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The Use of Force by Non-State Actors and the Limits of Attribution of Conduct

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Abstract

The grounds of attribution of conduct as codified by the International Law Commission in the Articles on State Responsibility for Internationally Wrongful Acts fail to capture different dimensions of the use of force by non-state actors. The conflicts in Syria, Ukraine and Yemen demonstrate the difficulty in applying the classical attribution framework to complex situations with multiple actors and varying degrees of state involvement in the internationally wrongful acts. This article proposes to redraw the boundaries between the concepts of a de facto organ of a state, the control thresholds for the attribution of non-state actors' conduct and complicity as an additional ground of attribution of conduct in international law.

1 Introduction

International law has changed significantly since the times in which the individual was regarded as a mere object of inter-state affairs. States remain the prime subjects of international law, but many other actors now shape international relations. Moreover, many rules 'are directly concerned with regulating the position and activities of individuals; and many more indirectly affect them'.[1] There persists, however, a gap in the regulation of the use of force by non-state actors and the consequences, if any, for the states that facilitate it.[2]

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1 R.Y. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, 2008), vol. 1, at 846.

2 On different mechanisms of accountability in respect of non-state actors see, e.g., L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), at 97; Gronogue, 'Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors', 23 *Duke Journal of Comparative and International Law* (2013) 365; Ryngaert, 'State Responsibility and Non-State Actors', in M. Noortman, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 163.

On the one hand, there are shortcomings at the level of the primary rules that apply to non-state actors. For example, it remains controversial whether Article 2(4) of the Charter of the United Nations (UN Charter) or customary international law prohibit the use of force by non-state actors and, as a result, whether states are allowed under international law to exercise their right to self-defence in response to such forcible measures.[3] There are convincing arguments that certain of these primary rules should be applied to specific categories of non-state actors such as armed opposition groups and terrorist groups.[4] For example, Article 3 common to the Geneva Conventions applies to organized armed groups in their capacity as parties to a non-international armed conflict.[5] Other primary rules of international humanitarian law apply explicitly to organized armed groups, including the 1977 Additional Protocol II to the Geneva Conventions, the Hague Regulations, the Convention for Protection of Cultural Property in the Event of Armed Conflict, and customary international law.[6] Moreover, there is a host of instruments outside the law of armed conflict that impose obligations on non-state actors, including the Terrorism Suppression Conventions and the Genocide Convention.[7] The practice of the UN Security Council (UNSC) also

3 See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Construction of a Wall*), Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at 194, para. 139; *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)* (*Armed Activities*), Judgment, 19 December 2005, ICJ Reports (2005) 168, at 222, para. 146.

4 See, e.g., A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 271–316.

5 Geneva Conventions 1949, 1125 UNTS 3, Art. 3; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (*Nicaragua*), Merits, 27 June 1986, ICJ Reports (1986) 14, at 114, para. 218 (recognizing that Art. 3 of the Geneva Conventions reflects customary international law). See, e.g., International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005), available at www.un.org/news/dh/sudan/com_inq_darfur.pdf (last visited 20 April 2017) (suggesting that '[t]he SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts' [para. 172] and that 'the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements' [para. 174]). See also Judgment, *Tadić* (ICTY-94-1-A), Appeals Chamber (*Tadić* AC), 15 July 1999, para. 70: '[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' For the explanations as to how the rules of armed conflict apply to non-state actors, see Sivakumaran, 'The Addressees of Common Article 3', in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 415, at 417–425; Sivakumaran, 'Binding Armed Opposition Groups', 55 *International Comparative Law Quarterly* (*ICLQ*) 369, at 371ff.

6 Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977, 1125 UNTS 609; Convention IV Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land (Hague Regulations) 1899, 187 CTS 227; Convention for Protection of Cultural Property in the Event of Armed Conflict 1954, 249 UNTS 240. On customary law rules, see J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 vols (2005).

7 See, e.g., International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197, Art. 2; Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277, Art. 4: 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

illustrates how obligations can be directed to non-state actors, including in the context of counter-terrorism, arms embargoes and access to humanitarian assistance.[8] For example, in its Resolution 1474 (2003), the UNSC stressed 'the obligation of all States and *other actors*' to comply with its previous resolution imposing an arms embargo in Somalia.[9] Several other resolutions have similarly called on non-state actors involved in non-international armed conflicts to comply with ceasefire agreements.[10]

Beyond these examples, states are obliged under customary and treaty law to prevent the activities of non-state actors from breaching the rights of third states. These obligations, particularly in the domain of human rights and environmental law, comprise taking all means reasonably available to the state in order to prevent unlawful non-state actors' conduct on their territory and, in certain circumstances, even extra-territorially.[11] By their nature, however, due diligence obligations are obligations of conduct or means, leaving some discretion for the state in practice, which may explain why the record of compliance with these obligations is far from satisfactory.[12] Further, the expected degree of diligence may vary across different areas of international law, and the scope of due diligence obligation under customary international law remains elusive.

However, international law also contains secondary rules on the attribution of private actors' conduct to states, which are set out in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[13] Attribution, as a constituent element of an internationally wrongful act, involves the normative process of linking a particular wrongful conduct of an individual to an action or omission of the state.[14] In other words, 'the state is never responsible for the act of an individual as such: the act of the individual merely occasions the responsibility of the state by revealing the state in an illegality of its own – an omission

[8] See, e.g., SC Res. 1304 (2000); SC Res. 1373 (2001); SC Res. 2170 (2014); SC Res. 864 (1993).

[9] SC Res. 1474 (2003), para. 1 (emphasis added).

[10] See, e.g., SC Res. 1160 (1998), para. 2; SC Res. 1199 (1998), para. 1; SC Res. 1203 (1998), para. 4; SC Res. 814 (1993).

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (*Bosnia Genocide*), Merits, 26 February 2007, ICJ Reports (2007) 43, at 221, para. 430; *Corfu Channel (UK v. Albania)* (*Corfu Channel*), Merits, 9 April 1949, ICJ Reports (1949) 4, at 22. See also *Island of Palmas Arbitration (The Netherlands v. US)*, Decision of 4 April 1928, reprinted in UNRIAA, vol. 2, 829, at 839.

[12] For detailed treatment of due diligence obligations, see, e.g., R. Pisillo-Mazzeschi, '*Due Diligence' e responsabilità internazionale degli Stati* (1989); Pisillo-Mazzeschi, 'The Due Diligence and the Nature of the International Responsibility of States', 35 *German Yearbook of International Law* (1993) 9; A. Ouedraogo, 'La diligence en droit international; contribution à l'étude d'une notion au contour imprécis' (PhD dissertation, Graduate Institute, Geneva, 2010). See also International Law Association, 'Study Group on Due Diligence in International Law', First Report, 7 March 2014, available at https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1429&StorageFileGuid=fd770a95-9118-4a20-ac61-df12356f74d0 (last visited 20 April 2017).

[13] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001.

[14] See *ibid.*, Art. 2 (the ILC opted for the terms 'attribution' and 'attributable' rather than 'imputability' and 'imputable'). See also J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 61, at 81–91; J. Crawford, First Report on State Responsibility, UN Doc. A/CN4/490/Add. 5, 22 July 1998, at 3ff.

to prevent or punish, or give positive encouragement to, the act of the individual'.[15] Since states are not *prima facie* responsible for private conduct, the notion of control has become an essential element of the classical conception of attribution, which is now codified in the ARSIWA.

The attribution of private conduct to a state is not a new issue in international law. However, there are two reasons for its renewed relevance and the possible need for its review, insofar as the use of force by non-state actors is concerned. First, the impact of non-state actors and their ability to use force transnationally is more prominent today than in the second half of the 20th century when the genesis of the modern conception of attribution was laid down. The examples of the Islamic State of Iraq and the Levant (ISIL) or Al-Qaida show the difficulty of applying the classical framework of attribution. Second, the character of non-state actors and their capacity to use force varies significantly in scale. Some non-state actors have established quasi de facto public authorities in portions of a sovereign state (for example, the Donetsk National Republic and the Lugansk National Republic in Ukraine and rebels in Syria or Hezbollah in Lebanon). Others have been involved in the sporadic acts of violence and terrorism (for example, Boko Haram in Nigeria or Al-Shabab in Somalia). Yet others, like private military contractors in Iraq, have been engaged by states to conduct military operations, with specific mandates as to the extent and the circumstances of the use of force (for example, Blackwater). International law must accommodate these different actors and their varying use of force, ensuring that state responsibility remains an available option alongside criminalization in domestic and international contexts.[16]

This article examines the use of force by non-state actors and the ability of the ARSIWA rules to ensure that states facilitating such conduct bear legal consequences. It is beyond the scope of this article to explore in detail every ground of attribution of conduct in international law. Nor is it the intention to argue that the rules on responsibility can remedy the absence of, or deficiencies inherent to, primary norms dealing with the use of force. Instead, the purpose of this article is to test the framework on attribution of conduct to the state and argue that, subject to adjustments, this framework could contribute to remedying the existing responsibility gap with respect to the use of force by non-state actors. To this end, this article questions the continuing utility of the control/agency standard where there is no consistent pattern of cooperation between a state and non-state actor. It is submitted that a complicity standard arising from the state's knowing aid or assistance to the wrongdoing is needed to complement the existing framework of attribution of conduct.

This article is structured as follows. The second section examines the existing legal framework on the use of force by non-state actors in international law. The extension

[15] C. Eagleton, *The Responsibility of States in International Law* (1928), at 77; see also Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers', 13 *Revue Générale de Droit International Public* (*RGDIP*) (1906) 5, at 14; A. Decencière-Ferrandière, *La responsabilité internationale des États* (1925), at 62.

[16] See ARSIWA, *supra* note 13, Art. 58. On the parallel application of individual criminal responsibility and state responsibility, see Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *ICLQ* (2003) 615.

of the prohibition of the use of force to, and the right to self-defence against, private actors, however desirable it may be from a legal policy perspective, is yet to find a unanimous recognition in positive international law.[17] Accordingly, alongside the development of primary norms directly binding on non-state actors and the universe of due diligence obligations, the rules of state responsibility indirectly play a role in limiting the use of force by non-state actors. The third section discusses the existing criteria for attributing the conduct of non-state actors to the state for the purposes of international responsibility – in particular, Articles 4 and 8 of the ARSIWA. It argues that there are limitations in the framework of attribution of conduct when it comes to less intense or systematic forms of collaboration between a state and a private actor. The fourth section argues that a complicity standard of attribution of conduct is emerging as an alternative to the de facto organ and the effective control tests. The article examines the limitations and added value of complicity as a new standard of attribution of conduct.

2 The Legal Framework on the Use of Force by Non-State Actors

The prohibition of the threat or use of force is a cornerstone of the UN Charter.[18] It is also a rule of customary international law and has been recognized as a peremptory norm (*jus cogens*).[19] This prohibition covers a wide extent of the use of force, ranging from a minor cross-border incident to full-scale warfare.[20] Crucially, however, the text of Article 2(4) of the UN Charter does not specify that it applies outside of the context of inter-state relations. Notably, Article 2(4) does not expressly prohibit the extraterritorial use of force against non-state actors. However, arguably, any use of force against non-state actors is likely to interfere with the territorial integrity of the state within which it operates, even if such use of force is directly aimed at the base of operations of the non-state actor. Consequently, apart from cases where the UNSC authorizes the use of force, a state can only act unilaterally in self-defence under Article 51 of the UN Charter and customary international law if the use of force by a non-state actor is attributed to another state and constitutes an armed attack.

This traditional interpretation of the interplay between Articles 2(4) and 51 of the UN Charter has been criticized, not least by the judges of the International Court of Justice (ICJ) in their individual capacity.[21] With the tragic events of 9/11, the discourse

[17] See, e.g., Henderson, 'Non-State Actors and the Use of Force', in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 77; Tsagourias, 'Non-State Actors and the Use of Force', in J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 326.

[18] *Armed Activities*, *supra* note 3, at 223, para. 148.

[19] *Nicaragua*, *supra* note 5, at 100, para. 190; *Construction of a Wall*, *supra* note 3, at 171, para. 87.

[20] See, e.g., *Corfu Channel*, *supra* note 11, at 35 (stressing that even a temporary infringement of another state's territorial integrity or political independence can amount to a violation of Art. 2(4)). See also I. Brownlie, *International Law and the Use of Force* (1963), at 265ff.

[21] *Construction of a Wall*, *supra* note 3, at 215, para. 33, Separate Opinion of Judge Higgins; at 229–230, paras 35–36, Separate Opinion of Judge Kooijmans. See also *Armed Activities*, *supra* note 3, at 313–314, paras 26–30, Separate Opinion of Judge Kooijmans; at 335–338, paras 4–15, Separate Opinion of Judge Simma.

surrounding the 'war on terror' set ground for the conceptual re-design of the law of self-defence. In its Resolutions 1368 (2001) and 1373 (2001), the UNSC recognized the inherent right of individual or collective self-defence without making any reference to an armed attack by a state.[22] Scholars have contended that the application of the prohibition of the use of force has been extended to the activities of terrorist groups, asserting the possibility of the right to self-defence against large-scale operations by such groups amounting to an armed attack.[23]

The use of force by private actors was originally excluded from Article 2(4) of the UN Charter. For example, numerous states have expressed the view that the reference to 'in their international relations' in Article 2(4) of the UN Charter purported to exclude the use of force in the context of a civil war, including rebellions.[24] However, some scholars have referred to the practice of the UNSC in the 1990s as evidence of extension of the prohibition of the use of force within the states.[25] This practice consists of the resolutions on non-international armed conflicts, imposing on the parties an obligation to observe a ceasefire[26] or refrain from any use of force,[27] condemning violations of the ceasefire by either party[28] and proclaiming the principle of the inadmissibility of territorial gains achieved by force by either party to an internal conflict.[29] As Olivier Corten rightly cautions, it would be wrong from a strictly legal perspective to find in such practice the basis for extending the rule on the prohibition of the use of force to non-state actors.[30] First, 'the condemnation sometimes made of the use of force within a State is not made by reference to article 2(4) but rather on the basis of observance of the elementary rules of protection of human rights, including in times of non-international armed conflict'.[31] Second, the UNSC has never referred to Article

22 SC Res. 1368 (2001); SC Res. 1373 (2001).

23 Tams, 'Swimming with the Tide or Seeking to Stem It? Recent ICJ Rulings on the Law on Self-Defence', 18 *Revue québécoise de droit international* (2005) 275; Franck, 'Terrorism and the Right of Self-Defense', 95 *American Journal of International Law* (*AJIL*) (2001) 839, at 840; Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', 43 *Harvard International Law Journal* (2002) 41, at 50.

24 See, e.g., UN Doc. A/AC.119/SR.10, 3 September 1964, at 8–9 (Australia); UN Doc. A/AC.119/SR.14, 8 September 1964, at 7 (Guatemala); UN Doc. A/C.6/SR.884, 29 November 1965, para. 27 (Central African Republic); UN Doc. A/C.6/SR.875, 15 November 1965, para. 5 (China); UN Doc. A/AC.125/SR.25, 25 March 1966, at 9, para. 13 (Sweden). See also O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2012), at 127–174.

25 See, e.g., Cassese, 'Article 51', in J.P. Cot and A. Pellet (eds), *La Charte des Nations Unies* (3rd edn, 2005), at 1333.

26 See, e.g., SC Res. 849 (1993); SC Res. 858 (1993); SC Res. 1150 (1998); SC Res. 1187 (1998); SC Res. 1225 (1999); SC Res. 1216 (1998); SC Res. 1199 (1998); SC Res. 1584 (2005): all cited in Corten, *supra* note 24, at 131.

27 Corten, *supra* note 24, referring to SC Res. 876 (1993), para. 4; SC Res. 881 (1993), para. 3; SC Res. 1225 (1999), para. 6; SC Res. 1311 (2000), para. 5; SC Res. 924 (1994), para. 3; SC Res. 931 (1994), para. 6; SC Res. 1203 (1998), para. 10.

28 See, e.g., SC Res. 876 (1993), para. 2; SC Res. 1494 (2003), para. 19; SC Res. 1524 (2004), para. 22; SC Res. 1554 (2004), para. 22; SC Res. 1582 (2005), para. 24; SC Res. 1615 (2005), para. 25; SC Res. 1590 (2005); SC Res. 1591 (2005), para. 1; SC Res. 1089 (1996), para. 2.

29 See, e.g., SC Res. 713 (1991); SC Res. 752 (1992), para. 1; SC Res. 757 (1992); SC Res. 820 (1993); SC Res. 824 (1993), para. 2; SC Res. 859 (1993).

30 Corten, *supra* note 24, at 132.

31 *Ibid.*

2(4) in the context of the obligations set forth on the parties to a non-international armed conflict.[32]

Similarly, the legitimatization of the use of force in the context of national liberation struggles in relation to the exercise of the right to self-determination has never been framed within the legal regime of Article 2(4).[33] Even when states have supported national liberation movements, 'it has not officially been claimed that the regime set up by articles 2(4) and 51 could apply as it stands to situations of self-determination. Such situations seem, then, to be governed by a specific *sui generis* legal regime that cannot readily be reduced to the armed attack/self-defence scheme that in principle characterises relations among States'.[34]

The prohibition of the use of force applies to all relations among states, even if the use of force is deployed in the territory of one of them (for example, intra-border dispute between two states).[35] However, it is questionable whether Article 2(4) of the UN Charter applies to relations with entities whose statehood is disputed. The explanatory note to Resolution 3314 (XXIX) defines a state by pointing out that it is 'without prejudice to questions of recognition or to whether a State is a member of the United Nations'.[36] Similarly, the declaration appended to Resolution 2625 (XXV) states that:

> [e]very State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.[37]

The proposal to extend the applicability of the rule to all 'political entities', including those that could not claim statehood, was rejected during the elaboration of the Declaration on the Definition of Aggression.[38] As the *travaux préparatoires* demonstrate, there was no intention to refer to entities other than states when using the term 'international lines of demarcation' either.[39]

[32] See, e.g., SC Res. 993 (1995), para. 5; SC Res. 1494 (2003), para. 13; SC Res. 1524 (2004), para. 13; SC Res. 1554 (2004), para. 8; SC Res. 1582 (2005), para. 9; SC Res. 1615 (2005), para. 8.

[33] Corten, *supra* note 24, at 135–147. See GA Res. 3070 (XXVIII) (1973); GA Res. 3246 (XXIX) (1974); GA Res. 3382 (XXX) (1975); GA Res. 31/34 (1976).

[34] Corten, *supra* note 24, at 147; see C. Gray, *International Law and the Use of Force* (2008), at 63–64; Y. Dinstein, *War, Aggression and Self-Defence* (2005), at 70.

[35] See Eritrea-Ethiopia Claims Commission, *Partial Award: Jus ad bellum – Ethiopia's Claims 1–8*, 19 December 2005, para. 10; *Award in the Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Decision of 17 September 2007, reprinted in UNRIAA, vol. 30, 1, at 118–119, para. 423. See also Schachter, 'International Law in Theory and Practice: General Course in Public International Law', 178 *Recueil des cours de l'Académie de droit international (RCADI)* (1982) 9, at 141–143; Gray, *supra* note 34, at 65; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), at 187.

[36] Declaration on the Definition of Aggression, GA Res. 3314 (XXIX), 14 December 1974, Art. 1, Explanatory Note.

[37] Declaration on Friendly Relations, GA Res. 2625 (XXV), 24 October 1970.

[38] See UN Doc. A/AC.134/L.17, 25 March 1969, para. II; UN Doc. A/AC.134/SR.19, 2 July 1968. Cf. UN Doc. A/AC.134/SR.58, 21 July 1970; UN Doc. A/C.6/SR.1206, 26 October 1970, para. 6.

[39] Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Supp. no. 18, UN Doc. A/8018 (1970), para. 207; UN Doc. A/AC.125/SR.109, 19 September 1969; UN Doc. A/C.6/SR.1160, 26 November 1969, para. 1; UN Doc. A/AC.125/SR.101, 22 August 1969.

More generally, Article 1 of the Declaration on the Definition of Aggression defines aggression as 'the use of armed force *by a State* against the sovereignty, territorial integrity or political independence of *another State*'.[40] Aggression also includes 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts [amounting to aggression], or its substantial involvement therein'.[41] It is questionable whether the 'sending by or on behalf of a State of armed bands' threshold should be regarded as the *lex specialis* threshold for attributing the aggression carried out by the armed bands to the state sending them.[42] Some commentators argue that such an interpretation would be in line with Article 1 of the Declaration on the Definition of Aggression.[43] Others doubt that the notion of 'sending' is a separate attribution standard and question whether it includes permitting or tolerating the activities of armed bands.[44]

That Article 2(4) of the UN Charter does not apply to situations of rebellion, national liberation struggles and political non-state entities shows the conceptual hurdles in applying self-defence directly against non-state actors. Moreover, there are many convincing arguments against the extension of the right to self-defence to the use of force by non-state actors. First, one common argument for the extension of the right to self-defence derives its legitimacy from the object and purpose of the rule in Article 2(4) – that is, the prohibition of any type of resort to force. However, there is little room in the language of Articles 2(4) and 51 to argue that these rules apply beyond inter-state relations. For example, Article 2(4) refers to 'all members' – that is, states as subjects to the obligation.[45] Second, there is evidence in the subsequent UN General Assembly (UNGA) resolutions of the prohibition of the use of force being treated as an inter-state rule.[46] Third, the extension of self-defence to terrorist activities may result in promoting terrorist groups' status (until now considered as simply criminals) and diluting sovereignty and the principle of territorial integrity.[47] Fourth, the Court has

[40] Declaration on the Definition of Aggression, *supra* note 36, Art. 1 (emphasis added).

[41] *Ibid.*, Art. 3(g).

[42] K.N. Trapp, *State Responsibility for International Terrorism* (2011), at 27.

[43] *Ibid.*

[44] T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), at 65; T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006), at 179–180.

[45] Minutes of 1619th meeting, 25 June 1980, reprinted in 1 *ILC Yearbook* (1980) 183, at 184, para. 3 (Ago): '[T]he concept of self-defence should be confined to a defensive reaction against an armed attack by another State, and should exclude an attack by private individuals. Without that restriction, the concept would be far too vague.' See also Minutes of 1629th meeting, 9 July 1980, reprinted in 1 *ILC Yearbook* (1980) 235, at 238, para. 21 (Schwebel); Minutes of 1621st meeting, 27 June 1980, reprinted in 1 *ILC Yearbook* (1980) 191, at 192, para. 5 (Ago).

[46] Declaration on Friendly Relations, *supra* note 37, First Principle, paras 4, 8, 9; Declaration on the Definition of Aggression, *supra* note 36, Arts 1, 3; Declaration on the Non-Use of Force, GA Res. 42/22, 18 November 1987, Principles I.1, I.13. See also A. Constantinou, *The Right of Self-Defense under Customary International Law and Article 51 of the UN Charter* (2000), at 87; Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"' 48 *Netherlands International Law Review* (2001) 271, at 284.

[47] Verhoeven, 'Les "étirements" de la légitime défense', 48 *Annuaire français de droit international* (2002) 49, at 62; Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004) 3, at 7–8.

continuously refrained from recognizing the legality of acting in self-defence against non-state actors, relying instead on the classical attribution framework.[48]

At the same time, the above arguments need to be counter-balanced with the fact that Article 51 of the UN Charter does not prescribe the origin of 'armed attack' and the growing state practice that supports the exercise of self-defence against non-state actors. Besides the prominent Operation Enduring Freedom in 2001, other examples include Rwanda's actions in the territory of the Democratic Republic of Congo in response to acts of former Armed Forces of Rwanda/Interahamwe forces[49] or Israel's response to Hezbollah's attacks.[50] Similar claims to use self-defence in response to armed attacks by non-state actors have been made by Senegal, Thailand and Tajikistan.[51] The US raids on several camps and installations in Sudan and Afghanistan, in response to the bombings of the American embassies in Kenya and Tanzania in 1998, provide another example. In that case, the USA did not justify its actions by directly attributing the acts of Al-Qaida to Sudan and Afghanistan. It stated that the air strikes 'were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization'.[52] However, the reactions of third states as to the legality of these operations were mixed.[53]

In other cases, claims to the use of self-defence against non-state actors have been more controversial, particularly when third states have regarded incursions against non-state actors as violations of sovereignty and territorial integrity. This was certainly the case with respect to the Israeli raids in Tunis in 1985.[54] The US attacks on

[48] See, e.g., *Construction of a Wall*, *supra* note 3, at 194, para. 139: 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State'; *Oil Platforms (Iran v. US)*, Judgment, 6 November 2003, ICJ Reports (2003), 161, paras 51, 61, 71 (the ICJ, failing to establish attribution of attacks to Iran, found that Iran committed no armed attack and therefore the USA was not entitled to exercise its right to self-defence).

[49] UN Doc. S/2004/951, 6 December 2004 (Rwanda).

[50] See, e.g., UN Doc. A/58/687, 21 January 2004 (Israel).

[51] Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?', 99 *AJIL* (2005) 62, at 69.

[52] UN Doc. S/1998/780, 20 August 1998 (US).

[53] United Kingdom (UK), Israel, Australia, Germany, France and Spain (approving the US actions without clarifying the legal basis); Iran, Iraq, Libya and Russia (condemning the US actions). See T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 426–427; Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *Yale Journal of International Law* (1999) 537, at 538; Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *AJIL* (1999) 161, at 164–165.

[54] See UN Doc. S/PV.2611, 2 October 1985, para. 18 (Denmark), para. 40 (Turkey), para. 52 (Australia), paras 111–112 (United Kingdom): '[E]ven if there had been demonstrable responsibility by the PLO, this would not have justified the retaliation taken against Tunisia on 1 October'); UN Doc. S/PV.2613, 3 October 1985, paras 16–18 (Madagascar), para. 115: (Greece): '[A]cts of terrorism cannot in any way serve as an excuse for a Government to launch an armed attack on a third country'). See SC Res. 573 (1985) (condemning the Israeli action as an 'act of armed aggression in flagrant violation of the Charter').

Libya in 1986[55] and Iraq in 1993,[56] frequently cited as evidence of the extension of self-defence against non-state actors, were framed in the classical context of state attribution. Turkey has also long claimed its right to self-defence against the Kurdistan Workers' Party (PKK) operating from Iraqi territory. Turkey's use of force against the PKK has attracted mixed views from third states on the legality of such actions, in particular, of Iraq and the USA.[57] Similarly, when Colombia launched a targeted military operation in self-defence against a Colombian Revolutionary Armed Forces training camp in Ecuador close to Colombia's border, both Ecuador and Venezuela immediately condemned it and cut off diplomatic ties with Colombia.[58] The Organization of American States later proclaimed that the Colombian incursion, based on the alleged right to self-defence, was a 'violation of the sovereignty and territorial integrity of Ecuador and of principles of international law'.[59]

Most recently, the USA, the United Kingdom and France have invoked collective and individual self-defence as a legal basis for launching airstrikes against ISIL in Syria.[60] Other states followed suit, including Turkey and Australia.[61] Russia, on the other hand, has launched its airstrikes relying on Syria's consent to intervention, which is one of the recognized circumstances precluding wrongfulness for the purposes of international responsibility.[62] Another recent case of a state invoking the right to self-defence in respect of activities of non-state actors is by the exiled President Abdrabbuh Mansur Hadi against Houthi rebels in Yemen.[63] The fact that self-defence has been invoked to justify airstrikes in Syria and Yemen may be regarded as yet another illustration of the normative shift within the conventional reading of the prohibition of the use of force and self-defence.

55 See UN Doc. S/17990, 14 April 1986 (USA); UN Doc. S/PV.2674, 15 April 1986, at 16–17 (the USA claiming to possess 'direct, precise and irrefutable evidence' of Libya's orders for its agents to carry out the attacks). For the reaction of third states condemning the US raid on Tripoli as unlawful, see UN Doc. S/PV.2675, 15 April 1986, at 18 (Syria), at 24–25 (Oman); UN Doc. S/PV.2680, 18 April 1986, at 32–4 (Ghana), at 47 (Nicaragua); UN Doc. S/PV.2682, 21 April 1986, at 16 (Uganda), at 41 (Thailand); UN Doc. S/PV.2683, 24 April 1986, at 7 (India), at 33 (Ghana).

56 See UN Doc. S/26003, 26 June 1993 (USA); UN Doc. S/PV.3245, 27 June 1993, at 3–6 (USA). For the reaction of third states, see UN Doc. S/PV.3245, 27 June 1993, at 13 (France), at 16 (Japan), at 17–18 (Brazil), at 18–20 (Hungary), at 21–22 (UK), at 22 (Russia), at 23 (New Zealand), at 24–25 (Spain).

57 See Trapp, *supra* note 42, at 56–57.

58 *Keesing's Record of World Events* (March 2008), vol. 54, at 48456, cited in Trapp, *supra* note 42, at 57–58.

59 Organization of American States, Doc. CP/Res. 930 (1632/08), 5 March 2008.

60 See UN Doc. S/PV.7565, at 2 (France), at 3–4 (USA), at 8–9 (UK); UN Doc. S/2014/695 (USA); UN Doc. S/2014/851 (UK); UN Doc. S/2015/745 (France). See also SC Res. 2249 (2015).

61 See UN Doc. S/2015/563, 24 July 2015 (Turkey stating that 'the regime in Syria is neither capable of nor willing to prevent these [ISIL] threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals') and UN Doc. S/2015/693, 9 September 2015 (Australia stating that 'States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory').

62 For background on Russian intervention in Syria, see L. Visser, 'Russia's Intervention in Syria', *EJIL Talk* (25 November 2015), available at www.ejiltalk.org/russias-intervention-in-syria/ (last visited 20 April 2017). See also ARSIWA, *supra* note 13, Art. 20; *Armed Activities*, *supra* note 3, at 196, para. 42ff.

63 UN Doc. S/2015/217, 27 March 2015. See also SC Res. 2216 (2015).

On balance, however, and subject to an evolving *opinio juris* on the conception of 'armed attack', it may be premature to affirm 'that Article 51 no longer requires any State involvement, and could be invoked against armed attacks irrespective of the attacker's character'.[64] The possibility of using force directly against large-scale armed attacks by non-state actors has certainly been recognized and applied in practice, subject to requirements of proportionality and necessity.[65] However, the ICJ has resisted both the express recognition of the possibility of self-defence against non-state actors and lowering the threshold of attribution for the purposes of *jus ad bellum*.[66] Even if, outside judicial scrutiny, the role of attribution for the purposes of *jus ad bellum* may have diminished over time, attribution certainly continues to play a central role for the purposes of state responsibility.[67]

3 Attribution of the Use of Force by Non-State Actors to a State

The law of international responsibility operates on the basis of a presumption that the conduct of individuals and non-state actors is not attributable to a state.[68] This presumption derives its legitimacy from the fiction of a public/private division that has shaped the political and legal theory of the state.[69] The responsibility of a state is thus 'normally limited to acts of its organs and agents exercising public authority'.[70]

64 Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', 16 *European Journal of International Law* (*EJIL*) (2006) 963, at 973.

65 For a balanced overview, see N. Lubell, *Extraterritorial Use of Force against Non-state Actors* (2014), at 25–42. See also Henderson, 'Non-State Actors and the Use of Force', in M. Noortman, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 77, at 83–96.

66 See *Armed Activities*, *supra* note 3, at 223, para. 147. Cf. *Oral Pleadings of Uganda*, CR 2005/7, 18 April 2005, at 30, paras 77–80. See also Kammerhofer, 'The Armed Activities Case and Non-State Actors in Self-Defence Law', 20 *Leiden Journal of International Law* (*LJIL*) (2007) 89, at 101–106.

67 Nollkaemper, 'Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility', in N. Blokker and N. Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality, a Need for a Change?* (2005) 133, at 136–137; Jinks, 'State Responsibility for the Acts of Private Armed Groups', 4 *Chicago Journal of International Law* (2003) 83. See also Corten, *supra* note 24; Ruys, *supra* note 53, at 427–430. Cf. M. Milanović, 'Self-Defense and Non-state Actors: Indeterminacy and the Jus ad Bellum', *EJIL Talk* (21 February 2010), available at www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/ (last visited 20 April 2017) (acknowledging that the requirement of attribution does not follow logically from the text of Arts 2(4) and 51 of the UN Charter).

68 ARSIWA, *supra* note 13, Commentary, Art. 8, para. 1. See also as early as *Finnish Shipowners (Finland/UK)*, Decision of 9 May 1934, reprinted in UNRIAA, vol. 3, 1479, at 1501: 'These acts must be committed by the respondent Government or its officials since it has no direct responsibility under international law for the acts of private individuals.'

69 For a critique of this fiction, see Chinkin, 'A Critique of the Public/Private Dimension', 10 *EJIL* (1999) 387, at 395. See also Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances', 189 *RCADI* (1984) 9, at 70–76.

70 J. Crawford, *State Responsibility: The General Part* (2013), at 141. See *Certain Questions Relating to the Settlers of German Origin in the Territory Ceded by Germany to Poland*, Advisory Opinion, 1923 PCIJ Series B, No. 6, at 22: 'States can act only by and through their agents and representatives.'

Following from the above, there are only limited circumstances in which private conduct may be attributable to a state, namely if a private actor has acted under a state's instructions, direction or control.[71] The rationale for this exception is that, in acting on behalf of the state, the non-state actor becomes 'the extended arm of the instructing State organ and therefore the attribution in the sense that the conduct is to be considered as State action is a matter of consequences'.[72] Well-established practice and *opinio juris* show that the criterion of control is central for determining whether the conduct of private actors operating on behalf of the state could be attributed to the state for the purposes of responsibility.[73] In particular, the issue is the extent, or threshold of control, that a state should exercise over a private actor for the latter's conduct to be attributable. While the question of control is required for several grounds of attribution, it is of particular relevance to determining whether a private actor operates as a de facto organ of the state (Article 4 of the ARSIWA) or on behalf of the state (Article 8 of the ARSIWA).

In addition to these two grounds of attribution of conduct, there are many other context-specific grounds of attribution. For instance, Article 5 of the ARSIWA deals with entities empowered by the state and exercising elements of governmental authority, which is relevant in those cases where a non-state actor would have an express legal link to the state, usually pursuant to a contract or a specific mandate.[74] Examples of such entities include airline companies exercising border control powers or private military and security companies involved in law-enforcement activities.[75] Other rather exceptional grounds for attribution of conduct are set out in Article 9 (cases of absence or default of official authorities),[76] Article 10 (cases of conduct of an insurrectional movement)[77] and Article 11 (cases of conduct of private actors not attributable, *prima facie*, to the state that is subsequently acknowledged and adopted by a state as its own).[78] This article focuses on Articles 4 and 8 of the ARSIWA since these

[71] ARSIWA, *supra* note 13, Commentary, Art. 8, para. 2; Crawford, First Report, *supra* note 14, at 39–40.

[72] Wolfrum, 'State Responsibility for Private Actors: An Old Problem or Renewed Relevance', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 423, at 427.

[73] See R. Ago, 'Third Report on State Responsibility', UN Doc. A/CN.4/246 and Add 1-3, reprinted in 2(1) *ILC Yearbook* (1971) 199, at 264.

[74] See, e.g., *Hyatt International Corporation v. Government of the Islamic Republic of Iran* (ITL 54-134-1), Iran–US Claims Tribunal, 17 September 1985, at 9; *Dame Mossé (France v. Italy)*, Decision of 17 January and 6 October 1953, reprinted in UNRIAA, vol. 13, 486.

[75] See Momtaz, 'State Organs and Entities Empowered to Exercise Elements of Governmental Authority', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 237, at 244ff; see also Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012), Principle 12, reprinted in 34 *Human Rights Quarterly* (2012) 1084; for a critical overview, see Ryngaert, 'State Responsibility and Non-State Actors', in M. Noortman, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 163, at 166–167.

[76] See Ryngaert, *supra* note 75, at 167–168.

[77] See d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents', 58 *ICLQ* (2009) 427; Dumberry, 'New State Responsibility for Internationally Wrongful Acts by the Insurrectional Movement', 17 *EJIL* (2006) 605.

[78] For the application of this latter basis of attribution of conduct, see, e.g., *Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980) 29, at 31–34. See also Murphy, *supra* note 23, at 50–51.

encapsulate some of the most difficult cases, in particular, where the link between a non-state actor and the state is purely factual. Moreover, there is a certain contiguity between the de facto organ and an actor acting on behalf of the state, both standards finding expression in the *Nicaragua* case and subsequent jurisprudence of the ICJ.[79]

On one side of the spectrum, there are situations where a private actor is so closely connected with the state that it may be regarded as a de facto organ of that state.[80] Article 4 of the ARSIWA provides that 'the conduct of any State organ shall be considered an act of that State under international law'.[81] The analysis of whether a private actor can be considered a de facto organ is more structural than functional – it is 'established largely through the operation of internal law'.[82] However, Article 4 of the ARSIWA recognizes that the status and functions of entities need not only be determined by law but can also be determined by practice.[83] Indeed, a 'state cannot evade responsibility for the conduct of a body which as a matter of practice is considered to be or acts as an organ merely by denying it status as such under internal law'.[84] This is a particularly difficult link to prove between the conduct of the private actor and the state and will only be established in exceptional circumstances. In the words of the Court, the link is one of 'complete dependence' on the state, of which the private actor is merely the instrument:

> 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 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.[85]

In determining the existence of a de facto organ, courts are likely to examine whether: (i) the non-state actor was created by the state; (ii) the state involvement exceeded the provision of training and financial assistance; (iii) complete control was exercised in fact and (iv) the state selected, installed or paid the political leaders of the non-state actors.[86] Of course, the application of these criteria to the facts in both *Nicaragua* and *Bosnia Genocide* cases has not led to a finding of the existence of a de facto organ.[87]

[79] *Nicaragua, supra* note 5. See Ago, *supra* note 72, at 264. See also Condorelli, *supra* note 69, at 93–116.

[80] For a detailed discussion, see, e.g., P. Palchetti, *L'organo di fatto dello stato nell'illecito internazionale* (2007); Kress, 'L'organe de facto en droit international public: Réflexions sur l'imputation à l'État de l'acte d'un particulier à la lumière des développements récents', 105 *RGDIP* (2001) 93; Hébié, 'L'attribution aux États des actes des sociétés militaires et de leurs employés à la lumière de l'article 4 du projet d'articles sur la responsabilité des États de 2001', in *Select Proceedings of the European Society of International Law* (2008), vol. 2.

[81] ARSIWA, *supra* note 13, Art. 4.

[82] Crawford, *supra* note 70, at 116.

[83] ARSIWA, *supra* note 13, Commentary, Art. 4, para. 4.

[84] Crawford, *supra* note 70, at 124–125. See also ARSIWA, *supra* note 13, Commentary, Art. 4, para. 11.

[85] *Bosnia Genocide*, *supra* note 11, at 205, para. 392; *Nicaragua, supra* note 5, at 62–63, paras 109–112. See also Condorelli and Kress, 'The Rules of Attribution: General Considerations', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 221, at 230–31.

[86] *Nicaragua, supra* note 5, at 62–63, paras 109–112.

[87] *Bosnia Genocide*, *supra* note 11, at 205–206, paras 394–395; *Nicaragua, supra* note 5, at 62, para. 110: '[T]he evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but it is insufficient to demonstrate their complete dependence on United States aid.' Cf. Judgment, *Tadić* (ICTY-IT-94-1-T), Trial Chamber, 7 May 1997, at 299, Dissenting Opinion of Judge McDonald.

The ICJ's prime consideration seems to be whether the private actor in question has any degree of autonomy left in its decision making to commit internationally wrongful acts. In this sense, applying this strict standard of attribution to non-state armed groups operating transnationally is problematic. First, these groups usually operate outside any recognized legal framework. Second, it may be difficult to distinguish the official conduct of such groups, even if, *ultra vires*, from their operation in a purely private capacity. This is particularly true in the context of terrorism 'given that acts of terrorism carried out by State organs will virtually always be in the form of covert operations, carried out by secret service agents who do not display any outward manifestation of the authority under which they act'.[88]

On the other side of the spectrum, states may channel unlawful acts through private actors, which are actually operating outside the formal or a de facto framework of the state. Article 8 as adopted by the ILC is more likely to capture such situations: '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*, the State in carrying out the conduct.'[89] Article 8 of the ARSIWA deals with two specific circumstances: (i) private persons acting on the instructions of the state in carrying out the wrongful conduct and (ii) private persons acting under the state's direction or control.[90] This provision mirrors the ICJ's analysis in the *Nicaragua* case.[91] In this case, the USA financed, trained, supplied and equipped the Contras, who were an armed opposition group fighting against the Nicaraguan government. The ICJ found that the conduct of the Contras was not generally attributable to the US despite the latter's extensive support.[92] The Court defined the test to be 'such a degree of control in all fields as to justify treating the Contras as acting on its behalf [and, thus,] that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law' as claimed by Nicaragua.[93] The Court held that, without proof of effective state control of the operation in the course of which the alleged violations were committed,

> 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 … for the purpose of attributing to the United States the acts committed by the *contras*.[94]

Accordingly, the ICJ concluded that acts contrary to international law 'could well have been committed by the members of the *contras* without the control of the United States'.[95] Other courts and tribunals have since attempted to challenge the

88 Trapp, *supra* note 42, at 35.
89 ARSIWA, *supra* note 13, Art. 8 (emphasis added).
90 Crawford, *supra* note 70, at 144.
91 *Nicaragua, supra* note 5, at 62.
92 *Ibid.*, at 105–106.
93 *Ibid.*, paras 109, 115.
94 *Ibid.*, at 64.
95 *Ibid.*, at 64–65, see also at 189, Separate Opinion of Judge Ago; Crawford, First Report, *supra* note 14, at 40.

effective control as overly rigid. Most notably, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) departed from the ICJ's effective control threshold in the *Tadić* case, suggesting instead that the requisite '*degree of control* may … vary according to the factual circumstances of each case'.[96] In particular, the Appeals Chamber, relying on the existing state and judicial practice, applied an 'overall control' threshold in a factual scenario where a state had '*a role in organising, coordinating or planning the military actions* of [a] military group, in addition to financing, training and equipping or providing operational support to that group'.[97] The Appeals Chamber held that the 'effective control' test might indeed be more appropriate in relation to private individuals or a group that is not militarily organized.[98] Moreover, where the conduct is extra-territorial, 'more extensive and compelling evidence' in support of the claim of control would be required.[99]

If any doubts could exist as to the continuing validity of the effective control standard, these dissipated in the *Bosnia Genocide* case, where the ICJ recognized that Article 8 of the ARSIWA is declaratory of customary international law.[100] This is not surprising as the provision was the result of the ILC's choice to prefer the 'effective control' over the 'overall control' standard, without this being specified in the text of the provision itself.[101] The Court affirmed the test of control set forth in its *Nicaragua* judgment – that is, the test requires that the 'State's instructions be given, in respect of *each* operation in which the alleged violations occurred, *not generally* in respect of the overall operations taken by the persons or group having committed the violations'.[102]

The Court rejected the 'overall control' threshold for the following reasons. First, it held that the ICTY, in addressing the issue of state responsibility, went beyond what was necessary for the exercise of its jurisdiction.[103] The ICJ considered that it did not need to take into account ICTY decisions when they concerned issues of general international law 'which do not lie with the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it'.[104] Second, the ICJ held that the 'overall control' test was inapplicable in any event. Unlike the ICTY, the Court was not deciding whether the conflict should be characterized as international, but rather whether state responsibility was engaged.[105] Moreover, in the view of the Court, the 'overall control' test 'has the major

96 *Tadić* AC, *supra* note 5, para. 117.

97 *Ibid.*, para. 137 (emphasis in the original). The International Criminal Tribunal for the Former Yugoslavia has applied the test of overall control in a number of subsequent case law, see, e.g., Judgment, *Aleksovski* (ICTY-IT-95-14/I-A), Appeals Chamber, 24 March 2000; Judgment, *Blaškić* (ICTY-IT-95-14/T), Trial Chamber, 3 March 2000; Judgment, *Kordić & Čerkez* (ICTY-IT-95-14/2-A), Appeals Chamber, 17 December 2004; Judgment, *Delalić* (ICTY-IT-96-21-A), Appeals Chamber, 20 February 2001.

98 *Tadić* AC, *supra* note 5, para. 137.

99 *Ibid.*, para. 138.

100 *Bosnia Genocide*, *supra* note 11, at 207–208, para. 398.

101 ARSIWA, *supra* note 13, Commentary, Art. 8, para. 5.

102 *Bosnia Genocide*, *supra* note 11, at 210, para. 404.

103 *Ibid.*, at 209, para. 403.

104 *Ibid.*

105 *Ibid.*, at 210, para. 404.

drawback of broadening state responsibility well beyond the fundamental principles governing the law of international responsibility'.[106]

There has been abundant criticism of the ICJ's stance in the *Bosnia Genocide* case, including by some of the judges who expressed the view that the high threshold of effective control, particularly in cases where there is common purpose between the state and a non-state actor could give states 'the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore'.[107] Indeed, 'if extraterritorial state responsibility could not be established in this particular case, it is difficult to imagine under what circumstances it could ever be established'.[108] For example, Antonio Cassese criticized the Court's circular reasoning for relying on the continuity of its own jurisprudence on the matter rather than reviewing the current support in practice and *opinio juris* for the effective control test.[109] As Nigel White puts it, 'disputes in international legal dissention about the nature of the control test for the attribution of acts of private actors are set to continue and reflect the failure of international law to keep pace with changes in the structure of states and organizations'.[110] On the other hand, James Crawford has opined that the Court's decision in the *Bosnia Genocide* case has effectively settled any ambiguity by affirming the correctness of the effective control standard for the purposes of state responsibility.[111]

A brief analysis of the existing standards of attribution reveals fundamental issues with the adaptation of the notion of control to the power/responsibility balance of modern actors in international relations. It is undeniable that some operating space needs to be left for states – providing for rules that engage their direct responsibility for any conduct of private actors would make the system unworkable. However, in light of the different forms of interaction between states and private actors, the theory of control in the context of the attribution framework needs to be re-evaluated. One way of doing so is to reconsider the degree of control itself; however, this is not something that the Court seemed to be keen on in its most recent pronouncement on the matter in the *Bosnia Genocide* case. An alternative approach is to put emphasis on the development of the obligations to prevent and the responsibility of a territorial state with respect to the unlawful conduct of private actors. However, here again, the notion of effective control, albeit with a slightly different connotation (relating more to the territory where the acts are committed rather than to the actor), plays a major role.[112]

[106] *Ibid.*, para. 406.

[107] *Bosnia Genocide*, *supra* note 11, at 256–257, para. 39, Dissenting Opinion of Vice-President Al-Khasawneh. See also *Bosnia Genocide*, *supra* note 11, at 448–449, paras 115–117, Dissenting Opinion of Judge Ad Hoc Mahiou.

[108] Gibney, 'Genocide and State Responsibility', 7 *Human Rights Law Review* (2007) 760, at 771; Milanović, 'State Responsibility for Genocide', 17 *EJIL* (2006) 553, at 585–586.

[109] Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649.

[110] White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMCs', 31 *Criminal Justice Ethics* (2012) 233, at 239.

[111] Crawford, *supra* note 70, at 156.

[112] For an excellent analysis of responsibility arising from breaches of due diligence obligations in the context of terrorism, see V.-J. Proulx, *Transnational Terrorism and State Accountability* (2012).

A final approach to the stringency of the control test is to develop complicity as a basis of the attribution of private actors' conduct to the state.

4 Complicity: Filling the Responsibility Gap?

The existing standards of attribution under Articles 4 and 8 of the ARSIWA fail to capture scenarios in which financial, military or other support to a non-state actor is: (i) sporadic; (ii) systematic, but does not involve interference of the state in the structure of a non-state actor (its leadership, chain of command or hierarchy) or (iii) originates from more than one state. Let us assume that State A provides aid or assistance to a non-state actor operating in State B. The aid consists of a financial contribution and military equipment, which facilitates the commission of military raids by the non-state actor against State C. The question arises as to whether it is possible to attribute the act of the non-state actor to State A, for by its financial contribution it has aided or assisted the violation of sovereignty and territorial integrity of State C?

Following the established case law of the ICJ, namely the *Nicaragua*, *Armed Activities* and *Bosnia Genocide* cases, the answer is negative. Clearly, a financial contribution or the sending of military equipment, even more so if it is a sporadic one, does not turn a private actor into a de facto organ of the state. Is there room to consider financial or military contribution to the wrongdoing as part of the control, direction or instructions test? The Court stated that for responsibility of the USA to arise in respect of some actions of the Contras, which were in breach of international humanitarian law (killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping),[113] it would have to go beyond mere financing or equipping, and the USA would have had to have 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State'.[114] In other words, the Court required 'the issuance of directions to the *contras* by the US concerning specific operations … and ordering of those operations by the US, or … the enforcement by the US of each specific operation of the *contras*, namely forcefully making the rebels carry out specific operations'.[115] A mere financial or military contribution will most certainly fall short of this test.

The ICJ confirmed this standard of effective control in both the *Armed Activities*[116] and the *Bosnia Genocide*[117] cases. In the latter case, the Court held that:

> the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* … The rules 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*.[118]

[113] *Nicaragua*, *supra* note 5, at 63–64, para. 113.
[114] *Ibid.*, at 64–65, para. 115.
[115] Cassese, *supra* note 109, at 653.
[116] *Armed Activities*, *supra* note 3, at 226, para. 160.
[117] *Bosnia Genocide*, *supra* note 11, at 206–214, paras 396–412.
[118] *Ibid.*, at 208–209, para. 401.

In fact, even if one were to apply a less stringent threshold of overall control, as outlined by the ICTY's Appeals Chamber in the *Tadić* case, financial or military contribution could only imply attribution of the non-state actor's conduct to the state, if the former is organized and hierarchically structured, such as a military or paramilitary group.[119] Such overall control arises not only from equipping, financing or training and providing operational support to the group but also from coordinating or helping in the general planning of its military or paramilitary activity.[120] As per our example, State A would evade responsibility for the acts committed by a non-state actor, whether applying the effective or overall control.[121] The case of Syria illustrates well the difficulty of attributing the conduct of non-state actors to third states that have provided varying degrees and forms of assistance.[122]

Several scholars have taken issue with the responsibility gap that arises from the limitations of the existing attribution framework.[123] They have argued that, given the rigidity of Article 8 of the ARSIWA, supplementary grounds of attribution have developed in the form of 'harbouring', 'tolerating' or 'supporting' the activities of private actors.[124] More often than not, it is argued that this type of collaboration amounts to complicity in an internationally wrongful act.[125] While complicity (aid or assistance) made its way into the ARSIWA as a form of attribution of responsibility in the inter-state context, there is no express mention of complicity among the grounds of attribution of conduct.

In the process of codification of the grounds of attribution of conduct in the ARSIWA, Roberto Ago noted that '[t]he study of international practice shows that the acts of private individuals are never taken into account in determining the international responsibility of the State unless they are accompanied by certain actions or omissions of organs of the State'.[126] In his fourth report, Ago clarified that 'complicity' has sometimes been used 'absolutely incorrectly' … 'and was no more than a fiction used to denote something else'.[127] As an example, Ago notes that 'a court cannot correctly be defined as "an accomplice" in the crime of an individual because it does not impose an appropriate sentence on that individual'.[128]

In Ago's view, '[t]he possible "participation" or "complicity" of organs of the State in the action of an individual do not have the effect of making that individual a member –

[119] *Tadić* AC, *supra* note 5, paras 131–137.

[120] *Ibid.*

[121] Chinkin, *supra* note 69, at 395.

[122] See Ruys, 'Of Arms, Funding and "Non-Lethal Assistance": Issues Surrounding Third-State Intervention in the Syrian Civil War', 13 *Chinese Journal of International Law* (2014) 13, at 22–26.

[123] See, e.g., Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines', 15 *Melbourne Journal of International Law* (2014) 1.

[124] Tams, 'The Use of Force against Terrorists', 20 *EJIL* (2009) 359, at 385; Jinks, *supra* note 67.

[125] C. Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995), at 240.

[126] R. Ago, Fourth Report on State Responsibility, UN Doc. A/CN.4/264 and Add. 1 (1972), reprinted in 2 *ILC Yearbook* (1972) 104, para. 64.

[127] *Ibid.*

[128] *Ibid.*

even an incidental or *de facto* member – of the machinery of the State'.[129] The ILC debates leading to the adoption of the ARSIWA have highlighted the need to regulate state responsibility in relation to new scenarios of cooperation between states,[130] and between states and non-state actors, which would neither fit within the purview of due diligence obligations nor under the narrow construction of a de facto organ.[131]

According to the former ILC member, Nikolai Ushakov:

> the possibility of a kind of complicity of a State organ going beyond mere failure to prevent or punish, should not be ruled out. A whole range of intermediate situations could be envisaged, which might involve elements other than mere failure to prevent or punish, including the extreme case in which the act of an individual became an act of the State because it was proved that the individual had, in fact, acted on behalf of the State.[132]

The responsibility for complicity in the acts of non-state actors that would arise for State A is without prejudice to the potential responsibility engaged by State B for failing to prevent the conduct of non-state actors on its territory that results in the harm to State C. The objection to applying complicity in this context is that State A engages responsibility for the act of aiding or assisting a particular wrongful conduct by a non-state actor. The problem is that aid or assistance regarded on its own may be lawful. It only becomes unlawful if there is a specific primary obligation directly prohibiting that assistance or if a link is made to the principal wrongful act. It cannot be excluded that specific conduct can be attributable to both the state having assisted the non-state actor and the territorial state on which the wrongful conduct took place. This would lead to a scenario of shared responsibility of both the complicit and territorial state in respect of the wrongful conduct perpetrated by a non-state actor. In other words, complicity as a purported basis of attribution of conduct operates differently from its conception as a derivative form of responsibility in the inter-state context as per Article 16 of the ARSIWA.

Further, complicity as a basis of attribution of conduct differs from the framework of attribution set forth in Article 8 of the ARSIWA. There are three elements that demonstrate this distinction. First, complicity is of particular interest in those situations where an organization is more than a mere private grouping. For instance, in the *Bosnia Genocide* case, the Bosnian Serb forces sought not to become the government of Bosnia and Herzegovina but, rather, to establish their own state in a part of Bosnia and Herzegovina's territory. Even though at no time was it formally constituted or recognized as such, the Bosnian Serb forces were clearly operating on a different scale from the Contras in the *Nicaragua* case. In this context, the use of complicity

[129] *Ibid.*

[130] Crawford, First Report, *supra* note 14, at 39–44, paras 192–218. See also Savarese, 'Issues of Attribution to States of Private Acts: Between the Concept of De Facto Organs and Complicity', 15 *Revue de Droit immobilier* (2005) 111, at 115.

[131] *Ibid.* See also Savarese, 'Fatti di privati e responsabilità dello stato tra organo di fatto e "complicità" alla luce di recenti tendenze della prassi internazionale', in M. Spinedi, A. Gianelli and M.L. Alaimo (eds), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti: Problemi e spunti di riflessione* (2006) 53.

[132] Minutes of the 1311th meeting, 16 May 1975, reprinted in 1 *ILC Yearbook* (1975) 38, at 41, para. 24 (Ushakov).

as a standard of attribution of conduct, at the very minimum, in situations of aid or assistance by a state to a de facto territorial authority seems justified.

Second, the conceptual distinction between the situation of complicity and the standard of a de facto organ or agent is that in the context of complicity, the private actor receiving the aid or assistance has its own will – that is, its decision making as to the commission of a wrongful act is autonomous from the state that has provided aid or assistance. The catalyst of responsibility for the state in the context of complicity is its knowledge of the wrongful character of the acts by private actors for which the state has provided aid or assistance.

The third distinguishing element relates to the evidence of knowledge on the part of the state of the circumstances in which its aid or assistance is used with the view to facilitating the commission of an internationally wrongful act. The aiding or assisting state must also be aware of the circumstances of the wrongful act at the time of providing its aid or assistance to the non-state actor. The knowledge standard thus allows for mitigating the rigidity of the requirement of control in respect of each operation by a non-state actor in the context of Article 8 of the ARSIWA.

It is submitted that the relationship between a state and non-state actors, while traditionally assessed on the basis of the de facto (complete dependency) test and Article 8 test of direction, control or instructions, is being supplemented in practice by a new complicity (aid or assistance) test.[133] In the *Bosnia Genocide* case, the ICJ applied Article 16 of the ARSIWA to a factual collaboration between a state and forces of Republika Srpska, which is technically a non-state entity. The Court found that although Article 16 'concerns a situation characterized by a relationship between two States, [and] is not directly relevant to the present case, it nevertheless merits consideration'.[134] Whether or not this was an intentional extension by the Court is immaterial to the logical possibility of using complicity as a criterion for the attribution of conduct in addition to its treatment as a form of attribution of responsibility.[135]

The signs of complicity as a new standard of attribution of conduct have also resurfaced in other cases.[136] On a number of occasions, the Inter-American Court of Human Rights has ruled that Colombia was responsible 'for the violations committed by paramilitary groups who have acted with the support, acquiescence, involvement,

[133] See Pellet, 'Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues', in P. Kóvacs (ed.), *International Law: A Quiet Strength: Miscellanea in Memoriam Géza Herczegh* (2011) 111, at 126 (arguing that the Court in *Bosnia Genocide*, *supra* note 11, assimilated complicity with aid or assistance as an additional basis of attribution of conduct).

[134] *Bosnia Genocide*, *supra* note 11, at 217, para. 420.

[135] For treatment of complicity as a form of international responsibility, see A. Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (2007); H.P. Aust, *Complicity and the Law of State Responsibility* (2011); Lanovoy, 'Complicity in an Internationally Wrongful Act', in A. Nollkaemper and I. Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014) 134; M. Jackson, *Complicity in International Law* (2015), at 125–175; V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016).

[136] In the context of terrorism, see Jinks, *supra* note 67; Savarese, *supra* note 130, at 123; Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law', 24 *LJIL* (2011) 989.

and cooperation of State security forces'.[137] The European Court of Human Rights (ECtHR) has also attributed non-state actors conduct to Russia as the latter was 'fully aware that [it] was handing [the applicants] over to an illegal and unconstitutional regime'.[138] The ECtHR found the responsibility not only on the part of the host state – that is, Moldova – but also on the part of Russia, holding that the Transdniestria regime 'remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation'.[139]

In more recent cases, involving renditions, the ECtHR further developed the attribution standard of complicity, based on the knowledge (acquiescence or connivance) of the wrongdoing by state authorities.[140] Likewise, in *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, the African Commission stated that:

> the government of Nigeria *facilitated* the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis.[141]

The legitimate question to be asked is whether these cases indicate that there is added value in construing complicity as an additional ground of attribution of conduct.[142] Kimberley Trapp has submitted that '[a]n argument that states should be held directly responsible for positive conduct (the commission of a terrorist act) on the basis of attributability, when all they may be responsible for is an omission (a however deliberate failure to prevent), would render many of the primary obligations in the terrorism context redundant'.[143] Similarly, Miles Jackson has argued that developing complicity as a rule of attribution of conduct risks undermining 'coherence in the secondary rules of attribution'.[144]

[137] IACtHR, *Rochela Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 11 May 2007, para. 78; IACtHR, *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006, paras 125, 133; IACtHR, *Mapiripán Massacre v. Colombia*, Judgment (Preliminary Objections), 7 March 2005, paras 121–123. See also Amoroso, *supra* note 136, at 994ff.

[138] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July 2004, para. 384.

[139] *Ibid.*, para. 392. See also *ibid.*, paras 379, 381 and 387.

[140] ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012, paras 206, 212–222, 235, 240; ECtHR, *Al Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014, paras 452, 517; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, Appl. no. 7511/13, Judgment of 24 July 2014, paras 449, 512. See also UN Human Rights Council, *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, paras 11.5–11.6; Committee against Torture, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, 24 May 2005, para. 13.4.

[141] African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, [2001] AHRLR 60, at 71, para. 58 (emphasis added). See also Cerone, 'Re-Examining International Responsibility: Inter-State Complicity in the Context of Human Rights Violations', 14 *International Law Students' Association Journal of International and Comparative Law* (2007) 525, at 530.

[142] Trapp, *supra* note 42, at 45–61.

[143] *Ibid.*, at 61.

[144] Jackson, *supra* note 135, at 197.

In this author's view, there is no systemic danger in using complicity as an additional ground of attribution of conduct or making redundant the existing due diligence obligations. To the contrary, complicity as a distinct ground of attribution of conduct would reinforce and complement the due diligence obligations.[145] Turning to our initial example in this section – the responsibility of State A for facilitating the commission of the wrongdoing by a private actor operating on the territory of State B against State C has no bearing on the separate responsibility of State B for failing to prevent that wrongdoing. Moreover, due diligence obligations are primarily concerned with the omissions of a state, whereas complicity usually arises from actions or a combination of actions and omissions. Similarly, due diligence obligations do not provide a satisfactory answer to situations in which 'state inaction amounts to connivance with private wrongdoers, namely when the state *repeatedly* and *knowingly* fails to prevent and to punish the unlawful conducts carried out by private entities under its jurisdiction'.[146]

Further, while in the case of due diligence obligations, the legal assessment is one of the capacity to prevent (that is, some form of control over the territory and/or actors), the ascertaining of complicity only requires knowledge of the wrongdoing and causal link between aid or assistance provided and the wrongdoing committed. Finally, the legal consequences deriving from complicity in the conduct of a non-state actor and failure to comply with a due diligence obligations are different. In the case of complicity as a ground of attribution of conduct, the complicit state would bear responsibility for the acts of non-state actors. In the case of the state's failure to exercise due diligence, it is responsible for its own omission but not necessarily for all, or any part, of the injury flowing directly from the non-state actors' conduct. In other words, a state is responsible for a violation of its own primary obligation, which is a separate *fait générateur* from the actions or omissions of a non-state actor.[147] In contrast, in situations of complicity, the conduct of a non-state actor is attributable to the state because of that state's knowing and causal aid or assistance facilitating that conduct.

In fact, the benefits of complicity as an additional standard of attribution of conduct are significant.[148] Complicity could lead to a lowering standard of attribution, somewhere in-between, or altogether outside, the *Nicaragua* and *Tadić* thresholds.[149] It would require that the assisting state merely possess knowledge of the circumstances

[145] See, e.g., Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, And Concurrent Responsibility', 36 *Michigan Journal of International Law* (2015) 129, at 163ff (arguing that direct and indirect attribution of conduct may give rise to concurrent responsibility).

[146] Amoroso, *supra* note 136, at 992 (emphasis in the original); Becker, *supra* note 44, at 43ff.

[147] See, e.g., *British Claims in the Spanish Zone of Morocco (UK v. Spain)*, Award of 1 May 1925, reprinted in UNRIAA, vol. 2, 615, at 641–642. See generally Proulx, *supra* note 112, at 57–62; R.P. Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (2008).

[148] Becker, *supra* note 44, at 258.

[149] *Nicaragua*, *supra* note 5, at 64, paras 115ff. Cf. *Tadić* AC, *supra* note 5, paras 120–145. See De Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', 72 *British Yearbook of International Law* (2002) 255.

in which its aid or assistance is being used by the non-state actor for the commission of an internationally wrongful act, rather than the need to exercise any specific degree of control over that non-state actor. Conversely, if the cognitive (knowledge *vis-à-vis* intent) or material (simple causal link *vis-à-vis* significant contribution) requirements are interpreted too strictly, complicity as a criterion of attribution of conduct will have no real impact or added value.[150]

Even if the requirements of Article 16 of the ARSIWA reflect customary international law and the notion of complicity in the context of inter-state relations is derivative in character, the same conception cannot and should not be hastily transposed to cases of collaboration between states and non-state actors. Complicity shall thus be construed in such cases as a ground of attribution of conduct proper, arising when a state provides a knowing and causal contribution to the commission of a conduct by a non-state actor that is thus attributable to that state and constitutes a violation of that state's international obligation.

5 Conclusion

This article has reviewed the existing legal framework regulating the use of force by non-state actors. It has tested the ability of the ARSIWA attribution framework to remedy the existing responsibility gap in respect of the use of force by private actors. One of the key limitations is a narrow construction of the attribution standards of private actors' conduct to a state – in particular, the stringency of the underlying control tests. States increasingly procure the commission of wrongdoings by private actors, without the latter fitting into any of the existing attribution standards, as set forth in Articles 4–11 of the ARSIWA, thereby perpetuating the responsibility gap in respect of the use of force by non-state actors.

One possible avenue for remedying the responsibility gap goes through the primary norms, namely enhancing the scope of due diligence obligations and their enforcement in practice.[151] Here again, however, the issue of control dominates the discussion, albeit with an emphasis on its territorial, rather than personal, aspect. This article advanced an alternative, or rather complementary, avenue of broadening the classical attribution standards with respect to the acts by non-state actors. Originally conceived of as a form of attribution of responsibility in its purely inter-state dimension, complicity now has unexplored potential as a form of attribution of conduct and could therefore strengthen the existing regulation of the use of force by non-state actors.

[150] See Lanovoy, 'Complicity in an Internationally Wrongful Act', *supra* note 135, at 141–156; see also Lanovoy, *Complicity and Its Limits*, *supra* note 135, at 306–329.

[151] *Bosnia Genocide*, *supra* note 11, at 219–226, paras 425–438; 237, para. 471.