
The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy

Ilias Plakokefalos*

1 Introduction

The standard of attribution of conduct of non-state actors (NSAs) to the state has been, for a long time, a contentious issue. At its heart lies the level of control a state has to exercise over a NSA's conduct in order to attribute that conduct to the state. The debate did not stop after the International Law Commission (ILC) finalized its Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)¹ and was picked up by the International Court of Justice (ICJ) in the merits phase of the *Application of the Convention for the Prevention and Punishment of the Crime of Genocide* between Bosnia and Serbia in 2007.² Since then, debate has continued on the control threshold, whether generally³ or with respect to particular areas of international law.⁴

Vladyslav Lanovoy's work fits neatly into this picture. Lanovoy puts forth a complex and sophisticated argument that merits close consideration because the issue of effective control plays a significant, if not decisive, role in attribution of conduct in situations where NSAs and states contribute (to varying degrees and in different ways) towards a harmful outcome. The proposition he makes – in a nutshell – is that complicity (aid and assistance) should be used as a test of attribution of conduct when a state 'provides a knowing and causal contribution' to the conduct of a NSA that – being attributed to that state – leads to the commission of a wrongful act by that state.⁵ While this is a bold and interesting idea, it faces a number of problems that I will address in the next few pages.

* Assistant Professor, Utrecht University, Utrecht, Netherlands. Email: i.plakokefalos@uu.nl.

¹ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83, 3 August 2001 (ARSIWA).

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, 26 February 2007, ICJ Reports (2007) 43.

³ See, e.g., Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', 58 *International and Comparative Law Quarterly* (2009) 493. See also the articles edited by d'Aspremont, Nollkaemper, Plakokefalos and Ryngaert in 62(1) *Netherlands International Law Review* (2015) 49, 49–160 under the title 'Shared Responsibility and Organized Non-State Actors'.

⁴ See, e.g., Tams, 'The Use of Force against Terrorists', 20(2) *European Journal of International Law* (2009) 359.

⁵ Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct', in this issue, 563, at 585.

2 The Primary/Secondary Rule Distinction

The basis for the argument is that there is a responsibility gap: certain acts of states that contribute towards the conduct of NSAs 'fall' through this gap and do not engage the responsibility of the state in question. This is so, claims Lanovoy, because of the effective control test, which is too strict to capture certain types of state conduct relating to NSAs. Therefore, the argument goes on, the standard for attribution must be lowered, so that NSA acts to which a state has contributed become attributable to that state. This is a sufficiently clear, but not unproblematic, argument.

The first problem is that the logical starting point should be the primary rules on the prohibition on the use of force (or any other primary rule for that matter). The real question is why states have not moved to regulate conduct that falls short of complicity as it is enshrined in the ARSIWA and qualify it as use of force (providing training, weapons, logistics and so on)⁶ or, alternatively, why they have not devised a host of primary obligations directly applicable to NSAs.⁷ There would have been no responsibility gap to speak of had states taken either step. In the first instance, the state would become responsible for the conduct of its own organs, rather than having to have NSA conduct attributed to it. In the second instance, the NSA would become internationally responsible for its own conduct.

The second problem is that even if this inaction leads to a responsibility gap, this gap is not created by some sort of inadequacy of the rules on state responsibility. The rules on state responsibility are general and residual in their application.⁸ They are not arbitrarily attached to, and they do not depend on the content of, the primary rules. Moreover, the role of state responsibility is not to respond to any kind of regulatory problems stemming from the lack of primary rules. This has been clear in other areas of international law. Most prominently, the treatment of the topic of liability for transboundary environmental harm by the ILC has shown that it is very difficult to address the inadequacies of the primary rules by tweaking the rules of state responsibility or by trying to create a rule on liability in international law.⁹

This brings forth the third, and probably the most crucial, problem, which is the conflation of primary and secondary rules. Granted, the distinction is used as an

⁶ The International Court of Justice (ICJ) was clear in *Nicaragua* that 'training, arming, equipping, financing and supplying' a non-state actor (NSA) all constitute a violation of the customary international law principle of non-intervention. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, ICJ Reports (1986) 14, para. 292(3). Therefore, it is obvious that states have in fact regulated against such acts. They just have not qualified them as use of force.

⁷ There are relatively few international obligations that are directly applicable to NSAs. See d'Aspremont, Nollkaemper, Plakokefalos and Ryngaert, 'Sharing Responsibility between Non-State Actors and States in International Law: Introduction', 62(1) *Netherlands International Law Review* (2015) 49.

⁸ ARSIWA, *supra* note 1, at 32, Commentary.

⁹ Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law', 17 *Journal of Environmental Law* (2005) 3

analytical tool¹⁰ and is not without problems itself, but it often helps to navigate through the maze of conceptual confusion. Complicity, in its ARSIWA form, is not necessarily a secondary rule.¹¹ Even though it depends on the commission of a wrongful act by a state (other than the aiding state), it does proscribe specific conduct, something that is the hallmark of a primary rule. If, as Lanovoy, suggests, an even looser form of complicity is employed as a test of attribution, without a requirement of the commission of a wrongful act by the NSA, then what he proposes is clearly a new primary rule. It is extremely difficult to find support for this in state practice, court decisions or in the literature. Such a proposition also brings us back to the starting point. If the idea is to come up with a new primary rule, it is not necessary to do so through a convoluted, if sophisticated, argument that travels through the secondary rules on attribution. A simple normative argument in favour of the creation of this rule would suffice, no matter how easy or difficult it would be to substantiate it.

3 Attribution

The decisions of the ICJ in *Nicaragua* and in *Bosnia Genocide* and the decisions of the International Criminal Tribunal for the Former Yugoslavia's (ICTY) in *Tadić*, have shaped the debate on the content of the control test for attribution.¹² In *Bosnia Genocide*, the ICJ put an end to any uncertainty by clearly and unconditionally stating that the relevant test for the attribution of conduct is that of effective control.¹³ Lanovoy challenges this conclusion by claiming that the stringency of the effective control test does not capture instances where the participation of the state in, and contribution to, the harmful outcome falls below the threshold set by the effective control test. Moreover, this type of contribution cannot be captured by complicity because of the difficulty in accepting that NSAs are bound by the primary rules that bind states when it comes to the prohibition on the use of force.

Lanovoy justifies the argument in favour of complicity as a test for attribution of conduct by claiming that the complicity test is distinguished from the effective control test by three factors: first, that in the case of the complicity test the organization needs to be more than a mere private grouping; second, that the private actor retains its own free will and, third, that there must be knowledge of the circumstances of the wrongful conduct. These three requirements are indeed correct, but something more important seems to be missing. In a scenario of aid and assistance, the aiding

¹⁰ See J. Crawford, *State Responsibility: The General Part* (2013), at 64–66. See also Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?', 39(1) *International and Comparative Law Quarterly* (1990) 1.

¹¹ H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 6, 51–52. Lanovoy posits that complicity is a *fait générateur* of responsibility separate from the principal wrongful act (though dependent upon its commission), thus highlighting the difficulty of classifying complicity as a secondary rule. See V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016), at 4.

¹² *Nicaragua*, *supra* note 6; *Bosnia Genocide*, *supra* note 2; Judgment, *Prosecutor v. Tadić* (IT-94-I-A), Appeals Chamber 15 July 1999, para. 122.

¹³ *Bosnia Genocide*, *supra* note 2, para. 404.

and assisting state is not responsible for the breach of the international obligation of another state. Rather, it is responsible for the act of aiding and assisting (hence, the argument above that complicity in Article 16 of the ARSIWA constitutes a primary rule in reality). It has not been made clear in Lanovoy's article how the rationale of aid and assistance can be successfully transposed to a secondary rule setting, namely the setting of attribution. These distinguishing factors do not explain, in and of themselves, how the complicity test will function in an attribution of conduct context.

What is more, it is not sufficiently explained what are the limits of such an operation. Surely not the limits of aid and assistance as they appear in the ARSIWA, since it would make little sense if these limits, as the author claims, are also the differentiating factors between ARSIWA complicity and complicity as a test for attribution. In the end, Lanovoy's argument seems to be more an argument for establishing a rule of complicity between a state and a non-state entity (as a primary rule) and less an argument for complicity as a basis for attribution of conduct to states.

4 Due Diligence

Lanovoy also argues that due diligence obligations do not provide a satisfactory answer where the state repeatedly and knowingly fails to prevent unlawful conduct by a non-state actor.¹⁴ Furthermore, he argues that the due diligence standard does not seem to cover a more active conduct that is usually the ground for complicity. Neither contention is supported by further elaboration. Due diligence obligations typically refer to the scenario where the state bears an obligation of conduct, and it must take measures in order to prevent a certain event. If the state takes these steps and nonetheless the event occurs, it cannot be held responsible. If the state fails to take these steps, then it may be held responsible, provided that the rest of the requirements for the determination of responsibility are fulfilled. The nature of the due diligence standard differs drastically in nature and content from attribution, simply because due diligence speaks to the nature of the primary obligation while attribution is a normative operation at the level of secondary rules. Therefore, it is somewhat peculiar to expect that due diligence would provide answers to the problem of attribution. Moreover, the standard of diligence depends on the nature and scope of the relevant primary rule.¹⁵ If due diligence were to play any role in the process of rendering states responsible for the conduct of NSAs, this would mean that the argument should be directed towards the primary and not the secondary rules.

¹⁴ On due diligence, see Handl, 'Territorial Sovereignty and the Problem of Transnational Pollution', 69 *American Journal of International Law* (1975) 50; R. Pisillo Mazzeschi, 'Due Diligence' e Responsabilità Internazionale degli Stati (1989); Barnidge, 'The Due Diligence Principle in International Law', 8 *International Community Law Review* (2006) 81; A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *New York University Journal of International Law and Politics* (2004) 265.

¹⁵ International Law Association, Study Group on Due Diligence in International Law, Second Report, July 2016, 2–3, available at <http://www.ila-hq.org/index.php/study-groups> (last visited 16 May 2017).

5 Support in Case Law

Regardless of the normative nature of the argument put forth by Lanovoy, the question remains: does case law support a substitution of control for complicity? Lanovoy suggests that the argument can be found, at least in an embryonic form, in *Ilaşcu*,¹⁶ *El Masri*,¹⁷ *al Nashiri*,¹⁸ decisions of the European Court of Human Rights (ECtHR) and in a number of decisions of the Inter-American Court of Human Rights (IACtHR).¹⁹ It is worth taking a look at these cases in order to establish whether the courts have actually taken up complicity as a ground for attribution.

Starting from *Ilaşcu*, the ECtHR used language that is rather confusing in determining the responsibility of Russia. It held that Russia's responsibility was 'engaged' not only for its own acts but also for the acts of the Transdnienstrian police.²⁰ It is far from clear, and in fact unlikely, that the ECtHR was developing an alternative standard for the exercise of effective control. According to the ECtHR, Russia was aware that it was handing the applicants over to 'an illegal and unconstitutional regime'.²¹ On the one hand, it was the conduct of knowingly exposing the applicants to ill treatment that was attributed to Russia; the Court did not rely on Russian aid and assistance to the Transdnienstrian police in order to attribute the Transdnienstrian police conduct to Russia. On the other hand, the Court did directly attribute acts of the Transdnienstrian police to Russia, but certainly not based on a lower threshold of control through complicity. It is very difficult to read *Ilaşcu* as promoting this view.

In *El Masri*, the ECtHR did not use complicity as a ground for attribution. The applicant was transferred by the authorities of the Former Yugoslav Republic of Macedonia (FYROM) to US agents and suffered ill treatment at their hands.²² The ECtHR held that the FYROM was responsible 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'.²³ The ECtHR also held that '[i]n such circumstances, the Court considers that by transferring the applicant into the custody of the US authorities, the Macedonian authorities knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention'.²⁴ It is clear from these passages that the FYROM was responsible for its own failure to fulfil its obligations under Article 3 and not for

¹⁶ ECtHR, *Case of Ilaşcu and others v. Moldova and Russia*, Appl. no. 48787/99, Judgment of 8 July 2004. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

¹⁷ ECtHR, *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012.

¹⁸ ECtHR, *Case of Al Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014.

¹⁹ IACtHR, *Case of Rochela Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 11 May 2007; IACtHR, *Case of the Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006.

²⁰ *Ilaşcu*, *supra* note 16, para. 384.

²¹ *Ibid.*, para. 384.

²² The applicant also suffered harm in the hands of Macedonian state officials but that is not relevant for our purposes. See *El Masri*, *supra* note 17, paras 195–198.

²³ *Ibid.*, para. 212.

²⁴ *Ibid.*, para. 221.

being complicit in another wrongful act. It was the conduct that led to the failure to fulfil these obligations that was attributed to the FYROM and not the act of aiding and assisting the USA in its operation that led to the violation of Article 3 of the European Convention on Human Rights (ECHR).²⁵

Even if that were the case, it seems that it would be a different and additional breach—namely the aid and assistance itself. Since attribution of the failure to ensure protection under Article 3 was enough, the ECtHR did not, and rightly so, go into examining the issue of complicity. In *Al Nashiri*, the applicant was also subject to ill treatment within the Central Intelligence Agency's extraordinary rendition program, this time in Poland. The ECtHR reaffirmed *El Masri* by holding that the breach of Article 3 of the ECHR is 'intrinsic in the transfer'²⁶ of the person to a location where the respondent state knows, or ought to have known, that there is a real risk of torture.²⁷

These cases seem to be problematic as a basis for Lanovoy's argument for two more reasons. First, even if one assumes that the ECtHR did in fact employ complicity in its reasoning, it did not do so in order to lower the standard of attribution. This is clear from the fact that the ECtHR found the FYROM and Poland responsible based on the conduct of their organs that was directly attributed to them in accordance with the customary rule enshrined in Article 4 of the ARSIWA.²⁸ Second, the aided entity in *El Masri* and *Al Nashiri* was the USA and not a NSA. Most importantly though, the primary rule breached was not the prohibition of the use of force. It was the prohibition of torture and ill treatment that was breached. Therefore, it appears that these cases refer to the attribution of conduct pure and simple and not to complicity that breaches a rule different from the one that forms the focus of Lanovoy's article.²⁹ Therefore, these cases cannot be seen as supporting any move towards complicity as an attribution test.

The IACtHR case law that Lanovoy cites does not seem to provide unequivocal support for his argument either. In these cases, the IACtHR has indeed used terminology that points towards the conclusion that it held Colombia responsible for being aiding and assisting NSAs in committing acts in violation of its obligations under the American Convention on Human Rights.³⁰ In *Ituango*, for example, it stated that 'far from taking measures to protect the population, members of the National Army not

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221.

²⁶ *Al Nashiri*, *supra* note 18, para. 454.

²⁷ *Ibid.*, paras 453–455.

²⁸ In *El Masri*, *supra* note 17, the question arose as to the ill treatment of the applicant by Central Intelligence Agency agents while still in the airport of Skopje.

²⁹ Even if they did refer to complicity that would be in the sense of ARSIWA, *supra* note 1, Art. 16, and not to complicity as a test of attribution. While it is true that the European Court of Human Rights might conflate concepts of the law of state responsibility and concepts that pertain to its own jurisprudence such as jurisdiction (see M. Milanovic, 'Jurisdiction, Attribution and Responsibility in Jaloud' EJILTalk! (11 December 2014), available at www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/ (last visited 16 May 2017), this was not the case with complicity and attribution. But see also Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture, and Jurisdiction', 27(3) *European Journal of International Law* (2016) 817.

³⁰ American Convention on Human Rights 1969, 1144 UNTS 123.

only acquiesced to the acts perpetrated by the military groups, but at times collaborated with and took part in them directly'.³¹ Similarly, in *Rochela* (citing *Ituango*), the IACtHR held that it has established on several occasions the responsibility of Colombia for violations 'committed by paramilitary groups who have acted with the support, acquiescence, involvement, and cooperation of State security forces'.³² Two points need to be raised here. First, the IACtHR reached this conclusion after establishing the breach of the government to take effective measures to protect the population.³³ Second, it seems that it did not attribute the acts of the paramilitary groups to the government. The relevant passages point to the direction of complicity pure and simple and not to a differentiation of the level of control. Moreover, it is clear that the IACtHR took into account the failure of Colombia to take measures, its acquiescence to the violations as well as the collaboration of its forces with the paramilitary groups.³⁴ It did not reach its decision simply by attributing the acts of the paramilitary groups to the government through a standard of complicity.

6 Concluding Remarks

The debate on the appropriate standard of control in the context of attribution of conduct of NSAs to the state will continue for the foreseeable future, and, admittedly, Lanovoy has made an important contribution to it in a very convincing and eloquent manner. His article is important because it brings to the surface the difficulties in attempting to lower the standard of effective control. It may seem trite, but it is true that tweaking the secondary rules of responsibility may not be the appropriate solution. Not because they are carved in stone but, rather, because the courts have been very cautious in approaching the issue, and the states do not seem willing to adopt different standards. It may well be that in the future both courts and states will change their tune. This change, of course, might also take place at the level of primary rules, thus taking the discussion back to where it, arguably, belongs.

³¹ *Ituango*, *supra* note 19, para. 133.

³² *Rochela*, *supra* note 19, para. 78.

³³ *Ituango*, *supra* note 19, paras 134–135; *Rochela*, *supra* note 19, para. 78.

³⁴ In *Ituango*, *supra* note 19, the Inter-American Court of Human Rights held that the responsibility of Colombia arises from the acts of 'omission, acquiescence and collaboration by members of the law enforcement bodies'.