
A Critique of the Public/Private Dimension

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Abstract

The dualism between public and private spheres of action has been identified as a key feature of Western, liberal thought. Its normative consequences in domestic law have been much critiqued on both practical and theoretical grounds. The article examines how this same distinction operates in international law, inter alia through the principles of attribution for the purposes of state responsibility to delineate the reserved area from international intrusion. It questions whether the changing concept of the role of the state undermines the usefulness of the distinction and considers some of the strategies engaged for its avoidance, in particular within human rights jurisprudence.

The International Law Commission's (ILC) Draft Articles on State Responsibility adopted on first reading in 1996¹ are currently being revised in light of government comments by the Special Rapporteur, James Crawford.² Although their final form remains unresolved, significant parts of the Draft Articles have already been relied upon, for example by the International Court of Justice, as customary international law.³ The Special Rapporteur has emphasized that the articles do not encompass primary rules of international obligation, but describe the secondary rules of state responsibility for the commission of an internationally wrongful act. Responsibility of other international actors, such as international governmental organizations, and individual responsibility for international crimes do not form part of this reference.

The concept of state responsibility rests upon distinguishing acts and omissions that can be attributed to the state from those that cannot,⁴ for it is axiomatic that '[p]rivate

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¹ Draft Articles on State Responsibility adopted on first reading, report of the ILC, GAOR, 51st Session, Supp. 10, at 125.

² Professor Crawford presented his First Report to the ILC at its 50th session in 1998; UN Doc. A/CN.4/490, 24 April 1998, with addenda.

³ *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia) ICJ Reports (1997) (Judgment of 25 September).

⁴ The term 'attributable', implying a legal operation, has been preferred to 'imputable', referring to a 'mere causal link'. Statement of the Chairman of the Drafting Committee, Mr Bruno Simma, ILC, 13 August 1998, at 3.

conduct is not in principle attributable to the state'.⁵ The relevant articles, Articles 5–15, have been streamlined by the Drafting Committee,⁶ but the essentials remain unaltered. Article 5 (which retains all the elements of former Articles 5, 6 and 7(1)) sets out the general principle of attribution to the state of the acts of its organs.⁷ Attribution does not depend upon a functional classification of activities but upon the characterization of the actor as a state organ, acting in that capacity. Nor is the position of a particular organ within the organizational structure of the state determinative. Identification of a state organ is established primarily by the internal law of the state,⁸ although its determination can be corrected in accordance with international law where an entity which in fact operates as a state organ has not been so classified by the internal law.⁹ Organs of both the central government and local sub-divisions of the state are included. A functional categorization is brought into Article 7, which attributes to the state responsibility for conduct of a non-state entity that has been empowered with 'elements of the governmental authority', again providing it was acting in that capacity at the time of the act. On first reading, those actions by non-state actors for which the state is not responsible ('negative attribution') were spelled out,¹⁰ but the relevant articles have currently been deleted on the recommendation of the Special Rapporteur.¹¹

Article 8 extends state responsibility to situations where an organ is 'acting on the instructions of, or under the direction and control of, that State in carrying out the conduct'.¹² Article 8 *bis*, the most significant addition, envisages exceptional circumstances where certain conduct is carried out in the absence of the official authorities, because of the total or partial collapse of the state. Article 10 attributes to the state 'conduct of organs acting outside their authority or contrary to instructions'.¹³ Article 15 prescribes when the actions of an insurrectionist movement are exceptionally attributable to the state,¹⁴ while Article 15 *bis* makes attributable acts that would not otherwise be so, if they are acknowledged and adopted by the state as its own.¹⁵ Such adoption does not necessarily denote approval by the state of the conduct.

The dichotomy between internationally wrongful acts or omissions that incur state

⁵ R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 153.

⁶ Draft articles provisionally adopted by the Drafting Committee, UN Doc. A/CN.4/L.569, 4 August 1998.

⁷ France has argued that the expression 'State organ' is too restrictive and should be replaced by 'any State organ or agent'. ILC, Comments and observations received from Governments, UN Doc. A/CN.4/488, 25 March 1998, 32.

⁸ Draft articles provisionally adopted by the Drafting Committee, Article 5(2).

⁹ Statement of the Chairman of the Drafting Committee, Mr Bruno Simma, ILC, 13 August 1998, at 6.

¹⁰ Draft Articles on State Responsibility, Articles 11–14.

¹¹ The Special Rapporteur proposed the deletion of Articles 6 and 11–14.

¹² This more precise formulation has replaced 'acting on behalf of the state', which had been adopted at first reading. 'Direction' and 'control' are alternative, not cumulative, conditions.

¹³ For an analysis of the problems of apparent authority see Meron, 'International Responsibility of States for Unauthorised Acts of their Officials', 33 *BYbIL* (1957) 85.

¹⁴ Article 15 now incorporates the previous Articles 14(2) and 15.

¹⁵ Article 15 *bis* covers the situation in the *Case Concerning US Diplomatic and Consular Staff in Iran (US v. Iran)* ICJ Reports (1980) 30 (Judgment of 24 May).

responsibility through attribution to the state from those that do not, is one of the ways in which international law rests 'on a variety of distinctions between public and private worlds'.¹⁶ Although the Draft Articles do not espouse the language of public/private, this distinction brings into the law of state responsibility the reserved domain from international intrusion.¹⁷ The residual area of domestic jurisdiction has been greatly reduced by human rights law which itself adds another layer of public/private opposition through its traditional applicability only to the relations between the state and individuals, through the acts of public officials. Human rights discourse thus largely excludes abuses committed by private actors. Doctrines of sovereign immunity also categorize foreign governmental acts.¹⁸ The retention of immunity from suit within the domestic courts of another state for governmental acts (*jure imperii*) asserts the international quality of those acts, while its denial for private or commercial acts (*jure gestionis*) locates them within the national, domestic arena.¹⁹

The dualism between public and private spheres of activity has been identified as a key feature of classical, Western liberal thought.²⁰ Despite its pervasiveness, its normative consequences in domestic law have been much criticized on both practical and theoretical grounds.²¹ For example, it has been argued that there is no reliable or constant basis for the distinction. Concepts of the public and private are complex, shifting, and reflect political preferences with respect to the level and quality of governmental intrusion. Since there is no constant, objective basis for labelling an activity or actor as 'private', the judiciary regularly resorts to this as a device to avoid ruling on political issues. This in turn obscures the ways in which government policy regulates the so-called private sphere.

Perhaps the most trenchant theoretical criticisms of 'these difficult and dangerous distinctions'²² have come from feminist writers, who argue that the liberal opposition between public life, the domain of business, economics, politics and law, and private life, the domestic sphere of the family, has both supported and obscured the structural subordination of women.²³ The division is more than a distinction between two forms of social activity for it also denies the symbiotic dependency between the two.²⁴ The representation of the public world as superior to the private, and the traditional location of women within the latter, renders them largely invisible in public life. The

¹⁶ Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law', in M. Thornton (ed.), *Public and Private Feminist Legal Debates* (1995) 243.

¹⁷ The domestic jurisdiction exclusion from international intervention is asserted in the UN Charter, Article 2(7).

¹⁸ I. Brownlie, *Principles of Public International Law* (5th ed., 1998), at 325–383.

¹⁹ In determining whether a claim of sovereign immunity can be upheld, the nature or purpose of the acts, as well as their commission by a state entity, is relevant: e.g. *I Congreso del Partido* [1983] 1 AC 244 (HL).

²⁰ For a summary see Thornton, 'The Cartography of Public and Private', in Thornton, *supra* note 16, at 2.

²¹ For a summary of such criticisms see A. Clapham, *Human Rights in the Private Sphere* (1993), at 124–133.

²² *Ibid.*, at 124.

²³ See, e.g., Pateman, 'Feminist Critiques of the Public/Private Dichotomy', in C. Pateman, *The Disorder of Women* (1989) 118.

²⁴ *Ibid.*, at 119.

legal translation of the division requires the denial of equality within the family.²⁵ It is further entrenched by the sexual division of labour (unpaid work within the family and undervalued ‘women’s’ jobs in the paid sector) upon which the maintenance of the public sector depends.

Many of these criticisms are equally pertinent to the replication of the dichotomy within international law, which upholds a very traditional view of the role of the state. Its claim to universal applicability assumes a commonly accepted rationale for distinguishing between the conduct of state organs and that of other entities which in fact depends upon philosophical convictions about the proper role of government and government intervention. The location of any line between public and private activity is culturally specific and the appropriateness of using Western analytical tools to understand the global regime is questionable.²⁶ Some governments have voiced their concerns. Germany, for example, queried whether the Draft Articles sufficiently take account of the fact that states increasingly entrust persons outside the structure of state organs with activities ‘normally’ attributable to a state, and suggested that the assumption of governmental function is rooted in the past rather than in present conditions. The United Kingdom also doubted whether what constitutes governmental functions can be effectively defined and included within the Articles since there is no shared understanding of the concept. Policies of privatization and self-regulation have reduced areas of direct government control; should this be accompanied by reduced international responsibility? The UK illustrated the difficulties by reference to private railway police and requested the Commission to give guidance on such problems.²⁷

Some of the difficulties raised by the legal distinction between acts of public officials and private actors are exposed by the international crime of torture. The Convention against Torture provides that torture constitutes pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.²⁸ Thus, violence committed by private actors does not constitute torture under international law, even when inflicted to intimidate or punish the victim. The proceedings commenced against General Pinochet highlight this dilemma in the context of state immunity through the claim that a former head of state — the most public of public officials — remains immune from criminal charges

²⁵ K. O’Donovan, *Sexual Divisions in Law* (1985).

²⁶ Charlesworth, *supra* note 16, at 251.

²⁷ ILC, Comments and observations received from Governments, at 41. The example is of the arrest of a suspected criminal for offences unrelated to the railway by a uniformed railway officer outside a railway station where he has no authority. Is this an instance of an organ exceeding its competence that is attributable to the state, or of a private action that is not attributable?

²⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, GA Res. 39/46, Article 1(1).

for such acts in the domestic courts of a foreign state.²⁹ An alternative view is that torture and crimes against humanity can never be regarded as official governmental functions. The *Pinochet* case brings together two levels of the public/private distinction: the public position of a (former) head of state and the characterization of the alleged acts as official or otherwise. State responsibility rests primarily on the former — commission of a wrongful act by a state organ — but the nature of the act also becomes relevant through the requirement that the state organ is acting in that capacity and in determining responsibility for unauthorized acts. Responsibility for torture blurs the two.³⁰ If the alleged acts are classified as not constituting governmental functions, criminal proceedings against an accused individual may proceed regardless of any claim for immunity (unless the alleged perpetrator is a current head of state or diplomat), but the same reasoning carried into the principles of state responsibility might suggest that the acts are not attributable to the state that provided the apparatus and setting for torture.³¹ There is no requirement that the criteria for designating activities as non-governmental for the purposes of determining whether jurisdictional immunity can be legitimately upheld should be the same as in other areas of international law, but lack of consistency exposes the tensions within the multiple levels of the public/private distinction.

Throughout contemporary social organization the distinction between the constitution and functions of state organs and other bodies has become blurred. If statehood itself is contested, the possibility of state responsibility may be excluded, or upheld through fiction.³² The Draft Articles isolate the position of insurrectionist movements as an example of non-state actors for whose acts the state bears no responsibility (unless the insurrection is successful in establishing itself as the new government), because such a body directly opposes the authority of the government.³³ The ILC notes that such movements are themselves fluid and uncertain, but they are not alone in challenging governmental power. Civil society in diverse forms also does so. For instance, in some states religious groups have accrued enormous power, even to the

²⁹ *R v. Bartle ex parte Pinochet Ugarte; R v. Evans ex parte Pinochet Ugarte (No. 1)* (Amnesty International and others intervening) [1998] 3 WLR 1456. This judgment of the House of Lords was set aside by the House of Lords because of the associations of one of the Law Lords with Amnesty International. In *R v. Bow Street Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [1999] 2 WLR 827, the House of Lords held that there was no absolute immunity for a former head of state for torture committed in Chile, after the coming into force of the Torture Convention for the states involved.

³⁰ Clapham discusses whether principles of state responsibility are applicable to human rights violations; Clapham, *supra* note 21, at 104–107.

³¹ Malcolm Evans has suggested that this might result in a 'hiding place' for states; Evans, 'International Wrongs and National Jurisdiction', in M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (1998) 173, at 182–186.

³² In *Loizidou v. Turkey*, ECHR (40/1993/435/514), 18 December 1996, Turkey was held to be in violation of the European Convention for the Protection of Human rights and Fundamental Freedoms, 1950, Protocol I, Article 1 for the continued denial of access to the petitioner's property in the unrecognized Turkish Republic of Northern Cyprus.

³³ Members of such movements may incur international obligations under common Article 3 of the Geneva Red Cross Conventions, 1949 and Protocol II, 1977.

extent of imposing harsh criminal sanctions for breach of religious laws and practices, but remain outside formal governmental structures. Other groups may directly challenge state decision-making, for example non-governmental organizations that campaign on environmental issues, for disarmament, for human rights. Civil society is likely to be most active in democratic societies, where in effect it is government policy to allow the expression of alternative viewpoints. Indeed, the government may even utilize civil society within an international arena to voice opinions that it feels unable to put forward itself. In some analyses civil society is presented as part of the public sphere,³⁴ although separate from government. In international law, civil society comprises non-state actors, whose acts are not attributable to the state. But if the acts of civil society amount to international wrongs, should governments that have fostered and facilitated their actions be able to deny responsibility? Alternatively, is another adjunct to state responsibility, the responsibility of international civil society that is currently largely non-accountable in international arenas?

Trade and economic dealings are also problematic. In domestic theory the position of the market has been disputed; at times it is presented as falling within the public sphere of economic activity, while at others it is denoted as private and outside government regulation and control.³⁵ However non-regulation of the market is itself an expression of political preference. The argument that state responsibility is not applicable to commercial acts that constitute international wrongs committed by the state seems illogical, especially since there is no immunity accorded to such acts under the restrictive view of sovereign immunity.³⁶ These different spheres of activity make attractive a four-way schema that depicts more accurately the complexities of social, political and economic life than does the public/private dichotomy: government; economic/social (the market); civil society; and the family.³⁷ Nevertheless, such further refinements still cannot indicate the basis for what are essentially value choices for distinguishing those acts for which a state should be deemed responsible from those for which it should not.³⁸

The feminist critique also has particular resonance in international law. Because the state does not incur responsibility for violations committed within the private sector, it can ignore the continued subordination of women in that arena. Thus, domestic violence against women can be designated as a private wrong, an individual matter that is outside international scrutiny. The tradition of viewing sexual conduct as private allows sexual abuse by public officials, such as prison officials or police

³⁴ See Pateman, *supra* note 23, at 122–124 for discussion of the public/private divide within civil society abstracted from family life; Olsen, 'International Law: Feminist Critiques of the Public/Private Distinction', in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (1993) 157.

³⁵ Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', 96 *Harvard Law Review* (1983) 1497.

³⁶ Higgins concludes that it is hard to see that if states act in the private law (commercial) arena, they should have no responsibility under international law for such acts; see Higgins, *supra* note 5, at 152–153.

³⁷ Thornton, *supra* note 20, at 7.

³⁸ For feminist caution with respect to extending state responsibility into the private sphere see Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights', in Dallmeyer, *supra* note 34, at 143.

officers, also to be readily discounted as not coming within their official duties. Failure by a state to investigate and punish such matters is a continuation of the exclusion of family/private life even from domestic legal intervention and thus far from international accountability. Similarly, treatment of domestic foreign maids within foreign states can be factored out from international law. Diplomatic protection of aliens was the historic starting point for the formulation of principles of state responsibility and the basis for the differentiation between *ultra vires* acts of officials for which there is responsibility because of their apparent authority, and the private acts of individuals who just happen to be officials and of private individuals for which there is no responsibility. The employment of foreign maids falls within both these areas: their household work is private and often concealed from domestic legal regulation and their employment, even by government officials, is not in that capacity. Yet their employment abroad is of major economic significance to many sending states and supported by receiving states.³⁹ Their widespread abuse in many states is not private, but systemic; it is upheld by government policies that fail to enquire about their treatment or to offer protection against known abuses,⁴⁰ and as such should engage state responsibility.

A number of devices have been used by decision-makers to allow such choices to be made both within the principles of state responsibility, and by more recent developments within human rights law. The standard of due diligence and the concept of apparent authority are both drawn upon to cross the public/private line. The constant refinement of what constitutes an internationally wrongful act, especially within the areas of environmental law and human rights, is another way of achieving this. Human rights institutions have extended the circumstances in which a state can be found in violation of human rights obligations. In *X and Y v. the Netherlands*,⁴¹ the state was found to have violated the European Convention on Human Rights through its failure to provide a remedy within its criminal law for abuse by a private actor. In *Airey v. Ireland* the right to private life guaranteed by Article 8 of the Convention required the state to ensure the petitioner the means to access the right.⁴² In another inroad into denial of responsibility for private actions, the European Court held in *Costello-Roberts v. the United Kingdom*⁴³ that the United Kingdom could be in violation of the Convention for acts perpetrated within a private school. The majority held that a state cannot abdicate its duty to provide an education system by delegation to private schooling.

³⁹ E.g. there are 4.2 million migrant workers from the Philippines employed in over 40 states and remittances amounted to some \$5.98 billion from 1986–1991; in 1988 remittances were equivalent to 58% of exports for Bangladesh, over 20% for Pakistan, Sri Lanka and India and 14% for the Philippines; J. Pettman, *Worlding Women: A Feminist International Politics* (1996), at 71.

⁴⁰ E.g. Women's Rights Project & Middle East Watch, *Punishing the Victim: Rape and Mistreatment of Asian Maids in Kuwait* (August 1992).

⁴¹ 91 ECHR (Ser. A) (1985).

⁴² 32 ECHR (Ser. A) (1979).

⁴³ 19 EHRR 112 (1993).

In what has been widely seen as a landmark decision,⁴⁴ in *Velasquez Rodriguez v. Honduras* the Inter-American Court of Human Rights referred to the duty of states parties to organize governmental apparatus and all the structures of the state through which public power is exercised so that they are capable of juridically ensuring the full enjoyment of all within the territory of their fundamental rights and freedoms.⁴⁵ The Court held that the state must exercise due diligence to prevent violations and to respond to human rights abuses committed by non-state actors which are therefore not immediately and directly imputable to the state. The context of the *Velasquez Rodriguez* case, widespread disappearances and alleged torture throughout the state, facilitated the holding of violation by the state. Building upon this reasoning, in *Osman v. United Kingdom* the European Court held that the state could be held responsible for failure by police forces to respond adequately to harassment which culminated in death.⁴⁶

Responsibility for failure to exercise due diligence to prevent violations of human rights builds upon those cases where the state was held responsible for breach of its obligations towards aliens because the level of protection offered was insufficient.⁴⁷ The standard of due diligence (itself contextually variable) has thus been coupled with state omission to penetrate the private sphere of non-responsibility under international law.⁴⁸ This reasoning has been deliberately targeted by feminist critics of the traditional exclusion of abuses by private actors and incorporated into the articulation of normative standards with respect to state responsibility for private acts of violence against women.⁴⁹ For example, the Committee on the Elimination of Discrimination against Women in its General Recommendation No. 19 confirmed that ‘States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.’⁵⁰ Similarly the General Assembly Declaration on the Elimination of Violence against Women explicitly asserted responsibility whether the violence was committed by state or private actors.⁵¹

⁴⁴ E.g. the Special Rapporteur on violence against women describes the case as ‘one of the most significant assertions of State responsibility for acts by private individuals’ and considers that it ‘represents an authoritative interpretation of an international standard on State duty’. Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc. E/CN.4/1996/53, 5 February 1996, para. 36.

⁴⁵ 28 *ILM* (1989) 294.

⁴⁶ ECHR (87/1997/871/1083), 28 October 1998. There was in fact no such failure in the case.

⁴⁷ E.g. *Youmans Claim (US v. Mexico)* 4 RIAA 110 (1926), para. 11.

⁴⁸ Higgins notes that the duty of care upon states to prevent injury as stipulated in the *Trail Smelter Arbitration (US v. Canada)* 3 RIAA (1941) 1905 has long required states to take care with respect to private activities; Higgins *supra* note 5, at 157.

⁴⁹ See further Cook, ‘Accountability in International Law for Violations of Women’s Rights by Non-State Actors’, in Dallmeyer *supra* note 34, at 93; Cook, ‘State Responsibility for Violations of Women’s Human Rights’, 7 *Harvard Human Rights Journal* (1994) 125; Romany, ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’, in R. Cook, *Human Rights of Women: National and International Perspectives* (1994) 85.

⁵⁰ CEDAW, General Recommendation No. 19. GAOR, 47th Session, Supp. No. 38 (A/47/38), 1992.

⁵¹ GA Res. 48/103, adopted 20 December 1993.

These developments leave open two questions. First, are principles formulated by specialist human rights bodies to denote state responsibility for violation of human rights obligations against people under its jurisdiction and control more broadly applicable to inter-state claims, or are they *lex specialis* restricted to their own context? Just as historically much of the substantive principles of responsibility were distilled from the primary rules relating to the treatment of aliens, can contemporary principles derive from human rights? This would have the advantage of locating human rights principles more squarely within the framework of international law and resist any trend towards autonomous development.⁵² Secondly, do the Draft Articles as currently formulated sufficiently reflect this penetration of the private sphere, or should they more directly indicate acceptance or rejection of this growing jurisprudence? The human rights cases have been facilitated by the positive obligation upon states to secure the enjoyment of the rights contained within the human rights treaties whereas the secondary rules of responsibility are applicable to all areas of international law — including those merely requiring state restraint. It may therefore be desirable for these developments to be explicitly addressed.

State responsibility is a legal construct that allocates risk for the consequences of acts deemed wrongful by international law to the artificial entity of the state. The human link is provided by the doctrine of attributability, but this maintains the fiction of public and private actions of individuals, which nevertheless begs the question of how they are determined. Why should the state only be responsible for the internationally wrongful acts of state organs? The state claims jurisdiction over the totality of functions within its territorial control; it might therefore be appropriate to assert its responsibility for all wrongful acts emanating from it, or from nationals subject to its jurisdiction. Who does denial of state responsibility for the actions of non-state actors protect — the state, individual freedom of action, or the most powerful who are able to remain outside the scope of international regulation?⁵³ Does preserving the private space of non-attributable acts enhance or impede the achievement of an international rule of law? Such questions require nuanced and contextual responses that are little assisted by too much emphasis on a distinction between public and private spheres of action.

⁵² This accords with the ILC's own view in respect of reservations to treaties; Preliminary Conclusions of the ILC on Reservations to Normative Multilateral Treaties including Human Rights Treaties, report of the ILC on the work of its forty-ninth session, UN Doc. A/52/10 (1997) 125.

⁵³ Engle conjectures this in the context of international trade; Engle, *supra* note 38.