# STATE RESPONSIBILITY FOR THE UNLAWFUL CONDUCT OF ARMED GROUPS

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**This dissertation is submitted for the degree of Doctor of Philosophy (Law)**

## DECLARATION

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text

It does not exceed the prescribed word limit for the relevant Degree Committee.

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## ABSTRACT

## STATE RESPONSIBILITY FOR THE UNLAWFUL CONDUCT OF ARMED GROUPS

**Tatyana Jane Eatwell**

The law of state responsibility codified by the International Law Commission (ILC) in its Articles on the Responsibility of States (ARS) is analysed with respect to unlawful acts of an armed group where: **(i)** the state provides substantial support to the group; **(ii)** the group exercises governmental authority over part of the state's territory; and **(iii)** a successful insurrection results in the establishment of a new government or a new state.

Part One addresses **(i)** and the control and agency paradigm central to the ARS. The 'effective control' test applied to identify a state's agents (article 8 ARS) means that state-sponsors of terrorism or international crimes will avoid direct responsibility by holding proxies at arms-length. This thesis challenges the arguments that attribution should be based on 'overall control' in such cases. Instead, this thesis proposes a rule of derivative responsibility for complicity that draws on primary obligations under international humanitarian and human rights law that prohibit encouragement or facilitation of certain acts.

Part Two addresses **(ii)** and **(iii)** and the application of articles 9 and 10(1) and (2) ARS respectively – exceptions to the control and agency paradigm that have been generally overlooked in discourse. With regard to **(ii)** this thesis counters recent scholarship that argues that article 9 will apply to the 'governmental' acts of armed opposition groups. Doctrinal analysis shows that article 9 will only cover the conduct of an armed group that acts in the interests of, or with the acquiescence of, the state's authorities. A critical approach is taken to the ILC's codification of articles 10(1) and (2) that cover circumstances **(iii)**: Contrary to the ILC's position, this thesis argues that the 'peace v. justice' debate should not influence article 10(1)'s application to governments of national reconciliation. Further, it is shown that article 10(2) is seriously flawed: the rule requires the new state to be bound by international obligations before that state existed in fact, a notion not supported by state practice or doctrine.

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FY2015 Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235)

## TABLE OF ABBREVIATIONS

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples Rights |
| ACiHPR | African Commission on Human and Peoples Rights |
| AFL | Armed Forces of Liberia |
| ARS | Articles on the Responsibility of States for Internationally Wrongful Acts, 2002 |
| CAT | UN Convention against Torture |
| CPN-M | Communist Party of Nepal-Maoist |
| DRC | Democratic Republic of Congo |
| ECtHR | European Court of Human Rights |
| FARC | Fuerzas Armadas Revolucionarias de Colombia |
| FLN | Front de Libération Nationale (Algeria) |
| FNLA | Frente Nacional de Libertação de Angola |
| FRY | Federal Republic of Yugoslavia |
| HRC | UN Human Rights Council |
| HRCttee | UN Human Rights Committee |
| HRW | Human Rights Watch |
| IACiHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| ICJ | International Court of Justice |
| ICL | International Criminal Law |
| ILC | International Law Commission |
| ISIL | Islamic State in Iraq and the Levant |
| JNA | Yugoslav People's Army |
| LTTE | Liberation Tigers of Tamil Eelam |
| LURD | Liberians United for Reconciliation and Democracy |
| MLC | Mouvement de Libération du Congo |
| MODEL | Movement for Democracy in Liberia |
| MPLA (Angola) | Movimento Popular de Libertação de Angola |
| MNLA | Mouvement National de Libération de l'Azawad (Mali) |
| MRT | self-proclaimed Moldavian Republic of Transdniestria |
| NPFL | National Patriotic Front of Liberia |
| NTC | National Transitional Council (Libya) |
| OHCHR | Office of the High Commissioner for Human Rights |
| RUF/SL | Revolutionary United Front of Sierra Leone |

| | |
|---|---|
| SFRY | Socialist Federal Republic of Yugoslavia |
| SPLA | Sudan People's Liberation Army |
| TFSA | Turkish-backed Free Syrian Army |
| TRNC | Turkish Republic of Northern Cyprus |
| UNCAT | UN Committee against Torture |
| UNITA | União Nacional para a Independencia Total de Angola |
| UPDF | Uganda People's Defence Force (Uganda state armed forces) |
| USSR | Union of Soviet Social Republics |
| VRS | Army of the Republika Srpska |
| YPG | Kurdish People's Protection Units (Syria) |

## Chapter 1. Introduction

### 1.1 Introduction

This thesis addresses how state responsibility for the conduct of groups participating in armed conflict is regulated by international law, and the extent to which the law of state responsibility is applicable to questions of post-conflict justice and reconciliation.[1]

The International Law Commission's (ILC) draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARS), adopted by the General Assembly in 2001,[2] are the product of 40 years of legal analysis and deliberation by the members of the ILC guided by the Special Rapporteurs. They are widely considered as a codification of customary international law.[3] With the exception of Article 10 that specifically applies to the conduct of insurrectional movements, the ARS are of general application. Nevertheless, the state practice and jurisprudence relied upon by the ILC in the formulation of the rules of attribution draw heavily on scenarios arising from armed conflict. However, the ARS and ILC Commentary leave some fundamental questions unanswered that I will address in this thesis.

States have often sought to intervene in the internal affairs of other states and to influence the strategic outcome of conflicts abroad. As Mumford has observed, "If life is nasty, brutal and short, as Thomas Hobbes would have us believe, then it would appear that it is also imbued with a perpetual desire to interfere in the affairs of others".[4] In recent internal armed conflicts in the Middle East and North Africa a number of third states have financed, trained, armed, advised, and provided air support to armed groups fighting on the ground. Several states have conducted joint military operations with armed groups seeking to overthrow President Assad's government and defeat 'radical Islamist' armed groups such as Islamic State in Iraq and the Levant (ISIL) and Jabhat al Nusra, the official al-Qaeda affiliate in Syria. Russia has been accused of intervening in the conflict in eastern Ukraine by arming, financing and otherwise supporting the self-proclaimed

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[1] The question whether an armed group may be held internationally responsible for its own conduct that violates international humanitarian law is beyond the scope of its thesis. For studies concerning the question of secondary rules of attribution with regard to armed group responsibility see Zegveld (2002) chpt.4; ILA, Washington Conference, 3rd Report (2014) pp.8-11; Verhoeven (2015) pp.300-302; Mastorodimos (2016) pp.123-126.

[2] Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the work of its 53rd session, UN Doc A/56/10, *ILC Ybk* 2001, Vol. II(2).

[3] *Bosnia Genocide,* §209

[4] Mumford (2013) p.97.

'Donetsk People's Republic' and 'Luhansk People's Republic', armed groups that seek to secede from the Ukraine and either establish a new independent state or accede to Russia.

When conflict ends armed groups might succeed in overthrowing the pre-existing regime (with or without the assistance of states), or transform themselves into a political party that enters into a coalition government pursuant to a power-sharing agreement with the pre-existing government, or establish a new state.

These different scenarios all raise questions concerning the extent to which the conduct of an armed group is attributable to the state that supports it, or the state to which the armed group becomes the new government. These questions are important for two reasons. First, the development of international human rights law (IHRL) has meant that individuals can now invoke the international obligations of a state in order to seek redress for harm suffered during an armed conflict in domestic courts and international human rights tribunals for harm suffered during an armed conflict. From a victim's perspective, the ability to identify whether the conduct that caused the harm is attributable to a state will be determinative of a claim for redress under IHRL. Second, attribution of conduct and as a consequence the engagement of a state's international obligations, is important in the wider legal, political and international context. A state that seeks to evade its international obligations by operating through another actor, in this case an armed group, empties those obligations of all substance. The same is true of a state that seeks to evade responsibility by diverting the blame to the individual who has, while acting on the state's behalf, committed offences contrary to international and domestic criminal law.

### 1.2 Structure of the thesis

The thesis is divided into two parts. Part I (Chapters 2, 3, 4 and 5) is concerned with the extent to which primary and secondary rules of international law are sufficient to 'catch' state participation in, or facilitation of, violations of international humanitarian law (IHL) and other unlawful acts committed by armed groups. In this regard the International Court of Justice's (ICJ) judgments in *Nicaragua* and *Bosnia Genocide* have framed the debate over the question of how a state's *de facto* organs or agents should be identified for the purposes of engaging a state's responsibility for their conduct.[5] While this debate appears to have been resolved by *Bosnia Genocide* and the affirmation

[5] One issue that has received much attention and is beyond the scope of this thesis is the question of shared responsibility between states and other subjects of international law. See generally, SHARES Project on Shared Responsibility in International Law, www.sharesproject.nl.

of the 'complete dependence' and 'effective control' tests, the question remains as to whether the law of state responsibility, coupled with the primary obligations of states, is sufficient to 'catch' state participation in or facilitation of violations of international law by armed groups - state conduct and policy that often faces political and moral condemnation by other states and the public at large.

In Chapter 2 I provide an overview of the current understanding of the control tests applied to identify a state's (*de facto*) organs and agents for the purposes of attribution of conduct. I show that the high threshold tests of 'complete dependence' and 'effective control' required to identify a state's '*de facto*' organs or agents (Articles 4 and 8 ARS) means that a state that sponsors a group that commits terrorism or war crimes will avoid direct responsibility for those acts by holding the group at arms-length. This legal framework provides the foundation for the following chapters that address the question of the extent to which a state is, or should be, held responsible for the provision to an armed group of financial, military or other support that is used in the commission of terrorism, international crimes and other unlawful acts.

In Chapter 3 I challenge the argument that attribution should be based on 'overall control' in cases where the state and armed group act with a 'shared unlawful purpose'.[6] I argue that to do so would undermine the notion of limited state responsibility for private conduct and therefore the very foundations on which the modern law of state responsibility is built.

In Chapter 4 I examine the extent to which a state's primary obligations to prevent certain acts, to respect and ensure respect for IHL, and to respect and ensure the enjoyment human rights and freedoms of all persons within its jurisdiction, are sufficient to cover state complicity[7] in international crimes and other unlawful acts committed by armed groups. I will show that in situations of armed conflict, a state's primary obligations to respect and ensure IHL will apply in circumstances where a state sponsors an armed group to commit violations of IHL. However, outwith situations of armed conflict, and with respect to certain acts committed outside the state's

[6] E.g. *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39 and Dissenting Opinion of Judge ad hoc Mahiou, §§114-117. Also, Stahn (2003) p.47 and (2004) p.839; Cassese (2007a); Trapp (2011) pp.42-45.

[7] The ILC abandoned of the use of the term 'complicity' because of its association with domestic criminal law. The use of the term in this thesis is not in order to connote criminal responsibility of states, but as shorthand for aid or assistance for the commission of an unlawful act.

jurisdiction,[8] there exists a 'responsibility gap'. This responsibility gap exists because of a lack both of primary obligations that would prohibit a state from providing support to persons or groups that commit unlawful acts and of secondary rules of attribution according to which, by virtue of its provision of support, the state is held internationally responsible for those acts. This responsibility gap allows states to evade their international obligations by using proxies and keeping their proxies at arms-length.

In light of this analysis, in Chapter 5 I suggest that the better approach would be through the formulation of general rules of derivative responsibility or 'complicity', drawing upon the specific primary rules that prohibit complicit conduct and are currently available in IHL and IHRL.

Part II (Chapters 6, 7, and 8) provides a critical analysis of the ILC's codification of Articles 9 and 10 ARS, two rules that have received limited attention. Unlike the scenarios considered in Part I, Articles 9 and 10 apply in exceptional circumstances where there is no legal or factual link between the armed group and the state at the time the relevant conduct is committed. Thus, these rules are exceptions to the control and agency paradigm that is central to the identification of a state's *de facto* organs and agents.

In Chapter 6 I challenge the argument that pursuant to Article 9 a state will be responsible for the unlawful conduct of armed groups in the circumstances where the armed group exercises elements of governmental authority in the absence or default of the official authorities. An analysis of doctrine and comparative approaches of international tribunals to the question of the validity of administrative acts of 'illegal' regimes shows that the only circumstances in which Article 9 will apply is where the armed group acts in the interests of, or with the consent or acquiescence of, the state's authorities.

In Chapters 7 and 8 I am critical of the ILC's codification of Articles 10(1) and (2) according to which the conduct of an insurrectional movement that succeeds in forming a new government or establishing a new state is attributed to a state. In Chapter 7 I question the assertion made by the ILC that Article 10(1) should not be 'pressed too far' in the case of governments of national reconciliation. My analysis demonstrates that there is no persuasive authority or policy upon which such an exclusion can be based. In Chapter 8 I argue that Article 10(2) is seriously flawed.

[8] Under international human rights law, a state will violate its obligation of non-refoulement if it facilitates the transfer of a person out of the state's jurisdiction and into the control of another state or non-state actor where there is a real risk that the person will be subjected to torture. For further discussion of the principle see chapter 4, 4.4.

Conceived by the ILC as a rule of attribution, the rule requires a new state to be bound by international obligations at a time before that state in fact came into existence, a notion that finds no support in state practice or doctrine. Article 10(2) can only operate if designed as rule of attribution of responsibility.

## PART I:

## STATE REPONSIBILITY FOR PRIVATE ACTS: CONTROL, AGENCY AND COMPLICITY

On 17 July 2014 Malaysian airlines flight MH17 was shot down whilst flying over Ukraine. Following a 15-month investigation the Dutch Safety Board concluded that the aircraft had been shot down by a Russian-made BUK surface-to-air missile system, fired from eastern Ukraine.[9] In September 2016, an international team of criminal investigators concluded that the BUK missile had been transported from Russia into eastern Ukraine and had been fired by members of a pro-Russian militia.[10] There has been widespread political condemnation of Russia for its alleged role in this atrocity. A number of states have called upon Russia to accept responsibility[11] and to 'account for its role' in the incident.[12] Whether Russia is legally responsible for the conduct of those who fired the BUK missile poses one of the more difficult questions addressed by law of state responsibility: to what extent is a state responsible for the conduct of an armed group that it arms, finances, trains or otherwise supports? This question is the focus of Part I of this thesis.

[9] Dutch Safety Board, 'Buk surface-to-air missile system caused MH17 crash', 13 October 2015.

[10] The Netherlands Public Prosecution Service, 'JIT: Flight MH17 was shot down by a BUK missile from a farmland near Pervomaiskyi', 28 September 2016. The investigation subsequently confirmed that it was 'convinced' that the BUK missile originated from the Russian army's 53rd Anti-Aircraft Missile brigade. See 'Update in criminal investigation MH17 disaster', 28 May 2018.

[11] UN Security Council, 8270th Meeting, 'As Civilians Bear Brunt of Four-year-old Conflict in Ukraine, Continued Ceasefire Violations Test Credibility of Global Community, Officials Warn Security Council', 29 May 2018.

[12] Global Affairs Canada, 'G7 Foreign Ministers statement on MH17', 15 July 2018.

## Chapter 2. Identifying a State's *De Facto* Organs and Agents

### 2.1 Introduction

As a general rule, the conduct of private persons or entities is not attributable to the state.[13] They are not considered to act upon the will or instigation of the state but on their own account.[14] This rule is tempered by the principle that a state should not escape responsibility for the conduct of a person or entity who in fact acts as a mere instrument of that state.[15] In this chapter I will examine the circumstances in which an armed group will be considered to act as a '*de facto*' organ or agent of the state pursuant to Articles 4 and 8 ARS. This question has been the subject of a well-known debate involving the ICJ and the International Criminal Tribunal of the Former Yugoslavia (ICTY). That debate has now been resolved in *Bosnia Genocide* in which the ICJ affirmed the tests of 'complete dependence' and 'effective control' to identify a state's '*de facto*' organs and agents respectively.[16]

However, the question of the conditions on which the conduct of an armed group should be attributed to a state continues to be important. *Bosnia Genocide* prompted criticism from jurists and scholars who argue that the law of state responsibility, as interpreted and applied by the ICJ, is not able to deal with contemporary challenges of state-sponsored acts of terrorism[17] and international crime.[18] The tests of 'complete dependence' and 'effective control' require the exercise of high degrees of control by the state over the armed group.[19] This means that a state's responsibility for the conduct of armed groups is strictly limited. For example, Iran is accused of supplying ballistic missiles to Houthis rebels and other armed groups fighting against the internationally-recognised government in Yemen,[20] a conflict in which all sides have been accused of committing violations

[13] ARS, Article 8, Commentary, §1. *Home Frontier and Foreign Missionary Society* (1920) p.44. Applied in *G.L. Solis* (1928) pp.361-362. See also *Sambaggio* (1903) in which Umpire Ralston provides a comprehensive analysis of earlier decisions on the issue at p.513 et seq. Also, *McNair* (1956) pp.244-245.

[14] ARS, Introductory Commentary to Chapter II, §2.

[15] *Bosnia Genocide*, §392.

[16] Ibid.

[17] Chase (2005) pp.111 & 123; Trapp (2011) pp.42-45.

[18] *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §§37 & 39.

[19] Or other non-state actor.

[20] Statement of Jonathan Allen, United Kingdom Deputy Permanent Representative to the United Nations, Security Council, 8190th meeting, 26 February 2018, p.2; Foreign and Commonwealth Office, 'Minister for the Middle East statement on Iranian involvement in Yemen', 9 November 2017.

of international law.[21] However, Iran will not be internationally responsible for any attacks directed at civilians or other violations of IHL, unless it can be shown that at the relevant time the armed group was, at the least, acting on Iran's instructions, or under Iran's direction or effective control.[22]

In this chapter I provide a critical analysis of the current understanding of the rules of attribution applicable to a state's '*de facto'* organs[23] and agents. This is the starting point from which in chapters 3 and 4 I consider first, whether the strictly limited nature of state responsibility can be exploited by states that keep their proxies at arms-length, and second, the extent to which a state's primary obligations to prevent certain acts, and not to encourage or facilitate certain acts, are sufficient legally to condemn state complicity in acts of terrorism and international crimes.

The argument is divided into three parts. Section 2.2 examines the codification of Article 4 ARS by the ILC and the 'complete dependence' test espoused by the ICJ in order to identify a state's *de facto* organ. Section 2.3 addresses the ILC's codification of Article 8 ARS and the attribution of conduct of a state's agents. The affirmation of the 'effective control' test by the ICJ in *Bosnia Genocide* as the appropriate test to establish agency means that states appear to enjoy considerable freedom to pursue foreign policy or other goals by arming, financing and otherwise supporting the activities of armed groups. In Section 2.4 the importance of the distinction between a state's *'de facto'* organs and its agents with respect to the attribution of *ultra vires* acts is considered. I conclude that it is doubtful that the law of state responsibility is sufficient to ensure that states do not evade their international obligations by 'contracting out' military operations in this way.

### *2.1.1. Terminology*

Before engaging in an analysis of the rules of attribution applicable to a state's *de facto* organs and agents it is first important to clarify what is meant by the two terms. This is because the terms '*de facto* organ' and 'agent' have been used interchangeably by some scholars,[24] in the judgments of

[21] HRC, 'Situation of human rights in Yemen including violations and abuses since September 2014', 17 August 2018.

[22] The same principle applies to states, such as the United Kingdom, that sell arms to state members of the coalition fighting in the conflict. According to the Group of Experts that has investigated allegations of violations of international law during the Yemen conflict there are reasonable grounds to believe that 'the Governments of Yemen, the United Arab Emirates and Saudi Arabia are responsible for human rights violations, including unlawful deprivation of the right to life...' See Ibid. p.14.

[23] A state's '*de facto'* organ is a person or entity who in fact acts as an organ but has not formal status as such according to domestic law or convention.

[24] E.g. Condorelli (1989) pp.237-238; Milanovic (2006) p.583; Griebel & Plucken (2008) pp.614-615; *Cf.* de Hoogh (2002) p.268; Milanovic (2009) pp.312-313.

international tribunals[25] (even, confusingly, in *Bosnia Genocide* in which the Court applied Article 8 ARS to 'persons other than the State's own agents'),[26] and in statements of *opinio juris*[27] to describe persons or entities who in fact act on behalf of the state, suggesting that there is no normative difference between the two categories for the purposes of state responsibility. This has led to a tendency to conflate organ status and the attribution of conduct, such that '*de facto'* organ status has been ascribed to any private actor whose conduct is attributable to the state.[28]

However, the distinction between an 'organ' and 'agent' is important. The terms describe distinct relationships between the state and the actor to which different rules of attribution of *ultra vires* conduct apply.[29] An 'organ' is a person or entity that is part of the organisation of the state, at any level. The term 'agent' is used to describe a person or entity that, on some occasions, acts on behalf of the state but is otherwise independent of the state apparatus. As the ILC explained in its early draft commentary to draft Article 5 (now Article 4 ARS) concerning the conduct of a state's organs,

> [I]t was agreed that the article should employ only the term "organ" and not the two terms "organ" and "agent". The term "agent" would seem to denote, especially in English, a person acting on behalf of the State, rather than a person having the actual status of an organ. Actions or omission on the part of persons of this kind will be dealt with in another article of this chapter.[30]

The term '*de facto* organ' is used in this thesis to describe a person or entity that is not a *de jure* organ: namely, a person or entity that has no organ status under the internal laws of the state but should be treated as a state organ because they 'in fact act under such strict control'[31] of the state.

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[25] E.g. *Bosnia Genocide*; ICTY *Tadic.*

[26] *Bosnia Genocide,* p.209 §401. In its determination whether the act of genocide calls for a departure from the effective control test formulated in *Nicaragua* the ICJ confirms that, 'Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs *or persons other than the State's own agents* were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.' [Emphasis added]

[27] See for example the statement of the British, Spanish and United States governments cited by the ILC in its commentary to Article 7 ARS (Excess of authority and contravention of instructions) that refer consistently to 'agents' and not 'organs'. Yet, the principle provided by Article 7 ARS only applies to the conduct of state organs (Article 4 ARS), persons authorised to exercise elements of governmental authority (Article 5 ARS), and organs placed at the disposal of a state by another state. See ARS, Article 7, Commentary, §§3 & 9.

[28] See for example Griebel & Plucken (2008) pp. 614-615; Milanovic (2006) p. 583. *Cf.* de Hoogh (2002) p.268; Milanovic (2009) pp.312-313.

[29] See section 2.4 below.

[30] Commentary to draft article 5, *ILC Ybk* 1973, Vol.II, p.193 §13.

[31] *Bosnia Genocide*, §391.

## 2.2 Article 4 ARS and the concept of '*de facto*' state organs

The 'first principle of attribution'[32] is that any acts or omissions committed by a state's organ will be considered to be an act of state.[33] According to Article 4 ARS,

> 1. The conduct of any State organ shall be considered an act of that State under international law, 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.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 4(2) defines a state's organ as 'any person or entity which has that status in accordance with the internal law of the state'. However, classification as an organ according to the internal law of the state is not necessary for the purposes of state responsibility.[34] Different states' internal legal systems may employ a different understanding of the meaning of 'organ', if state institutions are formally characterised as such at all. As Brownlie explains, '[t]he formal categories [of the 'internal legal order of a state'] are themselves often very localized and "conventional". Thus in the United Kingdom the police force, apart from the Metropolitan police (in London), are not directly subordinate to the Secretary of State for Home Affairs'.[35] The Commentary to Article 4 states that 'the powers of an entity and its relation to other bodies under internal law will be *relevant* (but not *decisive*) to its classification as an "organ", [but] internal law will not itself perform the task of clarification'.[36] Ultimately, 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'.[37]

However, the Commentary does not elaborate the conditions in which a person or entity should be determined to 'in truth act as' one of a state's organs. The Commentary merely advises that

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[32] ARS, Article 4, Commentary, §1.

[33] Article 4 ARS. The ICJ confirmed the principle that a state will be responsible for the conduct of its organs to be of 'customary character' in *Advisory Opinion of 29 April 1999,* §62.

[34] ARS, Article 4, Commentary, §11.

[35] Brownlie (1983) p.136.

[36] ARS, Article 4, Commentary, §11. [Emphasis added]

[37] Ibid.

'organ' has a 'very broad meaning' for the purposes of Article 4,[38] and offers two examples of cases to which this broad meaning would apply: (i) a legal system in which the term 'government' has a narrow meaning, applying only to the Head of State and members of the cabinet; and (ii) a police force that has a special status, independent of the executive.[39]

The question then arises whether there are any circumstances in which a person or entity that has no formal links to the state will 'in truth act' as one of its organs and therefore engage the state's responsibility? The text of Article 4 and the Commentary is wide enough to include such persons or entities – the use of the phrase 'in truth act' suggests that persons or entities that enjoy no formal status whatsoever may be treated as (*de facto*) organs - yet the examples offered by the Commentary concern persons or entities clearly authorised or empowered by the laws of the state to act on its behalf, namely a police force.[40]

In *Nicaragua* the ICJ determined the issue by asking 'whether or not the relationship of the *contras* to the United States 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, as an organ of the United States government, or acting on behalf of the government'.[41] The *contras* had received military aid and training from the United States. But there was no suggestion that United States law authorised the *contras* to conduct armed activities on its behalf.[42] The ICJ considered the following questions important to the determination of whether the *contras* were *de facto* organs of the United States: whether the United States created the *contra* force;[43] whether all *contra* operations 'reflected strategy and tactics wholly devised' by the United States; and whether the *contras* were wholly dependent upon United States military aid in the pursuit of their activities such that the cessation of aid would result in the cessation of activities.[44] On the evidence before it the Court concluded that the

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[38] Ibid.

[39] ARS, Article 4, Commentary, §11, citing German Federal Supreme Court *Church of Scientology* (1978) and England & Wales, Court of Appeal, *Propend Finance v Sing* (1997) in which the acts of members of a police force that enjoys a status independent of the executive were held to be sovereign acts and therefore not subject to the jurisdiction of the courts of another state. The ILC noted (at fn.122) that, although the cases concern the question of sovereign immunity, 'the same principle applies in the field of State responsibility'.

[40] Ibid.

[41] *Nicaragua*, §109.

[42] Nicaragua pleaded that the CIA was authorised by the President of the US to carry out 'covert activities' directed against Nicaragua and that the CIA conducted military and paramilitary activities through existing armed groups. See *Nicaragua,* §§93-94.

[43] The fact that Uganda had not created the MLC, was a decisive factor in the Court's conclusion that the group did not act as an 'organ' of Uganda pursuant to Article 4 ARS: See *DRC v Uganda*, §160.

[44] *Nicaragua*, §§108-110.

necessary criteria for 'complete dependence' were not established. The support provided by the United States was considered 'crucial to the pursuit of their activities, but is insufficient to illustrate their complete dependence on United States aid'.[45] Interestingly, the Court found that there was evidence that the *contras* were completely dependent on United States aid 'in the initial years'.[46] But even so, it was unable to determine that the United States 'devised the strategy and the tactics of the *contras*' because there was insufficient evidence to reach a finding on 'the extent to which the United States made use of the potential for control inherent in that dependence'.[47] Therefore, according to the test applied in *Nicaragua,* not only must the armed group be wholly dependent upon the state, the armed group's operations must reflect a strategy and tactics 'wholly devised' by the state.[48]

The Commentary to Article 4 ARS does not cite *Nicaragua*. The lack of reference to the case has caused some scholars to question whether the ILC intended to include *prima facie* private actors in the category of persons who 'in truth act' on behalf of the state on the basis of the state's control over that person, rather than limiting the scope of Article 4 to persons 'officially designated to perform certain state functions'.[49] Either the ILC did not consider the complete dependence test applied in *Nicaragua* relevant in its work on Article 4, or it interpreted *Nicaragua* as providing a single test for attribution of conduct – 'effective control'.[50] However, if the scope of Article 4 is limited to persons or entities officially designated to act on behalf of the state, the question then arises as to how these persons should be distinguished from persons or entities 'empowered by the law of that state to exercise elements of governmental authority', the subject of Article 5 ARS?[51]

An in-depth examination of Article 5 ARS is beyond the scope of this thesis (being concerned with state responsibility for the conduct of armed groups that are not authorised or empowered by law to act on behalf of the state). However, the distinction between the persons and entities

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[45] Ibid, §110.

[46] Ibid.

[47] Ibid.

[48] Ibid. §108.

[49] Griebel & Plucken (2008) pp.613-615.

[50] Milanovic (2009) p.318. *Cf.* Higgins (1994), p.155; Condorelli (1989) p.239; Meron (1998); Chase (2004) pp.108-110; Dupuy (2004) p.8; Cassese (2005) p.249. The Appeals Chamber of the ICTY in *Tadic* interpreted *Nicaragua* as espousing a single test for attribution. For critical analysis of that decision see chapter 4, 4.4.

[51] The ILC's Commentary to Articles 4 and 5 does not address the distinction between the two articles other than to say that Article 5 ARS 'deals with the attribution to the State of conduct of bodies which are not State organs in the sense of Article 4, but which are nonetheless authorized to exercise governmental authority'. See ARS, Article 5, Commentary, §1.

covered by Articles 4 and 5 ARS is important to understanding the fundamental characteristics of a *de facto* organ. According to the ILC Commentary, Article 5 is intended to cover the conduct of 'parastatal entities' – a term used by the ILC to describe what it calls 'autonomous bodies exercising public functions of an administrative or legislative character'.[52] The Commentary does not define 'autonomous' for the purposes of Article 5, but does explain that the entities that fall within the article's scope may be 'public corporations, semi-public entities, public agencies of various kinds and even… private companies'.[53] An important requirement is that the entity is 'empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority'.[54] Here, 'empowered' means 'empowered by law', in accordance with the terms of Article 5. Thus, Article 5 will cover the conduct of an airline that is contracted by the state to provide immigration services at an airport, or a private security company that is contracted by the state to run its prisons,[55] or a private military contractor, hired by a state to provide a wide range of services in armed conflict zones that would ordinarily be carried out by the state's armed forces, including security, intelligence analysis, and operational coordination.[56]

There are three important factors that distinguish a 'parastatal entity' covered by Article 5 from a *de facto* state organ: (i) the parastatal entity is empowered by law, whereas an entity that is a *de facto* organ is not designated as such by the laws of the state or by convention; (ii) a parastatal entity is empowered to exercise governmental authority, whereas the performance of governmental authority is not determinative of *de facto* organ status; (iii) the parastatal entity may retain some financial and decision-making autonomy from the state,[57] and may engage in other private or

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[52] ARS, Article 5, Commentary, §4.

[53] Ibid, §2.

[54] Ibid, §3.

[55] Ibid, §2.

[56] See generally, Elsea (2008) p.4; Dutch Advisory Council on International Affairs, *Employing Private Military Companies: A Question of Responsibility,* 18 January 2008. There is a growing body of academic literature that addresses the question of State responsibility for the conduct of private security companies: Lehnardt 'Primary military companies and state responsibility', in Chesterman and Lehnardt(eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007); Beaucillon, Fernandez & Raspail 'State Responsibility for the Conduct of Private Military and Security Companies Violating Ius ad Bellum' in Franconi & Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP 2011); Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2012); Macloed, 'Private Security Companies and Shared Responsibility' (2015) 62 *Netherlands International Law Review* 119. See also The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008 (Swiss Department of Foreign Affairs and ICRC)

[57] ARS, Article 5, Commentary, §7.

commercial activities, whereas a *de facto* state organ is defined by its complete lack of financial and decision-making independence from the state.[58]

### *2.2.1 Bosnia Genocide*

The importance of the absence of financial and decision-making independence from the state to the identification of *de facto* state organs has been affirmed by the ICJ in *Bosnia Genocide*. In that case the ICJ confirmed that in certain exceptional circumstances persons or entities, including armed groups, that do not form part of the organisation of the state should nevertheless be equated to state organs if in fact they 'act in "complete dependence" on the state, of which they are ultimately merely an instrument'.[59] According to the ICJ,

In such a case it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious'.[60]

For the ICJ the attribution of conduct on the basis of complete dependence 'must be exceptional, for it requires proof of a particularly great degree of control'.[61] The test is not satisfied if, at the time of the act in question, the person or group enjoys *some measure* of real independence from the state. Thus, the Court was unable to conclude that the Republika Srpska or its armed forces, the Army of the Republika Srpska (VRS) were acting as mere instruments of the Federal Republic of Yugoslavia (FRY).[62] This was despite the Court's conclusion that the FRY had given 'very important support' to the Republika Srpska, without which the latter would not have been able to

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[58] *Cf.* de Hoogh (2002) p.270 who posits that 'in order to consider a person or entity to be an organ, the person or entity must purport to exercise governmental authority'. De Hoogh draws this conclusion from his analysis of *Nicaragua,* in which he concludes that the Court could easily have held the *contras* to be *de facto* organs of the United States but observes that the *contras* did not exercise governmental authority but were intent on attaining it. This theory is now undermined by the clarification of the complete dependence test by the ICJ in *Bosnia Genocide* that places no weight on the exercise of governmental authority. The nature of the acts committed by a *de facto* organ are therefore not important to its classification.

[59] *Bosnia Genocide*, §392 applying *Nicaragua*, §§109-110. *Cf.* Griebel & Plucken (2008) p.614 who doubt that the complete dependence test falls within Article 4 ARS, arguing that the ILC intended the conduct of *prima facie* private actors to fall within the scope of Article 8 ARS.

[60] Ibid.

[61] *Bosnia Genocide*, §393.

[62] Ibid., §394.

have 'conducted its crucial and most significant paramilitary activities'.[63] For the Court, differences over strategic options between the FRY and the Republika Srpska was an indication that 'the latter held some qualified, but real margin of independence' from the FRY.[64]

The threshold imposed by the 'complete dependence' test is exceptionally high and in practice likely to be difficult to meet. The essence of a *de facto* organ is that it shares all the attributes of a *de jure* organ, but for its lack of legal status. It is 'a mere instrument' of the state. This approach is understandable given the legal consequences of identifying an entity as a *de facto* state organ. As discussed in section 2.4.1 below, the state is responsible for all conduct of its organs acting in that capacity, whether or not the organ acted contrary to instructions or beyond the scope of its authority. Thus, had the ICJ found that the VRS was a mere instrument and therefore a *de facto* organ of the FRY, the FRY would have been responsible for the Srebrenica genocide, whether or not it directed the VRS to carry it out. It is the armed group's complete lack of financial, operational and decision-making independence from the state that justifies the attribution of its conduct, including *ultra vires* conduct to the state.

## 2.3 Agents of the State

### *2.3.1 Codification by the ILC*

According to the ILC, the conduct of an armed group that holds some 'qualified, but real margin of independence'[65] from the state will be attributable to the state if 'a specific factual relationship' exists between the armed group and the state.[66] Article 8 provides that,

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The rule provided by Article 8 is an expression of customary international law.[67] But the scope of the rule, and in particular the level of 'control' necessary for attribution, has been a matter of major controversy.[68]

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[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] ARS, Article 6, Commentary, §1.

[67] *Bosnia Genocide*, §207. See also ILC Report (1974), p.284 §7.

[68] Ibid.

Special Rapporteur Ago first posited the rule in his third report to the ILC in 1971 albeit as the more general formula 'in fact acting on behalf of'.[69] That formula was adopted as draft Article 8(a) by the ILC at its twenty-fifth and twenty-sixth sessions in 1974.[70] The rationale underlying the rule is that a state should not escape responsibility by acting through a proxy. As Crawford explains, 'the international obligations of the state could easily be evaded if the possibility of private delegation was not taken into account'.[71]

Difficulties have arisen with respect to the application and interpretation of Article 8. In its early 1974 commentary to draft Article 8 the ILC stated,

> … in each specific case in which international responsibility of the State has to be established, it must be genuinely proved that the person or group were actually appointed by organs of the State to discharge a particular function or carry out a particular duty, that they performed a particular task at the instigation of those organs.[72]

The question that has dominated case law and academic discourse is on what basis a person or group should be 'genuinely proved' to be acting on behalf of the state?

It appears that Ago, in his capacity as a Judge of the ICJ, considered persons 'in fact acting on behalf of' to be confined to persons instructed to commit a specific act, or carry out a particular task on behalf of that state.[73] In his Separate Opinion in *Nicaragua* Judge Ago considered that the commission of 'atrocities, acts of violence or terrorism and other inhuman actions' by the *contra* forces could only be attributed to the United States if there was 'unchallengeable proof' that 'certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States'.[74] Ago criticised the majority's use of the term 'control'. For Ago, 'control' invoked the notion of indirect responsibility that was only relevant to inter-state relations, in cases where

[69] Ago, Third Report (1971), p.267.

[70] ILC Report (1974), pp.157-290.

[71] Crawford (2013), p.141.

[72] ILC Report (1974), p.285, §8.

[73] *Nicaragua*, Separate Opinion of Judge Ago, §16.

[74] Ibid.

one state acts under the control of another state,[75] and not to the relationship between a private person or group and a state.[76]

To some extent Ago's view is supported by the case law and state practice relied upon by him in his role as Special Rapporteur on the law of state responsibility. Only one authority cited by Ago in his reports to the ILC and by the Commentary to Article 8, *Zafiro*, refers to 'effective control' as a basis for attribution.[77] Nevertheless, following the ICJ's decision in *Nicaragua,* and upon the recommendation of Special Rapporteur Crawford in his First Report to the ILC,[78] the ILC revised the formula to the more specific 'instruction, direction or control'.

The Commentary to Article 8 explains that the terms 'instruction', 'direction', and 'control' are disjunctive - it is sufficient to establish any one of them in order to found attribution to the state.[79] However, the terms 'instruction' and 'direction' have been used interchangeably. In its commentary the ILC first refers to 'direction or control' as a single standard for attribution, alternative to the instruction standard,[80] but later surmises that 'a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct'.[81] In *Bosnia Genocide* the ICJ referred to the relevant test for attribution as acting 'in accordance with [the] State's instructions *or* under its "effective control".'[82] As the following analysis will show, the provision of instructions or direction are requisite to the exercise of effective control. Yet, the distinction between instruction and control is subtle but important. An armed group may be instructed to achieve a specific outcome, irrespective of the means and methods employed to achieve it. Effective control requires a lack of decision-making independence of the actor from the state for the purposes of a specific operation such that the state commands the means and methods that should be used to carry out that operation. 'Effective control' is thereby distinguished from 'complete dependence' on the basis that, outside of the specific operation, the person or

[75] As provided by Article 17 ARS (Direction and control exercised over the commission of an internationally wrongful act).

[76] *Nicaragua*, Separate Opinion of Judge Ago, §18, fn.1.

[77] *Zafiro* (1925).

[78] Crawford, First Report (1998), p.43 §213.

[79] ARS, Article 8, Commentary, §7. Special Rapporteur Crawford had suggested the terms instruction, direction, and control should be cumulative. However, the 'and' was changed to an 'or' during the drafting process. See Crawford, First Report (1998), p.43 §213 and p.56 §284.

[80] ARS, Article 8, Commentary, §1.

[81] Ibid., §7.

[82] *Bosnia Genocide*, §400.

entity may enjoy financial and decision-making independence from the state, whereas 'complete dependence' implies a complete lack of independence from the state at all times.

### *2.3.2 'Instructions'*

The ILC Commentary describes the conduct of a person or group acting on the instructions of a state as conduct in fact 'authorised' by the state:[83]

Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.[84]

The 'acting on instructions of' standard of attribution was approved and applied by the ICJ in *Tehran Hostages*.[85] In that case, one of the issues before the ICJ was whether the conduct of militants who had occupied the US embassy in Tehran and taken embassy staff hostage was directly attributable to Iran. Having found that there was no evidence of a link between the militants and any 'competent' organ of the state, the ICJ found that, at least under this head of attribution, Iran was not responsible for the militants' conduct.[86] The ICJ concluded that general declarations made by the Ayatollah condemning the US did not amount to authorisation of the specific operation of invading and seizing the US embassy.[87]

> [The militants'] conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.[88]

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[83] ARS, Article 8, Commentary, §§2 & 8.

[84] Ibid., §2.

[85] *Tehran Hostages*, §58.

[86] Ibid.

[87] Ibid., §59.

[88] Ibid, §58.The Court then moved on to consider whether or not the militants' conduct was attributable under a second head of attribution – acknowledgment and adoption, now codified in Article 11 ARS.

In *Bosnia Genocide* the ICJ attempted to provide further guidance on the application of the 'instructions' standard, observing that for a state to incur responsibility for the conduct of persons or groups acting on its instructions it must be shown that 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'.[89] The question then arises as to whether 'operation' refers to each specific act, or whether the term should be more broadly understood to cover the whole body of operations of the armed group?[90] According to the ICJ 'operation' should be narrowly interpreted, such that the acts constitutive of the violation of international law (in that case genocide) must be committed, 'wholly or in part, on the instructions of the State, or under its effective control'.[91] Hence the Court concluded that it had not been established that the federal authorities of the FRY had instructed members of the VRS to carry out the genocide at Srebrenica.[92]

Further indication by the ILC that for the purposes of attribution the instructions of the state should be directed to a specific act are provided by the ILC Commentary concerning the attribution of *ultra vires* acts, or acts beyond the scope of instruction.[93] As discussed in section 2.4 below, according to the ILC, an act committed beyond the scope of the state's instructions will not be attributable to the state.[94] This means that a state will only be responsible if it can be proven that the state instructed its agent to act unlawfully. There may be little difficulty in proving such instructions if the violation of international law is inherent in the instruction, for example if an armed group is instructed to launch an armed attack against another state or to torture detainees, provided sufficient evidence of the specific instruction is available. However, securing evidence of instructions to commit unlawful acts is likely to be extremely difficult if not impossible. States are not likely to document orders to their agents to commit such acts. In practice, the practical difficulties involved in securing evidence of instructions means that the instruction standard does little to ensure that states do not evade responsibility by private delegation.

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[89] *Bosnia Genocide*, §400.

[90] As argued by Bosnia Herzegovina in *Bosnia Genocide,* Verbatim Record 2006/10, 6 March 2006 at 3pm, Professor Alain Pellet, p.47, §§20-23. See also Crawford (2013), p.145; Tonkin (2011), p.115.

[91] *Bosnia Genocide*, §400.

[92] Ibid, §413.

[93] ARS, Article 8, Commentary, §8. See also Article 7 ARS. See further section 2.4 below.

[94] See above section 2.1.2.

### *2.3.3 Control*

One issue that has greatly troubled courts and scholars is the question of the degree of control required to identify a state's agents. This issue has given rise to a divergence between the jurisprudence of the ICJ in *Nicaragua* and the Appeals Chamber of the ICTY in *Tadic* that may be described as the 'effective vs overall control debate'. In *Nicaragua* the ICJ advanced a concept of limited state responsibility based upon two high threshold tests of 'complete dependence' to identify *de facto* organs and 'effective control' to identify state agents.[95] According to the ICJ, in circumstances where the relationship between an armed group and a state fall short of 'complete dependence', the conduct of that armed group is only attributable to the state if that armed group is proven to have acted on the instructions of, or under the *effective* control of the state.[96]

The 'effective control' standard means that state responsibility for the conduct of non-state actors is strictly limited. For the ICJ, '[a state's] participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of [an armed group]' will not provide a sufficient basis for attribution of that armed group's conduct to the state.[97] Thus, on the question of Russia's responsibility for the downing of flight MH17 over eastern Ukraine, the evidence that Russia provided the BUK-missile to the group that fired the missile[98] is not sufficient to prove that the persons who fired the missile were acting as 'state agents' for the purposes of engaging Russia's responsibility.

As is well known, the ICTY challenged the authority of the *Nicaragua* test in *Tadic*. The ICTY was asked to identify the legal criteria for establishing when an armed conflict that is *prima facie* internal in character is in fact an international armed conflict because one (or more) of the parties is 'acting on behalf of' a foreign power.[99] In order to decide the issue, the ICTY considered it necessary to establish whether the VRS, of which the accused was a member, was a '*de iure* or *de facto* organ' of the FRY, and therefore whether the VRS was acting on behalf of the FRY, thus internationalising the conflict in Bosnia, and activating the grave breaches provisions of the Geneva Conventions. The Trial Chamber had relied upon *Nicaragua* and the effective control test as the applicable standard.

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[95] *Nicaragua*, §115.

[96] *Bosnia Genocide*, §400 applying *Nicaragua*, §115.

[97] *Nicaragua*, §115.

[98] The Netherlands Public Prosecution Service, 'Update in criminal investigation MH17 disaster', 28 May 2018.

[99] ICTY *Tadic*, §88 et seq. For further discussion of *Tadic* see chpt.4.

The ICTY interpreted *Nicaragua* as espousing a single test,[100] the effective control test, and sought, with respect to organised armed groups,[101] to lower this threshold test to 'overall control'. Rather confusingly, the ICTY used the terms '*de facto* organs' and '*de facto* officials' to describe all persons or entities whose conduct is attributable to a state pursuant to Article 8 ARS.[102] For the ICTY, 'this kind of control over a military group and the fact that the State is held responsible for acts performed by a group independently of instructions, or even contrary to instructions, to some extent equates the group with State organs proper'.[103] In direct conflict with *Nicaragua*, the overall control test is satisfied by decisive and preponderant support that, according to the ICJ, falls short of effective control. According to the Appeals Chamber,

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 activity. Only then can a State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law.[104]

The ILC declined to take a firm view in its commentary to Article 8 ARS. Instead, the Commentary offers guidance but does not define the requisite degree of control. Citing cases of the Iran-United States Claims Tribunal[105] and the European Court of Human Rights (ECtHR),[106] the Commentary states that it is 'a matter for appreciation in each case whether particular conduct was or was not

[100] The mistaken interpretation of *Nicaragua* appears to have stemmed from the 'less than clear drafting' of the *Nicaragua* judgment. As Judge Shahabudeen commented in is Separate Opinion in *Tadic*, '*Nicaragua* is not easy reading'. See *Tadic*, Separate Opinion of Judge Shahabudeen, §8.

[101] In the case of individuals and unorganised individuals the Appeals Chamber invoked the instructions standard applied by the ICJ in *Tehran Hostages*. See *Tadic,* §118.

[102] The ICTY does not mention Article 4 ARS in its reasoning, referring only to Article 8 ARS as reflecting the principles of international law concerning the attribution of conduct of private actors to a state. See *Tadic,* §109 & §117. The ILC does not comment on the ICTY's use of terminology in its summary of the different approaches taken by the ICJ and the ICTY in its commentary to Article 8 ARS. See ARS, Article 8, Commentary, §§3-5.

[103] *Tadic,* §121.

[104] Ibid, §131.

[105] *Yeager* (1987) (control over the Revolutionary Guard before it was formerly recognised as a State organ); *Starrett Housing Corp.* (1983) (control over a private corporation).

[106] ECtHR *Loizidou v Turkey*, (Preliminary Objections) (1985) & (Merits) (1986) (control over territory).

carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it'.[107]

The adoption of a flexible approach by the ILC in the Commentary leaves open the possibility for adjustment of the control test depending on the circumstances of each case.[108] Some members of the ILC expressed support for this flexible approach before *Tadic* was decided, suggesting that attention should be drawn to 'the varying degree of sufficient control required in different specific legal contexts'.[109] This 'inbuilt ambiguity' was considered by the government of the Netherlands, the only government to have commented on this issue, to be a 'positive element [that] offers scope for progressive development of the legal rules on State responsibility'.[110]

However, the 'effective vs overall control' debate now appears to have been resolved by the ICJ in *Bosnia Genocide*. In that case the ICJ declared that attribution, in any circumstances, on the basis of instructions, direction or *effective* control, is 'the state of customary international law, as reflected in the ILC Articles on State Responsibility'.[111] For the ICJ, 'the "overall control" test is unsuitable for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a state's organs and its international responsibility'.[112] That connection is based on the 'fundamental principle governing the law of international responsibility, that a State is only responsible for its own conduct, that is to the say the conduct of persons acting, on whatever basis, on its behalf'.[113] The Court took the opportunity to clarify its judgment in *Nicaragua*, to reject the *Tadic* 'overall control' test, and to affirm its formulation of two tests of 'complete dependence' and 'effective control' to identify a state's *de facto* organs and agents respectively. For the ICJ, '[r]ules for attributing alleged internationally wrongful conduct to a state do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*'.[114]

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[107] ARS, Article 8, Commentary, §5.

[108] Ibid.

[109] ILC Report (1998), p.83 §395.

[110] ILC, Comments and observations received from Governments (2001), Netherlands, p.49.

[111] *Bosnia Genocide*, §401.

[112] Ibid. §406.

[113] Ibid.

[114] *Bosnia Genocide*, §401. The ICJ rejected the proposition made by the applicant, Bosnia, that the particular nature of genocide, in that it may be composed of a number of specific acts separate in space and time, justified the application of the effective control test to the whole body of operations carried out by the perpetrators, rather than to each specific act. The Court did so on the ground that, in the absence of *lex specialis*, the rules for attribution do not vary according to the nature of the internationally wrongful act. *Cf. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* ICSID (2009), §13 and §125 in which the ICSID tribunal noted that attribution tests developed in factual contexts relating to foreign armed intervention or international criminal responsibility 'are not

The ICJ rejected the overall control test on two grounds.[115] First, that matters of general international law 'do not lie within the specific purview of [the ICTY's] jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it'.[116] Second, that the two tests are applied for two distinct purposes – the attribution of conduct and the classification of armed conflict:[117]

> …logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[118]

Indeed, contrary to the ICTY's approach in *Tadic*, the classification of conflicts is generally understood to be a matter of primary rules of international law and not secondary rules of state responsibility.[119] The law of state responsibility is of general application but it does have 'a distinct methodology and purpose' that is and should remain separate to substantive primary rules of international law.[120] The ICTY has recognised as much in cases subsequent to *Tadic*. Soon after *Tadic* and before the ICJ's decision in *Bosnia Genocide* the ICTY departed from its own reasoning and its use of the general rules on state responsibility as a basis for classification of armed conflict. Instead the ICTY has drawn upon the law on the use of force.[121] In *Celebici Camp* the ICTY Appeals Chamber explained,

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always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant'. *Cf. Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* ICSID (2014) §304 *et seq*.

115 A third ground not considered by the ICJ is that, and contrary to the ICTY's analysis the overall control test is not supported by case law or state practice. See further chapter 3, 3.4.

116 Ibid, §403.

117 Ibid, §§404-405.

118 Ibid,, §405.

119 Akande (2012) p.61; Milanovic (2006) p.587; *Tadic,* Separate Opinion of Judge Shahabuddeen, §§22-24.

120 Milanovic (2006) p.585.

121 ICTY *Celebici Camp* (2001) §20. See also *Tadic,* Separate Opinion of Judge Shahabuddeen §§22-24.

The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the "overall control" test is utilised to ascertain the foreign intervention, and consequently, to conclude that a conflict which was prima facie internal is internationalised.[122]

Thus, whilst there is a clear conflict between the approaches taken in *Nicaragua* and *Tadic,* it is questionable whether there is a conflict between the jurisprudence of the ICJ and of ICTY generally. Only the ICTY Appeals Chamber in *Tadic* has challenged the ICJ.

However, the question still remains as to what kind of relationship amounts to 'effective control'? *Nicaragua* does not provide a clear definition of 'effective control' and the ICJ forewent the opportunity to provide a clear definition in *Bosnia Genocide*. The following section considers the ICJ's approach, the nature of the relationship between a state and an armed group that would constitute effective control, and state assistance or support that would fall short of the standard.

### *2.3.4 Effective Control*

In *Nicaragua* the ICJ rejected Nicaragua's claim that the United States was responsible for unlawful acts committed by the *contras* in the course of their military and paramilitary activities in Nicaragua despite evidence that the United States' involvement consisted of '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'.[123] In the view of Court it would have to be proved that, at the time they committed the acts in question, the *contras* were under the effective control of the United States:

> …[the] 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

[122] Ibid.

[123] *Nicaragua*, §§115-116.

> 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.*[124]

No clear definition of 'effective control' is provided by *Nicaragua* or *Bosnia Genocide*. What can be gleaned from the passage quoted above is that effective control sits between complete dependence and 'preponderant and decisive' support or general control over a force with a 'high degree of dependency' on the state. The state must be shown to have 'directed or enforced the perpetration of the acts' contrary to international law. Therefore, the normative distinction between the 'instruction' and 'effective control' lies in the freedom enjoyed by the actor to choose what means and methods it should adopt to carry out a specific military operation or objective. In order for acts to be under the 'effective control' of the state, the state must 'direct and enforce' those acts. Instruction to carry out a military assault on a particular target will not be sufficient to amount to 'effective control'. The military assault must be carried out under the operational command of the state's organs. This interpretation is applied by Special Rapporteur Crawford in his first report to the ILC:

The text and commentary should make it clear that it is only if the State directed and controlled the specific operation and the conduct complained of was a necessary, integral or intended part of that operation, that the conduct should be attributable to the State. The principle should not extend to conduct which was only incidentally or peripherally associated with an operation, or which escaped from the State's direction or control.[125]

According to the ICJ in *Nicaragua,* even the selection of targets and planning of an operation will be insufficient to amount to direction or enforcement of a specific act as long as the armed group retains some operational control.[126] It would appear, therefore, that conduct will only be attributed to a state if it is proven that the armed group was in fact ordered by the state to commit it. For

[124] Ibid, §115. [Emphasis added]

[125] Crawford, First Report (1998), p.43 §213.

[126] *Nicaragua*, §115.

these reasons, it is arguable that the effective control test is too lenient,[127] and, particularly in the context of state-sponsored terrorism, has the effect of insulating states 'that are the authors of terrorism from effective reaction, thereby encouraging further state-sponsored terrorism'.[128] As was argued above, a state is highly unlikely to document unlawful instructions or intentions to carry out unlawful military or other operations through the use of a proxy (or at all).

The difficulties faced by the Office of the UN High Commissioner for Human Rights ('OHCHR') in gathering sufficient evidence to accurately determine the nature of the relationship or factual links between armed groups and Libya in 2016[129] illustrate just how insurmountable the effective control test can be. The OHCHR had limited access to areas of Libya other than Tripoli due to security risks caused by on-going armed conflict and people were reluctant to provide witness statements for fear of violent repercussions.[130] Although the OHCHR was able to conclude that there were 'reasonable grounds to believe' that abuses and violations of international law occurred,[131] it had insufficient evidence to attribute the abuses or violations committed by armed groups supported by the state to the state.[132] The Report does not specify the criteria for attribution of conduct that it has applied. But even if it had, the dearth of evidence relating to the relationship between the state's organs and armed groups meant that any consideration of attribution would have been futile. The Report is only able to indicate support for armed groups in a generic sense, due to a lack of evidence of the exact nature of the relationship between armed groups and the state, or between two or more armed groups, including the nature of any command and control structures.[133] As the Report explains,

In the current Libyan context, the ability to establish the status of actors as either State or non-State entities is difficult, given the fragmented nature of State institutions and the inter-linkages between certain authorities and armed groups… This report has described where information indicating links between actors and the State is available (e.g. financial links or the endorsement of

[127] Chase (2005) pp.111 &123.

[128] Reisman (1999) p.37. See also Trapp (2011) pp.42-45.

[129] HRC, 'Investigation of the Office of the United Nations Commissioner for Human Rights on Libya: detailed findings' (2016).

[130] Ibid, §§12-14.

[131] Ibid, §11.

[132] Ibid, §54.

[133] Ibid.

acts). However, additional investigation of the operation of armed groups, in particular, is crucial to attribute responsibility for violations and abuses.[134]

As the OHCHR experience in Libya shows, obtaining the necessary evidence to prove a relationship of effective control will be extremely difficult.

### 2.4 *Ultra vires* conduct

The principles that govern a state's responsibility for the *ultra vires* conduct of its organs and agents exemplify the strictly limited nature of state responsibility for private conduct. How *ultra vires* conduct is attributed has important implications for the extent to which a state should be directly responsible for the conduct of armed groups to which that state provides substantial financial, military or other support, and for the suitability of a lower threshold test for agency based on 'overall control', considered in chapter 3.

The ILC Commentary is notable for the absence of any authority or state practice upon which the ILC's position on the attribution of *ultra vires* acts of a state's agents is based. The principles governing attribution of *ultra vires* conduct of a state's agents appear to have been a late addition to the Commentary. The reports of the ILC do not reveal any consideration of the issue, either as part of the discussion of the formulation of Article 8 ARS, or the general principle governing the attribution of *ultra vires* acts of a state's organs or persons empowered by law to exercise governmental authority as codified by Article 7 ARS.[135]

#### *2.4.1 State organs*

It is generally accepted that the *ultra vires* acts of a state's organ are attributable to the state.[136] The identification of a person or entity as a state organ is sufficient. This principle is reflected in Article 7 ARS and is considered to be a general rule of attribution by the ILC in its commentary to Article 4 ARS.[137] The rule has been clearly pronounced by the ICJ in *DRC v Uganda* in which the Court

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[134] Ibid, §30.

[135] Draft articles submitted by the Special Rapporteur, *ILC Ybk* 1974, Vol. I, pp.40; ILC Report (1975), pp.61-70; Draft ARS with Commentaries adopted on First Reading, 1997, pp.32-35, 40-49; ILC Report (1998), pp.81-82.

[136] Article 7 ARS*; Salvador Commercial Company* (1902) p.477; *Deférend concernant l'interprétation de l'article 79, par 6. lettre C du Traité de Paix* (1955) p.438; Crawford, First Report, *ILC Ybk* 1998, Vol.II(1), p.35 §162. See also ARS, Article 4, Commentary, §6.

[137] ARS, Article 4, Commentary, §13.

stated that 'it was irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority'.[138]

There is some limitation on a state's responsibility for the conduct of its organs. International law distinguishes between the *ultra vires* conduct of a person or entity acting 'in an apparently official capacity, or under the colour of authority', and 'purely private conduct'.[139] In the latter case the conduct of the state organ is not attributable to that state on the ground that the conduct 'is so removed from the scope of their official functions that it should be assimilated to the conduct of private individuals, not attributable to the State'.[140] Thus, a police officer who uses lethal force against a suspect during the course of an arrest is distinguished from a police officer who, when off-duty, is involved in a pub brawl that results in the death or serious injury of his or her adversary. In the latter case the officer is clearly acting in a private capacity and his or her conduct will not engage the state's responsibility.

It may not always be easy to determine the distinction between a person acting in an official capacity and a person acting in a purely private capacity. In *Youmans*[141] the United States-Mexico General Claims Commission held that Mexico was responsible for the conduct of Mexican soldiers who participated in a mob they were instructed to quell, resulting in the murder of two United States citizens. For the Commission a key consideration was whether the soldiers were on duty at the relevant time and acting in the presence of a commanding officer. The Commission stated that it could not consider 'the participation of the soldiers in the murder... as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer'.[142]

### *2.4.2 State agents*

In contrast to a state's responsibility for the *ultra vires* acts of its organs, the question whether the actor is acting in an official capacity is not relevant to the question of attribution of *ultra vires*

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[138] *DRC v Uganda,* §214 citing customary rule provided by Article 3 Hague Convention IV and Article 91 API, namely that 'a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces'.

[139] ARS, Article 4, Commentary, §13. Further ARS, Article 7, Commentary, §§4-7.

[140] ARS, Article 7, Commentary, §7. Also, *Estate of Jean-Baptiste Caire* (1929) p.531; *Petrolane v Iran* (1991) §83.

[141] *Youmans* (1926).

[142] Ibid, §14. See also *Eis (US v Soviet Union)* (1959) 30 ILR 116, p.117 in which it was held that the Soviet Union was responsible for the conduct of soldiers who pillaged neutral property for private gain whilst en route to the front line.

conduct of state agents. According to the ILC Commentary, the question whether a state is responsible for the *ultra vires* conduct of its agents will turn on whether the state exercised effective control over that agent at the relevant time.[143]

In circumstances where the person or entity is acting on the instructions of the state, but not under the state's effective control, the *ultra vires* acts of that person or entity – acts that are clearly beyond the scope of the state's instructions - will not be attributable to the state.[144] The Commentary explains that '[i]n general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally wrongful way'. [145]

If the ILC's approach is correct, unlawful conduct of an armed group delegated by the state to carry out a specific military operation or other function will only be attributable to the state if the latter instructed the armed group to act unlawfully. Thus, if a state instructs an armed group to use chemical weapons against a civilian population, the state will be responsible for the use of chemical weapons and the unlawful attack against a civilian population, both violations of international law. However, if a state instructs an armed group to undertake an offensive against an adversary's stronghold, and in doing so that armed group, of its own initiative, uses chemical weapons or summarily executes captured enemy combatants, the state will not be responsible for the group's wrongful conduct. This means that a state that instructs an armed group to achieve a certain objective, but does not exercise effective control over the armed group as the latter carries out this objective, can easily evade responsibility. This is because it will be difficult, if not impossible, to prove the existence of express instructions to achieve a lawful objective using unlawful means and methods. State officials are unlikely to document unlawful instructions. Furthermore, the outcome will be the same whether the instructing state organ knew or should have known that the armed group had a history of acting contrary to IHL and of rights-violating conduct.[146]

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[143] ARS, Article 8, Commentary, §8.

[144] Ibid.

[145] Ibid.

[146] However, a state that instructs an armed group to carry out a particular act or military operation, irrespective of allegations that the armed group has committed war crimes or other unlawful acts may be responsible for its own failure to prevent the *ultra vires* unlawful acts committed by the armed group, or, if the unlawful acts were committed in a situation of armed conflict, for its own failure to ensure respect for international humanitarian law. For further discussion see chapter 4.

The ILC's approach to question of the attribution of *ultra vires* acts of persons or entities acting on the instructions of the state appears to be at odds with the statement of principle contained in the commentary to the draft articles adopted on first reading. The statement is directed towards the attribution of *ultra vires* acts of state organs, but there is no reason why it should not apply to state agents. According to the draft commentary,

In international law, the State must recognize that it acts whenever persons or groups of persons exceed the formal limits of their competence according to municipal law or contravene the provisions of that law or of administrative ordinances or internal instructions issued by their superiors, they are nevertheless acting, even though improperly, within the scope of the discharge of their functions. The State cannot take refuge behind the notion that, according to the provisions of its legal system, those actions or omissions ought not to have occurred or ought to have taken a different form.[147]

In the same way, a state should not take refuge behind the fact that its agent acted contrary to its instructions. There is no authority for the assertion made by the ILC Commentary that a state should not bear the risk that its agents will carry out its instructions in an internationally wrongful way.[148] The risk that instructions will be carried out unlawfully is inherent in the employment of a person or entity that has no formal status in the structure of the state and is not bound by legal contract to act according to international law. This is particularly so in circumstances where the person or entity is instructed to carry out covert activities or a specific military operation, activities that often result in violations of international law, whatever the status of the actor.

The ILC's explanation of the attribution of *ultra vires* conduct of persons acting under the effective control of the state is also problematic. The Commentary states that *ultra vires* conduct committed by persons under the effective control of the state will be attributable because 'the condition for attribution will still be met even if particular instructions may have been ignored'.[149]

The ILC's reasoning, for which no authority is cited, is difficult to reconcile with the ICJ's explanation in *Bosnia Genocide* of the theory underlying Article 8. The ICJ explained that, for the purposes of Article 8, 'what must be determined is whether the FRY organs… originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether,

[147] Draft ARS with Commentaries adopted on First Reading, 1997, p.46.
[148] ARS, Commentary, Article 8, §8.
[149] Ibid.

*as a result*, the conduct of organs of the Respondent, *having been the cause of the commission of acts* in breach of its international obligations, constituted a violation of those obligations'.[150] For the ICJ, responsibility is engaged because the instructions given by or the effective control exercised by the state's organs *caused* the commission of the acts by the state's agent. However, if the basis for attribution to the state is that the exercise of effective control caused the agent to commit the act, it is arguable that control can never be effective if the agent acts *ultra vires*. For Special Rapporteur Crawford, in order for acts to be attributed to a state on the basis of its 'direction and control', those acts must be a 'necessary, integral or intended part' of a specific operation.[151] It is hard to think of any circumstances in which *ultra vires* acts will be an intended part of a specific operation. According to Crawford's construction, and that of the ICJ in *Bosnia Genocide*, either the unlawful acts are an intended part of the operation – they are caused by the effective control exercised by the state organs - or they are not. In the latter case the effective control test would not be satisfied. The ILC's intention may have been to apply the distinction between purely private conduct and acting 'in an official capacity', as applied to the question of attribution of the *ultra vires* acts of state organs. This would explain why the state is responsible for *ultra vires* acts of agents acting under the effective control of the state. However, this is not made clear in the text.

Thus, the attribution of *ultra vires* conduct will depend on whether the conditions are met to identify the armed group as a *de facto* organ of the state, or that the conduct was *ultra vires* at all, but committed on the instructions, direction or under the effective control of the state.

The significance of the distinction between organs and agents and the principles that, according to the ARS, govern the attribution of *ultra vires* acts in each case is thrown into sharp relief when one considers the alleged looting of residential and commercial properties in Afrin, northern Syria by members of the TFSA after the TFSA and Turkey claimed to have taken control of the city in 2018.[152] Turkey's overt involvement with the TFSA has been well documented and extends beyond mere logistical support and training to joint military operations in which the TFSA has been incorporated into the Turkish military command structure.[153] In response to the allegations of looting the Turkish Presidential Spokesperson, Ibrahim Kalin, said that Turkey took the allegations seriously and would investigate them and that 'some groups probably did not follow the orders

[150] *Bosnia Genocide*, §397 [Emphasis added].

[151] Crawford, First Report (1998), p.43 §213.

[152] France 24, 'Turkey to investigate Afrin looting reports', 19 March 2018.

[153] Yesiltas et al, Foundation for Political, Economic and Social Research, 'Operation Euphrates Shield: Implementation and Lessons Learned' (2017 SETA), pp.22-23.

that were given by their commanders'.[154] If the TFSA in fact enjoys the status and function of an organ of Turkey then regardless of whether the members of the armed group followed their commanders' orders, their conduct is attributable to Turkey. However, if the TFSA acted as agents of Turkey, according to the ILC's approach, in order for their conduct to be attributed to Turkey it must be shown that they did so on the specific instructions of Turkey or that they were operating under the effective control, namely under the operational command, of Turkey at the time the looting took place.

The Turkish government has since been accused of passing off olive oil plundered from olive groves in Afrin by members of the Turkish armed forces together with members of militia as the produce of Turkey to sell on EU markets.[155] The looting by members of the Turkish armed forces would be attributable to Turkey. The question whether the conduct of members of the militia would be attributable to Turkey would again turn on whether those militia were, at the time of the looting, acting on the instructions of or under the effective control of Turkey.[156] As the discussion of the nature of a relationship between a state and a non-state actor that would satisfy the test of effective control above in section 2.3.4 shows, conduct that is peripheral to the specific operation, such as looting after the successful completion of a military operation to gain control over territory, will not amount to conduct committed under the effective control of the state.[157]

## 2.5 Conclusion

The high threshold tests required to identify a state's *de facto* organs and agents mean that a state that provides substantial financial, military and other support to an armed group will not be directly responsible for the conduct of that armed group, even if that group uses the state's support to commit war crimes, genocide, crimes against humanity and other violations of international law. A state's strictly limited responsibility for private acts is reinforced by the approach suggested by the ILC Commentary to the question of attribution of *ultra vires* conduct of a state's agents. In effect, the state will not be responsible for such acts. It will only be responsible in circumstances where it has instructed or directed its agent to carry out the specific act, or the act is committed under the effective control of the state. In light of the practical and evidential difficulties that are likely to arise for those seeking to prove conduct was committed on the instructions of or under

[154] France 24, 'Turkey to investigate Afrin looting reports', 19 March 2018.

[155] Badcock, 'Turkey accused of plundering olive oil from Syria to sell in the EU', The Telegraph, 14 January 2019.

[156] See section 2.3 above.

[157] Crawford, First report (1998), p.43, §213.

the effective control of the state, it is doubtful that the law of state responsibility, as currently understood, is sufficient to ensure that states do not evade their international obligations by delegation to a proxy.

The question then arises as to how international law should address state complicity in unlawful acts of armed groups and upon what terms? Jurists and scholars have tended to answer that question in one of two ways. First is the argument that the context-specific approach proposed by the ILC Commentary to Article 8 ARS should be adopted, such that the test of 'overall control' may be applied in cases where the state and armed group share a purpose to commit violations of international law.[158] This argument has been countered by some scholars who argue that a state's primary obligations to prevent certain acts are sufficient to cover state complicity in terrorism and international crime.[159] In chapter 3 I examine the argument in favour of a variable control standard and the extent to which a broadening of the rules of attribution to address cases of 'shared unlawful purpose' would be an appropriate way to address state complicity in terrorism and international crime. In chapter 4 I then examine the extent to which a state's primary obligations under customary international law, IHL and IHRL are sufficient to cover complicity in terrorism, international crimes and other unlawful acts.

[158] E.g. *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39.

[159] Milanovic (2009) p.322; Boon (2014) pp.373-375; Crawford (2013) p.158.

## Chapter 3: *Tadic* Revisited - Overall Control in Cases of Shared Unlawful Purpose

### 3.1 Introduction

*Bosnia Genocide* has been described as 'a judicial massacre'.[1] News headlines announced that the Court had cleared Serbia[2] of genocide[3] and that Bosnia was 'dismayed' by the result.[4] Yet Serbia was not entirely absolved of responsibility with respect to the genocide at Srebrenica. The Court held that Serbia was responsible for failing to prevent the genocide and punish the perpetrators of it.[5] However, the focus of the state parties to proceedings, the media, campaigners and victims of the genocide was on *direct* responsibility for or complicity in the genocide, or the lack of it.[6] The case is politically sensitive. But as Jackson notes, the reaction to *Bosnia Genocide* shows that the public isn't concerned with a finding of responsibility *per se*.[7] What matters is the identification of a state's specific legal responsibility for its active role in the commission of international crimes or other unlawful acts. For Cassese, a staunch defender of the *Tadic* overall control test and critic of the ICJ's approach in *Bosnia Genocide,* the court 'absolved' Serbia and then awarded Bosnia a 'consolation prize' by affirming that there was a genocide at Srebrenica, and that Serbia failed to prevent it.[8]

Notwithstanding the ICJ's rejection of the overall control test in *Tadic,* some have expressed continued support for the test in cases where the state and armed group share a common purpose to commit acts amounting to international crimes[9] and specifically in the context of state-

[1] Cassese (2007b).

[2] As successor state to FRY.

[3] BBC News, 'Court clears Serbia of genocide', 26 February 2007.

[4] Bildanzic & Dervisbegovic, 'Serbs relieved, Bosnia dismayed by genocide ruling', 26 February 2007.

[5] *Bosnia Genocide*, §438.

[6] For further discussion of the ICJ's approach to the question of state complicity in genocide in *Bosnia Genocide* see chapter 5.

[7] Jackson (2017).

[8] Cassese (2007b).

[9] *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39 and Dissenting Opinion of Judge ad hoc Mahiou, §§114-117. Also, Cassese (2007a).

sponsored terrorism.[10] In defence of *Tadic* Cassese – who served on the bench in that case[11] - has argued that the effective control test is 'inconsistent with a basic principle underpinning the whole body of rules and principles on state responsibility'.[12] For Cassese there is a need to rely upon the overall control test generally because the effective control test imposes an evidential burden that, in practice, can be insurmountable.[13] Others have argued for a more context-specific application of the overall control test.[14] In their Dissenting Opinions in *Bosnia Genocide*, Vice-President Al Khasawneh and Judge ad hoc Mahiou observed that the Court had not considered whether it was appropriate to apply the effective control test to circumstances where the shared objective is to commit violations of international law, such as acts of terrorism, genocide or war crimes.[15] The words 'shared unlawful purpose' are used to describe this shared objective.

In this chapter I will question whether adopting the context-specific application of the overall control test would be an appropriate means of addressing the responsibility of state-sponsors of terrorism and international crime. Section 3.2 provides an account of the arguments made in favour of a modification of Article 8 ARS to include a test of overall control in cases of shared unlawful purpose. Section 3.3 summarises the approach of the Appeals Chamber in *Tadic*. In section 3.4 I argue that there is a third basis, not considered by the ICJ, upon which the overall control test should be rejected, namely the ICTY's misinterpretation and misapplication of case law cited in support the overall control test. Furthermore, the case law of international human rights courts subsequent to *Tadic* shows a trend in favour of the effective control test for attribution. In section 3.5 I argue that in practice applying 'overall control' to cases of 'shared unlawful purpose' would not resolve the evidential difficulties that result from the application of the 'effective control' test. I explain that in order to prove a 'shared unlawful purpose' it must be shown that the state deliberately provided substantial support to an armed group in order that the armed group use that support to commit the unlawful act. This fault element is similar to 'specific intent': acting in the knowledge that a specific outcome is a virtual certainty and with the purpose

[10] Trapp (2011), pp.42-45. For argument in favour of a flexible approach before *Bosnia Genocide* see Chase (2005) p.111. *Cf.* Stahn (2003) p.47 and (2004) p.839. Stahn argues that the effective control test was 'overturned' by state practice following 9/11 attacks and the use of force against Afghanistan as part of 'Operation Enduring Freedom', which provided 'official confirmation' to *Tadic* and the overall control test. Stahn does not appear to have returned to the issue since the ICJ's judgment in *Bosnia Genocide*.

[11] It is suspected that Cassese is the author of the judgment.

[12] Cassese (2007a) p.654.

[13] Ibid, pp.665-666.

[14] *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39. See Trapp (2011) pp.42-45.

[15] Ibid. and Dissenting Opinion of Judge ad hoc Mahiou, §§114-117.

of achieving that specific outcome. The effect would be to replace one criterion that entails a high evidentiary threshold – 'effective control', with another, 'specific intent'.

### 3.2 'Shared unlawful purpose': A special place for 'overall control'?

As a result of the application of the high threshold tests of 'complete dependence' and 'effective control' to identify state organs and agents states seemingly enjoy a substantial amount of freedom to provide an armed group with the means to conduct and sustain military operations without bearing responsibility for that armed group's conduct. History is replete with examples of state use or co-option of armed groups or other non-state actors in order to conduct operations on the state's own territory or abroad, or to intervene indirectly in conflicts occurring in other states. The practice dates back to the 16th century, if not before, with the use of privateers authorised by the monarchy to attack enemy vessels and plunder foreign commercial ships.[16] During the Cold War, interference by 'superpower' states such as the United States and Russia in internal armed conflicts was commonplace.[17] The support given to armed groups during this period was not insignificant. As Becker has observed, '[w]ithout the State playing a dominant role in facilitating or harnessing terrorist activity, non-State actors could not operate easily on the international stage. Without the private terrorist group doing its bidding, the State could not easily pursue its foreign policy objectives with this degree of efficiency and anonymity'.[18]

Since 2011 a number of states have sought to influence the outcome of internal armed conflicts in the Middle East and North Africa by providing varying degrees of support to armed groups. In Syria, opposition armed groups have been provided with 'lethal' and 'non-lethal' assistance that includes military training and the assistance of military advisors on the ground by, amongst others, the United Kingdom,[19] the United States,[20] Turkey, Qatar and Saudi Arabia.[21] The continued appeal of the use of proxy warfare by states to pursue foreign policy goals and the tragic inevitability of the commission of serious violations of IHL and human rights in armed conflicts has prompted the criticism that, with respect to cases where the state and the person or entity act

[16] Sir Francis Drake is one of the better-known English privateers who privateered on the commission of Queen Elizabeth I.

[17] Becker, (2006) pp.250-251. For a study of the dynamics and lineage of proxy warfare from the Cold War to the so-called 'War on Terror' see Mumford (2013).

[18] Becker (2006), p.251.

[19] BBC News, 'Syria conflict: UK to give extra £5 million to opposition groups', 10 August 2012.

[20] BBC News, 'Syria war: A brief guide to who's fighting whom', 7 April 2017.

[21] Vela, J., 'Exclusive: Arab states arm Syrian rebels as UN talks of Syrian civil war', The Independent, 13 June 2012.

with a common unlawful purpose - in particular cases of state-sponsored terrorism – the effective control standard raises the evidential bar too high.[22] For Trapp,

> …it is difficult to argue that material military support… for terrorist activities does not necessarily imply support for the offences committed by the terrorists in the course of their use of force. There is therefore no need for the added layer of effective control, in addition to a more general level of control over the group's operations (through its support thereof), to ensure that a state is only held responsible for that over which it exercised sufficient control.[23]

Scholars have criticised the effective control test for 'effectively provid[ing] a "script" for a state wishing to sponsor terrorism or insurgency while avoiding responsibility'.[24] They have suggested that if a more flexible approach to Article 8 ARS were to be adopted, the overall control test could be included as a basis for attribution 'and thereby respond to the particularities of the terrorism context in a way that rigid adherence to the *Nicaragua* standard does not.[25] For Cassese,

The hidden nature of those groups, their being divided up into small and closely-knit units, the secretive contacts of officials of some specific states with terrorist groups, all this would make it virtually impossible to prove the issuance of instructions or directions *relating to each terrorist operation*. If one instead relies upon the 'overall control' test, it suffices to demonstrate that certain terrorist units or groups are not only armed or financed (or also equipped and trained) by a specific state or benefit from its strong support, but also that such state generally speaking organizes or coordinates or at any rate takes a hand in coordinating or planning its terrorist actions (not necessarily each individual terrorist operation). It would then be relatively easy to infer from these links that the state at issue bears responsibility for those terrorist activities. In short, on the strength of the 'overall control' test, it would be less difficult to attribute those actions to the state in question. This test would make it possible to attribute to some specific states of the Middle East responsibility for the gross violations of human rights perpetrated by terrorist groups on which

[22] Chase (2005) p.111; Cassese (2007a) pp.665-667; Trapp (2011) pp.44-45. *Cf.* Becker (2006) pp.239-282 who argues for the rejection of the agency model in the context of establishing State responsibility for terrorism all together. For Becker, 'the agency paradigm not only neglects the subtle relationships between the private and public sphere in the perpetration of acts of terrorism, it encourages them' (at p.259).

[23] Trapp (2011) pp.44-45.

[24] Chase (2005) p.111.

[25] Trapp (2011) pp.44-45.

they have exercised a strong influence because, in addition to providing support, financing, training and weapons, such states help coordinate and plan their terrorist activities.[26]

In his Dissenting Opinion in *Bosnia Genocide,* Vice-President Al-Khasawneh remarked that the Court failed to address the crucial issue raised by *Tadic*, namely that 'different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution'.[27] In *Nicaragua*, he observed, the shared objective of the United States and the *contras* was the overthrow of the Nicaraguan government.[28] That objective could be achieved without the commission of war crimes or crimes against humanity.[29] However, when 'the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold'.[30] This argument, and the question whether, in practice, the 'shared objective' or 'shared unlawful purpose' formula would be an effective means of addressing state complicity in terrorism and international crimes is discussed below in section 3.5.

For obvious reasons, given the heavy evidential burden imposed by the effective control test, a context-specific approach continues to appeal to claimant states. For example, in *Georgia v Russia*,[31] Georgia argued for the application of a context-specific approach. Georgia instituted proceedings against Russia on the ground that Russia, through its organs or agents, had carried out a policy of violent discrimination against ethnic Georgians in South Ossetia contrary to the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Georgia cited the ILC Commentary to Article 8 in support of its submission that '[t]he requisite threshold for control in any particular case is thus fact-sensitive and requires a careful analysis of the relationship between the persons or groups and the State in question and the extent to which control was exercised by virtue of that relationship with regards to the conduct said to have breached the State's international obligations'.[32] Georgia did not expressly plead 'overall control' but submitted that the South Ossetian armed groups acted under the direction and control of the separatist government ministers who were Russian military and intelligence officials on active duty, that the groups

[26] Cassese (2007a) p.666 [original emphasis].

[27] *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39.

[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] *Georgia v Russia*, Preliminary Objections, p.70.

[32] *Georgia v Russia*, Memorial of Georgia, Vol. I, 2 September 2009, §9.46.

received 'critical financial and military' support from Russia, and some persons who committed violations of CERD were employed by Russia and had Russian citizenship.[33]

Proceedings in *Georgia v Russia* were discontinued after the Court held that it had no jurisdiction to decide the matter.[34] However, had the Court had the opportunity to consider Georgia's application at the merits stage, it may have found the proposed context-specific application of the overall control test more palatable than the general application of the test suggested in *Tadic*. This is because the context-specific approach preserves the effective control standard in cases where violations of international law are not inherent in the operations carried out by the state agent, for example the carrying out of a military operation against the armed forces of a third state or armed group.

Yet, contrary to the Appeals Chamber's assertion in *Tadic,* there is no support for the application of the overall control test in the jurisprudence of international arbitral tribunals or international human rights courts. Therefore, the application of overall control in cases of shared unlawful purpose would be a progressive development of the law of state responsibility.

### 3.3 *Tadic* Revisited

In *Tadic* the ICTY Appeals Chamber argued that the jurisprudence of other international tribunals supported a test of 'overall control' with respect to a state's relationship with organised and hierarchically structured groups.[35] With respect to such groups the ICTY concluded that the effective control test was not 'persuasive'.[36] For the ICTY, '[t]he "effective control" test propounded by the ICJ in *Nicaragua* as an exclusive and all-embracing test is at variance with international judicial and state practice: such practice has envisaged state responsibility in circumstances where a lower degree of control than that demanded by the *Nicaragua* test was exercised'.[37] Instead, the ICTY posited that policy and the jurisprudence of other international tribunals supported a test of 'overall control'.[38] A state will exercise overall control over an

[33] Ibid.

[34] *Georgia v Russia*, Preliminary Objections, p. 70.

[35] *Tadic,* p.49 §120 and p.59 §137.

[36] Ibid., §115. The basis upon which the ICTY distinguished organised groups from individuals and unorganised groups is unclear. The ICTY merely observes that an organised group will have a chain of command, its own set of rules, and its members operate within that structure, and that because members of the group are subject to the authority of the group's commander, the state need only exercise overall control over the group: §120.

[37] Ibid., §124.

[38] Ibid., §120 & §137.

organised armed group when it has financed, trained, equipped and helped the group in the planning of its operations.[39] Drawing an analogy with draft article 10 ARS[40] (now Article 7 ARS), the ICTY posited that in these cases the armed group should be treated as if it were a state organ, meaning that the state will be responsible for the *ultra vires* conduct of the group.[41] The ICTY therefore significantly lowered the evidential threshold required to establish *de facto* state organs. Even if the state does not exercise operational command over the group, the state will be responsible for all the acts of that group, whether or not they are incidental to the military operation in question. The ICTY justifies its approach on the ground that 'otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility'.[42]

As explained in chapter 2, the ICJ rejected the overall control test on two grounds: the ICTY's lack of jurisdiction over matters of general international law;[43] and the distinct purposes for which the effective control test and the overall control test were applied – the attribution of conduct and the classification of armed conflict respectively.[44] The ICJ did not address the question whether the overall control test is in fact supported by the jurisprudence of the United States-Mexico General Claims Commission, the Iran-United States Claims Tribunal, and ECtHR cited by the ICTY in *Tadic*, some of which are also cited by the ILC in its commentary to Article 8 ARS.[45] In light of continued support for the application of the overall control test to cases of shared unlawful purpose, there is therefore a need to consider whether there is force in the ICTY's assertion that, unlike the effective control test, the overall control test is grounded in judicial precedent.

### 3.4 *Tadic:* Misinterpretation and misapplication of case law

The following analysis will show that the ICTY misinterpreted and misapplied the decisions of the United States-Mexico General Claims Commission, the Iran-United States Claims Tribunal, and

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[39] Ibid. §131.

[40] Draft article 10 adopted on first reading by the ILC provides that:

> 'The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity': ILC Report (1980), p.31.

[41] *Tadic,* §121. See chapter 2.2.

[42] Ibid., §123.

[43] *Bosnia Genocide,* §403.

[44] Ibid., §§404-405.

[45] ARS, Article 8, Commentary, §2 fn.154, §5 fn.160.

the ECtHR authorities cited in support of the overall control test. Moreover, there is no indication in the judgments of the ECtHR subsequent to *Tadic* that the ECtHR will adopt the overall control test to attribute the conduct of non-state actors to the state.

### *3.4.1 United States-Mexico General Claims Commission and the Iran-United States Claims Tribunal*

According to the ICTY in *Tadic* international and judicial practice 'has envisaged State responsibility in cases where a lower degree of control than that demanded by the *Nicaragua* test was exercised'.[46] However, the ICTY's interpretation of the case law treats as express that which at most may only be implied by decisions that dealt with the question of attribution soley in general terms. The ICTY interprets 'effective control' as 'control that extends to the issuance of specific instructions concerning the various activities of the individuals in question'.[47] Citing *Stephens* and *Yeager,* the ICTY concludes that because no enquiry was made in either case as to whether any specific instructions were issued, those cases provide evidence of a practice of attributing conduct on the basis of overall control.[48]

*Stephens* concerned the conduct of a member of an 'informal municipal guards organisation' called the 'defensas sociales' that had 'sprung up' in the state of Chihuahua, Mexico, after federal troops had withdrawn from the state during the revolution led by Adolfo de la Heurta in Mexico 1923-1924 'partly to defend peaceful citizens, partly to take the field against the rebellion if necessary'.[49] The United States-Mexico General Claims Commission did not draw a firm conclusion as to the status of these defensas sociales vis-à-vis the state, but in any event concluded that they were 'acting for' Mexico. According to the Commission, '[i]t is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were "acting for" Mexico or for its political subdivisions'.[50] As a consequence, Mexico was held responsible for the conduct of Lorenzo Valenzuela, a member of the defensas sociales who, on orders to stop the claimants' brother at a check point, shot and killed him. Mexico contended that the guard was ordered merely to stop the victim and not to shoot him. The Commission accepted this position but found the following,

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[46] *Tadic*, §124.

[47] Ibid.

[48] *Tadic*, §§125-127.

[49] *Stephens* (1927) p.267.

[50] Ibid.

Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.[51]

For the ICTY, evidence of specific instruction or authorisation by the state was not required in *Stephens* as it was sufficient to demonstrate that the state had 'overall control' in order for that state's responsibility to be engaged.[52] However, this interpretation of *Stephens* is misconceived. The United States-Mexico General Claims Commission did not discuss the question of specific instructions because it was not relevant to its analysis. There is no suggestion on the facts that the Mexican army or any other state organ instructed, directed or controlled the defensas sociales. At most, the defensas sociales acted of their own will under the 'General Ordinance for the Army' of 15 June 1897, enacted before the start of the revolution, according to which individuals were obligated to stop and answer the questions of sentries.[53] But this does not mean that the defensas sociales were under the control of the state or instructed by the state to man a check point. As the Commission observed, the defensas sociales had 'sprung up' in the absence of the state's armed forces. As such, the defensas sociales were more akin to vigilante groups, self-appointed to maintain law and order in circumstances where the state could not do so.

The better interpretation of *Stephens* is that it supports the rule of attribution provided by Article 9 ARS – the exercise of governmental authority in the absence or default of the official authorities.[54] Members of the defensas sociales were treated as soldiers of the Mexican army for the purposes of state responsibility because they had organised themselves in order to exercise governmental authority – maintaining law and order – and it was necessary to do so because of the absence of Federal troops. Article 9 is engaged in circumstances where the state apparatus is wholly absent or lacking such that non-state actors take it upon themselves to engage in 'governmental' activities so as to fill the void.[55]

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[51] Ibid.

[52] *Tadic*, §125.

[53] *Stephens* (1927) p.267.

[54] *Cf.* Crawford (2013) p.142 who posits that the actor in the *Stephens* was found to have 'at least the status of *de facto* organ' within the meaning of Article 4 ARS.

[55] See chapter 6.

This was also the case in *Yeager*.[56] The ICTY acknowledges the finding by the Iran-US Claims Tribunal in that case that the Revolutionary Guards were exercising governmental authority in the immediate aftermath of the Iranian Revolution because the official police force had lost control. However, the ICTY interprets the findings of the Tribunal as supporting attribution on the basis that the Revolutionary Guards were in fact acting on behalf of the state,[57] rather than the second limb to what was then draft Article 8 (now Article 9) - in fact exercising governmental authority in the absence of the official authorities.[58]

In *Yeager* the Iran-US Claims Tribunal found that the government did not exercise sufficient control to 'effectively prevent' the Revolutionary Guard from committing wrongful acts against United States nationals, but the government must have known, and did not specifically object to the exercise of governmental authority by them.[59] However, the Tribunal did not attribute responsibility for the particular conduct discussed in *Tadic* (forced expulsion)[60] on the basis of Iran's control over the Revolutionary Guard. Rather, the Tribunal applied the principle that, '[u]nder international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary "Komitehs" or "Guards" and at the same time deny responsibility for wrongful acts committed by them'.[61]

The cases of the Iran-US Claims Tribunal cited in footnotes of *Tadic*[62](*William L. Pereira v Iran,*[63] *Arthur Young v Iran*[64] and *Schott v Iran*[65]) do not assist any further. The question of the requisite level of control over persons or groups for the purposes attribution is not discussed in these cases. Moreover, in *William L. Pereira Associates* the alleged conduct was committed after the

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[56] *Yeager* (1987). The Iran-US Claims Tribunal also found responsibility on the basis of what is now Article 10 ARS. See chapter 7.

[57] *Tadic,* §126.

[58] The government formally recognised the Revolutionary Guard as an organ of government in May 1979. The conduct that was subject of the *Yeager* took place in February 1979.

[59] *Yeager* (1987) §43. See also chapter 6, 6.6.

[60] *Tadic*, §126.

[61] *Yeager* (1987) §45. *Cf.* de Hoogh who posits that, on the basis that the Iran government tolerated the exercise of governmental authority by the Revolutionary Guard it could be argued that the latter operated 'within the organic infrastructure of the State' and could therefore be treated as a *de facto* organ: de Hoogh (2002) p. 271.

[62] *Tadic,* p.53 fn.151.

[63] *William L. Pereira v Iran* (1984).

[64] *Arthur Young v Iran* (1987).

[65] *Schott v Iran* (1990).

Revolutionary Guard was formally recognised by government decree in May 1979,[66] and in *Schott* at around the same time the Revolutionary Guard was declared the 'protector of the revolution' in an amendment to the Constitution.[67] In *Arthur Young* the Tribunal found that there was insufficient evidence of a causal link between the conduct complained of and the alleged violations of international law, and therefore did not consider the basis upon which the conduct of the Revolutionary Guards may have been attributed to the state.[68]

These cases do not provide judicial precedent for the overall control test.

### *3.4.2 Loizidou v Turkey*

With respect to the ECtHR cases, the ICTY conflated principles applied for the purposes of determining a state's exercise of extraterritorial jurisdiction with rules of attribution for the purposes of engaging a state's responsibility. Particular focus was placed upon *Loizidou v Turkey*[69] and the reference to 'effective overall control' in that case.[70] In its judgment on Preliminary Objections the ECtHR held that a state will exercise jurisdiction where, as a consequence of military action, that state exercises 'effective' control over an area outside its territory.[71] Moreover, the positive obligation to secure the rights and freedoms guaranteed by the European Convention on Human Rights (ECHR) flows from the fact of that control over territory, whether control is exercised through the state's armed forces or by a subordinate local administration.[72] However, the Court confused matters at the merits stage by introducing the concept of 'effective *overall* control' in its analysis of the question of responsibility,[73] a formula that appears to have been adopted from the claimant's submissions,[74] and the Court's discussion on jurisdiction.[75] Moreover,

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[66] In *William L. Pereira v Iran* (1984) the confiscation notice was issued on 5 October 1980: p.23. In *Schott* the alleged expropriate of property occurred in summer – late 1979: §§55 & 59.

[67] *Schott v Iran* (1990) §17.

[68] *Arthur Young v Iran* (1987) §§46-59.

[69] ECtHR *Loizidou v Turkey* (Preliminary Objections) and (Merits).

[70] *Tadic*, §128. *Loizidou v Turkey* is also cited by the ILC in its commentary to Article 8 ARS in support of its comment that 'it is a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State to such an extent that the conduct controlled should be attributed to it': Commentary to Article 8 ARS, §5 fn.160.

[71] ECtHR *Loizidou v Turkey* (Preliminary Objections) §62. Also (Merits), §52.

[72] Ibid.

[73] ECtHR *Loizidou v Turkey* (Merits) §56.

[74] Ibid., §49

[75] The terms 'effective overall control' and 'effective control' have been used interchangeably in subsequent ECtHR cases concerning a state's jurisdiction over an area outside its territory, suggesting that it was never intended for there to be two separate tests and 'overall' was used to describe control over the whole of an area, rather than part

having decided that, as a result of its military occupation, Turkey exercised jurisdiction over Northern Cyprus, the Court stated that the wrongful conduct was 'thus imputable' to Turkey, without considering the question of attribution of conduct as a separate issue. The Court concluded that 'the continuous denial of the applicant's access to her property in Northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) *and is thus imputable to Turkey'*.[76]

The phrase 'and is thus imputable' may be interpreted in two ways. First, that the Court found Turkey directly responsible for the conduct of the Turkish Republic of Northern Cyprus (TRNC) because it exercised effective (overall) control over the territory of Northern Cyprus. Alternatively, that the Court found Turkey responsible for the failure to protect Loizidou's Convention rights, in breach of its positive obligations under Article 1 ECHR to secure the rights of persons falling within its jurisdiction.[77]

The ICTY appears to have adopted the first interpretation of *Loizidou,* observing that the Court had found that 'the restrictions on the right to property complained of by the applicant were attributable to Turkey'.[78] In defence of the ICTY's approach Cassese takes this a step further. For Cassese, establishing state responsibility is a necessary condition for establishing the application of the ECHR.[79] Thus, Cassese argues that in order to establish whether or not a state exercised jurisdiction over the victim, the Court in *Loizidou* had to determine to 'which state or entity the violations were to be attributed or, in other words, which state or entity bore responsibility for those asserted violations'.[80] According to Cassese's interpretation, state responsibility is a prerequisite for jurisdiction. However, this interpretation of *Loizidou*, and of the ECtHR case law generally, is not correct. A State Party's obligation to secure an individual's rights, as guaranteed by the ECHR, is only engaged if that that person 'falls within' the state's jurisdiction. Therefore, the question of jurisdiction must be established before the question of responsibility can be addressed. In *Loizidou* the Court held that Turkey's exercise of extra-territorial jurisdiction over Northern Cyprus by virtue of its military occupation of the area triggered Turkey's positive

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of it. E.g. ECtHR *Cyprus v Turkey*; *Bankovic v Belgium* (Admissibility), §70; *Al-Skeini v United Kingdom,* §138; *Chiragov v Armenia*, §§168 and 169.

[76] ECtHR *Loizidou v Turkey* (Merits) §57.

[77] Milanovic (2006) p.586.

[78] *Tadic*, §128.

[79] Cassese (2007a) p.658 fn.17.

[80] Ibid.

obligation under Article 1 ECHR to *secure* individual rights and freedoms within the state's jurisdiction.[81] The Court's comment that '[i]t is not necessary to determine whether… Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC",'[82] should not be understood as an instance of the application of the overall control test to the question of attribution.[83] Rather, it is an indication by the Court that, having found a basis upon which Turkey is responsible, namely for the failure to secure Loizidou's rights, the Court was satisfied that it was not necessary to explore further the question whether the conduct of the TRNC was directly attributable to Turkey. As the Court observed in *Ilascu and Others v Moldova and Russia,* decided 8 years after *Loizidou*,

According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it exercises in practice effective control of an area situated outside its national territory. *The obligation to secure*, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.[84]

The key issue in *Loizidou* was not a state's control over an armed group, but its control over a geographical area outside its territory because of the presence of its organs (its military) in that area.[85] That case and subsequent cases of the ECtHR 'do not revolve around the general law on state responsibility, but deal with a concept of state jurisdiction which is specific to human rights treaties, as it is a prerequisite for their application'.[86] Indeed, the ECtHR has since sought to clarify its position in *Catan and Others v Russia and Moldova*,[87] in which the Court stressed that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been

[81] ECtHR *Loizidou v Turkey*, (Merits), §§52 & 56. See also *Al Skeini v United Kingdom,* §138; *Catan & Ors v Moldova & Russia,* §106.

[82] Ibid. §56.

[83] *Cf. Tadic,* §128.

[84] ECtHR *Ilascu & Ors v Moldova & Russia*, §314 [Emphasis added].

[85] The Appeals Chamber of the ICTY half-heartedly recognised the distinction as 'possible control of a sovereign State over a State entity, rather than control by a State over armed forces operating in the territory of another State': *Tadic,* §128.

[86] Milanovic (2006) p.586.

[87] ECtHR *Catan & Ors v Moldova & Russia,* §115. Re-iterated in *Jaloud v The Netherlands*, §154.

equated with the test for establishing a State's responsibility for an internationally wrongful act under international law'.[88]

The ECtHR's jurisprudence on questions of jurisdiction is evolving on a case-by-case basis[89] as the Court is presented with new factual scenarios. The Court has found a person to fall within the state's jurisdiction where the state exercises effective control over an area,[90] or authority and control over the person or a detention facility.[91] In these cases the ECtHR has adopted language similar, but not identical, to the ICJ's 'complete dependence' and 'effective control tests', namely: 'effective (overall) control' of an area, 'authority and control' over a person, 'decisive influence', 'survival by virtue of' in order to determine the exercise of extra-territorial jurisdiction by a state.

As the ECtHR has rightly stressed, the question of jurisdiction is separate from that of state responsibility.[92] There is nothing in the approach of the court to indicate the adoption of a lower threshold control test, such as 'overall control' to determine the attribution of conduct. It is only when the Court has already determined that a state exercises effective control over a local administration, and that the administration could not survive without the state's support that the ECtHR will treat the local administration as a *de facto* organ and therefore not consider it necessary to consider whether the state had detailed control over the conduct in question.[93] The terminology used by the ECtHR may differ from that used by the ICJ but the underlying principles are the same.

The ECtHR is yet to consider the situation where an armed group 'acts on behalf of' a state in the territory of another state in circumstances where the former state has no obvious military presence in the territory of the latter state. Ukraine's applications to the ECtHR concerning the involvement of Russia in the activities of armed groups in eastern Ukraine present the Court with the opportunity to do so.[94] In its applications Ukraine has maintained that by exercising control over

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[88] Ibid.

[89] For a general overview of the ECtHR's jurisprudence see Milanovic & Papic (2018).

[90] ECtHR *Loizidou v Turkey*, (Merits), §§52 & 56.

[91] See ECtHR *Al Skeini v United Kingdom* §137; *Issa & Others v Turkey,* §71; *Ocalan v Turkey,* §91. The 'authority and control' standard has also been applied by the Inter-American Commission on Human Rights. See IACiHR *Coard et al v United States,* §38.

[92] ECtHR *Catan & Ors v Moldova & Russia*, §115.

[93] E.g. ECtHR *Ilascu & Ors v Moldova & Russia,* §392; *Mozer v Moldova & Russia*, §157.

[94] Registrar of the ECtHR, Press Release, 'Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine', 9 May 2018.

separatists and armed groups operating in eastern Ukraine, 'Russia has exercised jurisdiction over a situation which has resulted in numerous Convention violations'.[95] In its applications concerning events occurring in Crimea and eastern Ukraine from September 2014, Ukraine has alleged that armed groups controlled by Russia have killed and tortured civilians and members of the Ukrainian military.[96] Provided that the cases move to the merits stage, it will be necessary for the Court to determine whether the conduct of those separatists or armed groups is directly attributable to Russia.

In light of the ECtHR's practice so far and the principles applied in *Loizidou* and *Ilascu* it is likely that the Court will determine the question of attribution on the basis of effective control.[97] Thus, Ukraine must first show that the armed groups operating in eastern Ukraine were operating under the effective control and 'decisive influence' of Russia (to use the language adopted by the Court). If jurisdiction is established on the basis that Russia exercises effective control over the armed group or groups, it is likely that the Court would also conclude that the conduct complained of is attributable to Russia. Russia would then be under an obligation to provide an effective remedy to the victims of rights-violating conduct committed by armed groups operating under its effective control in Ukraine.

#### *3.4.4 Post-Tadic limited application of overall control by international human rights mechanisms*

The overall control standard was applied by the UN Working Group on Arbitrary Detention (WGAD) in 1999 in order to determine whether the Southern Lebanese Army was 'acting on behalf of' Israel in its administration of Al Khiam prison.[98] The WGAD considered the applicable criterion for attribution of the conduct of non-state actors to a state to be in a state of evolution.[99] For WGAD the first stage in this development was Article 42 of the Hague Regulations 1907 according to which '[t]erritory is considered occupied when it is actually placed under the authority

[95] Ibid, with respect to *Ukraine v Russia* Applications no. 20958/14 and *Ukraine v Russia* (V), Application no. 8019/16.

[96] Ibid., with respect to *Ukraine v Russia* (IV) Application no. 42410/15 and *Ukraine v Russia* (VI), Application no. 70856/16.

[97] See also *Solomou & Others v Turkey* in which the ECtHR applied an 'authority and/or effective control' test to determine that (a) the victim was under the authority and/or *effective* control of Turkey, *or its agent*, and therefore fell within Turkey's jurisdiction [§§45 & 51] and (b) that the victim was killed by agents of Turkey [§79] in circumstances where the state organs were also present.

[98] Report of the Working Group on Arbitrary Detention, 'Handling of communications concerning detention at the Al-Khiam prison (southern Lebanon)', (1999).

[99] Ibid, §14.

of the hostile army'; and '[t]he occupation extends only to the territory where such authority has been established and can be exercised'.[100] The second stage was identified as the adoption of the Fourth Geneva Convention (GCIV) that codified the obligations of an occupying power vis-à-vis the detention and treatment of protected persons in international armed conflicts.[101] The 'effective control' test applied by *Nicaragua* was considered by WGAD to be the third stage in this evolution.[102] The 'overall control' test applied by the ICTY in *Tadic* constituted the fourth and latest stage of development.[103]

However, WGAD has not referred to the overall control test in any of its subsequent reports to the Human Rights Council (HRC). When it has addressed questions of control it has been in the context of a state's exercise of extra-territorial jurisdiction and recognition of the opinion of the UN Human Rights Committee (HRCttee) that 'a State party must respect and ensure the rights laid down in the [ICCPR] to anyone within the power or *effective* control of that State party, even if not situated in the territory of that State party'.[104]

Other special procedure mechanisms of the HRCttee have simply referred to the ARS without adopting or approving a specific control test. For example, in his latest report the Special Rapporteur on Torture, Inhuman and Degrading Treatment has not taken a clear view on the requisite level of control required for attribution pursuant to Article 8 ARS, merely stating the principle that 'States are responsible… for territorial and extra-territorial violations committed by… non-State actors under their instruction or control' and referencing articles 4-11 ARS in general terms.[105]

The International Commission of Inquiry on Darfur does cite *Tadic* in its 2005 report to the Security Council in its observations on the question of legal responsibility for the conduct of the Janjaweed. However, the Commission does not appear to have a firm grasp of the distinction between the effective and overall control tests. Confusingly, the Commission refers to the effective

[100] Ibid, §14(a).

[101] Ibid, §14(b).

[102] Ibid, §14(c).

[103] Ibid, §14(d).

[104] HRCttee, General Comment no.31, §10, referred to in Report of the Working Group on Arbitrary Detention, 10 January 2008, §11 with respect to the application of the ICCPR to the conduct of the US government outside of US territory.

[105] HRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment', 2018, §58 & fn.88.

control standard in its conclusion that in cases where militias conduct joint operations with government forces 'it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadic* (Appeal), at paragraphs 98 to 145'.[106] The Commission then goes on to conclude that the militias are therefore 'acting as de facto State officials'.[107]

#### *3.4.5 Summing-up*

This review of the case law shows that, contrary to the ICTY's claim, there is no authoritative support for the application of overall control to attribute 'private' conduct to a state. *Tadic* has had some influence on the opinions of UN human rights mechanisms. However, that influence has not persisted. The question remains whether, in spite of the lack of authoritative support for the overall control test, it should nevertheless be applied to specific cases of shared unlawful purpose, as suggested by Vice President Al-Khasawneh in his dissenting opinion in *Bosnia Genocide*[108] and Trapp in her study on state responsibility for terrorism.[109]

### 3.5 Shared unlawful purpose: problems and prospects

For Vice-President Al-Khasawneh,

> When… the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold.[110]

Therefore, according to Al-Khasawneh, in order for the overall control test to apply, the state and armed group must have a shared unlawful purpose. This gives rise to the question how a shared unlawful purpose may be proven?

The notion that a purpose is 'shared' by the state and the armed group invokes the idea of a common plan to commit a specific unlawful act or achieve a particular objective by unlawful means. Where a state provides substantial financial, military or other support to an armed group that has a well-known history of committing only acts of terrorism it is arguable that a common

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[106] Report of the International Commission of Inquiry on Darfur to the Secretary-General, 2005, §123.

[107] Ibid.

[108] *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39.

[109] Trapp (2011) pp.42-45.

[110] *Bosnia Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, §39.

plan to commit terrorist acts may be implied. But generally, proof of a shared unlawful purpose would require evidence of an agreement between the state and the armed group that the armed group will commit a specific unlawful act. For example, a shared purpose to commit genocide cannot be proven by evidence of an agreement that an armed group will kill members of a protected group.[111] A shared purpose to commit genocide can only be proven by evidence of an agreement between the state and the armed group that the latter will kill members of a protected group with the intention to destroy that group in whole or in part.[112] Likewise, a common plan to commit acts of terrorism would be clearly proven in circumstances where the state has selected the targets for the armed group to attack. However, in that case it is arguable that the selection of targets would amount to an instruction to commit a terrorist attack and would therefore satisfy the instruction standard required by Article 8 ARS in any event.[113]

Thus, the notion of 'shared unlawful purpose' introduces a subjective fault element into Article 8 ARS – a shared intent that the armed group should commit a specific unlawful act or achieve a particular objective using unlawful means. How then, should 'intent' be defined? 'Intent' in English criminal law is defined with reference to whether the person acted knowing that a particular result of his or her act was a 'virtual certainty'.[114] International criminal law (ICL) applies a similar definition of intent. For the purposes of establishing individual criminal responsibility under the Rome Statute a person must commit the particular act with 'intent' and 'knowledge'. Pursuant to Article 30 of the Rome Statute 'intent' is defined as:

> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[115]

'Knowledge' means 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.[116]

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111 Article II Genocide Convention; *Bosnia Genocide,* §187.

112 Ibid.

113 *Cf.* Trapp (2011), p.44 who includes the selection of targets in the criteria for 'overall control' test.

114 E.g. *R v Woollin* [1999] 1 AC 82, p.94: definition of intent in English law.

115 Rome Statute, Article 30(2).

116 Ibid. Article 30(3). On the meaning of 'knowledge' for the purposes of Article 16 ARS and state responsibility for 'complicity' in the internationally wrongful acts of another state see chapter 5, 5.4.

In *Bosnia Genocide* the ICJ defined 'intent' by reference to the terms of Article II of the Genocide Convention that defines the offence of genocide and the ILC's draft Code of Crimes against the Peace and Security of Mankind 1996:[117] 'intended' acts 'are by their very nature conscious, intentional or volitional acts'.[118]

Thus, 'intent' is more than mere knowledge that something is likely to occur. 'Intent' means a deliberate act, done with knowledge that the intended consequence of that act will occur or is a virtual certainty.

### *3.5.1 Ultra vires acts*

The question then arises as to whether, according to the 'shared unlawful purpose' formula, a state should be responsible for acts of the armed group that go beyond the scope of the agreement? As stated above, for the ICTY in *Tadic,* a state that exercises overall control over an armed group should be responsible for the latter's *ultra vires* acts.[119] However, the answer to this question is not straightforward.

In the context of the requisite level of a state's 'knowledge' for the purposes of engaging that state's responsibility for complicity in the internationally wrongful acts of another state, Lowe has argued that,

> …as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts. The fact that the unlawful conduct is foreseen, or foreseeable, as a sufficiently probable consequence of the assistance must surely suffice'.[120]

If this reasoning is applied to cases of shared unlawful purpose, a state must be supposed to intend the unlawful acts of the armed group that are beyond the scope of the common plan but nevertheless foreseeable. As argued in chapter 2 with respect to the attribution of *ultra vires* acts of an armed group acting on the instructions of the state,[121] there is an inherent risk in the use of a proxy that the proxy will go beyond the scope of the state's (lawful) instructions. There is little reason why a state should not bear responsibility for taking that risk. It may also be argued that

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[117] ILC Report 1996, Vol.II(2); *Bosnia Genocide,* §186.

[118] Ibid, p.44 §5.

[119] Definition of 'overall control' in *Tadic,* §121. See above section 3.3.

[120] Lowe (2002) p.8.

[121] Section 2.4.2.

the state should not evade responsibility for genocide committed by an armed group under its overall control in circumstances where the common plan was that the armed group should summarily execute a group of civilians, if the commission of genocide is foreseeable.

But this reasoning is problematic in circumstances where the common plan is to commit a specific unlawful act, and not unlawful acts generally. If the state will be responsible for genocide committed by an armed group that is beyond the scope of the agreement between the two, but is nevertheless foreseeable, then the only normative distinction between state responsibility for the *ultra vires* acts of its agents acting under the state's 'effective control' and state responsibility for persons acting under the state's 'overall control' in cases of shared unlawful purpose is the level of control exercised over the group. In effect, we return to the application of the test as formulated in *Tadic* and rejected by the ICJ in *Bosnia Genocide.*

Therefore, the 'shared unlawful purpose' formula raises important questions concerning the attribution of *ultra vires* acts to which there is no clear answer. Moreover, it is questionable whether applying the overall control test in cases of shared unlawful purpose would in fact provide a less rigid approach than the effective control test, as intended by its proponents.[122] It is highly unlikely that a shared unlawful purpose would be documented. As the facts and determination of the ICJ in *Bosnia Genocide* show, even if a state was in 'a position of influence over [the armed group]… owing to the strength of political, military and financial links',[123] absent documentary evidence of the object and purpose of a specific military operation, proving a state's actual knowledge of the armed group's plan to carry out an unlawful act (in that case genocide) will be difficult, if not impossible. Proving a state that exercises overall control over the group intends for that group to commit a specific unlawful act will be even more difficult. This is particularly so given the likelihood that the ICJ would likely require the same high standard of proof - a 'beyond any doubt' standard – as it did to prove complicity in genocide.[124] In practice one evidentially unattainable threshold, effective control, is replaced with another, intent to achieve a specific outcome.

### 3.6 Conclusion

The high threshold tests of 'complete dependence' and 'effective control' mean that a state that provides substantial support to an armed group will not incur international responsibility for the

[122] *Cf.* Trapp (2011), pp.44-45.

[123] *Bosnia Genocide,* §434.

[124] Ibid*,* §422.

conduct of that armed group if the latter retains some measure of decision-making independence. However, despite the legitimate concern that the current regime is too lenient on states, or raises the evidential bar too high, there is little sign that the ICJ will diverge from these tests. Legal arguments in favour of lowering the threshold of control from effective to overall control, such as those made by the ICTY in *Tadic*, are not persuasive and find little support in jurisprudence or state practice. As a matter of policy, there is some merit in the argument that lowering the required level of state control to overall control would result in the appropriate legal condemnation of state sponsorship of terrorism and other unlawful acts. However, the test would introduce a fault element to Article 8 ARS - the intention to achieve a shared unlawful purpose - that itself would be difficult to satisfy. Thus, it is doubtful that applying the overall control test in cases of shared unlawful purpose would in fact respond to the particularities of state-sponsored terrorism, genocide, or other unlawful acts.

## Chapter 4. Primary Obligations of States: Certain Prohibitions of Complicit Conduct

### 4.1 Introduction

In response to the argument, considered in chapter 3, that the rules of attribution should be modified, some have questioned whether this is necessary in light of customary and treaty-based norms that prohibit states from encouraging or facilitating non-state actors from committing certain acts. It is argued that these primary obligations of states are sufficient to cover state complicity in terrorism and international crime.[1] These arguments, and the extent to which a state's primary obligations are sufficient to 'catch' the wrong committed by states that use proxies in order to evade their international obligations are the subject of this chapter.

As the following analysis will show, the answer to the question whether a state's primary obligations are sufficient to address state complicity in unlawful acts will depend on the circumstances in which the specific act is committed, the applicable international legal framework, and the nature of the obligation. Section 4.2 considers the nature of a state's obligations to prevent and punish unlawful acts by non-state actors. It is argued that a state's obligations to prevent and punish the crime of genocide and terrorist acts do not provide an adequate or appropriate basis for the legal condemnation of the provision of substantial support and assistance to armed groups that falls short of the exercise of effective control over the specific operation in which the unlawful act is committed. However, a different conclusion is drawn when the question is framed in terms of a state's primary obligations under IHL and IHRL. In section 4.3 it is argued that the findings of the ICJ in *Nicaragua* and *DRC v Uganda* support an interpretation of a state's obligation to respect and ensure respect for the Geneva Conventions, as provided by Article 1 common to the Conventions (CA1), to include an obligation not to encourage, aid or assist violations of IHL by an armed group participating in an armed conflict.[2] Similarly, in section 4.4 it is shown that international human rights tribunals and UN human rights monitoring mechanisms have developed *lex specialis* rules that prohibit a state from facilitating the commission of human rights abuses by non-state actors. Thus, state complicity in the commission of violations of IHL and

[1] Boon (2014) pp.373-375; Crawford (2013), p.158; Milanovic (2009) p. 322.

[2] *Nicaragua*, §256. See also Rule 144, ICRC Customary IHL Database states that 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law'; ICRC Commentary to Geneva Conventions (2016), Common Article 1, §154.

IHRL, as opposed to specific international crimes or terrorist acts, may be covered by these *lex specialis* primary obligations of states. However, these rules do not provide a comprehensive approach to state complicity in the unlawful acts of armed groups. For example, a state's obligations under IHRL are only engaged with respect to territory or persons within the state's jurisdiction. Therefore, these rules will not apply to cases where a state is complicit in human rights violations committed by armed groups in areas outside the state's jurisdiction, for example a third state.[3] Nevertheless, these *lex specialis* rules provide the seed for a more general rule of state responsibility for complicity in unlawful acts committed by armed groups. The case for the formulation of this general rule is considered in chapter 5.

### 4.2 The Obligation to Prevent the Commission of Certain Unlawful Acts

States are subject to a number of customary and treaty-based norms that require them to take measures to prevent the commission of certain unlawful acts by non-state actors. As a rule of customary international law, a state is under a duty to prevent injury to aliens within its jurisdiction,[4] and to not knowingly allow its territory to be used for acts contrary to the rights of other states.[5]

Similar obligations arise out of a number of international instruments according to which states undertake to prevent the commission of certain acts within the state's jurisdiction. Such acts include, *inter alia,* acts of torture,[6] financing of terrorism,[7] the bombing or attempted bombing of public spaces and infrastructure, state or governmental facilities,[8] the possession of radioactive material with the intent to cause serious injury or death,[9] hostage taking,[10] and the hijacking of ships.[11] The treaty provisions providing for the obligation to prevent apartheid,[12] genocide,[13] and

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[3] The principle of non-refoulement is an exception. A state that transfers or allows the transfer of a person into another jurisdiction where there is a real risk that the person will be subjected to torture or a flagrant violation of other specific human rights will violate its obligation to respect and ensure the right in question. For further discussion see section 3.4 below.

[4] *British Claims in Spanish Morocco*, p.642.

[5] *Island of Palmas*, p.839; *Corfu Channel*, p.22.

[6] Articles 2 CAT.

[7] Articles 18 Financing Convention.

[8] Articles 15 Bombing Convention.

[9] Articles 7 Nuclear Terrorism Convention.

[10] Articles 4 Hostages Convention.

[11] Article 13 SUA Convention.

[12] Article IV Apartheid Convention.

[13] Article 1 Genocide Convention.

the hijacking of civilian aircraft[14] do not expressly limit the obligation to acts committed within the state's jurisdiction. These specific obligations to prevent certain acts are in addition to a state's obligations under IHL[15] and IHRL[16] that require the state to prevent acts that violate the rights and protections guaranteed to individuals under those legal regimes.

There is no general legal framework that governs when the obligation to prevent will arise and the content of that obligation.[17] The content of the obligation may vary depending on the specific treaty or legal regime applicable to the facts of any given situation.[18] It is generally considered to be a due diligence obligation, compliance with which is to be assessed in light of the circumstances existing at the relevant time. Thus, the HRCttee has stated that a state must 'take appropriate measures [and] exercise due diligence' to prevent violations of the ICCPR.[19] The ICRC's 2016 Commentary to CA1 advises that states 'must take all appropriate measures to prevent' violations of the Conventions, and that states 'have some latitude in choosing the measures by which to ensure respect for the Conventions, as long as these are adequate to achieve the desired result'.[20] In *Tehran Hostages*, in the context of Iran's failure to protect the US Embassy in Tehran from intrusion by militants and the resulting hostage-taking of the embassy staff by those militants, the ICJ held that Iran was in violation of the obligation to protect under the Vienna Convention on Diplomatic Relations 1961[21] in circumstances where (i) it was aware of its obligations and of the urgent need for action, (ii) had the means at its disposal to take 'appropriate steps',[22] to protect persons from harm, and (iii) 'completely failed' to do so.[23]

In *Bosnia Genocide* the ICJ took a strict approach, holding that 'it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means

[14] Article 9 Hague Hijacking Convention.

[15] E.g. Common Article 1 to GCs; Article 1(1) API; Article 38(1) CRC: "State Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child"; Article 1(1) APIII.

[16] Article 2(1) ICCPR; Article 1 ECHR; Article 1(1) ACHR; Article 1 ACHPR; Article 3(1) Arab Charter.

[17] Hakimi (2010) p.344.

[18] Ibid. *Bosnia Genocide*, §429.

[19] HRCttee, General Comment no.31, §8.

[20] ICRC Commentary of 2016, common Article 1, §§145-146. See generally Kalshoven (1999); Geiss (2015).

[21] Articles 22(2), 25-27 & 29.

[22] Article 22(2) Vienna Convention on Diplomatic Relations requires the receiving state to "take all appropriate steps" to protect the premises of the mission and prevent attacks on the mission.

[23] *Tehran Hostages*, §68.

reasonably at its disposal, they would not have sufficed to prevent the commission of genocide.'[24] This strict approach is tempered by the requirement that it must be shown that the state 'manifestly failed to take all measures to prevent genocide that were within its power'.[25] Nevertheless, a state is required to take any and every measure available to it, however small, taking into consideration the measures that other states might employ in their best efforts to prevent the genocide.[26]

### *4.2.1 Exercise of Jurisdiction*

With the exception of the obligation to prevent genocide,[27] a state's obligation to take appropriate measures to prevent the commission of harmful acts by non-state actors is generally understood to be limited to persons or entities acting within the state's jurisdiction.[28] Jurisdiction is understood to be primarily territorial, but a state may also exercise jurisdiction over an area outside its own territory over which it exercises effective control.[29] Therefore, as a general rule, a state's obligation to prevent is not an open-ended obligation to prevent the particular act wherever it may occur. The obligation tends to be focused on areas in which the state has the ability to act because of its effective control over the area by virtue of the presence of its organs or agents in that area.[30] Thus, in *DRC v Uganda* having concluded that Uganda was the occupying power in Ituri, the ICJ held that, 'Uganda's responsibility is engaged… for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'.[31] However, in areas of DRC not occupied by Uganda the latter's obligation to prevent violations of IHL was not engaged with respect to armed groups not acting on its behalf. In these areas Uganda was only responsible for acts and omissions of its own military forces.[32]

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[24] *Bosnia Genocide,* §430.

[25] Ibid.

[26] Ibid.

[27] See section 3.2.4.

[28] *DRC v Uganda*, §179: 'The Court, having concluded that Uganda was an occupying power in Ituri, finds that Uganda's responsibility its engaged… for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'.

[29] *Wall Advisory Opinion*, §109. For discussion of the meaning of 'jurisdiction' for the purposes of IHRL see below section 4.4.

[30] The importance of control over territory by a State as a basis for triggering that State's international obligations with respect to acts committed or occurring in that territory was stressed by the ICJ in *Namibia,* p.54 §118: 'Physical control of a territory and not sovereignty or legitimacy of title is the basis of State liability for acts affecting other States'. Also, ILC Report (1975), p.92 §4.

[31] *DRC v Uganda,* §179.

[32] Ibid, §180.

### *4.2.2 Obligation to Prevent Genocide: 'Capacity to Influence'*

Unlike the treaty obligations cited above[33] Article I of the Genocide Convention does not expressly provide any territorial or jurisdictional limit on the scope of the obligation,[34] and the ICJ did not choose to imply one. Instead the ICJ formulated the vague 'capacity to influence' criterion to determine whether a state has fulfilled its obligation to prevent genocide.[35] The state's capacity to influence will depend upon the geographical distance of the state from the place where the genocide is taking place or will take place, and the strength of political and other links between the state and the main actors in events.[36] As Milanovic has observed, this makes the obligation to prevent genocide 'vastly different from other due diligence obligations' that are generally considered to be dependent upon the exercise of jurisdiction.[37]

The ICJ's introduction of the 'capacity to influence' criterion is controversial. Judge Skotnikov criticised the majority for its introduction of 'a politically appealing, but legally vague, indeed, hardly measurable at all in legal terms, concept of a duty to prevent with the essential element of control being replaced with a highly subjective notion of influence'.[38] Judge Tomka referred to the arguments of FRY and Bosnia[39] that, respectively: (i) the obligation will only be engaged where the state has territorial jurisdiction or control over the areas in which the genocide is said to have taken place,[40] or (ii) that the obligation is not territorially limited, but the state at the least must 'exercise powers, functions, or activities' in the territory concerned.[41] For Judge Tomka, the dictum of the Court in its judgment on Preliminary Objections, that the obligation to prevent 'is not territorially limited by the Convention'[42] 'has to be interpreted in a reasonable way':[43]

The State does have an obligation to prevent genocide outside its territory to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities

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[33] Section 3.2, fn.19-25.

[34] Pursuant to Article I Genocide Convention the Contracting Parties 'confirm that genocide… is a crime under international law, which they undertake to prevent and to punish'.

[35] *Bosnia Genocide*, §430.

[36] Ibid.

[37] Milanovic (2007) p.685.

[38] *Bosnia Genocide,* Declaration of Judge Skotnikov, p.340.

[39] Ibid, Separate Opinion of Judge Tomka, §§63-64.

[40] Ibid*,* CR 2006/16, pp.15&19.

[41] Ibid, CR 2006/34, p.7.

[42] *Bosnia Genocide,* Preliminary Objections (1996), §31 referring to the *erga omnes* nature of the rights and obligations enshrined by the Genocide Convention.

[43] *Bosnia Genocide*, Separate Opinion of Judge Tomka, §65

abroad. This obligation exists in addition to the unequivocal duty to prevent the commission of genocide within its territory.[44]

The scope of the 'capacity to influence' criterion, that may be triggered by a state's 'political or other links' to the perpetrators of genocide,[45] is potentially far-reaching. It is not surprising, therefore, that the Court stressed that it did not purport to establish general jurisprudence applicable to the obligation to prevent arising out of specific treaty regimes or legally binding norms.[46] Nevertheless, the Court's order granting provisional measures in *Georgia v Russia* that 'both Parties… shall do all in their power, whenever and wherever possible, to ensure' the rights of individuals under Article 5 CERD indicates that the Court may be willing to apply the criterion to other specific obligations that are not territorially or jurisdictionally limited by express treaty provision.[47]

Moreover, the *dicta* of the ICJ in *Bosnia Genocide* with respect to the nature and content of the obligation to prevent genocide has been drawn upon by the ICRC in its 2016 Commentary to the Geneva Conventions to explain the nature and content of a state's due diligence obligations pursuant to CA1.[48] In the ICRC's view, a due diligence obligation similar to that provided by Article 1 of the Genocide Convention exists in IHL. For the ICRC, the extent to which a state has fulfilled its duty to exercise due diligence to bring violations of IHL to an end and to prevent the occurrence of violations of IHL by a party to the conflict will depend on the circumstances including (i) the gravity of the breach, (ii) the means reasonably available to the state, and (iii) the degree of influence it exercises over those responsible for the breach.[49] Thus, the ICRC's interpretation of the scope of a state's due diligence obligations untethers the obligation to prevent violations of IHL from the existence of jurisdiction over territory.

However, it remains unclear as to how and when a state's obligation to exercise due diligence to prevent violations of IHL, or the commission of genocide, will be engaged. One interpretation of the context-specific approach adopted by the ICRC is that a state that has extensive global military, economic and political influence might incur greater obligations pursuant to CA1 than a state that

[44] Ibid, §67.
[45] *Bosnia Genocide*, §430.
[46] Ibid, §429.
[47] *Georgia v Russia,* Provisional Measures, §149.
[48] ICRC Commentary to Geneva Conventions (2016), Common Article 1, §§164-166.
[49] Ibid, §164. Also, Geiss (2015), p.123; Hathaway et al (2017) pp.573-574.

does not.[50] The same interpretation applies to a state's due diligence obligations pursuant to the Genocide Convention.[51] At the least a state's due diligence obligations pursuant to CA1 and the Genocide Convention will be engaged if that state provides military, financial or other support to an armed group that is participating in an armed conflict in another state. The provision of such support in and of itself suggests a capacity to influence.[52] In this way, the obligation to prevent genocide requires a state to employ all its available resources, 'within the limits permitted by international law'.[53] What amounts to 'available resources' will depend upon the circumstances of each case. Moreover, the nature of available resources will differ according to the political, diplomatic and economic capacity of the state.[54]

#### *4.2.3 Distinction between failing to prevent and complicity*

A state's obligation to prevent the commission of harmful acts by non-state actors is not adequate to address the problem of state complicity in the unlawful acts of armed groups. A state that fails to prevent an act is not responsible for the act of the armed group or for any deliberate involvement it had in the commission of the act. The question whether or not the state's own acts or omissions in fact contributed to the violation of international law is not determinative of a finding that a state failed to exercise due diligence. With respect to the obligation to prevent genocide, the question is whether 'the State manifestly failed to take all measures to prevent genocide which were within its power, and which *might have* contributed to preventing genocide'.[55] Thus, the activities of the armed group merely provide the objective circumstances which give rise to the state's international obligations and the breach thereof by the state's organs. What is important is whether the state did all it could, in the circumstances existing at the time, to prevent or ensure respect for the rule of international law in question.[56] A state that, in full knowledge of an armed group's plans to commit violations of international law, deliberately does nothing to try

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[50] Hathaway et al (2017) p.573.

[51] Milanovic (2007) p.686.

[52] E.g. *Bosnia Genocide,* §434: 'The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, none- the less remained very close.' See also Corten & Koutroulis (2013), pp86-87.

[53] *Bosnia Genocide*, §430.

[54] Milanovic (2007) p.686 who compares the obligation to that which arise under treaties providing for socio-economic rights, 'which are supposed to be realized gradually, to the maximum of a state's available resources'.

[55] *Bosnia Genocide,* §430.

[56] E.g. *DRC v Uganda*, §211; *Bosnia Genocide*, §430.

to prevent the armed group from doing so is held responsible on the same terms as a state that negligently failed to employ all means at its disposal to prevent such acts. Yet, it is highly likely that the provision of lethal, financial or other support to an armed group or the deliberate failure to prevent an armed group from carrying out certain operations in an area under the state's jurisdiction, will contribute to the commission of international crimes and other violations of international law by that group.

In *Bosnia Genocide* the ICJ determined that 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide', including complicity in genocide.[57] The Court reasoned that such a prohibition flowed from the designation of genocide as 'a crime under international law',[58] and the obligation to prevent acts of genocide.[59] For the Court, 'by agreeing to such a categorization [as an international crime], the States parties must logically be undertaking not to commit the act so described'.[60] Moreover,

It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[61]

Accordingly, the Court held that States Parties to the Genocide Convention are 'bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them, and any other acts enumerated in Article III', namely: conspiracy to commit genocide; incitement of genocide; attempted genocide; and complicity in genocide.[62]

The ICJ's conclusion that the obligation to prevent genocide 'necessarily implies' the prohibition on the commission of acts of genocide, including the prohibition of state complicity in genocide, should be not interpreted to mean that the requirements for finding a state responsible for violating

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[57] *Bosnia Genocide*, p§166. For further discussion see chapter 5, 5.6.1. Crawford (2013), p.158; *Cf.* Boon (2014) pp.373-375.

[58] Article 1 Genocide Convention.

[59] *Bosnia Genocide*, §166.

[60] Ibid.

[61] Ibid.

[62] *Bosnia Genocide*, §167. Also §179; Article III(a)-(e) Genocide Convention.

the respective obligations are the same. The Court stressed that the differences between a failure to prevent genocide and complicity in genocide 'are so significant as to make it impossible to treat the two types of violation in the same way'.[63] First,

> …complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed.[64]

Second, the notion of complicity in the commission of genocide requires a deliberate act:[65]

> …there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.[66]

Thus, the ICJ identified the key normative difference between the failure to prevent genocide and complicity in genocide – the level of knowledge of the state. In order to prove state complicity in genocide it must be shown that the state provided military, financial or other support, *in the knowledge* that that support would 'enable or facilitate' the perpetration of genocide. The Court's

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[63] Ibid, §432.

[64] Ibid. For the approach of human rights courts to a state's obligation to prevent violations of the rights guaranteed under the relevant human rights treaty see for example: IACtHR, *Velasquez Rodriguez Case*, §172; *Gonzalez et al ('Cotton Field') v Mexico,* §243; ACiHPR *Association of Victims of Post Electoral Violence and INTERIGHTS v Cameroon,* 25 November 2009, §115; ECtHR, *Ilascu & Ors v Moldova and Russia,* §313. Also, HRCttee, General Comment no. 31, §8.

[65] See chapter 5, 5.3.2 for discussion of the *dicta* of the ICJ in *Bosnia Genocide* that failing to prevent entails an omission whereas complicity requires a positive act.

[66] *Bosnia Genocide*, §432.

approach to the question of state complicity in genocide, and the issues that arise out of requiring proof of a state's 'knowledge', will be considered in chapter 5. By contrast, the test for engaging a state's responsibility for its failure to prevent genocide is less strict and is therefore easier to prove: it only requires proof that, in the circumstances existing at the time, the state should have been aware that there was a danger the armed group would commit genocide.

As noted above, the Court was not purporting to pronounce on a general rule of international law. It is therefore not certain whether the Court would also find the obligation to prevent a specific act that arises out of other treaty provision will 'necessarily imply' a prohibition of the commission of that act by the state.[67] On the other hand, given the Court's adoption of a common-sense interpretation of the obligation to prevent genocide, it is difficult to see on what basis the obligation to prevent genocide and the obligation to prevent acts of terrorism or other offences may be interpreted differently. Thus, in its application instituting proceedings in the ICJ against Russia, Ukraine relies upon the obligation to prevent the financing of terrorism under Article 18 of the Terrorist Financing Convention to argue that 'in defiance of its international obligations, the Russian Federation actively finances terrorist acts on the territory of Ukraine'.[68]

### 4.3 Obligation to Respect and Ensure Respect for International Humanitarian Law

Pursuant to CA1, and as a general principle of IHL,[69] State Parties to the Geneva Conventions are under an obligation to respect and ensure respect for IHL in all circumstances.[70] The obligation consists of positive and negative obligations. The state must refrain from violating IHL, and must take positive steps to prevent violations where there is a foreseeable risk that they will be committed[71] and to ensure that other parties to an armed conflict comply with the Geneva Conventions.[72] Pursuant to CA1, a state is required to ensure respect for IHL by all persons within the state's jurisdiction, including armed groups.[73] Accordingly, the obligation 'applies to and is activated by any private activity that impairs the enjoyment of the protections granted by the

[67] For further discussion see chapter 5, 5.6.1

[68] *Ukraine v Russia,* Application instituting proceedings, 16 January 2017, §125.

[69] *Nicaragua*, §220.

[70] The obligation is reaffirmed by Article 1(1) API; Article 38(1) CRC: "State Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child"; and Article 1(1) APIII.

[71] ICRC Commentary to Geneva Conventions (2016), Common Article 1, §164.

[72] Ibid, §§153-156.

[73] Final Record of the Diplomatic Conference at Geneva, 1949, Vol II-B, p.53.

Geneva Conventions'.[74] Importantly, a state is under the obligation to ensure respect for IHL 'in all circumstances'. 'In all circumstances' is intended to reinforce the principle that the obligation applies in peacetime and not only in armed conflict.[75]

This section will focus on a state's negative obligations arising out of the requirement to ensure respect for IHL by other parties to an armed conflict and the extent to which, pursuant to this obligation, states are prohibited from 'encouraging', 'aiding or assisting' in the commission of violations of IHL by parties to a conflict.[76]

### *4.3.1 The 'external dimension'*

The 'unique nature' of CA1 is its 'external dimension' that extends a state's obligation to ensure respect for the Geneva Conventions beyond persons within the state's jurisdiction to other states and parties participating in armed conflicts to which the state is not a party.[77] This external dimension means that the obligation to 'ensure respect' for the Conventions not only applies to persons in the state's jurisdiction, but extends to armed forces of other parties, including non-state armed groups.[78] Thus, Boutruche and Sassoli claim that CA1 'serves as a basis for third States to adopt measures to induce compliance by Parties to an armed conflict in which the third States are not involved'.[79]

It is generally accepted that the drafters of the Geneva Conventions did not intend this external dimension to CA1.[80] The record of the Diplomatic Conference in 1949 indicates that the intention was to extend the undertaking to ensure respect for the Conventions to all persons within the state's jurisdiction so as to cover parties to an internal armed conflict.[81] However the principle has

[74] Geiss (2015) p.118.

[75] Kalshoven (1999) p.9; ICRC Commentary to Geneva Conventions (2016), Common Article 1, §127.

[76] ICRC Commentary to Geneva Conventions (2016), Common Article 1, §154.

[77] Geiss (2015) p.121; Boutruche & Sassoli (2016) p.9.

[78] ICRC Commentary to Geneva Conventions (2016), Common Article 1, §120. Also, Pictet (ed.), Commentary of 1952, p.26. Also, *Nicaragua,* §220.

[79] Boutruche & Sassoli (2016) p.2.

[80] Geiss (2015) p.121; Boutruche & Sassoli (2016) p.9.

[81] Final Record of the Diplomatic Conference at Geneva, 1949, Vol II-B, p.53; *Wall Advisory Opinion,* Separate Opinion of Judge Koojimans, §47.

been developed through practice[82] and the jurisprudence of the ICJ[83] subsequent to the Conventions coming into force.[84] The external dimension to CA1 was recognised by the ICJ in *Nicaragua*,[85] with respect to the duty to ensure respect for IHL by armed groups, and in *Wall Advisory Opinion* with respect to the duty to ensure respect for IHL by other states.[86]

According to the ICRC's 2016 Commentary to CA1, the obligation to ensure respect for IHL includes a negative obligation not to encourage, aid or assist in violations of IHL.[87] This obligation is additional to specific treaty obligations according to which states undertake not to use the weapons prohibited by the treaty and to never assist, encourage or induce any person to engage in activities act contrary to the particular treaty.[88] The 'external dimension' to CA1 means that the obligation not to encourage, aid or assist in violations of IHL will apply to conduct committed outside the state's jurisdiction.

#### *4.3.2 Encouragement*

The ICRC bases its analysis on the approach of the ICJ in *Nicaragua* in which the Court held the United States responsible for encouraging violations of IHL by the *contras*. According to the ICJ, a state will encourage violations of IHL if 'the encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable.'[89] In that case the

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[82] E.g. Resolution XXIII, 'Human Rights in Armed Conflicts', adopted by the International Conference on Human Rights, Tehran, 1968 in which the conference confirms the principle with respect to confirmation extends to obligation to ensure respect of IHL by other states; 30th International Conference of the Red Cross and the Red Crescent, Geneva, 2007, Resolution III, 'Reaffirmation and implementation of international humanitarian law: Preserving Human Life and Dignity in Armed Conflict', §2.

[83] *Nicaragua*, §220; *Wall Advisory Opinion,* §159.

[84] Geiss (2015) p.121; Boutruche & Sassoli (2016) p.9.

[85] *Nicaragua*, §220.

[86] *Wall Advisory Opinion,* §159. That CA1 requires states to ensure respect for the Conventions by another state was doubted by Judges Koojimans and Higgins in Separate Opinions in the Advisory Opinion. For Judge Koojimans the obligation on extended to the population under the state's jurisdiction, and so to internal armed conflicts, and not to third states: Separate Opinion of Judge Koojimans, §47; Separate Opinion of Judge Higgins, §39. See also General Assembly Resolutions 58/97 (2003) §3 and 59/122 (2004) §3. Security Council Resolution 681(1990) 'On the Question of Palestine', §5 calling upon all High Contracting Parties to GCIV 'to continue to exert all efforts to ensure respect for its provisions by Israel'

[87] ICRC Commentary to Geneva Conventions (2016), Article 1 Common to GCs, §158. Also, Geiss (2015) p.121. This is a new addition to the Commentary to CA1. ICRC's 1956 Commentary does not consider the content of CA1 in any detail.

[88] E.g. Article 1(1)(c) Anti-Personnel Mines Convention; Article 1(c) Cluster Munitions Convention; Article 1(d) Chemical Weapons Convention.

[89] *Nicaragua*, §256. See also Rule 144, ICRC Customary IHL Database which states that 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law'; ICRC Commentary to Geneva Conventions (2016), Common Article 1, §154.

publication and supply to the *contras* of a manual titled 'Psychological Operations in Guerrilla Warfare'[90] by the CIA was held to amount to 'encouragement' to commit violations of IHL contrary to CA1 and common Article 3 (CA3) of the Geneva Conventions.[91] The manual provided advice on how to neutralise 'carefully selected and planned' civilian targets in order to 'take part in the act and formulate accusations against the oppressor'.[92] The Court did not determine that the publication and dissemination of the manual was unlawful *per se*, despite its content being in clear contradiction to the rules of IHL. However, finding that those responsible for distributing the manual were aware of accusations that the *contras* had violated IHL, the Court held that,

> [t]he publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which is likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.[93]

Thus, for the purposes IHL, 'encouragement' will only be proven if it is established that (i) the act of the state is capable of encouraging violations of IHL and (ii) the encouragement is likely to be effective. Importantly, it appears that there is no requirement that the state in fact encourages violations of IHL.

#### *4.3.3 Aid or assistance*

The ICRC 2016 Commentary states that 'it would be contradictory if common Article 1 obliged the High Contracting Parties to 'respect and ensure respect' by their own armed forces while allowing them to contribute to violations by other parties to a conflict'.[94] Thus, for the ICRC, the prohibition of aid or assistance of violations of IHL is inherent in the negative obligation to refrain from certain conduct arising out of CA1. This common-sense interpretation of CA1 is similar to the interpretation of the obligation to prevent genocide adopted by the ICJ in *Bosnia Genocide*[95]that it would be 'paradoxical' if the obligation to prevent genocide did not necessarily imply a prohibition on states not to commit such acts.[96]

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[90] This is despite the fact that Nicaragua had framed its claim in terms of international human rights law and not the laws of armed conflict.

[91] *Nicaragua,* §§255-256. This was followed by the ICJ in *DRC v Uganda*, §§209-211.

[92] Ibid.

[93] Ibid. Also *DRC v Uganda*, Mémoire de La Republique Démocratique du Congo, 6 Juillet 2000, 4.74 where the DRC uses the test in *Nicaragua* to submit that Uganda is responsible for encouragement where the encouragement was likely to be effective.

[94] ICRC Commentary to Geneva Conventions (2016), Article 1 Common to GCs, §158.

[95] *Bosnia Genocide,* §166. See above section 4.2.3.

[96] Ibid.

The ICRC's interpretation of CA1 to include a prohibition of aid or assistance does not appear to be controversial.[97] However, there is a lack of judicial consideration of the exact scope and content of the prohibition. In *Nicaragua* the ICJ found that 'various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities'.[98] However, the Court confined its considerations to the United States' responsibility for 'encouragement'[99] based on the state's provision of the CIA manual, and not 'aid or assistance' by virtue of the provision of military, financial and other support to the *contras* more generally. In *DRC v Uganda* the ICJ again declined the opportunity to consider the content of the obligation not to aid or assistance in violations of IHL. The Court observed that there was persuasive evidence that land was seized from the Lendu with 'the encouragement and military support of' Ugandan soldiers.[100] However, the Court did not address whether Uganda was in violation of a specific obligation not to aid or assist in violations of IHL.

Therefore, questions remain as to scope and content of the obligation not to aid or assist violations of IHL. In particular, as the following analysis will show, questions arise as to the requisite degree of knowledge the state must have in order for it to be responsible for aiding or assisting in violations of IHL contrary to CA1.

#### *4.3.4 'Knowledge' of the state*

According to the standard formulated by the ICJ in *Nicaragua,* a state's responsibility for encouragement will turn on whether the violations of IHL by the armed group were likely or foreseeable. Knowledge of allegations that an armed group had previously committed violations of IHL would be sufficient to conclude that future violations of IHL by that group are foreseeable. The standard is one of constructive knowledge. The state must know, or should have known, that its conduct would encourage violations of IHL.

However, with respect to the provision of aid or assistance, the ICRC 2016 Commentary states that proof of a state's actual knowledge that its aid or assistance will be used in the commissions of violations of IHL is required. This is a higher standard of knowledge required than the

[97] Geiss (2015), p.130 referring to the principle as 'widely accepted' and 'undisputed'.

[98] Ibid, §110.

[99] *Nicaragua,* §220. The ICRC Customary IHL Database also refers only to the prohibition of encouragement: See Rule 144.

[100] Ibid, §209.

constructive knowledge standard required to prove 'encouragement'. In the ICRC's view, a state need not 'intend' its aid or assistance to facilitate in the commission of violations of IHL, provided that the state acted knowingly.[101] The 2016 Commentary then states that CA1 will be violated if a state provides '[f]inancial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law'.[102] Therefore, the ICRC appears to define 'intention' as acting in the knowledge that a particular outcome is virtually certain – violations of IHL. The ICRC Commentary seems contradictory. If a state, provides aid or assistance knowing it will be used by an armed group to commit violations of IHL, it is doubtful that there will be any circumstances in which a state will give that aid or assistance without 'intending' for it to be so used.[103]

Certain international instruments and regulations that govern the transfer of arms require different levels of knowledge. For example, the Preamble to Arms Trade Treaty 2013 (ATT) expressly refers to the obligation to ensure respect for IHL and applies the same knowledge standard as the ICRC 2016 Commentary. The Treaty, although not widely ratified,[104] prohibits states from authorising the transfer of arms if the state 'has knowledge at the time of authorization that those arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes defined by international agreements to which it is a party'.[105]

However, the EU Common Position governing control of exports of military technology and equipment applies a lower knowledge standard than that required by the ATT. EU Member States must deny an application for an export licence if approval would be inconsistent with the Member State's international obligations. In particular, Member States should deny an export licence if there is a 'clear risk that the military technology or equipment might be used for internal repression'.[106]

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[101] ICRC Commentary to Geneva Conventions (2016), Common Article 1, §159.

[102] Ibid, §160.

[103] Crawford (2013), p.407. See chapter 5, 5,4 for further discussion of a state's 'knowledge' for the purposes of state complicity in violations of international law.

[104] ATT is ratified by 95 and signed by 130 States (status on 21 February 2019).

[105] Article 6(3) ATT.

[106] Article 2, EU Council Common Position 2008/944/CFSP of 8 December 2008 on defining common rules governing control of exports of military technology and equipment. For the purposes of the EU Common Position the definition of "internal repression" is focused on the conduct of the third state. 'Internal repression' includes *inter alia* torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights': Ibid, Criterion 2(2)(b).

Thus, the state need not know that the arms will be used, only that there is a 'clear risk' the arms might be used for internal repression. This is a due diligence obligation. The reference to 'clear risk' requires the state to undertake a thorough inquiry into the recipient's past and present record of violations of IHL and IHRL.[107] States must also take into account the risk of the military technology or equipment being diverted to 'terrorist organisations and to individual terrorists'.[108]

The vetting by the United States of armed groups for the purposes of arming, training and deploying those groups to fight in the conflict in Syria indicates an acceptance, at least on the part of this state, of the obligation to ensure that such support is not provided to armed groups where there is a risk that the support will be used to violate IHL and IHRL.[109] However, it is arguable that the United States' policy is driven by political considerations rather than an understanding of the content of its obligation to ensure respect for IHL. In 2014 the Obama administration submitted a request to the US Congress to approve the training and equipping of vetted Syrian armed opposition groups in order to defend the Syrian people from attacks by the Syrian regime; facilitate the provision of essential services and stabilise territory controlled by the opposition; defend the US, its friends and allies, and Syrian people from the threats posed by terrorists in Syria; and promote the conditions for a negotiated settlement to end the conflict in Syria.[110] In September 2014 the request was amended to reflect the administration's goal of combatting and defeating ISIL in the region.[111] Congress approved the request to make funds available to provide training and equipment to 'appropriately vetted' persons with the aim of combatting ISIL and other terrorist organisations in Syria.[112] According to the vetting requirements, the beneficiaries (a) must not be associated with terrorist groups or aligned with or support the Government of Syria and Iran, and (b) must have demonstrated a commitment to human rights, rule of law and 'a peaceful and democratic Syria'.[113]

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[107] User's Guide to EU Council Common Position 2008/944/CFSP, §2.7. See also, *R (Campaign on Arms Trade) v Secretary of State for International Trade* [2017] H.R.L.R. 8, §27 in which the High Court of England and Wales held that the nature of the decision requires a 'rigorous and intensive' standard of review.

[108] Ibid, Criterion 7(e).

[109] Blanchard & Belasco (2015). See also with respect to the United Kingdom's policy and practice: House of Commons Defence Committee, 'UK military operations in Syria and Iraq: Second Report of 2016-17' (2016) §95 and 'UK military operations in Syria and Iraq: Government Response to the Committee's Second Report' (2017) pp.5-6.

[110] Ibid, p.2.

[111] Ibid.

[112] Ibid, p3. Sections 1209, 1510, and 1534, FY2015 National Defense Authorisation Act and Section 9016, FY2015 Consolidated and Further Continuing Appropriations Act, 2015.

[113] Ibid, Table 1; Section 1209 FY2015 National Defense Authorisation Act.

Thus, the principal concern appears to be that the beneficiary should not have any association with 'terrorist groups' and armed groups whose purpose is contrary to the interests of the United States. The requirement that the beneficiaries must show a commitment to promoting human rights and the rule of law also suggests a concern that the United States should not assist, or be seen to assist, in violations of IHL and IHRL. In practice the programme was not deemed a success and resulted in the successful deployment of only '4 or 5' of its graduates.[114] In September 2015 it was reported that the second unit deployed by the United States into Syria of approximately 70 vetted fighters had immediately handed their weapons over to al-Qaeda affiliate Jabhat Al-Nusra.[115]

The United States' experience shows the risk that a state's assistance will be used for a purpose contrary to that for which it is intended is inherent in the use of a proxy. The United States appears to have acknowledged this risk and a requirement that, at the least, it must ensure that the beneficiaries of its train and equip programme are instructed in rules of engagement that comply with IHL. Despite the failure of the train and equip programme to in fact prevent the transfer of weapons to al-Qaeda affiliated armed groups, the United States can argue that it did everything it could to ensure respect for IHL by the programme's beneficiaries and there was no foreseeable risk that its support would contribute to violations of IHL.

Applying a constructive knowledge standard to the CA1 prohibition of aid or assistance will deter states from providing financing, military or other support to armed groups that have committed, and are likely to commit, violations of IHL, and thus ensure that states do not evade their obligations under IHL through use of a proxy.

## 4.4 Obligation to Respect and Ensure Human Rights

### *4.4.1 Jurisdiction and the Obligation to Prevent Rights-Violating Conduct*

A common feature to human rights treaties is the provision that a state's obligation to refrain from committing violations of IHRL and to take measures to prevent human rights abuses by private actors will only be engaged with respect to acts occurring within the state's jurisdiction.[116] The

[114] Bulos, 'US-trained Division 30 rebels 'betray US and hand weapons over to al-Qaeda's affiliate in Syria', The Telegraph, 22 September 2015.

[115] Ibid.

[116] E.g. Article 2(1) ICCPR. See also Article 1 ECHR; Article 1(1) ACHR; and article 3(1) Arab Charter. The ACHPR is an exception. Article 1 ACHPR, pursuant to which State parties 'shall recognize' the rights and duties guaranteed by the Charter, and give effect to those rights, does not mention 'jurisdiction'. In practice the ACiHPR

meaning of 'jurisdiction' for the purposes of IHRL, and in particular the circumstances under which a state will exercise extraterritorial jurisdiction over an area or person, has occupied human rights bodies and tribunals, and the ECtHR in particular. However, the principles applied by the ECtHR to determine a state's jurisdiction have not always been clear. This is in part due to the fact that the court has progressively developed its jurisprudence on a case-by-case basis. However, it is possible to identify two models for jurisdiction adopted by the court, and by other human rights bodies: (i) the spatial model, based on a state's effective control over an area; and (ii) the personal model, based on a state's authority and control over the victim by the state organ or agent.[117] A victim will not fall within the jurisdiction of the state simply by virtue of the fact that the rights-violating conduct is attributable to the state.[118]

The HRCttee and the Inter-American Court of Human Rights (IACtHR) have applied an additional model for jurisdiction, a functional or causation-based model, to the question of state responsibility for the failure to prevent significant transboundary environmental damage by corporations operating in the state's jurisdiction that impacts on the rights of individuals outside of the state's jurisdiction.[119] According to the functional model, the scope of a state's obligation to prevent rights-violating conduct is potentially very broad. The IACtHR has found that a state will be responsible where: (i) the authorities knew or should of known of a real and immediate risk to the life of individuals outside its jurisdiction; (ii) the state failed to take all appropriate measures within its power that could reasonably be expected to avoid that risk; and (ii) there is a causal link between the significant environmental damage and the violation of human rights outside the state's jurisdiction.[120] It is not clear whether the functional model will only apply in circumstances where an entity's activities impact directly on certain fundamental rights, such as the right to life, or whether it is intended to apply to a broad range of human rights. Thus far, the HRCttee has

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has applied a State's obligations under the ACHPR extra-territorially to areas under a state's effective control. See ACiHPR *Democratic Republic of Congo v Burundi, Rwanda and Uganda.*

[117] ECtHR *Cyprus v Turkey,* §81; *Al Skeini v United Kingdom,* §§133-140; HRCttee, General Comment No.31, §10. See generally Milanovic (2011), p.19; Milanovic and Papic (2018), p781.

[118] ECtHR *Bankovic v Belgium,* §75.

[119] HRCttee, General Comment no.36, §22 with respect to the right to life. The functional model is advocated for by Yuval Shany, Vice-Chair of the Human Rights Committee until 2020, in Shany (2013); Advisory Opinion Requested by Colombia, 15 November 2017 (IACtHR) with respect to environmental protection, the right to life and personal integrity. Also Brilman (2018).

[120] Advisory Opinion Requested by Colombia, 15 November, §120: [Author's own translation]

> Para que surja esta obligación positiva, debe establecerse que: (i) al momento de los hechos las autoridades sabían o debían saber de la existencia de una situación de riesgo real e inmediato para la vida de un individuo o grupo de individuos determinados, y no tomaron las medidas necesarias dentro del ámbito de sus atribuciones que razonablemente podían esperarse para prevenir o evitar ese riesgo, y (ii) que existe una relación de causalidad entre la afectación a la vida o a la integridad y el daño significativo causado al medio ambiente.

confined its application to activities that have that have 'a direct and reasonably foreseeable impact on the right to life'[121] of persons outside of the state's jurisdiction.[122]

However, the content of the obligation to prevent engaged under the functional model is unclear. According to the HRCttee, the question whether the state has fulfilled its obligation to prevent the activities of a corporation operating in the state's jurisdiction from directly impacting on the enjoyment of the right to life extraterritorially will be determined according to whether the state has implemented effective measures to ensure that the corporation respects human rights standards when operating abroad, and the capacity of the state to effectively regulate the activities of the corporation.[123]

The functional model has only been invoked with respect to transboundary environmental harm. However, it is arguable that the functional model should apply in circumstances where the state allows its territory to be used by an armed group to host training camps, the latter then crossing into another state's territory to commit acts of terrorism or other violent acts that result in the killing of civilians and therefore the violation of the right to life.[124] The armed group must be within the state's jurisdiction in order for the state's obligation to take appropriate measures to prevent the armed group from conducting activities abroad that are likely to impact on the enjoyment of human rights to be engaged. Such measures might include *inter alia* taking measures to suppress the activities of the armed group and to prevent the transfer of arms to the armed group.

If the functional model defines the state's obligation to prevent the harmful activities of armed groups, the implications for the state are potentially far-reaching. According to IHRL principles, if found responsible for failing to prevent the activities of armed groups on its territory from directly impacting on the violation of the rights of persons present in the territory of another state,

[121] HRCttee, General Comment no.36, §22.

[122] See also HRCttee, *Yassin et al. v Canada,* §6.5 concerning the responsibility of Canada 'to ensure rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction' with respect to the Canadian-domiciled corporations' participation in the building of Israeli settlements in Palestinian occupied territory.

[123] Ibid. The Committee considered that Canada was not in violation of its obligation to protect the rights of persons in Palestine's occupied territories from the rights-violating activities of two corporations incorporated in Canada for tax reasons but holding no assets in the state's jurisdiction.

[124] Milanovic (2019), pp23-24 for brief comment on the application of the functional model for jurisdiction with respect to the killing of the journalist Jamal Khashoggi on the premises of Saudi Arabia's consulate in Istanbul, Turkey.

the state will be under an obligation to provide the victims with an effective remedy,[125] which may include compensation.

Nevertheless, the engagement of the state's human rights obligations will still require a jurisdictional link, namely the effective control over territory in which the armed group is based. A state's provision of financial, military or other support to an armed group operating outside its territory would not engage that state's obligation to prevent the commission of rights-violating conduct by that group.

#### *4.4.2 Obligation not to facilitate or acquiesce in rights-violating conduct*

A state's obligation to take measures to prevent the commission of rights-violating conduct by armed groups is complemented by the obligation to refrain from facilitating or acquiescing in rights-violating conduct of armed groups within the state's jurisdiction. As the ECtHR noted in *Cyprus v Turkey,*

> …the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention.[126]

The ECtHR has interpreted a state's obligation to respect human rights and to protect individuals against specific rights-violating conduct to entail an obligation not to deport, expel, extradite or otherwise remove a person from the state's jurisdiction, including into the control of non-state actors,[127] where there are substantial grounds for believing that there is a real risk that the person will be subjected to a flagrant violation of the right to freedom from torture (non-refoulement),[128] to freedom from arbitrary detention,[129] or a flagrant denial of justice contrary to the right to a fair trial.[130] In these cases, the obligation not to expose an individual to the real risk of ill treatment arises out of the state's obligation to ensure the enjoyment of the substantive rights guaranteed by

[125] Article 3 ICCPR; Article 13 ECHR.

[126] ECtHR *Cyprus v Turkey*, §81.

[127] ECtHR *Ilascu & Ors v Moldova & Russia*, §§317 & 384

[128] ECtHR *Soering v United Kingdom*, §§90-91; *Saadi v Italy*, §125; *Othman (Abu Qatada) v United Kingdom*, §185.

[129] ECtHR *Othman (Abu Qatada) v United Kingdom*, §233.

[130] Ibid., §258.

the ECHR and is triggered by the state's own acts and not the acts of the third party. As the ECtHR held in *Soering* with the respect to the principle of non-refoulement, the state's responsibility is engaged 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'.[131]

### *4.4.3 An emerging lex specialis rule of attribution based on complicity?*

Some have argued that the ECtHR and IACtHR have developed a *lex specialis* rule of attribution based on the state's 'complicity' in violations of specific human rights by a third state or non-state entity.[132] However, this argument misunderstands the basis upon which a state is found responsible when it is found to have been complicit in rights-violating conduct. The acts of the perpetrator are not attributed to the state. Rather, the state is held responsible for its own conduct that facilitates the rights-violating conduct of the third party, and thereby violates the state's obligation to ensure the rights and freedoms of all individuals in its jurisdiction.[133] The notion of complicity is drawn on by the ECtHR to interpret the nature of a state's obligations under Article 1 ECHR.

In support of his thesis that there is an emerging rule of attribution based on complicity Lanovoy cites decisions of the IACtHR in *Maripian Massacre,*[134] *Ituago Massacres*[135] and *Rochela Massacre*[136] in which the state was held responsible for violations of the American Convention on Human Rights (ACHR) on the ground that harmful acts committed by paramilitary groups were committed with the 'support, acquiescence, involvement, and cooperation of State security forces';[137] and decisions of the ECtHR concerning the transfer of persons into the custody of a separatist authority;[138] and extraordinary rendition cases.[139]

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131 ECtHR *Soering v United Kingdom*, §91.

132 Nollkaemper (2015), p.180. Lanovoy, (2017a) pp.582-583. Seibert-Fohr (2017). *Cf.* Jackson (2015) pp.196-200; Plakokefalos (2017).

133 ECtHR *Cyprus v Turkey*, §81.

134 IACtHR *Mapiripán Massacre v Colombia* (Preliminary Objections).

135 IACtHR *Ituango Massacres v Colombia.*

136 IACtHR *Rochela Massacre v Colombia.*

137 Ibid citing IACtHR *Rochela Massacre v Colombia*, §78; *Ituango Massacres v Colombia*, §§125 & 133; *Mapiripán Massacre v Colombia*, (Preliminary Objections), §§121–123.

138 ECtHR *Ilascu & Ors v Moldova & Russia*, §384.

139 Lanovoy (2017), p.583; Seibert-Fohr (2017) citing *El-Masri v Macedonia,* §206, 212–222, 235 & 240; *Al Nashiri v Poland* §§452 & 517; *Husayn (Abu Zubaydah) v Poland,* §§449 & 512. 'Extraordinary rendition' is defined as 'an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment': *Al Nashiri v Poland*, §453.

Lanovoy's argument is problematic for three reasons. First, in the IACtHR cases, Colombia acknowledged and accepted responsibility for the violation of the victims' rights on the basis of uncontested evidence that state agents took part in the criminal acts and the state's failure to prevent those acts.[140] Although not explicit in the judgments, Colombia's responsibility for the massacres may be engaged pursuant to Article 11 ARS, the state's acknowledgement and adoption of conduct as its own.

Second, although the IACtHR uses the language of complicity, referring to state agents' collaboration, acquiescence and toleration of activities of non-state actors, Colombia is found responsible on the basis of its own failure to adopt suitable measures necessary to guarantee the enjoyment of and to protect the human rights of the victims, and not on the basis of attribution of the wrongful act to the state.[141] It was established that Colombia's legislation allowed for the creation of 'self-defence' groups that then transformed into paramilitary groups with criminal objectives, that the state was 'fully aware of the terrorist activities perpetrated by these paramilitary groups', had failed to adopt appropriate measures to protect the civilian population in light of the paramilitary activities, and at times collaborated and took part in those activities.[142] It follows that Colombia was found responsible for its own acts and omissions that facilitated the paramilitaries operations, and not for the acts of the paramilitary groups themselves.[143]

Third, the language used by the ECtHR in the extraordinary rendition cases, and previous authorities upon which the Court relies, is confusing at best. In these cases, the Court appears to conflate the test to determine whether or not a state exercises jurisdiction, and therefore whether its obligation to respect and ensure the rights guaranteed by the Convention is engaged, with the rules governing attribution of conduct. Nevertheless, the state is found responsible in these cases for its own acts of complicity that are contrary to its obligations under Articles 1 and 3 ECHR, and not for the acts of the foreign officials. In order to demonstrate the point it is helpful to consider the approach of the ECtHR in these cases in more detail.

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[140] IACtHR *Ituango Massacres v Colombia*, §64.

[141] IACtHR *Mapiripán Massacre v Colombia* (Preliminary Objections), §123; *Rochela Massacre v Colombia*, §102; *Ituango Massacres v Colombia*, §§137-138. Similarly, Plakokefalos (2017) p.593.

[142] E.g. IACtHR *Ituango Massacres v Colombia*, §§125 & 133. Also, *Mapiripán Massacre v Colombia*, (Preliminary Objections), §121.

[143] *Cf.* Jackson (2015) p.196: '[f]aced with a mountain of evidence of the state's involvement, the court refused to rule that Columbia was responsible only for failing to protect against harm by private actors… Rather it was *complicit,* the State's participation constituting a particular way of contributing to the principal wrong'.

A starting point is *Ilascu and Others v Moldova and Russia* cited in the rendition cases as authority for the principle that a 'State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[144] In that case, in its determination of 'the concept of jurisdiction' pursuant to Article 1 ECHR, the Court states that,

> …the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction *may* engage the State's responsibility under the Convention.[145]

The use of the world 'may' and not the word 'will' is important. In *Ilascu* the Court was considering the consequences of one state's exercise of jurisdiction over part of the territory of another state.[146] Having determined that the applicants came within Russia's jurisdiction the Court then had to decide whether Russia could be held responsible for the alleged violations. The applicants had been arrested and detained, and in some cases suffered ill treatment, by the 14th Army of the Russian Federation that was stationed in the self-proclaimed Moldavian Republic of Transdniestria (MRT) and fought with MRT separatists against the Moldovan army in the Moldovan conflict 1991-1992. The applicants were transferred by the 14th Army into the custody of MRT police and subsequently suffered ill treatment at the hands of members of that police force contrary to Article 3 ECHR.[147] The Court held that the events fell within Russia's jurisdiction,

> … because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime.[148]

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144 ECtHR *El-Masri v Macedonia*, §206.

145 ECtHR *Ilascu & Ors v Moldova & Russia,* §318 applying *Cyprus v Turkey*, §81 [Emphasis added].

146 Ibid.

147 Ibid, §384.

148 Ibid.

The language used by the ECtHR is confusing. The Court states that Russia's responsibility is 'engaged' by virtue of the applicants falling within its jurisdiction, and that the acts that violate the applicants' substantive rights are 'imputable' to Russia.[149] However, the Court held Russia responsible on the basis of its continued exercise of effective authority or decisive influence over MRT, and the fact that it had 'made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after [it ratified the ECHR]'.[150] In other words, Russia had failed to meet its positive obligations to take all available measures to prevent violations of the applicants' rights by the separatist authorities. It is not at all clear, as Lanovoy argues,[151] that the Court's approach in *Ilascu* supports attribution of conduct on the basis of acquiescence or connivance.[152]

*El-Masri* concerns the involvement of Macedonia in the rendition and torture, inhuman and degrading treatment of a German citizen, Khaled El-Masri by the Central Intelligence Agency (CIA) of the United States. El-Masri had been detained and suffered ill treatment by the Macedonian authorities before he was handed into the custody of CIA agents at Skopje Airport where he was tortured.[153] He was then rendered by the CIA to Afghanistan where he was detained for four months.[154] The question of Macedonia's responsibility for his ill treatment while in the custody of the Macedonian authorities and for his transfer into the custody of the CIA entailed a straightforward application of Macedonia's obligations pursuant to Articles 3 ECHR,[155] and the principle of non-refoulement.[156]

However, the Court did not confine itself to the question of Macedonia's responsibility for the conduct of its own authorities. The Court also considered the question of Macedonia's responsibility for torture and ill treatment committed by the CIA agents at Skopje Airport. The Court set out the approach it must take to the question of Macedonia's responsibility for torture committed by the CIA agents at Skopje Airport as follows,

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149 Ibid, §442.

150 Ibid, §§393-394, 441, 448, 453 & 464.

151 Lanovoy (2017) p.583.

152 Plakokefalos (2017) p.591.

153 ECtHR *El-Masri v Macedonia,* §§17-22.

154 Ibid, §§23-31.

155 Ibid, §§200-204.

156 Ibid, §§212-214.

The Court must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State *must be regarded* as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.[157]

In the subsequent cases of *Al-Nashiri v Poland* and *Husayn v Poland* the Court applied the latter statement, 'in accordance with settled case law',[158] as a general principle of state responsibility for an applicant's treatment and detention by foreign officials on its territory. It is important to note here that the definition of torture, as provided by Article 1 of the Convention against Torture, and as adopted by the ECtHR,[159] includes pain or suffering inflicted 'at the instigation of, or with the consent or acquiescence of a public official'.[160] Accordingly, inherent in the definition of torture is the negative obligation of a state to refrain from consenting or acquiescing in the commission of torture by third state or non-state actors that corresponds to the state's positive obligation to take all available and appropriate measures to prevent and punish such acts.[161] According to the UN Committee against Torture, a state will be considered to 'consent or acquiesce' in torture if that state fails to implement measures to prevent, investigate, prosecute and punish acts of torture or ill-treatment committed by non-state actors.[162] In these circumstances, 'the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts'.[163] It is not surprising, therefore, that the ECtHR uses the language of complicity when addressing the question of state responsibility for torture by third state actors, not as a rule of attribution, but as an inherent element of a state's primary obligation not to commit torture.

The respondent states in *El Masri, Al-Nashiri* and *Husayn* were not held responsible for the violation of the applicants' Convention rights because the acts of the CIA agents were attributable

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157 Ibid, §206 applying *Ilascu v Moldova & Russia,* §318. [Emphasis added]

158 ECtHR *Al Nashiri v Poland*, §452 and *Husayn (Abu Zubaydah) v Poland*, §449 citing *Ilascu v Moldova & Russia*, §318 and *El-Masri v Macedonia*, §206.

159 See ECtHR *Selmouni v France*, §97.

160 Article 1 CAT.

161 Article 2 CAT.

162 UNCAT, General Comment No.2, §18.

163 Ibid.

to them. In *El Masri,* Macedonia was held responsible for violating the ECHR because 'its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring'.[164] It was the acts of the state's organs, and not of the foreign officials, that violated the state's obligations pursuant to Articles 1 and 3 ECHR to ensure individuals are not put at risk of torture.[165]

Thus, the ECtHR has developed rules of derivative responsibility according to which the state is responsible for its own acts that facilitate the commission of rights-violating conduct by state or non-state actors. The ECtHR has not developed rules of attribution of conduct based upon notions of complicity.[166]

#### *4.4.4 Foreseeability and real risk of harm*

According to the ECtHR's jurisprudence the act of removing a person from the state's jurisdiction may engage that state's responsibility 'if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination'.[167] It follows that a State Party will be in violation of its obligations under the ECHR if there are substantial grounds for believing that a person would, if transferred from its jurisdiction, face a real risk of torture and ill treatment contrary to Article 3 ECHR,[168] or there is a real risk of a flagrant breach of Articles 5 (liberty of the person) or 6 ECHR (right to a fair trial).[169]

Similarly, the Court of Appeal of The Netherlands held in *Association of Mothers of Srebrenica and Others v The Netherlands* that the Dutchbat's facilitation of the separation of male refugees by Bosnia Serbs during their evacuation from the 'mini safe area' at Srebrenica was wrongful pursuant to Articles 2 and 3 ECHR and Articles 6 and 7 ICCPR[170] because at the time the Dutchbat knew or should reasonably have understood that this separation was not for the purpose of screening for war crimes, and that there was a real risk that the separated men would be subjected to an

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164 ECtHR *El-Masri v Macedonia*, §211.

165 Ibid; *Al Nashiri v Poland*, §517; *Husayn (Abu Zubaydah) v Poland*, §517.

166 The question whether there an emerging general rule of state responsibility for complicity in the unlawful acts of an armed group is considered in chapter 5.

167 ECtHR *Al Nashiri v Poland*, §453.

168 ECtHR *Othman (Abu Qatada) v United Kingdom*, §185.

169 Ibid, §§233 & 258.

170 Court of Appeal Den Haag (The Netherlands) *Association of Mothers of Srebrenica & Ors v The Netherlands* (2017), §§ 46 & 50.1.

inhumane or humiliating treatment or executed.[171] The Court held that by putting the refugees together in groups and requiring them to walk through a human corridor formed of Dutchbat soldiers to the evacuation buses, the Dutchbat in fact facilitated the separation of male refugees from the larger group by the Bosnian Serbs before they boarded the buses.[172]

The application of a constructive knowledge standard by the ECtHR suggests that a state must conduct due diligence to acquire knowledge of the intentions of the receiving state or non-state entity, or to satisfy itself that there is no risk of a violation of the persons Convention rights as guaranteed by Articles 3, 5 and 6 ECHR. In cases where the sending state 'knew or ought to have known' that the removed person was subjected to extraordinary rendition[173], the ECtHR has held that 'the possibility of a breach of Article 3 ECHR is particularly strong and must be considered intrinsic in the transfer'.[174] Furthermore, as the Court has observed, the risk of a flagrant breach of Article 5 is inherent in extraordinary rendition that constitutes the deliberate circumvention of due process.[175]

However, it remains the case that the engagement of a state's human rights obligations not to facilitate or acquiesce in rights-violating conduct is dependent upon the existence of jurisdiction, whether territorial, by virtue of the state's effective control over territory or authority over the victim.[176] It follows that a state's obligation not to facilitate violations of IHRL will not be engaged where the state arms, finances, trains or otherwise assists an armed group that is active in a third state and commits human rights abuses outside that state's jurisdiction.

### 4.5 Conclusion: Identifying Responsibility Gap

In the absence of secondary rules of attribution, states that finance and otherwise support armed groups that commit *inter alia* terrorist acts, torture or genocide may be in breach of certain primary obligations to prevent those acts. However, the reach of these primary obligations is limited. State

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171 Ibid, §§46 & 51.5-51.6.

172 Ibid., §61.3 & 61.5. The Court did not determine whether the same standard should be applied to complicity in genocide, on the basis that it this was not required to prove wrongful conduct pursuant to the ECHR or ICCPR [see §50.1 & 51.6].

173 Extraordinary rendition has been defined by the ECtHR as 'an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment': ECtHR *Al Nashiri v Poland*, §453.

174 Ibid, citing *El-Masri v Macedonia*, §§218-221.

175 ECtHR *Othman (Abu Qatada) v United Kingdom*, §233.

176 Ibid. Also, Milanovic (2011) p.19.

responsibility for failing to prevent the commission of crimes by non-state actors is legally and conceptually distinct from responsibility for positive acts that contribute to the harm itself. In the former case, the state is not responsible for the acts the armed group or for its positive contribution to the commission of those acts. The activities of the armed group merely provide the objective circumstances which give rise to the state's international obligations, and the breach thereof by the state's organs. What is important is whether the state did all it could, in the circumstances existing at the time, to prevent or ensure respect for the rule of international law in question.[177] Therefore, a state's responsibility for failing to prevent certain acts fails to capture the wrong committed by a state that deliberately supports the commission of those acts.

Therein exists a normative gap in responsibility ('the responsibility gap') that sits between a state's primary obligations to prevent certain acts and a state's direct responsibility for violations of international law committed by armed groups acting on the instructions of, or under the effective control of, the state. A state is able to exploit this gap in order to evade responsibility for complicity in terrorism and international crimes committed by its proxy by virtue of its encouragement, instigation or facilitation through the provision of aid or assistance, of those acts.

This responsibility gap is addressed to some extent by the primary obligations of states to ensure respect for IHL pursuant to CA1, and to respect and ensure IHRL, that provide a more comprehensive framework of legal rules that govern state responsibility for acts that contribute to the commission of violations of international law by armed groups. However, a responsibility gap still exists in circumstances where a state facilitates the commission of terrorist acts or other rights-violating acts in situations outside armed conflict (and therefore not governed by IHL) and, rights-violating conduct in territory outside the state's jurisdiction. In the next chapter I explore an alternative approach to lowering the threshold test for attribution of conduct from 'effective' to 'overall control' to address state complicity in acts of terrorism, international crimes and unlawful acts: namely the formulation of a general rule of derivative responsibility for complicity within the framework of the law of state responsibility.

[177] E.g. *DRC v Uganda,* §211; *Bosnia Genocide,* §430.

## Chapter 5. State Complicity in the Unlawful Acts of Armed Groups

### 5.1 Introduction

In this chapter I consider the case for the formulation of a general rule of state responsibility for complicity in the unlawful conduct of armed groups and the extent to which such a rule will address the responsibility gap identified in chapter 4.

States have long condemned other states for complicity in the commission of unlawful acts by armed groups. For example, in *Aerial Incident at Lockerbie* under the heading 'The Issue of State Complicity in Acts of Unlawful Seizure and Acts of Unlawful Interference Against the Safety of Civil Aviation' the United Kingdom submitted that in addition to prosecution of alleged perpetrators of certain offences pursuant to the Montreal Convention, 'action should be taken against the States concerned'.[1] Parallel to the legal proceedings before the ICJ the United Kingdom brought its complaint that Libya sponsored terrorism to the Security Council.[2] There the United Kingdom and the United States had asserted that the Lockerbie bombing was a case of state-sponsored terrorism.[3] The United Kingdom further stressed that it was 'the exceptional circumstances of government involvement in the destruction of the two flights that made it appropriate for the Council to adopt a resolution urging the Libyan Arab Jamahiriya to comply with the requests that the accused be made available for trial in Scotland or the United States and cooperate with the French judicial authorities'.[4] By Resolution 748 (1992) the Security Council decided that Libya 'must commit itself definitively to cease all forms of terrorist action and *all*

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[1] *Aerial Incident at Lockerbie*, Counter-Memorial of the United Kingdom, §3.38.

[2] This may have been a tactical decision based upon the evidential burden required by legal proceedings in order to prove that Libyan organs or persons acting on the instructions, direction or control of Libya, in fact carried out the bombing. At that time the trial of the suspected bombers, Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, that heard evidence that Al Megrahi was a Libyan intelligene officer and resulted in Al Megrahi's conviction, had not yet taken place As Judge Bedjaoui observed,

> The second dispute, concerning the international responsibility of Libya, has been resolved in a strictly political way, the chief elements of the solution being the finding that Libya is responsible, a demand of compensation for the families of the victims and the imposition of an obligation concretely to renounce terrorism, whereas a judicial solution, which necessarily sets higher procedural standards, would have required, as a preliminary, the production of evidence, adversary proceedings and respect for due pro- cess of law. [*Aerial Incident at Lockerbie,* Request for the Indication of Provisional Measures, Dissenting Opinion of Judge Bedjaoui, §5.]

[3] Repertoire of the Practice of the Security Council: Supplement 1989-1993, p.213.

[4] Ibid. Pursuant to Resolutions 731 and 748 (1992) the Security Council condemned terrorism in all its forms, including acts in which states were directly or indirectly involved and urged, and then demanded, Libya to cooperate to the requests of France, the United Kingdom and the United States.

*assistance to terrorist groups*',[5] and imposed sanctions and an arms embargo on Libya for such time as Libya refused to meet the demands of France, the United Kingdom and the United States to surrender the suspects.[6]

Similarly, following the hijacking of an Indian Airlines passenger flight in February 1971, India lodged a formal protest against Pakistan for 'extending assistance and support to, and even encouraging, these two criminals and for their failure to protect the aircraft and the cargo, baggage and mail' and held Pakistan 'wholly responsible for any consequences that may follow from this deplorable incident'.[7] The hijackers had diverted the aircraft to Lahore, Pakistan and, after releasing the passengers, had blown up the aircraft. The incident led to proceedings before the ICJ relating to the jurisdiction of the International Civil Aviation Organisation (ICAO) Council over the dispute.[8] Pakistan rejected India's allegations that it had assisted the hijackers and in response counter-claimed that the Commission of Inquiry constituted by the President of Pakistan had concluded that the hijacking would not have been possible 'without the active complicity, encouragement and assistance of the Indian Intelligence Service personnel and other Governmental authorities in the Indian held Kashmir'.[9] India's apparent motive was to create tension between the political parties in Pakistan, financially weaken Pakistan, and 'to create a situation under which India could interfere actively in the internal affairs of Pakistan'.[10]

Likewise, in February 2019 India accused Pakistan of having 'a direct hand' in a terrorist bombing in Kashmir, for which the Pakistan-based group Jaish-e-Mohammed claimed responsibility.[11] The United States joined India in condemning Pakistan's alleged role in the bombing and urged Pakistan to 'end immediately the support and safe haven provided to all terrorist groups operating on its soil'.[12] Shortly thereafter India conducted airstrikes in Pakistan's territory.[13] In retaliation,

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[5] Security Council Resolution 748(1992), §2.

[6] Ibid, §§3-7.

[7] Note of 3 February 1971 from the Indian High Commission in Islamabad to the Ministry of Foreign Affairs of Pakistan, Memorial of India, *Appeal Relating to the Jurisdiction of the ICAO Council*, p.77.

[8] *Appeal Relating to the Jurisdiction of the ICAO Council.*

[9] Reply of the Government of Pakistan to the Preliminary Objections Raised by the Government of India under Article 5 of the Rules of Settlement of Differences, before the Council of the International Civil Aviation Organization, Annex to Memorial of India, *Appeal Relating to the Jurisdiction of the ICAO Council*, p.126.

[10] Ibid.

[11] Safi & Farooq, 'Indian PM: Pakistan will pay 'heavy price' for Kashmir bombing', The Guardian, 15 February 2019.

[12] The White House, 'Statement from the Press Secretary on the Terrorist Attack in India', 14 February 2019.

[13] India Ministry of External Affairs, 'Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp at Balakot' 26 February 2019.

Pakistan shot down two Indian fighter jets flying over the disputed border region.[14] India accused Pakistan of failing to take measures to prevent 'jihadis' from being trained in its territory and stressed that the group 'could not have functioned without the knowledge of the Pakistan authorities'.[15] Pakistan condemned India's actions as an act of aggression, and the 'baseless allegation' that Pakistan was involved in the terrorist bombing.[16]

Before the completion of the ARS in 2001 the principle of state responsibility for complicity in international law received limited attention.[17] In the period following the attack on the World Trade Centre on 11 September 2001 that has seen state collaboration in counter-terrorism policies, including the extraordinary rendition of suspected terrorists, targeted killings, and the invasion of Afghanistan in 2001 and Iraq in 2003, one state's complicity in another state's internationally wrongful act has received more detailed consideration.[18] However, notwithstanding the examples summarised above, state responsibility for complicity in the unlawful acts of non-state actors has received limited attention from scholars.[19]

Article 16 ARS provides a general rule of state responsibility for 'aid or assistance in the commission of an internationally wrongful act' by another state'. However, the ARS are marked by the absence of a rule of attribution covering state complicity in the unlawful acts of private persons or entities. This absence appears to be the result of a conscious decision by the ILC to leave examination of this issue to a future study, as was the case with respect to state responsibility for complicity in the commission of an internationally wrongful act by an international organisation.[20] As Special Rapporteur Ago explained,

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[14] Regan et al, 'Pakistan says it shot down two India jets as Kashmir border crises deepens', CNN, 28 February 2019.

[15] Ibid.

[16] Pakistan Ministry of Foreign Affairs, 'Pakistan strongly protests Indian aggression, violation of its airspace and promises a befitting response', Press Release, 26 February 2019. For discussion of the issues raised concerning the law on the use of force see Maheshwari (2019). See also chapter 6, 6.5.1 on the application of Article 9 ARS to the question of state responsibility for the commission of cross-border attacks by armed groups operating in the state's territory.

[17] Quigley (1986); Graefrath (1996); Brownlie (1983) p.191.

[18] Nolte & Aust (2009); Aust (2011); Jackson (2015); Lanovoy (2016).

[19] With exception of de Frouville (2010), p.277; Jackson (2015), chpt. 9; Lanovoy (2017a); Mackenzie-Gray Scott (2019).

[20] ARS, Article 57. State responsibility for aiding and assisting an international organisation in the commission of an international wrongful act was later codified as Article 58 of the draft Articles on Responsibility of International Organisations, *ILC Ybk* 2011, Vol. II(2).

[W]e shall take into consideration only the case of complicity of a State in an international offence committed by another State, even though it may well be presumed that the same principles would apply if one of the protagonists were a subject of international law other than a State.[21]

The absence of a rule on state complicity in violations committed by non-state actors in the ARS may also be a legacy of the positivist school of the early 20th century that contended that only states could be subjects of international law.[22] One feature of state responsibility for complicity in the commission of an internationally wrongful act by another state is the dual obligation requirement - the complicit state must itself be bound by the international obligation that has been breached.[23] This condition is a manifestation of the principle that 'a State cannot do by another what it cannot do by itself'.[24] Accordingly, if only states can be subjects of international law and therefore be bound by international law, the dual obligation requirement can only be satisfied between two states. Thus, legal theory that has contributed to the development of the principles that underpin the law of state responsibility has tended to concentrate on the circumstances in which the conduct of private actors may be attributed to a state, rather than notions of accessorial liability of the state.[25] However, the contention that only states can be subjects of international law is now undermined by a general acceptance that private actors can be and are subjects of international law, particularly IHL. It is argued below that in light of this development of international law the dual obligation requirement is no longer an obstacle to state responsibility for complicity in the unlawful acts of non-state actors. Against this background, I examine whether Article 16 ARS is an appropriate analogue for a general rule on state complicity in the unlawful acts of armed groups.

This chapter is divided into seven parts. Section 5.2 provides an overview of Article 16 ARS. The sections that follow examine the requisite criteria for Article 16 in more detail, namely: the conduct element (section 5.3); the knowledge of the state (section 5.4); the causal nexus between the assistance provided and the internationally wrongful act (section 5.5); and the dual obligation requirement (section 5.6). Finally, in section 5.7 I propose a general rule of state responsibility for complicity in violations of international law by armed groups.[26] I argue that it is not appropriate to

[21] Ago, Seventh Report (1978), §76.

[22] E.g. Anzilotti (1906).

[23] ARS, Article 16, Commentary, §6.

[24] Ibid.

[25] E.g. Anzilotti (1906); Eagleton (1928). For a comprehensive study of the development of legal theory of State responsibility from the Roman law doctrine of *jus gentium*, to Grotius to Anzillotti see Hessbruegge (2004).

[26] The focus on this thesis is on the conduct of armed groups, but the proposed rule may apply to non-state actors generally.

apply Article 16 by analogy. Instead, the proposed rule builds on the principles that govern the prohibition of complicity in violations IHL and IHRL, and encouragement of violations of IHL. The proposed rule is not a rule of attribution of conduct, but a rule of derivate responsibility. Thus, the rule would preserve the notion of limited state responsibility for private conduct that is central to the ARS but at the same time would condemn appropriately a state's active involvement in unlawful acts that, if committed by a state organ or agent would constitute a violation of an international obligation of the state.

### 5.2 Article 16 ARS: State Complicity in Internationally Wrongful Acts of Another State

Article 16 ARS provides that,

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
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> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
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> (b) the act would be internationally wrongful if committed by that State.

Article 16 sits together with Articles 17 and 18 in Chapter IV ARS that covers responsibility of a state in connection with the act of another state. However, there is an important difference in the nature of a state's responsibility under Article 16 and that arising under Articles 17 and 18. Articles 17 and 18 cover cases of a state's direction or control over another state and coercion of another state respectively. Pursuant to Articles 17 and 18 a state that directs, controls or coerces another state to commit an internationally wrongful act will be responsible for that act. By contrast, state responsibility pursuant to Article 16 is derivative: the assisting state is only responsible for its *own* conduct to the extent that it has caused or contributed to the breach, and not for the unlawful act of the principal perpetrator. [27]

Pursuant to Article 16, a state may be held responsible for aiding and assisting in the internationally wrongful act of another state on the basis of conduct that is not unlawful *per se*. As such, Article 16 arguably blurs the distinction between primary and secondary rules as it defines the substance

[27] ARS, Article 16, Commentary, §§1 & 10.

of the state's obligation.[28] On this point the ILC Commentary merely states that this is justified because responsibility is 'in a sense derivative' and refers by analogy to domestic legal systems in which offences like 'conspiracy, complicity and inducing breach of contract' forms part of 'general law'.[29]

In addition, there is a policy justification for blurring the distinction between primary and secondary rules in cases of complicity. If only unlawful acts fell within the scope of Article 16 then the rule would be unduly narrow. Conduct that is not unlawful *per se*, such as allowing a state to refuel its aeroplanes that are used in the unlawful rendition of terrorism suspects to 'black sites' for interrogation, or the provision of military assistance to states known to carry out human rights violations, would not be caught by the rule. Yet, if the purpose of the rule is to ensure greater compliance with international law[30] then it can only achieve that purpose if it condemns otherwise lawful conduct that facilitates another in the violation of international law.

In *Bosnia Genocide* the ICJ drew on Article 16 by analogy in order to determine the content of state complicity in the crime of genocide.[31] Therefore, it is helpful to consider Article 16, and the ICJ's application of the rule in *Bosnia Genocide,* in order to establish whether there is evidence of an emerging rule of state responsibility for complicity in unlawful acts by armed groups, what the content of that rule might be, and whether such a rule would close the responsibility gap.

## 5.3 Required Conduct

### *5.3.1 Aid or Assistance*

Article 16 ARS limits the modes of participation that amount to complicity to 'aid or assistance'. The ILC initially used the term 'complicity' in its draft articles[32] but abandoned the use of the term because of its association with criminal law under which it can have a far broader meaning than that applied under public international law.[33] For example, the Commentary states that 'incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility of the

[28] ARS, Introductory Commentary to Part IV, §7.

[29] Ibid.

[30] Lowe (2002) p.15.

[31] *Bosnia Genocide,* §419.

[32] Ago, Seventh Report (1978), draft Article 25, p.60.

[33] Commentary to draft Article 27 ASR, *ILC Ybk* 1978, Vol. II(2), pp.100-102; Quigley (1986).

inciting State'.[34] It is presumed that a state will act with 'complete freedom of decision and choice', whether incited or not.[35] The only real case of 'participation' by a state in the commission of an internationally wrongful act of another state is where the former 'actively assists' the latter in the commission of the act.[36]

However, state responsibility for aiding or assisting in the commission of violations of international law by non-state actors will inevitably relate to the commission of a crime. The question then arises whether, when applied in this context, 'aiding or assisting' should be equated to broader notions of 'complicity' in criminal law or should be restricted to 'aid or assistance'?[37] In domestic criminal law the term 'complicity' is often used as an umbrella term to cover various types of accessorial liability that can include encouragement or incitement of a criminal offence, as well as conduct that assists in the commission of a criminal office.[38] In ICL, the term 'complicity' is also used as a general term denoting a number of different modes of participation in an offence,[39] including encouragement or moral support that has a significant effect on the perpetrator.[40] However, different ways in which a person may be complicit in the commission of an offence are distinguished. For example, Article 25(3) of the Rome Statute distinguishes between the criminal responsibility of a person who 'orders, solicits, or induces' the commission of a crime[41] and a person who 'aids, abets or otherwise assists in the commission or attempted commission' of a

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[34] ARS, Introductory Commentary to Chapter IV ARS §9. Ago, Seventh Report (1978), p.54 §61; Quigley (1986) fn.15. *Cf. Nicaragua,* §220 and *DRC v Uganda*, §§209-211 on encouraging non-state actors to commit violations of IHL contrary as a breach of the state's obligations under Articles 1 and 3 Common to GCs. See chapter 4.

[35] Ago, Seventh Report (1978), p.55 §63.

[36] Ibid. The meaning and scope of 'aid or assistance' is arguably unclear. Cf. Aust (2011) pp.195-230. Aust argues that 'aid or assistance' in Article 16 is 'a normative and case-specific concept, meaning that its content will always have to be determined in the specific situation, with a view to the relation between supportive conduct to the neighbouring normative environment and the enabling function it played in the case in hand'. See also Gaja, Seventh Report on the responsibility of international organisations, (2009) §75.

[37] Cassese (2005) pp.882-883 who argues that once the ICJ in *Bosnia Genocide* adopted the criminal law notion of complicity in order to determine state responsibility pursuant to the Genocide Convention the Court should have adopted 'a rigorous criminal approach' with regard to the *mens rea* and *actus reus* requirements required for an accomplice to incur responsibility under international criminal law.

[38] Commentary to draft article 27 ARS, *Ybk ILC* 1978 vol II(2), p.102 §12; Quigley (1986) fn10; Ago, Seventh Report (1978), p.55 §62; Milanovic, (2007) p.682; Jackson (2015), pp.32-33. E.g. Section 8, Accessories and Abettors Act 1861 (England & Wales) provides that it is an offence to 'aid, abet, counsel or procure' the commission of any indictable offence. 'Incitement' of a criminal offence constitutes an offence under English common law if committed before 1 October 2008. From that date forward, Section 44 Serious Crime Act 2007 provides that a person commits an offence if he 'does an act capable of encouraging or assisting the commission of an offence; and he intends to encourage or assist its commission'. See generally Law Commission of England and Wales, *Assisting and Encouraging Crime* (1993) and *Participating in Crime* (2007).

[39] ICTY *Blagojevic & Jokic,* (Trial Chamber) §§776-777; *Krstic* (Appeals Chamber) §139.

[40] ICTY *Furundzija* (Trial Chamber), §233.

[41] Article 25(3)(b) Rome Statute.

crime'.[42] 'Aiding and abetting' refers to acts that are 'specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime… [and have] a substantial effect upon the perpetration of a certain specific crime'.[43] According to the ICTY in *Tadic*, the aider and abetter must know that his or her acts will assist in the commission of the *specific* crime by the principal.[44] Tacit encouragement or approval of the principal's acts by a person in authority will amount to aiding and abetting.[45]

In *Bosnia Genocide* the ICJ seems to have confined state complicity in genocide to acts of 'aid or assistance', and therefore excluded the possibility of the wider definition of complicity applied in criminal law. However, the notion of encouragement is not confined to criminal law. As the analysis of a state's primary obligations in chapter 4 shows, pursuant to CA1 states are prohibited from encouraging violations of IHL. Moreover, the principle that a state should not encourage non-state actors to commit terrorist acts is inherent in the principle of non-intervention. According to the Friendly Relations Declaration states should not aid, assist or encourage the commission of terrorism or armed activities by non-state actors against the government of another State.[46]

### *5.3.2 Acts and Omissions*

In *Bosnia Genocide* the ICJ distinguished between a failure to prevent genocide by an omission (a state's failure to act) and complicity in genocide that 'always requires that some positive action has been taken to furnish aid or assistance to the perpetrators' of the unlawful act.[47] According to the Court's approach, 'a violation of the obligation to prevent arises from mere failure to adopt suitable measures to prevent [the harmful act] from being committed'[48] in its own territory or territory under its occupation,[49] or, in case of genocide, by persons that the state has the 'capacity to influence'.[50] Therefore, for the ICJ the notion of 'complicity' implies some deliberate act directed at assisting the other party in the commission of the unlawful act.[51]

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[42] Ibid. Article 25(3)(c).

[43] *Tadic,* §229. Also ICTY *Aleksovski,* §162; *Celebici Camp,* §352; and ICTR *Akayesu,* §447. O'Keefe (2016), 5.69.

[44] Ibid.

[45] ICTY *Brdanin,* §§273 & §277 in which the Court refers to the 'silent spectator'.

[46] Resolution 2625 (XXV) (1970), Third principle, §2.

[47] *Bosnia Genocide*, §432.

[48] Ibid.

[49] *DRC v Uganda*, §179.

[50] *Bosnia Genocide,* §430.

[51] See also chapter 4, 4.2.3.

Some scholars have questioned the validity of the Court's distinction between complicity and the failure to prevent based on act or omission.[52] For Aust, where the failure to act is closely connected with the obligation breached, it would be justifiable to consider this as falling within the scope of aid or assistance.[53] This will be the case where a state's armed forces have deliberately stood by and failed to prevent violations of IHL being perpetrated in front of them.[54] As Latty asks, 'should not a State which permits transit of its territory by armed groups, being aware of their genocidal intention, be recognized as complicit in their acts as a result of its knowing failure to act?'[55]

There is some force in these arguments. A failure to prevent a wrongful act may be considered less serious than participation in the commission of the wrongful act, even if the consequences are the same. Complicity implies a deliberate contribution to the wrongful act, whereas a failure to prevent a wrongful act may arise out of an incapacity to do so because of a lack of resources, in which case the state may be exonerated,[56] or because of negligence.[57] The distinction between complicity in the wrongful act and a failure to prevent the wrongful act lies in the intention[58] of the state to assist, by doing nothing to stop the armed group, in the commission of the unlawful act by the armed group.[59]

If, contrary to the ICJ's conclusion in *Bosnia Genocide*, a state can facilitate the commission of an unlawful act by act or by omission, the question then arises as to whether all acts or omissions of a state that facilitate the commission of an unlawful act by a non-state actor will engage that state's responsibility for complicity? The ILC Commentary advises that the scope of Article 16 is limited by the following four requirements:[60] first, the state providing the aid or assistance must be aware of the circumstances of the unlawful act;[61] second, the aid or assistance must be provided 'with a view to facilitating' the commission of that unlawful act; third, the aid or assistance *must actually*

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[52] Latty (2010) p.359; Aust (2011) pp.226-227.

[53] Aust (2011) pp.229-230.

[54] *DRC v Uganda*, §209.

[55] Latty (2010) p.359. Also, Jackson (2015) pp.156-157.

[56] *DRC v Uganda,* §301; Cahin (2010b) p.337.

[57] E.g. *Bosnia Genocide*, §§422 & 438 in which the ICJ held that Serbia was responsible for its failure to prevent genocide in Srebrenica, but that there was insufficient evidence of Serbia's knowledge of the intention of the perpetrators to commit genocide to establish complicity.

[58] See chapter 3, 3.1 & 3.5 on the meaning of 'intention' with respect to proving a shared purpose to commit unlawful acts.

[59] *Cf.* Mackenzie-Gray Scott (2019), p.15.

[60] ARS, Article 16, Commentary, §3.

[61] Ibid, §3.

facilitate the commission of the unlawful act; and fourth, the unlawful act must breach an international obligation by which the assisting state is also bound (the 'double obligation rule').[62]

Each of these requirements, and how the ICJ applied them to the question of state responsibility for complicity in genocide, are considered in turn in the sections below.

### 5.4 Knowledge of the assisting state

Article 16 ARS requires that the state must provide aid or assistance 'with knowledge of the circumstances of the internationally wrongful act'.[63] The inclusion of a mental element to Article 16 provides an exception to the otherwise 'objective' approach of the ARS. Generally, the rules do not require any fault element to be established in order for a state's responsibility to be engaged.

The objective approach to the ARS reflects the influence of early 20th century scholars such as Anzilotti on the development of principles embodied in ARS. Anzilotti rejected the notion of culpability or fault of the State, commonly attributed to Grotius,[64] as an essential requirement for responsibility.[65] He argued,

> Attribution, from the point of view of international law, is nothing other than the consequences of the relationship of causality that exists between an act contrary to the law of nations and the conduct of the State that is the author of the act.[66]

However, the exclusion of fault in the majority of rules in the ARS does not equate to its irrelevance. As Special Rapporteur Crawford stated, 'it is an error to think that it is possible to eliminate the significance of fault from the articles'.[67] The Commentary to Article 2 ARS explains that notions of fault and culpability are dependent on the relevant primary obligation of the state

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[62] Ibid.

[63] Article 16(a) ARS.

[64] Grotius developed the idea of fault-based responsibility of the State. According to Grotius the sovereign incurred responsibility as a natural person, including for the acts of individuals, where fault of the sovereign was established: Grotius (1625), pp.436-437.

[65] Dupuy (1992) p.143.

[66] Anzilotti, (1906) p.291: 'L'imputabilité, au point de vue du droit international, n'est donc pas autre chose que la conséquence du rapport de causalité qui existe entre un fait contraire au droit des gens et l'activité de l'État dont ce fait émane.'

[67] Crawford (2002) p.13. See also Gattini (1999).

and the standard of conduct that amounts to a breach in particular circumstances.[68] Generally, the question of fault is left to be resolved in each individual case according to the specific violation.[69]

According to the Commentary, first, 'the relevant State organ or agency providing the aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful'.[70] Second, the aid or assistance must be given 'with a view to facilitating' in the commission of the wrongful act by the other state, and must actually do so.[71] The words 'with a view to' are elaborated upon to mean an 'intention to facilitate' in the commission of the internationally wrongful act.[72]

The notion that intent is a necessary requirement of complicity was recognized early in the drafting process by Special Rapporteur Ago who commented in his seventh report to the ILC (1978) that,

> The very idea of 'complicity' in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence… knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition there can be no question of complicity.[73]

This strict characterisation of the knowledge requirement by the ILC, has been interpreted by Aust to mean 'something more akin to wrongful intent'.[74] However, this interpretation of 'knowledge' is rather imprecise. Either a state acts with intent to facilitate the commission of an internationally wrongful act by another state or it does not.

The requirement that the state must act with 'knowledge' and 'intention' has been criticised for raising the threshold too high thus making 'the whole construction of complicity unworkable'.[75] For Quigley, the purpose of a state complicity rule is to require states to be cautious about how

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[68] ARS, Article 2, Commentary, §4.

[69] Crawford (2002) pp.13-14.

[70] ARS, Article 16, Commentary, §3. Also, Crawford (2013) p.407.

[71] Ibid, §§3&5.

[72] ARS, Article 16, Commentary, §5. This formula is rather vague. For the purposes of this thesis the definition of intent considered in chapter 3, 3.5 is preferred. To act with 'intent' to achieve a particular result means to act deliberately

[73] Ago, Seventh Report (1978) p.58 §72.

[74] Aust, (2011) p.235.

[75] Graefrath (1996) p.375. See also Quigley (1986) p.109; Lanovoy (2016) pp.101 & 103.

their aid or assistance is used by another state.[76] Thus, Quigley posits that knowledge and awareness of harm should be sufficient to define complicit conduct.[77] However, the suggestion that the words 'or should have known' should be added to the text of Article 16(a),[78] so as to introduce a requirement of constructive knowledge on the part of the assisting state, was rejected by the ILC's Drafting Committee. For the Drafting Committee, 'the knowledge requirement was essential, as a narrow formulation of the chapter was the only approach acceptable to many States'.[79]

Some have suggested that intent may be presumed by the existence of actual knowledge of the circumstances in which the aid or assistance is to be used.[80] According to Lowe, proof of the assisting state's knowledge does not require proof that the assisting state 'desires or intends' the unlawful use of the aid or assistance: 'States must be supposed to intend the foreseeable consequences of their acts'.[81] The existence of a mere possibility that the aid or assistance may be used unlawfully will not be sufficient to establish knowledge and an intention to collaborate.[82] However, the unlawful conduct must be foreseeable. Lowe's reference to foreseeability in his interpretation of 'knowledge' suggests that constructive knowledge would be sufficient. Thus, the knowledge standard favoured by Lowe is lower than the 'actual knowledge' standard favoured by the ILC. The ILC's standard suggests that the assisting state must have actual knowledge of the circumstances of the internationally wrongful act and must intend its aid or assistance to be used for that purpose.[83]

Thus, the ILC's standard is similar to that required in order to prove the existence of a common unlawful purpose, as examined in chapter 3.[84] It is a strict standard that requires proof of knowledge that the commission of the internationally wrongful act by the other state is virtually certain, and thus preserves the principle that '[a] State providing material or financial assistance or

[76] Quigley (1986) p.116.

[77] Ibid.

[78] ILC, Comments of the Government, The Netherlands, (2001), p.52.

[79] First Statement of the Chairman of the Drafting Committee (Peter Tomka), 2681st to 2683rd meetings of the ILC, 2001, p.19. E.g. Comments of Germany, United Kingdom, United States, 50th Session of the ILC (1998), pp.128-129; Comments of the United Kingdom & United States, 53rd Session of the ILC (2001), p.52.

[80] Crawford (2013) p.407; Melzer (2013) p.38; Jackson (2015) pp.160-161.

[81] Lowe (2002) p.8.

[82] Ibid, p6.

[83] Nolte & Aust (2009) p.12; Dominicé (2010) p.286; Crawford (2013) p.407; Moynihan (2016) p11.

[84] Section 3.5.

aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act'.[85] A state is therefore shielded from responsibility for inadvertently aiding or assisting the commission of an internationally wrongful act. This gives rise to the question whether a state has a duty to inquire or to obtain knowledge of the circumstances in which its aid or assistance will be used. This question is discussed below in section 5.4.2. First, the next section considers the following: if the state must have actual knowledge of the circumstances of the internationally wrongful act, what exactly must the state know?

### *5.4.1 Knowledge of the intentions of the principal*

In *Bosnia Genocide* the ICJ held that 'at the least' the assisting state must have knowledge of the specific intent of the perpetrator to commit genocide in order to categorise a state's aid or assistance in genocide as complicity.[86] Despite finding that substantial military and financial aid was provided by the FRY to the VRS that committed the genocide at Srebrenica before and during the genocide, there was insufficient proof upon which the Court could be certain that the FRY knew that a genocide would or was taking place.[87] The Court's finding suggests that general knowledge of the circumstances giving rise to the unlawful act will not be sufficient. What is required is knowledge of the facts that make the act unlawful,[88] meaning that the state must (a) know that the principal intends to commit a certain act; and (b) that all the necessary criteria that make that act internationally wrongful will be fulfilled.

The ICJ has been criticised for its failure in *Bosnia Genocide* to resolve the issue whether the assisting state must itself have the specific intent to commit genocide.[89] As Milanovic has observed, even if one accepts the Court's finding that there was insufficient evidence to prove that Serbia knew genocide would be or was being carried out by Republika Srpska at Srebrenica, that does not justify the Court's failure to answer a legal question put before it.[90] It therefore remains to be clarified whether the state should share specific intent of the principal to commit genocide in order to satisfy the requirements for complicity.[91]

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[85] ARS, Article 16, Commentary, §4.

[86] *Bosnia Genocide*, §421.

[87] Ibid, §422.

[88] Crawford (2013), p.407. *Cf.* Jackson (2015), p.160.

[89] Milanovic (2007) p.681.

[90] Ibid.

[91] See section 3.5 in which it is argued that a shared specific intent to commit genocide is required in order to prove a 'shared unlawful purpose' and the consequences of this with respect to Vice-President Al-Khasawneh's argument that in this cases 'overall control' over the armed group should provide a sufficient basis for attribution of conduct.

In his Separate Declaration in *Bosnia Genocide* Judge Keith held the view that knowledge of the specific intent of the principal actor should be sufficient.[92] This would bring the fault requirement for complicity in genocide into line with the jurisprudence of the ICTY according to which proof of knowledge of the genocidal intent of the perpetrator is required.[93] Thus, a state that knows that the principal intends to commit genocide and continues to provide assistance to the principal should not escape responsibility because it only intends to facilitate mass killing without the intention to exterminate a particular group.

For Judge Bennouna a state's knowledge of the perpetrator's intent to commit genocide will be proven if 'the aid or assistance continued even though the [state] knew or should have known that the recipients were preparing to commit an act of genocide and the [state] thus supported them in the pursuit of their aims'.[94] On this basis a state would be responsible for complicity in genocide (or any other crime of specific intent) if the commission of the crime is foreseeable, based upon a history of abuse or upon information available to the state at the time, and state nevertheless provides support or continues to provide support.[95]

The knowledge standard proposed by Judge Bennouna is similar to the principles underlying the rules developed in IHL and IHRL that prohibit encouragement, aid or assistance of violations of IHL and the facilitation of human rights violations committed by third states or non-state actors. As explained in chapter 4, these primary rules tend to rely upon constructive knowledge of the state and the foreseeability of the risk of harm.[96] Therefore, it is arguable that state complicity in the crime of genocide should require the same constructive knowledge standard. Actual knowledge of specific intent to commit genocide, the standard set as a baseline by the ICJ and proposed by Judge Keith as the correct standard, is overly restrictive.

There are persuasive reasons why constructive knowledge should be sufficient to show state complicity in the unlawful acts of non-state actors. First, for the purposes of Article 16, the ILC

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[92] *Bosnia Genocide*, Declaration of Judge Keith, §§5-7. Also, Declaration of Judge Bennouna, p.361 who posits that a state must have 'actual or constructive knowledge of the nature of the crime which the principal is preparing to commit'.

[93] E.g. ICTY *Krstic,* §140.

[94] *Bosnia Genocide,* Separate Declaration of Judge Bennouna, p.363.

[95] Becker (2006), p.345 with respect to complicity in terrorism.

[96] Sections 4.3.2 & 4.4.1. The ICRC's interpretation of the degree of knowledge required to prove aid or assistance in violations of IHL is an exception.

has posited that a state that provides aid or assistance to another state 'should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful'.[97] A state is presumed to carry out its international obligations in good faith. The knowledge standard required by Article 16, together with the requirement of a causal nexus, ensures that there is a close connection between the aid or assistance provided and the commission of the internationally wrongful act.[98] However, a state cannot presume a non-state actor, whether a person or an entity, will act in good faith or comply with international law if that non-state actor has not itself undertaken to be bound by international law.

Second, the requirement of actual knowledge may encourage 'wilful blindness' on the part of the state. A state will be wilfully blind if that state, knowing what the answer is likely to be, does not ask any questions of the purpose to which its aid or assistance will be put. As a matter of policy, and the integrity of international law, this not acceptable. Moreover, it is unlikely that a tribunal would allow a state to evade responsibility if that state deliberately failed to make the necessary inquiries as to the nature and purpose of the assisted act in circumstances where there are clear indications that the state's aid or assistance will be put to an unlawful purpose.[99]

### *5.4.2 A duty to acquire knowledge?*

The question then arises as to whether the assisting state is under a general duty to acquire knowledge of the purpose for which its assistance will be used.[100] For Quigley, in the context of the question of state complicity in the internationally wrongful acts of another state, the assisting state should be under a duty to inquire whether the assisted state will violate international law using the aid or assistance, 'if [the assisting state] has information about the plans but does not know their extent'.[101] The requirement that a state should carry out due diligence implies a constructive knowledge standard that the ILC did not accept for the purposes of Article 16 ARS. However, there is little reason why states should not be held to a higher standard when it comes to the provision of aid or assistance to armed groups, unless it is accepted that an armed group should be presumed to act in compliance with international law. In the face of overwhelming evidence to the contrary, it is highly unlikely that such a presumption will be accepted as principle.

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[97] ARS, Introductory Commentary to Chapter IV, §8.

[98] Ibid. On causation see section 5.5 below.

[99] Lowe (2002), p.10. See also Jackson (2015), p.162.

[100] Quigley (1986), pp.119-120; Talmon (2008) p.219.

[101] Ibid.

The ICJ did not consider whether the FRY was wilfully blind to the VRS' intention to commit genocide. Had the Court done so it may well have found the FRY complicit, notwithstanding the requirement that knowledge must be proven 'beyond any doubt'.[102] The Court's conclusion that the FRY did not actually know of the VRS leaders' specific intent to commit genocide at Srebrenica was based on its determination that the necessary intent to commit genocide was not established until on or about 12 or 13 July.[103] The decision to commit genocide 'was not brought' to the FRY authorities when it was taken, the decision was taken shortly before it was carried out, and the genocide took place over a short time - only three days.[104] However, the Court also held that the FRY gave substantial financial, military and political aid to Republika Srpska and VRS before *and during* the genocide at Srebrenica.[105] Even if the FRY would not have had time to make the necessary inquiries before the VRS began to commit the genocide, it would have had the opportunity to do so while the genocide was being carried out and therefore to withdraw its support. Thus, the question should not have been whether the decision to commit genocide 'was brought to the attention' of the FRY, but whether the FRY, in the face of clear evidence of a massacre, inquired as to the purpose of that massacre.

### 5.5 Causal Nexus

Complicity requires the existence of a causal nexus between the provision of aid or assistance and the commission of the specific act.[106] The existence of a causal nexus is a question of fact, left to be considered on a case-by-case basis.[107] According to the ILC Commentary, the aid or assistance must actually facilitate the commission of the wrongful act;[108] but, '[t]here is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act'.[109] The Commentary is not entirely clear on the extent to which the aid or assistance must contribute to the commission of the principal's act. With respect to the assisting state's liability to pay compensation, the Commentary later states that assistance 'may only have been an incidental factor in the commission of the primary act, and

[102] *Bosnia Genocide,* §422. Also §§209.

[103] Ibid, §295.

[104] Ibid, §423.

[105] Ibid, §422.

[106] Lowe (2002), p.5; Jackson (2015), p.158. See further Gardner (2001).

[107] Aust (2011) p.210; Crawford (2013), p.407.

[108] ARS, Article 16, Commentary, §§3 & 5.

[109] Ibid, §5.

may have only contributed to a minor degree, *if at all*, to the injury suffered'.[110] This suggests that a state may be held responsible even if its aid or assistance was only 'incidental' to the commission of the unlawful act by the principal.[111]

However, some scholars have argued that founding a state's responsibility for complicity on the basis of aid or assistance that provided some indirect or remote contribution to the commission of the unlawful act is not advisable.[112] Without a causal nexus that as a minimum requires that the aid or assistance significantly contributed to the commission of the unlawful act, the scope of Article 16 could be extremely wide.[113] However, there will be circumstances in which assistance 'incidental' to the unlawful act may nevertheless be an important contribution to its commission. For example, the transfer of a surface-to-air missile by Russia to an armed group may be 'incidental' to the armed group's decision to use that missile to shoot down flight MH-17, but the armed group could not have shot down the aircraft without the missile. By contrast, if the aiding state's contribution is significant and essential to the commission of the unlawful act the state may exceed the complicit role and in fact be a co-principal.[114] The contribution required for complicity will sit somewhere in between these two thresholds. Whether or not the contribution was more than incidental but less than that of co-perpetrator will depend on the circumstances of each case. For example, a state that provides an armed group with the facilities to develop chemical weapons will make a significant contribution to a chemical attack by that armed group. However, a state that provides chemical weapons to the armed group and the training on how to use them will make a significant and essential contribution to the attack and may be treated as a co-principal.

### 5.6 The Dual Obligation Requirement

According to Article 16 ARS, a state will only be responsible for aiding and assisting the commission of an internationally wrongful act by another state if the act would be internationally wrongful if committed by the former state.[115] Underlying this limitation on the scope of Article 16 is the principle that 'a state cannot do by another what it cannot do by itself'.[116] Therefore, where

[110] Ibid, §10. [Emphasis added]

[111] Jackson (2015), p.158.

[112] Aust (2011) p.197; Jackson (2015), p.158.

[113] Lowe (2002), p.5; Jackson (2015), p.158.

[114] A state's responsibility as a co-perpetrator is governed by Article 47 ASR (Plurality of Responsibility of States).

[115] Article 16(b) ARS.

[116] ARS, Article 16, Commentary, §6.

the principal state has acted in violation of a treaty obligation, the aiding state's responsibility will only be engaged if it is also party to the particular treaty. In this way the dual obligation requirement is an expression of the *pacta tertiis* rule, according to which a treaty cannot bind a third state without that state's consent.[117] As the Commentary explains,

> …a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State'.[118]

In circumstances where the principal has acted in violation of an obligation under customary international law, both states will be bound by the obligation, and the assisting state may be held responsible under Article 16. The question then arises whether, in order for a state to be complicit in a violation of international law by a non-state actor, the latter must be bound by the same obligation as a state?

Historically, only states could have international personality, and therefore only states were capable of committing internationally wrongful acts and of incurring international responsibility for those acts.[119] It followed that as there was no rule of international law that recognised individuals as 'subjects' of international law.[120] An individual did not hold obligations under international law, an individual could not breach international law, and thus a state could not be an accomplice or complicit in a breach of international law by an individual.[121]

States continue to be the primary holders of rights and obligations under international law. However, the notion that only states are subjects of international law is no longer sustainable. International law has developed such that it is now recognised that other entities, such as individuals, corporations and international organisations, may possess international personality.[122] The notion that non-state actors hold obligations under IHRL remains controversial,[123] but it is

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[117] Ibid. The *pacta tertiis* rule is reflected in Articles 34 & 35 Vienna Convention on the Law of Treaties, 1969.

[118] Ibid.

[119] E.g. Anzilotti (1906) p.286; Pellet (2010) p.6; de Frouville (2010) p.276.

[120] Ibid. For a comprehensive study of the development of legal theory of State responsibility from the Roman law doctrine of *jus gentium*, to Grotius to Anzillotti see Hessbruegge (2004); See also Becker (2006) pp.13-38 & pp.43-66, Pellet (2010) pp.5-6.

[121] de Frouville (2010), p.276.

[122] Pellet (2010) pp.6-7; Schwarzenberger (1976) p.42; de Frouville (2010) p.277; Clapham (2006).

[123] Rodley (2013) pp.524-526.

now accepted that that armed groups participating in armed conflicts hold obligations under IHL. Individuals may also be held responsible for committing acts contrary to ICL.[124] As Crawford posits, 'any person or aggregate of persons has the capacity to be given rights and duties by states, and in an era of human rights, investment protection and international criminal law, everyone is at some level 'the bearer of rights and duties' under international law'.[125]

The acceptance, as a matter of principle, that international law may bind non-state actors appears to remove the conceptual obstacle to a general rule on state complicity in the unlawful acts of a non-state actor. If non-state actors can hold international obligations then it follows that a non-state actor may commit an internationally wrongful act by acting in breach of that obligation. The question then arises whether, in order for a state to be complicit in that breach, the non-state actor must be bound by the same obligation as the state.

The dual obligation requirement, as provided by Article 16, can be satisfied if state complicity in the unlawful acts of armed groups is approached within the framework of IHL. First, an international armed conflict is not necessarily a conflict between two states. It may also be a conflict between a state and a non-state armed group that is recognised as a 'national liberation movement', or peoples 'fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self-determination'.[126] In these circumstances the armed group will be bound by the same obligations as the state. Second, it is well-established that IHL will bind the parties to a non-international armed conflict.[127] The obligations of states and armed groups that are parties to non-international armed conflict are provided by CA1 and CA3, Additional Protocol II (APII), and customary IHL, as well as written agreements entered into during the course of the conflict by the parties to the conflict.[128] Pursuant to CA3, all parties to the conflict should undertake obligations to ensure the humane treatment of persons not taking active part in hostilities.[129] All parties are prohibited from directly targeting civilians,[130]

[124] Articles 1, 2, 8(2)(c) & (e) Rome Statute.

[125] Crawford (2007) p.28. Also, Higgins (1994) p.49.

[126] Article 1(4) API.

[127] ICRC Customary IHL Database, Introduction; Sivakumaran, (2012) pp.181-182.

[128] On the practice of ad hoc written agreements on commitments to IHL and human rights law see Sivakumaran (2012) pp.124-139.

[129] Common Article 3 to GCs.

[130] This is a rule of customary IHL and Article 13(2) APII. See further the ICRC Customary IHL Database, rule 1.

indiscriminate attacks,[131] hostage-taking,[132] acts of terrorism,[133] torture,[134] inhuman and degrading treatment,[135] rape,[136] slavery[137] and pillage,[138] or threatening to commit any of those acts.[139] Moreover, as the ICRC Study on Customary IHL demonstrates, state practice has gone beyond the regulatory framework provided by treaty law and has extended rules applicable to international armed conflicts to non-international armed conflicts.[140] Accordingly, the dual obligation requirement will often be satisfied in circumstances where a state is complicit in the commission of a violation of IHL by an armed group that is party to an armed conflict.

Nevertheless, it is questionable whether the limitation on the scope of state responsibility for complicity that results from the dual obligation requirement is necessary or desirable. For Jackson, the requirement places 'undue limitation on the operation of a prohibition on complicity in international law'.[141] A general rule that prohibits complicity in any unlawful act, whether or not the complicit state would be in breach of its own international obligations if it committed the act, would go some way to ensuring that states respect the rule of law. Moreover, the dual obligation rule fails to recognise the wider interests of the international community in states' compliance with international law.[142]

The concern that the dual obligation requirement fails to recognise the wider community interests arises with respect to the formulation of a rule on state complicity in international crimes. Questions of individual criminal responsibility and state responsibility under international law are distinct.[143] For example, only natural persons may be prosecuted for genocide, crimes against humanity, and war crimes under the Rome Statute,[144] and thereby incur individual criminal

131 Ibid, rule 11.

132 Ibid, rule 96; article 4(2)(c) APII.

133 Ibid, rule 2; article 4(2)(d) APII.

134 Ibid, rule 40; article 4(2)(a) APII.

135 Ibid, rule 90; article 4(2)(e) APII.

136 Ibid, rule 93; article 4(2)(e) APII.

137 Ibid, rule 94, article 4(2)(f) APII.

138 Ibid, rule 52, article 4(2)(g) APII.

139 Article 4(2)(h) APII.

140 Ibid.

141 Jackson (2015), p.166.

142 Lanovoy (2011) p.31 & (2016) p.106; Jackson (2015) pp.166-167.

143 ARS, Article 58, Commentary, §3.

144 Article 25 Rome Statute.

responsibility for those acts. The Rome Statute does not define 'state crimes' or state responsibility for crimes committed by individuals.[145] In addition there are a number of treaties according to which states agree that certain acts constitute crimes under international law[146] or 'offences of grave concern in the international community',[147] whether or not those acts are committed in times of peace or war. The underlying purpose of this body of treaties is to enhance international cooperation in efforts to prevent the commission of such acts.[148] In order to achieve this aim, the treaties oblige states to criminalise these acts in domestic law[149] and to establish jurisdiction to prosecute those offences in the domestic courts.[150]

Thus, these treaties do not conceive the acts as 'state crimes', nor do the terms of these treaties expressly prohibit states from committing those acts. The obligation of states is to prevent the commission of such acts by individuals, whether those individuals are state or non-state actors, by implementing the appropriate domestic legislation to criminalise such acts under domestic criminal law, and to prosecute and punish individual offenders.[151] Thus, de Frouville has argued that 'if the individual cannot be an 'accomplice' to a wrongful act of the State, the State can conversely not be the accomplice of an international crime within the meaning of international criminal law'.[152] However the ICJ's interpretation of a state's obligations pursuant to the Genocide Convention in *Bosnia Genocide* has opened up the possibility that a state may be complicit in an international crime committed by an individual or group of individuals. As the following section will show, the ICJ applied the notion of dual responsibility rather than dual obligation. I argue that the former does not require that the obligation of the state and the non-state actor arise out of the same international instrument but a shared origin in an underlying principle of international law.

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145 Article 25(4) Rome Statute states that 'No provision of this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'. Similarly, Article 58 ARS provides that the ARS are without prejudice to the question of individual responsibility under international law.

146 E.g. Article I Genocide Convention.

147 E.g. Hostages Convention.

148 Also, Cassese (2005) pp.876-877.

149 E.g. Article III Genocide Convention; Article 1 Hague Hijacking Convention; Article 1(2)(b) Hostages Convention; Article 2(3) Bombings Convention; Article 2 Financing Convention.

150 E.g. Article 4 Hague Hijacking Convention; Article 5 Hostages Convention; Article 6 Bombings Convention; Article 7 Financing Convention.

151 Gaeta (2007).

152 de Frouville (2010) p.277. This theory may be tested by the Dutch municipal court in The Hague that in February 2019 heard preliminary arguments on the court's jurisdiction to determine a claim against the oil company Royal Dutch Shell on the basis of its alleged complicity in the state execution of nine protesters following a manifestly unfair trial and human rights abuses committed by Nigeria during the 1990s. The Court is due to give its ruling on jurisdiction in May 2019. See Austin, R., 'Ogoni widows testify at The Hague over Shell's alleged complicity in killings', The Guardian, 12 February 2019.

Understood in this way, the notion of dual responsibility surmounts the once perceived conceptual obstacle to state complicity in the unlawful acts of non-state actors generally.

### *5.6.1 ICJ's approach in Bosnia Genocide and the notion of dual responsibility*

*Bosnia Genocide* suggests that, rather than a duality of obligation, a duality of responsibility will be required in order for a state to be complicit in an international crime.[153] The notion, described by the Court as 'a constant feature of international law',[154] is reflected in Article 58 ARS and Article 25(4) of the Rome Statute, that provide that a finding of state responsibility is without prejudice to any question of individual responsibility and vice versa.[155] According to the ICJ's approach, duality of responsibility differs from the notion of duality of obligation as expressed in Article 16 ARS. Duality of responsibility requires that the obligation of the state and of the individual must derive from the same source, in the immediate case the Genocide Convention, but state responsibility and individual responsibility may be engaged on different terms.[156] According to the ICJ,

The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs *(a)* to *(e)* of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals.[157]

However, it must be remembered that the ICJ was constrained by its limited competence that meant it could only consider Serbia's obligations under the Convention and not customary international law. It is therefore open to question whether duality of responsibility requires the prohibition of conduct to arise out of the same source or instrument of international law, or whether it is sufficient for the prohibitions to originate from the same underlying principle of international law.

In *Bosnia Genocide* Serbia had submitted in reply to allegations that it was responsible for acts of genocide committed in Bosnia during the Balkans conflict that the Genocide Convention was merely intended to enhance international cooperation on the prosecution and punishment of

[153] *Bosnia Genocide* §173.

[154] Ibid.

[155] Ibid.

[156] Ibid, §163 & §§173-174.

[157] Ibid, §174.

individuals for the crime of genocide. As such, the Convention did not prohibit States Parties from committing genocide, and therefore the Court did not have jurisdiction *ratione materiae* to consider state responsibility for acts of genocide, and only had jurisdiction to consider state responsibility for the failure to prevent and punish genocide.[158]

The Court disposed of Serbia's argument by adopting an expansive interpretation of Article I, and the Convention as a whole, according to which States Parties 'undertake to prevent and punish' genocide, in light of the object and purpose of the Genocide Convention, and the status of genocide as 'a crime under international law'.[159] The Court concluded that the effect of the obligation to prevent and punish genocide necessarily implies the obligation not to commit genocide.[160] According to the Court's interpretation of Article I of the Convention, the Article imposes positive and negative obligations on States Parties that are distinct: the obligation to prevent genocide and the obligation not to commit genocide.[161]

It follows that States Parties to the Convention can be held responsible for the commission of all acts that constitute the offences listed in Article III that are attributable to them. Those acts include complicity in genocide.[162] In effect, the Court interpreted Article I by analogy to the undertaking common to human rights treaties whereby state undertake to 'respect and ensure' individual human rights and freedoms of all individuals in the state's jurisdiction.[163] As explained in chapter 4, that undertaking has been interpreted by international human rights courts to entail an obligation not to acquiesce in or assist the commission of violations of the human rights by another state or non-state actor.[164]

The ICJ noted that the term 'complicity' refers to a well-known category of criminal conduct and therefore appears particularly well adapted to penal sanction against individuals'.[165] However, the ICJ considered that '[i]t would however not be in keeping with the object and purpose of the

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[158] Ibid, §156.

[159] Ibid, §§160-162.

[160] Ibid, §166. *Cf.* Separate Opinion of Judge Owada, §44. Owada disagrees with the proposition that Article I necessarily implies the obligation not to commit genocide. Nevertheless, Article IX provides jurisdiction to consider state responsibility under general international law resulting from acts of genocide committed by individuals contrary to Article III of the Convention [§73]. See also chapter 4, 4.2.3.

[161] Ibid, §432.

[162] Ibid, §167.

[163] See chapter 4, 4.4.

[164] Ibid.

[165] *Bosnia Genocide*, §167.

Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III'.[166]

The Court's interpretation of the Genocide Convention has been criticised. Cassese agrees with the Court's interpretation of Article I so as to include the obligation not to commit genocide, but questions whether the Court's extension of the obligations of States Parties not to commit the acts enumerated in Article III on the basis of the object and purpose of the Convention alone was justified.[167] For Cassese, the Court's extension of state obligations not to commit *inter alia* complicity in genocide 'is in stark contrast' to the Court's rejection of the *Tadic* overall control test on the basis that it 'stretches too far, almost to breaking point, the connection that must exist between the conduct of a State's organs and its international responsibility'.[168] Accordingly, Cassese questions, without offering an answer, whether it is 'not also excessive unduly to widen state responsibility for genocide, without any support to this effect in state practice and *opinio juris*, or at least in general principles?'.[169] However, Cassese's critique fails to consider that the Court's approach does not widen state responsibility for genocide itself, as the application of the overall control test as a rule of attribution would, but engages state responsibility for certain acts related to the commission of genocide, namely conspiracy, incitement, complicity, and attempts to commit genocide.

Some judges criticised the Court's focus on the purposive approach to the interpretation of Article I and its conclusion that the obligation not to commit genocide is inherent in the obligation to prevent genocide. In a Joint Declaration Judges Shi and Koroma rejected this finding of the majority.[170] For them the object and purpose of the Convention is to prevent and punish genocide, and the Convention is therefore directed at individuals and not at states.[171] Accordingly, the state's obligation to prevent genocide 'has to be interpreted in the light of Article VI [the obligation to prosecute] and the attempt in the Judgment to sever Article I of the Convention from Articles IV,

[166] Ibid.

[167] Cassese (2005) p.878.

[168] Ibid, pp.878-879 quoting *Bosnia Genocide,* §406.

[169] Cassese (2005), p.879.

[170] *Bosnia Genocide,* Joint Declaration of Judges Shi and Koroma, §1.

[171] Ibid, §3. Also, *Bosnia Genocide,* Separate Opinion of Judge Tomka, p.310; Gaeta (2007).

V, VI, VII and VIII, in order to reach the outcome stated in the Judgment, is to us legally unsustainable'.[172]

Judge Owada agreed with the majority that international law recognises the principle of duality of responsibility but stressed that the question for the Court in the immediate case was whether the Genocide Convention recognised duality of responsibility for genocide.[173] For Judge Owada, the question of state responsibility for acts of genocide was a separate question to the state's obligation to prevent genocide.[174] The former question may be determined by the terms of the compromissory clause of the Convention that defines the scope of the jurisdiction of the Court.[175] The adding of the words, 'including those [disputes] relating to the responsibility of a State for genocide' to the standard formula used for such clauses that ordinarily refer simply to disputes relating to the interpretation and application of the treaty, brings, 'albeit through the jurisdictional backdoor… the justiciability of the question of State responsibility under general international law for an internationally wrongful act of genocide… within the scope of the jurisdiction of the Convention'.[176]

The criticism of Judges Shi, Koroma and Owada has some merit. Although as a matter of logic it is arguable that inherent to an obligation to prevent an act is the obligation not to commit that act, the absence of any express provision in the operative clauses of the Genocide Convention providing for state responsibility for the commission of genocide suggests that the Contracting Parties did not envisage such a broad interpretation of Article I, or that state responsibility for genocide would be engaged on the same terms as individual criminal responsibility for genocide.[177] Treaties, such as the Genocide Convention, that require States Parties to prevent the commission of certain acts by individuals and to ensure that the acts constitute offences under domestic criminal law are a manifestation of the state's general obligation to take positive measures to prevent and punish such acts, with the specific purpose of enhancing international cooperation in the suppression of such acts. The acknowledgment that a specific act constitutes a crime that the state must punish and take steps to prevent is evidence that the act is prohibited under international

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[172] Ibid, §4.

[173] *Bosnia Genocide,* Separate Opinion of Judge Owada, §56.

[174] Ibid, §58.

[175] Ibid, §60.

[176] Ibid, §72. Also, *Bosnia Genocide,* Separate Opinion of Judge Tomka, §56. Jackson (2015) p.205 posits that 'the wording of Article IX… provides a stronger textual argument for the imposition of state responsibility under the Convention'.

[177] Gaeta (2007) p.643. *Cf.* Seibert-Fohr (2017).

law.[178] However, the obligation to prevent an act is not the source of the prohibition of that act. The treaty obliges states to make the specific act offences in domestic law. The international prohibition, upon which state responsibility and international criminal responsibility is based, is provided by a separate body of rules provided by customary international law.[179]

It is overly formalistic to require that the state's obligation not to commit a specific act and the obligation to prevent that act derive from the same international instrument. The question should instead be whether state responsibility and individual criminal responsibility flow from a common underlying principle of international law.[180] As noted above, it should be appreciated that in *Bosnia Genocide* the Court was constrained by its limited jurisdiction to consider only state responsibility under the Genocide Convention. However, questions whether a court has jurisdiction to consider a particular issue should not dictate questions of a state's responsibility generally. As the commentary to Article 16 ARS states,

States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.[181]

Thus, it is not necessary to tether the dual responsibility requirement to the question whether the specific instrument recognises the duality of responsibility in order to invoke state responsibility for acts that also engage individual criminal responsibility. The provisions of treaties that require states to penalise certain offences in domestic law are expressions of general principles of international law. These treaties are manifestations of an agreement amongst State Parties that the acts proscribed therein are prohibited by international law, and that the suppression of those acts, including those in which states are directly or indirectly involved, is essential for the maintenance of international peace and security.[182] Gaeta argues that '[t]he state can incur international responsibility for [an international crime] only if, alongside the international criminal rule, there exists a corresponding rule that is *addressed to states* and has exactly the same content as the criminal

[178] Gaeta (2007), p.639; Milanovic (2006) p.681.

[179] Gaeta (2007), pp639-640; Milanovic (2006) p681 fn.57.

[180] For a similar argument that it is overly formalistic to require that States be bound by the exact same rule despite different rules representing the same norm, for example those provided by different human rights conventions that different States are party to, see Aust (2011) pp.263-265.

[181] ARS, Article 16, Commentary, §11.

[182] E.g. General Assembly Resolution 2625(XXV) Declaration on Principles of Friendly Relations, Preamble and §§1&4; General Assembly Resolution 49/60 (1994), Declaration on Measures to Eliminate International Terrorism, Annex.

one, i.e., an international rule that provides in the same terms for the criminal responsibility of individuals and the international responsibility of states'.[183] If this view is accepted, the duality responsibility requirement is satisfied even if corresponding rules that give rise to international crimes and the internationally wrongful acts of states are expressed in separate instruments.

In *Bosnia Genocide* the ICJ was careful to confine its reasoning to the provisions of the Genocide Convention, stressing that the Court did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation on States to prevent certain acts'.[184] Nevertheless, the ICJ's interpretation of the Genocide Convention may have important implications for the interpretation of a state's obligations pursuant to other 'criminal law' treaties, particularly in future cases in which the competence of the court is limited to determination of a state's obligations under a specific treaty. For example, the ICJ's approach in *Bosnia Genocide* has clearly influenced the submissions of Ukraine in its Application Instituting Proceedings against Russia before the ICJ. Ukraine has submitted that Russia's active support for certain terrorist acts, combined with its failure to prevent or investigate financing that contributed to those acts, is a violation of its obligation to prevent the financing of terrorism.[185] According to Ukraine's Application, 'Far from preventing the financing of terrorism, the Russian Federation has financed terrorism as a matter of state policy. These actions are blatant violations of Article 18 of the Terrorism Financing Convention'.[186] There is strength in this argument. It is difficult to argue that a state that has financed terrorism has fulfilled its obligation to prevent the financing of terrorism.[187]

In light of the ICJ's statement in *Bosnia Genocide* that it was not purporting to establish general jurisprudence in relation the obligation to prevent,[188] it is not surprising that Russia has argued that the Financing Convention 'does not cover matters of State responsibility for the financing of such activities by the State itself', and therefore 'purported instances of a State itself allegedly financing acts of terrorism as defined by the Convention do not fall within the jurisdiction provided for in Article 24 of the Convention'.[189] It is likely that Russia will seize on arguments made by Judges

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[183] Gaeta (2007) p.636. [Emphasis added] For Gaeta, a state should only be held internationally responsible for international crimes that are attributable to the state if those acts coincide with 'a systemic pattern of criminality organized, tolerated, or acquiesced in by the state'.

[184] *Bosnia Genocide*, §429.

[185] *Ukraine v Russia*, Application of Ukraine Instituting Proceedings, §§7-12 and §128.

[186] Ibid, §128.

[187] Also, Trapp (2011) p.138. *Ukraine v Russian Federation*, Provisional Measures, §30

[188] *Bosnia Genocide,* §429.

[189] *Ukraine v Russian Federation*, Provisional Measures, §27

Owada and Tomka in *Bosnia Genocide* and seek to distinguish the compromissory clause of the Financing Convention from its equivalent in the Genocide Convention on the basis that the former only refers to disputes relating to the 'interpretation and application of th[e] Convention' and not to state responsibility for any of the acts enumerated in the Convention.[190] Yet, the ICJ's emphasis in *Bosnia Genocide* was on the nature of a state's obligations pursuant to Article I of the Genocide Convention, rather than on the jurisdiction clause. It is open to the Court to adopt the same approach in *Ukraine v Russia.* If it does, then the Court's interpretation of the obligation to prevent may be applied in future cases to support claims of state responsibility for complicity in the commission of other international crimes. Most treaties that place obligations on states to prevent the commission of certain acts by individuals identify acting as an accomplice as a criminal offence.[191] For example, pursuant to the Hague Hijacking Convention, states are under an obligation to make being an accomplice to the hijacking of aircraft, as defined by the Convention, a criminal offence under domestic law.[192] Applying the approach of the ICJ in *Bosnia Genocide,* a state that provides financial, logistical and other support could be held internationally responsible for complicity by acting as 'an accomplice' in the hijacking.

### 5.7 An emerging general rule?

The general acceptance of the notion that international law can and does impose obligations on non-state actors raises the prospect that states may be held responsibility for complicity in violations of IHL and IHRL by armed groups, and the commission of offences under ICL by individuals. *Bosnia Genocide* held the door open to the possibility of state responsibility for complicity in international crimes. Moreover, as shown in chapter 4, states are prohibited from encouraging violations of IHL by armed groups and, under IHRL, prohibited from transferring individuals into the jurisdiction of another state or control of a non-state entity where there is a real risk of a flagrant violation of that individual's rights and freedoms. The development of these *lex specialis* rules of IHL and IHRL is a clear acknowledgement of the need for international law to address state involvement and participation in the unlawful acts of non-state actors that stand alone as crimes.

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[190] Article 24(1) Financing Convention.

[191] E.g. Article 1 Hague Hijacking Convention requires states to make acting as 'an accomplice to' a person who hijacks or attempts to hijack an aircraft a criminal offence. See also Article 1(2)(b) Hostages Convention; Article 2(3) Bombing Convention; Article 2 Financing Convention.

[192] Articles 1, 2 & 4 Hague Hijacking Convention.

The already existing primary obligations of states are sufficient to address state participation in a number of violations of international law. However, the existence of specific substantive rules prohibiting state complicity in certain unlawful acts by non-state actors, and requiring states to take measures to prevent the commission of those acts does not preclude the existence of a general rule.[193] A general rule of derivative responsibility of states for complicity in violations of international law by non-state actors would close the responsibility gap that exists in instances where the state's obligation to respect and ensure respect for IHL pursuant to CA1, and obligation to respect and ensure IHRL do not apply. For example, the general rule would cover circumstances where a state provides aid or assistance to an armed group that uses that aid or assistance to commit a terrorist bombing on the territory of another state, or a crime against humanity, prohibited conduct that is not necessarily committed in situations of armed conflict.

Thus, a general rule of derivative responsibility for complicity in violations of international law by non-state actors would be an important contribution to the progressive development of the law of state responsibility and would complement the primary obligations of states. A rule of derivative responsibility would preserve the current control-agency paradigm that is central to the ARS by ensuring that a state is only responsible for its own acts.[194] Importantly, a general rule of derivative responsibility would provide legal foundation to the political condemnation of states that are complicit in violations of international law by non-state actors but currently evade international responsibility by keeping those non-state actors at arms-length.

The question then arises as to what a general rule should look like? One approach may be to follow the approach of ICJ in *Bosnia Genocide* and apply Article 16 ARS by analogy.[195] In the absence of a general rule on state complicity in the unlawful acts of non-state actors in the ARS, Article 16 has been drawn on by analogy by states and human rights mechanisms to warn states that provide military and other support to armed groups of the possibility that their responsibility may be engaged. In 2013 Austria drew on Article 16 by way of analogy in order to warn states that had supplied arms to armed opposition groups in Syria that they might incur responsibility for complicity in the commission of internationally wrongful acts by those groups.[196] The Austrian paper draws attention to the conclusions of the Independent International Commission of Inquiry

[193] ARS, Article 16, Commentary, §2.

[194] *Cf.* Becker (2006), pp.337-345.

[195] Jackson (2015) pp.209-210 & 214.

[196] Austria, Discussion paper circulated at among EU Member States concerning Austria's position on the lifting of the EU Arms Embargo, 13 May 2013.

on the Syrian Arab Republic that armed opposition groups in Syria had committed war crimes and other unlawful acts. According to Austria, '[s]hould supplied arms be used by armed opposition groups in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid and assistance in the commission of such acts'.[197]

However, it is questionable whether a general rule of derivative responsibility for complicity in the unlawful acts of armed groups should adopt the same strict knowledge standard – 'knowledge and the intention to facilitate' - as Article 16 ARS. As explained in chapter 4, primary rules that prohibit state complicity in violations of IHL and IHRL tend to apply a constructive knowledge standard.[198] According to these rules the relevant question is whether the state knew or should to have known that its conduct would encourage, or its assistance would be used in, the commission of the violation of IHL or IHRL.[199] The constructive knowledge standard is favoured by the Independent International Commission of Inquiry on the Syrian Arab Republic that, citing Article 16 ARS in support of its determination that 'in addition to the specific obligations' of the parties to the Syrian conflict to respect and ensure respect for IHL, concludes:[200]

In addition to the specific obligations under international humanitarian law of all parties engaged in the Syrian conflict, the Commission reiterates that every state providing arms, funding, and other forms of support is required to refrain from providing such support if there is *an expectation based on past conduct* of the recipients that it will encourage the commission of violations of international humanitarian law.[201]

Thus, with respect to a general rule on state responsibility for complicity in the unlawful conduct of armed groups (and other non-state actors), there is support for view that the application of a constructive knowledge standard is appropriate. Such a standard would mean that states are required to conduct due diligence to acquire knowledge of the circumstances in which the armed group proposes to use the state's financial, military or other support. Accordingly, a state that supplies an armed group with weapons, in circumstances where a state should have known that

[197] Ibid, §4.

[198] Sections 4.3.2 & 4.4.2.

[199] Becker (2006) p.345 with respect to state-sponsored terrorism.

[200] See chapter 4.

[201] HRC, Independent International Commission of Inquiry on the Syrian Arab Republic, 'Human Rights Abuse and International Humanitarian Law Violations in the Syrian Arab Republic', 2017, p.22 §102. [Emphasis added]

those weapons may be used in the commission of acts contrary to IHL or for other unlawful purposes, would be responsible for complicity in such acts.

Moreover, the application of such a rule should not be conditional upon the fulfilment of the 'dual obligation' criterion required by Article 16 ARS such that the state and the armed group must be bound by the same obligation arising out of the same treaty instrument or international law. As argued in section 5.6, such a criterion would be overly restrictive. The purpose of a general rule of state responsibility for complicity is to ensure that states do not evade their international obligations by delegating warfare or other conduct to a proxy. Therefore, the existence of 'dual responsibility' should be sufficient. In other words, the rule should apply in circumstances where members of an armed group are individually responsible for the commission of acts that constitute offences as defined by international law, and if those acts would, if attributable to the state, constitute an internationally wrongful act of the state arising out of any customary or treaty-based norm binding on the state.

### 5.8 Conclusion

The ICJ's treatment of state responsibility for violations of international law committed by non-state actors in *Bosnia Genocide*, *Nicaragua* and *DRC v Uganda* demonstrates a gap in the current law of state responsibility. This gap exists between direct attribution for the acts of groups under the effective control of a state and the failure to prevent the crimes and other violations of non-state actors. In some instances that gap may be filled by a state's obligation to ensure respect for the IHL pursuant to CA1, that includes the negative obligation to refrain from encouraging violations of IHL. However, there will still be cases where the CA1 principles, or a state's human rights obligations, will not apply, as where the state is accused of complicity in crimes against humanity or terrorist acts that are not necessarily committed in situations of armed conflict.

In practice, according to the rules of attribution as codified by the ARS, a state that provides sometimes substantial, military and financial support to an armed group that commits unlawful acts is likely evade international responsibility for any contribution that support made to the commission of those acts. This is the case even if it was foreseeable that the armed group would use the state's support in the commission of the particular act. In circumstances where a state intends for its support to be use in the commission of unlawful acts, that state is able to escape liability for its contribution to injury that it would otherwise be liable for if the aid or assistance were provided to another state. States show no sign of abandoning the practice of proxy warfare.

A general rule of derivative responsibility for complicity in the unlawful acts of armed groups will go some way to closing the responsibility gap. Moreover, this rule would act as a deterrent to states that are reckless as to the methods used by their proxies and ensure that states are not able to evade their obligations under international law by use of a proxy.

## PART II: REBEL GOVERNORS AND SUCCESSFUL INSURRECTIONS

Part II of this thesis considers Articles 9 and 10 ARS that are exceptions to the control-agency paradigm that is otherwise central to the ARS and the identification of a state's *de facto* organs or agents. The rules of attribution of conduct provided by Articles 9 and 10 cover the conduct of 'persons or entities that exercise elements of the governmental authority in the absence or default of the official authorities' and of insurrectional movements that succeed in forming a new government or a new state respectively. Articles 9 and 10 have been generally overshadowed by the 'effective control vs overall control' debate considered in Part I, and therefore have received limited attention. Nevertheless, these rules of attribution raise important questions concerning the extent to which a state is, and should be, responsible for the conduct of armed groups that exercise control and governmental authority over part of a state's territory, and those that succeed in establishing a new government or a new state by using means and methods of warfare contrary to international law.

In chapter 6, I challenge recent scholarship that argues that Article 9 will apply to 'governmental' acts of armed opposition groups.[1] I show that Article 9 will only cover the conduct of an armed group that acts in the interests of, or with the acquiescence of, the state's authorities. In chapters 7 and 8 a critical approach is taken to the ILC's codification of Articles 10(1) and (2) that cover circumstances in which the conduct of a 'successful' insurrectional movement will be attributable to the state. I argue that the ILC's position that Article 10(1) 'should not be pressed too far in the case of Governments of national reconciliation' is not persuasive'.[2] To the contrary, provided that a new government meets the requirements of Article 10(1), invoking the state's responsibility for the unlawful conduct of all parties to an internal conflict provides an important legal basis upon which individual victims may seek reparation from the state. Further, I demonstrate that Article 10(2) is seriously flawed: the rule requires the new state to be bound by international obligations before that state existed in fact, a notion not supported by state practice or doctrine.

[1] Fortin (2017) & (2018).

[2] ARS, Article 10, Commentary, §7.

## Chapter 6. State Responsibility for the Conduct of Armed Group 'Governors'

### 6.1 Introduction

During an armed conflict between a government and an armed opposition group or groups, one or more of those armed groups may take control over part of the state's territory. Examples from the recent past include the self-proclaimed 'Donetsk People's Republic' and 'Luhansk People's Republic'[3] that, since 2014, have asserted control over parts of the Donbas region in eastern Ukraine, and the so-called Islamic State of Iraq and the Levant ('ISIL') that until 2017 controlled vast swathes of the territories of Iraq and Syria.[4] Other examples include the Taliban in Afghanistan;[5] the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka;[6] Hezbollah in southern Lebanon;[7] the Naxalites in Chhattisgarh State, India;[8] the Mouvement National de Libération de l'Azawad (MNLA) and successive Islamist groups in northern Mali;[9] the Sudan People's Liberation Army (SPLA) in (former) southern Sudan,[10] and competing armed groups in Libya.[11]

As a consequence of its loss of effective control over part of its own territory the state's ability to exercise domestic sovereignty over that territory will be limited. The ability to provide essential services, to maintain law and order, or to exploit natural resources will be precluded by the destruction, expulsion or usurpation of state institutions by the armed group. The state will have little influence or authority over the population living in that area. Of course, an armed group may operate in an area of a state that is so remote or inaccessible that there is in any event a complete

[3] Wedel (undated); HRC, 'Report on the human rights situation in Ukraine (2018); OSCE Special Monitoring Mission to Ukraine, 'Findings on Formerly State-Funded Institutions in Donetsk and Luhansk Regions' (2015).

[4] Callimachi, 'The ISIS Files', The New York Times, 4 April 2018.

[5] Rashid (2002); International Crisis Group, 'The Insurgency in Afghanistan's Heartland' (2011), p.8.

[6] Mamphilly (2011), pp.111-113.

[7] UN Secretary-General, 'Report of the Secretary-General on the United Nations Interim Force in Lebanon, delivered to the Security Council', (2006), §§27-28.

[8] HRW, 'Being Neutral is Our Biggest Crime': Government, Vigilante and Naxalite Abusies in India's Chhattisgarh States' (2008), pp.21-22.

[9] Branson & Wilkinson (2013); UN Security Council, 'Final Report of the Panel of Experts established pursuant to Security Council resolution 2374 (2017) on Mali', (2018), §§15-17.

[10] Mamphilly (2011), pp.148-150.

[11] UN Security Council, 'Final Report of the Panel of Experts established pursuant to Security Council resolution 1973 (2011) concerning Libya' (2014) pp.10-14; Lacher & al-Idrissi, 'Capital of Militias: Tripoli's Armed Groups Capture the Libyan State', Small Arms Survey Briefing Paper (2018).

absence of state institutions.[12] In these circumstances one might argue that the armed group has not so much 'seized' control of the area in which it operates, but rather taken advantage of the geography of the region that limits the state's ability to assert its authority. Nevertheless, in the absence of government, and in circumstances where civilians live under the armed group's control, the armed group may establish its own administration in order to ensure the provision of law and order and essential services, such as water, electricity, and medical care to the local population. As Sivakumaran has observed, this is 'a conscious effort on the part of the armed group to afford services that are traditionally provided by the state in an attempt to normalize the situation, to present the image of a stable and functioning regime, and to create a quasi-state'.[13] The most striking example is that of ISIL that took control of vast swathes of Iraq and Syria. ISIL established a pseudo-state that micromanaged the everyday lives of the population under its control and ran a self-sustaining economy based on the trade in key oil assets seized from Syria, taxation, extortion and selling plundered antiquities on the black market.[14] This is not a new phenomenon. For more than two decades, between 1983 and 2009, the LTTE exercised effective control over large parts of northern and eastern Sri Lanka where it established local administrative bodies that carried out functions ordinarily mandated to government such as revenue collection, courts and policing, public services and economic development initiatives.[15]

The international legal dilemmas raised by a state's loss of control over its territory are often framed in terms of the threat to international security posed by the state's inability to prevent terrorism, drug trafficking and other organized crime committed by armed groups, and whether current rules of international law are adequate to deal with that threat.[16] For example, the debate concerning ISIL has revolved around the question whether a third state may use force against ISIL on Syrian territory without the consent of the Syrian government.[17]

In this chapter I consider the issues raised by a state's loss of control over territory within the framework of the law of state responsibility. This is important in relation to questions concerning

[12] E.g. *DRC v Uganda,* §300 in which Uganda had submitted that armed groups were able to operate 'unimpeded' in the DRC-Uganda border region because of 'its mountainous terrain, its remoteness from Kinshasa (more than 1,500km), and the almost complete absence of central government presence and authority in the region'.

[13] Sivakumaran (2012) p.559.

[14] Cronin, 'ISIS is not a Terrorist Group', *Foreign Affairs,* March/April 2015; Callimachi, 'The ISIS Files', The New York Times, 4 April 2018.

[15] Stokke (2006) p.1022.

[16] Crawford & Miscik, 'The Rise of Mezzanine Rulers', *Foreign Affairs*, November/December 2010.

[17] Akande & Milanovic (2015); Gray (2018) pp.237-248. See below section 6.5.

international responsibility for acts committed by armed group 'governors'. Unlike the scenarios considered in Part I of this thesis, in these circumstances there is no question of control by the state over the armed group. However, the capacity of some armed groups to create a 'quasi-state' or 'quasi-government' and to govern territory under their control effectively raises the question whether these armed groups are or should be considered as 'quasi-organs' of the state for the purposes of the law of state responsibility. In such cases the armed group will be the *de facto* government of the territory that it controls. Organisationally, there may appear to be little difference between an armed group's authorities and the official authorities, as the armed group may emulate or take over existing state structures. Moreover, the policies and 'laws' of an armed group's administration may have equivalent impact on everyday life in the area under the armed group's control.[18] Civilians continue to live and work in these areas. Children are born, people fall ill or die, property is sold or transferred, businesses continue to operate, people may commit criminal offences unrelated to the conflict, and individuals may enter or leave the armed group-controlled territory through check-points controlled by the group.[19] Individuals may also be subject to abuse, intimidation and violence at the hands of the armed group, particularly but not exclusively with regard to the provision of law and order.

The question of the extent to which the acts of an armed group that exercises governmental authority may be attributed to the state is distinct from that of state responsibility for the conduct of a successful insurrectional movement.[20] In the latter case the attribution of acts of the successful insurrectional movement are covered by Article 10 ARS.[21] By contrast, it is the question of state responsibility for the conduct of an 'unsuccessful' armed group or 'insurrectional movement' that is considered here. For the purposes of this study an 'unsuccessful' armed group is one that has been defeated by the incumbent government or one that is *not yet* successful or defeated, in the sense that the conflict is still on-going and the eventual outcome unknown. Writers have described armed groups that exercise governmental functions but are not, or not yet, 'successful' in different ways: for example as '*de facto* revolutionary governments' or 'local *de facto* governments',[22]

[18] Fortin (2017) pp.27-32.

[19] E.g. The LTTE erected check points between LTTE and Sri Lankan government-controlled areas. See Mampilly, (2011). The self-proclaimed Donesk People's Republic has also erected and manned check points between the area under its control and the rest of Ukraine: Losh, 'Checkpoints Block Civilians, Aid Traffic in Eastern Ukraine'. Vice News, 8 July 2015.

[20] See chapter 7 for discussion of the ILC's definition of 'insurrectional movement'.

[21] See chapters 7 & 8.

[22] O'Connell, (1970) p.970.

'unsuccessful revolutionaries',[23] 'unsuccessful insurgent governments',[24] or simply 'armed bands'.[25] Similarly, the term '*de facto* government' can be used to describe the central authorities of a state that are not recognised as the *de jure* government.[26] In this study the term 'armed group governor' is used. Reference to an 'armed group' should be understood to include any administrative authority established by that group.

The law of state responsibility is rarely invoked with regard to the conduct of armed group governors. This is not surprising. As a general rule the state is not responsible for the conduct of private or non-state actors.[27] However, the question of state responsibility for the conduct of armed group governors does appear to be addressed by Article 9 ARS. Article 9 covers the conduct of 'a person or group of persons' that exercises 'elements of the governmental authority in the absence or default of the official authorities'. Article 9 ARS provides,

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

As with Article 8 ARS, Article 9 refers to the conduct of 'a person or group of persons'. It would seem, therefore, to apply to *any* person or group of persons, including 'armed opposition groups' - groups engaged in an armed conflict with the incumbent government. The proposition that Article 9 covers the conduct of armed opposition groups is supported by references to Article 9 in the ILC Commentary to Articles 5 and 10 ARS.[28] Article 5 covers the conduct of persons or entities empowered by the law of the state to exercise elements of governmental authority. The Commentary to Article 5 states,

The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where... an entity or

[23] Schwarzenberger (1957) p.629.

[24] Silvanie, (1939a) p.87 & (1939b) p.95.

[25] Cahin (2010) pp.334-335.

[26] ILC Report (1974), p.286 §12. See further below, section 6.3.

[27] ARS, Article 8, Commentary, §1.

[28] Fortin (2018) p.373 & fn.10.

group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: *these are dealt with in article 9*.[29]

Further, Commentary to Article 10 states,

> The general principle in respect of the conduct of [insurrectional] movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example *in the special circumstances envisaged by article 9*.[30]

The reference to Article 9 and the conduct of 'insurrectional movements' committed during a continuing struggle with the constituted authority in the commentary to Article 10 is interesting for two reasons. First, the ILC Commentary to Article 9 does not refer explicitly to 'insurrectional movements' or armed groups, or to any legal precedent or state practice that would support Article 9's application to unsuccessful 'insurrectional movements'. Second, it is extremely unlikely that states and their governments would accept any suggestion that a state may be held directly responsible for the internationally wrongful conduct of an armed group that seeks to overthrow the state's government or establish a new state, unless and until that movement is successful.[31] For example, in response to the establishment of a separate legal system by the LTTE in areas under the latter's control, the Chief Justice of Sri Lanka, Sarath N. de Silva said,

The LTTE can have a conciliation mechanism if they want, like if two neighbors are at dispute then settling such a dispute in an amicable matter is all right. But they have no judicial authority. Judicial power is part of the sovereignty of the people and it cannot be exercised by any other person than those who are vested with it. If someone else is administering justice then he is doing it on his own accord.[32]

The ILC presents a confusing picture and raises the following questions: First, did the ILC intend Article 9 'in special circumstances' to be applicable to 'unsuccessful' armed groups? Second, if so,

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[29] ARS, Article 5, Commentary, §7. [Emphasis added]

[30] Emphasis added. ARS, Article 10, Commentary, §2. The question how 'success' is defined by the ILC for the purposes of Article 10 ARS is addressed in chapter 7. See also Fortin (2018) p.373 & fn.10.

[31] As provided by Article 10 ARS.

[32] Kamalendran, 'The inside story of 'Eelam Courts', 14 November 2004, The Sunday Times (Sri Lanka).

is there any legal precedent or state practice to support the application of Article 9 to the conduct of such 'unsuccessful' armed groups?

Article 9 has received limited detailed attention.[33] The scholars who have considered whether Article 9 applies to the conduct of armed opposition groups have drawn conflicting conclusions. Crawford states that it does not.[34] Rather, the conduct of an armed opposition group is only attributed to the state upon the movement's success in establishing a new government or state, pursuant to Article 10 ARS.[35] Some take the opposite view, namely that Article 9 covers any conduct of any armed group that falls within the terms of the article.[36] Others take the view that the principle's application may be limited to more 'traditional' governmental functions exercised by armed groups related to customs, taxation, immigration control and the administration of law and order.[37] These conflicting interpretations of Article 9 and its application to the conduct of armed groups calls for a re-consideration of the case law and state practice drawn upon by the ILC in support of the rule. In order to do so, it is necessary to venture back to the debates both within the ILC and between others during the 1970s when the rule was first introduced to the draft ARS by Special Rapporteur Ago who did the majority of the work on Article 9. As the Commentary to Article 9 offers little assistance, it is only by understanding the origins of the rule that one can determine whether there is any support for its application to the conduct of armed groups.

I will argue that there is support for the notion that certain administrative acts committed by an armed group that give rise to private law rights, such as the entering into commercial contracts, and the registration of births, deaths and marriages, should be treated as valid. The approach of the ICJ and the ECtHR to the question of the validity of the acts of an administration declared 'illegal' by the Security Council supports the principle that conduct of a person or entity that, in the absence or default of the official authorities, exercises elements of governmental authority that benefit the local population should also be treated as 'valid'. However, the question of the validity of certain acts is distinct from the question of the attribution of conduct to a state, thereby

[33] With the exception of Fortin (2018). In this chapter I argue that Fortin's analysis of authority and state practice in support of the application of the rule to armed opposition groups that exercise 'traditional' functions of government is not persuasive.

[34] Crawford (2013) p.168.

[35] Ibid.

[36] Becker (2006), p.77 fn.170 and pp.222-223.; Ruys (2007); Cahin (2010b) p.334.

[37] Verhoeven (2015) p.295; Fortin (2018) pp.379-380. *Cf.* Bílková (2015) pp.269-270 who posits that Article 9 ARS will only apply in circumstances where there is a 'bona fide' need for the exercise of governmental authority i.e. the absence of State institutions is not the result of the activities of the armed group itself.

engaging that state's responsibility for an act that violates its international obligations. With respect to the latter question, there is no support in case law or state practice for the proposition that a state will be responsible for internationally wrongful acts committed by an armed opposition group in the exercise of 'governmental authority' unless the state knew and did not specifically object to the performance of those acts.

The argument that follows is constructed in five stages. In section 6.2 I map out the requirements that must be met in order for Article 9 to apply. In section 6.3 I consider the personal scope of Article 9 and the rule's application to armed groups. 'Personal' is used to refer to all legal and physical persons. Specifically, I address the issue of the extent to which, if at all, Article 9 applies to the conduct of armed groups. First, I consider the ILC Commentary to Article 9. As a result of this analysis it is concluded that the answers cannot be found in the Commentary itself, which raises more issues than it resolves. Accordingly, I go on to consider the analysis provided by Special Rapporteur Ago upon the introduction of the rule in his third report in 1971[38] and later as draft Article 8 submitted to the ILC for discussion in 1974[39] in order to determine the intended personal scope of the rule. In this section I consider the arguments, rejected by Special Rapporteur Ago, posited by Silvanie in 1939 and D. P. O'Connell in 1970 in favour of the rule's application to armed groups, based on the decisions of the Mexican Commissions concerning claims arising out of the Mexican revolutions in the late 19th and early 20th centuries.

In section 6.4 I consider the state practice and jurisprudence of the ICJ and the ECtHR that supports the principle that certain administrative acts committed by armed opposition groups should be recognised as valid, and the extent to which this assists in the interpretation of the scope of Article 9.

In section 6.5 I draw a distinction between the situation in which an armed group seeks to overthrow a government and that in which a government acquiesces to the exercise of governmental authority by an armed group on its territory. In doing so, I consider Article 9's application to the exercise of governmental authority by armed groups acting against a third state, but not necessarily contrary to the interests of the host state. In this part of the study I question the suggestion that Article 9 may be used to justify the use of force by states against the state that

[38] Ago, Third Report (1971), pp.262-263.

[39] Draft Articles submitted by the Special Rapporteur, *ILC Ybk* 1974, Vol.I, p32, §1. It later became draft article 8(b) in the draft articles provisionally adopted by the ILC on first reading in 1996, before becoming Article 9 in the articles adopted by the ILC in 2001.

is 'harbouring' or passively supports the group.[40] I will argue that Article 9 does not provide a legal justification for the use of force against a state in response to cross-border attacks by armed groups. This question is governed by the law on the use of force. However, this analysis gives rise to the question explored in Part 6.6, namely whether notions of state toleration of or acquiescence in the exercise of governmental authority by armed groups may play a role in the operation of Article 9 in circumstances other than those governed by *lex specialis* rules of international law. I conclude that Article 9 will only apply to the conduct of an armed group in the very exceptional circumstances that the armed group implements the directives of the *de jure* government of a state, with the cooperation or acquiescence of that government.

## 6.2 Requirements of Article 9 ARS

The ILC Commentary on Article 9 identifies three conditions for the operation of the rule: the exercise of the governmental authority; the absence of or default of official authorities; and circumstances such as to call for the exercise of elements of governmental authority. The following sections will look at each of these conditions in turn.

### *6.2.1 Exercise of the governmental authority*

The nature of the activity performed by the 'person or group of persons' is essential to the operation of Article 9. This distinguishes the rule from Article 8 ARS that requires a factual link between the state and the person or group of persons on the basis that the person or group is 'acting on the instructions of, or under the direction or control of' the State'.[41] Instead, Article 9 gives more weight to the fact that the person or group of persons 'must be performing governmental functions, though they are doing so on their own initiative'[42] and may do so without the knowledge of the official authorities.[43] Thus, Article 9 attributes to the state the conduct of persons or groups of persons that have no prior or formal link to 'the machinery of the State'. With this in mind, the ILC has stressed in its commentary to the draft articles adopted at its 26th session in 1974 that the rule applies 'only in genuinely exceptional cases'.[44]

[40] Ruys (2007) p.289; Murphy (2002) p.50. In a footnote Becker briefly suggests that Article 9 may apply to the use of force following 9/11: Becker (2006) p.77 fn.170.

[41] Cahin (2010b) p.334. See chapter 2.

[42] ARS, Article 9, Commentary, §4.

[43] ILC Report (1974), Commentary to draft article 8(b), p.285 §10.

[44] Ibid, §12.

The ILC Commentary does not stipulate what acts would constitute an 'exercise of the governmental authority' for the purposes of Article 9. This is consistent with the approach taken by the ILC to the definition of 'governmental authority' for the purposes of Article 5 ARS in which the ILC expressly states that 'it does not attempt to define precisely the scope of "governmental authority" for the purposes of attribution of conduct to the state'.[45] The ILC Commentary explains that 'beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions'.[46] In its commentary on Article 9 the ILC merely refers to the exercise of 'police or other functions', without defining what those 'other functions' might be.[47] However, the Commentary does cite *Yeager* as an example of the exercise of 'governmental authority'.[48] In this case the Iran-United States Claims Tribunal concluded that immigration and customs duties carried out by the Revolutionary Guard at Tehran Airport in the immediate aftermath of the revolution in the Islamic Republic of Iran would fall within the meaning of 'governmental authority'.[49] Beyond a reference to *Yeager* the Commentary does not provide any other examples of acts that would constitute the exercise of 'governmental authority'. However, the ILC's draft commentary to draft articles 1-9 adopted in 1974 provides a non-exhaustive list of examples of 'acts of governmental authority', drawn from instances during the Second World War. The draft commentary to draft Article 8(b),[50] states,

During the Second World War, for example, in belligerent countries and any other country invaded, local administrations fled before the invader, or, later, before the armies of liberation. It then sometimes happened that persons acting on their own initiative provisionally took over, in the interests of the community, the management of certain public concerns or that committees of private persons provisionally took charge of the administration, issued ordinances, performed legal acts, administered property, pronounced judgements, etc., in other words exercised elements of governmental authority. In such circumstances it may also happen that private persons acting on their own initiative assume functions of a military nature; for example, when the civilian population of a threatened city takes up arms and organizes its defence.[51]

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[45] ARS, Article 5, Commentary §6.

[46] Ibid.

[47] ARS, Article 9, Commentary, §6.

[48] Ibid, §2.

[49] *Yeager* (1987) §43.

[50] That was to become Article 9 ARS.

[51] ILC Report (1974), Commentary to draft article 8(b), p.285 §9. Also, Ago, Third Report (1971), p.263, §189. *George Hopkins* (1926), §4.

With regard to the assumption of 'functions of a military nature', the ILC drew support from Article 2 of the Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention (IV) 1907[52] and Article 4A(6) of the Third Geneva Convention on the Treatment of Prisoners of War 1949 (GCIII).[53] The two provisions, similarly worded, extend prisoner of war status to civilians who, living in unoccupied territory, spontaneously take up arms to resist an invading enemy army.[54]

Similarly, as explained in chapter 3,[55] in *Stephens* the US-Mexico General Claims Commission concluded that Mexico was responsible for the conduct of a member of an 'informal municipal guards organisation' called the 'defensas sociales' that manned security check points after federal troops had withdrawn from the state during the revolution in Mexico 1923-1924.[56] Valenzuela's conduct was attributed to Mexico on the basis that he must be considered as a soldier, in spite of the fact that the defensas sociales were essentially vigilante groups. Attribution of Valenzuela's conduct was not based on any formal organ status afforded to the defensas sociales, or on any evidence of control exercised over the defensas sociales by the state, of which there was none.[57] Valenzuela was treated as if he was a soldier, a state organ, because of the nature of the conduct – the administration of law and order – in the absence of Federal troops that had withdrawn from the state of Chihuahua.

Thus, for the purposes of Article 9, functions that constitute 'governmental authority' may be defined as functions ordinarily the prerogative of government, such as the administration of law and order, border security, and other functions that usually may only be performed by a private

[52] Article 2, 1907 Hague Regulations. Article 2 extends belligerent status to 'inhabitants of a territory that has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves'.

[53] Article 4A(6) GCIII provides that, 'Prisoners of war... are persons belonging to one of the following categories, who have into the power of the enemy:... (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war'.

[54] ILC Report (1974), Commentary to draft article 8(b), p.285 fn.593.

[55] Section 3.4.1.

[56] *Stephens* (1927) §§4 & 7. For a summary of facts of this case see chapter 3, 3.4.1. *Stephens* is cited by the commentary to Article 8 ARS as support for the attribution of conduct of persons or entities acting under the instruction, direction or control, of the State. However, as argued in chapter 3 on close reading the facts of the case are more aligned to Article 9 ARS.

[57] *Cf.* Crawford (2013), p.142.

actor if that actor is vested with the authority of the state.[58] Such functions will include: the exercise of police and judicial functions; the administration of property; the issue of ordinances; the use of force in self-defence against an invading foreign army; entering into contracts that give rise to private law rights; the registration of births, deaths, and marriages; the collection of taxes; the operation of public transport systems; and immigration and customs control.

### *6.2.2 In absence or default of the official authorities*

The second condition for the operation of Article 9 is that the person or group of persons is acting in 'the absence or default of the official authorities'. According to the ILC Commentary this may be in cases where the state apparatus has collapsed in its entirety, or where the state is unable to exercise its functions because its apparatus has failed in part or it has lost control over part of the state's territory. The Commentary states that this requirement,

> . ..is intended to cover both situations of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality.[59]

Situations that may satisfy the condition of 'absence or default' of the official authorities will arise where the government's infrastructure has been physically destroyed as a result of armed conflict, or in the immediate aftermath of an armed conflict where a new government is not yet fully established such that it is able to carry out all the duties expect of government. Thus, in *Yeager* the Iran-US Claims tribunal considered that the principle provided by Article 9 applied to the exercise of immigration and customs duties at Tehran Airport by members of the local revolutionary committee, loyal to the new government, despite the fact that they were not authorised to carry out such duties by the government at the relevant time.[60]

Although the Commentary refers to 'situations of a total collapse of the State apparatus', Article 9 is not intended to apply to '*de facto* governments' – a government that 'is itself an apparatus of the

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[58] Ibid. p.169. *Cf.* Fortin (2017) pp.268-269; (2018) p.383. The attribution of conduct of persons or entities authorised to exercise elements of governmental authority is covered by Article 5 ARS.

[59] ARS, Article 9, Commentary, §5.

[60] The government formally recognised the Revolutionary Guard as an organ of government in May 1979. The conduct that was subject of the *Yeager* took place in February 1979.

State, replacing that which existed previously'.[61] One might assume, although it is not made entirely clear by the Commentary, that 'total collapse' refers to a post-apocalyptic scenario caused by conflict or natural disaster where the citizens of a state are left without government and therefore take it upon themselves to re-build the administrative structures but do not claim to be the government.

There is no indication in the Commentary that Article 9 would not cover circumstances where part of a state's territory is governed or administered by an armed group that directs its acts against the government. This question is examined in section 6.3 of this chapter. Before doing so, it is important to consider the third condition of Article 9 ARS, that the circumstances must 'call for' the exercise of governmental authority. The interpretation of this requirement is important to the question of Article 9's application to the conduct of armed opposition groups: in particular, whether circumstances in which the total or partial collapse of a state's authorities results from the activities of an armed opposition group can 'call for' the exercise of governmental authority by that group.

### *6.2.3 'Circumstances such as to call for it'*

The third condition to Article 9 introduces the notion of necessity. As the Commentary explains '[t]he principle underlying article 9 owes something to the old idea of *levée en masse*, the self-defence of the citizenry in the absence of regular forces: in effect it is a form of agency of necessity'.[62] 'Necessity' here is not a 'circumstance precluding wrongfulness' as it is understood by Article 25 ARS. As Special Rapporteur Crawford explained the phrase 'such as to call for' is used to emphasise that it is the exercise of governmental functions that is required in the circumstances and not necessarily the particular conduct.[63]

Article 9 appears to cover the conduct of any 'person or group of persons', including armed opposition groups, whatever their political or ideological ambitions. After the discussion of the meaning of the term 'call for' the Commentary concludes,

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[61] ARS, Article 9, Commentary, §4. For a more detailed discussion of the definition of '*de facto* government' see section 6.3 below.

[62] ARS, Article 9, Commentary, §1. Pursuant to Article 2, 1907 Hague Regulations and Article 4A(6) GCIII this conduct is lawful and belligerent status is afforded to participants in a *levée en masse*. In effect, the acts of individuals are transformed into public acts and participants in a *levée en masse* are treated as if they were agents of the State.

[63] Crawford, First Report (1998), p.44 §§217-218.

There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.

It is not clear what is meant by 'normative element in the form of agency'. The ILC appears to be trying to convey the idea that it is the nature of the conduct and not a factual link between the person and the state that is important to the operation of the rule. Nevertheless, this sentence is interesting because it seems to suggest that Article 9 applies to the conduct of 'insurrectionary forces'. Yet it is highly likely that states and their governments would reject outright any suggestion that the state may be held directly responsible for the internationally wrongful acts of an armed opposition group that controls and governs part of that state's territory and seeks to overthrow that state's government or establish a new state.

There is some suggestion in the Commentary that Article 9 would not apply to the conduct of a person or group of persons that has created or contributed to the circumstances surrounding the exercise of elements of governmental authority. This is hinted at by the condition that,

> ... the circumstances surrounding the exercise of elements of the governmental authority by private persons *must have justified* the attempt to exercise police or other functions in the absence of any constituted authority.[64]

'Must have justified' may be understood in two ways. On the one hand, it may be understood to mean that because of the absence or default of the official authorities and lack of intervention from the state machinery due to its destruction in full or in part, the individuals concerned are justified to take it upon themselves to fill the shoes of government in order to forestall the complete breakdown of public order and protect the essential interests of the population – such as security, access to clean water, sanitation, food, electricity and fuel.[65] This is the interpretation offered by Fortin, the only contemporary scholar thus far to have considered in depth the scope and application of Article 9 to armed groups generally.[66] In Fortin's view, '[i]n circumstances where

[64] ARS, Article 9, Commentary, §6.

[65] Fortin (2018) p.385.

[66] *Cf.* Ruys (2007) considers the application of Article 9 ARS to the question of attribution of cross-border attacks by an armed group in the context of the victim's State's right to use force in self-defence against the State on whose territory the armed group is operating pursuant to Article 51 UN Charter.

the *de jure* government is absent, there will be a good argument that the acts in question were 'called for".[67]

Alternatively, 'must have justified' may be understood to mean that the initial reason for the absence or default of state machinery must justify the exercise of governmental functions. Thus, the absence of 'constituted authority' would not in and of itself create the circumstances to justify the 'attempt to exercise police or other functions'. If the state of affairs is of the person or group of person's own creation, for example where an armed opposition group has successfully driven out or destroyed the official authorities and taken control of part of the territory of a state, the exercise of governmental functions may be necessary in order to maintain law and order, but it may not be 'justified' in the sense that the group cannot take advantage of disorder and pending humanitarian disaster of its own creation.[68]

The ILC's intended meaning of the phrase 'the circumstances surrounding [the conduct] must have justified' the exercise of elements of the governmental authority is not clear from the Commentary. Therefore, in order to determine whether and if so, to what extent Article 9 covers the conduct of armed opposition groups it is helpful to look at the drafting history of the rule. In particular, it is helpful to consider the work of the ILC under the supervision of Special Rapporteur Ago during the 1970s, who made the most substantial contribution to the rules of attribution of the conduct of non-state actors, and arguments made by some scholars in favour of Article 9's application to armed opposition groups that were considered and rejected by Ago.

### 6.3 Armed opposition groups

The Commentary to Article 9 defines 'person or group of persons' to some degree by stating what category of 'private persons' the rule does not apply to. The Commentary stresses that 'the private persons covered by Article 9 are not equivalent to a general *de facto* government'.[69] As stated above, the conduct of the organs of a 'general *de facto'* government' are covered by Article 4 ARS, and not Article 9.[70] However, the use of the term 'general *de facto* government' is problematic. The Commentary does not explain what it means by the term other than to say that a 'general *de facto*

[67] Fortin (2018) p.385.

[68] Bílková (2015) p.269. *Cf.* Cahin (2010b) p335.

[69] ARS, Article 9, Commentary, §4.

[70] Ibid. Article 4 covers 'the conduct of any State organ'... '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'.

government' 'is itself an apparatus of the State, replacing that which existed previously'.[71] Moreover neither Article 4 nor the commentary thereto refer to a 'general *de facto* government'. This raises difficulties because the term '*de facto*' is used to describe a number of different types of government of different legal status (in internal and international law) and different degrees of control over territory. Talmon has helpfully summarised these as follows:

> ...the term *de facto* government has been used to describe (1) an effective government, i.e. a government wielding effective control over people and territory, (2) an unconstitutional government, (3) a government fulfilling some but not all the conditions of a government in international law, (4) a partially successful government, i.e. a belligerent community or a military occupant, (5) a government without sovereign authority, and (6) an illegal government under international law.[72]

In order to determine exactly what the ILC intended to mean by 'general *de facto* government' it is necessary to look back at its commentary on the draft articles in 1974, and to the award by Arbitrator Taft in the *Tinoco Case*, cited by the ILC in a footnote.[73] It can be deduced from these two sources that for the ILC 'general *de facto* government' means a government as understood by international law that is firmly established as the government of the state, but is unconstitutional according to the internal laws of the state. The commentary to draft Article 8(b) of 1974 explains that,

> [t]he term "*de facto* government", or "general *de facto* government", is sometimes used to denote a government which, though not invested with power in accordance with the previously established constitutional forms, has fully and finally taken power, the previous government having disappeared. The adjective in question then merely reflects the existence of a problem of legitimacy concerning the origin of the new government... All this is without relevance to the problems of international responsibility, in which no distinction may be made between a State ruled by a *de facto* government and one ruled by a *de jure* government... The State organization exists in the one case as in the other; and the

[71] ARS, Article 9, Commentary, §4.

[72] Talmon (1998) p60.

[73] ARS, Article 9, Commentary, §4 fn.169; *Tinoco Case* (1923).

> persons who are part of it are no less "organs" – true organs – of the State because the Government has a *de facto* rather than a *de jure* origin.[74]

In the *Tinoco Case* Arbitrator Taft considered what constitutes a government in international law. He concluded:

To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true... The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?[75]

Except for the ILC's efforts to distinguish what it calls 'general *de facto* governments' from the 'private persons' covered by Article 9, the Commentary defines the personal scope of application of the article in general terms, referring to what it calls 'irregulars':

> The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases.[76]

This raises the question whether Article 9 would apply to the conduct of *all* 'irregulars', including an armed opposition group. The Commentary's explanation of the meaning of the phrase 'in the absence or default of' suggests that it may. As noted, the Commentary states that the ILC envisaged Article 9 would cover situations of 'total collapse of the State apparatus' and situations of 'partial collapse', where the state has lost control 'over a certain locality'.[77] This explanation, read together

[74] ILC Report (1974), p.286 §12.

[75] *Tinoco Case* (1923) p.382.

[76] ARS, Article 9, Commentary, §4.

[77] Ibid, §5.

with the 1974 draft commentary reproduced above, suggests that the scope of Article 9 would include the conduct of members of an armed opposition group who have replaced the official authorities, either by appropriating already established administrative apparatus or by replacing elements of the 'state machinery' with its own administrative infrastructure as, for example, the establishment of tribunals by the LTTE in areas under its control in Sri Lanka, enforcing its own penal and civil codes in order to try disciplinary, criminal and civil cases.[78] However, as argued above, one interpretation of the requirement that circumstances must 'call for' the exercise of governmental authority would mean that 'irregulars' who are the cause of the circumstances would be excluded from Article 9's scope. If that is the case, the conduct of the LTTE's civil administration would not be attributable to Sri Lanka pursuant to Article 9.

As noted above, there is no agreement in the literature on whether Article 9 applies to the conduct of armed opposition groups. This lack of consensus demonstrates a need for a clear understanding of the intended scope of Article 9. The following section attempts to achieve this clarity by first considering the ILC's early rejection of the application of Article 9 to armed opposition groups. This is important, because the arguments made in favour of the attribution of the conduct of armed opposition groups pursuant to Article 9, and the case law upon which these arguments rely, have been resurrected since the adoption of the ARS in 2001,[79] and those who reject the view that Article 9 would apply to armed opposition groups have not provided any detailed argument.[80] My analysis challenges the view that there is legal precedent to support the attribution of the conduct of armed opposition groups to a state. I will show that there is some authoritative support for the proposition that a state may recognise, as a matter of policy, certain administrative acts committed by 'unsuccessful' armed groups as 'valid', provided that: (i) those acts do not further the insurgency – for example the registration of births, deaths and marriages, and (ii) if to treat them otherwise would be to the detriment of the population that was subject to that government's control.[81] However, these cases do not provide support for a general rule that routine administrative acts committed by an armed opposition group in the absence or default of the official authorities will be attributable to the state.

[78] Sivakumaran (2009) pp.493-495.

[79] E.g. Fortin (2018).

[80] Crawford (2013) p.168.

[81] *Namibia*, §125.

### *6.3.1 ILC's early rejection of the application of Article 9 to armed opposition groups*

When Article 9 was first discussed by the ILC international practice of the rule was 'very limited'.[82] In its draft commentary to draft Article 8, 1974, the ILC only pointed to generalised examples taken from the Second World War where members of the local population took it upon themselves to carry out governmental functions in circumstances where the official authorities had fled.[83] No specific state practice was identified by the ILC in 1974. The ILC found support for the rule in unspecified 'national laws [that] often regard such conduct as conduct of the State under internal law and even hold the State responsible for such acts'.[84] The commissioners broadly accepted this thesis as a general principle of international law.[85] Rather unfortunately, given the number of questions raised by the Commentary to Article 9, the rule appears to have been discussed only briefly.[86]

However, an examination of the draft commentary in the ILC's 1975 report to the General Assembly reveals an early intention that armed opposition groups would be excluded from the scope of Article 9.[87] The ILC Commentary on draft article 14 states that once an 'insurrectional movement' takes shape it exists,

> ... side-by-side with the State, an organization which has its own machinery and whose organs may act on behalf of the insurrectional movement itself in a portion of the territory under the sovereignty or administration of the State. The organs which form part of the structures of the insurrectional movement and which act on its behalf *are in no sense organs of the State*...[88]

Draft article 14 provided the general rule that a state should not be considered responsible for the internationally wrongful acts of an 'insurrectional movement' established in its territory or in

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[82] ILC Report (1974), Commentary to draft article 8(b), p.285 §11.

[83] Ibid, §9. Also, Ago, Third Report (1971), p.263 §189.

[84] Ibid.

[85] See comments of the Commissioners upon the introduction of draft article 8 to the draft articles *ILC Ybk* 1974 Vol.I, pp.33-40.

[86] Commissioner Reuter, supported by Commissioners Elias and Hambro commented that he hoped the draft article 'would be only very briefly discussed before being referred to the Drafting Committee' as he was 'somewhat concerned at the slow progress the Commission was making.' Reuter, *ILC Ybk* 1974, Vol.I, p.34 §40. See also Hambro, ibid, p.41 §27; Elias, ibid, p.41 §28.

[87] ILC Report (1975), p.98 §26.

[88] Ibid, p.91 §3. [Emphasis added]

territory under the State's administration.[89] In a footnote to the commentary on draft article 14 the ILC added that,

> ... persons or groups of persons who act as organs of an insurrectional movement *directed against a State or against a particular government* in no way intend... to be "in fact exercising elements of governmental authority" of that State or Government for such time as certain exceptional circumstances persist. On the contrary, their aim is to overthrow the structures of the State in question and take their place as the new Government of that State or as the Government of a new State which has separated from the pre-existing State.[90]

The only state to comment on the scope of draft articles 8(b)[91] (now Article 9) and 14[92] and the draft commentary was Austria. For Austria, recognition of what it called a 'local *de facto* government' was an important factor in the determination of the scope of draft article 8(b). In Austria's view,

> When reading... the commentary to article 8 in conjunction with... the commentary to article 14, it is not clear whether article 14, paragraph 1, includes the case of an insurrectional movement, *recognized by foreign States as a local* de facto *government,* which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities. Again, uncertainty may engender unnecessary disputes.[93]

The use of the term 'local' suggests a government that only controls part of the state's territory, in direct challenge to the official authorities.

The ILC does not appear to have agreed that there was a need to clarify whether draft article 8(b)) would apply to an insurrectional movement recognised by foreign States as the 'local *de facto*

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[89] Ibid, p91.

[90] Ibid, pp.91-92 fn.205. [Emphasis added]

[91] Draft article 8(b) provided, 'The conduct of a person or group of persons shall also be considered as an act of the State under international law if... (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority'. *ILC Ybk* 1975, Vol.II, p.60.

[92] Draft article 14 was deleted from the ARS following the recommendation of Special Rapporteur Crawford in his first report 1998. Crawford, First Report (1998), p.54 §277 & p.57.

[93] Written Comments by Austria, *ILC YBk* 1980/II(1), p.92 §38 [Original emphasis].

government'.[94] The Commentary to Article 9 is silent on the matter. This silence is consistent with the ILC's position that the ARS do not make a 'distinction between movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts'.[95] Moreover, the recognition by a third state of a government or state as the '*de facto*' or '*de jure*' government is primarily a matter of domestic policy and not international law. International tribunals tend to view the recognition of governments 'as a political act grounded on political considerations' rather than 'as an admission of the effective status of a regime'.[96]

Draft article 14 was subsequently removed from the ARS upon the recommendation of Special Rapporteur Crawford in his first report in 1998.[97] Regrettably, the Commentary to draft article 14 cited above[98] was not inserted into the Commentary to Article 9. The Commentary's silence as to any exclusion of the conduct of armed groups from the personal scope of Article 9, has been understood by some scholars to imply that the article would be applicable to them.[99]

However, the draft commentary to article 14 indicates that the ILC intended to limit Article 9's personal scope of application to armed groups that act in the interests of the '*de jure*' government of the state. How then, can the draft commentary be reconciled with the Commentary to Article 10 adopted in 2001 that suggests that the conduct of 'unsuccessful insurrectional movements' would be attributable to the state 'in the special circumstances envisaged by article 9'?[100] Does this mean that an armed group's ambition to overthrow the official authorities of a state does not necessarily preclude the exercise of elements of governmental authority by that group? In other words, are there certain acts that will fall within the definition of 'the governmental authority' regardless of the identity of the actor, in the exceptional circumstances envisaged by Article 9? Further, does the exclusion of armed opposition groups from the scope of Article 9 extend to armed groups that direct their activities against a state other than the state in which they are based?

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[94] In his first report to the ILC in 1998 Special Rapporteur Crawford made express reference to Austria's remarks. However, in paraphrasing these remarks the Special Rapporteur removed any reference to draft article 8(b) and his commentary does not address the specific issue raised by Austria. See Crawford, First Report (1998), p.54 §277.

[95] ARS, Article 10, Commentary, §11.

[96] Cheng (1987), p.147.

[97] Crawford, First Report (1998), p.54 §277 & p.57.

[98] ILC Report (1975), pp.91-92 §3 & fn.205.

[99] E.g. Becker (2006) p.77 fn.170 and pp.222-223; Ruys (2007); Cahin (2010b) p.334; Verhoeven (2015) p.295; Fortin (2018) pp.379-380. *Cf.* Crawford (2013) p.168; Bílková (2015) pp.269-270.

[100] ARS, Article 10, Commentary, §2.

In an attempt to answer these questions, I first consider the argument in favour of state responsibility for 'routine administrative acts' committed by armed opposition groups in the exercise of governmental authority. This argument, rejected by Special Rapporteur Ago in his 1972 report,[101] was based on the case law of the US Supreme Court following the American Civil War and the US-Mexico General Claims Commission.[102]

### *6.3.2 'Routine administrative acts' performed by armed opposition groups*

In his Fourth Report (1972) Special Rapporteur Ago dismissed the suggestion made by writers Silvanie,[103] Reuter,[104] Schwarzenberger[105] and O'Connell[106] that a state ought to be held responsible for 'any routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory that is under their control.'[107] Ago accepted that a state might acknowledge that it is bound by 'lawful routine acts of administration performed' by an insurrectional government but rejected any notion that a state would be responsible for the internationally wrongful acts of that government.[108] For Ago,

> ...while a State might conceivably acknowledge that it is bound by certain obligations deriving from lawful routine acts of administration performed by the organs of an insurrectional government in territory formerly under its administration, it is much harder to conceive that it would do likewise in the case of obligations arising out of wrongful acts by the same organs.[109]

In Ago's view, even if a state agreed in some cases to be bound '*in proprio*' by obligations incurred by an 'insurrectional government' 'this would be done by virtue of succession of one subject of

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[101] Ago, Fourth Report (1972), p142 §186; ILC Report (1975), p98, §26.

[102] Silvanie (1939a) pp.84-103 & (1939b) p.95; Schwarzenberger (1957) pp.629-630; O'Connell (1970) pp.969-970. Also Reuter (1973) p.204. Reuter posits that the attribution of routine administrative acts is an accepted principle of international law, without reference to precedent or further analysis.

[103] Silvanie (1939a) pp.84-103 & (1939b) p.95.

[104] Reuter (1973) p.204.

[105] Schwarzenberger (1957) pp.629-630.

[106] O'Connell (1970) pp.969-970.

[107] Ago, Fourth Report (1972) p.142 §186; ILC Report (1975) p.98 §26.

[108] Ibid.

[109] Ibid.

international law to the obligations of another subject and not by virtue of attribution to the former of the actions of the latter'.[110]

Ago found that 'there is not a single case to be cited in practice', that would support the attribution of the international wrongful acts of armed groups exercising governmental authority to the state.[111] This is at first surprising given that the argument, developed primarily by Silvanie in 1939[112] and later by O'Connell in 1970,[113] that a state is responsible for the conduct of armed groups exercising governmental authority rests on case law of the US-Mexico General Claims Commission of 1923, specifically *George Hopkins* that dealt with the conduct of the Huerta administration that governed a large part of Mexico from February 1913 to July 1914.[114] This argument has been resurrected by Fortin who argues that the case law of the US-Mexico General Claims Commission, United States Supreme Court, and the Italian Conciliation Commission following the Second World War support the attribution to the state of acts performed by an armed group (including an armed opposition group) relating to the 'continuance of daily life in armed conflict'.[115] However, as I will show, these authorities do not support the attribution of 'routine administrative acts' performed by armed oppositions groups to the territorial state, let alone conduct that would violate the state's obligations under international law. At most, these separate lines of case law support the principle that certain administrative acts that give rise to private law rights of persons living under the control of an 'illegal' administration should be considered valid, and therefore binding upon the state.

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[110] Ibid.

[111] Ibid.

[112] Silvanie (1939a) pp.84-103.

[113] O'Connell (1970) pp.969-970.

[114] *George Hopkins* (1926).

[115] Fortin (2017) pp.268-269 & pp.273-274 & (2018) p.383. Fortin uses the argument that certain routine administrative acts of an armed group are attributable to a State pursuant to Article 9, to explain why armed groups that control territory, and are not acting for or on behalf of a third state, may be bound by obligations under international human rights law. Fortin draws on the principle of effectiveness and the proposition that State organs are themselves directly bound by international obligations of the State because it is through the State's organs that those obligations are enforced to argue that: '(i) armed groups exercising governmental functions in default of the *de jure* government are performing acts of State; (ii) with respect to those acts international law is prepared to treat the armed groups as unofficial and unsanctioned agents of the State whose actions can incur State responsibility; and (iii) the principle of effectiveness, and some recent judicial authority, supports the fact that in respect to those functions, the armed groups are bound by the international obligations of the State, i.e. human rights law.'

### *6.3.3 George Hopkins, US-Mexico General Claims Commission of 1923*

The proposition that Article 9 ARS would cover acts of 'government routine' or acts 'related to the continuance of daily life' committed by armed opposition groups[116] should be met with caution. As the following analysis shows, there is no indication that the Commission in *George Hopkins* intended its decision to be applied to *all* armed groups that exercise control over and govern part of a state's territory, including an armed group that acts in opposition to the official authorities.[117] The issue in *George Hopkins* was 'the validity or nullity'[118] of certain administrative acts and contracts entered into by the Huerta administration that seized control of the Government by coup d'état. The Commission found that the Huerta regime was an 'administration of illegal origin'.[119] The Commission then drew a distinction between the 'Government itself' – what one might call the civil service - and the 'administration of that Government'[120] - the Executive. 'Unpersonal acts', or 'acts of government routine'[121] would be performed by the 'Government itself' and be attributable to the state.[122] However, the 'administration of that government' assumes 'a personal character': its acts are directed at maintaining in power the individuals who had, in this case, usurped the government machinery.[123] According to the Commission, the administration's 'personal' acts would only be binding upon the state for such time as it was in fact 'the real master of the nation'.[124] The Commission accepted that a 'large doubtful zone' exists between the two extremes of 'personal' and 'unpersonal' acts, 'in which each case must be judged on its merits'.[125]

The Commission's definition of 'unpersonal' acts is vague. It's *dicta* suggests that this category would apply to everyday matters such as the registration of births, deaths and marriages, the

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116 Silvanie (1939a) pp84-103; Schwarzenberger, (1957) p.630; O'Connell (1970), p.970; Fortin (2017) pp.268-269 & (2018), p.383.

117 *Cf.* Fortin (2018) p.386.

118 This distinction is important when one considers the case's relevance (or lack thereof) to the question whether Article 9 ARS is intended to apply to the conduct of armed opposition groups. This question is addressed below in section 6.3. On the practice of non-recognition of an 'illegal' situation in international law see generally Ronen (2011) chpt.3; Crawford (2012) pp.155-156.

119 *George Hopkins* (1926), §12

120 Ibid, §§5 & 10.

121 Ibid.

122 Ibid, §12.

123 Ibid.

124 Ibid.

125 Ibid, §6.

collection of taxes and 'even many rulings by the police'.[126] Generally, one might describe these acts as day-to-day acts that are necessary for the functioning of a society.

The Commission held that the sale and purchase of postal money orders fell 'within the category of purely government routine having no connection with or relation to the individuals administering the Government for the time being' and therefore Mexico was bound to honour the contract.[127] Important to the Commission's decision was its finding that in seizing power Huerta did not change the 'government machinery' that had been set up by the ousted President Maduro and that government agencies functioning under the Huerta administration continued to honour pre-existing contracts made under the former regime.[128]

For Silvanie, writing in 1939, *George Hopkins* supports the argument that a revolutionary government 'is not alien to the state nor are its acts necessarily meant to destroy the state'[129] and may co-exist with the government of the state and perform administrative functions that are 'very largely in the interest of the state'.[130] The important question is 'whether such acts, or any of them, accrue to the benefit of the state'.[131] Thus, Silvanie concludes, the US-Mexico General Claims Commission 'extended the rule of state liability for the acts of unsuccessful insurgents to include certain categories of contractual and tortious acts... and held the state liable for insurgent contracts benefiting the state and for insurgent acts of governmental routine'.[132]

However, Silvanie attributes broader meaning to the decision than is justified. The Commission was concerned with the conduct of a group that has seized control of the Government.[133] It never envisaged its approach to apply to the conduct of unsuccessful armed groups as Silvanie seems to suggest.[134] The Commission expressly stated that the acts of an armed group that controls part of the territory of the state, and co-exists with the incumbent government of the state, will only be

[126] Ibid., p.43 §4. See the discussion in section 6.2.1 above with respect to the ILC's approach and the definition of 'governmental authority'.

[127] Ibid., p.44 §10.

[128] Ibid., p.45 §11.

[129] Silvanie (1939a) p.103.

[130] Ibid.

[131] Ibid.

[132] Silvanie (1939b) p.95.

[133] *Cf.* Cheng (1987) p.191.

[134] Also Fortin (2018), p.383.

attributable to the state if that armed group is ultimately successful.[135] This reflects the principle now provided by Article 10 ARS: the conduct of a successful insurrectional movement is attributed to the state.[136] Thus, the Commission expressly excluded from its reasoning armed groups that co-exist with the official authorities.[137]

At its highest *George Hopkins* is an example of an attempt to give some legal credibility to what was, in fact, a policy-based decision. This is made clear in the Commission's reasons quoted above. The Commission acknowledged the generally accepted principle of international law that that the legality of a government is not determinative of its existence in fact as the government of a state[138] or capacity to represent the state in international relations.[139] But the Commission then added that once that administration had lost control over of the affairs of government, even if it maintained control over key ministries and diplomatic relations with foreign states and had not in fact been overthrown, 'it would be no more than one among two or more factions wrestling for power'.[140] Had it not said this the Commission would have had to have accepted that all acts of the Huerta administration were attributable to the state, as it was the government of the state until completely overthrown in July 1914. Thus, the Commission appears to place undue weight on the 'legitimacy' and 'legality' of a government with regard to its status as an organ of the state, despite its recognition of the rule that the legality of a government's origins is not determinative of that government's existence in fact. The Commission does so without reference to any legal precedent or state practice, or any explanation as to why an entity, previously categorised as an 'insurrectional movement' that obtains control over central government would not be considered an organ of the state in the event that another insurrectional movement challenges its authority.

It may be that the Commission intended to identify a category of 'revolutionary' government that does not achieve a degree of permanence. After all, the Huerta administration only lasted 17 months.[141] On the Commission's findings of fact the administration only controlled the northern, central and southern regions of Mexico for 3 of those 17 months.[142] But this is speculative.

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[135] *George Hopkins* (1926) §12.

[136] See chapters 7 & 8.

[137] *George Hopkins* (1926) §12.

[138] Cheng (1987) p.147; Crawford (2012) p.152. *Tinoco Case* (1923) p.381; *Dreyfus Case* p.350.

[139] *Dreyfus Case*, p.350.

[140] *George Hopkins* (1926) §12.

[141] Ibid.

[142] Ibid.

A more persuasive explanation of *George Hopkins* is that the Commission did not apply legal principle or seek to establish new principle, but instead applied notions of 'justice and equity'.[143] O'Connell[144] and Brownlie[145] have noted that Mexico denied liability for any acts of the successive 'revolutionary' governments that controlled Mexico during a period of protracted unrest between 1910 and 1920. Nevertheless, Mexico agreed to indemnify claimants on an *ex-gratia* basis.[146] Accordingly, O'Connell posits, the commissioners were mandated to decide the claims on the basis of justice and equity 'as distinct from the law'.[147]

Finally, even if is accepted that *George Hopkins* does support the attribution of the 'unpersonal' or 'governmental' acts of an armed group's civil administration to the state, the case does not support the attribution of internationally wrongful acts. The cases of the US-Mexico General Claims Commission that followed and applied *George Hopkins* concerned issues relating to the performance of commercial contracts entered into by the Huerta government of Mexico with third parties for the purchase of postal orders and other various goods, such as ambulances,[148] school benches,[149] and office and household furniture.[150] None of these cases concerned the attribution of internationally wrongful acts. Even Silvanie recognised that no cases of the Mexican Commissions concerned the 'personal' or 'revolutionary' acts of the Huerta administration.[151]

### *6.3.4 Italian Conciliation Commission*

Fortin draws on a series of cases considered by the Italian Conciliation Commission following the Second World War in support of her argument that legislative acts enacted by an armed opposition group would be attributable to the state on the ground that the Commission determined the laws

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[143] Cf. Fortin (2017) pp.256-258.

[144] O'Connell (1970) p.970.

[145] Brownlie (1983), p176.

[146] Mexico's intention to indemnify on an *ex gratia* basis is only expressed in article II of the Convention of 10 September 1923 that established the Mexican Special Claims Commission. The Special Claims Commission was to deal with cases concerning arising out of the revolutions and 'disturbed conditions' existing between November 1910 and May 1920, including acts '(1) By forces of a Government *de jure* or *de facto*'. *George Hopkins* was not determined by the Special Claims Commission, rather the case was determined by the General Claims Commission.

[147] O'Connell (1970) p.970.

[148] *Peerless Motor Car Co.* (1927).

[149] *George W. Cook* (1929).

[150] *George W. Cook* (1930).

[151] Silvanie (1930b) p100.

of the Italian Social Republic (otherwise known as the Salò Republic)[152] constituted the 'laws in force in Italy' at the relevant time.[153] However, as I will show, the decisions of the Commission in these cases were not based on general principles governing the law of state responsibility, but on the interpretation of the treaty provisions that expressly provided for the liability of Italy for the conduct of authorities during the war.

The Italian Conciliation Commission cases concerned the question whether Italy was liable to pay compensation to Italian citizens whose property had been confiscated or damaged by the authorities of the Salò Republic and whether individuals were exempt from an Extraordinary Progressive Patrimonial Tax on property enforced by the post-war Italian government[154] according to the provisions of the Treaty of Peace 1943. The issue common to these cases was whether the claimants should be treated as 'enemy aliens' for the purposes of 'the laws in force in Italy during the war'. The laws in question were the discriminatory laws enacted by the Salò Republic.

Mussolini had established the Salò Republic in the north of Italy following his dismissal from government, and the subsequent signing of an Armistice between Italy and the Allies in 1943. For the 19 months that the Salò Republic existed[155] 'there was thus, *de facto*, two Italys, each claiming to be the only lawful one'.[156] The main issue for the Commission was whether the discriminatory laws of the Salò Republic constituted the 'laws in force in Italy' for the purposes of articles 78(4)[157] and 78(6)[158] of the Treaty of Peace, 1947 and whether, therefore, the claimants who had been living in the Salò Republic, established after the Armistice, could avail themselves of the privileges afforded to 'United Nations nationals' by the Treaty.[159] Italy argued that the laws enacted by the

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[152] *Baer* (1959); *Falco Claim* (1959).

[153] Fortin (2018), p.382.

[154] *Treves Case* (1956); *Levi* (1956); *Fubini* (1959); *Baer Case* (1959); *Falco Claim* (1959).

[155] The Republic ceased to exist in April 1945 after Mussolini was shot whilst attempting to escape capture by allied troops and upon the unconditional surrender of German forces in Italy.

[156] *Treves Case* (1956) p.266.

[157] Article 78(4)(a) Treaty of Peace 1947 provided that the Italian Government would pay compensation '[i]n cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy'.

[158] Ibid., Article 78(6) provided that, 'United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imports imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943 and the coming into force of the present Treaty for the specific purpose of meeting the charges arising out of the war or of meeting the costs of the occupying forces or of reparation payable to any of the United Nations.'

[159] Ibid., Article 78(9)(a) provided that, 'United Nations nationals' were either those who had the relevant citizenship before 3 September 1943, or those who had been treated as enemy 'under the laws in force in Italy during the war'.

Salò Republic were not 'laws in force in Italy' for the purposes of the Treaty as only a state may legislate and the Salò Republic was not a state but an insurrectional government.

In *Baer,*[160] the *Falco Claim*,[161] *Treves*,[162] and *Fubini,*[163] the Commission concluded that the Salò Republic was an 'insurrectional government', that co-existed with the legal government of Italy, such that 'each of which denied the power of the other'.[164] However, the Commission held the laws of the Salò Republic constituted the 'laws in force in Italy during the War' on the basis of the 'principle of effectiveness': the 'laws in force' were the 'actual powers' exercised by each of the two governments over the territory each controlled.[165] Thus, the Commission concluded that the claimants were exempt from the Progressive Tax on Property and the Italian government was liable to pay compensation for damage to property caused by the Salò Republic.

The Commission's decisions do not establish a general rule of attribution of conduct.[166] Rather, the decisions of the Commission turned heavily on the interpretation of the treaty provisions that expressly provided for the liability of Italy for the conduct of the authorities during the war. The Commission's approach differs slightly in each case, but ultimately it draws the same conclusion, namely that the laws in force in Italy must include the laws of the Salò Republic. In *Treves* the Commission concluded that the drafters of the Treaty could not have considered the legality of the laws of the Republic, or the fate that the former would suffer in post-war Italy.[167] In *Baer,* the Commission gave weight to the proposition that the Contracting Parties did not indicate which Italian authority should have enacted the laws.[168] Thus the Commission concluded that the text of the Treaty did not justify the exclusion of the laws of the Salò Republic that were only directed at Italian nationals and not enemy nationals, and therefore the claimants should be compensated for the loss of their property that was confiscated by the Salò Republic.[169] Moreover, the Commission

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[160] *Baer* (1959).

[161] *Falco Claim* (1959).

[162] *Treves Case* (1956).

[163] *Fubini* (1959).

[164] Ibid, p.428, *Baer* (1959) p.402, *Falco Claim* (1959) pp.31-2, *Treves Case* (1956) p.266.

[165] *Baer* (1959) p.406.

[166] *Cf.* Jennings & Watts (2008) p.553 citing the Italian Commission cases as support for the proposition that '...although a state is not generally responsible for the acts of insurrectional forces it may, even in the case of an unsuccessful insurrection, still be committed by certain governmental acts of insurrectional authorities in the area which was temporarily under their control'.

[167] *Treves Case* (1956) p.266.

[168] *Baer* (1959) p.407.

[169] Ibid.

was clearly influenced by the fact that the Salò Republic's discriminatory laws were linked to the legal provisions enacted by the pre-Armistice Italian government of the National Fascist Party headed by Mussolini and allied to Germany.[170]

Therefore, these cases do not assist on the identification of general principles governing the attribution of conduct of armed groups to a state pursuant to Article 9 ARS.

## 6.4 Recognition of 'validity', but not attribution, of certain administrative acts

### *6.4.1 Distinction between recognition of 'validity' of acts and attribution of conduct*

Insofar as armed opposition groups are concerned, the argument by Silvanie, O'Connell and Fortin that the case law of the US-Mexico General Claims Commission, and for Fortin, the Italian Conciliation Commissions, provide precedent for the principle that a state will be responsible for certain routine administrative acts carried out by an armed opposition group on its territory ascribes a broader meaning to the case law than is justified. The better interpretation of these two lines of case law is that they are manifestations of exception to the 'doctrine of non-recognition', that provides that certain administrative acts committed by an 'unlawful' authority should be recognised as 'valid', if a failure to do so would disadvantage those persons living under that authority's control. Fortin appears to have conflated the recognition of acts as 'valid' with attribution of conduct.[171] However, the distinction between the principle that certain acts should be recognised as 'valid' and principles governing attribution of conduct to a state is important. As I will show, the doctrine that certain acts of an 'illegal administration' should be recognised as valid only applies to acts of 'routine administration' that create private law rights for the population under the armed group administrator's control. The doctrine does not support the attribution of acts of an 'illegal administration' that, if attributed, would constitute internationally wrongful acts of the state.

### *6.4.2 Taxation*

There is early precedent to support the recognition of the collection of taxes by an armed opposition group from the population living under its control as legally valid, provided that those

[170] Ibid., p.407

[171] Fortin (2018), p.381.

taxes are in fact used for a public purpose and not to further the insurrection.[172] However, it is important to note that this principle is based upon a prohibition placed on the state rather than the exercise of governmental authority by the armed group. The state is precluded from its right to collect taxes for a period during which it was unable to its discharge public functions to the benefit of the taxpayers. As the tribunal explained in the *Santa Clara Estates Case*:[173]

It is incontestably true that with the duty to pay public taxes flows the right of protection and the conscientious and careful discharge of all imposed public duties by the Government to which this tribute is made; that with the right to demand and exact revenue for the support of government stands the correlative duty to be competent and willing to discharge its public functions and conserve the welfare of the taxpayer, and that one can not rightfully or lawfully exist in the absence of the other.

Hence, a state is prohibited from enforcing a second payment of taxes in circumstances where those taxes had already been collected by an armed group, provided that those taxes would have been payable to the legitimate authorities.[174] This rule is subject to the qualification that the voluntary payment of taxes to an armed opposition group may be seen as support for the insurgency, in which case a government is entitled to collect the taxes again.[175]

### *6.4.3 'Validity' of certain administrative acts of an 'illegal' authority*

As contended above, contrary to Fortin's argument, *George Hopkins* cannot be relied upon as precedent to support the application of Article 9 ARS to armed opposition groups. However, the decision is an example of how courts will give legal effect to certain administrative acts carried out by an 'illegal' authority.[176] The distinction between 'acts of government routine' and acts that further the insurrection made by the US-Mexico General Claims Commission reflects the approach taken by the US Supreme Court in a series of cases following the American Civil War. In these cases, the US Supreme Court held that certain acts of the Confederate state governments would be 'valid and binding',[177] if to treat them otherwise would disadvantage the population.

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[172] *Santa Clara Estates Co* (1903), p.458; *Guastini Case* (1903). US Supreme Court: *MacLoed v US* (1913); *US v Rice* (1819).

[173] Ibid.

[174] Ibid.

[175] *Guastini Case* (1903) p.580; *British Shareholders of the Mariposa Co* (1931).

[176] *Texas v White* (1869) §16.

[177] *Horn v Lockhart* (1873) p.580.

These acts were restricted to matters of 'routine administration', such as the registration of births, deaths and marriages. The Court distinguished acts that aided the insurgency or impaired the 'just rights of citizens' afforded by the Constitution, which were void, from those that did not, which were to be treated as valid. Thus, in *Texas v White* the US Supreme Court applied the following general rule without devising an exhaustive list of the kinds of acts that should be treated as 'valid' if the acts 'would be valid if emanating from a lawful government':

> It may be said... that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government, and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.[178]

On this basis the Supreme Court in *Horn v Lockhart* reasoned that,

> ...the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace.[179]

The US Supreme Court held that the Confederate government was 'simply the military representative of the insurrection against the authority of the United States'.[180] As such the

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[178] *Texas v White* (1869) §16.

[179] *Horn v Lockhart* (1873) p.580. See also *Baldy v Hunter* (1898); *Texas v White* (1869) §16. Lord Wilberforce stated his approval of this doctrine *obiter dicta* in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No2)* [1967] AC 853, p.954.

[180] *Williams v Bruffy* (1877) §8.

Confederate government only carried out acts that furthered the rebellion and had no role in 'civil government' or the 'regular administration of laws'.[181] Thus, none of the Confederate government's acts were considered valid. However, the Confederate *state* governments continued to carry out acts of 'civil government or the regular administration of the laws', including the preservation of law and order, as they had done before their purported secession from the United States. According to the US Supreme Court, the acts of the state governments that violated a citizen's constitutional rights or furthered the insurgency would not be considered valid.

Sivakumaran has posited that the reasoning in *Horn v Lockhart* suggests that trials of violations of IHL conducted by insurgent courts 'would equally be regarded as valid whereas politically motivated prosecutions would not'.[182] This interpretation is partly correct. However, the US Supreme Court goes further. The reference by the US Supreme Court to the exclusion of acts that impaired the just rights of citizens, whether or not those acts were committed by the Confederate government or the state governments, implies that any act that violated an individual's constitutional rights would not be considered as valid, even if it that act was committed in the (otherwise legitimate) administration of law and order. Thus, if the US Supreme Court's approach were applied to trials for violations IHL by armed groups generally, those trials would only be regarded as valid if the trial process itself was in accordance with principles governing the right to a fair trial under international law.[183]

Important to the question whether the US Supreme Court's doctrine may be applied generally to armed opposition groups is the US Supreme Court's clear exclusion of the acts of what it refers to as a '*de facto*' government 'such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government' from its scope.[184] This type of '*de facto*' government was distinguished from the state governments that were not established by an armed opposition group but had been established according to the US

[181] Ibid.

[182] Sivakumaran (2012), p.560.

[183] According to customary international humanitarian law and international human rights law, the basic guarantees to a right to a fair trial may not be derogated from under any circumstances. See HRCttee General Comment no.29, §11 and General Comment no.32 and ICRC, Customary IHL Database, Rule 100: Fair Trial Guarantees' and Commentary.

[184] *Williams v Bruffy* (1877), §7. This definition of '*de facto* government' is different to that adopted by the ILC in its Commentary to Article 9. For the purposes of Article 9, the term '*de facto* governments' means a government that has established itself as the only government of the State but is not recognised as legitimate.

Constitution.[185] The validity of the acts of the category of '*de facto*' government was dependent upon the insurrection's ultimate success.[186] Hence, as in *George Hopkins*, the US Supreme Court did not intend its doctrine to apply to all armed groups. Rather, the US Supreme Court formulated its doctrine to address a specific situation, unique to the circumstances of the American Civil War. The United States had never accepted the secession of the Confederate state governments. Thus, the state governments were lawfully established according to the Constitution. The issue was whether those governments had exceeded their constitutional powers to the extent that they supported the insurgency.[187]

Nevertheless, the US Supreme Court cases reflect a concern, shared by the US-Mexico General Claims Commission, that there should be some regulation of the relationship between a governing authority and the population under its control, which is not affected by the 'legitimacy' or 'legality' of the governing authority. In other words, life goes on in spite of the upheaval of armed conflict and a population should not be wholly prejudiced because it has the 'misfortune' of finding itself governed by an unlawful entity.

A similar doctrine has been developed by the ICJ, and applied by the ECtHR, in the related context of a UN Member State's duty not to recognise the acts of a government that has been declared 'illegal and invalid' by the UN Security Council,[188] known as 'the doctrine of non-recognition'.[189] This doctrine of non-recognition is not a rule of attribution. Rather, it is a manifestation of the principle that states should not recognise as lawful a situation declared 'illegal' by the UN Security Council.[190] As the ICJ explained in *Namibia,* 'it would be an untenable interpretation [of the UN Charter] to maintain that, once a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law such as to rise from it'.[191]

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[185] The state governments were not 'unlawful', but their acts that furthered the insurgency were as they went beyond the state governments' constitutional powers: Ronen (2011) p.86.

[186] *Williams v Bruffy* (1877) §7.

[187] Ronen (2011) p.86.

[188] E.g. Security Council Resolution 276(1970), The Situation in Namibia, §2; Security Council Resolution 541 (1983) & 550 (1984) Cyprus. Ronen (2011) pp.1-2.

[189] *Namibia,* Separate Opinion of Judge Onyeama, p.149.

[190] See generally Crawford, (2012), p.155. This principle is codified by Article 41 ARS with respect to serious breaches of peremptory norms which provides that, 'no State shall recognize as lawful a situation created by a serious breach [of an obligation arising under peremptory norm of general international law],… nor render aid or assistance in maintaining that situation'. See Dawidowicz (2010).

[191] *Namibia*, §112.

### *6.4.4 Namibia Advisory Opinion*

In response to South Africa's continued occupation of Namibia following the termination of its Mandate by the Security Council in 1966,[192] the UN Security Council declared South Africa's presence in Namibia to be 'illegal' and that as a consequence 'all acts taken by the Government of South Africa on behalf of Namibia after the termination of the Mandate are illegal and invalid'.[193] The Security Council called upon all states 'to refrain from any dealings with the Government of South Africa that are inconsistent with' its declaration that acts done on behalf of Namibia are illegal and invalid. Consequently states were under the obligation not to 'recognise' South Africa's continued presence in Namibia, to refrain from giving any support or assistance to South Africa in that capacity, not to enter into treaty obligations with South Africa insofar as it purported to act on behalf of Namibia, and to abstain from entering into diplomatic or economic relations as to do so 'may entrench its authority over the Territory'[194] and amount to recognition of the situation as legal.[195] The obligation of states not to deal with an 'illegal' government arises out of a concern not to lend any legitimacy or to entrench the regime. As Ronen explains, '[b]y non-recognition states deny the competence of the governing apparatus to act on behalf of the territory and its people, and thus prevent the acts of the illegal regime from producing valid consequences'.[196] Thus, like an armed group's civil administration, an 'unrecognised' government is not considered to exercise the sovereign authority of the state in which it operates, although it may claim to. In these cases, the test applied is whether the failure to recognise the act as valid would be 'to the detriment of the inhabitants of the Territory'.[197]

In *Namibia* the ICJ held that the obligation of non-recognition was not absolute. In a similar approach to that of the US Supreme Court towards the acts of the Confederate states, the ICJ was of the opinion that non-recognition of an 'illegal' administration should not deprive the population 'of any advantages derived from international cooperation'.[198] In the opinion of the ICJ, whereas generally the official acts of the South African government in Namibia were illegal and invalid, certain official acts, such as the registration of births, deaths and marriages, should be recognised

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[192] Security Council Resolution 2145 (XXI) (1966).

[193] Security Council Resolution 276 (1970), The Situation in Namibia, §1.

[194] *Namibia*, §124.

[195] Security Council Resolution 276 (1970), §§2 & 5; *Namibia,* pp54-56 §§119-125.

[196] Ronen (2011) p5.

[197] *Namibia,* §125 applied by the ECtHR in *Loizidou v Turkey* (Merits) §45.

[198] Ibid.

as legitimate as the effect of ignoring these arrangements would only be 'to the detriment of the inhabitants of the Territory'.[199]

### *6.4.5 Loizidou v Turkey and Cyprus v Turkey*

In the case of *Loizidou v Turkey* the ECtHR considered whether the confiscation of property belonging to Greek Cypriots by the TRNC in order to provide housing for Turkish Cypriots fleeing southern Cyprus was a violation of the ECHR. The UN Security Council had declared the purported cessation of northern Cyprus from the Republic of Cyprus and establishment of the TRNC as 'legally invalid' and had called upon all Member States not to recognise any Cypriot state other than the Republic of Cyprus.[200] Turkey had contended that the expropriation of property was irreversible by virtue of Article 159 of the TRNC's constitution, that it submitted was a manifestation of the international law doctrine of necessity. Article 159 of the TRNC Constitution provided for the confiscation of property that was 'abandoned or ownerless' on 13 February 1975, the date of the proclamation of the establishment of the TRNC.[201] The ECtHR considered that, because 'the international community does not regard the "TRNC" as a state under international law', and because the Republic of Cyprus was the sole legitimate government of Cyprus (including northern Cyprus), it '[could] not attribute legal validity… to such provisions as Article 159 of the fundamental law on which the Turkish Government rely'.[202]

The Court noted the principle in *Namibia,* stating that 'international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, "the effects of which can be ignored only to the detriment of the inhabitants of the Territory".'[203] Implied in the ECtHR's decision is the finding that Article 159 of the TRNC Constitution was not a 'legal arrangement', the non-recognition of which would be to the detriment of the local population. In this case Article 159 was of clear detriment to the former inhabitants of Northern Cyprus who had been prevented from returning to their property by the TRNC administration and the Turkish military guarding the delineation line of Northern Cyprus, and thereby from enjoying and asserting their title over that property.

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[199] Ibid.

[200] Security Council Resolution 541 (1983) & 550 (1984).

[201] *Loizidou v Turkey* (Merits) §18.

[202] Ibid, §44.

[203] Ibid, §45. The Court added that it did not 'consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC".'

The ECtHR drew a different conclusion in the related inter-state case, *Cyprus v Turkey*.[204] In that case the Court was concerned with the question whether the court system established by the TRNC could provide effective remedies to persons living in Northern Cyprus, for the purposes of satisfying the requirement that an applicant to the Court must have exhausted all available domestic remedies in order for their complaint to be admissible.[205] For the Court, *Namibia* clearly shows that 'the obligation to disregard the acts of *de facto* entities is far from absolute'.[206] Thus, the Court reasoned in terms similar to those used by the ICJ in *Namibia* and the US Supreme Court,

> Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.[207]

Despite its clear approval and application of the *Namibia* principle, the ECtHR stressed that its application of *Namibia* was 'judged solely from the standpoint of the Convention',[208] and the requirements of former Article 26 ECHR relating to the exhaustion of domestic remedies. Thus, for the Court, the *Namibia* principle affirmed that 'if remedies exist *to the advantage of individuals* and offer them reasonable prospects of success *in preventing violations of the Convention*, use should be made of such remedies'.[209]

Fortin argues that these cases give 'further support for the principle that the acts of a subject of international law, usurping the *de jure* government, may be given limited recognition if they are the impersonal acts of a State and ensure that life can continue when the government is unable to exercise its usual functions'.[210] For Fortin, the case law of the US-Mexico General Claims

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[204] *Cyprus v Turkey,* p.96. The ECHR has not applied the *Namibia* principle in similar cases concerning the acts of the self-proclaimed Moldavan Republic of Transdniestria. E.g. *Catan & Ors v Moldova & Russia,* §109; *Ilascu & Ors v Moldova & Russia.*

[205] *Cyprus v Turkey*, §§56 & 82-102.

[206] Ibid.

[207] Ibid, §96.

[208] Ibid, §91.

[209] Ibid.

[210] Fortin (2017) p.262.

Commission, the US Supreme Court, the ICJ and the ECtHR, provide assistance in the determination of whether certain acts are 'impersonal' and therefore 'governmental' in nature for the purposes of attributing those acts to the state pursuant to Article 9 ARS.[211]

However, this interpretation of the case law conflates the notion of an entity's 'impersonal' acts, as applied by the US-Mexico General Claims Commission and the US Supreme Court, with acts that benefit the local population living under that entity's control. *Namibia*, *Loizidou* and *Cyprus v Turkey* provide authority for the principle that the duty of non-recognition is not absolute. Accordingly, certain acts of an 'illegal' administrative authority should be recognised as 'valid', if those acts are to the advantage of the persons living under that authority's control, and to do otherwise would be to the detriment of those persons. The question whether the acts further the interests of the governing authority is not relevant to the determination of whether the acts benefit the local population or not. As the ECtHR found in *Cyprus v Turkey*, the provision of domestic remedies by the TRNC through the institution of its own court system in order to adjudicate complaints concerning the violations of Convention rights by TRNC organs was to the *advantage* of the inhabitants of northern Cyprus, and 'the absence of such institutions would work to the detriment of the members of that community'.[212]

The acceptance of an exception to the duty of non-recognition of illegal acts by the ICJ in *Namibia*, and the ECtHR's application of *Namibia* in the context of the protection of an individual's human rights and freedoms under the ECHR, suggests that where there is a tension between the interests of the population and states' concerns regarding the recognition of the acts of 'unlawful' entities, the interests of the population ought to prevail. There are strong policy reasons that support treating the administrative acts of an armed opposition group as valid and binding upon the state in these circumstances, even if ultimately the armed group is not successful. It is clear from the case law relating to the similar context of 'illegal' governments that there is a real concern that the population of a territory that is beyond the control of the official authorities should not be disadvantaged by political upheaval. Like 'illegal' or '*de facto*' governments, an armed group's civil administration may exist for a long period of time and may firmly establish itself on the territory of a state to the exclusion of the state's apparatus. Thus, it is arguable that the *Namibia* principle should also apply to acts of an armed group's civil administration that benefit the population living

[211] Ibid, p.269.

[212] *Cyprus v Turkey*, §92.

under its control. However, this principle is not a rule of attribution and should not be relied upon to support the inclusion of armed opposition group in the personal scope of Article 9 ARS.

## 6.5 Exercise of 'governmental authority' by armed groups acting against a third state

The exclusion of armed opposition groups from the personal scope of Article 9 ARS raises the question whether this exclusion applies to *all* armed groups. In its 1975 commentary on the draft articles, the ILC contended that an armed opposition group cannot exercise governmental authority because its purpose is to overthrow the government of the state.[213] The question then arises whether the personal scope of Article 9 ARS extends to an armed group whose activities are directed against a third state. This question has been approached by some scholars in the context of the commission of cross-border attacks by armed groups.[214] They argue that attribution of cross-border attacks to the host state in circumstances where that state tolerates the presence of the armed group on its territory may provide a legal basis upon which the victim state may invoke its right to use force in self-defence pursuant to Article 51 of the UN Charter. I will show that this argument should be rejected for two reasons: first, it is questionable that cross-border attacks will ever by 'called for'; and second, the argument conflates secondary rules of attribution with primary rules that govern the use of force.

### *6.5.1 Attribution of cross-border attacks by armed groups*

Ruys[215] and Murphy[216] have suggested that Article 9 ARS may be a means of justifying one state's use of force in self-defence against another state, from whose territory an armed group has launched the attack against the former state. Ruys has done so in the context of the Lebanon-Israel Conflict 2006 that was ignited by an attack on Israel by Hezbollah,[217] and Murphy with regard to the United States-led invasion of Afghanistan following the attacks of 11 September 2001 by Al-Qaeda, although Murphy merely suggests that Article 9 would apply without developing the argument further.[218] Drawing on the law of state responsibility, Murphy suggests that Article 9 may be invoked as a basis for attribution of responsibility for the 9/11 attacks to the Taliban government, and therefore provide a legal basis upon which the United States could justify the use

[213] ILC Report (1975), p.98 §26.

[214] Becker (2006), p.77 fn.170 & pp.222-223; Ruys (2007) p.289; Murphy (2002) p.50.

[215] Ruys (2007) p.289. Becker has also briefly referred to this argument: Becker (2006), p.77 fn.170.

[216] Murphy, (2002) p.50.

[217] Ruys (2007) p.289.

[218] Murphy (2002) p.50.

of force in self-defence against Afghanistan.[219] For Murphy, 'depending on the facts,' one might find that the Taliban 'by default essentially allowed al-Qaeda to exercise governmental functions in projecting force abroad'.[220]

Murphy's argument gives rise to two observations. First, the facts of this case do not satisfy the condition of Article 9 ARS that the person or group of persons act in absence or default of the official authorities. Evidence suggests that the Taliban maintained effective control over the areas in which al-Qaeda was operating.[221] Security Council resolutions addressing the Taliban expressed concern that terrorist organisations operated in areas under Taliban control.[222] There is no suggestion that the Taliban authorities were absent at that time. Second, it is doubtful that the condition that circumstances 'called for' the exercise of governmental authority is satisfied in the case of the 9/11 attacks, or any terrorist attack. It is hard to imagine any circumstances in which the hijacking of civilian aircraft and use of those aircraft to destroy buildings and kill civilians in another State would be 'called for'.[223]

### *6.5.2 Israel - Lebanon (Hezbollah) Conflict (2006)*

Ruys applies a similar argument to the question whether Israel was justified in its use of force against Lebanon in response to cross-border attacks by Hezbollah against an Israeli border control along the 'Blue Line',[224] that resulted in the kidnapping of two IDF soldiers and killing of three others.[225] Hezbollah justified its actions as 'legitimate resistance to Israeli occupation of Lebanese territory and as a necessary response to the relative weakness of Lebanese state security

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[219] Ibid. Murphy also raises the possibility of invoking the Taliban '*de facto*' government's responsibility pursuant to Articles 2, 4-5 ARS 'because of the omissions of its organs or officials in allowing Al Qaeda to operate from Afghanistan even after its known involvement in terrorist attacks prior to the September 11 incidents'. Also Wolfrum & Phillip (2002) p.595 who argue that the *Taliban* is responsible on a basis analogous to Article 16 ARS (aid and assistance in an internationally wrongful act. See chapter 5 of this thesis for discussion of the question of state complicity in violations of international law by an armed group; Dinstein (2004), p.920: 'In blatantly and adamantly refusing to take any action against al-Qaeda and Bin Laden, and in offering them a sanctuary within the territory under its control, the Taliban regime in Afghanistan espoused the armed attack against the US. From the moment of that espousal, the US could invoke the right of individual self-defence against Taliban-run Afghanistan and use counter-force against it'. *Cf.* Cassese (2001) p.999; Paust (2002) pp.540-543; Becker (2006) pp.225-226; Duffy (2015) pp.87-88.

[220] Ibid. *Cf.* Wolfrum & Phillip (2002) pp.594-595.

[221] Wolfrum & Phillip (2002) p.595.

[222] E.g. Security Council Resolutions 1214 (1998) & 1333 (2000).

[223] Becker (2006) p.222-223.

[224] The border between Israel and Lebanon created by Article V Lebanese-Israeli General Armistice Agreement (1949).

[225] Ruys (2007), pp.288-289. Also Becker (2006), p.77 fn.170. Security Council, 'The Situation in the Middle East', Briefing by Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations, (2016) pp.2-3.

institutions'.[226] Israel notified the General Assembly and the Security Council that it considered the attack to be 'a clear declaration of war' and reserved its right to use force against Lebanon in self-defence pursuant to Article 51 of the UN Charter.[227] In the Security Council Israel made clear that its actions 'were in direct response to an act of war by Lebanon' and that it held Lebanon responsible.[228] In letters sent to the General Assembly and the Security Council, the Lebanese Government stated that it had 'not been aware of the events that occurred and are occurring on the international Lebanese border'.[229] Despite the Lebanese government's denial of responsibility for the Hezbollah attacks and express statement that it did not endorse them,[230] Israel launched attacks against Hezbollah positions *and* against Lebanese military and civilian infrastructure.[231] Lebanon condemned Israel's actions as 'aggressions' against 'vital and civil Lebanese infrastructure'.[232]

The initial attack by Hezbollah was widely condemned.[233] Most states supported Israel's right to self-defence generally, but did not hold Lebanon responsible for Hezbollah's acts.[234] However, in light of Israel's attacks on Lebanese civilians and civilian infrastructure, some states criticised Israel for the disproportionate use of force,[235] or at least urged Israel to ensure that its actions were proportionate.[236] Russia strongly condemned the actions of Hezbollah, but viewed 'Israel's military action as a disproportionate and inappropriate use of force that threatens the sovereignty and territorial integrity of Lebanon and peace and security throughout the region'.[237] The United States focused its comments on the need for the Lebanese government to 'extend and exercise its sole

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226 Blanchard (2014) p.5.

227 Identical letters from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council', 12 July 2006, A/60/937 - S/2006/515.

228 Comments of Israel, Record of Security Council Meeting, 14 July 2006. S/PV.5489, p. 6.

229 Identical letters from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations to the Secretary-General and the President of the Security Council', 13 July 2006, A/60/938 – S/2006/518.

230 Ibid.

231 Identical letters dated 13 July 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations to the Secretary-General and the President of the Security Council', 13 July 2006, A/60/939 – S/2006/522.

232 Ibid. The conflict was eventually brought to an end on 14 August 2006 by a ceasefire, provided for by Security Council Resolution 1701(2006), 11 August 2006.

233 E.g. Comments of representatives of Russia, Ghana, Argentina, United States, Japan, Congo, Denmark, Slovakia, Greece and France in the Security Council, Record of Security Council Meeting, 14 July 2006. S/PV.5489.

234 Ibid. Peru is an exception. According to Peru's comments to the Security Council, 'aggressive action by any State is unacceptable, and in this case it provoked a military response by Israel in the State of Lebanon' [p. 14]

235 Ibid, Comments of Argentina, Qatar, China, Japan, Congo, Slovakia, Greece and France.

236 Ibid, Comments of United Kingdom and Denmark.

237 Ibid, Comments of Russia, p. 7.

exclusive control over all Lebanese territory',[238] and called on Syria and Iran to be 'held to account' for supporting terrorism and for their role in the crisis.[239]

In its letters to the Secretary-General and the Security Council, Israel held Lebanon responsible for Hezbollah's attacks on the ground that the attacks emanated from the latter's territory, and on the 'ineptitude and inaction of the Government of Lebanon that has led to a situation in which it has not exercised jurisdiction over its territory for many years'.[240] Becker and Ruys have argued separately that because of Lebanon's inability to exercise effective control over southern Lebanon, Hezbollah's attacks may be attributed to Lebanon pursuant to Article 9 ARS. For Becker, 'one could argue that the conduct of Hezbollah in southern Lebanon constitutes the exercise of governmental security functions in the absence of effectively deployed forces of the Lebanese army'.[241] In support of the proposition, Becker notes the fact that the UN Security Council had repeatedly called on Lebanon to assume effective control over South Lebanon following Israel's withdrawal from the area in May 2000, and referred to Lebanon's obligation to take over security responsibilities from Hezbollah.[242]

Ruys considers the application of Article 9 ARS to Hezbollah's attacks against Israel in more detail. He argues that although there was 'no complete absence' of the official authorities, in some areas Hezbollah 'exercised a range of functions traditionally exercised by the government' and 'was in fact policing parts of Lebanese territory'.[243] Ruys points to evidence that at the time of the attack the Lebanese authorities did not exercise effective control over the border area of southern Lebanon.[244] The Security Council had made repeated calls for Lebanon to disband and disarm Lebanese and non-Lebanese militias and restore fully the government's control over 'all Lebanese territory'.[245] According to a report of the Secretary-General on the situation in southern Lebanon preceding the attacks in July 2006,

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238 Ibid, Comments of the United States, p. 10.

239 Ibid.

240 Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council', 12 July 2006, A/60/937 - S/2006/515.

241 Becker (2006) p.77 fn.170.

242 Ibid. E.g. Security Council Resolutions 1310 (2000), 1559 (2004) & 1680 (2006).

243 Ruys (2007) p.288.

244 Ibid.

245 E.g. Security Council Resolutions 1310 (2000), 1559 (2004) & 1680 (2006).

> The Lebanese Government's authority and security control remained limited, especially in the areas close to the Blue Line. The Lebanese Army maintained a presence in some of the areas vacated by Israel in May 2000, but at a distance from the Blue Line...
>
> In letters to the Foreign Minister, dated 23 March, 27 June and 5 July 2006, the [UNIFIL][246] Commander, General Pellegrini, expressed grave concern about the Hizbollah construction works in close proximity to the United Nations positions and requested that the Government of Lebanon take necessary actions to rectify the situation. However the situation remained unchanged despite repeated objections expressed by UNIFIL to the Lebanese authorities.[247]

In addition to the implementation of security measures along the Blue Line by Hezbollah, the organisation's political wing is reported to have provided public services to areas of southern Lebanon, including rubbish collection, health and education services,[248] and traffic policing.[249] As a result this area has been popularly described as Hezbollah's 'state within a state'.[250] Ruys argues that, given 'the preponderant role of Hezbollah as a social and military security provider, and the near absence of the official Lebanese authorities, one might say that Hezbollah exercised, "elements of governmental authority in the default of the official authorities".'[251]

The argument that Article 9 provides a basis for the attribution of cross-border attacks by armed groups 'tolerated' by a state is problematic. First, it is questionable whether there will ever be circumstances that 'call for' an attack against another state that is not an act of self-defence. Even if it is accepted that Hezbollah's presence and organisation along the Blue Line fulfilled the first two conditions of Article 9 – that the group exercises elements of the governmental authority and this is done in the absence or default of the official authorities – fulfilment of the third condition, that circumstances call for the exercise of governmental authority, remains. Ruys attempts to address this issue, arguing that the presence of 'circumstances such as to call for' 'is arguably the

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[246] United Nations Interim Force in Lebanon, a peace-keeping force established by Security Council Resolutions 425 (1978) and 426 (1978).

[247] Secretary-General, 'Report of the Secretary-General on the United Nations Interim Force in Lebanon, delivered to the Security Council' (2006) §§27-28.

[248] Schuster, 'Hezbollah's secret weapon', CNN International, 26 July 2006.

[249] Bennett-Jones, 'Hezbollah: Terrorist organisation or liberation movement', BBC News, 11 October 2011.

[250] Masters & Laub, 'Hezbollah', Council of Foreign Relations (2014).

[251] Ruys, (2007) p.289. Also Becker (2006) p.77 fn.170.

vaguest of the three criteria'.[252] According to Ruys, the repeated calls from the Security Council for the Lebanese government to re-establish its governmental authority over the area, combined with the fact that the use of military force 'normally' falls within the scope of governmental authority satisfies this third condition of article 9.[253] Ruys concludes,

> It thus seems fair to conclude that the July 12 attack could be attributed to Lebanon on the basis of Draft Article 9 and that, from the legal point of view, the attack constituted an armed attack by a state, triggering Israel's right to self-defence.

Becker argues that, from the point of view of the victim state, it may be preferable in these scenarios 'to regard the private actors as agents of necessity, rather than renegade terrorist operatives, so as to justify the direct attribution of the wrongful private conduct to the State', and therefore justify the use of force in self-defence against that state.[254] But whilst this interpretation may be preferable to the victim state, it most cases it is not likely to be justified. The fact that military force 'normally' falls within the scope of governmental authority, and that an armed group exercises governmental functions within part of the territory of a state, does not give rise to circumstances that would 'call for' an armed attack against another state. Something more is required in order that the exercise of governmental authority is justified. Thus, it is difficult to conclude that Hezbollah's attack against Israel was 'called for', and therefore attributable to Lebanon pursuant to Article 9 ARS.

Second, the argument that Article 9 provides a basis for the attribution of cross-border attacks to the territorial state relies upon secondary rules of attribution to determine whether or not an 'armed attack', for the purposes of the Definition of Aggression, has been committed by the host state, thereby engaging the victim state's right to use force in self-defence against the host state. However, the definition of 'armed attack' is governed by primary rules of international law on the use of force. It is not the function of the secondary rules of attribution to define the content of a state's obligations under international law, a point stressed by the ILC in its General Commentary to the ARS.[255]

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[252] Ibid.

[253] Ibid.

[254] Becker (2006) p.77.

[255] ARS, General Commentary, p.31.

Ruys' argument that a state's unwillingness to re-establish authority and control over its territory constitutes 'circumstances such as to call for' is similar to the submission of Uganda in *DRC v Uganda,* that 'toleration of armed bands by the territorial state generates responsibility and therefore constitute armed attacks for the purpose of article 51'.[256] The assertion is that a state's toleration of the activities of an armed group on its territory is sufficient to attribute cross-border attacks committed by that armed group to the state and therefore the cross-border attack will fall within the definition of an aggression by one State against another.[257] According to the Declaration on Friendly Relations between States, 'every State has the duty to refrain from . . . acquiescing in organized activities within its territory directed towards the commission of [terrorist acts or acts of civil strife involving the threat or use of force]' and 'no State shall . . . tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State'.[258] Uganda had submitted that armed groups were able to operate 'unimpeded' in the DRC-Uganda border region because of 'its mountainous terrain, its remoteness from Kinshasa (more than 1,500km), and the almost complete absence of central government presence and authority in the region'.[259] However, the ICJ implicitly rejected Uganda's submission, finding that a state's failure to exercise control over territory, thereby allowing an armed group to operate in the area, does not amount to 'toleration' of that group and therefore to a violation of a state's duty of vigilance.[260] The Court noted that neither the DRC nor Uganda was in a position to put an end to the activities of armed groups in the area, and thus could not conclude that the absence of action was 'tantamount to "tolerating" or "acquiescing"' in those activities.[261]

### *6.5.3 Summing-up*

The arguments of Murphy, Ruys and Becker, that Article 9 ARS may be applicable to cross-border attacks by armed groups 'tolerated' by a state should be rejected. These arguments are reflective of the view that the UN Security Council's apparent acceptance of the US and its allies' right to exercise individual and collective self-defence against Afghanistan following the 9/11 attacks is evidence that the threshold of attribution of an armed attack has been lowered such that a state

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[256] CR 2005/7, p.30 §80, quoted in *DRC v Uganda,* Separate Opinion of Judge Koojimans, §21.

[257] Gray (2018) p.141 fn.92.

[258] General Assembly resolution 2625(XXV) (1970) Declaration on Principles of Friendly Relations, Principles 1 and 3.

[259] *DRC v Uganda*, §301.

[260] *DRC v Uganda*, §§300-301.

[261] Ibid. For further discussion of the obligation to exercise due diligence, and the distinction between the failure to exercise due diligence and complicity see chapters 3 & 5.

that tolerates or harbours the armed group that perpetrated the attack is responsible for it.[262] However, as Judge Koojimans stated in his Separate Opinion in *DRC v Uganda,* the 'mere failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act'.[263]

Moreover, in the years that have followed 9/11 states have not sought to attribute attacks by armed groups to the state on whose territory the armed group is operating. Rather, states have sought to justify military action against an armed group on another state's territory, without that state's consent, as the exercise of the right to individual or collective self-defence against the armed group.[264] The core principle of self-defence is that the use of force must be necessary and proportionate.[265] For the purposes of self-defence, 'necessity' has been understood to require that there are no other means to respond to an armed attack.[266] 'Necessity' has been narrowly interpreted by the ICJ. According to the Court, 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"'.[267]

Different formulae have been used to assert that exceptional circumstances exist in which the defensive use of force is justified and necessary, such that the consent of the host state is not required.[268] None of the justifications put forward address the question of the violation of the host state's sovereignty or territorial integrity, and therefore compatibility of the 'unwilling and unable' test with Article 2(4) of the UN Charter. State practice is most evident in the deployment of 'targeted' military operations against armed groups or individuals, or facilities run by terrorist organisations on the territory of another state. In exercising this policy of 'targeted killing' or targeted military operations states have tended to stress that the use of force is against the armed group or specified individual 'known to be actively engaged in planning and directing imminent

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[262] E.g. Franck (2001) p.841 & (2002) p.54; Murphy (2002) p.50.

[263] *DRC v Uganda,* Separate Opinion of Judge Koojimans, §26; Separate Opinion of Judge Simma Opinion, §12.

[264] E.g. Letter from the Permanent Representative of the United Kingdom to the President of the Security Council, 8 September 2015, S/2015/688 with respect to the use of force in Syria against ISIL.

[265] *Nicaragua,* §194; *Nuclear Weapons,* §41; *Oil Platforms*, §§43, 74 & 76; *DRC v Uganda*, §147.

[266] See generally, Kress (2015) pp.586-580; Gray (2018) pp.157-160.

[267] *Oil Platforms*, §73. 'Necessity' for the purposes of self-defence is not the same as 'necessity' as a circumstance precluding wrongfulness as provided by Article 25 ARS. Article 25 ARS is not intended to cover conduct that is regulated by states' primary obligations under international law and not the law of state responsibility, such as the use of force and the right to self-defence: ARS, Article 25, Commentary, §21.

[268] The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations', December 2016, p. 9.

armed attacks' against the state.[269] Some states, the United States in particular, have sought to justify the use of force against ISIL in Syria on the basis that the use of force is necessary because the latter state is 'unwilling or unable' to suppress the threat emanating from its one territory.[270] Other states have alluded to a state's lack of effective control, or the armed group's control, over territory.[271] Other states have not referred to either test and have instead referred to the inherent right to individual and collective self-defence in general terms.[272]

However, it would be unjustified to conclude on this basis that states have accepted that the use of force against an armed group on its territory without its consent will always be justified. For example, Iraq condemned Turkey's military incursion into its territory and the establishment in 2015 of a military camp outside Mosul, then subject to ISIL control, without prior consultation or coordination with the Iraqi government as 'an act of aggression under the Charter of the United Nations and the relevant provisions of international law'.[273]

This emerging state practice, which does not rely upon the attribution of such attacks to a state in order to justify the defensive use of force, does not support the argument that Article 9 ARS provides an alternative basis for holding a state responsible for cross-border attacks committed by armed groups operating on that state's territory. Nevertheless, as explained in section 6.2, an armed group may exercise elements of the governmental authority in a number of ways, such as the administration of law and order, state responsibility for which are not governed by *lex specialis* rules of primary rules of international law. The next section examines the extent to which a state's toleration of or acquiescence in the exercise of the governmental authority by an armed group is important to the application of Article 9 ARS and the identification of an armed group generally as an 'agent of necessity' of the state.

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[269] E.g. Letter from the Permanent Representative of the United Kingdom to the President of the Security Council, 8 September 2015, S/2015/688 with respect to the use of force in Syria against ISIL.

[270] The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations', December 2016, p. 9; Letter from the Permanent Representative of the United States of America to the United Nations to the Secretary-General, 23 September 2014, S/2014/695.

[271] E.g. Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations to the President of the Security Council, 10 December 2015, S/2015/946; Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations to the President of the Security Council, 7 June 2016, S/2016/523.

[272] E.g. Identical letters from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations to the Secretary-General and the President of the Security Council, 25 November 2014, S/2014/851. France also cited article 51 in general terms. See Identical letters from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, 8 September 2015, S/2015/745.

[273] Identical letters from the Permanent Representative of Iraq to the United Nations to the Secretary-General and the President of the Security Council, 17 October 2016, S/2016/870.

### 6.6 A state's 'acquiescence' in the exercise of governmental authority by armed groups

According to the ICJ's conclusions in *DRC v Uganda,* a state's inability to suppress the harmful acts of armed groups will not be sufficient to amount to 'toleration' or 'acquiescence' in those acts for the purposes of a state's duty of vigilance.[274] This gives rise to the question whether notions of 'tolerance' and 'acquiescence', as applied by the ICJ, can inform the application of Article 9 ARS to armed groups and explain the ILC Commentary that 'the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example *in the special circumstances envisaged by article 9*.[275]

*Yeager* suggests that conduct will be attributable to the state pursuant to Article 9 in circumstances where the state 'must have had knowledge and to which it did not specifically object'.[276] The requirement of knowledge and lack of specific objection implies that in order for conduct to be attributable pursuant to Article 9 the official authorities must consent or acquiesce in the exercise of governmental authority. This gives rise to the question of how this consent or acquiescence might be demonstrated. Must consent or acquiescence be express or may it be implied? The test applied in *Yeager* suggests that consent or acquiescence may be implied by a lack of specific objection, however this criterion is particularly vague. Moreover, the criterion will only be met in circumstances where the armed group exercises governmental authority for a prolonged period, or at least for long enough to draw the reasonable conclusion that the official authorities must have had knowledge of it.

It is important to note that 'consent or acquiescence' is not generally sufficient for attribution. The ILC Commentary to Article 11 ARS (acknowledgment and adoption of conduct) states that 'as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it'.[277] 'Mere acknowledgment' must be combined with the express adoption of the conduct by the state as its own.[278] The ILC emphasises that the state must clearly indicate its acceptance of responsibility for the specific conduct.[279]

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[274] *DRC v Uganda*, §§300-301.

[275] Emphasis added. ARS, Article 10, Commentary, §2. The question how 'success' is defined by the ILC for the purposes of Article 10 ARS is addressed in chapter 7. See also Fortin (2018) p.373 & fn.10.

[276] *Yeager* (1987) §43

[277] ARS, Article 11, Commentary, §6.

[278] Ibid, §6 stating that *Tehran Hostages,* §74 should be limited to its facts. De Frouville (2010), p.275; Crawford (2013), p.187.

[279] Ibid.

Thus, the ILC has clearly rejected the notion that a state will 'acknowledge and adopt' conduct by virtue of acquiescence *per se*. As Crawford warns, 'the adoption required by ARSIWA Article 11 is not to be lightly inferred'.[280] For Crawford, 'care should be exercised when considering the possibility that using ARSIWA Article 11 to 'entrap' other states by deeming them to have adopted conduct which is merely tolerated or not disowned'.[281] Crawford's concern is that Article 11 ARS should not be misapplied in order to attribute armed attacks by armed groups to a state in that harbours those groups. As argued above, the notion that Article 9 ARS may also apply in these circumstances should be rejected.

The circumstances envisaged by Article 9 are exceptional. As explained above, the exercise of governmental authority by an armed group will only be covered by Article 9 in circumstances where the official administration is absent or partially destroyed. In these circumstances there may be a need for the exercise of governmental authority by the armed group. As argued above, that 'need' is not the need of the armed group itself, but the need of the local population. In the case of the use of armed force by an armed group against the invading army of another state the consent of the host state is implied on the basis that the armed group's acts were necessary for the preservation or protection of the state and its population. This is envisaged by the ILC Commentary and its reference to 'self-defence of the citizenry in the absence of regular forces'.[282] It is the need to defend the territorial integrity of the state in response to an invading army that justifies taking up arms against that enemy.

*Yeager,* the only case cited by the ILC Commentary in support of Article 9, supports the notion that in other cases, where there is no immediate threat to the nation or civilian population, acquiescence may be implied in circumstances where the official authorities should know, and do not specifically object, to the exercise of governmental authority.

However, the distinction between an armed opposition group and an armed group that acts in the interests of the state is not always clear. For example, the LTTE's civil administration did not function to the absolute exclusion of Government of Sri Lanka. Some governmental functions, namely law and order, were exercised beyond the control of the Government. However, somewhat surprisingly, the Government continued to provide education and health services.[283] The

[280] Crawford (2013), p.188.

[281] Ibid.

[282] ARS, Article 9, Commentary, §2.

[283] Mamphilly (2011) p.112.

Government even assigned government agents to work in LTTE-controlled territory and ensure the implementation of government directives in these provinces.[284] The extent to which the Government maintained effective control over the delivery of services is not clear. According to Mampilly,

> ...in the conflict zone, the LTTE's civil administration was the only structure capable of determining the direction of [funds allocated to reconstruction by the government]. In effect, the government knowingly ceded control over state fiscal appropriations to the insurgents.[285]

This complex interface between the state and armed opposition group's civil administration does not sit easily with a distinction made between armed opposition groups and other groups with regard to the operation of Article 9 ARS. This symbiotic relationship was in the interests of both parties. By appropriating the government machinery in order to facilitate the provision of public services (paid for by the Government), the LTTE was able to entrench its rule of the civilian population and achieve legitimacy. Moreover, the LTTE taxed civil servants paid by the Government, providing LTTE with an important source of revenue.[286] As Mampilly concludes, 'in rebel-held areas, most civilians came to view the LTTE political regime as the sovereign authority itself, despite its continued reliance on the incumbent for support'.[287] For the Government, the provision of services to the region provided a tenuous link to the Tamil population in order to 'wean the population away from the insurgents by providing public goods'.[288]

However, a state's provision of support for education and other essential services in an area under armed group control is not necessarily a manifestation of a state's consent to the exercise of governmental authority by the armed group, or an acceptance that the armed group is acting in the interests of the state. A state may be required to continue to pay civil servant salaries or to finance education or health services in areas under armed group control in order to fulfil its

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[284] Ibid.

[285] Ibid, p.113.

[286] Ibid, p.115. The Iraqi government continued to pay its civil servants who lived in ISIL-controlled territory for up to a year, eventually cutting off wages and pensions in July 2015 in order to cut off what had become a source of income to ISIL itself. See Coles, 'Despair, hardship as Iraq cuts off wages in Islamic State cities', Reuters, 2 October 2015.

[287] Mamphilly (2011) p.128.

[288] Ibid, p.114.

positive obligations to ensure the rights and freedoms of all persons within its jurisdiction.[289] For the purposes of IHRL, a state's jurisdiction is presumed to be primarily territorial. However, this presumption of jurisdiction will persist but may be 'limited' in circumstances where that state has lost control over part of its territory.[290] In these circumstances a state will only be considered to exercise jurisdiction in so far as its positive obligations to take legislative, diplomatic, judicial or other measures to ensure the enjoyment of the rights of all persons within its (territorial) jurisdiction, even those living under the authority and control of another subject of international law. According to the ECtHR,

> … [a state] must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of rights and freedoms defined in the Convention.[291]

These legal and diplomatic means will include taking measures needed to re-establish the state's control over its territory, as well as measures needed to protect and ensure the rights and freedoms of persons within that territory.[292] Accordingly, the ECtHR held in *Ilascu* that with respect to measures taken by Moldova to restore control over Transdniestria, administered by the MRT,

> The obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separatist regime of the "MRT", and secondly to act by taking all the political, judicial and other measures at its disposal to re-establish its control over that territory.[293]

It is not clear from the ECtHR case law what acts would cross the line between fulfilling a state's positive obligations to ensure the enjoyment of rights of persons living on their territory under armed group control and supporting the armed group or separatist regime. In *Catan* the ECtHR found that Moldova had taken all measures within its power to re-establish control over

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[289] Article 2(1) ICCPR states that 'Each State Party… undertake to respect and ensure to all individuals within its territory and jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'*. The list of bases of discrimination is non-exhaustive. Other human rights treaties contain similar non-discrimination clauses. Article 1 ACHR refers to 'economic status' and 'other social condition' instead of 'property' and 'other status'. Article 14 ECtHR adds 'association with a national minority'. Article 2 ACHPR refers to 'fortune' instead of 'property'.

[290] E.g. *Wall Advisory Opinion*, §109.

[291] *Ilascu & Ors v Moldova & Russia,* §333.

[292] Ibid, §339.

[293] Ibid, §340 applied in *Catan & Ors v Moldova & Russia,* §145.

Transdniestria, and to protect children's right to education in the national language as guaranteed by Article 2, Protocol 1 ECHR.[294] Measures taken by Moldova included the payment of staff salaries, and for rent and refurbishment of school buildings that had been closed down by the MRT authorities, in order that children could continue to access education in Latin script, and not, as MRT 'language laws' required, in Cyrillic script.[295]

Thus, the question whether Article 9 ARS would cover the armed opposition group's conduct will turn on the particular facts of each case. Whatever the political ambition of a group, it may be argued that the implementation of government directives would fall within the reasoning of the Iran-US Claims Tribunal in *Yeager*. In other words, if an armed opposition group implements a government directive, in "cooperation" with the government, then the state will be responsible for any conduct of the armed opposition group relating to the implementation of that directive, including internationally wrongful acts.

However, if the armed opposition group were to use government funds in order to implement its own policies and directives it is arguable that the armed opposition group is not 'exercising the governmental authority' within the meaning of Article 9 and therefore the state would not be responsible for any internationally wrongful acts that arise out of that conduct. Following the case law of the ECtHR, a state that provides services in the area under an armed group's civil administration that undermine the administration's own policies, in an effort to comply with its international obligations, will not 'support' that administration or consent to the exercise of governmental authority by the latter. The state will still be responsible for its own conduct with respect to the persons living in the area under the armed group's control, insofar as it violates the state's primary obligations under international law.

### 6.6 Conclusion

References to Article 9 ARS in the ILC Commentary on Articles 5 and 10 ARS that suggest that Article 9 would cover the conduct committed by any armed group in any exercise of "governmental authority" are misleading. As the above analysis shows, there is no case law or state practice that supports the attribution of any conduct of an armed opposition group to the state,

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[294] *Catan & Ors v Moldova & Russia* §§136-137. Article 2, Protocol 1 ECHR provides that: 'No person shall be denied the right to education'. 'The right to education would be meaningless if it did not imply… the right to be educated in the national language or one of the national languages: *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium*, §3.

[295] Ibid, §141-144.

although Article 9 may cover certain governmental acts of armed groups that operate with the consent of or acquiescence of the state. A state's inability to control the area in which the armed group is operating, or implementation of measures in fulfilment of its positive obligations to guarantee the human rights of all persons within its jurisdiction, including those under an armed group's authority and control, will not amount to 'acquiescence'.

Thus, circumstances in which Article 9 ARS will apply to the exercise of governmental authority by armed groups are extremely limited. Unless it can be shown that by an express act the state acquiesces in the exercise of governmental functions by an armed opposition group or, as in *Yeager*, the state must have known and did not specifically object to the exercise of the governmental function by the armed group, Article 9 does not provide a basis upon which the unlawful acts of armed groups that 'govern' part of a state's territory may be attributed to the state.

However, there are strong policy reasons that support treating the administrative acts of an armed group's civil administration as valid and binding upon the state. The population of a territory controlled by an armed group should not be wholly prejudiced because it has the 'misfortune' of finding itself governed by an unlawful entity. As such, the legal relationship between a governing authority and the population under its control should not be affected by the 'legitimacy' or 'legality' of that authority. A similar doctrine has been developed by the ICJ in the cases of 'illegal' governments in *Namibia,* and the ECtHR.[296] In these cases the courts have held that the duty of states not to recognize the conduct of 'illegal' governments as valid should not deprive the population 'of any advantages derived from international cooperation.'[297]

[296] *Loizidou v Turkey* (Merits) §45.

[297] *Namibia*, §125.

## Chapter 7. Successful Insurrectional Movement: Establishment of a New Government

### 7.1 Introduction

There are two possible final outcomes to revolution: the armed group that struggles against the constituent authorities of a state will either be successfully suppressed by the state, or it will succeed in its objective of to overthrow the government or to establish a new state. In these circumstances Article 10 ARS provides an additional exception to the general principle that the conduct of an armed group 'committed during the continuing struggle with the constituted authority, … is not attributable to the State under international law'.[1] This is based upon the success of an 'insurrectional movement'. According to the two rules of attribution provided by Article 10, the conduct of an insurrectional movement becomes attributable to the state if and when that movement succeeds in overthrowing the pre-existing government and becomes the new Government or establishes a new state. Article 10 has been described as 'a negative attribution clause to which is attached to a curious form of secondary, contingent responsibility based on the successful outcome of the insurgency'.[2] For Crawford, 'it is as if the state represented by the successful insurgents is precluded from denying the attribution to it of their conduct in the course of the insurgency'.[3]

In this chapter I will focus on the application of the first rule of attribution provided by Article 10(1): attribution to the state of the conduct of an insurrectional movement that becomes the new government of a state to that state. The second rule, applicable in circumstances where an insurrectional or other movement succeeds in establishing a new state, will be considered in chapter 8.

Pursuant to Article 10(1) ARS:

> The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

[1] ARS, Article 10, Commentary, p.50, §1.

[2] Crawford (2013) p.171.

[3] Ibid.

The rule is based on the idea of structural continuity between the organisation of the insurrectional movement and the new government.[4] According to the commentary to Article 10,

> The continuity which … exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle.[5]

Article 10(1) was adopted with little opposition from states[6] and appears to be uncontroversial.[7] As the ILC observed in its 1975 report, 'there is no divergence of views, no doubt whatsoever, as to the validity of the principle in question'.[8] Yet, with the exception of the Iran-US Claims Tribunal established following the Iranian Islamic Revolution 1979,[9] state practice or case law addressing the rule is limited to the case law of arbitral tribunals of the late 19th and early 20th centuries.[10] Since the adoption of the ARS in 2001 there has been limited discussion of Article 10(1) and its application,[11] and there appear to be no examples of judicial application of the rule.

There have been insurrections in recent years to which Article 10(1) will apply. For example, the application of Article 10(1) to the situation in the Central African Republic has been mentioned by the then UN High Commissioner for Human Rights, Navanethem Pillay, in her report to the General Assembly on human rights in the Central African Republic, 2013.[12] In March 2013 the Séléka, led by Michel Djotodia, successfully seized power and forced President Bozizé of the Central African Republic into exile. As noted in the report,

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[4] ARS, Article 10, Commentary, §§4-6; Dumberry (2006) p.608; Crawford (2013) p.178.

[5] ARS, Article 10, Commentary, §5.

[6] 'Comments and Observations received from Governments', A/CN.4/515, 19 March 2001.

[7] Cahin (2010a) p.249; *Jack Rankin* (1987) p.143: Citing draft Article 15 ARS, 'it is an accepted principle of international law that acts of an insurrectional or revolutionary movement which becomes the new government of a State are attributable to the State'. *Cf.* d'Aspremont (2009) p.432.

[8] ILC Report (1975), Commentary to draft article 15, p.102, §9 referring to the 'less numerous' statements of international arbitral tribunals that expressly recognise the principle. See also ibid, p.104 §16 on the replies of States to the Preparatory Committee of the Hague Conference 1930's questionnaire on the issue confirming recognition of the rule and §18 on the affirmation of the rule by international jurists.

[9] E.g. *Jack Rankin* (1987) §25.

[10] E.g. *French Company of Venezuelan Railroads* (1902) p.354; *The Bolivar Railway Case* (1905); *Dix Case* (1903).

[11] See generally Zegveld (2002) chpt.5; Dumberry (2006); d'Aspremont (2009); Cahin (2010a) p.247 and Crawford (2013) chpt.6. For consideration of the rule before the ARS were adopted see Atlam (1987) pp.35-56; Akehurst (1969).

[12] OHCHR, 'Situation of human rights in the Central African Republic' (2013) §25.

> … in accordance with article 10 of the draft articles on Responsibility of States for Internationally Wrongful Acts, the Séléka, after it seized power, engaged the State responsibility of the Central African Republic for all violations committed by Séléka members in the country during the armed conflict.[13]

Similarly, it is arguable that Article 10(1) would cover the conduct of Maoist rebels that succeeded in establishing a new government in 2006 in Nepal following ten years of armed conflict. As a resolution to the conflict, the government of Nepal and the rebels agreed to the Kathmandu Comprehensive Peace Accord 2006 (CPA).[14] According to the terms of the CPA the monarchy was stripped of its rights of state administration, and an interim government was established by a coalition of the existing political parties and the Maoist political wing, the Communist Party of Nepal-Maoist (CPN-M).[15] The post-conflict political transformation in Nepal, governed by the terms of the CPA and an interim Constitution, led to the eventual election of the former Maoist leader and chairman of the CPN-M, Puspa Kamal Dahal, as Prime Minister in 2008 and a CPN-M majority government.[16]

In some cases, whether the insurrectional movement has in fact succeeded in establishing a government may be less clear. This is particularly so in situations involving a number of armed groups with competing interests that all seek to overthrow the pre-existing government. For example, by late February 2011, mass demonstrations in Libya had escalated into a non-international armed conflict.[17] The National Transitional Council (NTC), a civilian political organisation with no 'military wing', chaired by former justice minister Mustafa Abdul Jalil, was established as early as February 2011 and in March 2011 declared itself as the sole legitimate representative of the people of Libya.[18] The NTC eventually assumed power following six months of armed conflict fought by a number of armed groups and the death of former President Gaddafi

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[13] Ibid. However, the 2013 report does not go beyond this mere mention of Article 10 ARS.

[14] Kathmandu CPA 2006.

[15] Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process (2007) §3.

[16] Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process (2008) §§6-7.

[17] See OHCHR, 'Report of the International Commission of Inquiry to Investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' (2012) §30.

[18] In the months that followed and before Gaddafi was toppled, a number of states including France, Germany, the UK, Australia, Gambia, Jordan and the United Arab Emirates announced their 'recognition' of the NTC as the sole legitimate representative of the Libyan people. For discussion of whether these statements constitute 'recognition' for the purposes of international law, and what 'recognition' means, see Talmon (2011).

in August 2011.[19] Similarly, there may be cases where civilian representatives, who may or may not be members of an armed group, establish a civilian authority that challenges the government's authority and eventually takes control of government. For example, over a period of eleven months from the end of December 2010 governments of Tunisia, Egypt, and Yemen, that had been established in the Middle East and North Africa for between 23 and 42 years were toppled as the result of mass demonstrations.[20] This raises the question whether a civilian political opposition that is born out of popular revolution will constitute an 'insurrectional movement' for the purposes of Article 10(1)?

With the exception of the UN High Commissioner for Human Rights' 2013 report on the situation in the Central African Republic, the question of Article 10's applicability to these situations has been notably absent from discussions of these conflicts and of state responsibility for human rights violations and war crimes committed by armed groups that have successfully overthrown the pre-existing government.[21] The lack of discussion or application of Article 10 may be due to a prevailing focus on individual criminal responsibility for violations of international law by human rights advocates and the Security Council.[22] In the cases of Nepal and of Libya serious violations of IHL and IHRL were documented by the OHCHR[23] and the International Commission of Inquiry into Libya.[24] These included unlawful killings, arbitrary detention and enforced disappearances, torture and attacks on civilians (in the case of Libya on both Libyan and foreign citizens). The emphasis of both reports is on individual criminal responsibility[25] and the state's responsibility to ensure the appropriate mechanisms are in place to ensure individual accountability for crimes and human rights violations.[26] Neither report refers to Article 10 ARS. Yet, these situations are precisely those that Article 10 ARS seeks to address.

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[19] In July 2012 the NTC handed over power to the General National Congress following elections. Libya has since descended into a prolonged internal armed conflict between rival armed group factions and political crisis following elections in 2014 and the GNC's refusal to concede control to an elected House of Representatives. See Reports of the Secretary General, on the United Nations Support Mission to Libya, S/2014/653, 5 September 2014; S/2015/144, 26 February 2015; S/2016/182, 26 February 2016; S/2016/1011, 1 December 2016; S/2017/726, 27 August 2017; S/2018/870, 24 August 2018.

[20] 'Arab Uprising – BBC News, 'Arab Uprising- Country by Country', last updated 16 December 2013.

[21] E.g. OHCHR, Nepal Conflict Report 2012.

[22] E.g. Security Council Resolution 2040 (2012) §3.

[23] OHCHR, Nepal Conflict Report 2012.

[24] Report of the International Commission of Inquiry into Libya (2012).

[25] Ibid, Annex 1, p.188, §758; OHCHR Nepal Conflict Report 2012, p.176 & pp.179-181.

[26] Ibid, p.21 & Annex 1, p.189, §§763, 765-769; OHCHR Nepal Conflict Report 2012, pp.192-200.

The focus of this chapter is on two key issues that arise out of the ILC's approach to scope of Article 10(1) and evidentiary issues that arise from its judicial application: (i) whether the rule will or should apply to a government formed as the result of a negotiated power-sharing agreement between the pre-existing authorities and one or more insurrectional movements, or between one or more insurrectional movements; and (ii) the evidential difficulties that relate to the identification of conduct attributable to the insurrectional movement. The argument is divided into five parts. Section 7.2 provides an overview of the basic elements of the rule that the conduct of a successful insurrectional movement is attributable to the State and considers the approach of the ILC. In section 7.3 the definition of the terms 'insurrectional movement' for the purposes of Article 10 ARS is considered. In section 7.4 the evidential difficulties that are likely to arise in the practical application of Article 10 and in the identification of conduct that is attributable to the insurrectional movement will be examined. Section 7.5 provides an in-depth examination of the policy and legal justification for ILC's proposed exclusion of governments of national reconciliation. This issue raises the question of the nature of the political outcome that will constitute 'success' for the purposes of Article 10(1). The ILC Commentary suggests that the application of Article 10(1) 'should not be pressed too far' in cases of governments of national reconciliation formed by the pre-existing government and the insurrectional movement.[27] This proposition has received limited attention.[28] Of those who have considered Article 10(1), some have simply reiterated the ILC's commentary without further examination of the basis for proposed exclusion.[29] Others have observed that, to the extent that the exclusion of governments of national reconciliation from the scope of Article 10(1) is accompanied by the provision of amnesty in peace agreements, 'impunity and irresponsibility will go hand-in-hand'.[30] I will argue that the idea that peace and justice are irreconcilable is outdated. The development of jurisprudence in IHRL, according to which any amnesty that protects an individual from prosecution for grave crimes and human rights violations is invalid, shows that the tide is turning towards justice as an essential component to long-term peace and stability.

[27] ARS, Article 10, Commentary, §7.

[28] An exception is d'Aspremont (2009). See section 7.5.5 for a critique of d'Aspremont's argument concerning the application of article 10(1) to governments of national reconciliation. For a brief discussion of the application of the rule provided by Article 10(1) ARS to coalition governments before the adoption of the ARS in 2001 see Akehurst, (1969) p.60.

[29] E.g Zegveld (2002) p.157; Crawford (2013) p.176.

[30] Cahin (2010a) p.250.

I then examine whether Article 10(1) would apply in situations where the downfall of a government has been brought about by the actions of a number of separate insurrectional movements, each with its own organisational structure and political and/or ideological mandate. This issue was not addressed by the ILC and has only received limited academic attention.[31] In these circumstances one group, or a coalition of groups, may succeed in forming the new government. It may be questioned whether such a coalition government could satisfy the real and substantial continuity requirement. Further, are the wrongful acts of all insurrectional movements that were fighting the previous government attributable to the state or only the wrongful acts of the insurrectional movements that have attained governmental authority? In section 7.6 I make the case for the application of Article 10(1) to coalition governments where the parties to the conflict achieve a substantial share of authority. It follows that in situations where the pre-existing government is overthrown as the result of the activities of several insurrectional movements, the conduct of the insurrectional movements that draw together to form a coalition government may be attributable to the state.

## 7.2 Article 10(1) ARS

As a general rule a state is not responsible for the conduct of non-state actors that act entirely independent of it, for example persons who take part in insurrections, riots, or mass demonstrations, unless there is a failure to exercise due diligence in the prevention or punishment of a violation of international law.[32] Thus, the conduct of an unsuccessful insurrectional movement not covered by Articles 4-9 ARS[33] will not be attributable to the state. The insurrectional movement is considered to be an adversary of the established government, its acts are directed against the government and, once established, it operates beyond the government's effective control.[34] As the Umpire in *Home Frontier and Foreign Missionary Society of the United Brethren in Christ v Great Britain* said,

> It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority,

[31] See Dumberry, (2006) p.612 and Crawford, (2013) p.179.

[32] See chapter 4. ILC Report (1975), pp.95-96 §§19-20; Brownlie (1983) p.172. Another exception to this general rule is where a State assumes responsibility for the actions of private actors, as provided by Article 11 ARS.

[33] Article 10(3) provides that 'This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9'. For discussion of Articles 4, 8 and 9 ARS see chapters 2 and 6.

[34] ARS, Article 10, Commentary, §2.

> where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. [35]

Article 10(1) provides an exception to the general rule in situations where an insurrectional movement succeeds in establishing a new government. According to Article 10(1) the conduct of an insurrectional movement that succeeds in establishing a new government will be attributable to the state. This rule of attribution is drawn from the jurisprudence of early international arbitral decisions, in particular the Mixed Claims Commissions instituted between a number of states and Venezuela (1902-1903) and Mexico (1910-1930). For example, in *French Company of Venezuelan Railroads* the Umpire said,

> When revolution laid waste both country and village, or seized the railroad and its material, or placed its hands upon the boats and wrought serious injury to all, it is regrettable, deplorable, but it is not chargeable upon the respondent Government, unless the revolution was successful and unless the acts were such as to charge responsibility under the well-recognized rules of public law.[36]

An injured state may seek to make a claim against an insurrectional movement itself. However, in many cases this will not be practical. Insurrectional movements enjoy only a temporary existence – a movement will cease to exist either because it succeeds and becomes the new government or the government of a new state, or it fails and disintegrates.[37] Ago argued that this temporary existence creates practical difficulties that would frustrate the making of a claim while the conflict is ongoing.[38] The claims process is unlikely to be concluded before the conflict ends and the insurrectional movement ceases to exist.[39] The prospects of obtaining reparation are further hindered by the fact that an insurrectional movement may not hold sufficient property or resources

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[35] *Home Frontier and Foreign Missionary Society* (1920) p.44 applied in *G. L. Solis* (1928) p.361.

[36] *French Company of Venezuelan Railroads* (1902) p.354.

[37] Some movements may last for decades, for example Euskadi Ta Askatasuna (ETA), a paramilitary group seeking the independence of the Basque Region of Spain has existed since 1959. ETA announced a definitive ceasefire in 2011 and its dissolution in April 2018: Burgen, 'Basque terrorist group Eta to be dissolved in week says mediator', The Guardian, 2 April 2018.

The Irish Republican Army (IRA) was founded in 1913 and operated in various forms until it called a ceasefire in 1994 and the signing of the Good Friday Agreement 1998 (the Real IRA, opposed to the peace agreement continues to operate).

[38] Ago, Fourth Report (1972), pp.129-130 §154.

[39] Ibid.

to pay compensation.[40] Moreover, there are no established rules of attribution according to which members of an insurrectional movement may be identified. Identification, particularly in the movement's 'embryonic stages' will be difficult.[41]

All this creates uncertain and unattractive conditions for a state to present a claim against an insurrectional movement while the conflict is on-going. Article 10(1) envisages situations where an injured state waits until the end of the conflict to make its claim, presenting them to the new government created by the successful insurgency.

### *7.2.1 Real and substantial continuity requirement*

Early case law sought to explain the attribution of conduct of the successful insurrectional movement to the state on the ground that the movement constituted an expression of the 'national will'. In *The Bolivar Railway Case* the Umpire said,

> Responsibility comes because it is the same nation. Nations do not die when there is a change of their rules or in their forms of government. These are but expressions of a change of national will... The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[42]

However, the notion that a state will be responsible for the conduct of an insurrectional movement because the latter represents the 'national will' should be approached with caution. As the ILC warned in its 1975 report,

> The idea has also been put forward that, where the action of the insurgents was successful, they would be regarded as having represented the true national will ever since their uprising against the constituted power. But the very concept of "national will" is to be treated with caution, quite apart from the fact that, in general, international law is not greatly concerned with whether a given government is or is not the representative of the "true" national will. Even leaving that aside, it is difficult to maintain that the outcome of fighting should, like

[40] Ibid.

[41] See section 7.4.

[42] *The Bolivar Railway Case* (1905), pp.452-453.

> a judgement of God, establish retrospectively that the victors, from the outset of the civil war, were more representative of the true national will than the defeated.[43]

The ILC adopted the alternative theory of structural continuity between the organisational structures of the insurrectional movement and the new government,[44] generally supported in recent case law.[45] The Commentary explains,

> Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle.[46]

The ILC has been criticised for failing to give any guidance in its commentary as to the point at which acts of the insurrectional movement become attributable to the state.[47] According to *The Bolivar Railway Case,* the state will be responsible for all wrongful conduct committed by the insurrectional movement throughout the revolution, from its inception until its eventual success.[48] However, the Tribunal did not expand upon how the point at which a revolution 'begins' might be determined. For the ILC, 'the acts of organs of the organization which grew up during the insurrection and then became the organization of the State itself' are attributable to the state.[49] This approach suggests that conduct will only be attributable to the state from the point at which the insurrectional movement is sufficiently organised such that its organs are identifiable. As will be discussed below in section 7.4, identifying what acts are those of organs of the insurrectional movement, rather than supporters of it or individuals acting in favour of it, particularly during the nascent stages of a revolution, is not an easy task in practice and can place a high burden of proof on claimants that can be difficult to overcome.

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[43] ILC Report (1975) p.100, §3.

[44] ARS, Article 10, Commentary, §§4-6; Dumberry, (2006) p.608; Crawford (2013) p.178.

[45] *Starrett Housing Corp v Iran* (1983), fn.4; *Short v Iran* (1987) §28 and Dissenting Opinion of Judge Brower, §28. See also ILC Report (1975) p.102 §9; ARS, Article 10, Commentary §§3-12 and accompanying footnotes.

[46] ARS, Article 10, Commentary, §5. See also §4.

[47] D'Aspremont (2009).

[48] *Bolivar Railway Case* (1905), pp.452-453.

[49] ILC Report (1975), Commentary to draft article 15, p.101 §5.

Nonetheless, in order for Article 10(1) to operate as an effective rule of attribution, it is necessary to define 'insurrectional movement' in precise terms.

### 7.3 Definition of 'Insurrectional Movement'

The term 'insurrectional movement' is left undefined by the ILC. Importantly, no distinction is made between an insurrectional movement that may be considered to be 'legitimate'[50] and one that would not. This lack of distinction was a source of controversy during the drafting of the ARS. The ILC received criticism from states such as the German Democratic Republic, Tanzania, Czechoslovakia, Oman, Madagascar, Syria, Swaziland, Ghana and Zambia on the grounds that a general approach failed to take into consideration the legitimacy of national liberation movements.[51] However, the notion that an 'insurrectional movement', for the purposes of attribution, might be defined according to its perceived legitimacy was rejected by the ILC. As the ILC explains in its commentary to Article 10,

> …it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin. Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.[52]

Moreover, relying upon the recognition of the international legal personality of an insurrectional movement, or recognition of belligerency, is impractical for the purposes of Article 10. Except for situations of peoples under alien subjugation[53] or the now rare situations of decolonisation,[54] the recognition of the international legal personality of insurrectional movements appears to have fallen into disuse.[55]

Rather than providing a comprehensive definition of 'insurrectional movement', the ILC suggests that the criteria laid down in Article 1 APII should be used as a guide to the 'essential idea' of an

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[50] Article 1(4) API.

[51] See Atlam (1987) p.39.

[52] ARS, Article 10, Commentary, §11.

[53] E.g. the recognition of the Palestinian Liberation Authority as the 'sole and legitimate representative' of the Palestinian people by the General Assembly in 1982 (GA Res 37/43 (3 December 1982) §23).

[54] According to the United Nations, as of 10 January 2019, 17 non-self-governing territories remain to be decolonised: United Nations and Decolonization: Non-Self-Governing Territories.

[55] Clapham (2006) pp.271-2; Sivukumaran, (2012) p.19; Crawford (2013) p.171.

'insurrectional movement'.[56] As a minimum, therefore, Article 10 will apply to 'dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol', as opposed to groups taking part in 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character'.[57] As 'insurrectional movements' also include national liberation movements,[58] Article 10 would also operate with regard these groups as defined by API as 'peoples...fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[59]

The ILC's approach seeks to recognise the different forms an insurrectional movement can take according to the situation it is operating in, whether that be 'limited internal unrest, a genuine civil war situations, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements... [that] may be based in the territory of a State against which the movement's actions are directed, or in the territory of a third State'.[60] However, the use of Article 1 APII as guidance for the threshold of application of Article 10 would 'seem to limit the envisaged situations to those of a large-scale civil war',[61] despite the inclusion of 'limited internal unrest' as an example of one situation in which an insurrectional movement may exist.[62] Accordingly, Article 1 APII should be taken only as a guide to the key elements of the insurrectional movement's organisational structure necessary for Article 10 to apply in order that a 'dissident armed force' that succeeds in taking over a government by a short, sharp insurrection, rather than an enduring civil war is included within the scope of the article.[63]

It would appear from the Commentary that the conduct of political opposition groups in Tunisia, Egypt and Yemen that successfully deposed the former governments through mass demonstrations in 2010 and 2011 in circumstances that did not cross the threshold of armed

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[56] ARS, Article 10, Commentary, §§9 & 11.

[57] Article 1(2) APII.

[58] ARS, Article 10, Commentary, §§9 & 11.

[59] Article 1(4) API.

[60] ARS, Article 10, Commentary, §9.

[61] Cahin (2010a) p.252.

[62] ARS, Article 10, Commentary, §9.

[63] E.g. the February Revolution in Russia 1917 lasted one week, resulting in the abdication of Tsar Nicholas II and the installation of a provisional government in his place.

conflict would not be attributable to the state. In each of these cases, an identifiable political group took over government. However, that group's success rode on the wave of the masses. This gives rise to the question whether the organisation that succeeds to government as a result of revolution, whatever the form that revolution may take, should fall within the definition of insurrectional movement. The reliance by the Commentary on APII as a guide would appear to exclude the possibility that mass demonstrations, even ones that entail the commission acts of violence or damage to property by participants in those demonstrations will fall within the definition of 'insurrectional movement'.

Nevertheless, in all cases the question arises as to how to identify the acts of an insurrectional movement. Do the supporters of a movement constitute its 'organs' or 'agents' for the purposes of Article 10(1)?

### 7.4 Identification of Acts Attributable to the Insurrectional Movement

The cases of *Short,*[64] *Arthur Young & Co,*[65] and *Yeager*[66] decided by the Iran-US Claims Tribunal demonstrate that in practice the identification of acts that are attributable to an insurrectional movement can prove difficult.

In *Short* the claimant was unable to prove that his wrongful expulsion was due to the acts of the Revolutionary Guard rather than pro-Khomeini activists. The Tribunal stated in clear terms that,

> The acts of supporters of a revolution cannot be attributed to the government following the success of the revolution just as the acts of the supporters of an existing government are not attributable to the government.[67]

Similarly in *Arthur Young & Co* the claim of wrongful expulsion by agents of the Iranian government was denied as the claimants had failed to prove 'who these "agents" were and how they were associated with the Government of Iran'.[68] The Tribunal held that 'attribution of acts to

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[64] *Short v Iran* (1987).

[65] *Arthur Young & Co v Iran* (1987).

[66] *Yeager* (1987).

[67] *Short v Iran* (1987) §34, referring to the statement of the ICJ in *Tehran Hostages,* p.29, §58 that only conduct of militants that was directed by an organ of the State to carry out a specific task could be attributable by way of analogy.

[68] *Arthur Young & Co v Iran* (1987) §48.

the State is justified only when the identity of acting persons and their association with the State is established with reasonable certainty'.[69]

In *Yeager* the claimant was only able to prove that his expulsion was due to members of the revolutionary guard 'in light of other circumstances',[70] namely that affidavits of other witnesses mentioned the Revolutionary Guard and it was not disputed that the Hilton Hotel, where he had been taken, was taken over by the Revolutionary Guard that had expelled a different revolutionary group the day before. Members of the Revolutionary Guard were identified only by their red armbands.

The ILC, though recognising the possibility that an insurrectional movement may itself be held responsible for violations of IHL, did not address the question of attribution of conduct to an insurrectional movement in the ARS that are only concerned with the responsibility of states.[71] The question then arise was to whether it is appropriate to apply Article ARS by analogy in order to identify the agents of an insurrectional movement. Zegveld has argued that the ASR may be applied to '*de facto* governments or other large, well-organized armed opposition groups', but contends that separate rules of attribution should be formulated with respect to less organised groups based on 'actual control over individuals, rather than the existence of a defined state-like structure'. [72] However it is questionable whether it is appropriate to apply separate rules of attribution to armed groups depending on their level of organisation. The result would be that a less organised movement may be held to a stricter standard than states. Further, it is not clear how Zegveld's alternative set of rules based on control standard would differ from a rule analogous to Article 8 ASR.

There is no clear answer to the question how members of an insurrectional movement should be identified, particularly in the embryonic stages of revolution. In the embryonic stages a revolutionary leader of what may in due course become an 'insurrectional movement' may issue a general 'call to arms' or make inflammatory statements against the Government and its supporters. Supporters of a movement who respond to a call to arms or are incited by inflammatory statements to commit violent acts may have a significant impact on the overall success of the overall

[69] Ibid.

[70] *Yeager* (1987) §41.

[71] ARS, Article 10, Commentary, §16. Explaining that the issue is beyond its mandate.

[72] Zegveld (2002), p.155. Also Caron (1998) p.150; Kleffner (2009), p.261; Verhoeven (2015) p.300.

movement, but they are unlikely to wear a uniform or enjoy any formal status within the movement.

In *Tehran Hostages* the ICJ held that the inflammatory statements of Ayatollah Khomeini were not an authorisation to militant students to storm the US embassy.[73] Yet, inflammatory proclamations may be decisive in spurring supporters of a movement to act against the government, or to use threats or acts of violence against a particular group of people generally, thus facilitating the ultimate downfall of the pre-existing government or the establishment of a new state. As Judge Brower notes in his dissenting judgment in *Short*, the fact that general inflammatory statements cannot amount to authorisation to carry out a specific act, 'does not... compel the Award's conclusion that such statements also cannot be seen to have caused the more general, less cataclysmic and rather complete exodus of Americans from Iran'.[74]

The Islamic Revolution was punctuated by a series of proclamations made by the Ayatollah Khomeini from exile in France and then later after his return to Iran on 1 February 1979. He condemned the United States' support for the Shah and called upon the Iranian people to work together to overthrow the Pahlavi dynasty.[75] The day after the Shah left Iran, on 16 January 1979, the Ayatollah declared,

The U.S. administration and the President have become enemies of the Iranian people. The presence of their military bases and advisers have impoverished our country. The United States has become an accessory and has backed the massacre of our people by the Shah's ignoble regime. It is now up to the American people to exert pressure on their government.[76]

For Judge Brower, there was a clear relationship between the Ayatollah's proclamations, the success of the revolution, and the injury or loss caused to United States' citizens in Iran at the time. He states,

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[73] *Tehran Hostages*, pp.29-30 §59.

[74] Ibid.

[75] For excerpts from Ayatollah Khomeini's proclamations see *Short v Iran* (1987), dissenting judgment of Judge Brower, §§6-13.

[76] Ibid. §10.

> It seems to me reasonable to conclude that there was a cause and effect relationship between these successive statements by the leader of the ultimately successful Islamic Revolution in Iran and the events that befell Americans almost universally in that country from the beginning of November 1978. The record here is replete with evidence of threats, attacks, firebombings and virtually every form of overt assault on the persons and property of Americans in Iran during that period. If plotted on a graph the rising curve of such anti-American violence would track precisely the growing intensity of Khomeini's verbal attacks on America and its citizens and the accompanying climax of the Revolution. Indeed, the essential facts are conceded, or at least not disputed.[77]

However, Judge Brower's assessment of the Iranian Revolution that tally's the 'rising curve' in violence with the growing intensity of Khomeini's verbal attacks may be reasonable on the facts of that case, but it does not provide a precise formula for attribution of conduct.

Difficulties in identifying the organs or agents of an insurrectional movement are further highlighted by the Final Report of the Commission for Reception, Truth and Reconciliation Commission in East Timor. According to the Final Report,

The Commission in no way seeks to minimise violations committed by the Resistance. In the early stages of the conflict many senior figures in the political and military leadership of the Resistance behaved with extreme brutality not only towards their political opponents but also towards ordinary civilians. However, during the 1980s and 1990s, both the quantitative and the qualitative evidence confirm that the number of killings and disappearances attributed to the Resistance declined sharply. In addition, for a number of reasons the Commission has often found it difficult to be sure that the Resistance always bears institutional responsibility for the unlawful killings and disappearances attributed to it. Because East Timorese society became so heavily militarised during this period, the status of many of the civilians who were killed by Fretilin/Falintil was often ambiguous. Further complicating the attribution of responsibility is the fact that victims included people who were forcibly put at risk by the Indonesian security forces. Moreover, particularly during armed attacks, it is also not always clear from the available information that a particular victim was specifically targeted. Finally, in at least some cases, particularly but not only in 1999, the Commission received credible information, including from persons who had been censured

[77] Ibid.

for their actions, that the Falintil High Command did not institutionally condone violations committed by its personnel.[78]

The requirement that the claimant should prove that the perpetrators of their injury were acting under the direction and control of the insurrectional movement sits uneasily with idea that a revolution can be the sum of acts of individual supporters of a charismatic figure, a movement or an opposition party who respond to a call to arms but are not instructed to carry out a specific task and do not act under the control of the figure, movement or party.

Yet, despite the evidential difficulties experienced by claimants in the Iran-US Claims Tribunal, it is necessary to impose criteria to identify a movement's organ or agent. This is highlighted by the ILC in its commentary that at the least a movement should have the attributes identified by Article 1 APII. Without rules of attribution specific to an insurrectional movement, Article 8 ARS is a helpful analogue. For if any or all acts of any or all persons during a revolution were attributable to the state pursuant to Article 10 ARS there is a risk that the exceptional status of Article 10 would be diluted and the importance of the notion that the conduct is carried out on behalf of the movement would be lost.

### 7.5 Establishment of 'Governments of National Reconciliation'

According to the Commentary, the requirements of Article 10(1) will only be fulfilled if there is 'real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming'.[79] The question then arises as to what constitutes 'real and substantial continuity'?

The Commentary does not expand on the definition of 'real and substantial continuity'. However, the Commentary does state that Article 10(1) 'should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement'.[80] It is not clear whether the exclusion of any and all governments of national reconciliation should be absolute or whether the issue is a question of degree that should be addressed on a case-by-case basis. The distinction is important as governments of national reconciliation are not uniform in structure.

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[78] Chega! Final Report of the Commission for Reception, Truth and Reconciliation Commission in East Timor (2005).

[79] ARS, Article 10, Commentary, §7.

[80] Ibid.

The Commentary does not cite any authority upon which the suggested exclusion of governments of national reconciliation is based. Instead, the Commentary merely reiterates the real and substantial continuity requirement, advising that,

> The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming. [81]

The ILC's purported justification for the exclusion prompts two observations. First, it is not clear what the phrase 'should not be pressed too far' means. Either a new government will satisfy the real and substantial continuity requirement, or it will not. Second, the Commentary asserts that governments of national reconciliation should be excluded from the scope of Article 10(1) if that exclusion is in the interests of an overall peace settlement. This implies a value judgement that considers responsibility for violations of international law as an obstacle to peace and post-conflict stability.[82] This value judgement is analogous to the justification for the use of amnesty in peace agreements to shield persons from criminal prosecution for crimes committed during an armed conflict, in the hope that the removal of fear or threat of prosecution will encourage the parties to the negotiating table. However, from the victim's perspective this entrenches impunity and leaves victim states and individuals without a legal basis upon which to pursue reparation.[83]

### *7.5.1 Governments of national reconciliation and the real and substantial continuity requirement*

The reference by the ILC to 'real and substantial continuity' to conclude its explanation for the proposed exclusion of governments of national reconciliation has been understood to imply that there can be no continuity between an insurrectional movement and a government of national reconciliation.[84] In its 1998 report the ILC suggests that Article 10 'should only apply in the narrow case where the opposition movement actually defeated and replaced the Government of the State

[81] Ibid.

[82] D'Aspremont (2009) p.437.

[83] Fletcher (2016) p.512. See section 7.6 below.

[84] ARS, Article 10, Commentary, §7. Ryngaert (2015) p.175.

concerned'.[85] However, this interpretation of 'real and substantial continuity' is not justified, and is a rather more definitive statement than that eventually adopted.

The use of the phrase 'should not be pressed too far' suggests that Article 10 may apply to some but not all governments of national reconciliation. If this is correct, then it may be argued that this exception to Article 10 qualifies rather than abrogates the position adopted by the ILC in its 1975 report that:

> The principle that it is legitimate to attribute to a government resulting from a successful revolution the injurious acts committed earlier by the revolutionaries must also apply... to the case of a coalition government formed following an agreement between the 'legitimate' authorities and the leaders of the revolutionary movement.[86]

Indeed, it appears to have been the intention of Special Rapporteur Crawford to qualify the ILC's early position.[87] Addressing the issue of the rule's application to coalition governments in a footnote to his draft commentary Special Rapporteur Crawford recommended, in terms strikingly similar to those adopted by the ILC in its Commentary to Article 10, that:

> It is doubtful how far this principle should be pressed in cases of governments of national reconciliation. A State should not be made responsible for the acts of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. *In this respect the commentary needs some qualification.*[88]

However, this statement does not provide any guidance as to the threshold for attribution in such cases.

An indication of what is meant by the term 'elements' and the type of government Crawford had in mind may be drawn from his book (2013) in which he posits that Article 10 would not apply to the government created by the Lomé Accord, agreed between the Government of Sierra Leone

[85] ILC Report (1998), p.85 §416.

[86] ILC Report (1975), Commentary to draft article 15, p.104 §17.

[87] Crawford, First Report (1998), p.52, fn.347.

[88] Ibid. [Emphasis added] Crawford appears to distinguish governments of national reconciliation from coalition governments. However, it is not clear on what basis this distinction is made.

and the Revolutionary United Front/Sierra Leone (RUF/SL) in 1999.[89] The Lomé Accord did not provide each party with a substantial share of control of government. The Lomé Accord 'recognizing the right of the people of Sierra Leone to live in peace, and desirous of finding a transitional mechanism to incorporate the RUF/SL into governance within the spirit and letter of the Constitution'[90] paves the way for members of the RUF/SL to take political office and for the movement to transform itself into a political party.[91] The RUF was initially guaranteed a seat in government but remained in the minority. Four out of eighteen cabinet ministries were allocated to the RUF, one of those ministries being 'senior cabinet appointments such as finance, foreign affairs and justice'.[92] Corporal Sankoh, leader of the RUF, was appointed Vice President[93] and Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development that oversaw the exploitation of the country's gold, diamonds and other natural resources.[94] The RUF/SL failed to win any seats in the 2002 general election, the first election following the signing of the Lomé Accord.[95]

Some further guidance as to whether a coalition government, and therefore a government of national reconciliation, may satisfy the real and substantial continuity requirement was drawn by Ago from arbitral decisions of the late 19th and early 20th century following a number of insurrections in South and Central American States.[96]

### *7.5.2 Case Law of Arbitral Tribunals of Late 19th and Early 20th Century*

The *McCord Case*[97] concerned the ill treatment of a US consular official by members of the insurrectional movement that later became part of the provisional coalition government of Peru following the civil war brought to an end in 1885 by agreement between the then Head of State, General Iglesias and leader of the insurrectional movement, General Caceres.[98] According to the

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[89] Crawford (2013) p.176, fn.56.

[90] Lomé Accord 1999, Part II.

[91] Ibid., Article III.

[92] Article V(3) Lomé Accord 1999. In practice RUF representatives were appointed to Trade and Industry, Energy and Power, Lands, Housing and Country Planning and the Environment. The new Minister for Tourism and Culture was appointed from the ranks of the Armed Forces Revolutionary Council (AFRC) allied to the RUF.

[93] Ibid. Article V.

[94] Ibid. Article VII.

[95] Sierra Leone news, May 2002. Available at: http://www.sierra-leone.org/Archives/slnews0502.html

[96] Ago, Fourth Report (1972), p.149, §209.

[97] *McCord Case* (1886-1888) pp.985-990.

[98] Ibid. Also, Akehurst (1969) p.60.

terms of the agreement, the parties formed a provisional coalition government and that government then held a general election. General Caceres was elected President. The defendant State (Peru) had initially denied responsibility for the ill treatment of the US consular official on the ground that, 'as the acts complained of were committed by "a chief in arms against the government then recognized as legitimate by all nations," responsibility therefor, if any existed, did not rest upon the Peruvian nation'.[99] The United States contended that Peru was responsible because the Government and the insurrectional movement, led by General Caceres, had joined together at the end of the conflict to form a provision coalition government to which the existing government was successor. In response Peru amended its position, accepting that the conduct was that of a 'legitimate authority', but disputed liability on the ground that conduct was lawful.[100]

The *McCord case* was cited by Special Rapporteur Ago in his 1972 report in support for his contention that where the insurgents are integrated into the framework of the pre-existing government,

> ...the State apparatus which results is in reality the continuation of both the organizations which confronted each other during the civil war. In that case there is therefore nothing surprising in the attribution to the State of the acts not only of members of its preceding organization but also of members of the organization that grew up during the insurrection and is subsequently united with the preceding organization.[101]

The question then arises as to where the line should be drawn between what the ILC Commentary refers to as 'a government of national reconciliation' and a coalition government for the purposes of the application of Article 10(1)?

In his study on state responsibility for the conduct of the Ian Smith government of Southern Rhodesia (now Zimbabwe) Akehurst has suggested that the findings of the Italian-Venezuelan Commission in the *Guastini Case*,[102] 'may indicate that even appointment to very high office does not render a State liable unless there is a coalition government in law as well as in fact'.[103] In that case the Italian Commission had submitted that Venezuela was liable for the return of license fees

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[99] Ibid, p.987.

[100] Ibid, p.989.

[101] Ago, Fourth Report (1972), p.146 §199. See also ILC Report (1975), Commentary to draft article 15, p.104 §17.

[102] Guastini Case (1903).

[103] Akehurst (1969) p.60 fn.3.

paid by the claimant to the insurrectional movement because, in the face of its inability to suppress the revolution, Venezuela had offered ministerial positions to the civil and military leadership of the insurrectional movement, headed by José Manuel Hernández.[104] At the time of the arbitration Hernández's political party had 'members in cabinet, in Congress, among the high officials of the customs, and even among the presidents of the States'.[105] Some of those officials had 'governed' uninterrupted by the change of government, first in the name of the revolution, and second, as part of the official government authorities.[106] On this basis, the Italian Commissioner invoked 'a special responsibility for the period of the Hernandez and Matos revolutions, the latter being a continuation of the former, whose adherents were its mainstay'.[107] The Umpire rejected the Italian Commissioner's submission that Venezuela was responsible for the conduct of the rebels. However, the decision did not turn on the composition of the post-revolution government, but on whether the licence fees would have been payable to the legitimate authorities had they been in control of the area at the time. As stated previously with respect to questions of state responsibility for the conduct of armed groups exercising elements of the governmental authority through the collection of taxes, provided that the taxes are in fact used for a public purpose, the collection of those taxes will be considered legally valid.[108] The state will not, therefore, be permitted to request payment of those taxes again, nor will it be liable to repay those taxes to the payee.[109] Therefore, the finding that Venezuela was not liable to re-pay the license fees should not be interpreted as a rejection of the plea by the Italian Commissioner that 'no distinction should be drawn between revolutions wholly or partially successful'.[110] That point was not determinative of the issue in the case. Had the issue been whether Venezuela was responsible for the destruction of property or personal injury caused by the insurrectional movement, the decision may well have been different. However, this is speculation.

Nevertheless, there is some support for the proposition that, for the purposes of attribution under Article 10(1) ARS, one or two public appointments of former leaders of an insurrectional movement will not constitute 'a new government'. In the *Case of Hugh Divine,*[111] the arbitral tribunal

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[104] *Guastini Case* (1903). p.567.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] *Santa Clara Estates* (1903) p.458; *Guastini Case* (1903); *MacLoed v US* (1913); *US v Rice* (1819). See chapter 6,6.4.2.

[109] Ibid.

[110] *Guastini Case* (1903) p.568.

[111] *Case of Hugh Divine* (1875).

rejected the submission that Mexico should be responsible for the destruction of property by rebels in circumstances where the rebel commander, General Carvajal, had been pardoned and was later instated as the civil and military governor of Tamaulipas and other Mexican states and as Major-General of the Mexican army. The claimant sought damages on the basis that Mexico 'was bound to make good the loss of the property in question, the circumstances of whose destruction rendered it "a national affront"'.[112] The Umpire concluded that the destruction of the property was due to the acts of rebels and 'for this reason alone... the Mexican Government cannot be called upon to make compensation for the damage done'.[113]

At first glance this case may seem to support the exclusion of governments of national reconciliation from the ambit of Article 10. However, rather than supporting the argument, this case undermines it. On its facts it cannot be said that the General Carvajal had become part of a coalition government at the end of the rebellion. The correct interpretation of the case is that 'public appointments that *do not amount* to a coalition government do not make a State liable'.[114] As a corollary it may be inferred that a state would be liable where public appointments *do* amount to a coalition government.[115]

Applying the doctrine of real and substantial continuity to these cases, it may be concluded that the real and substantial continuity requirement will not be satisfied if only a couple of key figures of a former insurrectional movement are absorbed into the government. A government composition that could fall short of the requirement is that considered by the agreement between the government of Colombia and the FARC in the Peace Accord of 24 November 2016. According to the terms of the Colombia-FARC Peace Accord the FARC, transformed into a political party, is guaranteed 10 congressional seats between 2018 and 2026.[116]

However, it is arguable that the requirement of real and substantial continuity is satisfied in the case of the CPN-M led government, established following Constituent Assembly elections in Nepal in 2008, and resulting from the terms of the Kathmandu CPA between the Government of

[112] Ibid.

[113] Ibid., p.2981.

[114] Akehurst (1969) p.60 [Emphasis added].

[115] Akehurst argues that if a State is liable for the acts of successful insurgents, 'it is only logical that it should be liable if the rebels and *de jure* government get together to form a coalition government'. (1969) p.60.

[116] Colombia-FARC Peace Accord 2016, pp.70-71.

Nepal and the Maoists in 2006.[117] The power-share achieved by the CPN-M according to the terms of the Kathmandu CPA was more than the assimilation of 'mere elements' of the party into government, the CPN-M securing the largest allocation of cabinet positions in multi-party coalition government, and largest allocation of seats in the legislature.[118]

### *7.5.3 Formation of a New Government Resulting from Efforts of a Number of Insurrectional Movements*

The question remains as to whether and what conduct is attributable following the formation of a new government as the result of efforts of a number of insurrectional movements, even if only one of those groups forms the new government.[119] Libya is a recent example of the overthrow of a government and Head of State as a result of the efforts of a number of different insurgent groups. The downfall of Libyan President Gaddafi resulted in the formation of a new interim government by the NTC. The insurgency was conducted by a number of different insurgent groups not all of whom were aligned to the NTC.[120] Further, the conflict in Syria saw the formation of a coalition of insurgent groups, some under the umbrella of the Supreme Military Council, that nevertheless maintained independent command structures and agendas.[121] If this insurgency had successfully established a new government that result would have been due to the efforts of all of these groups and not just one.

Despite a lack of judicial consideration of the issue, Crawford remains doubtful as to whether the acts of all insurrectional movements that contribute to the downfall of a government should be attributable to the state pursuant to Article 10(1), referring to the 'exceptional character' of attribution pursuant to the rule.[122] This is understandable given Special Rapporteur Crawford's position, adopted by the ILC, that 'real and substantial continuity' is necessary in order for responsibility to be attributed to the state. If it is right that governments of national reconciliation do not, or do not necessarily, pass this threshold, then it must equally be so for a new government created following a successful insurrection conducted by multiple groups.

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[117] See further Annex One, OHCHR, 'Nepal Conflict Report', October 2012, pp.228-229; Ramesh, 'Nepal rejoices as peace deal ends civil war', The Guardian, 23 November 2006.

[118] Articles 3.2 & 3.3, Kathmandu CPA 2006.

[119] Dumberry (2006) p.612; Crawford (2013) p.179.

[120] United States Institute for Peace, 'Special report: Stakeholders of Libya's February 17 Revolution' (2012), p6.

[121] BBC News, 'Syria crisis: Guide to armed and political opposition' 13 December 2013. The Supreme Military Council supports the political opposition coalition the National Coalition for Syrian Revolutionary and Opposition Forces. At the time of writing the Syrian conflict is not concluded.

[122] Crawford (2013) p.179.

However, the words 'real and substantial continuity' suggest a variable standard that, in cases where an insurrection results in the formation of a coalition government the application of Article 10(1) will depend upon the extent to which each group secures a foothold in government. If the conduct of insurrectional movements that come together to form coalition government is not covered by Article 10(1), then the exclusion of coalition governments *per se* would open up another potential gap in the law of state responsibility.[123] Coalition governments, or governments installed as the result of the efforts of multiple insurrectional movements, may take many forms. On the one hand each insurgent group may have a significant stake in the government, an equal share of power. For example, the 2003 Comprehensive Peace Agreement (Liberia CPA) between the Government of Liberia, Liberians United for Reconciliation and Democracy (LURD), Movement for Democracy in Liberia (MODEL) and other 'Political Parties'[124] established the National Transitional Legislative Assembly as a branch National Transitional Government, in which the parties to the agreement were allocated an equal number of seats in the legislature.[125] Ministries of State were allocated between the parties, with the former government, LURD and MODEL taking charge of five of the more important ministries each and the Political Parties and 'civil society' sharing the remaining six ministries.[126] In these circumstances it may be possible to identify real and substantial continuity from the organisational structure of each movement to that of the government. On the other hand, the majority of the new government may be formed out of one dominating insurrectional movement, whilst others may have some representation in the form of one or two representatives. In the latter case, only the majority party would pass the 'real and substantial continuity' test.

This analysis of the case law of the arbitral tribunals of the late 19th and early 20th centuries shows some support for the proposition that a government of national reconciliation, or coalition government, may satisfy the real and substantial continuity requirement. Power-sharing agreements and the resulting allocation of power between the pre-existing government and the insurrectional movement can vary considerably. With this variety of national reconciliation and

[123] In addition to that opened up by the exclusion of governments of national reconciliation.

[124] Liberia CPA 2003.

[125] Ibid., Article XXIV. The seats were allocated as follows: GOL, LURD and MODEL 12 seats, 'Political Parties' 18 seats, Civil Society and Special Interest Groups 7 seats, Counties 15 seats.

[126] Ibid, article XXVI and annex 4 with GOL, LURD and MODEL each receiving 5 ministries including those most central to government i.e. Ministry of National Defence (GOL), Ministry of Finance (LURD) and Ministry of Foreign Affairs (MODEL).

power-sharing agreements in mind, it may be more realistic to consider the application of Article 10(1) to governments of national reconciliation dependant on the circumstances of each case and how power is allocated and shared.

The following section considers the policy-based argument that, notwithstanding a government of national reconciliation's satisfaction of the real and substantial continuity requirement, nevertheless the exclusion of such a government from the operation of Article 10(1) is justified on the basis that in these circumstances state responsibility could act as a 'disincentive' to peace.[127]

### *7.5.4 Policy-based justification: interests in peace vs interests in responsibility*

Special Rapporteur Crawford raised his concern that Article 10(1) should not apply to governments of national reconciliation in his first report to the ILC 1998.[128] As observed above, Crawford contended that the ILC's 1975 draft commentary needed some 'qualification with respect to governments of national reconciliation, stating that it is 'doubtful how far [Article 10(1)] should be pressed' in these cases.[129] For Crawford,

> ...it would be unwise and unrealistic to attribute to the State the conduct of the insurrectional movement prior to the agreement... otherwise existing Governments which had been neither overthrown nor replaced and had shown a spirit of conciliation by incorporating elements of insurrectional movements in the Government would be too heavily penalized: they would in fact pay for their policy of reconciliation by being required to shoulder the full responsibility for the acts committed by the insurrectional movements during the insurrection.[130]

Special Rapporteur Crawford offers a policy-based justification for the exclusion of governments of national reconciliation from the operation of Article 10 that implies two related presumptions: first, that the attribution of conduct of a successful insurrectional movement, thereby engaging state responsibility for that conduct, can be an obstacle to peace; and second, that the interests in

[127] Crawford (2013) p.176.

[128] Crawford, First Report (1998), p.52, fn.347.

[129] Ibid.

[130] ILC Report (1998), p.249 §55.

attaining peace outweighs interests in state responsibility. If applied to governments of national reconciliation, Article 10(1) 'could act as a disincentive'.[131]

However, as I will show, the argument that to attribute the acts of an insurrectional movement to the state in the event of national reconciliation would be too heavy a penalty on the state is not convincing.

The supposed incentives for peace and reconciliation provided by the exclusion of governments of national reconciliation from the scope of Article 10(1) may be three-fold. First, the insurrectional movement, in the knowledge that the state would not bear responsibility for its conduct, is likely to consider a political solution to the conflict as an attractive alternative to fighting on and risking potential defeat.[132] Second, the government is likely to be loath to accept the prospect of the state being responsible for the acts of an insurrectional movement it has been fighting to suppress. After all, should the government succeed in defeating the movement in its entirety the state would bear none. Non-attribution of the insurrectional movement's conduct to the state may act as an incentive to negotiate a peaceful settlement and offer concessions to the armed opposition, rather than subject the state to 'continuous strife'.[133] Third, it may be seen to be in the 'best interests' of both sides to grant the other reprieve for their wrongdoing so that their own unlawful activities may be absolved.[134]

There is no doubt that the most effective way to prevent the commission of human rights violations and war crimes during an armed conflict is to bring that armed conflict to an end. In this regard, a state has two options available to it. Either it can seek a military victory, or it can negotiate a peace agreement with the opposing party or parties to the conflict.[135] For Akehurst, writing in 1969, a state must be free to exercise its discretion to negotiate a settlement 'particularly since this removes the danger of their own subjects suffering losses as a result of fighting'.[136] This discretion will 'almost certainly include some sort of amnesty', and states should not question the

[131] Crawford (2013) p.176.

[132] D'Aspremont (2009) p.436.

[133] Ryngaert (2015) p.175.

[134] Cahin (2010a) p.250.

[135] E.g. Akehurst (1969) p.58.

[136] Ibid.

exercise of this discretion, 'particularly since this removes the danger of their own subjects suffering losses as a result of fighting'.[137]

However, Akehurst's support for the use of amnesty did not translate into support for the exclusion of governments of national reconciliation from the operation of the rule provided by Article 10(1) ARS. According to Akehurst, '[s]ince a State is liable for the acts of successful revolutionaries, it is only logical that it should be liable if the rebels and the de jure government get together to form a coalition government'.[138]

Moreover, the argument in favour of excluding governments of national reconciliation from the scope of Article 10(1) is undermined by a number of conceptual and practical problems.

First, the exclusion of governments of national reconciliation implies a value judgement based on the way in which power is achieved, one that the ILC sought to avoid by refusing to distinguish between 'legitimate' and 'illegitimate' insurrectional movements. If an insurrectional movement achieves power through 'legitimate' means, i.e. the negotiation of a peace agreement, the state's responsibility will not be engaged for the acts of that movement committed during its struggle. However, if the insurrectional movement succeeds in usurping the pre-existing government by force, the state's responsibility will be engaged.

Second, the exclusion of governments of national reconciliation from the scope of Article 10(1) puts the parties on an unequal footing that may threaten long-term political stability. There is no suggestion that the state would not be responsible for the conduct of the pre-existing government. The conduct of the pre-existing government, a state organ, will be attributable to the state pursuant to Article 4 ARS. Therefore, the state may face claims for reparations with regard to any internationally wrongful acts committed by its pre-existing government, but not the acts of the (former) insurrectional movement. This unequal treatment can only serve to undermine reconciliation rather than promote it. The legitimacy of the former government that continues to exist as part of the new government of national reconciliation may be damaged by claims of responsibility for violations of IHL and IHRL committed against members of the insurrectional movement and civilians during the conflict, while the former insurrectional movement, now transformed into a political party, may be untarnished by its previous conduct.[139]

[137] Ibid.

[138] Ibid, p.60.

[139] Eatwell (2018a) p.394.

Third, the exclusion unfairly discriminates between the victims of the former and the victims of the latter. The state would only have a legal obligation to provide reparation for injury incurred at the hands of the pre-existing government.

Fourth, the victims of internationally wrongful acts committed by the insurrectional movement must rely on the state to carry out its duty to prosecute the perpetrators of crimes under international law, and to provide an effective remedy.[140] However, despite a general consensus in IHRL and ICL that rejects the use of amnesties that cover such acts,[141] amnesties under domestic law continue to be a common ingredient to peace agreements.[142]

In practice, the assimilation of the perpetrators of war crimes and human rights violations into government can entrench impunity.[143] Even where a peace agreement does not provide for amnesty, power-sharing deals can have the same effect. As the Centre for Humanitarian dialogue has observed:

> [T]he most active proponents and perpetrators of war are relatively unchallenged by law in most peace agreements. When justice mechanisms are adopted, the overwhelming trend is towards strategies of co-existence, forgiveness and reconciliation instead of legal accountability.[144]

With regard to the cases of Kenya and the DRC, Davis argues that '[t]he power-sharing deals enabled elites to entrench their power within the political and security institutions, and then fundamentally undermine justice efforts in the implementation phase'.[145] This raises the question whether, when combined, the exclusion of governments of national reconciliation from Article 10 and the use of such amnesties will result in impunity and non-responsibility going 'hand in hand'?[146]

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[140] Davis (2013ab); Eatwell (2018a) p.395.

[141] IACtHR *Case of Barrios Altos v Peru,* (2001); ICTY *Furundz*ija, §§154-156; SCSL *Kallon & Kamara* (Jurisdiction, Lom*é* Accord Amnesty, Appeals Chamber) (2004).

[142] Mallinder (2008) pp.123-151 & (2017), pp.10-11.

[143] Davis (2013ab).

[144] Centre for Humanitarian Dialogue 'Charting the roads to peace: Facts, figures and trends in conflict resolution', Mediation Data Trends Report (2007), p.15.

[145] Ibid.

[146] Cahin (2010b) p.250.

Fifth, non-attribution may serve to undermine efforts to persuade insurrectional movements to comply with international law.[147] Even if the insurrectional movement is mindful of the rules of state responsibility, excluding the application of Article 10 to governments of national reconciliation 'could be interpreted as meaning that the manner in which the insurgency is carried out... is of no importance and may give the impression that the rebels have a blank check as to means of warfare to which it can resort'.[148] The exclusion of governments of national reconciliation from the operation of Article 10(1) may legitimise the use of violence, criminality, war crimes and the abuse of human rights, to achieve political ends.

### *7.5.5 Exception to Article 10(1) for insurrectional movements democratically elected to government?*

D'Aspremont argues that Article 10 'rests neither on sound precedential nor systemic grounds... this provision rather constitutes the outcome of a political choice to lessen impunity and promote accountability in case of violation of international law by non-state actors'.[149] For d'Aspremont, the exclusion of governments of national reconciliation from the scope of Article 10 is not justified. Such an exclusion 'should be *limited to hypotheses where such a national reconciliation or power-sharing agreement leads to national democratic elections which eventually bring the rebels to power*'.[150] He claims that state responsibility may 'dent the stability of the regime in transition and, more fundamentally, undermine stability'.[151] Thus, the interests of democracy and peace are weighed against the interests of state responsibility in much the same way that peace is weighed against justice in the debate concerning the provision of amnesty. According to d'Aspremont, attributing the conduct of the insurrectional movement to the state following democratic elections, may result in a 'disastrous political fallout' for the state.[152]

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147 D'Aspremont (2009) p.437.

148 Ibid.

149 Ibid. p.427.

150 Ibid. [Original emphasis] The issue of effect of elections on the operation of Article 10(1) was raised by Commissoner Hafner and acknowledged, but not discussed, by Special Rapporteur Crawford in his first report to the ILC. Crawford found that 'elections created a new situation with an interruption of the causal link with the earlier situation'. And that '[a]lthough it was a very interesting point of doctrine... recommended not going further than the existing text... which was based on the current practice and many precedents'. See Crawford, First Report, *ILC Ybk* 1998, Vol.II(1) p.252 §18 (Hafner), and p.254 §41 (Crawford).

151 Ibid.

152 Ibid.

Democracy is not a panacea for political or politicised violence, a point acknowledged by d'Aspremont.[153] Nevertheless, d'Aspremont posits that 'it is however hard to deny that democracy remains the most efficient tool to bring to power effective governments as it endows them with the necessary internal and external legitimacy (and effectivité) without which stability, and hence peace, are inconceivable'.[154] However, d'Aspremont's argument the exclusion of an insurrectional movement that achieves power by democratic election from Article 10(1) is problematic for two reasons. First, even if an insurrectional movement ultimately achieves power by democratic and peaceful means, in most cases it would not have been in the position to do so had it not engaged in an armed struggle against the government.[155] The exclusion of the acts of an insurrectional movement democratically elected to government from Article 10(1) may 'offer an enticement for *democratic settlement of civil wars*',[156] but it also conveys a message that legitimises the use of violence and brutality and the possible disregard of international law to achieve political ends.

Second, the suggestion that in certain situations responsibility must yield to an interest in ensuring the new government is democratically elected because responsibility may 'dent the stability of the regime and, more fundamentally, undermine stability'[157] invites impunity. The fact that a government is democratically elected will offer little comfort to victims who are left to rely upon the state to comply with its duty to prosecute the perpetrators of crimes under international law and to provide victims with an effective remedy. There is no guarantee that the new government will prosecute and punish individuals for crimes committed as part of the struggle, particularly if those individuals hold high office. For example, Charles Taylor, as leader of the National Patriotic Front of Liberia (NPFL), became the dominant power in the Liberian civil war (1989-1996). Taylor was elected President of Liberia in July 1997.[158] The elections were held according to the terms of the Abuja II Accord 1996.[159] Charles Taylor and the NPFL have been implicated in the commission of gross human rights violations and war crimes that include the deliberate killing of civilians throughout the conflict, torture and the recruitment of child soldiers.[160] However, Taylor

[153] Ibid, p.439.

[154] Ibid.

[155] Verhoeven (2015) p.289.

[156] D'Aspremont (2009) p.439. [Original emphasis]

[157] Ibid.

[158] For a comprehensive analysis of the Liberia's problematic peace process see Sesay (1996).

[159] Kieh 'Peace agreements and the termination of civil wars: Lessons from Liberia', 19 August 2011, African Centre for the Constructive Resolution of Disputes.

[160] The Abuja II Accord was the 13th peace agreement signed by the parties to the Liberian conflict between 1990 and 1996. The NPFL refused to be party to the first two accords but denounced and undermined subsequent peace accords on the ground that the agreement did not install Taylor as the leader of the proposed transitional

has not been prosecuted for any crimes allegedly committed during the Liberian civil war,[161] and no steps were taken during his presidency to investigate and prosecute any crimes or human rights violations committed during the conflict, or to provide reparation to the victims of the conflict. To the contrary, Taylor's presidency was marred by continued reports of the commission by government forces of torture and rape of civilians suspected of supporting an armed incursion against the Taylor administration.[162]

A Truth and Reconciliation Commission was provided for later by the Liberia CPA 2003, and created in 2005 under the presidency of Ellen Johnson Sirleaf. The Final Report of the Commission concluded that '[a]ll warring factions are responsible for the commission of gross human rights violations in Liberia, including war crimes, crimes against humanity, IHRL, IHL, ICL, domestic criminal laws'.[163] The list of 12 'significant violator groups' identified as responsible for the commission of 'egregious' crimes and human rights violations provided in the Final Report includes the NPFL, and the Armed Forces of Liberia (AFL), the state's armed forces.[164] The focus of the Final Report is on individual criminal responsibility and not the state's responsibility for acts committed by its organs or agents in violation of international law. This is the case with respect to human rights violations and war crimes committed by the AFL, as much as it is with respect to the acts of the various armed groups that participated in the conflict.[165] The Final Report recommended the prosecution of individuals for such crimes as 'desirable' as well as the institution of 'appropriate mechanisms to promote the ends of justice, peace and security, foster genuine

government. The peace agreements that preceded Abuja II were: Banjul I Peace Accord, September 1990; Banjul II Peace Accord, October 1990; Bamako Accord, November 1990; Banjul III Accord, December 1990; Lomé Peace Accord, February 1991; Monrovia Peace Accord, April 1991; Yamoussoukro Peace Accords, October 1991; Geneva Peace Accords, July 1993; Cotonou Peace Accord, 1993; Akosombo Peace Accord, September 1994; Accra Peace Accord, December 1994; Abuja I Peace Accord, August 1995. See Kieh (2011).

[161] Charles Taylor has been prosecuted and convicted by the Special Court for Sierra Leone for aiding and abetting war crimes between 1996 and 2002 in Sierra Leone. See SCSL *Charles Taylor* (Trial Chamber) (2012).

[162] Amnesty International, 'Liberia: War in Lofa County does not justify Killing, Torture and Abduction', 1 May 2001. In 2008 Charles Taylor's son, 'Chucky' Taylor, was convicted by a US court for torture committed in Liberia, as head of the Anti-Terrorist Unit, on or about April 1999 and on or about 18 July 2003 and sentenced to 97 years' imprisonment.

[163] TRC Liberia, Final Report, Vol.1 (2009) p.11. The list of 12 'significant violator groups' identified as responsible for the commission of 'egregious' crimes and human rights violations provided in the Final Report includes the National Patriotic Front of Liberia, the armed group led by Charles Taylor, and the Armed Forces of Liberia, the State's armed forces. See p.74.

[164] Ibid. p.74.

[165] The report identifies a total of 26 'armed groups, rebel groups or warring factions and the financiers, leaders, commanders, combatants and advisors etc. associated with them are responsible for committing 'egregious' domestic crimes, 'gross' violations of human rights and 'serious' humanitarian law violations including economic crime in Liberia between January 1979 and October 14, 2003'. See pp.74-75.

national reconciliation and combat impunity'.[166] In 2013, a decade after the agreement of the Liberia CPA 2003 and Charles Taylor's resignation from the presidency, Liberia implemented the 'National Palava Hut', a restorative justice programme recommended by the TRC aimed at consolidating a lasting peace. However, Liberia has not taken any steps to institute the prosecution of individuals for the crimes as identified by the Truth and Reconciliation Commission, or to implement legislation necessary to provide victims with effective remedy.[167]

The HRCttee and NGOs vested in Liberia have focused on Liberia's obligations under ICCPR to investigate, prosecute and punish individuals suspected of committing war crimes and committed during the conflicts that occurred between 1993 and 2003,[168] and 'to end impunity for civil-war era crimes'.[169] It is interesting that neither the NGOs campaigning for an end to impunity for civil-war era crimes, nor the HRCttee have cited Article 10(1) or Liberia's responsibility for the conduct of the NPFL committed during the conflict before Charles Taylor became President in 1997. Moreover, there is no mention of Liberia's responsibility for the conduct of the AFL.

The focus on individual responsibility at the expense of state responsibility for the wrongful conduct of its organs or agents has not been confined to cases of conflicts concluded by political settlement. Even in cases that fall squarely within Article 10(1), where the insurrectional movement has successfully overthrown the pre-existing government in its entirety and replaced it with a new government, questions of state responsibility, other than the duty to prosecute and to provide reparation to victims, have been largely ignored.[170] For example, Security Council resolution 2009 (2011) adopted following the establishment of the NTC in Libya after the fall of President Gaddafi in 2011, welcomes the statements of the NTC 'appealing for unity, national reconciliation and justice',[171] and encourages the NTC to 'put an end to impunity' but makes no express reference to state responsibility.[172]

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[166] TRC Liberia, Final Report, pp.11 & 76.

[167] HRCttee, 'Concluding Observations on the initial report of Liberia' (2018) §10. Also, Submission of 76 non-governmental organisations, 'Liberia's Compliance with the International Covenant on Civil and Political Rights Report of Civil Society Organizations in Reply to the List of Issues Regarding Impunity for Past Human Rights Violations (arts. 2, 6, 7 and 14) for the 123rd Session of the Human Rights Committee' (2018).

[168] Ibid.

[169] Ibid.

[170] Fletcher (2016) p.511.

[171] Security Council Resolution 2009 (2011) §4.

[172] Ibid, §5(b).

However, just as the state should not shield the individual, the individual should not be used to shield the state from responsibility.[173] The exclusion of governments of national reconciliation, or democratically elected governments, from the scope of Article 10 denies victims an important avenue to pursue legal redress, namely by pursuing legal action against the state for the conduct of members of its new government.[174]

### *7.5.6 Trends towards responsibility in international law and practice*

The idea that responsibility is an obstacle to peace has been invoked in the 'peace v justice' debate to justify the use of amnesty as a tool of reconciliation incorporated into peace agreements.[175] The provision of amnesty from criminal liability is a common part of the panoply of instruments of conflict resolution and reconciliation: in Uganda, amnesty for 'any crime committed in the cause of the war or armed rebellion' was used in order to encourage rebels to lay down their arms;[176] in South Africa civil and criminal amnesty was granted on condition of full confession,[177] including for international crimes and gross human rights violations;[178] and Afghanistan enacted the National Reconciliation, General Amnesty and National Stability Act 2008, which grants amnesty for any crimes committed by members of armed groups of the opposition on condition that the individual withdraws from opposition and joins the National Compromise, respects the Constitution and other laws of the Islamic Republic of Afghanistan.[179]

Despite the continued use of amnesty, the trend in international law is in favour of responsibility, albeit focused on individual criminal responsibility. There is no general prohibition of the use of amnesties in customary international law or treaty law.[180] However, in practice, it is now more common for amnesties to exclude war crimes, genocide, crimes against humanity and gross human

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[173] See also Fletcher (2016). Fletcher approaches the issue through the question of State responsibility for international crimes committed by the State authorities rather than the attribution of conduct of a successful insurrectional movement pursuant to Article 10, ARS.

[174] See section 7.6 below.

[175] E.g. Section 1(b) Esquipulas II Accords 1987; Article 19 Cotonou Agreement 1993.; Article 3(c) Quadripartite Agreement 1994; Article VI Agreement on Refugees and Displaced Persons, Annex 7 to Dayton Accords 1995 Article IX Lomé Accord 1999.

[176] Sections 2 to 3 Amnesty Act, Uganda (2000); Akhavan (2005) p.414; King (2010) p.578.

[177] Section 20(c) Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa).

[178] South African Constitutional Court, *Azanian Peoples Organisation (AZAPO) and Ors v The President of South Africa* (1996).

[179] Articles 1-4 National Reconciliation, General Amnesty and National Stability Law, 2008 (Afghanistan).

[180] Mallinder (2008) pp.123-151; Freeman (2009) pp.32-36 & pp.52-53. Article 5 Genocide Convention is understood to prohibit the use of amnesty. This prohibition is framed within the obligation to prosecute.

rights violations.[181] Where amnesties do not exclude such acts, the jurisprudence of both domestic[182] and international criminal tribunals,[183] and regional human rights courts and commissions[184] have generally supported the principle that amnesties over international crimes and non-derogable human rights lack legal effect in international law.[185] The United Nations has adopted the same approach. With specific regard to Croatia[186] and Sierra Leone[187] the Security Council, and, generally, the General Assembly have declared that amnesties should not cover international crimes.[188] The UN Secretary-General has declared that:

> United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.[189]

It was once considered that the granting amnesty that shields a person from criminal prosecution and/or civil action amounted to the endorsement of the wrongful act, such that the state thus assumed responsibility for that act.[190] The now accepted position is that the state that grants amnesty over international crimes may be responsible for its failure to investigate, prosecute and punish violations of international law,[191] and for the expropriation of the right of action.[192] This principle has developed from the law governing state responsibility for injuries to aliens, according to which a state that grants general or individual amnesty to persons responsible for the unlawful seizure of a foreigner's property will be responsible for its government's own action of depriving

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[181] E.g. Article 3(c), Quadripartite Agreement 1971; Article VI, Annex 7, Dayton Accords 1995; Global and Inclusive Agreement on Transition in the Democratic Republic of Congo, 2002 §8; Colombia-FARC Peace Accord 2016.

[182] E.g. Chile Appeal Court *Videla Case* (1994); Argentina Supreme Court *Simón (Julio Héctor)* (2005). Cf. Uganda High Court *Kwoyelo alias Latoni v Uganda* (2011); South African Constitutional Court *Azanian Peoples Organisation (AZAPO) and Ors v The President of the Republic of South Africa* (1996).

[183] *Furund*zija (ICTY) §§154-156; *Kallon & Kamara* (SCSL). See further Naqvi (2003).

[184] E.g. IACtHR *Barrios Altos v Peru* (2001); ECtHR *Abdulsamet Yaman v Turkey* (2004), §55; ACiHPR *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2002) §211.

[185] E.g. IACtHR *Barrios Altos v Peru* (2001) p.17.

[186] Security Council Resolution 1120 (1997), §7.

[187] Security Council Resolution 1315 (2000) §2.

[188] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (2002) §22.

[189] UN Secretary-General, Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004).

[190] *Cotesworth & Powell* (1875) p.2085; *Bovallins and Hedlund Cases* (1903); *Case of the 'Montijo'* (1874) p.1438.

[191] E.g. IACiHR *Hugo Leonardo de los Santos Mendoza et al v Uruguay* (1992).

[192] *Case of the 'Montijo'* (1874) p.1438. Also Akehurst (1969) p.56.

'foreigners of the possibility of obtaining compensation'.[193] In the event that a state deprives foreigners of 'all means of action, by passing a law of amnesty, its international responsibility would be involved and it would be answerable for any damage which the revolutionaries or rebels might have caused to the foreigners in question'.[194] The ILC adopted a similar position, observing that the grant of amnesty did not amount to a ratification of the wrongful act, but was a breach of the obligation to punish the wrongful act. For the ILC,

> Some writers... see the grant of a pardon to such insurgents as a kind of ratification of their acts by the State. It may, of course, happen that the State in granting an amnesty, is breaching an international obligation to punish which it ought to have fulfilled, but that does not mean that it is endorsing the acts of others. In such a case, it is the breach which will be attributed to it as a source of responsibility, and not the acts committed by the organs of the insurrectional movement.[195]

IHRL has since developed the principle that a state that grants amnesty will be responsible for the failure to punish rights-violating conduct in accordance with its obligation to take appropriate measures to ensure, without discrimination, the enjoyment of human rights of persons within the state's jurisdiction, and the separate obligation to provide an effective remedy.[196] According to the HRCttee,

There may be circumstances in which a failure to ensure Convention rights as required by article 2 would give rise to violations by State Parties of those rights, as a result of the State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[197]

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[193] Conclusion 9, Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation, Annex to Questionnaire 4, Report of the Sub-Committee, M. Guerrero, Rapporteur, 20 April 1927, republished in Rosenne (1972) p.131.

[194] Ibid., p128.

[195] ILC Report (1975), p.98 §26. Brownlie notes that '[t]his statement seems to go too far if it is intended to suggest that ratification cannot be inferred *in any circumstances*' (1983) p.177 [Original emphasis].

[196] E.g. Article 2(3)(a) ICCPR provides that: Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. See also HRCttee, General Comment no.31, p.3 & p.6 §16.

[197] Ibid.

In order to fulfil their obligation to take appropriate measures to investigate or redress harm, states are urged to implement reparations schemes for victims. For example, the HRCttee's concluding observations on the initial report of Liberia (2018) recommends that Liberia '[d]evelop and implement a comprehensive reparations scheme for all victims of gross human rights violations and war crimes'.[198]

The majority of cases that concern the use of amnesty have been brought before the Inter-American Commission on Human Rights (IACiHR) and IACtHR.[199] These cases concern the use of amnesties that covered violations committed by state officials or persons associated with the state in situations other than internal armed conflict. However, there is little reason to suggest that the principles advanced should not be applied to violations committed by insurrectional groups that also enjoy amnesty in situations of national reconciliation, or otherwise.

In *Hugo Leonardo de los Santos Mendoza et al v Uruguay*[200] the IACiHR held that the amnesty law of 22 December 1986[201] violated the claimants' rights to a fair trial[202] and to judicial protection pursuant to article 1 of the American Declaration on the Rights and Duties of Man and articles 1, 8, and 25 of the ACHR. This is in spite of the fact that the law was approved by a democratically elected parliament and referendum, and was 'part of a legislative program for national pacification'.[203] In *Loaya Tamayo v Peru*[204] the state had submitted that a general amnesty granted to the military, police

198 HRCttee, 'Concluding Observations on the initial report of Liberia' (2018) §11(c).

199 Cases in the ECtHR have not been directly concerned with amnesty, but have recognised the duty of a State to investigate allegations of alleged violations including torture and arbitrary killings. E.g. *Abdulsamet Yaman v Turkey,* (2004) (commenting the use of amnesty for torture). The African Commission has held that amnesty laws are incompatible with a state's human rights obligations. E.g. *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2002) (legality of clemency law).

200 IACiHR *Hugo Leonardo de los Santos Mendoza et al v Uruguay* (1992).

201 Ley no 15.848 (1986) (Uruguay).

202 Although the right to fair trial is often interpreted as applying to an accused person, in Uruguay the victim has the right to be a party to criminal proceedings. This context the Commission held that it covers the right of a victim to participate in criminal proceedings 'which is the appropriate means to investigate the commission of the crimes denounced, determine criminal liability and impose punishment on those responsible, their accomplices and those accessories after the fact'. [IACiHR *Hugo Leonardo de los Santos Mendoza et al v Uruguay* (1992) §40]

203 IACiHR *Hugo Leonardo de los Santos Mendoza et al v Uruguay* (1992, §22 (submissions of Uruguay). The Commission declared that the domestic legality of the legislation was not relevant to its considerations of whether the law violated the State's obligations under international law. On this point see also IACiHR *Gustavo Carranza v Argentina,* (1997) §63; IACtHR *Loayza Tamayo v Peru – Reparations* (1998). In IACiHR *Monsignor Oscar Arnulfo Romero y Galdámez et al v El Salvador* (2000) the Commission said [at §130]:

> ...a state cannot rely on the existence of provisions of internal law to elude carrying out its obligation to investigate human rights violations, place on trial the persons responsible, and prevent impunity.

204 IACtHR *Loayza Tamayo v Peru - Reparations* (1998).

and civilian personnel as part of the 'pacification process' precluded the prosecution of individuals who had unlawfully detained and tortured the victim.[205] The IACtHR held,

Under the American Convention, every person subject to the jurisdiction of a State Party is guaranteed the right to recourse to a competent court for the protection of his fundamental rights. States, therefore, have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected.[206]

There is some support in South African constitutional law for the principle that the provision of amnesty that is conditional upon the perpetrator's full disclosure of his or her involvement in acts constituting gross violations of human rights within a truth and reconciliation mechanism will not violate the state's obligation to prosecute and punish that act. In *AZAPO v President of South Africa*[207] the South African Constitutional Court held that section 20(7) of the Promotion of National Unity and Reconciliation Act 1995 was not a blanket amnesty, and was therefore not unconstitutional, as it was provided for on condition of full disclosure by the perpetrator. The Act permits the Committee on Amnesty to grant amnesty to a perpetrator of an unlawful act associated with a political objective and committed prior to 6 December 1993. International law was given short shrift in this case, except in so far as the Court determined that international law does not prohibited amnesty, rather it encourages it.[208] Despite the support for prosecution over amnesty in international human rights tribunals, the South African approach, combining amnesty with a truth and reconciliation commission, is considered to be a viable alternative to prosecution and a valid means of achieving 'the right to know and understand the past, and aims at reconciliation rather than retribution'.[209]

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[205] Ibid, §167.

[206] Ibid, §168.

[207] South African Constitutional Court *Azanian Peoples Organisation (AZAPO) and Ors v The President of South Africa* (1996).

[208] Ibid, §30 referring to article 6(5) APII that encourages the uses of amnesty at the end of a non-international armed conflict.

[209] Dugard (1999).

State responsibility for the failure to provide an effective remedy for harm caused by private persons or entities is preserved by the without prejudice clause provided by Article 10(3).[210] Thus, even if Article 10(1) is not applied to a government of national reconciliation, the state will be responsible for any protection from criminal prosecution or civil action provided to members of an insurrectional movement, or indeed state officials, in a peace agreement.

However, the question remains whether the state's obligation to prosecute and punish gross human rights violations and war crimes is sufficient to plug any gap in responsibility caused by the non-attribution of conduct of a successful insurrectional movement to the state for whatever reason.

### 7.6 The case for the application of Article 10(1) to 'governments of national reconciliation'

Invoking the state's responsibility under international law for the conduct of members of the insurrectional movement that now makes up the new government will provide transitional justice with 'a legal basis to pursue remedies advocates have argued need to be secured to ensure victims a full measure of justice and post-conflict societies a sustainable peace'.[211] State responsibility engages the state's obligation to make reparation for the harmful consequences that flow from the violation of international law.[212] This obligation goes beyond the requirement that a state should prosecute and punish individuals for their crimes. Reparation may be provided by the implementation of restorative justice mechanisms, rehabilitation programmes, the reconstruction of destroyed infrastructure, and the resettlement of internally displaced persons, as well as the provision of compensation. Invoking the state's responsibility provides victims with an additional recourse to remedy that does not rely upon the state or the international community to take the initiative to investigate and prosecute individuals for crimes committed during the armed conflict. The ARS are concerned with the state's obligation to provide reparation to 'another State, to several States and or to the international community as a whole'.[213] However, establishing state responsibility with respect to obligations owed to individuals is also important. The ARS do not exclude the possibility that, 'where a primary obligation is owed to a non-State entity, it may be

[210] See section 7.2 above, fn.42.

[211] Fletcher (2016) p.512.

[212] ARS, Article 31.

[213] ARS, Article 33(1).

that some procedure is available whereby that entity may invoke the responsibility on its own account without the intermediation of the State'.[214] In such cases, the success of any claim against the state for injury caused by the conduct of members of an insurrectional movement now in government will depend on whether the claimant can show that the conduct is attributable to the state. Thus, state responsibility provides the legal foundation upon which victims can directly initiate civil claims against the state within the municipal courts[215] and, if necessary, appeal to the applicable international human rights mechanisms.

As the above consideration of Liberia's failure to investigate and prosecute violations of human rights and war crimes committed by the AFL, NPFL, and other armed groups during the civil war shows, the provision of an effective remedy is by no means guaranteed. Remedies provided by IHRL and ICL frameworks offer individual victims retribution, compensation or other measures of just satisfaction. However, such remedies do not address the institutional and collective nature of conflict-related internationally wrongful acts.[216] As the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Grieff has explained, gross human rights violations and serious violations of IHL 'presuppose systemic abuses of (state) power that have a specific pattern and rest on a degree of organizational set-up'.[217] Article 30 ARS provides that a state responsible for an internationally wrongful act is under an obligation: '(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require'. Guarantees of non-repetition focus on prevention rather than reparation,[218] and may form an important part of the process of post-conflict reconstruction. Measures may include *inter alia* 'reforming institutions, disbanding unofficial armed groups, repealing emergency legislation incompatible with basic rights, vetting the security forces and the judiciary, protecting human rights defenders and training security forces in human rights'.[219] These institutional, legal and cultural interventions are considered to 'contribute to a reduction in the likelihood of recurring violations'.[220]

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[214] ARS, Article 33, Commentary, §4. Gaeta (2011).

[215] See generally Tomuschat (2014).

[216] Also, Eatwell (2018a) p.399-400.

[217] Ibid.

[218] ARS, Article 30, Commentary, §9.

[219] Report of Pablo de Grieff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', 7 September 2015, §23. For arguments concerning State responsibility for 'State crimes' and the importance of guarantees of non-repetition see Fletcher (2016) p.512.

[220] Ibid, §25.

A power-sharing agreement cannot achieve the same results as the engagement of state responsibility. For example, the failure to implement effective demobilisation and reintegration programmes for members of armed groups in the DRC following the signing of the Global Agreement 2002 'contributed to the normalisation of human rights violations within the culture of the army, in violation of the Military Code'.[221] Moreover, the failure to ensure the independence of the judiciary and to reform the law enforcement sector meant that there was no effective check on state power and corruption.[222] In practice, the provision of amnesty in the Global Agreement, albeit in accordance with international standards, and executive interference in the judiciary resulted in the absence of 'any serious attempts' to prosecute the perpetrators of serious conflict-related crimes, such that alleged perpetrators enjoyed a blanket amnesty.[223] For Gérard Prunier, 'the whole exercise, necessary as it was to stop major organised violence, reeked of rewards for crime coupled with pork barrel politics'.[224]

Ultimately, invoking the state's responsibility for the commission of gross human rights violations and other serious breaches of international law committed by the parties that make up the new government can contribute to the process of reconciliation. Generally, an internal armed conflict may erupt against a background of authoritarianism, corruption, the suppression and violation of human rights, economic depression, social and economic inequality, or extreme poverty, but the catalyst for conflict is likely to differ in each case. For example, Liberia under the presidency Samuel Doe, who governed during the 1980s and at the outbreak of conflict in 1990, 'was characterised by sustained levels of political violence, dramatic economic decline precipitated by widespread corruption, a lack of progress in political reform, and purges of real and imagined enemies… Politically, the regime's brutality was demonstrated by the persistent haste with which those implicated in anti-government plots were eliminated'.[225] With respect to the 'Arab Spring', it has been observed that 'the recent crisis in North Africa has been explained away by the global food price crisis and the support given by the West to the regimes that have now been displaced by anxieties over political Islam, whereas the evidence seems to suggest that the real driver for the insurgencies in Egypt, Tunisia and Libya has been the contempt and repressiveness with which the Mubarak, Ben Ali and Qadhafi regimes treated the people over whom they ruled'.[226] Against

[221] Davis (2013b) p.293.

[222] Ibid, p.294.

[223] Ibid, p.300.

[224] Prunier (2009) p.277.

[225] Sesay (1996) p.22. See also, TRC Liberia, Final Report. Vol.1, p.9.

[226] Joffé (2011) p.508.

this background, a state that acknowledges responsibility and seeks to ensure reparation for victims of the pre-existing government *and* the insurrectional movement now joined together in coalition projects an image of integrity, accountability, and respect for its citizens rather than one of contempt and impunity.

## 7.7 Conclusion

The ILC has presented Article 10(1) ARS as a long-standing and uncontroversial rule of attribution that provides that the state will be responsible for the wrongful acts of an insurrectional movement that succeeds in establishing a new government or state. However, the ILC's suggested limitation on the scope of Article 10(1) by the exclusion of governments of national reconciliation is problematic. The ILC did not make clear whether it intended for this exclusion to apply to all governments of national reconciliation in all their forms or whether this exclusion should be a matter of degree, dependent upon the extent to which the former insurrectional movement shares executive power with the pre-existing government. Moreover, as argued in this chapter, the ILC's concern that the attribution of responsibility in these circumstances would prevent the negotiation of a peace is not persuasive on a number of grounds. Not least, the exclusion discriminates between the victims of the former government and victims of the insurrectional movement. The state would only be under a legal obligation to provide reparation to the victims of the former government.

A state is not entirely absolved of responsibility in the event of a peace accord and establishment of a government of national reconciliation. The state remains responsible for the prosecution and punishment of gross human rights violations, war crimes, genocide and crimes against humanity. However, the state's responsibility to prosecute and punish the unlawful acts, whether committed by state or non-state actors, does not have the gravitas of direct attribution of the unlawful acts of a movement that now governs the state, nor does it serve to deter insurrectional movements from violating international law in order to achieve their goals. The focus on the state's obligation to provide an effective remedy allows the state apparatus to distance itself from its involvement in violations of international law and detracts from the interests of victims, and injured states, in the engagement of the state's responsibility for those violations and the state's consequent obligation to provide reparation.

How Article 10(1) should be applied to situations where more than one insurrectional movement has participated in a conflict that brings to an end the pre-existing government is an issue that is

yet to be resolved. I suggest that each situation should be looked at on a case-by-case basis: whether or not Article 10(1) applies will depend upon how executive power is shared between the groups. I recognise that this does not resolve uncertainty. Insurrections and their resolution can and do take many different forms. However, an overly restrictive approach to the application of Article 10(1) risks the rule, if not already, becoming obsolete.

## Chapter 8. Successful 'Insurrectional or Other Movement': Establishment of a New State

### 8.1 Introduction

This chapter considers the second rule of attribution provided by Article 10 ARS, namely the attribution of conduct of an 'insurrectional or other movement' that succeeds in establishing a new state to that state. The rule is considered by scholars to be well established and uncontroversial.[1] Yet, by contrast with the principle provided by Article 10(1), authoritative support for Article 10(2) is extremely limited.[2] Moreover, scholars have tended to misapply the few cases and incidents of state practice cited as early indications of the rule.[3] As I will show, the case law provides support for the doctrine applied by municipal courts of the retroactive validation of the legal order of a state from the date that state came into existence as a matter of fact, once the state has been recognised as such by another state. However, it is questionable whether international law can retroactively bind a state such that conduct committed before the state in fact came into existence can engage that state's international responsibility. Accordingly, it is argued that it is better to regard Article 10(2) as a rule of attribution of responsibility and not a rule of attribution of conduct. It is accepted that the scope of application of such a rule will be limited to the conduct of an insurrectional or other movement that is itself bound by IHL. Nevertheless, as a rule of attribution of responsibility, Article 10(2) would ensure that the responsibility of a new state can be engaged for serious violations of IHL committed by the movement that now makes up its organisation. Thus, conceived as a rule of attribution of responsibility, Article 10(2) can provide an important means of ensuring that a new state does not avoid responsibility for the unlawful acts committed by those who fought for its establishment, and as a consequence the obligation to provide reparation to the victims of those unlawful acts.

This chapter is divided into five parts. In section 8.2 the basic structure of Article 10(2), the rule's intended application, the definition of 'other movement', and the application of the requirement of continuity between the organisational structures of the insurrectional or other movement and the new state as the theoretical basis for the rule are considered. In section 8.3 I consider situations not covered by Article 10(2). In section 8.4 I question the proposition that Article 10(2) reflects a

[1] Atlam (1987) pp.53-54; Quigley (1999) p.358; Zegveld (2002), pp.155-156; Dumberry (2006) p.608; Cahin (2010a) p.247; Crawford (2013) p.176.

[2] As recognised by Special Rapporteur Ago, Fourth Report (1972), p.134 §157.

[3] With exception of the case law of the French municipal courts that held that Algeria would be responsible for the conduct of the FLN before its independence. See below section 8.3.

rule of customary international law. I argue that case law and state practice concerning the principle of retroactive validation of the legal order of an entity recognised as a state, cited by scholars as expressions of the rule provided by Article 10(2), have been misapplied. This analysis gives rise to the question posed in section 8.5, whether Article 10(2) is a rule destined for desuetude. I contend that Article 10(2), as currently conceived by the ILC, can only function as a rule of attribution of conduct if it is accepted that customary international law can retroactively apply so as to bind a state before it has come into existence. However, there is no support in case law or state practice for the retrospective application of law in this way. I propose an alternative approach in section 8.6 whereby Article 10(2) is applied as a rule of attribution of responsibility, rather than of conduct. I argue that it is only by conceiving Article 10(2) as a rule of attribution of responsibility that the rule will be an effective means of ensuring that a new state does not avoid responsibility for the unlawful means and methods used by persons or entities to secure the establishment of that state.

## 8.2 Article 10(2) ARS

According to Article 10(2), the conduct of an 'insurrectional or other movement', committed during its struggle against the authority of the predecessor state, will be attributable to the new state established by that movement. The rule states,

> The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

A similar rule was adopted by the 1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens.[4] Article 18(1) provides that,

> In the event of a revolution or insurrection which brings about a change in the government of a State or *the establishment of a new State*, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.[5]

[4] Reproduced in Sohn & Baxter (1961).

[5] Ibid, p.576 [Emphasis added].

In the event that the insurrectional or other movement succeeds in establishing a new state, only the internationally wrongful acts of the successful revolutionary movement would be attributable to the new state.[6] The question of responsibility for the conduct of the predecessor state would be a matter of state succession.[7]

### *8.2.1 Definition of 'Other Movement'*

Article 10(2) refers to an insurrectional 'or other' movement that succeeds in establishing a new state.[8] The ILC explains that this is in recognition of 'a greater variety' of movements whose acts may result in the creation of a new state.[9] The Commentary refers to 'other revolutionary movement',[10] which is understood to imply the inclusion of national liberation movements in the definition of the term.[11] 'Revolutionary' is not a legal term of art and may be understood to refer to any movement that seeks to establish a new state outside the constitutional framework of the predecessor state. As the Commentary states, the words 'other movement' 'do not extend to encompass the actions of a group of citizens advocating secession or revolution where these are carried out within the framework of the predecessor State'.[12]

Thus, the term 'other movement' would appear to refer only to a political party or other entity that acts outside the constitutional framework of the predecessor state. For example, should Catalonia successfully secede and declare independence from Spain, the 'other movement' may be the pro-independence movement led by Catalan President, Carles Puigdemont.[13] Similarly, the 'representatives of the people of Kosovo'[14] acting outside the Constitutional Framework of Kosovo (formerly an Autonomous Province of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY) and then the FRY) that unilaterally declared independence from Serbia on 17

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[6] Ago, Fourth report (1972), p.131 §157.

[7] Ibid; Article 11 ARS and Commentary §3. Any gap in responsibility caused by the non-attribution of the conduct of the organs of the extinct state may be filled by the adoption of the liabilities of the predecessor by the successor State: E.g. *Lighthouses Arbitration,* pp.196-200; *Gabcikovo-Nagymaros Project* p.81 §151. On the subject of state succession see generally Marek (1968); Craven (2007); Dumberry (2007).

[8] The definition of 'insurrectional movement' is discussed in chapter 7 with respect to Article 10(1) ARS.

[9] ARS, Article 10, Commentary, §10.

[10] Ibid, §8.

[11] Cahin (2010b) p.251.

[12] ARS, Article 10, Commentary, §10.

[13] Puigdemont and members of his cabinet have since been charged with offences of rebellion and sedition.

[14] *Kosovo Advisory Opinion*, pp.447-448, §109. The declaration of independence was made during a special session of the Assembly of Kosovo. However, the ICJ determined that the authors of the declaration were not acting in their capacity as the 'Assembly of Kosovo', one of the Provisional Institutions of Self-Government established under the Constitutional Framework but were in fact acting 'in a different capacity', outside of the legal framework of the Government of Kosovo. See pp.444-448, §§102-109.

February 2008[15] would constitute an 'other movement' for the purposes of Article 10(2) from the date at which Kosovo is established as a new state.[16]

However, confining the definition of 'other movement' to movements that operate outside the constitutional framework of the predecessor state in order to achieve their aims may define the term too narrowly. As the events leading up to and during the dissolution of the SFRY[17] and the conduct of the government of the Republic of Serbia (a constituent republic of the SFRY) demonstrate, a 'movement' may succeed in dominating the organisational structures of a state by political means such that the organisational structures of the movement and the predecessor state appear to be one and the same. During the SFRY's period of dissolution, Slobodan Milosevic used his position as the President of Serbia to lead a 'Serbian nationalist movement' and advocate for the establishment of a 'Greater Serbia' and to take over the organisation of the SFRY within the constitutional framework of the state.[18] Upon its establishment, the FRY (Serbia and Montenegro) adopted the organisational structures of the SFRY and claimed to be the continuing state of SFRY.[19] In *Croatia v Serbia* Croatia argued that the Yugoslav People's Army (JNA) and other armed forces under the control of the 'Serbian nationalist movement' that later proclaimed the establishment of the FRY committed genocide against the Croatian population of SFRY.[20] Croatia submitted that the conduct in question was attributable to the FRY on the basis of Article 10(2) ARS.[21] Serbia maintained that even if there was a 'Serbian nationalist movement' that succeeded in establishing the FRY in April 1992, that movement did not challenge the authority of the SFRY but instead was in fact in control of SFRY and of the JNA, and therefore did not constitute a

[15] Kosovo is not admitted as a Member of the United Nations. As at 19 December 2018 114 states had recognised Kosovo. See http://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483

[16] The status of Kosovo remains unresolved.

[17] The dissolution of the SFRY saw the emergence of its six constituent Republics that were later recognised as new States: Croatia; Federal Republic of Yugoslavia (Serbia and Montenegro); Bosnia and Herzegovina; Macedonia; and Slovenia.

[18] *Croatia v Serbia,* Memorial of the Republic of Croatia, pp.63-64, §2.105; Oeter (2011).

[19] Letter dated 6 May 1992 from the Charge d'affaires a.i. to the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, A/46/915, Annex II. This claim was rejected by a number of States, not least the other former Republics of the SFRY, Bosnia and Herzegovina, Croatia, and Slovenia. The Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission) was of the view that the FRY was a new state and could not be considered the sole successor to the SFRY: Conference on Yugoslavia, Arbitration Committee, Opinion 10 (1992) 31 *ILM* 1494, p.1525. However, the HRCttee considered that all the new independent Republics were successors to the SFRY with respect to the ICCPR: Comments of the HRCttee: Federal Republic of Yugoslavia (Serbia and Montenegro), CCPR/ C/79/Add.16, 28 December 1992. Nevertheless, by overwhelming majority of 52-1 (17 abstentions) State Parties to the ICCPR voted to ban FRY from participation in the eighteenth meeting in New York in 1994, held to conduct the periodic election of the HRC's members: CCPR/SP/SR.18, 8 December 1994. See also Tyagi (2008) pp.163-167.

[20] *Croatia v Serbia,* Memorial of the Republic of Croatia, p2 §1.03 & chpt.4.

[21] Ibid, pp.395-396, §§8.40-8.45.

'movement' within the meaning of Article 10(2) ARS.[22] Therefore, even if it was proven that there was a 'Serbian nationalist movement', a necessary requirement of Article 10(2), the existence of an insurrectional or other movement that acted outside the framework of the pre-existing state and resulted in the creation of a new state, would not be satisfied and its conduct was not attributable to FRY.[23] Serbia argued that SFRY existed as a subject of international law in 1991 and early 1992 and one cannot assume continuity between the organs of SFRY and the organs of FRY.[24]

Croatia did not dispute the fact that the organs of government and federal authorities of the SFRY had become the '*de facto* organs of the emerging FRY' in the period between mid-1991 (when the SFRY ceased to function as a state and was in a process of dissolution) and 27 April 1992.[25] In response to Serbia's submission that for the purposes of Article 10(2) the 'movement' must act *against* the constituted authorities of the predecessor state, Croatia argued that the intention of the ILC was to distinguish movements that *continue* to struggle against the state from those covered by Article 10 ARS.[26] In other words, the reference in the Commentary to movements struggling against the state's authorities was in the context of describing the general rule that the conduct of unsuccessful insurrectional movements is not attributable to the state.[27]

The ICJ did not decide the point, having concluded that Article 10(2) did not provide a basis for establishing jurisdiction.[28] However, Croatia's argument has some force. It would not be desirable for a political authority such as that led by President Milosevic to escape the reach of Article 10(2) simply because it managed to subsume the organs of the predecessor state by political machination. The underlying purpose of Article 10(2) is to ensure that responsibility for violations of international law committed by the organs or agents of a movement is not evaded merely because that movement has transformed into the organisation of a new state and therefore the movement as such no longer exists. In order to ensure responsibility, the definition of 'other movement' for the purposes of Article 10(2) should be broad, and not restricted so as to exclude movements that achieve control over the organs of the predecessor state through political means if that movement,

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[22] *Croatia v Serbia,* Counter-Memorial submitted by the Republic of Serbia, Vol. I, December 2009, §§302-306.

[23] Ibid, §305.

[24] Ibid, §311(iv).

[25] *Croatia v Serbia,* Memorial of the Republic of Croatia, p.394 §8.40; Written Statement of the Republic of Croatia, p.27 §3.40.

[26] *Croatia v Serbia,* Verbatim Record 2014/10, p.42 §23 (Crawford).

[27] Ibid; ARS, Article 10, Commentary, §2.

[28] *Croatia v Serbia*, p.53 §105. See also section

through those organs, commits violations of international law before the formal establishment of the new state.

### *8.2.2 Continuity between the insurrectional or other movement and the new state*

Different rationales for Article 10(2) have been suggested.[29] These include the theory of structural continuity; legitimacy of the struggle; resurrection of an ancient state; and continuity of a *de facto* government formed by insurgents during the insurgency.[30] However it is the notion that the internationally wrongful acts of an insurrectional movement are attributed to the new state by reason of the structural continuity between the organisation of the movement and the organisation of the new state, the same rationale for Article 10(1) ARS, that has been adopted by the ILC[31] and is most widely supported and accepted.[32]

Special Rapporteur Ago justified the attribution of responsibility pursuant to Article 10(2) on a slightly different basis, namely the continuity between the 'personality' of the movement and of the new state, reasoning that,

> … the affirmation of the responsibility of the newly-formed State for any wrongful acts committed by the organs of the insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurrectional movement and that of the State to which it has given birth.[33]

For Ago, the conduct of the insurrectional or other movement is attributed to the new state because the latter is the continuation of the former, 'in a more stable and perfected form'.[34] The new state will be responsible for conduct committed when the state existed it is 'embryonic' form, as an insurrectional or other movement:

> … the new State will in general appear at the international level as the continuation, in a more stable and more perfected form, of the insurrectional movement, whose true nature as an embryo State will then be revealed and whose structures and organization will have

[29] See Quigley (1999) p.357; Dumberry, (2006) pp.606-612.

[30] Dumberry (2006) pp.606-612.

[31] ARS, Article 10, Commentary, §6.

[32] Ibid. 612; Atlam, (1987) pp.53-54; Crawford, First Report (1998), pp.51-52 §264; Zegveld (2002) p.156.

[33] Ago, Fourth Report (1972), p.131 §159.

[34] Ibid, §157.

> become those of the newly emerged State. In that case, the attribution to such a State, as a potential source of responsibility, of acts which were formerly attributed to the insurrectional movement, because they had been committed by its organs, would be only natural. It would not be a question of attributing to a subject of international law the conduct of organs of another subject, but merely of continuing to attribute to the same subject—which would only have reached the final stage of its progressive evolution - the acts of its own organs.[35]

Thus, Ago identifies two separate bases for state responsibility pursuant to Article 10(2): (i) the continuity between the 'personality' of one subject of international law, the insurrectional movement, and the new State; (ii) the continuity between the organisational structure of the insurrectional movement, and the organisational structure of the new state. The ILC does not adopt Ago's 'progressive evolution' model. Instead the Commentary explains attribution to the new state on the basis of (ii), continuity between the organisation of the insurrectional or other movement, and the government of the new state. As the Commentary explains, '[e]ffectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish'.[36]

Article 10(2) is intended to apply to situations where a new state is constituted by secession or decolonization.[37] The reference to 'decolonization in part of the territory which was previously subject to the administration of the predecessor State' is included 'to take into account the differing legal status of different dependent territories'.[38] Further, it is arguable that Article 10(2) would apply to the dissolution of a state that results in the creation of a number of new states on the territory of the predecessor state, and the extinction of the latter.[39] However, the Commentary states clearly that Article 10(2) is not intended to apply to cases of annexation of part of a state's territory by another state.[40]

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[35] Ago, Fourth Report (1972), p.131 §157.

[36] ARS, Article 10, Commentary, §6.

[37] Ibid, §8.

[38] Ibid.

[39] Dumberry (2006) p.617. Dumberry further posits that Article 10(2) should apply to the unification of States. However, the unification of States involves questions of State succession, not the attribution of conduct. For discussion of the exclusion of cases of annexation of part of a State's territory to another State see section 8.3.2.3 below.

[40] ARS, Article 10, Commentary, §10.

## 8.3 Situations not covered by Article 10(2) ARS

### *8.3.1 Establishment of a new state on the whole of the territory of the predecessor State*

In his Fourth Report (1972) Special Rapporteur Ago suggests that Article 10(2) may apply where a successful revolution results in 'the establishment of a new State within the same territorial boundaries of the pre-existing State'.[41] The ILC was more equivocal. In its 1975 Report the ILC commented that some scholars had posited that change in the state apparatus resulting from revolution 'might be so far-reaching as to alter the identity of the State itself', but observed that 'in these cases 'political and philosophical considerations sometimes become more important than strictly legal ones'.[42] These comments have been understood to support the application of Article 10(2) to the exceptional cases 'where the change in government in reality corresponds to a change in the identity of the State following a revolution or in a situation similar to the replacement of a racist regime like that of Ian Smith in Rhodesia by the national liberation movement which proclaimed the State of Zimbabwe'.[43]

However, the assertion that changes in the organisational structures of a state by revolution can alter the identity of a state such that the predecessor state is extinguished and a new state established in its place is contrary to the principle that the state does not cease to exist as a result of changes, however radical, to its organisational structure.[44] As the US-Mexican Claims Commission said in the *Baxter's Case*, '[t]he State is the same, although the form of government is changed'.[45]

In practice states that have undergone radical changes as a result of revolution have not claimed to have established new states. For example, the end of the Chinese imperial system in October 1911 following a revolt against the Qing dynasty resulted in the end of authoritarian imperial rule and the establishment of the Republic of China.[46] Following a second revolution in 1949, the Republic was transformed into the People's Republic of China, a Communist state.[47] However,

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[41] Ago, Fourth Report (1972), p.151 §213.

[42] ILC Report (1975), p.101 §7.

[43] Cahin (2010a), p.250.

[44] ARS, Article 10, Commentary, §5. Also, Chen (1951) p.97; Marek (1968) p.24; Jennings & Watts (1992) pp.204-205 §57.

[45] *Baxter's Case* (1871) p.2934.

[46] US Department of State, Office of the Historian, 'Milestones: 1899-1913. The Chinese Revolution of 1911.'

[47] Ibid, 'Milestones: 1945-1952. The Chinese Revolution of 1949.'

the People's Republic of China never claimed discontinuity with the Chinese Empire.[48] A similar example is that of the Russian Revolutions of 1917 that resulted in the abdication of Tsar Nicholas II and the end of the autocratic Tsarist system[49] and civil war, resulting in the creation of the Union of Soviet Socialist Republics in 1922. The USSR was, like the Tsarist Russian Empire, governed by a central authority. However, the political identity of that authority, that of Marxist-Leninism, was completely different to the autocratic monarchy that had previously governed the Empire. Nevertheless, it was generally accepted that despite these fundamental changes to government and the identity of the state, from absolute monarchy to communist state, the USSR was a continuation of the Russian Empire.[50] These cases would fall within the scope of Article 10(1) ARS.

### *8.3.2 Annexation of part of the territory of one State to another State*

According to the Commentary, Article 10(2) does not apply where the insurrectional or other movement succeeds in bringing about union with another state. This would constitute a case of succession and is therefore beyond the scope of the articles.[51] Therefore, these circumstances may give rise to a gap in responsibility as, in the event the insurrectional or other movement ceases to exist because it has been dissolved or subsumed into the organisational structures of the annexing state as a result of the union, responsibility for the conduct of the insurrectional or other movement will die with it.[52]

The exclusion of cases where part of the territory of one state has acceded or is annexed to another state may be explained as an application of the notion of continuity between the organisational structures of the movement and the organisational structures of the new state. The Commentary explains, 'article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be'.[53] In cases of accession of territory there will be a break in continuity between the organisational structure of the movement and the other state as the former are either absorbed into or dissolved by the organisational structure of latter. Thus, the

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[48] Hsiung (1972) p.36; Crawford (2008) p.679.

[49] In 1905 the Tsar issued the October Manifesto that established the Duma, or legislature, as a small concession to the Tsar's opposition. However, the Tsar maintained the right to veto any legislation and to dissolve the Duma in the event of disagreement.

[50] *Agency of Canadian Car and Foundry Co. Ltd v American Can. Co.* (US Circuit Court of Appeals) (1919); *The Russian Roubles (Attempted Counterfeiting) Case* (Japan Supreme Court) (1919); *Lowinsky v Receiver in Bankruptcy of the Egyptische-Turksche Handwerksigarettenfabriek* (Holland, District Court of Amsterdam) (1932); *Lazard Bros. v Midland Bank* [1932] AC 289, pp306-307 (Lord Wright). See also Mullerson (1993) p.476.

[51] ARS, Article 10, Commentary, §10.

[52] Dumberry (2006) pp.619-620.

[53] ARS, Article 10, Commentary, §10.

exclusion is based on the 'rather technical' basis that the insurrectional or other movement has not established a new state but has been annexed to an already existing state.[54]

Whatever the basis for the exclusion, the result is that there is no subject of international law to which any internationally wrongful acts committed by the insurrectional or other movement in its struggle to achieve union with the other state will be attributable.[55] For Dumberry, fairness requires that the now enlarged state should provide compensation to the victims of any internationally wrongful acts committed by the insurrectional or other movement.[56] For the same reason, Dumberry suggests that the principles of Article 10(2) should also apply to cases of 'total incorporation' of one state into another, for example the incorporation of the German Democratic Republic into the Federal Republic of Germany in 1990.[57] However the latter case involves the question whether one state should accept responsibility for the internationally wrongful acts committed by another state. Cases such as this are better approached according to principles of international law governing state succession, not attribution of conduct.

### 8.4 Questioning the customary status of Article 10(2)

Special Rapporteur Ago acknowledged that a number of scholars did not distinguish between the two situations addressed in Article 10 ARS, namely that where an insurrection results in the establishment of a new government and that where an insurrection results in the creation of a new state on part of the pre-existing state's territory.[58] Indeed, there is a distinct lack of case law or examples of state practice supporting the existence of the rule provided by Article 10(2). The scarcity of judicial precedent and state practice is evident in the ILC Commentary on Article 10. Contrary to the Commentary's assertion that '[a]rbitral decisions, together with State practice and literature, indicate a general acceptance of the two positive attribution rules in article 10',[59] no authority is cited in direct support of Article 10(2). This is surprising given that since the creation of the United Nations, and before and during the period of the ILC's study on State responsibility, 80 former colonies (otherwise described as 'non-self-governing territories') or Trust Territories[60]

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[54] Dumberry (2006) pp.619-620.

[55] Ibid.

[56] Ibid, p.620.

[57] Ibid.

[58] Ago, Fourth Report (1972), p.150 §210.

[59] ARS, Article 10, Commentary, §12.

[60] Trust Territories are territories placed under the supervision of the United Nations International Trusteeship System created according to chapter XII of the UN Charter, 1945. Pursuant to article 77 of the UN Charter, the Trustee System applied to: Territories under mandates established by the League of Nations after the First World

have achieved independence.[61] Of that number, nearly half emerged during the 1960s.[62] The rest, with the exception of Timor-Leste that achieved independence in 2002,[63] achieved independence with the dissolution of the USSR and the SFRY, before the adoption of the ARS by the General Assembly in 2001. However, with exception of Croatia's pleadings in *Croatia v Serbia*, none of these cases appear to have given rise to the application of the rule provided by Article 10(2), or the suggested application of that rule. This lack of authoritative support for Article 10(2) has led one scholar to conclude that the rule 'seems to be more doctrinal construction than one based on actual state practice'.[64] Nevertheless, scholars have generally considered the rule provided by Article 10(2) to be uncontroversial.[65]

Some limited support for the rule provided by Article 10(2) has been drawn from the interpretation by the French municipal courts of Article 18 of the Déclaration de Principes Relative à la Coopération Économique et Financière, which formed part of the Evian Accords 1962 between Algeria and France at the end of the civil war in Algeria and the establishment of Algeria as an independent state. Article 18 of the Déclaration provides that,

> L'Algérie assume les obligations et bénéficie des droits contractés en son nom ou en celui des établissements publics algériens par les authorités françaises compétences.[66]

In response to a request for an official interpretation by the French courts, the French Ministry of Foreign Affairs declared that article 18 provided that Algeria should not be held responsible for the acts and measures taken by France that were 'specifically directed against the rebellion of the

War; Territories detached from 'enemy States' as a result of the Second World War; and Territories voluntarily placed under the System by States responsible for their administration. United Nations, 'International Trusteeship System'.

[61] See United Nations, Committee of 24 (Special Committee on Decolonization), 'Trust and Non-Self-Governing Territories (1945-1999)'.

[62] During the 1960s 37 former trust and non-self-governing territories established new States: Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville) now Republic of Congo, Cyprus, Equatorial Guinea, Gabon, Gambia, Guyana, Indonesia, Ivory Coast, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Mali, Malta, Mauritania, Mauritius, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Singapore, Somalia, South Yemen, Swaziland, Tanzania, Togo, Trinidad and Tobago, Uganda, Upper Volta now Burkina Faso, and Zaire now the Democratic Republic of Congo.

[63] United Nations, Committee of 24 (Special Committee on Decolonization), 'Trust and Non-Self-Governing Territories (1945-1999)'.

[64] Dumberry (2006) p.612.

[65] Atlam (1987) pp.53-54; Quigley (1999) p.358; Zegveld (2002) pp.155-156; Dumberry (2006) p.608; Cahin (2010a) p.247; Crawford (2013) p.176.

[66] Translation: 'Algeria shall assume the obligations and enjoy the rights contracted for on its behalf or on behalf of Algerian public institutions by the competent French authorities'.

Front de Libération Nationale (Algeria) (FLN).[67] This interpretation has been applied by the French courts to support the principle that Algeria is responsible for acts attributable to the FLN committed during the insurgency and its struggle for independence from France. For example in *Perriquet*[68] the Conseil d'Etat, in refusing a claim for compensation for damage caused by the FLN during the insurgency, held that whilst Algeria was not responsible for injury caused by measures taken by the French authorities directed towards the suppression of the insurrection, Algeria was responsible for damage attributable to the insurrectional movement.[69] Similarly in *Grillo*[70] the Conseil d'Etat refused to annul the decisions of lower courts refusing compensation to the appellant for damage caused by the FLN during the insurgency, stating that the acts were attributable to a foreign state, and therefore France's responsibility was not engaged.[71]

However, as Algeria was not a party to proceedings it is unlikely that the French municipal courts decision would have had any legal consequences for Algeria. Therefore, the decisions are of limited assistance to the determination whether Article 10(2) is a rule of customary international law.

There is support for the principle that a new state should be responsible for the conduct of its organs from the date that state in fact came to exist, rather than from the date of a state's recognition as a state. However, this principle has been expressed in terms of the 'retroactive validation of the legal order' of a state *in statu nascendi*,[72] rather than in terms of the attribution of conduct of the insurrectional or other movement that succeeded in forming a state to that new state. Some scholars have cited retroactive validation of a legal order in support of the existence of the rule provided by Article 10(2).[73] However, there is an important distinction between the retroactive validation of a legal order of a state *in statu nascendi* and the attribution of conduct of an insurrectional or other movement to the new state. As will be discussed further below, the former

[67] Dumberry (2006) p.614; Cahin (2010a) p.250; Crawford (2013) p.178.

[68] Conseil d'Etat, *Perriquet* 1995).

[69] Ibid: '...que si l'application de cette règle générale n'a pas pour effet de mettre à la charge de l'Etat algérien la reparation des dommages cause par les mesures prises spécialement et directement par les authorites francaises en vue de faire échec aux mouvements insurrectionnels, l'indemnisation des dommage imputables à des éléments insurrectionnel intéresse l'Etat algérien'. See also *Hespel* [1980]; *Consort Hovelque* [1984]; *Grillo* [1999].

[70] Conseil d'Etat, *Grillo* (1999).

[71] Ibid: 'que le préjudice subi par les requérants, qui trouve son orgine directe dans le fait d'un Etat étranger, ne saurait engager la responsibilité de l'Etat français sur le fondement du principle de l'égalité devant les charges publiques'.

[72] E.g. Crawford (2007) p.654 & (2013) pp.135-136.

[73] Crawford (2013) pp.176-179 & (2007) p.654. For Dumberry the authorities 'to some extent' support the principle provided by Article 10(2): Dumberry (2006) p.613.

rule does not require the attribution of conduct of one entity to another. The rule of retroactive validation, that has been described as 'a rule of convenience rather than principle',[74] is based on the notion that 'the principle of effectiveness dictates acceptance, for some legal purposes at least, of continuity before and after statehood is firmly established'.[75] The US Supreme Court, the courts of England and Wales and the US International Claims Commission have tended to treat the legal order of the new state as valid from the date it *in fact* was established.[76] The retroactive validation of a legal order of a state is reliant upon recognition of that state by another state or states. The act of recognition is the conferment upon an *already existing state* of the right to act in the international sphere.[77]

A rule of attribution of conduct of an insurrectional or other movement to a state is just that - it provides the circumstances in which the conduct of a person or entity is attributable to the state. A rule of attribution does not create international obligations of the state, retroactively or otherwise. As the ILC has stressed in an early draft of its commentary to Article 10 ARS,

> …it should be made clear that the article under consideration relates only to the attribution of certain acts to the State. It in no way seeks to define at the same time the international responsibility which might possibly derive from this attribution or to determine the amount of compensation due.[78]

Support for the retroactive validation of the acts of an insurrectional or other movement that achieves statehood, from the date of a declaration of independence rather than the point of its recognition as a state, may be found in the *obiter dictum of* the US Supreme Court in *Williams v Bruffy*.[79] In that case, one that concerns the responsibility of the Union for acts committed by the Confederate authorities during the civil war, the United States Supreme Court said,

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[74] Jennings & Watts (1992), p.161 §48. Also, Jones (1935) p.55. *Cf.* Chen (1951) pp.177-178.

[75] Crawford (2013), p.136. Also, Chen (1951), p.177.

[76] E.g. *Williams v Bruffy* (1877) pp.185-186; *Luther v Sagor* [1921] 3 KB 532, pp.543-544 (Banks LJ); *Socony Vacuum Oil Company Claim* [1955] 21 ILR 55; *Lazard Bros. v Midland Bank* [1932] AC 289, p.297 (Lord Wright). See also Jennings & Watts (1992) p.161 §48.

[77] *Cf.* Chen (1951), pp.30-31 who argues that the existence of a State and its international personality cannot be separated: 'To say that a State 'exists', but is not a subject of international law, is a contradiction in terms'.

[78] ILC Report (1975), p.102 §8.

[79] *Williams v Bruffy* (1877) pp.185-186.

The other kind of *de facto* governments to which the doctrines cited relate is such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and becomes recognized, its acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the state governments under the old confederation on their separation from the British Crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy's property made by them were sustained as if made by an independent nation. But if they had failed in securing their independence, and the authority of the King had been reestablished in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.

In the *Socony Vacuum Oil Company Claim*[80] the US International Claims Commission cited with approval the above extract from *Williams v Buffy* (in part), reflecting that following its secession from the British Crown in 1776 the new state of the United States of America was responsible for internationally wrongful acts committed by the revolutionaries from the date of declaration of independence.[81] In that case the claimant sought damages from Yugoslavia regarding the expropriation of property by the 'Independent State of Croatia' sometime between 1941 and 1945. The United States and Yugoslavia had, pursuant to an Agreement dated 19 July 1948, agreed to the 'full settlement and discharge of all claims of nationals of the United States against the Government of Yugoslavia on account of the nationalization and other taking by Yugoslavia of property'.[82] The Commission found that rather than being an established state, Croatia was a puppet state, controlled by Italy and Germany, which had never successfully seceded from Yugoslavia nor did it enjoy *de facto* control over the territory.[83]

To this rather limited list of authorities may be added the legal opinion of Law Officers of the British Crown in 1863 concerning responsibility for losses suffered by British citizens during American Civil War. According to that opinion, in the hypothetical situation that the Confederate

[80] *Socony Vacuum Oil Company Claim* [1955].

[81] Ibid.

[82] Ibid.

[83] Ibid, pp.57-60.

states were to succeed in establishing a new state, Britain could claim compensation from the new 'Sovereign Government' for losses suffered by British citizens during the Civil War.[84]

According to the *dicta* of the US Supreme Court in *Williams v Buffy* and the US International Claims Commission in *Socony Vacuum Oil Company Claim* the conduct of the state governments would be attributable to the new independent state *from the date of the declaration of that state's independence from the predecessor state*, provided that the new state is in due course recognised as a state by other states: 'Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged'.[85] Therefore, the concern of the US Supreme Court, and of the US International Claims Commission, is not whether or not the conduct of an insurrectional or other movement is attributable to the new state, but the legal consequences of recognition and the notion that once statehood is firmly established the 'retroactive validation' of the legal status of a state *in statu nascendi* is justified.[86] Underlying this notion of the retroactive validation of the legal status of a state *in statu nascendi* once statehood is achieved is the principle of effectiveness. As Crawford explains,

> States not infrequently first appear as independent belligerent entities under a political authority which may be called, and function effectively as, a provisional government. Once statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition as a state, when some degree of effective government existed.[87]

Applying the doctrine of retroactive validation of the legal order of a political authority that has established a degree of effective government or effective control over territory before achieving statehood to successful insurgents, Crawford states in his study, *The Creation of States in International Law*, that it is 'well established that legal rights and liabilities of successful insurgent governments continue to bind the State so formed',[88] and posits that this rule is now affirmed as a rule of attribution provided by Article 10(2) ARS.[89] However, Crawford apparently misinterprets Article 10(2) ARS. As stated above, the doctrine of retroactive validation of a legal order of a recognised

[84] Ago, Fourth Report (1972), §204 fn.467 cited in *Croatia v Serbia,* Counter-Memorial of Serbia, §290.

[85] *Socony Vacuum Oil Company Claim* [1955].

[86] Crawford (2007) p.654 & (2013) pp.135-136.

[87] Ibid.

[88] Ibid, p.658.

[89] Ibid, p.659.

state is different from the attribution of conduct of the insurrectional or other movement, before it succeeded in forming a new state in fact, to that state. Special Rapporteur Ago explained that the premise of the rule was 'not … a question of attributing to a subject of international law the conduct of organs of another subject, but merely of continuing to attribute to the same subject - which would only have reached the final stage of its progressive evolution - the acts of its own organs'.[90] Article 10(2) is not drafted as a rule of attribution of rights and liabilities, but as rule of attribution of conduct.

In *Croatia v Serbia* Serbia argued that Article 10(2) 'does not represent customary international law' in 1991-1992, the period relevant to that case.[91] Drawing on Special Rapporteur Ago's Fourth Report in which the Special Rapporteur introduced Article 10(2),[92] and on Dumberry's survey of state practice, Serbia contended that,

> … the rule contained in Article 10, para. 2 of the ILC Articles on State Responsibility is not supported by State practice, which is almost non-existent. Nor is there evidence of States' *opinio juris* in this regard. It is therefore submitted that said rule does not reflect international custom.[93]

The Court affirmed its previous conclusion that the FRY, the new state that emerged following the dissolution of the SFRY in April 1992, was only bound by the obligations of the Genocide Convention from that date.[94] Thus, 'even if the acts prior to 27 April 1992 on which Croatia relies were attributable to a "movement", within the meaning of Article 10 (2) of the ILC Articles, and became attributable to the FRY by operation of the principle set out in that Article, they cannot have involved a violation of the provisions of the Genocide Convention but, at most, only of the customary international law prohibition of genocide'.[95] Accordingly, the ICJ did not find it necessary to consider whether Article 10(2) constitutes an expression of customary international law as it was in 1991-1992 or thereafter.[96]

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[90] Ago, Fourth Report (1972), p.131 §157.

[91] *Croatia v Serbia,* Counter-Memorial of Serbia, §284 & §286.

[92] Ago, Fourth Report, *ILC Ybk* 1972, Vol.II, §§200-209.

[93] *Croatia v Serbia,* Counter-Memorial of Serbia, §293. The Court did not decide the point on the ground that it did not have jurisdiction. See section 8.2.1 above.

[94] *Croatia v Serbia,* Preliminary Objections, pp.454-455 §117.

[95] *Croatia v Serbia*, p.53 §105.

[96] Ibid.

The limited examples of case law and state practice supporting the existence of Article 10(2) lead one to suspect that had the ICJ considered the question whether Article 10(2) is an expression of customary international law, it is likely that the Court would have answered the question in the negative. Nevertheless, the approach of the ICJ in *Croatia v Serbia* reveals a greater challenge to Article 10(2) than the question of its status as customary international law. This is the question whether Article 10(2) works as a rule of attribution of conduct for the purposes of engaging a state's international responsibility at all. If this is answered in the negative, and contrary to the stated purpose of Article 10 in the ILC Commentary, a new state can and will avoid responsibility for unlawful conduct committed its organs in their effort to establish that state.

### 8.5 A rule destined for desuetude?

Article 10(2) is a rule of attribution that is the product of a notion of fairness, justice, and equity. The rule is representative of a view of what ought to happen when an insurrectional or other movement succeeds in establishing a new state. As Special Rapporteur Ago reasoned, 'the attribution to such a State, as a potential source of responsibility, of acts which were formerly attributed to the insurrectional movement, because they had been committed by its organs, would be only natural'.[97] There should be no gap in the law of responsibility that would allow a new state to avoid responsibility, and therefore the obligation to provide reparation, for internationally wrongful acts committed by its founders.

However, the ICJ's judgment in *Croatia v Serbia* exposes a fundamental flaw in Article 10(2),[98] thus far not addressed by scholarship. According to the ILC, 'for the purpose of attributing acts [of an insurrectional movement] to the State, no distinction is made between the acts of organs of the insurrectional movement according to whether they preceded or followed the acquisition by the movement of effective power over a given region'.[99] The ILC's commentary to Article 2 ARS states that,[100] 'for responsibility to attach to the act of the State, the conduct must constitute a breach of an international obligation in force for that State *at that time*'.[101] The Commentary further

[97] Ago, Fourth Report (1972), p.131 §157.

[98] See *Croatia v Serbia*, p.52 §104.

[99] ILC Report (1975), p.100 §2.

[100] Article 2 ARS provides the two elements of an internationally wrongful act of a State for the purposes of establishing State responsibility, namely (a) that the act is attributable to the State and (b) that the act constitutes a breach of an international obligation of that State.

[101] ARS, Article 2, Commentary, §1.

elaborates that Article 2(b) refers to a breach of 'an international obligation of that State' rather than to an international norm or rule as '[w]hat matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State'.[102] Further, Article 13 ARS applies the inter-temporal rule of international law and a guarantee against the retrospective application of international law in matters of state responsibility. Article 13 ARS provides that 'an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'.[103]

As a general rule, a treaty does not bind a party with retroactive effect, i.e. with respect to any act or omission that took place before the treaty came into force for that state.[104] In circumstances where a new state is created that new state will only be bound by international law from the date of that state's accession to a treaty, or, where applicable, the date of its succession to the international obligations of the predecessor state,[105] unless the provisions of the treaty provide for its retroactive effect.[106] Thus, in its assessment in *Croatia v Serbia* of whether Article 10(2) could provide a means of bringing acts occurring before the establishment of the FRY (Serbia and Montenegro) in April 1992 within the Court's jurisdiction, the ICJ observed that,

> … even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[107]

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[102] Ibid., §13.

[103] Article 13 ARS.

[104] Article 28 VCLT; Jennings & Watts (1996) p.1249 §620.

[105] *Ambatielos (Greece v United Kingdom)* p.40; *Croatia v Serbia,* Preliminary Objections, pp.454-455, §117; *Croatia v Serbia,* pp.49-51, §§95-100. See also, Müllerson (1998), pp.26-32.

[106] E.g. *Mavromattis Palestinian Concessions* (PCIJ); *Ambatielos (Greece v United Kingdom),* p.40. Provisions of a treaty the reflect customary international law may be applied to events that occurred before the treaty came into force insofar as they are 'a convenient expression of the customary rules': Jennings & Watts (1996) p.1249 §620, fn.6; e.g. ECtHR *Golder v United Kingdom*, §29.

[107] *Croatia v Serbia,* p.52 §104. Also, *Croatia v Serbia,* Declaration of Judge Xue, p.382 §3.

The ICJ concluded that even if the acts complained of were attributable to Serbia pursuant to Article 10(2), 'they cannot have involved violations of the Genocide Convention, but, at most, only the customary international law prohibition of genocide'.[108]

The ICJ's analysis in *Croatia v Serbia* gives rise to a further question whether a new state's obligations under *customary international law* can be applied retroactively to conduct that occurred before the state came into existence?[109]

It is generally accepted that a new state will be bound by principles of customary international law.[110] Judge Weeramantry observed in his separate opinion in *Bosnia Genocide* (judgment of 1996), principles of customary international law 'continue to be applicable to both sovereign and subjects, irrespective of changes in sovereignty, for the new sovereign, equally with the old, is subject to customary international law'.[111] However, it is questionable whether, under accepted principles of international law, a new state will be responsible for conduct that has occurred before it came into existence. According Marek,

The rights and duties of the new State will initially be derived exclusively from customary international law. The new State will not be internationally responsible from what has taken place on its territory prior to its birth… On the other hand, an old State will continue to bear its international rights and duties both customary and conventional... It may be held internationally responsible for what has occurred in its territory.[112]

It may then be questioned whether Article 10(2) provides an exception to the requirement that a state must be bound by the international obligation at the time the act was committed? For in order for the conduct of an insurrectional or other movement to engage the responsibility of the new state, customary international law must be considered to retroactively bind that new state from the point at which that movement took form. As stated above, the authorities that appear to support the rule provided by Article 10(2) are at most expressions of the principle that once a new

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[108] Ibid., p53, §105.

[109] The ICJ did not address this question in as any jurisdiction it possessed in that particular case derived from article IX of the Genocide Convention that does not afford a basis for the exercise of jurisdiction over a claim of violations of the prohibition of genocide under customary international law. See *Croatia v Serbia,* pp.47-48, §§88-89.

[110] Jenks (1952) p.107; Marek (1968) p1.

[111] *Bosnia Genocide*, Preliminary Objections, Separate Opinion of Judge Weeramantry, p.648.

[112] Marek (1968) p.1.

state has been recognised the retroactive validation of its legal order, and of the rights and obligations created by the acts of that state before its recognition, is justified. However, the authorities only support retroactive validation to the date the new state was proclaimed or established in fact, not the date at which the movement whose struggles led to the formation of that state came into being. The retroactive validation of a state's legal order does not result in the retroactive application of international law to that state. Rather, it is an acceptance of the law-making capacity of that state so as to ensure that the legal rights and duties created by the acts of that state may be effectively implemented and enforced.[113] Non-recognition of a new state denies that state any law-making faculty and the ability to create legal title, and therefore deprives the acts of that state of any validity within international law.[114] In circumstances where a movement claims to have established a new state on part of the territory of the predecessor state, the practice of non-recognition ensures the continuity of the predecessor state to legal title over the territory.

It follows from the above analysis that there is no authoritative support for the notion that customary international law can bind a state with respect to acts committed by armed groups before that state *in fact* came into existence. Therefore, as much as it is desirable that a new state should be international responsible for the conduct of the insurrectional or other movement whose agitations led to that state's formation, it is questionable whether Article 10(2) can operate as a rule of attribution of conduct.

### 8.6 An alternative approach: A rule of attribution of responsibility

The notion that a new state, established by an insurrectional or other movement, is a potential source of responsibility for the acts of that insurrectional or other movement that violate international law should not be dismissed altogether. As an alternative to invoking Article 10(2) as a rule of attribution of conduct, the question of the new state's responsibility for violations of international law committed by the insurrectional or other movement may be approached as one of attribution of responsibility. This may be what Ago had in mind when he explained the justification for Article 10(2) according to the 'continuity which would exist between the personality of the insurrectional movement and that of the State to which it has given birth'.[115]

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[113] For discussion of the effect of recognition of the validity of acts of a government declared 'illegal' by the UN Security Council. The application of Article 9 ARS to the conduct of armed opposition groups is considered in chapter 6 of this thesis.

[114] Marek (1968) p.560.

[115] Ago, Fourth Report (1972), p.131 §159. See section 8.2.2 above.

A rule of attribution of responsibility would be narrow in its application, both in terms of the persons or entities to which any such rule would apply and in terms of the nature of international obligations. This is because the category of non-state actors bound by international law, and the extent to which they are so bound is limited. It is generally accepted that IHL may bind certain armed groups.[116] As the ILC Commentary recognises, '[a] further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example, for a breach of IHL committed by its forces'.[117] However, the notion that armed groups hold obligations under IHRL is controversial, albeit that there is a growing acceptance of the notion that entities that exercise effective power and authority over territory may hold certain obligations under IHRL.[118] Nevertheless, a rule that provides for the attribution of responsibility for violations of international law committed by the insurrectional movement that succeeds in establishing a new state would ensure against impunity and require the new state to provide reparation to victims of its founders unlawful acts.

As with Article 10(1), this rule is based on the continuity between the organisational structures of the insurrectional movement and the organisational structures of the new state. The proposed rule of attribution of responsibility is different to a rule of succession of one subject of international law to the rights and obligations of another subject of international law. The insurrectional movement does not transform into a subject of international law (the new state). On the establishment of the new state, the insurrectional movement transforms in to the organisational structure, the organs, of that state.

### 8.7 Conclusion

The rule provided by Article 10(2) has been described as 'uncontroversial'. This is in spite of a lack of authority supporting the existence of the rule. As I have shown, the authorities and practice support the retroactive validation of the legal order of a state, once that state has been recognised, from the date of the declaration of independence by that state, but not the attribution of conduct of the insurrectional or other movement committed before that declaration of the new state.

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[116] See e.g. *Nicaragua,* §§218-219 in which the Court states that the acts of the *contras* are 'governed by the law applicable to [non-international armed conflicts]'; SCSL *Kallon & Kamara,* Jurisdiction: Lomé Accord Amnesty (2004) §45; *Sam Hinga Norman*, Jurisdiction (Child Recruitment), (2004), §22; Article 3 Common to GCs and ICRC Commentary of 2016, §505; Rule 139, ICRC Customary IHL Study, updated 6 June 2016; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005) §§157-158 & 172. There is disagreement as to *why* armed groups are so bound. See Sivakumaran (2006); Kleffner (2011); Murray (2015).

[117] ARS, Article 10, Commentary, p.52 §16.

[118] Rodley (1993); Tomuschat (2004) p.588. See also, Bellal (2016).

Moreover, the ICJ's conclusion that Article 10(2) cannot be applied to the question of Serbia's responsibility for acts of genocide committed before the state's proclamation as a new, independent state on 27 April 1992, reveals a fundamental flaw in the operation of Article 10(2). The effective operation of the rule relies upon the retroactive application of customary international law so as to bind a new state with respect to conduct committed before that state came into existence. However, there is no support in case law or doctrine for such a rule.

Thus, rather than applying Article 10(2) as a rule of attribution of conduct it should be applied as a rule of attribution of responsibility. The scope of application of the rule will be limited, given that it is only generally accepted that armed groups in situations of armed conflict may be bound by IHL. Nevertheless, the application of Article 10(2) as a rule of attribution of responsibility would ensure that responsibility for gross violations of IHL commissioned by a successful insurrectional or other movement is not extinguished by virtue of the establishment of the new state.

## Chapter 9: Conclusion

The attribution of conduct of non-state actors to a state is one of the more controversial aspects of the law of international responsibility. The orthodox view is that state responsibility for 'private' conduct is extremely limited. As argued in chapter 2, the high threshold tests required to identify a state's *de facto* organs and agents mean that a state that provides substantial financial, military and other support to an armed group will not be directly responsible for the conduct of that armed group, even if that group uses the state's support to commit war crimes, genocide, crimes against humanity and other violations of international law. In light of the practical and evidential difficulties that are likely to arise when seeking to prove conduct was committed on the instructions of or under the effective control of the state, it is doubtful that the law of state responsibility, as currently understood, is sufficient to ensure that states do not evade their international obligations by delegating the conduct of war, terrorism or other violations of the state's international obligations to a proxy.

The question of a state's responsibility should take into account a state's primary obligations to prevent certain unlawful acts. However, as argued in chapter 4, the failure to prevent the commission of unlawful acts is legally and conceptually distinct from complicit conduct – deliberate acts that contribute to the harm itself. Thus, although overlapping primary and secondary rules of international law can provide a comprehensive legal framework that regulates state complicity in violations of IHL and certain rights-violating conduct, outside of situations of armed conflict a normative gap in responsibility exists between a state's primary obligations to prevent certain acts and a state's direct responsibility for violations of international law committed by armed groups acting on the instructions of, or under the effective control of, the state. A states is able to exploit this gap, thereby undermining the integrity of international law, and evading responsibility for complicity in terrorism and international crimes committed by its proxy outside of the state's jurisdiction.

But adopting a flexible approach to the rules of attribution and applying the 'overall control' test to cases of unlawful purpose shared by the state and armed group would not be an appropriate or effective means of addressing state complicity in the unlawful acts of armed groups. The requirement of proof of a common plan to commit unlawful acts means that the test introduces a new criterion to the attribution of the conduct of a state's agents – proof of the state's intention.

In practice one evidentially unattainable threshold, effective control, is replaced with another, intent to achieve a specific outcome.

Thus, in chapter 5 I argued that this gap in responsibility may be addressed by a general rule of derivative responsibility for complicity. *Lex specialis* rules of derivative responsibility that have been progressively developed in IHL, IHRL and primary obligations pursuant to international instruments that govern the transfer of arms support holding a state to a stricter standard when the beneficiary of that state's aid or assistance is an armed group. In such cases it is sufficient to show that the state knew, or should have known, that its support would be used to commit unlawful acts.

In Part II I considered the scope and content of Articles 9 and 10 ARS, two rules that provide an exception to the control-agency paradigm that underlies the principles that govern the identification of a state's organs or agents. As explained in chapter 6, references to Article 9 in the ILC Commentary to Articles 5 and 10 ARS that suggest the rule would cover the conduct committed by any armed group in any exercise of "governmental authority" are misleading. There is no case law or state practice that supports the attribution of any conduct of an armed opposition group to the state pursuant to Article 9. Article 9 only covers conduct committed in the exercise of governmental authority with the acquiescence of the state. Moreover, arguments that Article 9 provides a basis for attribution of cross-border armed attacks by an armed group to the 'harbouring' state are firmly rejected. A state's inability to control the area in which the armed group is operating will not amount to 'acquiescence'.

Articles 10(1) and (2), the subjects of chapters 7 and 8, are two rules of attribution that are heavily influenced by principles of equity and justice. Described as 'uncontroversial' by most scholars, these rules provide a potential basis upon which the normative gap in responsibility that would otherwise exist: namely, in circumstances where that armed group succeeds in its efforts to become the government of the state, or to establish a new state. However, the potential of Article 10(1) to ensure that armed groups that achieve power by force do not avoid responsibility for the unlawful acts committed in the pursuit that goal is significantly hampered by the ILC's suggestion that the rule should not be pressed too far in cases of 'governments of national reconciliation'. As argued in chapter 7, this suggested limitation on the scope of Article 10(1) is problematic. Not least, the exclusion discriminates between the victims of the former government and victims of the

insurrectional movement. The move in international law is, and should continue to be, towards responsibility not away from it.

The approach of the ICJ to the question of the applicability of Article 10(2) to the question of Serbia's responsibility for acts of genocide committed before the state's proclamation as a new, independent state, reveals a fundamental flaw in the rule. The effective application of the rule relies on the acceptance, as a matter of principle, that customary international law may retroactively bind a new state with respect to conduct committed before that state in fact existed. However, there is no support in case law or doctrine for such a rule. Thus, in chapter 8 it is argued that Article 10(2) should be conceived as rule of attribution of responsibility. The scope of application of this rule will be limited. Nevertheless, such a rule would ensure that responsibility for gross violations of IHL commissioned by the successful insurrectional or other movement is not extinguished by virtue of the establishment of a new state. Otherwise, Article 10(2) will, if it has not already, swiftly pass into desuetude.

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