

International responsibility and attribution of conduct

Citation for published version (APA):

Jorritsma, R. (2021). *International responsibility and attribution of conduct: an analysis of Case Law on Human Rights and Humanitarian Law*. [Doctoral Thesis, Maastricht University]. Maastricht University. <https://doi.org/10.26481/dis.20210910rj>

Document status and date:

Published: 01/01/2021

DOI:

[10.26481/dis.20210910rj](https://doi.org/10.26481/dis.20210910rj)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

SUMMARY

Rules on the attribution of conduct determine whether conduct (be it an action or an omission) is considered an act of the State for the purpose of holding it responsible under international law. If conduct is attributed to the State and in breach of its international legal obligations, the State has committed an internationally wrongful act for which it must make full reparation. By the same token, there will no wrongfulness on the part of the State if conduct is not attributed to it. The law of State responsibility is authoritatively laid down in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles). The ILC regards the law of State responsibility as a framework of so-called "secondary rules" that purportedly do not address or regulate the content, interpretation or application of "primary" (substantive) rules of international law. At the same time, the ILC Articles acknowledge that its provisions, including its attribution rules, offer a general, default regime of international law that is applicable unless deviated from in special fields of law.

This thesis analyses the standard and function of attribution rules in the case law of human rights courts, quasi-judicial human rights bodies, and international criminal courts with jurisdiction over violations of humanitarian law. More specifically, this thesis analyses whether human rights courts on the one hand, and international criminal tribunals when dealing with humanitarian law on the other, have followed the *standards* of attribution as laid down in Articles 4 to 11 of the ILC Articles as a representation of customary international law or, rather, whether these courts and tribunals have adopted or recognized *lex specialis* rules to determine whether certain conduct constitutes an act of the State? Additionally, this thesis examines whether these courts, tribunals and bodies apply attribution rules from the law of State responsibility to determine the applicable law and consequently enable the exercise of their judicial function. The latter is a question of the *function* of attribution rules.

Chapter 2 demonstrates that the distinction between primary (substantive) rules and secondary rules on State responsibility law had originally been devised within a specific context and for the purpose of achieving a particular aim, namely to serve as a method of project delimitation. It also shows that from a theoretical point of view attribution rules may have a substantive dimension, given that they exercise a permeating effect on the scope, content or application of primary rules of international law. The legal operation of attribution rules from the law of State responsibility reveals that the State is considered in law as the true author of factual conduct, which may have implications for the applicable legal framework within which such conduct ought to be assessed (and, consequently, the lawfulness of the conduct itself).

Chapter 3 connects the notion of international responsibility with international legal personality. It explains that international law was traditionally a system that only took States into account. States were the only actors with international legal personality, and only States had rights and obligations towards other States. The modern notion of international responsibility, however, is no longer purely inter-State but extends to non-State actors, who enjoy a certain measure of international legal personality that derives from the will of States or the international community as a whole. This is particularly the case in human rights law (which involves rights for individuals and judicial or quasi-judicial procedures to enforce these rights) and in international criminal law (which involves obligations for individuals which are enforced, *inter alia*, by international criminal tribunals).

This Chapter further shows that the rules on State responsibility as codified in the ILC Articles are for the most part geared towards solving inter-State disputes. The rules on attribution of conduct, however, are of general application and apply to all types of disputes in which the State is held responsible. Accordingly, in human rights disputes, the attribution rules from the ILC Articles are applicable to the extent that human rights law does not provide its own *lex specialis* attribution rules. Moreover, even though the regime of international criminal law applies to individuals and not to States themselves, it is nevertheless crucial to attach conduct to States as belligerent parties in order to be able to prosecute and convict a person for crimes committed in international armed conflicts (which, by definition, involve two or more States opposing each other by force).

Based on an extensive examination of case law of human rights courts and quasi-judicial human rights bodies, Chapter 4 subsequently demonstrated that these courts and bodies do not apply any *lex specialis* attribution rules. Even in cases where human rights courts have not referred to the standards of attribution in the ILC Articles by name, their examination of whether conduct amounts to an act of the State tends to be exactly in line with what would otherwise follow pursuant to the customary law of State responsibility. This Chapter also shows that in some cases human rights courts appear to deviate from Articles 4 to 11 of the ILC Articles, but that such deviation is only apparent upon further reflection of the facts and the legal analysis of the case at hand. Moreover, in very few cases human rights courts have recognized the legal value and relevance of the attribution rules of the ILC Articles but applied them to the facts of the case in a manner that remains open to doubt. Finally, in one case analysed in this Chapter, the human rights court in question identified one of the attribution provisions from the ILC Articles as relevant, even though a different one would have been more appropriate. Accordingly, based on the cases examined in this Chapter and in light of the close analyses provided there, it can be concluded that human rights law knows no *lex specialis* rules on the attribution of conduct.

Chapter 5 turned to the function of attribution rules in relation to the application of human rights law, as well as the exercise of jurisdiction disputes by human rights courts and quasi-judicial bodies with regard to conduct that is alleged to constitute a human rights violation. This Chapter focused on the case of the

European Court of Human Rights, given that this judicial body has generated a vast body of precedents on this topic. The conceptual difference between the applicability of the Convention, and the responsibility for an act that occurs where and to whom the Convention is applicable, means that a finding of whether a State has committed a breach of the Convention actually involves a number of dimensions. The first is one of attribution. Attribution rules serve to tie conduct to an actor with international legal personality, in this case a State party to the European Convention on Human Rights. But the fact that conduct is attributable says nothing about whether such conduct was lawful or not. This still depends on whether there is a breach of any applicable law. As this Chapter shows, this latter question actually comprises two sub-questions: the existence of State jurisdiction in the sense of Article 1 of the Convention so as to make the treaty applicable in the first place, and the existence of a breach itself. If a victim is within a State's territory, the Convention applies, and there is a presumption that it applies in full. However, the (preliminary) question of whether a victim is within the jurisdiction of a State other than the territorial State cannot be answered without resolving the question of whether the relevant conduct that gives rise to jurisdiction is attributed to the State in the first place. This depends on whether a victim or territory is under control by a person or entity whose conduct is attributed to the State as a matter of State responsibility law.

Finally, Chapter 6 turned to the standard and function of attribution rules in international humanitarian law pertaining to international armed conflicts. This body of law is adjudicated by international criminal tribunals with criminal jurisdiction over individuals. This Chapter demonstrated that rights and obligations stemming from the law pertaining to international armed conflicts are not applicable to individuals or States unless the situation *de jure* involves two opposing States with full responsibility for the regular and irregular forces through which they act. Given this connection between State responsibility and the existence of an international armed conflict, it is necessary to apply attribution rules to establish whether conduct (such as that of an organized armed group) can be attributed to a State, and thereby trigger the application of the relevant rules of humanitarian law. If the threshold of application for international armed conflicts (such as any hostile resort to force between States, or territorial control amounting to occupation) is met as a result of acts attributable to a State as a matter of State responsibility law, then the law pertaining to international armed conflicts applies to that particular conduct, and any such attributable conduct in violation of the applicable law leads to State responsibility. This equally means that an individual accused cannot be tried and convicted for war crimes in international armed conflicts, unless the situation involves two parties that fight on behalf of States as a matter of State responsibility law.