The Attribution Rules in ILC’s Articles on State Responsibility: A Preliminary Assessment on Their Application to Cyber Operations

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1. Introduction

In recent scholarship on cyber security, the issue of attribution has attracted more and more attention. Yet it should be noted that in the debate on cyber issues, the term ‘attribution’ can be, and has been, understood in different ways. Many authors, when talking about the ‘attribution problem’ in a cyber context, refer to the process of identifying the origin of a cyber operation, i.e. from which machine is a cyber operation launched and who are the persons operating the machine.1 As can be seen below, attribution of cyber operations in this sense can be extremely complicated, and often involves different issues, as “what has been described as the attribution problem is actually a number of problems rolled together”.2 Thus, “[a]ttribution on the Internet can mean the owner of the machine (e.g., the Enron Corporation), the physical loca-

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2 Brenner, supra note 1, p. 405.
tion of the machine (e.g., Houston, Estonia, China), or the individual who is actually responsible for the actions”.³

But in international law, particularly in the law of State responsibility, the term ‘attribution’ is used to denote a legal operation which serves to “establish whether given conduct of a physical person, whether consisting of a positive action or an omission, is to be characterized, from the point of view of international law, as an ‘act of the State’ (or the act of any other entity possessing international legal personality)”⁴ Simply put, attribution denotes the imputation of an act of a physical person to a State, i.e. conditions under which acts of individuals will be regarded as those of a State.

The legal fiction of attribution⁵ deals with a classic problem in international law. As Dionisio Anzilotti famously pointed out almost one century ago, “the activity of a State is nothing but the activity of individuals that the law imputes to the State”.⁶ Thus the significance of the process of attribution and its relevance extends far beyond the particular field of international responsibility; in principle, the question of attribution can be raised in relation to any conduct of the State in relation to which a norm of international law attaches any legal significance, for example, the relevant State practice for the purposes of the identification of customary norms, or for all unilateral acts.⁷

3 Clark and Landau, supra note 1, p. 324.
4 L. Condorelli and C. Kress, ‘The Rules of Attribution: General Considerations’, in J. Crawford et al. (eds.), The Law of International Responsibility (Oxford University Press, Oxford, 2010) p. 221. For the issue of attribution regarding another collective entity with international legal personality, i.e. IOs, see Articles 6-9 of the Draft Articles on Responsibility of International Organizations, as adopted on second reading in 2011, Report of the ILC, 63rd Session, 2011, A/66/100. For the purpose of this article, only attribution of conduct to States will be considered.
5 The International Law Commission has attempted to justify its preference for the term ‘attribution’ (rather than ‘imputation’): although “[i]n international practice and judicial decisions, the term ‘imputation’ is also used, … the term ‘attribution’ avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is ‘really’ that of someone else.” See Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 74, para 12. But for this author, it’s hard to deny attribution is a legal fiction, although a necessary and useful one.
7 Condorelli and Kress, supra note 4, p. 222.