

# The Relevance of Article 9 of the Articles on State Responsibility for the Internationally Wrongful Acts of Armed Groups

*Katharine Fortin\**

## 1 Introduction

In a world in which armed conflicts are increasingly non-international, there is a heightened imperative to understand how armed groups fit into the framework of international law. There is a need to understand their legal personality, the source and scope of their obligations and the ways in which responsibility can be incurred for their actions. The purpose of this chapter is to examine whether Article 9 of the Articles on State Responsibility for Internationally Wrongful Acts (ASR) can extend to the acts of armed groups. Article 9 states that the conduct of a ‘person or group of persons’ shall be considered an act of a State under international law if the person or group is ‘in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority’. On the basis that the drafting papers to Article 9 suggest that the article was drafted to cover instances where individuals or groups of individuals filled the administrative void that sometimes occurs during war or natural disaster, it seems natural to question whether it might apply to armed groups too. Indeed, the Commentary to Article 10 explicitly states that the acts of ‘unsuccessful insurrectional movements’ may be attributed to a State ‘in the special circumstances envisaged by Article 9.’<sup>1</sup> Although the potential for Article 9 to apply to the acts of armed groups has already been identified in legal literature, its drafting history has so far been little explored.<sup>2</sup>

\* Katharine Fortin is an Assistant Professor at the Netherlands Institute of Human Rights, Utrecht University where she teaches public international law, human rights law and international humanitarian law. The ideas contained within this chapter are further explored in her book *The Accountability of Armed Groups under Human Rights Law* (OUP 2017).

1 See Commentary to Article 10 found in the Commentary to the Articles on State Responsibility for Internationally Wrongful Acts, (2001) YILC 11(2), UN Doc A/CN.SER.A/2001/Add.1 (Part 2) (hereafter Commentary) 50, para 2.

2 The longest previous discussion of the application of Article 9 to armed groups is found in T Ruys, ‘Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defense against

This paper provides a close analysis of Article 9 and its drafting history in order to draw conclusions about the possibility of applying it to the acts of armed groups.

## 2 General Rule

Under the law on State responsibility, States are generally not responsible for the acts of armed groups.<sup>3</sup> As a general rule, States are only responsible for the actions of their organs of government or for individuals who have acted under the direction, instigation or control of those organs, *i.e.* 'agents' of the State. In an earlier draft of the ASR, this principle was deemed so important that it was contained in an article in its own right.<sup>4</sup> In the final version of the ASR, the principle is found in the Commentary to Article 10. This states:

The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law.<sup>5</sup>

This principle has a long historical precedent. Copious and unequivocal support for the rule is found in the jurisprudence of arbitral tribunals from the nineteenth and early twentieth century.<sup>6</sup> Arbitral case law on the issue from the nineteenth century made consistently clear that a State would not generally be held responsible for its failure to take action in respect of damage caused by armed groups unless its organs were in a position to take appropriate preventive and punitive action but omitted to do so.<sup>7</sup>

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Hezbollah' (2007) 43 *Stan. J. Int'l L.* 265, 285–290. For further mentions of the potential of Article 9 to address the acts of armed groups, see also C Ryngaert, 'Human Rights Obligations of Armed Groups' (2008) 2 *Revue Belge de Droit International* 355, 361. See also S Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law' (2005) 18 *LJIL* 541, 551, R McCorquodale and R La Forgia, 'Taking Off the Blindfolds: Torture by Non-State Actors' (2001) 2 *HRL Rev* 189, 213–214, JA Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) *Buff. Hum. Rts. L. Rev.* 21, 62–3 and V Bilková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law' in Ryngaert (ed), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill 2015) 269.

3 See the Commentary to Article 10 (n 1) 50, para 2.

4 In an earlier draft of the Articles, this principle was stated explicitly. See draft Article 14 in (1975) II *YILC* 91. See also the Fourth Report on State Responsibility by Roberto Ago, Special Rapporteur, (1972) II *YILC* 143, para 192.

5 See the Commentary to Article 10 (n 1) 50, para 2.

6 For a review of these cases and State practice in this regard see ILC (n 4) 94–7.

7 *Ibid.*, 135, para 167.

### 3 Exceptions to General Rule for Armed Groups

However, the ASR indicate that there are several key exceptions to this general rule.<sup>8</sup> The two best-known exceptions are set out in Article 10 which makes clear that States will be responsible for the conduct of (I) insurgent groups which have been successful in their attempt to either take over the government of the country or (II) insurgent groups which have established a new State in part of the old State's territory. It is argued in this chapter that there may be a further exception found in Article 9 of the ASR that is little known and under-explored. The first clue that Article 9 may be applied to the acts of armed groups lies in the Commentary to Article 10 which states that 'unsuccessful' insurrectional movements may be attributed to the State in the special circumstances envisaged by Article 9.<sup>9</sup> Although it is not clear what was meant by the term 'unsuccessful armed group', it seems likely that the term was intended to counter the concept of a 'successful' armed group articulated in Article 10. Accordingly, it is likely that the term refers to armed groups who are still engaged in a continuing struggle with the *de jure* government or armed groups who have been defeated and no longer exist.<sup>10</sup> The idea that the acts of 'unsuccessful insurrectional movements' can fall under Article 9 constitutes a little noted exception to the general rule that States will not be responsible for the acts of armed groups and is explored in this chapter in detail.<sup>11</sup>

#### 3.1 Closer Analysis of Article 9

In order to examine the significance of the statement in the Commentary to Article 10 it is important to look more closely at the text and scope of Article 9 of the ASR. Article 9 states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in

8 The due diligence principle is not strictly seen as an 'exception' to this principle as the State is not found responsible for the conduct of the armed group *per se* but its failure to exercise due diligence with regard to that conduct.

9 See Commentary to Article 10 (n 1) 50, para 2.

10 The observation is derived from a study of the relevant sentence, in combination with the sentence that precedes it: 'The general principle in respect of the conduct of such movements, committed *during the continuing struggle with the constituted authority*, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9 (my emphasis)'. See *ibid*.

11 See (n 2) above for existing analysis of the application of Article 9 to armed groups.

fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

These words indicate that three conditions must be met for the conduct to fall within the scope of Article 9: (1) a person or group must be in fact exercising elements of governmental authority (2) in the absence or default of the official authorities and (3) in circumstances such as to call for the exercise of those elements of authority. Research into the drafting of the article shows that Article 9 was intended to deal with a very 'exceptional' situation under international law.<sup>12</sup> It was intended to deal with circumstances in which persons who are not State officials were required to perform State functions, as a result of the exigencies of the situation.<sup>13</sup> It is stated in the Article's Commentary that Article 9 owes something to the idea of the '*levée en masse*' and is 'a form of agency of necessity'.<sup>14</sup> The Commentary also states that the situations in which Article 9 will be invoked will only occur rarely, for example 'during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative'.<sup>15</sup>

Further guidance on the scope of the article is found in the specific factual examples cited by the Special Rapporteur in previous discussions of the article<sup>16</sup> and cited in the commentary to an earlier version of the article.<sup>17</sup> These include the instances in the Second World War (WWII) when local administrations fled before the invading German army and the liberating Allied Forces. In such situations, private individuals or groups of individuals often filled the administrative void, by setting up committees and taking over government functions, on their own initiative. These *ad hoc* committees provisionally took charge in these circumstances, issuing ordinances, performing legal acts, administering property or pronouncing judgements.<sup>18</sup> The Commentary also notes that private persons are sometimes driven to assume military functions in default of the national army. Examples include *levée en masse* or the decision of the Paris taxi-drivers in World War I to assume the function of auxiliaries to

12 Commentary to Article 9 (n 1) 49, para 1.

13 See (1974) YILC I, 32, para 3

14 Commentary to Article 9 (n 1) 49, para 2.

15 Ibid, para 1.

16 See ILC (n 13) 32–33.

17 See (1974) YILC II(1), 283–286.

18 Ibid 285, para 9.

the regular armed forces.<sup>19</sup> In his Fourth Report Special Rapporteur Ago also mentions that Article 9 might be relevant in the circumstances of a major natural disaster when the local people are forced to take over some of the prerogatives of public power e.g. police, health services.<sup>20</sup> Having explained the article's inception, it is now necessary to see how it might apply to the acts of armed groups.<sup>21</sup>

### 3.1.1 The Application of Article 9 to Armed Groups

Somewhat frustratingly, despite the fact that the Commentary to Article 10 explicitly indicates that Article 9 may be applied to 'unsuccessful armed groups', the Commentary to Article 9 contains no mention of armed groups. However, it is noteworthy that the idea that Article 9 might apply to armed groups was mentioned by International Law Commission member Mr. Ramangasoavina during discussions of what is now Article 9. Mr Ramangasoavina stated:

If the insurrectional movement failed, but it was subsequently found that some of its acts had been carried out in the interests of the community, then those acts – if internationally wrongful – must engage the State's responsibility under Article 8 [now Article 9].<sup>22</sup>

The fact that there is no record of any members of the Commission disagreeing with Mr. Ramangasoavina indicates that his comment was not considered strange.<sup>23</sup> However in earlier drafts of the Articles, Special Rapporteur Ago, who worked most closely on the draft articles relating to insurrectional groups, explicitly dismissed the possibility that a State could ever be

19 ILC (n 13) 32–33, 32, para 5.

20 Ibid, 32, para 5 and ILC (n 17) 285, para 9.

21 See (n 3) above for commentators who have commented on the potential for Article 9 to apply to armed groups. Ruys (n 2) 287 comments that 'much, unfortunately, remains unclear with regard to the principles governing this type of situation'.

22 ILC (n 13) 37, para 8.

23 Another indication that armed groups can fall under Article 9 is found in the commentary to Article 5 which distinguishes situations covered by Article 5 from situations in which a 'entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for'. The Commentary to Article 5 affirms, that the latter situation will be covered by Article 9 of the Articles. The reference to an entity or group 'seizing power' in the Commentary to Article 5 seems to support the possible application of Article 9 to armed groups. See Commentary to Article 5 (n 3) 43, para 7.

responsible for the harm caused by armed groups.<sup>24</sup> His rationale seems to have been firstly the general rule set out above and secondly the observation that when an armed group becomes an entity of international law in its own right, it will rather incur its own responsibility under international law.<sup>25</sup> This contradiction between the Commentary to Article 10 and Special Rapporteur Ago's position troubling. One possible solution to the contradiction is that Special Rapporteur Ago was referring only to *damage* caused by armed groups. It is noteworthy that the case law establishing the general rule focuses exclusively on instances in which armed groups cause harm to assets and people. Indeed, this type of damage is far from the sort of quasi governmental acts which are contemplated by Article 9. On the basis of the Commentary to Article 10, it seems important to look at Article 9 in more detail.<sup>26</sup>

### 3.1.1.1 *Functions must be 'Governmental' in Nature*

The Commentary to Article 9 provides important guidance about the location of the dividing line between the core principle that States are generally not responsible for private actors and the idea that in some exceptional circumstances States may incur responsibility for the acts of private actors. Indeed, the Commentary confirms that three conditions must be met for the conduct of a person or group of individuals exercising elements of the governmental authority to be considered an 'act of State under international law'. The Commentary states:

First, the conduct must effectively relate to the exercise of the governmental authority, secondly, the conduct must have been carried out in

24 See ILC (n 4), 98, para 26 and 142, para 186.

25 Special Rapporteur Ago's view on this is evidenced by draft Article 14 of the ASR. See ILC (n 5) 91–106.

26 The decision to introduce this phrase into the Commentary of Article 10 was made in May 2001. See Summary Record of the 2681st Meeting, UN Doc A/CN.4/SR.2681, 94, para 32. The phrase was inserted in response to a comment by The Netherlands that Article 10, when read with Article 9 (then Article 7) implied that all acts of unsuccessful insurrectional groups could be attributable to the State. The Drafting Committee confirmed that this would not be the case, unless the State was responsible under some other Article in chapter II, for example Article 9. Indeed, the question from the Netherlands was explicitly drafted in such a way to imply a view that Article 9 applied to unsuccessful insurrectional groups. See Netherlands comments on Article 10 at 50 of Comments and Observations Received from Governments, UN Doc A/CN.4/515 and Add.1–3.

the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.<sup>27</sup>

With relation to the first condition, the commentary makes clear that the persons must be exercising some kind of function which is 'governmental' in nature. In its earlier discussions of the article, the International Law Commission provides examples of activities which might be included within this category. These include the assumption of military duties in support of the government, the exercise of policing roles, the issuance of judgments and ordinances, the performance of legal acts, the taking charge of administration, the provision of health services or the administration of property.<sup>28</sup>

### 3.1.1.2 *Functions must be Performed in the Absence of or Default of the Government*

Expounding on the second condition, the Commentary states that the phrase 'in the absence of or default of' in Article 9 was intended to cover the situations of a 'total collapse of State apparatus' as well as cases where 'the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality'.<sup>29</sup> It also contains the clarification that Article 9 does not apply to entities which constitute 'general *de facto* government[s]', clarifying that such entities will be better treated as State organs under Article 4 of the ASR. It elaborates further:

[T]he cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously.

It is not clear what the Commission meant by 'general *de facto* governments'. Earlier Commentary suggests that it was referring to a government that completely 'replaced' the previous government as a result of a *coup d'état*, military

27 Commentary to Article 9 (n 1) 49, para 3.

28 See ILC (n 13) 32 para 5 and (n 17) 285, para 9.

29 See the Commentary to Article 9 (n 1) 49, para 5.

defeat or total State failure.<sup>30</sup> The Commission seemed to be of the view that any ‘general de facto Government’ emerging out of the ashes of the previous government in these scenarios would be better covered by either Article 4 of the ASR or possibly Article 10.<sup>31</sup> In making this distinction, it can be concluded that Article 9 could apply to the acts of a *local de facto* government set up by an insurgent group, existing contemporaneously with the legal government, and controlling territory in the absence of that government.

3.1.1.3 *Circumstances must have been Such ‘to call for the Exercise of Elements of the Governmental Authority by Private Persons’*

The third condition set out in the Commentary requires that the circumstances must have been such ‘to call for the exercise of elements of the governmental authority by private persons’. The Commentary elaborates:

The term ‘calls for’ conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority.<sup>32</sup>

Crucially, the Commentary then goes on to say:

There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principal that conduct of private parties, including insurrectionary forces, is not attributable to the State.<sup>33</sup>

30 It is noteworthy that the Commentary to an earlier version of this Article states: ‘A de facto government, on the other hand, is itself a State apparatus which has replaced the State machinery that existed previously. The term “de facto government” or “general de facto” government is sometimes used to denote a government which, though not invested with power in accordance with the previously established constitutional forms, has fully and finally taken power, the previous government having disappeared’. See ILC (n 17) 286, para 12.

31 See Commentary to Article 9 (n 1) 49, para 4. The same result is reached by reliance on Article 10(1). It is observed that Article 10(1) is simply a reinforcement of the fact that Article 4 will apply to a new government of a State which is comprised of an entity which was previously an insurgency.

32 See the Commentary to Article 9 (n 1) 49, para 6.

33 Ibid.



While the Commentary indicates that this 'normative' element will be of principal assistance in identifying the dividing line between armed groups treated purely as 'private actors' and armed groups whose acts are capable of incurring State responsibility, its brevity leaves considerable uncertainty about what this 'normative element' may entail.<sup>34</sup>

It has been suggested that this normative requirement can only be met by armed groups which have not caused the State 'default' in the first place, because any other group will lack a *bona fide* attitude.<sup>35</sup> Although the drafting records of Article 9 do not provide guidance on this point, they also do not indicate that a *bona fide* attitude is what was meant by the 'normative element' mentioned in the commentary. Instead, it seems more likely that the words 'call for' simply require proof that the exercise of governance was objectively necessary in the circumstances. Indeed, the application of a *bona fide* test would be hard to apply in reality because it would be difficult to measure which party to a non-international armed conflict was to blame for the absence of the *de jure* government in a particular location, at any given moment. In a similar vein, it has been argued that Article 9 will only apply to armed groups which are tolerated by the government, rather than armed *opposition* groups as such, e.g. the Revolutionary Guards in the immediate aftermath of the revolution in Iran.<sup>36</sup> Yet it is argued that the necessity of such a condition is not borne out in the Commentary which explicitly uses the adjective 'insurrectional' to describe the movements that can sometimes fall within the scope of Article 9.<sup>37</sup> Further analysis and explanation of this position is given in the paragraphs below.

### 3.1.2 Article 9 applies to Certain Acts of Certain Armed Groups

From the three conditions set out in the commentary above, it can be seen that the factors which will be relevant to determining whether the acts of an armed group may be treated as acts of a State include (I) the nature of the act (II) the position of the incumbent government in the factual context and (III) the question of whether the situation required some exercise of government function, although not necessarily the conduct in question. Crucially, the Commentary suggests that Article 9 of the Articles should be understood to apply to 'distinct acts' rather than 'distinct entities'. In other words, Article 9 should not be understood as applying to specific kinds of

34 Ruys calls this the 'vaguest of the three criteria'. See Ruys (n 2) 289.

35 Bílková (n 2) 269.

36 T. Eatwell, 'State Responsibility and the Conduct of Armed Group Governors', paper on file with author.

37 See Commentary to Article 10 of the Articles on State Responsibility (n 3).

groups but as applying to 'certain acts' of 'certain groups'. Such an approach is supported by the wording of the heading to Article 9 which states that the Article applies to '*conduct* carried out in the absence or default of the official authorities [my emphasis]'. It is also supported by Commentary which states that when considering whether a person or group is performing governmental functions 'the nature of the activity performed [should be] given more weight than the existence of a formal link between the actors and the organisation of the State'.<sup>38</sup> This is another reason why it is argued that the Commentary does not support the application of Article 9 to certain armed groups on the basis of their relationship with the government or their attitude. According to the Commentary, only some of the acts of *any* armed group can be attributed to the State.<sup>39</sup>

#### 4      1923 General Claims Commission between           the United States and Mexico

It is helpful to note that a similar argument was made by Silvanie and other legal scholars in the 1930s. Silvanie argued that international law requires acts of insurgents to be treated differently depending on whether they were acts of 'government routine' or acts of a revolutionary government in its personal character.<sup>40</sup> In his book published in 1939 'Responsibility of States for Acts of Unsuccessful Insurgent Governments', Silvanie relied upon a line of case law from the General Claims Commission of 1923 between the United States and Mexico and also cases from the Supreme Court of the United States after the American Civil War.<sup>41</sup> The first line of case law arose out of instances in which the United States requested the government of Mexico to abide by contracts signed by the revolutionary Huerta government, which

38 See Commentary to Article 9 (n 1) 49, paragraph 4.

39 Note that this is different to the approach suggested by Ruys and Bílková who suggest that the application of Article 9 to the acts of armed groups should be determined by the relationship of the group to the State.

40 See fairly strong criticism of these authorities in the Fourth Report on State Responsibility by Roberto Ago, Special Rapporteur, ILC (n 4) 142. Ago states that similar ideas are found in writings by Reuter, Schwarzenberger and O'Connell. Yet in dismissing Silvanie's argument Special Rapporteur Ago states that Silvanie does not cite a 'single case' in support of this argument. This is not the case as is shown below.

41 H Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (Columbia University Press 1939).

had taken control of large swathes of Mexico for a period of months in 1913 and 1914.<sup>42</sup> Here, the General Claims Commission stated that the acts of the Huerta insurgents could bind the Mexican State, but only in instances where it had been exercising functions related to the administration of impersonal government. In other words, it argued that a distinction needed to be made between acts of a revolutionary administration in its personal character and acts of purely government routine.<sup>43</sup> In making this differentiation, the Commission noted that there may be some grey areas that fell into the 'doubtful zone' between these two categories, e.g. purchase of ambulances.<sup>44</sup>

The second line of case law emanated from the Supreme Court of the United States after the conclusion of the Civil War. Here, the Supreme Court was asked to decide what effect should be given to the various acts of the Confederate Government and the separate governments of the revolting States, during the Civil War. The Supreme Court found it relevant that the Confederate Government's activities were almost exclusively military and related almost solely to its rebellion against the United States.<sup>45</sup> On the basis that it had almost no involvement in acts of 'government routine', the Supreme Court concluded that none of the Confederate Government's actions could be held to have created binding obligations on the State, in international law terms.<sup>46</sup> However, when examining the conduct of the individual revolting States, it remarked that often 'the same constitutions, the same laws for the protection of property and personal rights remained, and were administered by the same officers'.<sup>47</sup> On this basis, it was willing to find that some of the acts of the revolting governments were binding on the State. In doing so, it advocated an approach whereby the acts of an armed group are divided into those which 'aid the rebellion' and those which are 'done in the ordinary course of governmental routine'.<sup>48</sup> The approach of the US Supreme Court reveals an application of similar principles of law to those found in the case law from the General Claims Commission of 1923 and Article 9 of the ASR discussed above.

42 See facts set out in *George W. Hopkins (U.S.A.) v. United Mexican States*, IV RIAA, 31 March 1926, 42-51, 42, 45-46.

43 Ibid 43.

44 Ibid.

45 *Thorington v Smith*, 75 US 1 (8 Wall.) 9, 1868 as cited by Silvanie (n 41) 98.

46 Silvanie (n 41) 99.

47 Ibid.

48 Ibid 101.

## 5 Cases from the Franco-Italian Conciliation Commission

Significantly, ideas similar to those articulated in the case law above are also found in a series of cases from the Franco-Italian Conciliation Commission (FICC) established under Article 83 of the 1947 Treaty of Peace.<sup>49</sup> The cases heard by the FICC emanated out of acts perpetrated by the Salo Republic, which was established by Nazi Germany in September 1943. The Salo Republic had its own local Government, and exercised powers through its own administrative and judicial organs. The rules it decreed were obligatory to the people who were subjected to that legal order and liable to penalties.<sup>50</sup> The cases before the FICC related to the confiscation, destruction or damage of assets by officials belonging to the Salo regime. In broad terms, the FICC had to decide whether post-war, the laws passed by the Salo Republic could be treated as the laws of Italy. If this question was answered in the affirmative, the people who had been deprived of their property by the Salo Republic, who were mainly Jewish, would be entitled to compensation or tax exemption.<sup>51</sup> In examining the factual circumstances of the situation in Italy at the time, the Commission rejected the Italy's argument that the Salo Republic was an agent of the German Reich and or occupied by Germany.<sup>52</sup> Instead, it found that the Salo Republic should be treated in a manner akin to an insurrectional group operating alongside the incumbent government. Basing its reasoning on the principle of effectiveness, the FICC found that the 'legal order' of the insurgents should be treated as part of the legal order of the State as a whole. As a result, the Commission found that the laws that had been passed by the Salo Republic during the Second World War fell within the definition of 'laws in force' in Italy.

49 *Fubini Case*, Decision No. 201, RIAA XIV, 12 December 1959, 420–434 (*Fubini Case*), *Baer Case*, Decision No. 199, RIAA XIV, 12 December 1959, 402–407 (*Baer Case*), *Falco Case*, Decision No. 200, RIAA XIV, 12 December 1959, 408–419 (*Falco Case*) and *Différend Dame Mossé*, Decision Nos. 144–157, RIAA XIII, 17 January 1953 and 6 October 1953, 486–500 (*Différend Dame Mossé Case*).

50 *Fubini Case*, 429–430.

51 The result of the Conciliation Commission's decision in this respect was different in each case. In the *Fubini* case, it resulted in the applicants being exempted from payment of the tax on their property. In the *Baer*, *Falco* and *Différend Dame Mossé* cases, it resulted in the claimant receiving compensation from the Italian government for losses suffered during the war as a result of damage to a building owned by the claimant.

52 *Fubini Case*, 429. Although the Commission's conclusions were the same in each case, it articulated its reasoning slightly differently in each case and relied on slightly different legal authorities in each.

## 6 Conditions for Application of Article 9

### 6.1 *Functions must be 'Governmental' in Nature*

The case law reviewed above supports the idea that the 'impersonal' governmental acts of an armed group may be considered acts of State. It might be tempting to adopt a subjective approach to the definition of 'impersonal', enquiring into the group's motivation in providing the service in question. Yet, it is argued that a subjective approach would be imprudent because a single motive is rarely found for any action by a political entity. The provision of public services by an armed group may often serve a dual purpose. While an armed group may claim to be performing government functions in response to the needs of the civilian population, it may also be serving its own political agenda by doing so. In the light of the great potential for armed groups to have ambiguous motives, it is argued that categorization on the basis of subjective indicators is not advisable. It would also not be in line with the general approach to the rules on State responsibility, which excludes considerations of State motive. Under an objective approach, attention must be given to whether the acts relate to the continuance of daily life in armed conflict and can be performed by fungible actors.<sup>53</sup> Examples of such activities would include acts relating to the resolution of domestic disputes, the registration of births, deaths and marriages, the administration of basic policing and judicial functions, the provision of healthcare and education and the provision of telecommunication services in the territory. In contrast, functions performed by an armed group which are intimately related to its military struggle with the government or their military or political agenda will never constitute acts of State. Examples of such activities would include actions relating to military campaigns, recruitment and training of troops, the conduct of hostilities and the purchase and supply of weapons. Such an approach would still leave room for governance activities to fall into the latter category in exceptional instances where they are utilised by an armed group as a weapon of war; a means by which an armed group may achieve complete military dominance over a civilian population, thereby dissuading it from rising up against it.<sup>54</sup>

53 See also K Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control' (2016) 63 NILR 161, 167–170.

54 This is currently seen in the tactics exerted in Raqqa in Syria by the Islamic State. See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Rule of Terror: Living under ISIS in Syria, 14 November 2014, in particular, para 73. See also Fortin (n 53)

## 6.2 *Functions must be Performed in the Absence of or Default of the Government*

The Commentary to Article 9 makes clear that the conduct must be performed in the absence of or default of the government, in some part of the territory. Additionally, it seems to confirm that it does not apply in circumstances where a *de facto* government has emerged out of complete State failure. Instead, the Commentary indicates that such an entity will be better treated as State organs under Article 4(1) of ASR. In making this distinction, the Commentary confirms the point which was also made by the General Claims Commission with respect to the Huerta regime. Importantly, the requirement that the functions must be performed ‘in the absence of or default of the official authorities’ indicates that the Article will largely not apply to the acts of an armed group exercising governmental functions *in parallel to* the government in the same territory, unless they are fulfilling different functions.<sup>55</sup> Such a phenomenon may occur when a government and an armed group are locked in a struggle for legitimacy in a particular area of the country and neither entity has exclusive control of the territory. In such instances, unless the government in that area is failing to a considerable degree, an armed group will not be exercising government functions ‘in the absence of or default of the official authorities’ but instead will be exercising government functions which are deliberately in competition with those of the government.

## 6.3 *Circumstances must have been Such ‘to Call for the Exercise of Elements of the Governmental Authority by Private Persons’*

It has already been shown that there are problems with inquiring into an armed group’s motivations when seeking to determine whether an armed group’s actions are ‘impersonal’. For similar reasons, it is argued that when determining whether an armed group’s actions were ‘called for’ it is not advisable to formulate a test that considers whether the armed group had the populations’ best interests at heart. While this suggestion seems contrary to the position taken by the US Supreme Court, it is argued that there will rarely be a consensus on whether a particular armed group is acting ‘in the interest of the community’ or following its own political agenda. Moreover, it is noted that in finding that the Salo Republic’s laws were the ‘laws in force in Italy’, the *Franco Italian Claims Commission* gave little attention to the fact that the Salo Republic’s laws were discriminatory against Jews. Instead, it focused only on the fact that the Salo Republic had established a ‘new provisional legal order’ in an area where the Italian *de jure* government was absent. It is also noted

55 See Ruys (n 2) 288.

that an approach focusing on whether an armed group's conduct was 'called for' would also not be in line with the general approach of the ARSIWA which is generally resistant to an enquiry into a person or State's motivation or an assessment of whether a person or State's acts were appropriate.

In the light of these arguments, it is argued that an assessment of whether the acts in question are 'called for' should take no heed of the quality of the armed group's response or the armed groups motives' in providing them. Instead, it should simply be considered whether the functions of government were 'necessary' in the circumstances ruling at the time; a condition which could be fulfilled by the absence of the *de jure* government in the territory in question. This approach to the 'normative' requirement is supported by the commentary to Article 9. This states 'circumstances must have been such to call for the exercise of elements of the governmental authority by private persons' and continues significantly:

[T]he term 'call for' conveys the idea that some exercise of governmental functions was called for, *though not necessarily the conduct in question* (my emphasis).<sup>56</sup>

This confirms a view that it is not necessary to embark on a qualitative evaluation of the service provided. It also confirms that this third condition is closely linked to the requirement that the acts must be 'in the absence of or default of' the State. In circumstances where the *de jure* government is absent, there will be a good argument that the acts in question were 'called for'. Further support for this stance is found in the fact that the Articles on State Responsibility deal in principle with 'wrongful acts'. This focus makes it clear that the principle found in Article 9 cannot be not limited to praiseworthy acts.

## 7 Conclusions

Finally, some comments must finally be made about the procedural consequences of the arguments above. It has been seen in the case law from the FICC, the US Supreme Court and the General Claims Commission between the United States and Mexico that it may make sense to address a State for particular wrongs of an armed group, in instances where the armed group no longer exists and the armed conflict is over. In these instances, the armed group will no longer be available as a legal entity. However, in instances where the

<sup>56</sup> See Commentary to Article 9 of the ILC Articles on State Responsibility (n 1) 49, para 6.

armed conflict is ongoing, it makes little sense to address the territorial State for the breach of these obligations because the armed group is a subject of international law in its own right. From a practical perspective, addressing the territorial State would provide little motivation to the armed group to comply with international norms relevant to impersonal governance because there would be no consequences for the armed group in breaching a particular international norm. From a political and equity perspective, it would hold a State responsible for the acts of the very entity against which it was fighting. It would be akin to accusing Iraq for being responsible for the ongoing human rights violations committed by Islamic State on its territory. Indeed, there are good reasons to argue that where the 'groups of individuals' to whom Article 9 applies are subjects of international law in their own right, they should bear their own responsibility under international law for their wrongs.<sup>57</sup> Considering the principle set out in Article 9, it is suggested that the entity's own responsibility will be concurrent to the international responsibility of the State, albeit that the State's responsibility is mainly not invoked.<sup>58</sup>

As a result, it is argued that the choice of which responsibility bearer will be pursued will be determined mainly by the circumstances of the situation. While the armed conflict is still ongoing, it will make most sense for the armed group to be addressed directly. Moreover, in many scenarios where an armed group holds territory in a non international armed conflict between an armed group and a State, both parties may be capable of bearing responsibility under international law. An example of practice in this regard is seen in the Special Rapporteur's report on Afghanistan in 1989:

The territorial sovereignty of the Afghan Government is not fully effective since some provinces of Afghanistan are totally or partly in the hands of traditional forces. The responsibility for the respect of human rights is therefore divided.<sup>59</sup>

57 Indeed, this was Special Rapporteur Ago's main argument against the State being held responsible for the acts of an armed group that had its own legal personality under international law.

58 C Ryngaert (n 2) 361 for the idea that the State and the armed group could be concurrently responsible for the same violation.

59 Report on the Situation of Human Rights in Afghanistan Prepared by the Special Rapporteur Mr Felix Ermacora, in accordance with Commission on Human Rights Resolution 1988/67, UN ESCOR, Commission on Human Rights, 45th Session, Agenda Item, 12, para 68, UN Doc E/CN.4/1989/24, 16 February 1989. See Hessbruegge (n 2) 21–88.



A similar sub-division of responsibility could arise in instances where a State continues to provide services in a territory under the control of an armed group. In those situations, it is possible that two different entities could be addressed for different or shared conduct in the same area. After the conflict has ended, it may make more sense for a third party to pursue the State for the acts of the armed groups which it perpetrated while exercising governmental functions in default of the government.<sup>60</sup> At that point, the armed group will no longer have legal personality under international law and may not be an effective recipient of any claim for responsibility.

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60 If the armed group is successful, the State will be the natural addressee of any request for compensation because Article 10 of the Articles on State Responsibility will apply.