Indirect Responsibility in the Contemporary Law of State Responsibility
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Introduction

States often cooperate and influence each other’s conduct. This inevitably raises questions of responsibility for the acts that take place within the framework of the cooperation or are a result of the influence exerted. To solve these questions, international law employs a variety of legal regimes and legal techniques. Thus, there are laws that prescribe diligence when faced with certain acts or situations, institutional frameworks that streamline cooperation and allocate responsibility, and treaty regimes that indicate, for a particular field of activity, how parties are to behave vis a vis each other and who foots the bill. Virtually all of these regimes and techniques hold a State responsible for – exclusively – the conduct of its own organs. Simply put, the State pays for how its own organs behave towards the activity of other State(s), but not for that activity itself. There is however an exception to this. In very rare cases, a State is held responsible not only for the conduct of its own organs, but also for the conduct of another State’s organ. More controversially, the State may even become responsible for another State’s internationally wrongful act (“IWA”). The present study is about these cases, where a State is made to bear responsibility for the acts of another State’s organ.

The study refers to these cases as ‘indirect responsibility’. Indirect responsibility is defined as the attribution of conduct or an internationally wrongful act that has been committed by the organ of a State, to another State. ‘Committed by the organ of a State’ means physically committed by a person or entity that holds the status of organ of a State. For the reasons given further below, the conduct or IWA in question need not be attributable under law to the State whose organ committed it. In addition, the study is only concerned with general international law on the topic.

The main purpose of the research is to map rules on indirect responsibility. It does this by scouring sources of international law (i.e. treaties, States’ legal practice, scholarship and so on) to identify rules that these sources seem to agree are in existence. So, when different sources suggest that international law establishes indirect responsibility when criteria X, Y and Z are fulfilled, and this suggestion is not or hardly contradicted by other sources, the study will present it as a rule. That rule is then considered as being underpinned by ‘normative consensus’, as it can rely on the shared opinion of legal sources.

Importantly, rules founded on normative consensus do not necessarily bind all States under general international law. This is because according to majority opinion, binding force occurs only when a rule is either adopted in a universal treaty, or finds consistent, uniform and widespread application in the legal practice of States. No rule on indirect responsibility enjoys anywhere near widespread application, and none is part of a universal treaty. Therefore, the research maps rules based on
consensus rather than binding force. It should be noted that this approach is far from unique as other studies, most notably the International Law Commission’s articles on State responsibility, too offer rules without prejudice to their binding force. Doing so offers a framework for analysis and the further development of the law, in addition to providing practitioners and scholars insight into the position of legal sources on the problem at hand.

Main additions to scholarship
As stated, the principal purpose of the study is mapping. What rules are there, when do they apply and what consequences does their application have? Furthermore, how do the rules relate to each other and what do they share in terms of underlying principle(s) and reason(s) for being? Mapping is useful, as the last comprehensive study of indirect responsibility was written in 1941. Later studies focus on aspects or specific rules, but none looks at them in conjunction. With regard to some rules, hardly any scholarship is available. Furthermore, the understanding of rules is still dominated by the seminal research on State responsibility which the International Law Commission completed already in 2001. The conclusions of 2001, in turn, built on drafts from the 1970s. These drafts relied heavily on legal practice and scholarship from decades earlier. In sum, a contemporary look at rules on indirect responsibility is in order.

This contemporary look leads to a number of conclusions. One is that current scholarship lacks some necessary differentiation, so that distinct legal scenarios are erroneously placed under a single rule. For instance, Articles 17 and 18 of the International Law Commission’s Articles on State Responsibility (“ASR”) purport to cover all cases under general law where State B’s control over State A’s act leads to attribution of that act to State B. This obscures the fact that when control is exercised against the background of coercion, belligerent occupation, complete dependence or connivance, the standards for attribution differ. The present research identifies ten different legal scenarios, each subject to its own rule, that feature attribution to another State.

Another conclusion is that the attribution of a State’s internationally wrongful act (“IAW”) to another State constitutes a virtually obsolete phenomenon that has little and perhaps no place in contemporary international law. The attribution of an IAW from one State to another State historically was necessary because without it, responsibility could not be implemented. These were the days of colonies, protectorates and (forced) representation. If the colony, protectorate or represented State acted wrongfully towards another State, the State protecting or representing it would step in and shield it against redress. In some cases, the protector had limited the freedom of action of its protectee to such an extent, that the protectee could hardly be regarded as (still)
responsible. The solution to the above problems was found in making the protector / representative itself responsible for the wrongful act of its ‘subject’ State. This way, the injured State had a claim against the protector itself, one it could enforce pursuant to international law. Consequently, it no longer found its enforcement blocked by a third State (the protector / representative) who invoked a duty to protect its subject, but could not itself be addressed.

Times have changed, however. Colonies, protectorates and forced representation have ceased to exist. At the same time, the principle of independent responsibility – meaning that each State is held responsible exclusively for its own conduct and under its own obligations – has continued to gain prominence. As a consequence, attributing one State’s IWA to another State has become increasingly problematic, in addition to having become unnecessary. The legal practice of States evidences this as it offers no recent examples of a State bearing responsibility under the obligations of another State. Rather, as the current study surmises, we only see the attribution of conduct. When this conduct violates the obligations of the State to whom it is attributed, that State becomes responsible for its own internationally wrongful act.

The above conclusion – that international law attributes conduct, but not an IWA – has significant implications. The ILC and many scholars view (or viewed) important rules (from ‘direction and control’ to ‘common organs’) as entailing the attribution of an IWA. This is to be corrected. Doing so will free scholarship from the quaint fixes and loose ends that inevitably result from continuing to regard the attribution of an IWA as part of contemporary law. This means no more requirements of ‘double wrongfulness’ or ‘responsibility for the same IWA’. Instead, indirect responsibility fits seamlessly within the contemporary system of responsibility. It is simply a matter of conduct being attributed to a State, regardless of whether that conduct is also attributed to another State. Wrongfulness, defences and consequences remain – like in all other cases – individual to the State concerned.

The above comes with one caveat. Arguably, the attribution of an IWA from one State to another State still has a role to play when a State coerces another State into the commission of an internationally wrongful act. After all, here the argument that the implementation of responsibility requires the attribution of one State’s IWA to another State still applies. This is when the coerced conduct violates the obligations of the coerced State, but not those of the coercing State. This may happen, for example, when during a belligerent occupation the occupying Power directs the occupied State to violate some of the obligations the latter owes to other States. As the occupied State may rely on the coercion to preclude its own responsibly, the attribution of the IWA to the
occupier may be the only way to ensure responsibility is not lost. It is important to note that the above argument is quite new and (perhaps for that reason) is not supported by normative consensus.

A different conclusion is that indirect responsibility constitutes a single topic. Traditionally, such cases as ‘adoption’, ‘organ placed at the disposal of another State’ or ‘coercion’ were seen as distinct legal scenarios. The International Law Commission’s Articles on State Responsibility for example places each of the before-mentioned scenarios in a distinct chapter of its study on State responsibility. However, the core characteristic of all of these scenarios is the attribution of an act by one State’s organ to another State. As such, they share many of the same problem-sets. For example, what is attributed (conduct or an IWA) and what motivated this extremely rare phenomenon (as conduct or an IWA are almost always only attributed to the State whose organ committed it). The current study demonstrates that the notions of control, a grant of competence to represent the State and a State’s freedom to assume obligations are key to understanding the origin and content of each rule. All the rules can be brought back to these three notions, which interact and reinforce each other.

This study furthermore argues that indirect responsibility is best explored by not requiring that the conduct which is attributed to another State, is (also) attributed to the State whose organ committed it. This is in contrast to traditional approaches to multiple State attribution and indirect responsibility, which do require conduct or an internationally wrongful act to have been attributed to a State, before it can be attributed to another State. After all, when the initial State did not become responsible for the act in question, the responsibility of any subsequent State for that act can hardly be called indirect or involving multiple States. However, this traditional approach has several drawbacks. Thus, in such a case as ‘organs placed at the disposal of another State’ it is generally assumed that the organ’s activities are attributed only to the State at whose disposal it is placed – and not therefor to the organ’s own State. As a result, ‘organs placed at the disposal’ would not be a case of indirect responsibility. But this would be misleading as in about every respect the case of ‘disposal’ is similar and linked to other cases that do feature indirect responsibility. For instance, it being an exception to the rule that an organ’s acts are attributed only to its own State and it being governed by the critical elements of control and the grant of competence to represent to the State. Furthermore, any change to how these elements apply leads to scenario of ‘disposal’ to seamlessly flow into adjacent scenarios, which (also) involve indirect responsibility. Thus, less control means the scenario changes to that of a mandate, whilst the absence of a clear grant of competence (but retaining control) indicates we are dealing with a situation of ‘direction and control’. In addition, the attribution to the other State is the very reason why the State no longer bears responsibility for acts by its own organ. By limiting its scope to acts ‘physically carried out’ by the organ of a State, but
doing so without prejudice to the question of whether said acts are actually attributed to that State, the study brings legal scenarios that are closely connected together and so helps elucidate the law.

**Rules on indirect responsibility**

The present study argues that all cases of indirect responsibility can be traced back to any of the three concepts, each of which is underpinned by their own rationale(s). Chapter 2 treats control-based indirect responsibility, which is primarily motivated by the need to prevent a State from circumventing its obligations by acting through another. Chapter 3 focuses on grants of governmental authority, where indirect responsibility follows from a State’s sovereign right to select its representatives. Chapter 4 addresses the adoption after the fact of another State’s acts, which is based on a sovereign State’s right to assume international obligations. After discussing the concept that underlies it, each chapter subsequently turns to the rules that are based on that concept.

The first concept is control. Chapter 2 explains how control has long been viewed as one of the – some would say the only - concept from which indirect responsibility arises. The use of control may serve various goals, such as preventing States from circumventing their obligations by acting through another. The concept of control gives rise to five distinct rules, each of which applies in a different legal situation. The first rule governs the situation in which two independent States agree that one of them should exercise control over the other. This rule is much like Article 17 ASR (on “direction and control”) but, in contrast to that provision, without the requirement that the act in question is wrongful for both the controlling and the controlled State.

The second rule pertains to coercion and is similar to the rule set out in the ILC’s Article 18 ASR. This means that (subject to very high thresholds) a State may engage indirect responsibility when it forces another State to commit a specific act, leaving the latter with no choice but to comply. Importantly, the study diverges from Article 18 ASR on the point of what the coercion results in. According to the ILC, the result is the attribution of the coerced State’s act, which would be wrongful ‘but for’ the coercion, to the coercing State. In the ILC’s view, the act is not wrongful for the coercing State as that State can rely on a circumstance to preclude its wrongfulness (force majeur). However, the coercing State would not be able to rely on that circumstance (as it was itself the cause of the force majeur), so that for the coercing State the internationally wrongful act remains wrongful. The present study, by contrast, submits that coercion leads only to the attribution of conduct to the coercing State. In principle it is therefore the coercing State’s own obligations (rather than those of the coerced State) that establish wrongfulness. This conclusion is based on international law’s general preference for attributing conduct and the scarce availability of State practice that disputes this conclusion. This
notwithstanding, as the current conclusion explained above, coercion is the one circumstance where the traditional argument for attributing an IWA to the other State still holds merit. After all, when the coerced conduct is not wrongful for the coercing State and the coerced State can rely on the coercion to preclude its wrongfulness, injured States would be left without redress. Over decades it has been argued that the need to avoid such a gap in responsibility means that the coercing State should (also) be held responsible under the obligations of the coerced State. There even appears to be normative consensus on this point. For this reason, the present study concludes that coercion leads to the attribution of conduct to the coercing State, but that possibly, that conduct could be made wrongful under the coerced State’s obligations.

The third rule covers control exercised against the backdrop of a belligerent occupation. Reflecting the occupying power’s over-all control over the occupied State, attribution takes less than it would otherwise. A unique aspect of the rule is its focus on whose interests are served by the act that the occupying State purportedly is involved in. State practice indicates that when the occupying State has little operational control over the act in question, it may still become responsible when the act clearly serves its interests, rather than those of the occupied State. On questions as to whose obligations (the occupied or the occupying State’s) generate wrongfulness and what responsibility remains with the occupied State, the law appears to be especially unsettled.

The fourth rule applies to cases where one State is completely dependent on another State for its survival or operation. In such cases, the test for attribution is less demanding than under regular circumstances. It may even include some acts that the dominant State had little control over or did not intend to happen. Chapter 2 argues that this rule has a long history, which saw it invented, discarded and reinvented anew several times over. Currently, the effect of dependency on control-based attribution develops at the ICJ, ICTY and ECHR in the context of State like entities (essentially self-proclaimed republics that function like a State but lack international recognition). This case law, coupled with the rule’s history and the general ideas behind indirect responsibility, lead the study to conclude the before-described rule on dependent States is present in contemporary law.

Connivance is covered by the fifth and final rule that leads to control-based indirect responsibility. Chapter 2 demonstrates this rule too has a long and chequered history. This history provides a neat (but often overlooked) fit with recent case law. Essentially, the rule applies when a State connives in the commission of acts that another State commits on its territory. That the act takes place on the State’s own territory is key. After all, this gives the indirectly responsible State the ability to exercise decisive influence over the act, should it choose to do so. As we have seen with complete dependence and occupation, this ability results in lower standards for control-based attribution.
Chapter 3 explores a situation where indirect responsibility follows from a very different concept. The grant of authority to act in the State’s name is the most commonly used concept when it comes to attribution. A State may authorise an entity to act on its behalf and so incur responsibility for that entity’s act. This is no different when that entity is another State. The chapter introduces three distinct situations – each covered by their own rule - where responsibility springs from a grant of authority.

The first situation involves so-called common organs. A common organ is an entity that several States have designated as an official organ of their State. It can be established by treaty or through the domestic law of each State involved. Typical of a common organ is that none of the participating States enjoys exclusive control over the organ.

Where one State exercises exclusive control over the organ, the situation may transform into that of an organ acting at the disposal of another State. In this scenario, the organ in question remains an organ of its home State. However, it acts only in the name of the State at whose disposal it has been placed and pursuant to that State’s instructions. In such situations, the State at whose disposal the organ operates is responsible for the acts of that organ in the same way as it is for the acts of its own organs. When the organ is no longer exercising the home State’s governmental authority, its acts will no longer be attributed to that State.

The last scenario in the chapter on governmental authority-based rules pertains to inter-State mandates. Mandates exist where one State authorises another State to act in its name in regard to specific activities. Critically, the authorising State does not exercise the level of control associated with other rules of attribution. It simply requests another State to perform certain tasks on its behalf and, for that reason, engages responsibility for these acts. The term ‘on its behalf’ here is key. Common requests or cooperation is not enough; the authorising State must clearly have communicated that acts by the mandatary will reflect its governmental authority.

Adoption after the fact constitutes the third and final conceptual basis from which indirect responsibility may spring. It encompasses the scenario in which one sovereign State assumes responsibility for the past act of another sovereign State (‘regular adoption’) as well as adoption in the context of State succession. Both these scenarios find their principal origin in the sovereign right of each State to assume international obligations. For regular adoption, it is clear that nothing short of an unambiguous declaration of full legal responsibility for the act will suffice for that act to be attributed to the State. Statements of regret or offers to alleviate damage caused are not enough. Unsurprisingly, indirect responsibility through regular adoption is highly exceptional.
Adoption in the context of State succession is more common. This scenario comes into play when a territory that formerly belonged to one State becomes either a new State or becomes part of another (most likely neighbouring) State. In such situations, the inevitable question is what responsibility the new government bears for acts by the previous rulers. History shows the answer to this question is often more political than legal. The new government often assumes responsibility for the acts of the old, either by treaty or through domestic law. Importantly, in line with its basis in the sovereign right to choose and assume obligations, such adoption still requires the consent of the new government. This means that some other notions that are associated with responsibility in the context of succession - such as equity or the need for responsibility to continue even when the old State withdraws or seizes to exist – are never decisive.

All of the before mentioned rules appear to draw normative consensus as to them being part of contemporary international law. However, allegedly more rules exist than those described thus far. Chapter 5 discusses rules that some authoritative sources have claimed form part of international law, but that according to the present study do not draw normative consensus.

The first of these (alleged) rules is that indirect responsibility follows when a State contributes heavily to the commission of a wrongful act by another State. Typically, the assertion is that while rendering limited assistance to the act would result ‘only’ in a distinct responsibility for aiding (Article 16 ASR), truly substantial contributions would result in responsibility as a co-author, so that the act in question is attributed to both the acting and the contributing State. This claim may seem easy enough, but it has no basis in the actual practice of States. If only for that reason it is rejected.

The second claim pertains to situations where several States engage in the same unlawful activity (for instance the mining of an international waterway or pillaging a village), without it being possible to identify the author of the individual act that led to the damage. Various domestic legal systems deal with this problem by channelling responsibility to all those involved in the illegal activity. The international law on State responsibility however is not one of these systems, as practice is too diverse and contradictory. Consequently, this study rejects three suggestions for rules on this subject.

The subsequent section in chapter 5 explores the claim that participation in a joint enterprise would result in the attribution to all participants of acts that fall within the enterprise. The enterprise referred to involves several States agreeing to a common plan, with each State contributing to the execution of that plan. The section first notes the wide-spread nature of this claim. Various States, International Courts and a number of prominent authors have hinted at, or even alleged, the presence of a rule on joint enterprises. A few treaties explicitly provide for the attribution of acts
within a joint activity to all States that participate in that activity. In international law and domestic tort law, similar rules are well known and often applied. The rule encourages States not only to refrain from own unlawful conduct (as the State can no longer hide in the group), but also to police its partners – after all, the joint nature of the enterprise leaves the State responsible for the conduct of its partners. Overall, efficiency and justice would benefit. However, the above does not amount to a legitimate claim that a rule on joint enterprises is in existence. This is because in the actual practice of States, not even the most egregious instances of joint enterprise – involving willing and substantial contributions to plans that have the commission of unlawful acts as their very aim – trigger the application of any sort of joint enterprise doctrine. States, Courts and authors have both explicitly and implicitly rejected the doctrine. Contrary claims must be attributed to factors ranging from wishful thinking to self-interest; they are not persuasive.

The final section in chapter 5 surveyed the proposition that acts by multiple States can come to compose a single internationally wrongful act, which each of these States subsequently becomes responsible for. As each of these States are each responsible for the full internationally wrongful act, each would inevitably be responsible for the conduct underlying the wrongful act – so including that of others. In that sense, composite acts may, as the proposition goes, lead to indirect responsibility. Composite acts certainly are an acceptable part of international law. It is not difficult to envision situations where multiple States, at least to the casual observer, contribute acts that form one violation of the law; a breach of the prohibition of the use of force for example. In addition, a handful of treaties impose on their parties a shared commitment. Each of these parties is responsible under international law when this commitment is not met. However, the evidence suggests none of the above results in a rule on attribution by virtue of there being a composite act.

Conclusion
In sum, there is normative consensus that in rare instances, international law attributes conduct that has been committed by the organ of one State, to another State. This happens in ten distinct legal scenarios, each of which is subject to its own rule. These scenarios are shaped primarily by the concepts of control and governmental authority (and incidentally, adoption). International law no longer attributes one State’s internationally wrongful act, or ‘the same’ international wrongful act, to other or multiple State(s). Instead, contemporary international law is much simpler. It features the attribution of conduct to another or multiple States, after which – in accordance with the principle of independent responsibility – wrongfulness, defences and consequences are all individual to each State concerned. The present study purposefully refrained from promoting policies or values. Still,
the above conclusion on the law’s simplicity and individuality may well improve the implementation of the international responsibility of States.