PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: PRIVATE ACTORS & STATE RESPONSIBILITY IN ARMED CONFLICT

Who Are 'Private Actors' In Armed Conflict And How May They Be Held Accountable For Violations Of International Humanitarian Law (IHL)?

For this primer, the term 'private actor in an armed conflict' is defined as an entity 'lacking the status of State organs' but may be involved, directly or indirectly, in international or non-international armed conflict. This includes private companies that provide services to State militaries or armed groups, such as logistical support or armed security. States may rely on such private actors to pursue military objectives while maintaining distance from those actors' actions (see, for example, here and here).

Where a private actor disproportionately or indiscriminately harms individuals not taking part in armed conflict, this is a violation of International Humanitarian Law (IHL). Where such a violation is committed by a 'natural person', prosecuting this violation under domestic or international criminal law may provide accountability (see here). When a violation is committed by a 'legal person' such as a private company, criminal prosecution may also be possible, although there may be more limited avenues for accountability particularly within international criminal law.

However, criminal proceedings alone may not address the structural conditions enabling private actor harm where a violation is committed within a framework shaped, funded, or directed by a State. When States bear responsibility for private harms violating their international obligations, other States may have standing to take the matter to the International Court of Justice (ICJ).

When Might States Bear Responsibility For Private Actor Conduct?

Under international law, a State incurs responsibility when an internationally wrongful act is committed—namely, when there is a breach of an international obligation and the conduct in question is attributable to the State. This is known as the 'doctrine of State responsibility'.

The doctrine of State responsibility does not extend to all private conduct. However, States may be considered responsible for certain acts by private actors where a sufficiently close legal connection exists. This may include: (1) where acts by private actors are attributable to a State; or (2) where a State fails to prevent, regulate, or respond to harmful private activity.

When May A Private Actor's Conduct Be Attributable To A State?

The doctrine of State responsibility is reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). While the ARSIWA is not legally binding, it may be described as a crystallisation of customary international law.[1]

[1] See, for example, principles later incorporated into the Draft Articles on Responsibility of States for Internationally Wrongful Acts articulated in the International Court of Justice case of Military and Paramilitary Activities in and against Nicaragua, including 'effective control' at [115]. However, see also here.

This paper has been produced by the Asia Justice Coalition.
It should not be taken to reflect the views or positions of all members.

Under ARSIWA, there are at least three relevant situations[2] in which private actors' conduct may be attributable a State. These include: [3]

- *Where a private actor is so closely tied to the State that it basically operates as part of it; this can be described as a 'de facto organ'.*

  Under **ARSIWA Article 4**, acts of State organs are attributable to the State. However, a private actor will only be considered a *de facto* organ where there is evidence that it is heavily dependent on the State and operates under its direction or as an integral part of its structure. Therefore, the threshold for attribution of acts 'by a *de facto* organ' is high.

- *Where a private actor is legally empowered to carry out State functions.*

  Under **ARSIWA Article 5**, acts of actors *other than State organs*, when exercising governmental authority, are attributable to the State. For example, this may apply if a State outsources functions such as detention, security, or even certain military tasks. However, State attribution in this circumstance relies on the private actor acting within the authority given by the State.

- *Where a private actor acts under the instruction, direction, or control of a State (**ARSIWA Article 8**).*

  The ARSIWA Commentaries indicate that the bar to meet attribution under Article 8 is also high, citing the ICJ case of Military and Paramilitary Activities in and against Nicaragua: the violating conduct must be an 'integral part' of a 'specific operation' directed or controlled by the State (see Commentary Article 8, paragraph 3).

In reality, the same conduct may fit under more than one 'situation'. For example, it may be unclear whether private military contractors are exercising delegated authority (under **Article 5**) or acting under State control (under **Article 8**). Therefore, attribution may turn on how much independence the private actors have in carrying out tasks.

When May A State's Failure To Prevent, Regulate, Or Respond To Harm Create Responsibility?

Even where a private actor's conduct cannot be 'attributed to' a State, international law recognises that responsibility may arise from a failure to exercise due diligence (see the ICJ Corfu Channel case at page 22).

Relevant to this primer, this responsibility to proactively foresee and mitigate risks related to core international crimes is recognised as an obligation to prevent genocide, crimes against humanity, and war crimes. As found by the ICJ in the Bosnian Genocide case (see paragraph 430), this obligation does not require States to guarantee that a particular harm will never occur. Instead, it requires States to take proactive measures such as adopting and enforcing legislation, regulating and supervising activities that pose foreseeable risks, and responding effectively when violations occur through investigation and accountability efforts.

Similar obligations arise in environmental law and the law of the sea, where responsibility often depends on whether the State exercised appropriate regulatory oversight over activities within its jurisdiction.

[2] There are also less frequently applied situations envisioned in Articles 9 to 11, which cover exceptional situations where a State later accepts or adopts the conduct as its own.
[3] See International Law Commission, *Responsibility of States for Internationally Wrongful Acts: Commentaries* (2001) https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.