
The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Rejoinder to Ilias Plakokefalos

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Abstract

I am grateful to Ilias Plakokefalos for his thought-provoking comments on my article. Plakokefalos makes two overarching critiques. First, he argues that my normative claim conflates the distinction between primary and secondary rules and is closer to an argument in favour of a new primary rule prohibiting aid or assistance (complicity) of states in the use of force by non-state actors (NSAs). Second, Plakokefalos submits that there is insufficient support in case law for the construction of complicity as a basis for the attribution of conduct.

1 Primary/Secondary Rule

In brief, my argument is that complicity, originally conceived as a form of attribution of responsibility of states and then extended to international organizations, is emerging as a new basis for the attribution of conduct. Complicity exhibits traits of both a primary and secondary rule, and while it follows broadly Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), it also diverges from it in important respects.¹ If the state renders aid or assistance to a NSA for the commission of a breach of an obligation that the state is itself bound by, the principal wrongful act becomes attributable to that state because of that assistance. However, not every aid or assistance will automatically trigger the attribution of the principal wrongful conduct by an NSA to the state – knowledge and a causal link are required. Complicity is thus linked to the commission of the principal wrongful act, resembling in this respect a secondary rule.

My responses to Plakokefalos' critique of my normative claim are as follows. I disagree with Plakokefalos' contention that absent a primary rule on complicity, the

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

rules on attribution of conduct serve no purpose in dissuading states from rendering assistance to NSAs.² If actions or omissions can be attributable to the state through complicity, it will impact that state's decision whether to assist a NSA. Plakokefalos' submission that the rules on state responsibility are general and residual does not detract from the fact that these rules 'embody judgements about the scope of state ... obligations, the range of persons bound by a given set of norms and the potential spread of losses that give rise to remedial rights'.³ Indeed, as Plakokefalos acknowledges, the framework of attribution of conduct and its outer limits are 'not carved in stone'. Whereas complicity was construed by the International Law Commission as a form of attribution of responsibility in the relations between states, Special Rapporteur James Crawford noted a close analogy between Article 16 of the ARSIWA and the bases of attribution of conduct.⁴ Further, the International Court of Justice (ICJ) in the *Bosnia Genocide* case did not see these structural issues as an obstacle when extending the scope of application of Article 16 to cases of state-to-NSA assistance.⁵

In Plakokefalos' view, it would have been more straightforward to argue for a prohibition of complicity as a primary rule – accordingly, any assistance by the state to a NSA would constitute a breach of an international obligation attributable to that state. While this normative claim is appealing, there is less support for the existence of such an overarching obligation in international law when compared to its more limited construction as a rule of attribution of conduct. For example, while rendering arms or funds to NSAs in the context of an armed conflict may be morally reprehensible, it is not unlawful as such. Yet it does become unlawful from the moment the state provides such assistance knowing, for instance, that it will be used to attack non-military targets. States can also undertake treaty obligations not to provide certain forms of aid or assistance.⁶ In the context of the use of force specifically, not every form of assistance by a state to a NSA amounts to a direct violation of the prohibition of the use of force as such. Of course, the provision of assistance may breach other rules of international law, such as the principle of non-intervention, or may even constitute aggression.⁷ This does not mean that lesser forms of assistance cannot be attributable

² Plakokefalos, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy', in this issue, 587.

³ Boon, 'Are Control Tests Fit for Future? The Slippage Problem in Attribution Doctrines', 15 *Melbourne Journal of International Law* (2014) 1, at 46.

⁴ J. Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498 and Add. 1–4 (1999), reprinted in 2(1) *International Law Commission* (1999) 3, at 47, para. 167.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, ICJ Reports (2007) 43, at 217, para. 420.

⁶ See, e.g., Arms Trade Treaty, GA Res. 67/234B, 2 April 2013, Arts 2(2), 6. See also V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (2016), at 186–217; H.-P. Aust, *Complicity and the Law of State Responsibility* (2011), at 376–418.

⁷ *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, at 226–227, paras 161–165; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, at 126–127, para. 246; 146, para. 292(3). See also GA Res. 3314 (XXIX), 14 December 1974, Art. 3(g).

to a state and that the state should not engage responsibility for acts committed with the help of that assistance insofar as it had knowledge thereof.

Plakokefalos criticizes my comparison of complicity with the obligations of due diligence owing to fundamental differences between the two. My argument is simply that there are different ways to respond to the existing responsibility gap. On the one hand, due diligence obligations are engaged where the state knows of the NSA's activities (usually within its own territory) and fails to take measures to prevent the harmful outcome. When such a failure to prevent occurs, the state is not responsible for all damage flowing from the conduct of the NSA but only that which it could have prevented by taking measures reasonably available to it in the circumstances. On the other hand, where complicity is engaged, the ultimate wrongful conduct by the NSA (usually operating extra-territorially) is directly attributable to the state that has given such aid or assistance. This, in turn, triggers the state's responsibility for all consequences flowing from the wrongful act committed by the NSA and not only for the aid or assistance it has provided, as there is 'a direct causality between the state's conduct and the wrongful result'.⁸

With reference to Article 16 of the ARSIWA, Plakokefalos questions the limits of complicity as a basis for the attribution of conduct.⁹ To attribute the principal wrongful act that has benefited from aid or assistance to the state, one needs to show that (i) the state had knowledge of the circumstances of the principal wrongful act by a NSA and (ii) that aid or assistance delivered by the state was in fact used in the commission of an internationally wrongful act by the NSA. In essence, Article 16 is transposable to a scenario of state-to-NSA assistance, but for the following differences. First, considering the unequal nature of subjects involved, the NSA's ability to breach international law derives from the obligations of the aiding or assisting state, which makes the operation of the opposability requirement in Article 16(b) redundant. Second, contrary to Article 16, which provides for derivative responsibility, the NSA's wrongful act that benefits from the aid or assistance received, in the case of complicity as a basis for the attribution of conduct, is directly attributable to the aiding or assisting state.

2 Support in Case Law

Aside from the theoretical critique above, Plakokefalos questions jurisprudential support for the construction of complicity as a basis for the attribution of conduct. I do not claim that the rule of complicity as a basis for the attribution of conduct and as advocated in my article is *lex lata*. However, international case law does provide support for using complicity as a basis for the attribution of conduct. The most prominent example, of course, is the application of Article 16 of the ARSIWA by the ICJ to the

⁸ 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 154.

⁹ For a detailed analysis, see Lanovoy, *supra* note 6, at 306–329.

situation of state-to-NSA aid or assistance in the *Bosnia Genocide* case. Plakokefalos does not appear to object to the fact that one can plausibly interpret the relevant international case law as setting out responsibility of a state on the basis of its complicity with respect to the wrongful conduct of NSAs. Rather, he argues that the courts have not referred to complicity as lowering the existing standard for attribution of private conduct (that is, that of effective control). I will limit myself to the following observations.

Plakokefalos is correct that the European Court of Human Rights (ECtHR) has adopted contradictory interpretations of the attribution standards and has conflated issues of jurisdiction with those of attribution of conduct for the purposes of establishing state responsibility.¹⁰ However, in its more recent judgments, the Court has attempted to rectify this discrepancy by stating that it has never sought to pronounce on attribution standards for the purposes of responsibility.¹¹ In my view, however, that appears to be more of a self-legitimation technique. For instance, the Moldova cases show that the Court was doing more than just determining whether the individuals concerned fell within the jurisdiction of Moldova and Russia; it was also determining the responsibility of each state for the applicants' detention and ill-treatment in breach of the European Convention on Human Rights (ECHR).

In *Ilaşcu*, for example, the ECtHR relied on the fact that the self-proclaimed Moldavian Republic of Transdniestria (MRT) was 'under the decisive influence [of] ... and survive[d] by virtue of the military, economic, financial and political support given to it by the Russian Federation' to attribute the actions of ill-treatment of applicants by the MRT to the Russian Federation, even though Russian agents did not participate 'directly in the events complained of' by the applicants.¹² Incidentally, the Moldova cases also show a different operation of due diligence obligations and the responsibility for complicity in practice, as the Court found Moldova and Russia responsible under these distinct bases of responsibility. Finally, Plakokefalos is correct that the recipients of aid or assistance in *El Masri* were the agents of the intelligence services of a third state and not NSAs. However, the fact that the responsibility of the territorial state (the Former Yugoslav Republic of Macedonia) was not only found on the basis of a violation of Article 3 of the ECHR but also because some of the acts were being performed by 'foreign officials on its [the respondent's] territory with the acquiescence or connivance of its authorities' is telling for the possibility of using complicity as a basis for the attribution of conduct.¹³

¹⁰ See, e.g., ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 18 December 1996; ECtHR, *Ilaşcu and Others v. Moldova and Russia (Ilaşcu)*, Appl. no. 48787/99, Judgment of 8 July 2004. See also M. Milanović, *Extraterritorial Application of Human Rights Treaties* (2011), at 41–53.

¹¹ ECtHR, *Jaloud v. The Netherlands*, Appl. no. 47708/08, Judgment of 20 November 2014, para. 154; ECtHR, *Mozer v. Moldova and Russia (Mozer)*, Appl. no. 11138/10, Judgment of 23 February 2016, para. 102.

¹² *Ilaşcu*, *supra* note 10, para. 393.

¹³ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012, para. 206.

Judgments by the Inter-American Court of Human Rights' (IACtHR) further support the attribution of acts of paramilitary groups to the state party to the American Convention on Human Rights because of the complicity of that state.¹⁴ For example, in the *Mapiripán Massacre* case, the IACtHR delineated the elements of complicity as a basis for the attribution of conduct, noting that the massacre was carried out with 'full knowledge, logistic preparations and collaboration by the Armed Forces', and concluded that the 'massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance' of the armed forces.¹⁵ The question is not whether the IACtHR aimed at 'a differentiation of the level of control', as Plakokefalos suggests, but, instead, whether it was applying an altogether different standard of attribution based on complicity. Thus, a more viable, but not fatal, critique to my argument is that both the IACtHR and the ECtHR have construed complicity as a *lex specialis* basis for the attribution of conduct in respect of human rights violations, and it can thus be too early to extend the application of that complicity standard of attribution of conduct to general international law.¹⁶

3 Concluding Remarks

While we await the emergence of the general prohibition of state-to-NSA aid or assistance in all circumstances, a feasible way forward to address the responsibility gap is through a more limited conception of complicity as a basis for the attribution of conduct where the state is knowingly assisting NSAs in the commission of internationally wrongful acts. The criteria of knowledge and a link between the assistance and the ultimate harm caused by the act of NSA would counterbalance any concerns with casting complicity too broadly as a basis of attribution of conduct. The ultimate solution to the use of force by NSAs may well lie outside the law of international responsibility, as indicated by the increasing reliance on domestic and international criminal mechanisms in respect of violations of international law by NSAs. However, this risks ignoring the roots of these violations – that is, the knowing aid or assistance provided by states, thereby leaving room for a so-called 'system criminality', where state responsibility is a mere afterthought.¹⁷

¹⁴ 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. 125.1–125.5, 133; IACtHR, *Mapiripán Massacre v. Colombia (Mapiripán Massacre)*, Judgment (Merits, Reparations, and Costs), 15 September 2005, paras 121–123; IACtHR, *19 Merchants v. Colombia*, Judgment (Merits, Reparations and Costs), 5 July 2004, paras 134–142. American Convention on Human Rights 1969, 1144 UNTS 123.

¹⁵ *Mapiripán Massacre*, *supra* note 14, paras 120–123.

¹⁶ See M. Jackson, *Complicity in International Law* (2015), at 190–199; cf. Lanovoy, *supra* note 5, at 326–328.

¹⁷ A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (2009), at 15; N. Jørgensen, *The Responsibility of States for International Crimes* (2003), at 112.