

THE DILEMMAS OF ATTRIBUTION



Between politics and law

24 September 2019

Venue: Town Hall Europe, Square de Meeus 5-6

Concept

While the general idea that attribution is a political process is not controversial in itself, the criteria for arriving at the decision to attribute are highly contested. The main disagreement is linked to the question about degrees of certainty and what evidentiary standards need to be met for a decision about attribution to be legitimate and lawful. One camp in this debate is focused primarily on the decision to attribute as a means to deter malicious actors. Due to the political nature of such decisions, the main risks associated with these decisions are political and reputational. This contrasts with another approach grounded in the rule of law and due process which sees the decision about attribution not as the final objective but as one step in imposing the consequences on malicious actors. The risks in such cases are not only political but have significant bearing on legitimacy and legality of the concrete measures adopted as a result of the legal and procedural standards that the evidence has to meet. Both processes require evidence, but the standards are very different. Proponents of political attribution fear the lawlessness of a space in which unacceptable behaviour has no consequences; proponents of the more legalistic approach fear the lawlessness of a space in which consequences are the result of politics and not of international (criminal) law.

The purpose of this seminar is to exchange upon the outcome of the workshop organised at the Leiden University in May 2019. Throughout the day, participants discussed differences and commonalities in the respective approaches (international law, criminal law, policy perspective) to the main stages of the attribution process: suspicion, accusation, and consequences. The key questions to be addressed include:

- > What evidentiary standards are dictated by the international law and criminal proceedings and under what circumstances? And how do these standards relate to the different approaches?
- > Is there a threshold that needs to be met for attribution to specific states and how does that correspond to criminal law and international law? To what extent does indicting individuals also mean indicting a state?
- > How can evidence from intelligence agencies play a role? What other sources of evidence play a role in this process?
- > How to publically communicate the decisions about the attribution and what are the roles of different stakeholders in this process?

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