State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework

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One of the foundations of modern international law is the separation of an international realm in which state public activity is regulated from the realm of commercial markets and private law relations. The international dimensions of private law are shaped by public international law, but more directly governed by rules of private international law which allocate authority between domestic legal orders (or, perhaps increasingly, to arbitral tribunals and transnational law). The boundary between these domains – an important and contested public-private distinction in international law – is policed by legal rules at both the international and domestic level. In the first half of the twentieth century, one principal concern was whether acts by public authorities should sometimes be characterised as private and regulated by domestic law and courts, and thus the rule that state immunity does not cover commercial acts was crystallised, alongside other comparable exclusions. This symposium contribution is focused on the opposite concern – whether the conduct of ostensibly private actors should sometimes be characterised as public, and thus included in the domain of public international law. In particular, it considers the impact of the privatisation of state functions on the question of attribution for the purposes of state responsibility. Privatisation raises particularly challenging questions concerning attribution, because it is often designed to transfer control and thus responsibility away from the state.

When reading the relevant rules on attribution in the Articles and Commentary, the tension between two opposing influences is striking: on the one hand, the need to defer to states on matters falling within their internal affairs; and on the other, the need to provide for universal international rules which are effective regardless of those internal arrangements. A foundational problem thus arises as to which body of law – national or international – should be responsible for determining whether an act or actor is public or private in character. The guidance provided by the Articles is limited and somewhat ambivalent.

Article 4 addresses the basic principle that the conduct of state organs is attributable to the state, and that 'organ' includes any person or entity with that status under internal law. Importantly, however, domestic law organ status is sufficient but not necessary. In addition, under Article 5:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental

> authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

The Commentary explains that:

> The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions. (Commentary, Article 5, (1))

But should domestic or international law determine what is 'governmental authority' and what is a 'public or regulatory function' for these purposes? The Commentary further explains that:

> the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government (Commentary, Chapter II, (6))

Elsewhere in the Commentary it is similarly affirmed that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law' (Commentary, Article 4, (11)). What is implicit in these provisions is that international law must have its own concept of what is a 'public function', its own sense of when a body 'in truth' acts as a state organ. To put this another way, although the Articles profess deference to domestic law, this is subject to 'a certain limit' (Commentary, Article 5, (6)) beyond which they appear to require their own definition of the 'essential' functions of government.

This issue can be particularly significant in the context of privatisation. Sometimes privatisation is merely a change in ownership of a market participant – this might occur, for example, where a state-owned airline which is already subject to free competition is privatised. Sometimes, however, privatised entities carry with them expressly public regulatory power – where, for example, an airline exercises delegated powers of immigration control or quarantine (Commentary, Article 5, (2)). Between these examples lie a wide variety of situations in which the entity may not have public power as defined in domestic law, but may nevertheless exercise regulatory authority (for example, through contracts, or licences, or defining industry standards) with the express or tacit support of the state. The Commentary suggest that these situations may not be captured by Article 5:

> The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category. (Commentary, Article 5, (7))

With respect, however, this is in tension with the idea that 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law' (Commentary, Article 4, (11)). Article 5 requires at least a partially independent and international determination of what is 'in truth' governmental.

The context in which these rules have been most tested in practice is international investment law. The relationship between privatisation and investment law has dual aspects. First, privatisation is frequently the door through which foreign investment is invited by a state – investment disputes

often arise because the state subsequently seeks to regulate an entity which is operating in a newly-constructed and perhaps problematic market space (such as privatised water or electricity supplies). This context may also raise concerns about whether the state might be held responsible for a failure to prevent wrongs committed within that space, when the state has undertaken not to interfere in market activity as part of the process of privatisation. How much space does privatised health care, for example, leave for state obligations to ensure the right to health, not least in a pandemic? The quest to establish human rights obligations for private actors is in part an effort to fill this potential gap, but one which is yet (at best) imperfectly realised. Contractual obligations or regulatory oversight may provide alternative mechanisms of accountability, and may even be required as a matter of human rights law, but even willing states may not always be in a sufficiently strong position to negotiate or operate robust mechanisms.

Second, where privatisation has occurred (international or otherwise), a distinct question may arise concerning whether the state is responsible for acts of the private entity which affect a foreign investor, because that entity is exercising what is 'truly' governmental authority. There is an extensive and growing practice here (indeed, too many arbitral awards to list), in which tribunals are frequently caught in the dilemma posed by the Articles – to what extent should this determination be based on a deference to national law, and to what extent should it reflect an international standard? A context-sensitive approach is generally adopted, and is of course frequently valuable as a legal device to ensure the appropriate application of the law – but if the context is rules of domestic law which are within the control of one of the parties, the effect may not be flexibility but rather a deference through which privatisation facilitates an evasion of state responsibility. Umbrella clauses in investment treaties may also transform domestic contract law breaches into international wrongs, crossing the boundary between public (international) and private (domestic), although these have given rise to further and distinctive attribution (or attribution-adjacent) complexities where the contracting party is a separate legal entity from the host state.

None of this is intended to be too strident a criticism of the Articles, even if they have not proven easy to apply in difficult cases – they were and remain one of the most significant developments in modern international law, and an enduring tribute to their concluding Special Rapporteur, the late lamented Professor James Crawford. Offering some kind of codification of what constitutes a governmental function for the purposes of international responsibility would be an invidious task, and one at least in tension with international law's professed aspirations of universality and political neutrality. Certainly it would be difficult to suggest that the years of investment tribunal practice since the Articles were adopted have added significant clarity. Perhaps the task is one better not attempted at all given the complex and varied dynamics of state governance, although it would undoubtedly be helpful if guiding principles could be identified. For example, where international law imposes extensive positive and negative obligations on states in a certain field, like criminal law enforcement, could that be an indication that it should be considered a core exercise of governmental authority even if privatised (such as in a privatised policing or prison system)? More work is needed on these questions; the point of this symposium contribution is simply to highlight a tension in the Articles in this context – that they are caught between the need to defer to states in respect of their internal organisation, but also to ensure that privatisation does not too readily permit an evasion of responsibility.

Two final modest conclusions may be offered. A state considering whether and how to privatise a particular function or entity ought to take into account that a loss of governmental control does

not necessarily equate to an avoidance of state responsibility. Privatisation may exclude the state from profits, but not necessarily from international legal liability. And it ought perhaps to be acknowledged that in this context the Articles have an unavoidable but hidden ambivalence, and that rather than clearly demarcating the boundary of the international and the domestic they provide a context in which the contours of what constitutes a 'true' exercise of governmental authority are and will continue to be tested and contested. In the context of these public-private characterisation issues, it is perhaps better to think of the Articles not as contributing a set of codified problem-solving rules, but rather as providing an intellectual architecture which shapes and sharpens the ways in which these questions are confronted by international lawyers.

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