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The Secret History of Successful Rebellions in the Law of State Responsibility

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In the fragmented landscape of international law, the question of responsibility for non-state armed actors is a vexed one. In a recent arbitral award, an ICSID (International Centre for Settlement of Investment Disputes) tribunal found Egypt liable for failing to exercise due diligence in protecting a foreign-owned oil pipeline from terrorist attacks.[1] This followed a previous ICSID decision in which failing to exercise due diligence to prevent damage being caused by rebels had been acknowledged as a ground of state responsibility.[2] In contrast with the state of play in international investment law, Article 10 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (the 'ARSIWA') provides for much more limited responsibility for rebels (and, of course, no responsibility for terrorists). It reads:

> 1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
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> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory

[1] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017).
[2] *Asian Agricultural Products Ltd v Republic of Sri Lanka*, Case No. ARB/87/3 (1997) 4 ICSID Reports 250.

under its administration shall be considered an act of the new State under international law.

Article 10 has attracted minimal academic attention and when it has, it has been criticised as lacking a decent basis either in precedent or logic.[3] It has also had little practical impact, other than its unsuccessful invocation by Croatia in the recent genocide case against Serbia.[4] In what follows I will explore the history of the principle which Article 10 codifies.

The rule of state responsibility for successful rebels was only a marginal part of a much wider doctrine of state responsibility for injuries to aliens caused by rebels, which flourished in the period prior to WW2. One of the central rules here was a due diligence requirement upon states in respect of preventing and punishing harm by rebels. If the ARSIWA had really been committed to making states responsible for the acts of rebels, it might have followed the lead from international investment law and adopted this due diligence rule. Instead, the peripheral – yet relatively uncontroversial – rule regarding successful rebels was codified, a rule which, as I will show, arose, not as a matter of logic or policy, but out of confusion. This says something, I suggest, about how international law protects capital before any other interest. It has also meant that Article 10 is both practically irrelevant and intellectually unstable.

In what follows, I will begin by contextualising Article 10 within the broader rules of state responsibility for injuries to aliens caused by rebels. Then I will explore its history. First I will look at the context in which successful and unsuccessful rebels were originally distinguished. This was a matter of denying the international enforceability of claims made by foreign nationals regarding loans to or contracts with unsuccessful rebels, rather than establishing the international responsibility of successful rebels. Then I will move on to look at how responsibility for successful rebels came to be articulated as a positive rule of international law at the turn of the 20th century. For much of the scholarship and practice, it seems that responsibility for successful rebels followed on from state responsibility for *de facto* governments. Yet these rules have different ways of operating and different rationales, as I will show in the final section.

[3] See e.g. Jean d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents' (2009) 58 ICLQ 427.
[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 3 February 2015 (2015) ICJ Reports 3, at paras 102-105.

Article 10 as the Last Trace

Article 10 is the last trace in the ARSIWA of a rich body of rules addressing state responsibility for injuries to aliens caused by rebels developed during the late 19th and early 20th centuries in the context of the protection of the burgeoning foreign trade and investment in recently decolonised Latin America and the transition from old colonialism to new economic imperialism in the region.[5] It is strange that the principle that the state will be held responsible for the acts of successful rebels from the commencement of their revolution should be the one rule regarding responsibility for rebels which survived from this period to make it into the ARSIWA since it was, at the time, rather peripheral. It received relatively little attention in the scholarly works of the period and while this was a hotly contested area of international law, it was reasonably uncontroversial. The rules here did not reflect the successful/unsuccessful distinction in terms of there simply being responsibility for successful rebels and non-responsibility for unsuccessful ones. Rather, there was a general rule of non-responsibility conditional upon the state exercising due diligence in protecting against rebels and duly administering justice in respect of any harm caused by them. Retroactive responsibility for successful rebels was a particular rule carved out from this general principle, to which it was secondary.

The commentaries to the ARSIWA (the 'Commentaries') state that, '[a]rbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10'.[6] They cite the *Bolívar Railway* (Britain v Venezuela, 1903), *French Company of Venezuelan Railroads* (France v Venezuela, 1903), and *Pinson* (France v Mexico, 1928) cases and the replies of governments to the request for information by the Preparatory Committee for the 1930 League of Nations Codification Conference at The Hague where one of the topics chosen for codification was the responsibility of states for damage done in their territory to the person or property of foreigners (although the topic proved too controversial for states to agree a convention at The Hague). This analysis is not incorrect as far as it goes, other than the anachronism of the reference to attribution, which was a later concept – during this period the question of state responsibility for rebels was not thought of in such terms. Here, however, I want to delve deeper into the genesis of the principle of responsibility for successful rebels.

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[5] This is the subject of my current doctrinal research. For a flavour of the debates of the period see e.g. James W Garner, 'Responsibility of States for Injuries Suffered by Foreigners within their Territories on Account of Mob Violence, Riots and Insurrection' (1927) 21 Proc ASIL 49.

[6] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) 2(2) Yearbook of the International Law Commission 1, at 51.

The Initial Appearance of the Distinction

We see the distinction between successful and unsuccessful rebels being made early in the development of the doctrine of state responsibility for injuries to aliens by the 1868 Mexican-US mixed claims commission. Here the distinction was used to argue that alien protection claims cannot operate akin to insurance: aliens cannot have it both ways, speculatively lending money or providing supplies to rebels in the hope that if the rebels win, they will pay and if they lose, the alien's government will enforce a claim against the government who put down the rebellion.[7] However, this was about denying claims arising out of contracts with or loans to unsuccessful rebels, rather than establishing responsibility for successful rebels. The crystallisation of success as a distinct, standalone ground of international responsibility in positive law was another matter entirely.

Nevertheless, in the context of claims about loans and contracts made to or with rebels we can see what the distinction between successful and unsuccessful rebels is doing: trying to stop speculators using alien protection claims to insure their risky business with rebels. In contrast, outside of this context, in the case of 'involuntary' engagements with rebels, where they violate the laws of war for example, this justification for the distinction does not work. However, later this context gets overlooked and subsequent debates on responsibility for rebels tended not to pay attention to the nature of the underlying claim.

The Later Crystallisation of the Rule

John Bassett Moore distinguished successful and unsuccessful rebels in his seminal *History and Digest of the International Arbitrations to Which the United States Has Been a Party (1898)* although it is not immediately clear where he got such a distinction from since the cases he refers to do not necessarily account for themselves in such terms. The single case he cites in support of the rule of responsibility for successful rebels is not a convincing authority. The case, *Hughes*, decided by the Mexican-US mixed claims commission of 1839, is an example of a state, here Mexico, being held responsible for the acts of rebels who were ultimately successful.

[7] See e.g. *Cucullu v Mexico*, in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 4 (Government Printing Office 1898), at 3482-3483.

However, the excerpt included by Moore gives no indication as to the basis of responsibility.[8] We can find plenty of examples like this in the earlier practice but it was not until the Venezuela commissions of 1903 that a tribunal explicitly articulated a positive rule of responsibility for rebels based on success.

In 1893, Carlos Wiesse, a Peruvian scholar, published *Reglas de Derecho Internacional Aplicables a las Guerras Civiles* (or 'Rules of International Law Applicable to Civil Wars'), one of, if not the first monograph on civil war and international law. It contained a significant section on responsibility. For Wiesse, a revolution which 'ended up triumphing replacing the legitimate government' would be responsible for its previous own acts and for those of the government it replaced under the rules governing the succession of *de facto* governments (under an established rule changes of government did not affect the international personality of the state, the responsibility of which continued – the state is bound by acts of *de facto* governments regardless of their internal legitimacy).[9] It is not until his second edition in 1905 that Wiesse distinguishes the two rules and gives a separate justification for responsibility for successful rebels (on which more below). He does not cite, however, the Venezuela commissions, which, presumably, were published after he was writing. Rather, he rationalises earlier practice, offering a number of examples of 'indemnities conceded by insurgent parties after having achieved victory', including Colombia in the *Case of the 'Montijo'* and Chile and Peru after their civil wars of the 1890s.[10]

Wiesse is certainly not the only one to link the questions of *de facto* governments and successful rebels. In fact, it seems that the rule of responsibility for successful rebels grew out of the rule regarding the continuity of government regardless of legitimacy. For Edwin Borchard, for example, whose 1915 monograph *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims* basically established the field, the acts of successful rebels 'are considered as at least those of a general [i.e. national] *de facto* government'.[11] Jackson Ralston, leading authority on international arbitration and umpire at the US-Venezuelan commission of 1903, cites *The Guano Affair*, a claim decided by the Chilean-French commission of 1901, as

[8] *Memorial of Mary Hughes, administratrix of George Hughes*, Opinion of Messrs Evans, Smith, and Paine, commissioners, February 18, 1850, under the act of Congress of March 3, 1849 as cited in Moore, vol 3, at 2972.
[9] Carlos Wiesse, *Reglas de Derecho Internacional Aplicables a las Guerras Civiles* (Viuda Galland 1893), at 82.
[10] Carlos Wiesse, *Reglas de Derecho Internacional Aplicables a las Guerras Civiles* (2nd edn, Imprenta Torres Aguirre 1905), at 84-85.
[11] Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims* (Banks Law 1915), at 241.

authority here.[12] However, rather than articulating that the state is retroactively responsible for successful rebels, in fact this case sets out a classic formulation of the continuity of government principle.[13]

Turning to the Venezuela commissions, the leading *Bolívar Railway Case* presents the rule that the state is responsible for successful rebels as following on from its responsibility for *de facto* governments, as follows:

> [T]he ground on which successful revolutions are charged, through the government, with responsibility [is that] it is the same nation. Nations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will … The nation is responsible for the debts contracted by its titular government, and that responsibility continues through all changing forms of government until the obligation is discharged. The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result.[14]

The opinion of umpire Plumley cites a US Supreme Court case, *Williams v Bruffy*, which considered the responsibility of the US for the Confederacy, as the origin of the rule of responsibility for successful rebels. Plumley states:

> This rule was laid down in *Williams v. Bruffy*, wherein the court say, speaking of a similar condition – 'such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.'[15]

However, in *Williams v Bruffy*, the Supreme Court also distinguished another kind of *de facto* government 'such as exists after it has expelled the regularly constituted authorities from the

[12] Jackson H Ralston, *The Law and Procedure of International Tribunals* (Stanford University Press 1926), at 343. See also Haig Silvanie, 'Responsibility of States for Acts of Insurgent Governments' (1939) 33(1) AJIL 78, at 81-83.
[13] *Affaire du Guano (Chili, France)* (1901) XV RIAA 77, at 350-351.
[14] *Bolívar Railway Case (on merits)* (1903) IX RIAA 445, at 452-453.
[15] *Bolívar Railway Case*, at 453.

seats of power and the public offices, and established its own functionaries in their places', in this case, the continuity of government rule applies.[16] Plumley overlooks this distinction between the two different types of *de facto* government governed by different rules and assumes that the rule laid down in *Williams v Bruffy* regarding successful secession can apply more generally. This distinction subsequently gets lost.[17]

Responsibility for Successful Rebels and* de facto *Governments – Differences in Operation and Rationale

So, in *Williams v Bruffy* we see responsibility based on success and responsibility for *de facto* governments clearly distinguished. The rule of responsibility for successful rebels only applied to the specific case of secession. The continuity of government rule applied where a revolutionary government replaced the constitutional government in the same territory. That is to say, the two situations addressed in paragraphs (1) and (2) of Article 10 were subject to different rules. While the rule of responsibility for successful rebels is often presented as a logical follow-on from the rule of continuity of government, these two rules, applying in different situations, operate differently and have different rationales.

The rule of responsibility for successful rebels is retroactive: all acts of successful rebels are attributed to the state even those prior to their taking power. In contrast, the continuity of government rule is not retroactive in this way: the acts of *de facto* authorities bind the state whether they are ultimately 'successful' or not (i.e. even if they are later overthrown), but this applies only to those acts carried out during the period of *de facto* authority not those prior to it.[18] The rationale for the continuity of government rule was articulated in *The Guano Affair*: 'outside of the case of pure anarchy the permanence of the existence of a state supposes necessarily the presence of a power which acts in its name and which represents it'.[19] The *Case of the 'Montijo'* adds further explanation:

> [I]t is not the part of a foreign merchant to decide on the legitimacy or the reverse of the government under which he lives. To do so would be really to interfere in the

[16] *Williams v Bruffy* (1877) 96 US Sup Ct 176, at 185. See also *Affaire du Guano*, at 351.
[17] See e.g. *Heny Case* (1903-1905) IX RIAA 125, at 128.
[18] See e.g. Borchard, at 205-210, setting out the rules applying to *de facto* governments.
[19] *Affaire du Guano*, at 350.

> domestic concerns of the country. He has only to satisfy himself that the government with which he deals is the one actually in possession of supreme power.[20]

What this rule achieved, while not explicit, is clear: first, there must be someone with whom to do business and second, it must be possible to do business with an authority without having to be concerned with its legitimacy. Allowing *de facto* governments to bind the state internationally increased stability and security for the merchants and investors who made up the bulk of aliens; it sought to guarantee business as usual.

The rule of responsibility for successful rebels, rather than being based on the idea that there must be some authority to represent the state, has the opposite effect. Its retroactive operation means that, during the period of their insurrection, the state will potentially be responsible for the acts of both the rebels and the government they are seeking to overthrow. There is very little effort to address why this should be or how there can be two authorities legitimate to represent the state internationally at the same time. Of course, in the context in which responsibility for successful rebels was originally applied in *Williams v Bruffy*, secession, it would not have led to this result. It is the extension of this rule that causes the paradox.

In many of the cases there is no attempt made to explain the rule of responsibility for successful rebels.[21] The attempts that do exist to explain the rule and its retroactive and 'double binding' effects tend not to be very convincing. We saw that in the *Bolívar Railway Case* the theory was that the revolution 'represented *ab initio* a changing national will, crystallizing in the finally successful result'.[22] However, there is generally no requirement that an authority, in order to bind the state, must represent the national will. Furthermore, it is not necessarily the case that the success or otherwise of a revolution reflects the national will, there may be all sorts of determining factors. Wiesse argues that successful insurgents must take responsibility for acts done during their insurgency given that since the beginning of their insurrection they sought to be considered in the place of the legitimate government – upon succeeding they cannot refuse to recognise their previous acts as those of a legitimate government such as they purported to be. This is one of the more convincing explanations. However, it conflates state and government as, indeed, does much of the commentary and practice here.[23] When it is the government being

[20] *Case of the 'Montijo' (US v Colombia)* reported in Moore, vol 2, at 1421.
[21] See e.g. *Dix Case* (1903-1905) IX RIAA 119, at 120; *Puerto Cabello and Valencia Railway Case (on merits)* (1903) IX RIAA 510, at 513; *French Company of Venezuelan Railroads Case* (31 July 1905) X RIAA 285, at 354.
[22] *Bolívar Railway Case*, at 453.
[23] See e.g. Borchard, at 241; *Bolívar Railway Case*, at 447.

held responsible, the fact of the continuity between the rebels and the government they end up forming has some purchase as an argument. However, once it is a conceptually distinct state being held responsible, it is not so obvious why this continuity should imply responsibility. Ultimately, the distinction between successful and unsuccessful rebels only makes sense, I suggest, in the context of denying alien protection claims based on contracts with or loans to rebels who do not succeed. Even then, this does not offer an explanation for international responsibility for those that do. Why the rule of responsibility for successful rebels is unsatisfactory is apparent. It seems to have come from a misreading of *Williams v Bruffy* combined with a misapplication of the continuity of government rule.

Concluding Remarks

Unlike international investment law, the ARSIWA did not adopt the more controversial due diligence rule in respect of state responsibility for rebels. Instead, it codified the marginal – yet relatively well accepted – rule of state responsibility for successful rebels. However, this rule arose not as a matter of logic or policy, I have argued, but out of confusion – a confusion inherited by the ARSIWA. This has led to Article 10's practical irrelevance and intellectual instability with the result that international law protects capital before any other interest.

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