
International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 10, State Responsibility

Question 1. *Reflect on the situations where the acts of a non-State actor may be attributed to a State and the problems that might be raised by such attribution.*

The ARSIWA raise a number of situations when the acts of a non-State actor might be attributable to a State. These raise a number of controversies as they link the responsibility to a State to the conduct of actors that are not its organs. However, given that States routinely resort to conduct through non-State organs, customary international law recognises a number of situations where the responsibility of a State is engaged:

1. *De facto* State organs (see *Application of the Genocide Convention* 2007 judgment): where a non-State actor acts in ‘complete dependence’ on the State and are essentially its ‘instrument’. This complete dependence would have to be demonstrated on the facts.
2. An organ that is legally empowered under internal law to exercise elements of governmental authority (Art 5 ARSIWA). One would have to find applicable municipal law that establishes this legal situation.
3. An organ placed ‘at the disposal’ of a State (Art 6 ARSIWA): These are organs of one State that are, in effect, have been assigned elements of government authority by one State to another. The classic example is the UK Privy Council’s role as highest appellate court for several Commonwealth States.
4. Acts by non-State actors under the control and direction of a State: this is not a situation of ‘complete dependence’ but rather, in relation to specific operations. It is here that the very well-established controversy between situations of ‘effective control’ (ICJ in *Nicaragua* and *Application of the*

Genocide Convention) versus 'overall control' (ICTY in *Tadić*) would apply. Students should recall that the effective control test is the higher: it requires that a State not only have financed, organised, or provided supplies for a given act or conduct, but that it have actively instructed or directed that act or conduct. The overall control test, conversely, would permit for a more case-by-case approach, looking at specific circumstances and not requiring such a high degree of direction or instruction.

The ICJ has criticised the overall control test as stretching the relationship between conduct of an actor and that of the State 'almost to breaking point', as the State would be found responsible for the acts of non-State actors and organs in which it would have had no direct role in planning or perpetrating.

5. Successful revolutionary movements taking control of a State (Art 10 ARSIWA): A State would be responsible for the acts of an insurgent movement if that insurgency leads to a take-over of control of the State. In some respects, this is a caution to insurgent movements not to breach international law in times of conflict.
6. The adoption of acts of non-State actors through subsequent conduct (Art 11 ARSIWA and *Tehran Hostages*). Finally, the ARSIWA envisage situations where a State may be found responsible for the acts of non-State actors in situations where the State has 'adopted' these or even 'claimed them as their own'. This is a high threshold that requires the State to have made statements of strong support, effectively endorsing and encouraging non-State actors to take such actions.

What draws all of these together is that international law rejects the idea that only the acts of State organs can bind the State. Instead, all these circumstances give rise to situations in which the approval, control or direction of a State can give rise to its responsibility for the acts of non-State groups or individuals.

Question 2. *'Why does the notion of "breach" take on such importance in the law of State responsibility?' Discuss.*

Breach, together with attribution, are the two requirements for State responsibility to be engaged (Art 2 ARSIWA). It is not enough for conduct to be attributable to a State – there is no wrongdoing if there has been no violation of international law, or in technical terms, no breach of an international obligation. The existence of a breach is important on a number of fronts. First, it allows one to discern precisely when responsibility has been engaged (and thus, dictates the remedy for that breach, such as restitution or compensation). Moreover, because international law has no requirement of fault, it adheres to a regime of 'objective' responsibility which is determined by when a violation of international law will have first arisen (see *Corfu Channel* and *Application of the Genocide Convention*).

Finally, international law also does not place much importance on whether there has been actual harm or damage: it is the existence of the breach that constitutes the essential element of responsibility, which means that a State may be responsible for violations of international law that have caused no calculable injury or harm (see eg *Pulp Mills on the River Uruguay*).

Question 3. *'A claim of "necessity" is just a way for a State to get away with wrongful conduct, as it can unilaterally decide what is "necessary" – there are no objective criteria'. Give your view on the accuracy of this statement.*

First off, students would want to look at where the plea of necessity is found in international law, in Article 25(1)(a) of the ARSIWA. Departing from the quotation as posed, there necessity must fulfil a number of conditions to be valid:

- It must be the only means to protect a State's essential interests, and they must be against a 'grave and imminent peril';

- Necessity cannot justify harming an essential interest of another State or the 'international community as a whole; this in effect means that there is an assessment of proportionality when a State invokes necessity.
- Because a State is breaching its own obligations when it pleads necessity (it is a defence, or a 'circumstance precluding wrongfulness'), that obligation cannot exclude pleas of necessity. Some treaties will designate certain treaty provisions as being non-derogable, and norms of *jus cogens* are non-derogable by their very nature.
- A State cannot itself have contributed to the situation where it was necessary for it to breach its international obligations.

A plea of necessity remains, above all, a justification for wrongful conduct under international law. It justifies unlawful conduct in exceptional circumstances. This is why it has almost never been upheld successfully by international courts and tribunals (see e.g. *Gabčíkovo-Nagymaros* and *Rainbow Warrior*), though students may also wish to point out that it is often invoked by States in situations that never lead to adjudication or arbitration.