REBELLION AND STATE RESPONSIBILITY: WRONGDOING BY DEMOCRATICALLY ELECTED INSURGENTS

This paper argues that the rule enshrined in Article 10 of the International Law Commission's articles on State responsibility, according to which violations of international law by rebels that subsequently seize power are attributable to the State, rests neither on sound precedential nor systemic grounds. It seeks to demonstrate that this provision rather constitutes the outcome of a political choice to lessen impunity and promote accountability in case of violation of international law by non-State actors. Since the rule is not based on any precise precedent nor systemic logic but only on political motives, there is no reason why one could not resort to similar motives to attempt to refine the currently hazy scope of application of that rule. Along this line of reasoning, this paper submits that—contrary to what has been advocated by the ILC and its Special Rapporteur—excluding the responsibility of the State for acts committed by victorious rebels in situations of national reconciliation or power-sharing agreements is not justified. It is argued that the exclusion of the application of the rule of attribution of the victorious rebels should only apply in cases where rebels eventually seize power through democratic elections. It is eventually explained that the ILC's limitation to the scope of application of Article 10 could have been more easily justified if the responsibility of the State for acts of victorious rebels had been designed as a rule of attribution of responsibility and not as a rule of attribution of conduct.

As a matter of principle, acts of rebels cannot be attributed to any State given that insurgents are not organs of the State. It is however uncontested that in a few specific hypotheses, acts of insurgents can be considered acts of the State. This is true if these rebels—like any other individual who is not a State official—have acted under the control of another State.[1] It is unfortunate that the over-dramatization of the controversy that arose between international judges as to the extent of the control necessary in this situation—a debate which seem to have been ultimately resolved by the International Court of Justice[2]—has overshadowed the second—and equally interesting—hypothesis where a State may be held responsible for acts committed by rebels, that is when the insurgents triumph and become the new government of the State.

[1] See ICTY (Appeals Chamber), *Prosecutor v Dusko Tadic* (IT-94-1), 15 July 1999, paras 99 ff. See gen A de Hoogh, 'Articles 4 and 8 of the 2001 ILC articles on state responsibility, the Tadic case and attribution of acts of Bosnian Serb authorities to the Federal Republic of Yugoslavia' (2002) 72 BYBIL 255–292; F Dopagne, 'La responsabilité de l'État du fait des particuliers: les causes d'imputation revisitées par les articles sur la responsabilité de l'État pour fait internationalement illicite' (2001) 34 Revue belge de droit international 492–525.

[2] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* 26 February 2007, paras 396 ff. See gen M Spinedi 'On the Non Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5 J Intl Crim Justice 829–838; J Griebel and M Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v Serbi*a' (2008) 21 LJIL 601–622.

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It is noteworthy that the rule whereby acts of victorious insurgents are attributable to the State has been enshrined in the Articles of the International Law Commission (hereafter the ILC) on the Responsibility of the State for internationally wrongful acts without much debate.[3] Likewise, it has barely been the object of scholarly debate, giving the impression that it is exempt from difficulties.[4] It would be erroneous to infer from the scarcity of the literature devoted to that question that the rule of attribution to the State of acts of victorious rebels is unproblematic. Indeed, its actual scope of application remains largely hazy and vague. As it stands today, the rule fails to define what an insurgent is and, correlatively, the moment from which the acts of the insurgency can be retroactively attributed to the State. More importantly, the rule is silent on the *manner in which the insurgents must seize power* for the rule to apply, thereby implying that it automatically applies to any sort of victorious rebellion.

The application of that rule is particularly problematic in the intricate situation of *insurgents seizing power through democratic elections*. Indeed, the above-mentioned rule of attribution, if strictly construed, applies to such victorious insurgents, thereby making the violations of international law committed during their insurgency attributable to the State. At a time when more and more States move towards the adoption of a democratic political regime[5] such situations have become common. For instance, former insurgents in Liberia[6], Congo[7], Rwanda[8], Burundi[9],

[3] International Law Commission, 'Report of the International Law Commission on the Work of its 48th Session' (6 May to 26 July 1996) A/51/10, (F), chp III, paras 51–66; see also 'Report of the International Law Commission on the work of its 53rd Session (23 April–1 June and 2 July–10 August 2001) A/56/10, 2001, chp IV, paras 30–77.

[4] The question seems to have only been debated in the context of wars of national liberations. For a rare contribution, see H Atlam 'National liberation movements and international responsibility' in M Spinedi and B Simma (eds), *United Nations Codification of State Responsibility* (Oceana, New York, 1987) 35–56. See also A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford, 2006) 285–286. On the particular hypothesis of insurgents establishing a new State, see P Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement' (2006) 17 EJIL 605.

[5] J d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJILP 877. See also, J d'Aspremont, *L'Etat non démocratique en droit international* (Paris, Pedone, 2008).

[6] After the official end of the civil war in 1996, the former warlord Charles G Taylor was elected President of Liberia on August 2, 1997. The election was judged free and fair by some observers. See 'Liberia's Ambiguous Election', *New York Times*, 27 July 1997.

[7] Joseph Kabila, before being elected president of Congo on 29 October 2006, was at the age of 25 the commander of the famous army of 'kadogos' and played a key role in the rebellion led by his father who overthrew Mobuto. See 'After Violent Decades, Congo Finally Installs an Elected Leader' (Reuters), *New York Times*, (New York 7 December 2006).

[8] Paul Kagame, who had already been appointed president by his own government in 2000, was elected president in 2003. It must be acknowledged that in the case of Rwanda, the absence of opposition and the particular circumstances of the elections have seriously hampered their free and fair character. See, M Lacey, Rwandan President Declares Election Victory', *New York Times*, (New York 26 August 2003).

[9] The elections in mid-2005 were won by the former Hutu rebel National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD). The sole candidate, Pierre Nkurunziza of the CNDD-FDD, was overwhelmingly endorsed as president by the parliament. Nkurunziza was sworn in on 26 August 2005. See J-P Rémy, 'Au Burundi, l'élection présidentielle offre un espoir à un pays martyr' *Le Monde*, (Paris 20 August 2005).

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Nicaragua[10] (and to some extent in Kosovo[11]) were sworn in as the new leaders of the State after a democratic process.

The internal legitimacy (ie the perception by the people that its government is legitimately entitled to rule) of these former rebels now entrusted with governmental powers usually remains very precarious and fragile as controversies pertaining to their behavior during the insurgency often severely undermine the perception by the people subjected to it. By the same token, the external legitimacy of the new government (ie the perception by the international community of State that the government is legitimately entitled to speak and act on behalf of the State) and, hence, its external *effectivité* can be seriously dampened if controversies pertaining to the past are unearthed through the responsibility of the State as a whole for violations of international humanitarian law and human rights law committed by the rebels during their insurgency. Stirring the past and burdening the State in transition with international responsibility can encumber its reconstruction and hinder national reconciliation.

Given the potentially sweeping consequences of an attribution to the State of any possibly wrongful acts of rebels committed during their insurgency, especially in situations of transition to democracy or national reconciliation, it seems necessary to examine more closely the scope of the particular rule of attribution pertaining to victorious insurgents. This article first expounds on the general rule of attribution to the State of acts of victorious rebels with a view of pinpointing the main issues left unresolved (I). It then zeroes in on the specific situations where insurgents seize power through democratic elections (II).

I. ARTICLE 10 OF THE ILC ARTICLES ON STATE RESPONSIBILITY AT A GLANCE

The attribution of acts of victorious insurgents to the State was included in the draft articles on State responsibility as early as 1972.[12] This rule constitutes an exception to the principle that acts of individuals (including rebels) cannot be considered acts of the States for the sake of State responsibility.[13] It allows the retroactive attribution of acts committed by the insurgents at the time of their insurgency to the State once they have established themselves as the new government. A similar principle has also been devised with respect to situations where the rebels seeking the independence of a part of the territory of the State succeed in establishing a new State.[14]

[10] After a popular rebellion which led to the overthrow and exile of Anastasio Somoza Debayle in 1979, Daniel Ortega became a member of the ruling junta and was later elected president, serving from 1985 to 1990. On 5 November 2006, he returned to the presidency after winning the elections. See J C McKinley Jr. and J Replogle, 'Leftist Headed Toward Victory In Nicaragua', *New York Times*, (New York 7 November 2006).

[11] See 'Former rebel leader Hashim Thaci elected prime minister of Kosovo', *International Herald Tribune*, 9 January 2008. On this issue of Kosovo, see the recent debate on the *Interest Group on Peace and Security* (IGPS) website (http://igps.wordpress.com/); See more generally J d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement' (2007) 20 LJIL 649–668.

[12] See the '4th Report of Roberto Ago,' A/CN.4/264, Yearbook of the International Law Commission, 1972, para 193–214, 144–151.

[13] This principle was the object of an express provision in previous sets of draft articles. See Former Article 14 and its commentary,' Yearbook of the International Law Commission, 1975, vol II, 91–99.

[14] International Law Commission, '4th Report of Ago' (n 12) para 194. See gen P Dumberry (n 4) 605–621.

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It is important to note that the responsibility of the State for the wrongful acts of victorious rebels has always been conceived as a *rule of attribution*. This means that it was decided not to construe such an accountability mechanism as a *rule of succession of responsibility* between two distinct subjects of the international legal order. Attribution was deemed a more reliable ground as it allowed for a bypassing of the controversial question of international legal personality of the insurgents[15] although that solution required that a new exception be made to the principle that only acts of organs can be attributed to the State.[16]

Not being a rule of succession of responsibility and entailing an exception to the general principle of attribution, it proved necessary to justify that accountability for wrongful acts of rebels be channeled through an exceptional ground of attribution. The dominant explanation that has been floated by the International Law Commission which devised that rule has always been the idea of *continuity between the movement and the government*. Indeed, the commentary highlights that 'the continuity which thus exists between the new organization of the State and that of the insurrectional movement leads *naturally* to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle'.[17] It is far from certain that the idea of continuity suffices to justify such an exception. There is no doubt that the triumph of an insurrectional movement does not impinge on the international identity of the State concerned and there is, from the standpoint of international law, continuity. However, by hypothesis, State responsibility always presupposes continuity. In that sense, continuity alone fails to justify that rule of attribution of triumphant insurgents.[18]

If continuity were to underpin any rule of attribution, the rule of attribution of acts of triumphant insurgents should have been construed, not in terms of *attribution of conduct*, but rather as a principle of *attribution of responsibility*.[19] Attribution of responsibility—also called *responsabilité derivée* ('derived responsibility')[20]—is commonly interpreted as an exception to the principle of independent responsibility[21] in that a State is held responsible for an *act factually committed by another legal*

[15] See gen L Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002). See also A Clapham (n 4) 275–285.

[16] 4th Report of Roberto Ago (n 12) para 196.

[17] J Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, Cambridge 2005), commentary of Article 10, 117, para 5 (emphasis added). See also '4th Report of Ago' (n 12) para 194 and Yearbook of the International Law Commission, 1975, vol II, para 3.

[18] For similar doubts about the use of continuity as a rationale for this rule, see I Brownlie, *System of the Law of Nations: State Responsibility* (Clarendon Press, Oxford, 1983) 178. See also J Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 NYUJILP 265, 273.

[19] The distinction between *attribution of conduct* and *attribution of responsibility* has scantly been systematized in the framework of State responsibility although it underlies the chapter IV of the first part of the ILC articles. The distinction between attribution of conduct and attribution of responsibility has been more expressly referred to by the Special Rapporteur of the ILC on the Responsibility of International Organizations in its second report, A/CN/4/541, pp. 6–7. For some comments on the use of that distinction in the context of the responsibility of international organizations, see J d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 Intl Organizations L Rev 91–119.

[20] See British Claims in the Spanish Zone of Morocco, RIAA, vol II, 615 (1924), 648.

[21] J Crawford (n 17) 147.

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subject. Rules of attribution of responsibility have been devised for hypotheses where the violation of international law is the result of a complex web of acts involving several legal subjects.[22] These forms of *responsabilité dérivée* were first devised by Ago on the basis of a vague idea of control,[23] moving away from the theories of *representation* of Anzilotti.[24]

It is posited here that the grounds for attribution of responsibility could have been extended to include the conduct of rebels. In other words, it would have been conceivable to devise the principle whereby the State is responsible for acts of victorious insurgents not as a rule of attribution of conduct but as a rule of attribution of responsibility. It goes without saying that such an approach would have required that it be inserted in chapter IV of the ILC articles on State responsibility pertaining to the responsibility of the State for an act not committed by it and that the scope of that chapter be widened. It is worth noting in this respect that the commentary of Article 10 is not entirely exempt from ambiguity as to how the rule should ultimately be construed, for it points out that the State is eventually the only subject to which '*responsibility* can be attributed',[25] implying that the logic of attribution of conduct does not suffice to justify the rule of attribution of victorious rebels. This seems to confirm that the responsibility of the State for the acts of rebels subsequently seizing power could also have been designed as a principle of attribution of responsibility.

It is surmised that the ILC decided to devise the principle of the responsibility of victorious rebels as a rule of attribution of conduct and not as a rule of attribution of responsibility to bypass the difficult question of the legal personality of insurgent movements which the ILC probably wanted to dodge. Another hurdle which the ILC may have considered as preventing that the rule be seen as a principle of attribution of responsibility is the fact that attribution of responsibility classically requires the fulfillment of a mental element, that is, the knowledge of the circumstances of the wrongful act. This second difficulty should probably not be exaggerated as the same fiction that justifies the retroactive attribution of the acts of victorious rebels to the State could have helped overcome it. Indeed, the knowledge of the wrongful circumstances of the acts of the insurgents could have been retroactively established as soon as they forcefully take the power.

It is probably of no avail to elaborate further on the ultimate conceptual shape of the responsibility of the State for acts of victorious rebels. The foregoing suffices to show that the justification found by the ILC in the idea of continuity was more in line with another conceptual approach than the one that it eventually pursued. It is submitted here that the obstinacy of the ILC to root this rule in the idea of continuity can probably be traced back to the lack of real practice underpinning it. Indeed, the rule contained in Article 10 of the articles of State responsibility is barely supported by significant international practice. It is particularly noteworthy that the commentary of Article 10 and that of former Article 15 allude to dated arbitral decisions of 1920–1930 but fail to

[22] ibid 145.

[23] See, eg International Law Commission, '8th Report on State Responsibility by Mr Roberto Ago', Special Rapporteur, UN Doc A/CN.4/318, 2(1) Yearbook of the International Law Commission 3 (1979) 17.

[24] ibid 5. On this debate, see the interesting analysis of one ground of *responsibilité derivée* of J Fry, 'Coercion, Causation and the Fictional Elements of Indirect State Responsibility' (2006–2007) 40 Vanderbilt University Law School 611–641.

[25] J Crawford (n 17) 117.

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refer to any post-WWII practice, especially practice pertaining to decolonization or wars of national liberation.[26] Only one recent decision is cited, yet it is very doubtful that this decision was at all directed to the international responsibility of the State.[27] While the 2001 commentary of Article 10 claims that this arbitral practice offers 'a general acceptance', the 1975 commentary acknowledged that this arbitral practice was limited but curiously—and unconvincingly[28]—justified the rule by the fact that 'there is no divergence of views, no doubt whatsoever, as to the validity of the principle in question'.[29]

The rule of attribution to the State of acts of victorious rebels is thus not only barely supported by any systemic logic but is also hardly buttressed by practice.[30] In that sense, one may be left with the feeling that the rule contained in Article 10—contrary to what the commentary asserts[31]—does not correspond to any pre-existing customary international norm. This should however not lead to a rejection of the rule. The responsibility of a State for acts of victorious insurgents may well serve a very useful as well as lofty purpose which makes it worthy. Elaborating progressing rules of international law that are deemed desirable falls within the mandate of the ILC as it is entrusted with the mission of floating progressive developments of international law. Such a role is of particular importance as, even in the absence of an international convention, such a *lex ferenda* may some day crystallize in customary international law.[32]

The prime motive that led the ILC to bypass the lack of systemic foundation and the lack of weighty precedents probably lies in the role that the responsibility of State for acts of victorious rebels may play in curbing impunity for acts committed by non-state actors. In that sense, attribution of the acts of the rebels to the State following their triumph undoubtedly was primarily designed to fill an accountability gap.[33] The idea of

[26] J Crawford (n 17) 119 para 12; see also the commentary of former Article 15, Yearbook of the International Law Commission, 1975, vol II para 9–19. Most of the case-law to which it is resorted stems from the General Claims Commission between United States and Mexico under the Convention of 8 September 1923. On its case-law, see J de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico under the Convention of September 8, 1923* (Leiden, Martinus Nijhoff, 1938).

[27] See the decision of the Supreme Court of Namibia about the responsibility of Namibia for the acts of the predecessor administration of South Africa, Namibia v Mwandinghi, 1992 (2) SA 355, 360, ILR, vol 91, 341. The commentary acknowledges that the decision was based on a provision of the Constitution. See J Crawford (n 17) 120 para 14.

[28] It is interesting to note that Verzijl considers that the case-law of arbitral tribunals and mixed commissions on this question is beset by a great terminological and logical confusion. See J H Verzijl, *International Law in Historical Perspective—Part IV Judicial Facts as Sources of International Rights and Obligations* (Leiden, Sijthoff, 1973) 695. Cp with the 1961 Harvard Draft Convention on International Responsibility, art 18, (1961) 55 AJIL 548.

[29] Commentary Article 15, Yearbook of the International Commission, 1975, vol II para 9.

[30] For a similar conclusion in the case of insurgents establishing a new State see P Dumberry (n 4) 612.

[31] J Crawford (n 17) 120 para 12.

[32] This is the case of the rule pertaining to complicity which was deemed declarative of customary international law by the International Court of Justice while probably not being of such a character at the time of its adoption by the ILC. See ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v Serbia and Montenegro), (Merits)* 26 February 2007, para 420; cp with J Crawford (n 17) 148–151.

[33] It is interesting that this is highlighted in the commentary of former Article 15 which provides that 'the point is not so much to find a justification for the attribution to the State, as a

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'justice' that seems to underlie this exceptional rule of attribution is not expressly invoked by the ILC. This is however underpinned by the observation found in the commentary that it would be 'anomalous if the new regime . . . could avoid responsibility for conduct earlier committed by it'.[34] It must be acknowledged that, leaving aside individual criminal responsibility[35], accountability for the wrongful act of rebel groups is inexistent and there is no doubt that such a rule of attribution can help stem impunity. This is a righteous purpose which suffices to justify the rule.[36] One may accordingly find it bewildering that the ILC has balked at expressly stating this underlying political motive when devising that rule and preferred to cloak its desire to curb impunity in a flimsy argument based on continuity.

While the absence of both a systemic argument and precedents do not suffice to put into question the principle of a responsibility of the State for acts of triumphant rebels enshrined in Article 10 of the ILC articles on State responsibility, it is argued here that the uncertainty pertaining to its precise scope of application constitutes a more serious impediment to its application as well as its crystallization into a rule of customary international law. Indeed, as was famously recalled by the ICJ in its decision related to the North Sea Continental Shelf case,[37] a rule can hardly turn into customary law if its scope of application proves so unclear that it does not prescribe any given behaviour.[38]

In particular, there are two contentious points which obfuscate the scope of application of the rule of attribution of triumphant rebels, thereby buoying the legal uncertainty and hobbling its acceptance and crystallization. First, insurgent movements to which the rule should apply remain undefined. Indeed, neither the provision nor the commentary provide for a definition of the concept of insurgency for the sake of that rule. It is true that it is difficult to capture insurgency *in abstracto*. However, one may wonder what the threshold is for an insurgency to qualify as such for the sake of State responsibility. The 2001 commentary suggests that the high threshold of the 1977 first additional protocol to the Geneva Conventions be used.[39] Only the acts of rebellious movements under responsible command and exercising control over a part of the territory of the State could eventually be considered acts of the State if the movement triumphs,[40] thereby excluding all sorts of internal disturbances and civil disorders.[41] The commentary refrains from adopting any authoritative criterion to determine which

possible source of "international responsibility", of conduct engaged in by the organs of an insurrectional movement before the latter has taken power' for 'what is important is to determine whether that attribution is or is not made in the real world of international relations', Yearbook of the International Law Commission, 1975, vol II, para 3.

[34] J Crawford (n 17) 117 para 4.

[35] For a recent example, see P Apuuli Kasaija, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda' (2004) 15 Crim L Forum 391–409.

[36] On the lofty goal pursued by this rule, see J A Hessbruegge (n 18) 274.

[37] ICJ, *North Sea Continental Shelf*, Rec 1969, para 72.

[38] On that difficulty, see J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 EJIL 1075–93, esp 1085. See also A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, 2007) 220–222 or R Baxter 'International Law in "Her Infinite Variety"' (1980) 29 ICLQ 549–66.

[39] UNTS, vol 1125, 609.

[40] 118 para 9.

[41] Over the threshold of additional Protocol I, see L Zegveld (n 15) and A Clapham (n 4) 275–285.

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kind of rebellions would fall within the scope of Article 10, leaving the scope of application of the rule into a state of confusion.

The lack of clear understanding of which insurgencies fall within the scope of this provision is not alien to the second—and more important—lingering question mark hanging over Article 10. Indeed, the rule of attribution of acts of victorious rebels to the State is silent as to the manner in which the rebels 'triumph'. The few indications that the Commentary contains on this question are undermined by the fact that they contradict its earlier positions. Indeed, in 1975, it was deemed that the rule would also apply 'in the case of an agreement between the legitimate government and the insurrectional government under which members of the insurrection are called upon to participate in the government of the State'[42]. The Special Rapporteur James Crawford seems to have backed away from this solution and considered that 'it should not be pressed too far in the case of a government of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement.[43] The latter solution would be allegedly justified by the fact that 'the State should not be made responsible for the conduct of a violent opposition movement merely because, in the interest of an overall peace settlement, elements of the opposition are drawn into a reconstructed government'.[44] Such an uncertainty reinforces the doubts spawned by the absence of definition as, strictly speaking, after signing a power-sharing agreement, a rebel no longer qualifies as an insurgent.

The hesitations of the ILC on this point demonstrate that we are largely in uncharted waters and that the question of the limits of this rule of attribution remains largely open-ended. It is the aim of the next section to address the uncertainties of the scope of application of Article 10, in particular when insurgents come to power through democratic elections.

II. THE PARTICULAR SITUATION OF DEMOCRATICALLY ELECTED INSURGENTS

As was explained above, the rule providing for the attribution of acts of victorious rebels to the State is silent on the manner in which insurgents must triumph for the rule to apply. This silence raises the question of whether a legitimate mode of accession to power—like a power-sharing agreement or a democratic election—should prompt the same consequences in terms of State responsibility as when power is seized by force.

It must be recalled in this regard that the articles on State responsibility have generally ignored the questions of legitimacy. This is not entirely surprising.[45] The mechanism of State responsibility devised more than a century ago by Anzilotti[46] has been—subject to a few exceptions devised at a later stage[47]—stripped of all its subjective features. The natural law dimension that Ago attempted to trickle in did not

[42] Yearbook of the International Law Commission, 1975, vol II para 5.

[43] J Crawford (n 17) 118 para 7.

[44] ibid.

[45] For a far more radical view on the relationship between Responsibility and Legitimacy, see *contra* A Nissel, 'The ILC Articles on State Responsibility Between Self-Help and Solidarity' (2006) 38 NYUJILP 355.

[46] See gen P M Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' (1992) 13 EJIL 132.

[47] See for instance Article 16 of the articles on State responsibility pertaining to complicity.

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fundamentally alter this key pattern of the mechanism of State responsibility[48] which remains based on a factual triggering factor, ie the violation of international law. Judgments about the legitimacy of the organs committing the violation have accordingly been kept at bay. The same seems to apply with respect to the rules of attribution, even in the case of insurgency. In that hypothesis, the objective factor is the seizure of power. There is no doubt that the seizure of power is an objective fact although it is acknowledged that, in situation of civil wars, it may not always be obvious whether and when one of the warring parties has decisively taken hold of the power. Nonetheless, this difficulty boils down to an evidential issue and does not put in question the objective character of the triggering factor on which Article 10 rests.

Despite the 'objectification' of the mechanism of State responsibility, one may still wonder whether, in case of insurgency, resort to criteria of legitimacy must necessarily be excluded. After all, the rule of attribution of acts of victorious rebels, as was explained above, is not inherent to the 'logic' of the mechanism of State responsibility and is rather an exception carved with a view to fighting impunity. This is underpinned by the commentary of Article 10 which justifies such an exception, not on the basis of the general objective logic of State responsibility but by pointing to the fact that it would be 'unnecessary and undesirable to exonerate a new government... from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin',[49] thereby implying that the rule should apply even if some sort of democratic legitimacy is attached to the new government.[50] The rule being thus the byproduct of a will to achieve a given political goal, there is no reason why subjective factors like legitimacy could not be taken into account for the sake of that rule. Moreover, the illegitimacy can be seen as a constitutive element of any insurgent status. Insurgents are deemed rebels because they violently oppose the authority seen as the government. Should the rebels be deemed the legitimate representative of the State, they would simply cease to be insurgents *sensu stricto*. Thus, for the rule to apply, it must first be demonstrated that the rebels were not the legitimate authority entitled to act and speak on behalf of the State.[51] This suffices to show that judgments of legitimacy cannot be utterly excluded from the application of the rules of attribution in the case of rebellions.

Whether or not there is room in Article 10 for judgments of legitimacy, it seems that the International Law Commission itself and the Special Rapporteur have not balked at taking into account the political specificity of the context of the seizure of power. In particular, the 2001 commentary—glaringly opposing the earlier solution advocated by the ILC in this respect[52]—suggests that the rule does not apply when an agreement has

[48] G Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations' (2002) 3 EJIL 1083.

[49] On the distinction between legitimacy of origin and legitimacy of exercise, see J d'Aspremont, 'Legitimacy of Government in the Age of Democracy' (n 5).

[50] J Crawford (n 17) 119 para 11. The ILC refers to the ICJ statement that 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports, 1971, para 118).

[51] On the non-application of Article 10 of the articles on State responsibility in situation of a coup d'Etat, see J d'Aspremont, 'La licéité des coups d'Etat en droit international' Proceedings of the Société française pour le droit international (Paris, Pedone, 2009) 117–137.

[52] Yearbook of the International Law Commission, 1975, vol II, para 5.

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been sealed between the rebels and the government paving the way for reconciliation or power-sharing.[53] While such an exclusion seems to be welcome from a practical point of view as will be explained below, this demonstrates that arguments pertaining to the political context of the seizure of power cannot be entirely excluded when applying Article 10. Indeed, the sealing of a reconciliation or power-sharing agreement with the government bestows some sort of legitimacy upon the rebels—a legitimacy which may in turn strip the insurgency of its status of rebel. The ILC and its Special Rapporteur having themselves resorted to arguments of that kind, nothing seems to theoretically exclude that questions of legitimacy, and especially democratic legitimacy, play a role for the sake of the responsibility of States for acts of insurgents.

It must be acknowledged that the hypothesis of democratically elected insurgents can generally be conflated with that of *national reconciliation or power-sharing agreements* between the rebels and the governments. As a matter of fact, elections in which former rebels are allowed to participate usually take place in the wake of an agreement between the rebellion and the government.[54] As a result, the question of excluding attribution in case of democratically elected agreements partly overlaps with the question of non-attribution in case of national reconciliation or power-sharing agreements. It is accordingly interesting to examine the reasons why the ILC deemed that Article 10 should not apply in the context of power-sharing and national reconciliation agreements.

The main idea that has prodded the ILC and its Special Rapporteur to rule out the application of Article 10 in case of national reconciliation and power-sharing agreements pertains to the reasons mentioned above. Issues of responsibility can severely hinder the conclusion of such an agreement and prevent that peace be achieved through negotiations. Indeed, should the rebels know that the violations of international law which they may have committed will not bind the State which they will control, they may prove more amenable to negotiated power-sharing solutions rather than resort to force to gain control of the State apparatus. In that sense, the exclusion of Article 10 in situations of national reconciliation or power-sharing agreements may serve as an incentive for the rebels to resort to negotiations rather than force to achieve their political agenda.[55]

Although being directed at an honorable purpose, the abovementioned argument is not fully conclusive for the following reasons. First, it is not certain that rebels are always mindful of the subtle technicalities of international law, especially in the field of State responsibility. The insurgents may well be mindful of their duties in the field of international humanitarian law and the possible consequences of their violations as far as their individual criminal responsibility is concerned. They however usually ignore the fallout of these violations for the State that they seek to control. Second, even if we assume that rebels are aware of the main rules of inter-State responsibility, one could argue that excluding the application of Article 10 in case of negotiated agreements between rebels and the government could entice rebels to use political negotiations to purge and expunge their seizure of power from its most atrocious and monstrous deeds. It is true that the exclusion of Article 10 in case of national reconciliation or power-sharing agreement does not bring about an exclusion of the individual criminal

[53] J Crawford (n 17) 120 para 7.
[54] See the abovementioned examples of Liberia, Congo, Rwanda, Burundi (n 6–9).
[55] J Crawford (n 17) 118 para 7.

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responsibility of the insurgents. However, exclusion of attribution in that situation can be interpreted as meaning that the manner in which the insurgency is carried out (especially with respect to international humanitarian law) is of no importance and may give the impression that the rebels have a blank check as to means of warfare to which to can resort. In that sense, the exclusion of Article 10 in situations of national reconciliation or power-sharing agreements can backfire, as rebels may no longer feel deterred from resorting to inhuman means of warfare if negotiating an agreement with the government could ultimately bar accountability of the State in the international legal order.

Moreover, if it were clear that the State incurs responsibility for acts of rebels, the government and the rebels would probably address issues of accountability and restorative justice for victims in their agreement. It is true that such a responsibility of the State would make the conclusion of such an agreement more difficult. However, the downright exclusion of Article 10 in this hypothesis is an enticement to leave aside issues of accountability in power-sharing agreements between the rebels and the government.

The incentive offered to rebels to negotiate a political settlement to the civil war through the exclusion of the rule of attribution of victorious rebels is thus not decisive. This paper accordingly submits that the exclusion of that rule of attribution should be *limited to hypotheses where such a national reconciliation or power-sharing agreement leads to national democratic elections which eventually bring the rebels to power*.[56] While this paper argues that a power-sharing or reconciliation agreement does not suffice to exclude the attribution of acts of victorious rebels to the State as long as it is not immediately followed by democratic elections, it must be emphasized that such a restriction should not be construed as a consequence of the prominent status of democracy in modern international law. It is true that international law has turned more amenable to the democratic or non-democratic character of the political structure of States, although not to the extent advocated by the American liberal theories about democracy.[57] It seems reasonable to assert that living up to some democratic standards corresponds with, not only a conventional rule,[58] but also an international customary obligation, although of a very limited scope.[59] Despite its limited ambit, it must be acknowledged that the principle of democracy has borne observable legal consequences, for instance regarding the ability of states to take countermeasures to

[56] For an example where a power-sharing agreement has not led to the organization of free and fair elections, see the peace agreement in January 2005 in Sudan between the government and rebellion of South Sudan represented by J Garang, *New York Times*, (New York 9 January 2005).

[57] The most radical liberal view on this question is probably offered by F R Tesón, 'The Kantian Theory of International Law' (1992) 92 Columbia L Rev 53, 54–55. For milder forms of the democratic entitlement theory, see T M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 Am J Intl L 46; C M Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1994–1995) 27 NYUJILP 289, 329.

[58] See Article 25 of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, General Assembly Res 2200A, UN Doc A/6316 (1966) ('ICCPR'). On the ICCPR and democracy, see generally A Mavrommatis 'The International Covenant on Civil and Political Rights and Its Role in Promoting Democracy', in K Koufa (ed) *Human Rights and Democracy for the 21st Century* (Athens, Sakkoulas Publications, 2000) 255. On the possible ratification by China of the ICCPR, see K Lee 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges', (2007) 6 Chinese J Intl L 445.

[59] J d'Aspremont, *L'Etat non démocratique* (n) 187–316.

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sanction violations of democracy[60] or in terms of recognition of governments.[61] The non attribution of acts of rebels seizing power through democratic elections defended here can nonetheless not be considered a direct consequence of the status of democracy in international law, whatever it is. The obligation of States to organize free and fair elections does not bear upon the extent to which we can qualify acts of individuals—and especially acts of rebels—acts of the States. The fact that insurgents subject themselves to a national electoral process may well be the manifestation that the State as a whole is complying with its international obligation to organize free and fair elections. It does not however amount to any sort of compliance by the insurgents themselves to an international obligation of that kind for the obligation to organize free and fair elections remains an inter-state obligation and is only binding States.

The justification for not applying the rule enshrined in Article 10 of the ILC articles on State responsibility must thus be sought elsewhere. Given that the principle enshrined in Article 10 is exclusively justified by motives of that kind as was explained above, there is no reason why similar motives may not be resorted to with a view to defining the scope of application of that rule. It is posited here that same kind of justifications that have encouraged the ILC to devise that rule may call for its exclusion in the case of democratically elected rebels. Indeed, the ILC saw the responsibility of the State for acts of victorious rebels as a means to fill a gap of accountability in the case of violations of international law by non-State actors. It has been shown that filling the accountability gap was the only serious underpinning for Article 10 as no systemic reasons or precedents buttress this exception to the principle that only acts of organs become acts of the State. If we take a similar line of reasoning as the ILC based on the political goal of the rule, it may however turn out that accountability should not always be the paramount political objective. It seems that the hypotheses of democratic elections of rebels constitute situations where accountability must yield to other considerations and, in particular, democracy. This is not to say that democracy and accountability cannot be reconciled. Whilst accountability is certainly not a constitutive element of democracy,[62] a democratic regime will usually uphold some idea of justice. But this may not necessarily be true, especially if accountability comes at the expense

[60] Indeed, notwithstanding the reserving clause adopted by the International Law Commission, there is a fair amount of practice as well as scholarship buttressing the idea that, in the case of the violation of democracy, all states—or at least those states party to the ICCPR, when the obligation only arises under that treaty—are entitled to take countermeasures against the offending state. See the practice mentioned by the Special Rapporteur in its commentary on Article 54, UN International Law Commission, 'Report on the Work of its 53rd Session,' UN Doc A/56/10, 137–39 (2001). See also C J Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP, Cambridge 2005) 220–21.

[61] On this question, see J d'Aspremont 'Legitimacy of Governments in the Age of Democracy' (n 5); See also S D Murphy 'Democratic legitimacy and the recognition of states and governments' (1999) 48 ICLQ 545–581.

[62] See for instance J N Shklar, *The Faces of Injustice* (New Haven, Yale University Press, 1990) 35. See more gen. the discussion of this question in the scholarship devoted to transitional justice. See eg J Elster, *Closing the Books: Transitional Justice in Historical Perspective* (CUP, Cambridge, 2004); C Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design' (2005) 18 LJIL 425–466; N J Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington DC, United States Institute of Peace Press, 1995); D A Crocker, 'Punishment, Reconciliation, and Democratic Deliberation' (2001–2002) 6 Buffalo Crim L Rev, 509–549; R G Teitel, *Transitional Justice* (OUP, Oxford, 2000).

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of democracy itself. In case of democratic elections of rebels, accountability through the international responsibility of the State for acts of victorious rebels may dent the stability of the regime in transition and, more fundamentally, undermine stability. By excluding any attribution of the acts of rebels to the State in case of a seizure of power through democratic elections, international law would conversely provide an enticement for *democratic settlement of civil wars*. In other words, should it be made clear that the rule of Article 10 does not apply in case of accession to power through democratic elections, democracy would turn a more appealing as well as efficient means to settle conflicts.

The foregoing does not mean that democracy is the panacea, despite the dogmatic enthusiasm that it sometimes generates. It is however hard to deny that democracy remains the most efficient tool to bring to power effective governments as it endows them with the necessary internal and external legitimacy (and *effectivité*) without which stability, and hence peace, are inconceivable.[63] By the same token, the exclusion of attribution in the case of democratically elected insurgents can also buoy the new institutions and shore up the stability of the transitional institutions. In that sense, ensuring that the State does not incur responsibility when the rebels have seized power through democratic elections helps strengthen the new State apparatus and protect it against the disastrous political fallout of any finding of international responsibility of the State in the midst of its transition from civil war to peace. If we follow the reasoning of the ILC, it accordingly seems that considerations of democracy and peace can outstrip accountability-based arguments in situations of rebels seizing powers through democratic elections and justify that the State does not incur responsibility for acts of the victorious rebels.

It is true that one of the main objections raised against the exclusion of attribution in case of power-sharing or national reconciliation agreements falling short of organizing democratic elections pertains to the abatement of the incentives to carry out a rebellion respectful of elementary rights of individuals. Such an objection is however far less relevant here. Indeed, by inciting rebels to subject themselves to a democratic process, excluding attribution in this case can entice the rebels—to the extent that they are aware of the technical subtleties—to curb as much as they can the violations of the elementary rights of the population in order not to jeopardize their popularity and their correlative chance to win any future election. In other words, prodded into participating in the democratic process, rebels may become more concerned with the protection of the population from which they must secure support if they want to have a chance to win the potential future elections that precludes attribution of their acts to the State.

To remain a firm incentive for democratic settlements of civil wars, this exclusion of attribution in case of democratically elected rebels should *not* apply when rebels take the power through force and subsequently subject themselves to democratic elections to legitimize their power.[64] This means that if rebels resort to force to overthrow the government but subsequently organize democratic elections which they win, the rule of attribution of Article 10 should still apply. Indeed, it is the manner in which power was *first* seized that must be taken into account for the sake of the rule enshrined in

[63] F N Aoláin and C Campbell, 'The Paradox of Transition in Conflicted Societies' (2005) 27 HRQ 172–213. See also J d'Aspremont, *L'Etat non démocratique* (n 5).

[64] See for instance the election of Charles Taylor in Liberia in July 1997, *New York Times*, (New York 25 July 1997).

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Article 10. Drawing on the abovementioned political rationale supporting that rule, subsequent democratic elections of a government made of former rebels should not allow the State to retroactively circumvent its responsibility for the former insurgent action of its government.

Besides these political motives, there eventually is a more conceptual underpinning for the exclusion of the responsibility of the State in a situation of rebels seizing power through democratic elections. This brings us back to the manner in which the responsibility of States for acts of victorious rebels has conceptually been conceived by the ILC. It has been explained earlier that the responsibility of the State for acts of victorious rebels was construed as a rule of *attribution of conduct* rather than a *rule of attribution of responsibility*. It is argued here that, had it been carved as a rule of attribution of responsibility—and the ILC itself has occasionally proved hesitant on this point[65]—the non-application of the responsibility of State for acts of triumphant insurgents in cases of rebels seizing power through democratic elections would find more support. Indeed, as was previously recalled, attribution of responsibility classically requires the fulfillment of a mental element, that is, the *knowledge of the circumstances of the wrongful act*.[66] In other words, for responsibility to be attributed to a State to which the wrongful act is not formally attributable, it must commonly be demonstrated that that State has had the knowledge of the wrongful character of the preceding or subsequent main wrongful act. It has been explained above that it is not inconceivable that, in the case of rebels seizing power through the resort to force, such a mental element could be retroactively established by resorting to the exact same fiction that the one that currently allows the retroactive attribution of acts of rebels to the State. However, should power be bestowed upon the rebels through a national reconciliation or power-sharing agreement without democratic elections, it could hardly be denied that the government of the State has had some knowledge of the circumstances of the violations possibly committed by the rebels with which it concludes the power-sharing or reconciliation agreement. In that sense, seizure of powers through reconciliation or power-sharing agreements *without democratic elections* necessarily implies knowledge by the State of the circumstances of the violation. On the contrary, if the rebels come to power through a democratic electoral process—whether or not this is preceded by any sort of agreement, any knowledge of the circumstances of the violation cannot be ascribed to the State as a whole. It is true that the population casting its vote in favor of the rebels may be aware of the possible violations of international law committed by the rebels. The elections—and the correlative theoretical unpredictability of their outcome—nonetheless preclude the subjective element of the attribution of responsibility in this case. This naturally *presupposes that the elections are free and fair* as only democratic elections can yield a will which really is that of the population and not that of the State. Even though the responsibility of the State for acts of victorious rebels has eventually been conceived as a rule of attribution of conduct, the solution that would have prevailed if the responsibility of the State for acts of triumphant insurgents had been devised as a rule of attribution of responsibility accordingly indicates that the foregoing is not so far-fetched a limitation to the scope of Article 10 which, so far, remains nebulous.

[65] n 25.

[66] See Article 16–18 of the ILC articles on State responsibility. See also J Crawford, (n 17) 145–148.

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III. FINAL REMARKS: DEMOCRACY AND ACCOUNTABILITY

This article has argued that the rule enshrined in Article 10 of the ILC articles on State responsibility according to which violations of international law by rebels that subsequently seize power are attributable to the State rests on neither sound precedent nor systemic grounds. It has been shown that it rather constitutes the outcome of a political choice to promote accountability and curtail impunity for violations of international law by non-State actors. Since the rule does not stem from any precise precedent or systemic logic but only from political motives, there is no reason why one could not resort to a similar reasoning to define the currently hazy scope of application of that rule. In this respect, this paper has argued that—contrary to what has been advocated by the ILC and its Special Rapporteur[67]—it does not always seem justified to exclude the responsibility of the State for acts of victorious rebels in situations of national reconciliation or power-sharing agreements. It has been demonstrated that the exclusion of the application of the rule of attribution of the victorious rebels should only apply in cases where rebels eventually seize power through democratic elections. Such a limitation to the scope of application of Article 10 could have been more easily justified if the responsibility of the State for acts of victorious rebels had been molded as a rule of attribution of responsibility and not as a rule of attribution of conduct.

There is no need extensively to question the conceptual path that was eventually taken by the ILC to include in the articles on State responsibility a rule providing for the responsibility of the State for acts of rebels subsequently victorious. The completion of the articles remains a feat in itself and they will most likely not be amended.[68] It is accordingly of no avail to dwell upon the abovementioned criticism of the conceptual orientation eventually followed by the ILC. It is more interesting to highlight that the *lege ferenda* limitation to the responsibility of the State for acts for democratically elected rebels defended in this paper raises the question of the objectives that the institution of State responsibility ought to pursue. Indeed, the debate that has been broached by this paper echoes the choice that must ultimately be made between two conflicting objectives: *democracy* and *accountability*. Such a conflict may be solved in different ways, whether as a conflict of values or, more simply, a conflict between different means to achieve peace and stability.[69] However one understands that conflict, it is finally contended here that solving that quandary does not constitute a task to be taken by international legal scholars. It does not behoove them to make these political choices.[70] However, by pointing out the uncertainty revolving around the scope of application of the rule enshrined in Article 10 and by determining the gaps that still needs to be filled, international legal scholars serve the role that they are the

[67] n 54.

[68] J Crawford and S Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959–971; see also the special symposium on the articles on State Responsibility in (2002) 13 EJIL 1053–1255 or J Crawford, J Peel, S Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 EJIL 963–991.

[69] For a criticism of an understanding of international law based on values, see J d'Aspremont, 'International Law in Asia: the Limits to the Constitutionalist and Liberal Doctrines' (2008) 13 Asian YB Intl L 89–111 or 'The Foundations of the International Legal Order' (2007) 12 Finnish YB Intl L (forthcoming).

[70] See *contra* M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern L Rev 1–30.

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most qualified for: singling out the most pressing legal questions that still need to be answered by the lawmakers and pinpointing the dilemmas lurking behind each of these technical loopholes.

The limitation to the scope of application of the responsibility of the State for acts of victorious rebels that has been advocated here should ultimately not be interpreted as an utter rejection of accountability mechanisms for violations of international law by rebels that are subsequently democratically elected. The argument made here only shows that—contrary to what the ILC has intended by devising a rule of attribution of acts of triumphant insurgents—State responsibility is not necessarily the most appropriate paradigm to address problems of impunity for the crimes committed by non-state actors. More generally, it could even be questioned whether accountability for crimes of non-State actors should be achieved through international legal mechanisms at all.[71] It is not improbable that, especially in situations of transition from civil war, domestic institutions and rules constitute the most efficient fora and instruments to address the question of accountability for crimes committed in times of civil wars. This is true at least as long as the (new) political regime of the State is based on some procedural democratic requirements.

JEAN D'ASPREMONT*

[71] On this question, see gen A Clapham (n 4) 271–316. See the remarks of E De Brabandere, 'Review Essay. Non-state Actors, State-centrism and Human Rights Obligations' 22 LJIL (2009) 191–209.

* Associate Professor, University of Amsterdam.

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