attribution tests' are used to describe the various solutions developed by courts, with the understanding that at least some of these tests may be based on factors other than control.

6 The African Court of Human Rights has not yet been faced with cases concerning control-based attribution. As noted above in Section 1.3, the work of international human rights bodies issuing non-binding decisions (such as the Inter-American Commission on Human Rights (IACHR), African Commission on Human and Peoples' Rights and the UN treaty bodies) are excluded from the scope of the dissertation.

in *Tadić*, and the ICJ's 2007 ruling in the *Bosnian Genocide* case.[7] The aim here is not to rehash old debates; but the only way to gain a full understanding of the control tests developed by the IACtHR and the ECtHR is to view them against the backdrop of ICJ and ICTY jurisprudence, and the debate it generated.

4.2.1 Military and Paramilitary Activities in and against Nicaragua

In this 1986 landmark case at the ICJ, Nicaragua accused the US of violating the prohibition on non-intervention, use of force, and certain rules of international humanitarian law in attempting to overthrow the Nicaraguan government by various means. As part of the case, the Court had to decide whether it was possible to attribute the conduct of the *contras* – Nicaraguan insurgent groups intent on overthrowing the government and operating with significant US involvement – to the United States. Having established that – contrary to Nicaragua's claim – the US did not create the *contras*,[8] the Court turned to dependence and control as the relevant factors in determining whether the *contras*' conduct could be attributed to the US, holding that:

> What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[9]

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7 While there had been other cases (notably *United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Reports 3, and *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Award No. 324-10199-1, 2 November 1987, (1987) 17 Iran-US Claims Tribunal Reports 92) predating *Nicaragua* which also touched upon the issue of control, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Reports 14, was the first case to consider the matter in depth. In the literature, see generally de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles'; Kress, 'L'organe de facto'; see also F.A. Boyle, 'Determining U.S. Responsibility for Contra Operations under International Law' (1987) 81 *American Journal of International Law* 86; M. Milanović, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553; M. Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669; A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649; Finck, 'L'imputabilité'.

8 *Nicaragua*, paras. 94, 108. Interestingly, it has been suggested by de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles', at 269, that: 'Although no more was said about this, the implication [of the ICJ's conclusion that the US had not created the *contras*] might be that if the United States had indeed created the contras, then the Court's conclusion on attribution might have been different.' See also Kress, 'L'organe de facto', 128.

9 *Nicaragua*, para. 109.

Applying these requirements to the facts, the Court found the criterion of dependence fulfilled regarding a certain time period, but – while it acknowledged 'the potential for control inherent in the degree of the *contras*' dependence' – it did not find conclusive evidence to consider the requirement of control to have been met.[10] Nonetheless, the Court continued to discuss the degree of control exercised by the US over the *contras* (as well as the latter's dependence on the former), eventually coming to the conclusion that:

> United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[11]

The Court's standard – which became known as the 'effective control' test – set a particularly high threshold for attribution, requiring close control over the specific operations themselves. Based on this test, the ICJ concluded that the conduct of the *contras* could not be attributed to the US.[12] Despite the Court's answer being in the negative, the *Nicaragua* case remains crucial for having provided the initial spark for the debate on control-based attribution.

4.2.2 *Prosecutor* v. *Duško Tadić*

The next installment of the debate on control-based attribution took place at the ICTY in the 1999 *Tadić* case. In order to establish the applicable law in the case, the Tribunal had to determine whether the conflict in Bosnia was internal or international. Arguing that IHL itself did not provide a test to decide the issue, both the Trial and Appeals Chambers of the Tribunal main-

10 *Ibid.*, paras. 109-110.
11 *Ibid.*, para. 115.
12 *Ibid.*, paras. 116ff. That said, the US remained responsible for conduct of its *de jure* organs 'directly in connection with the activities of the *contras*', such as the distribution of a manual on psychological warfare written by a low-level CIA official, see *ibid*.

tained that the question had to be answered by recourse to general international law, and attribution in the law of state responsibility in particular. This argument was based on quite simple logic: if the conduct of one of the participating armed groups could be attributed to another state, that would make the conflict international – otherwise it would be internal.[13]

However, in determining whether the conduct of the Army of the Republika Srpska (*Vojska Republike Srpske*, VRS) could be attributed to the Federal Republic of Yugoslavia (FRY), the Trial and Appeals Chamber took opposing views. The Trial Chamber was deferential to the ICJ's jurisprudence in *Nicaragua*, and came to the conclusion that the relationship between the VRS and the FRY was coordination rather than 'command and control'.[14] By contrast, the Appeals Chamber eschewed the *Nicaragua* test as setting an unreasonably high threshold in the case of 'organised and hierarchically structured group[s]', and not being in conformity with customary international law.[15] Instead, following a review of state practice and jurisprudence, the Appeals Chamber put forward the 'overall control test' for organized – such as military or paramilitary – groups (though it did sustain the necessity of specific instructions for individuals and unorganized groups).[16] The test of 'overall control' was laid down in the following terms:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. […] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law. […] Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them […]. The control required by international law may be deemed to exist when a State […] *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.[17]

There are two main features of this test, which the Appeals Chamber repeatedly emphasized throughout its analysis. Firstly, overall control 'must comprise more than the mere provision of financial assistance or military equipment or training'.[18] It is not entirely clear, though, whether

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13 *Prosecutor* v. *Duško Tadić*, ICTY Trial Chamber, Judgment of 7 May 1997, IT-94-1-T, para. 584; *Prosecutor* v. *Duško Tadić*, ICTY Appeals Chamber, Judgment of 15 July 1999, IT-94-1-A, para. 98.

14 *Tadić* (TC), paras. 584-607, particularly 598, 604, 606.

15 *Tadić* (AC), paras. 115-130.

16 *Ibid.*, paras. 131-137. While the judgment focuses primarily on military and paramilitary groups, it also clarifies that the overall control test can apply to other kinds of organized groups as well, see *ibid.*, paras. 120, 122, 146.

17 *Ibid.*, paras. 131, 137.

18 *Ibid.*, para. 137; see also *ibid.*, paras. 130, 145.

such support is a necessary (but not sufficient) requirement, or whether the Appeals Chamber highlighted it simply to point out that it is not relevant (i.e. not even necessary) for the test. The wording of the judgment suggests that the former interpretation is the correct one, as every iteration of the test refers to control as something *additional* to such support – but neither option is dismissed conclusively.[19]

Secondly, while it is clear that the requisite control is general, rather than specific, the judgment uses several different formulations regarding the state's role, which do not necessarily describe the same degree of involvement: 'coordinating or helping in the general planning', 'a role in organising, coordinating or planning', 'generally directing or helping plan their actions', 'participation in the planning and supervision of military operations'.[20] Strikingly, while control – whether effective or overall – would imply subordination, not all of these terms actually denote subordinate relationships. At the strongest end of the spectrum, 'directing' or 'supervision' does describe subordination, and a role in organizing or planning may also imply a certain degree of control, depending on the circumstances. At the weakest end of the spectrum, however, 'coordination' does not involve *any* degree of control, referring to a horizontal, rather than vertical, relationship.[21] When applying the overall control test to the facts of the case, the Appeals Chamber took a slightly different stance compared to the test's description *in abstracto*, holding that 'the relationship between the VJ [*Vojska Jugoslavije*, Yugoslav Army (the army of the FRY)] and VRS cannot be characterised as one of merely coordinating political and military activities', and that 'the FRY/VJ directed and supervised the activities and operations of the VRS'.[22] This holding by Appeals Chamber suggests that despite the loose general formulation, the 'overall control' test tilts toward the stronger end of the scale.

In the context of the 'overall control' test, the Appeals Chamber also made a few remarks about the identity of the controlling state, observing that:

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19 See *ibid.*, paras. 131 ('not only […] but also'), 137 ('in addition to', 'more than'). See also the ICTY's subsequent interpretation of 'overall control' as a two-part test, discussed at notes 24-28 and accompanying text below.

20 *Tadić* (AC), paras. 131, 137, 138 and 145, respectively.

21 In fact, the ICTY's Trial Chamber found that there was indeed coordination between the VRS and the FRY/VJ, but held that this was not sufficient to establish (effective) control, explicitly noting that '[c]oordination is not the same as command and control' and referring to the VRS and the FRY/VJ as 'allies' instead: *Tadić* (TC), para. 598; see also *ibid.*, paras. 603-606.

22 *Tadić* (AC), paras. 152, 151(ii), respectively; see Kress, 'L'organe de facto', 115, 129, and E. Savarese, 'Issues of Attribution to States of Private Acts: Between the Concept of *De Facto* Organs and Complicity' (2005) 15 *Italian Yearbook of International Law* 111, at 118-119, observing the same. Note that the Appeals Chamber arrived at this conclusion based on the same facts as the Trial Chamber, since the former made no findings of fact of its own, see *Tadić* (AC), para. 148.