

## CHAPTER II

## ATTRIBUTION OF CONDUCT TO A STATE

*Commentary*

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.<sup>[88] 92</sup>

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.<sup>[89] 93</sup> This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.<sup>[90] 94</sup>

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<sup>[88] 92</sup> See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, “The basis of responsibility: attribution and other trans-substantive rules”, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, “L’imputation à l’État d’un fait internationalement illicite : solutions classiques et nouvelles tendances”, *Recueil des cours . . . , 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Diplá, *La responsabilité de l’État pour violation des droits de l’homme: problèmes d’imputation* (Paris, Pedone, 1994); A. V. Freeman, “Responsibility of States for unlawful acts of their armed forces”, *Recueil des cours . . . , 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, “The international responsibility of States for the unauthorized acts of their organs”, *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

<sup>[89] 93</sup> League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

<sup>[90] 94</sup> *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.<sup>[91]</sup> <sup>95</sup> In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.<sup>[92]</sup> <sup>96</sup> Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.<sup>[93]</sup> <sup>97</sup> Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.<sup>[94]</sup> <sup>98</sup> Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.<sup>[95]</sup> <sup>99</sup>

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining

<sup>[91]</sup> <sup>95</sup> See *United States Diplomatic and Consular Staff in Tehran* (footnote [39] 59 above).

<sup>[92]</sup> <sup>96</sup> See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

<sup>[93]</sup> <sup>97</sup> The point was emphasized, in the context of federal States, in *LaGrand* (see footnote [79] 91 above). It is not of course limited to federal States. See further article 5 and commentary.

<sup>[94]</sup> <sup>98</sup> See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

<sup>[95]</sup> <sup>99</sup> See article 7 and commentary.

its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the “State” to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*<sup>[96]</sup> 100), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran–United States Claims Tribunal has affirmed, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State”.<sup>[97]</sup> 101 This follows already from the provisions of article 2.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

#### *Prosecutor v. Tihomir Blaškić (“Lasva Valley”)*

In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia considered the situation in which, following the issue of a binding order of the Tribunal to a State for the production of docu-

<sup>[96]</sup> 100 See article 55 and commentary.

<sup>[97]</sup> 101 *Kenneth P. Yeager v. The Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 17, p. 92, at pp. 101–102 (1987).

ments necessary for trial, “a State official who holds evidence in his official capacity, having been requested by his authorities to surrender it to the International Tribunal . . . refuses to do so, and the central authorities [do] not have the legal or factual means available to enforce the International Tribunal’s request.”<sup>[98] 25</sup> The Appeals Chamber observed that

in this scenario, the State official, in spite of the instructions received from his Government, is deliberately obstructing international criminal proceedings, thus jeopardizing the essential function of the International Tribunal: dispensation of justice. It will then be for the Trial Chamber to determine whether or not also to call to account the State; the Trial Chamber will have to decide whether or not to make a judicial finding of the State’s failure to comply with article 29 (on the basis of article 11 of the International Law Commission’s draft articles on State responsibility) and ask the President of the International Tribunal to forward it to the Security Council.<sup>[99] 26</sup>

[A/62/62, para. 19]

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<sup>[98] 25</sup> International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaškić (“Lasva Valley”), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14, 29 October 1997, para. 51.

<sup>[99] 26</sup> *Ibid.* Draft article 11, as adopted by the International Law Commission on first reading, was deleted on second reading on the understanding that its “negative formulation” rendered it “unnecessary” in the codification of State responsibility (*Yearbook . . . 1998*, vol. II (Part Two), p. 85, para. 419). However, the principles reflected in that provision are referred to in paragraphs (3) and (4) of the introductory commentary to chapter II of the articles finally adopted in 2001 (see [*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77) and this is the reason why it is reproduced here. The text of draft article 11 adopted on first reading was the following:

Article 11

Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

#### Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

#### Commentary

(1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: “An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority”.<sup>[100] 102</sup> There have been many statements of the principle since then.<sup>[101] 103</sup>

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference<sup>[102] 104</sup> were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of “any failure on the part of its organs to carry out the international obligations of the State”.<sup>[103] 105</sup>

<sup>[100] 102</sup> Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

<sup>[101] 103</sup> See, e.g., *Claims of Italian Nationals* (footnote [17] 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

<sup>[102] 104</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . (see footnote [76] 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

<sup>[103] 105</sup> Reproduced in *Yearbook* . . . 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.<sup>[104] 106</sup>

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule . . . is of a customary character.<sup>[105] 107</sup>

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.<sup>[106] 108</sup> As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

From the standpoint of International Law and of the Court which is its organ, municipal laws . . . express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.<sup>[107] 109</sup>

<sup>[104]</sup> 106 See *Salvador Commercial Company* (footnote [101] 103 above). See also *Chattin* case, UNRI-AA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

<sup>[105]</sup> 107 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote [32] 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

<sup>[106]</sup> 108 As to legislative acts, see, e.g., *German Settlers in Poland* (footnote [45] 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote [63] 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote [10] 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote [12] 36 above); and *ELSI* (footnote [73] 85 above). As to judicial acts, see, e.g., “*Lotus*” (footnote [64] 76 above); *Jurisdiction of the Courts of Danzig* (footnote [70] 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote [71] 83 above), at p. 65.

<sup>[107]</sup> 109 *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

Thus article 4 covers organs, whether they exercise “legislative, executive, judicial or any other functions”. This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words “or any other functions”.<sup>[108]</sup><sup>110</sup> It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as “commercial” or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.<sup>[109]</sup><sup>111</sup> Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,<sup>[110]</sup><sup>112</sup> and it might in certain circumstances amount to an internationally wrongful act.<sup>[111]</sup><sup>113</sup>

(7) Nor is any distinction made at the level of principle between the acts of “superior” and “subordinate” officials, provided they are acting in their official capacity. This is expressed in the phrase “whatever position it holds in the organization of the State” in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.<sup>[112]</sup><sup>114</sup>

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State

<sup>[108]</sup> <sup>110</sup> These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as “guidance” it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

<sup>[109]</sup> <sup>111</sup> See article 3 and commentary.

<sup>[110]</sup> <sup>112</sup> See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers’ Union v. Sweden*, *Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström v. Sweden*, *ibid.*, *Series A, No. 21* (1976), at p. 15.

<sup>[111]</sup> <sup>113</sup> The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook . . . 1998*, vol. II (Part Two), p. 17, para. 35).

<sup>[112]</sup> <sup>114</sup> See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote [104] 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey*, *ibid.*, p. 155 (1927); *Way*, *ibid.*, p. 391, at p. 400 (1928); and *Baldwin*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote [73] 85 above), e.g. at p. 50, para. 70.

is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.<sup>[113] 115</sup>

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of “[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)”. All answered in the affirmative.<sup>[114] 116</sup>

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations. The award in the “*Montijo*” case is the starting point for a consistent series of decisions to this effect.<sup>[115] 117</sup> The French-Mexican Claims Commission in the *Pellat* case reaffirmed “the principle of the international responsibility . . . of a federal State for all the acts of its separate States which give rise to claims by foreign States” and noted specially that such responsibility “. . . cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law”.<sup>[116] 118</sup> That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.<sup>[117] 119</sup>

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to

<sup>[113]</sup> <sup>115</sup> UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

<sup>[114]</sup> <sup>116</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . (see footnote [76] 88 above), p. 90; *Supplement to Vol. III* . . . (see footnote [102] 104 above), pp. 3 and 18.

<sup>[115]</sup> <sup>117</sup> See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, pp. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote [113] 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote [90] 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

<sup>[116]</sup> <sup>118</sup> UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

<sup>[117]</sup> <sup>119</sup> *LaGrand, Provisional Measures* (see footnote [79] 91 above). See also *LaGrand (Germany v. United States of America)*, *Judgment*, I.C.J. Reports 2001, p. 466, at p. 495, para. 81.



enter into international agreements on its own account,<sup>[118]</sup> <sup>120</sup> the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.<sup>[119]</sup> <sup>121</sup> This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, internal law will not itself perform the task of classification. Even if it does so, the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term “government” refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.<sup>[120]</sup> <sup>122</sup> Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word “includes” in paragraph 2.

(12) The term “person or entity” is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term “entity” is used in a similar sense<sup>[121]</sup> <sup>123</sup> in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct

<sup>[118]</sup> <sup>120</sup> See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

<sup>[119]</sup> <sup>121</sup> See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

<sup>[120]</sup> <sup>122</sup> See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. VI ZR 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd. v. Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

<sup>[121]</sup> <sup>123</sup> See *Yearbook . . . 1991*, vol. II (Part Two), pp. 14–18.

of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.<sup>[122]</sup><sup>124</sup> The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where “the act had no connexion with the official function and was, in fact, merely the act of a private individual”.<sup>[123]</sup><sup>125</sup> The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.<sup>[124]</sup><sup>126</sup> In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### IRAN-UNITED STATES CLAIMS TRIBUNAL

*International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary v. Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force, and the Ministry of National Defense, acting for the Civil Aviation Organization*

In its 1985 award in the *International Technical Products Corp. v. Islamic Republic of Iran* case, the Tribunal, in examining the issue whether Bank Tejarat, a Government-owned bank with a separate legal personality, had acted in its capacity as a State organ in taking control of a building owned by the claimants, referred in a footnote to the text of draft article 5 provisionally adopted by the International Law Commission<sup>[125]</sup><sup>27</sup> and the commentary thereto.<sup>[126]</sup><sup>28</sup> The Tribunal found, with regard to the taking of property, that

<sup>[122]</sup> <sup>124</sup> *Mallén* (see footnote [115] 117 above), at p. 175.

<sup>[123]</sup> <sup>125</sup> UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) (“a wanton trespass . . . under no color of official proceedings, and without any connection with his official duties”); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

<sup>[124]</sup> <sup>126</sup> See paragraph (7) of the commentary to article 7.

<sup>[125]</sup> <sup>27</sup> This provision was amended and incorporated in article 4 finally adopted by the International Law Commission in 2001. The text of draft article 5 provisionally adopted by the Commission was the following:

#### Article 5

##### Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook . . . 1980*, vol. II (Part Two), para. 34.)

<sup>[126]</sup> <sup>28</sup> Iran-United States Claims Tribunal, *International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary v. Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force, and the Ministry of National Defense, acting for the Civil Aviation Organization*, award No. 196–302–3, 24 October 1985, Iran-United States Claims Tribunal Reports, vol. 9 (1985-II), p. 238, [footnote] 35.

Bank Tejarat had not acted on instructions of the Government of the Islamic Republic of Iran or otherwise performed governmental functions.

[A/62/62, para. 20]

*Yeager v. Islamic Republic of Iran*

In its 1987 award in the *Yeager v. Islamic Republic of Iran* case, the tribunal, in determining whether its jurisdiction over the case was precluded by paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981 (also known as the “General Declaration”),<sup>[127]</sup><sup>29</sup> referred in the following terms to draft articles 5 *et seq.* of the articles provisionally adopted by the International Law Commission:

... the exclusion [referred to in paragraph 11(d) of the General Declaration] would only apply to acts “which are not an act of the Government of Iran”. The Claimant relies on acts which he contends are attributable to the Government of Iran. Acts “attributable” to a State are considered “acts of State”. See draft articles on State responsibility adopted by the International Law Commission on first reading (“ILC-Draft”, articles 5 *et seq.*, 1980 *Yearbook International Law Commission*, vol. II, Part 2, at pp. 30–34, United Nations doc. A/CN.4/SER.A/1980/Add.1 (Part 2). Therefore, paragraph 11 of the General Declaration does not effectively restrict the Tribunal’s jurisdiction over this Claim.<sup>[128]</sup><sup>30</sup>

[A/62/62, para. 21]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*Amco Asia Corporation and Others v. Republic of Indonesia*

In its 1990 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others v. Indonesia* case considered that draft article 5 provisionally adopted by the International Law Commission (as well as articles 3 and 10 provisionally adopted), which it quoted *in extenso*, constituted “an expression of accepted principles of international law”. The relevant passage is reproduced [on page 16] above.

[A/62/62, para. 22]

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*Prosecutor v. Tihomir Blaškić (“Lasva Valley”)*

In its 1997 decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* in the *Blaškić* case, Trial Chamber II, in examining the question whether individuals could be subject to orders (more specifically *subpoenae duces tecum*) from the International Tribunal, quoted in a footnote, without any comment, but together

<sup>[127]</sup> <sup>29</sup> Under paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981, the United States of America agreed to “bar and preclude prosecution against Iran of any pending or future claim . . . arising out of events occurring before the date of this Declaration related to . . . (d) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran”.

<sup>[128]</sup> <sup>30</sup> Iran-United States Claims Tribunal, *Yeager v. Islamic Republic of Iran*, award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 100–101, para. 33.

with draft article 1,<sup>[129] 31</sup> the text of draft article 5 adopted by the International Law Commission on first reading.<sup>[130] 32</sup>

[A/62/62, para. 23]

*Prosecutor v. Tihomir Blaškić (“Lasva Valley”)*

The decision of the *Blaškić* case (above) was later submitted, on request by the Republic of Croatia, to review by the Appeals Chamber.<sup>[131] 33</sup> In its 1997 judgement on this matter in the *Blaškić* case, the Appeals Chamber observed that Croatia had submitted in its brief that the International Tribunal could not issue binding orders to State organs acting in their official capacity. The Appeals Chamber noted that, in support of this contention, Croatia had argued, *inter alia*,

that such a power, if there is one, would be in conflict with well-established principles of international law, in particular the principle, restated in article 5 of the draft articles on State responsibility adopted by the International Law Commission, whereby the conduct of any State organ must be considered as an act of the State concerned, with the consequence that any internationally wrongful act of a State official entails the international responsibility of the State as such and not that of the official.<sup>[132] 34</sup>

In dealing with this issue, the Appeals Chamber did not refer explicitly to the draft articles adopted by the International Law Commission. It observed nevertheless that

It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.<sup>[133] 35</sup>

The Appeals Chamber considered that there were no provisions or principles of the Statute of the International Tribunal which justified a departure from this well-established rule of international law and concluded that, both under general international law and

<sup>[129]</sup> 31 See [pp. 10-11] above.

<sup>[130]</sup> 32 International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor v. Tihomir Blaškić (“Lasva Valley”), Decision on the Objection of the Republic of Croatia to the Issuance of Supoenaes Duces Tecum*, Case No. IT-95-14, 18 July 1997, para. 95, [footnote] 156. The text of draft article 5 adopted by the International Law Commission on first reading (see *Yearbook . . . 1996*, vol. II (Part Two), para. 65) was identical to that of draft article 5 provisionally adopted (see [footnote] [125] 27 above).

<sup>[131]</sup> 33 See [footnote] [34] 8 above.

<sup>[132]</sup> 34 International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaškić (“Lasva Valley”), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14, 29 October 1997, para. 39. Croatia was referring to draft article 5 adopted by the International Law Commission on first reading.

<sup>[133]</sup> 35 *Ibid.*, para. 41.

the Statute itself, judges or a trial chamber could not address binding orders to State officials.<sup>[134] 36</sup>

[A/62/62, para. 24]

#### INTERNATIONAL COURT OF JUSTICE

##### *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*

In its 1999 advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court considered that the principle embodied in draft article 6 adopted by the International Law Commission on first reading<sup>[135] 37</sup> was “of a customary character” and constituted “a well-established rule of international law”:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in article 6 of the draft articles on State responsibility adopted provisionally by the International Law Commission on first reading . . .<sup>[136] 38</sup>

[A/62/62, para. 25]

#### INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

##### *Prosecutor v. Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, took note of the further statement made by the International Court of Justice in its 1999 advisory opinion quoted above in the following terms:

It would . . . seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as ‘a well-established rule of international law’ [see the advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* quoted [. . .] above], that a State

<sup>[134]</sup> <sup>36</sup> *Ibid.*, paras. 42–43.

<sup>[135]</sup> <sup>37</sup> This provision was amended and incorporated in article 4 finally adopted by the International Law Commission in 2001. The text of draft article 6 adopted on first reading was the following:

#### Article 6

##### Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State. (Yearbook . . . 1980, vol. II (Part Two), para. 34.)

<sup>[136]</sup> <sup>38</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 62.

incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.<sup>[137]</sup> 39

In a footnote to this passage, the Appeals Chamber observed that “customary law on the matter is correctly restated in article 5 of the draft articles on State responsibility adopted in its first reading by the United Nations International Law Commission”.<sup>[138]</sup> 40 It further quoted the text of that provision, as well as of the corresponding draft article provisionally adopted by the Commission’s Drafting Committee in 1998,<sup>[139]</sup> 41 which it considered “even clearer” in that regard.

[A/62/62, para. 26]

#### WORLD TRADE ORGANIZATION PANEL

##### *Korea—Measures Affecting Government Procurement*

In its 2000 report on *Korea—Measures Affecting Government Procurement*, the panel rejected the Republic of Korea’s argument according to which it would not be responsible for the answer given by its ministry of commerce to questions asked by the United States during the negotiations for the Republic of Korea’s accession to the Agreement on Government Procurement based on the fact that the issues dealt with were under the competence of the ministry of transportation. The panel considered that its finding according to which such answer was given on behalf of the whole Korean Government was “supported by the long established international law principles of State responsibility” by which “the actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law”. In a footnote, the panel then referred to draft articles 5 and 6, and the commentary thereto, as adopted by the International Law Commission on first reading, which it considered applicable to the context of negotiations of a multilateral agreement such as the Agreement on Government Procurement.<sup>[140]</sup> 42

[A/62/62, para. 27]

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<sup>[137]</sup> 39 International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 109 (footnotes omitted).

<sup>[138]</sup> 40 *Ibid.*, para. 109, [footnote] 129.

<sup>[139]</sup> 41 The text of draft article 4 adopted by the Drafting Committee in 1998 was the following:

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State. (*Yearbook . . . 2000*, vol. II (Part Two), p. 65.)

<sup>[140]</sup> 42 WTO Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, 1 May 2000, para. 6.5, [footnote] 683.

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER MERCOSUR)

*Import Prohibition of Remolded Tires from Uruguay*

In its 2002 award, the *ad hoc* arbitral tribunal of MERCOSUR constituted to hear the dispute presented by Uruguay against Brazil on the import prohibition of remolded tires from Uruguay, in response to Brazil's argument according to which some of the relevant norms, rulings, reports and other acts from administrative organs were opinions from various sectors of the public administration that had no specific competence regarding the regulation of the country's foreign trade policy, invoked the articles finally adopted by the International Law Commission in 2001, and more particularly article 4, which it considered a codification of customary law:

It should be recalled that the draft articles of the International Law Commission on State responsibility, that codify customary law, state that, under international law, the conduct of any State organ shall be considered an act of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State (see article 4 of the draft articles on State responsibility, adopted by the International Law Commission at its fifty-third session . . . )<sup>[141]</sup> 43

The tribunal thus considered that all the said acts of the administration were attributable to Brazil.

[A/62/62, para. 28]

## AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

*Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. Argentine Republic*

In its 2002 decision on annulment in the *CAA and Vivendi Universal v. Argentina* case, the ICSID *ad hoc* committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passage is quoted [on page 17, above]. Later in the same decision, when commenting on a passage of the challenged award which “appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, a priori, have breached” the bilateral investment treaty concerned, the *ad hoc* committee again referred to the commentaries to articles 4 and 12 in support of the statement that “there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.”<sup>[142]</sup> 44

[A/62/62, para. 29]

<sup>[141]</sup> 43 MERCOSUR, *Import Prohibition of Remolded Tires from Uruguay*, award, 9 January 2002, p. 39 (unofficial English translation).

<sup>[142]</sup> 44 ICSID, *Ad Hoc Committee, Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. Argentine Republic*, Case No. ARB/97/3, decision of annulment, 3 July 2002, para. 110 and [footnote] 78, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, p. 134. The committee referred, in particular, to paragraph (6) of the commentary to article 4 and paragraphs (9) and (10) of the commentary to article 12 (see [*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77).

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA AND THE ICSID ADDITIONAL FACILITY RULES)

*Mondev International Ltd. v. United States of America*

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev v. United States* case noted that the United States had not disputed that the decisions of the City of Boston, the Boston Redevelopment Authority and the Massachusetts courts that were at stake in that case were attributable to it for purposes of NAFTA. In a footnote, it referred to article 105 of NAFTA and to article 4 of the International Law Commission articles as finally adopted in 2001.<sup>[143]</sup> 45

[A/62/62, para. 30]

*ADF Group Inc. v. United States of America*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc. v. United States* case, after having found that an “existing non-conforming measure” of a “Party” saved by article 1108(1) of NAFTA might “not only be a federal government measure but also a state or provincial government measure and even a measure of a local government”,<sup>[144]</sup> 46 considered that its view was “in line with the established rule of customary international law”, formulated in article 4 finally adopted by the International Law Commission in 2001, that “acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units”.<sup>[145]</sup> 47 The tribunal then quoted the text of that provision and observed in a footnote, with reference to the commentary thereto, that

“[t]he international customary law status of the rule is recognized in, inter alia, *Differences relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* . . . [see page 39 above]. See also paras. (8), (9) and (10) of the commentary of the International Law Commission [to article 4], stressing that “the principle in article 4 applies equally to organs of the central government and to those of regional or local units” (para. (8) ([*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77)), and that “[i]t does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the

<sup>[143]</sup> 45 NAFTA (ICSID Additional Facility), *Mondev International Ltd. v. United States of America*, Case No. ARB(AF)/99/2, award, 11 October 2002, para. 67, [footnote] 12, reproduced in *International Law Reports*, vol. 125, p. 130.

<sup>[144]</sup> 46 NAFTA (ICSID Additional Facility), *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, award, 9 January 2003, para. 165, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 269–270. As noted by the tribunal, the pertinent part of article 1108(1) of NAFTA states that articles 1102, 1103, 1106 and 1107 of the agreement do not apply to any “existing non-conforming measure” maintained “by (i) a Party at the federal level, as set out in its Schedule to Annex I or III, [or] (ii) a state or province, for two years after the date of entry into force of [NAFTA] . . . , or (iii) a local government”.

<sup>[145]</sup> 47 *Ibid.*, p. 270, para. 166.



federal parliament power to compel the component unit to abide by the State's international obligations". (para. (9) [*ibid.*]).<sup>[146] 48</sup>

[A/62/62, para. 31]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

*Técnicas Medioambientales Tecmed S.A. v. United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* case referred to the text of article 4 finally adopted by the International Law Commission in 2001, as well as to the commentary thereto, in support of its finding that actions by the National Ecology Institute of Mexico, an entity of the United Mexican States in charge of designing Mexican ecological and environmental policy and of concentrating the issuance of all environmental regulations and standards, were attributable to Mexico.<sup>[147] 49</sup>

[A/62/62, para. 32]

INTERNATIONAL ARBITRAL TRIBUNAL

*Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention explained that its proposed interpretation of article 9(1) of the Convention was "consistent with contemporary principles of State responsibility", and in particular with the principle according to which "[a] State is internationally responsible for the acts of its organs".<sup>[148] 50</sup> It added that:

... this submission is confirmed by articles 4 and 5 of the International Law Commission draft articles on the responsibility of States for internationally wrongful acts, providing for rules of attribution of certain acts to States. On the international plane, acts of "competent authorities" are considered to be attributable to the State as long as such authorities fall within the notion of state organs or entities that are empowered to exercise elements of the government authority. As the International Court of Justice stated in the *LaGrand* case, "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be".<sup>[149] 51</sup>

[A/62/62, para. 33]

<sup>[146]</sup> 48 *Ibid.*, p. 270, para. 166, footnote 161.

<sup>[147]</sup> 49 ICSID, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, Case No. ARB(AF)/00/2, award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original).

<sup>[148]</sup> 50 *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, Final Award, 2 July 2003, para. 144.

<sup>[149]</sup> 51 *Ibid.*, para. 145 (footnotes omitted).

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*CMS Gas Transmission Company v. Argentine Republic*

In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *CMS Transmission Company v. Argentina* case stated, with reference to article 4 as finally adopted by the International Law Commission in 2001:

Insofar as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the articles on State responsibility adopted by the International Law Commission is abundantly clear on this point. Unless a specific reservation is made in accordance with articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other State institutions does not necessarily make them separate disputes. No such reservation took place in connection with the [relevant bilateral investment treaty].<sup>[150] 52</sup>

[A/62/62, para. 34]

*Tokios Tokelés v. Ukraine*

In its 2004 decision on jurisdiction, the arbitral tribunal constituted to hear the *Tokios Tokelés v. Ukraine* case found evidence of extensive negotiations between the claimant and municipal government authorities and, having recalled that “actions of municipal authorities are attributable to the central government”, quoted in a footnote part of the text of article 4 finally adopted by the International Law Commission in 2001.<sup>[151] 53</sup>

[A/62/62, para. 35]

## WORLD TRADE ORGANIZATION PANEL

*United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

In its 2004 report on *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the panel considered that its finding according to which the actions taken by the United States International Trade Commission (an agency of the United States Government) pursuant to its responsibilities and powers were attributable to the United States was supported by article 4 and its commentary, as finally adopted by the International Law Commission in 2001, which it considered to be a “provision . . . not binding as such, but . . . reflect[ing] customary principles of international law concerning attribution”:

<sup>[150]</sup> 52 ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Case No. ARB/01/8, decision on objections to jurisdiction, 17 July 2003, para. 108 (footnote omitted).

<sup>[151]</sup> 53 ICSID, *Tokios Tokelés v. Ukraine*, Case No. ARB/02/18, decision on jurisdiction, 29 April 2004, para. 102 and [footnote] 113, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 20, No. 1, 2005, p. 242. In the original of the decision, the tribunal inadvertently indicates that the text it quotes, which is actually taken from article 4, belongs to article 17 of the International Law Commission articles.

6.128. This conclusion is supported by the International Law Commission articles on the responsibility for States for internationally wrongful acts. Article 4, which is based on the principle of the unity of the State, defines generally the circumstances in which certain conduct is attributable to a State. This provision is not binding as such, but does reflect customary principles of international law concerning attribution. As the International Law Commission points out in its commentary on the articles on State responsibility, the rule that “the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions”. As explained by the International Law Commission, the term “State organ” is to be understood in the most general sense. It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.<sup>[152] 54</sup>

[A/62/62, para. 36]

#### INTERNATIONAL ARBITRAL TRIBUNAL

##### *In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV v. Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, observed that “it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State”. It then quoted the text of article 4 finally adopted by the International Law Commission in 2001, which it considered “crystal clear” in that regard,<sup>[153] 55</sup> and later referred to the commentary thereto.<sup>[154] 56</sup>

[A/62/62, para. 37]

#### INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

##### *Noble Ventures, Inc. v. Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc. v. Romania* case, in determining whether the acts of a Romanian “institution of public interest” (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 4 finally adopted by the International Law Commission in 2001, which it considered to lay down a “well-established rule”:

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<sup>[152] 54</sup> WTO Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, para. 6.128 (footnotes omitted).

<sup>[153] 55</sup> *In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Eureko BV and Republic of Poland*, partial award, 19 August 2005, paras. 127–128.

<sup>[154] 56</sup> *Ibid.*, paras. 130–131. The arbitral tribunal referred in particular to paragraphs (6) and (7) of the commentary to article 4 ([*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77).

As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The bilateral investment treaty does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the bilateral investment treaty in this respect. Regarding general international law on international responsibility, reference can be made to the draft articles on State responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the United Nations General Assembly in res. 56/83 of 12 December 2001 . . . While those draft articles are not binding, they are widely regarded as a codification of customary international law. The 2001 International Law Commission draft provides a whole set of rules concerning attribution. Article 4 of the 2001 International Law Commission draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence.<sup>[155] 57</sup>

Later in the award, in response to an argument by the respondent that a distinction should be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the arbitral tribunal observed, with reference to the commentary of the International Law Commission to article 4, that

. . . in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so call *acta iure imperii*, should be attributable. The International Law Commission draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the International Law Commission regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the International law Commission in its draft articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.<sup>[156] 58</sup>

[A/62/62, para. 38]

*Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* case explained that, when assessing the merits of the dispute, it would rule on the issue of attribution under international law, especially by reference to the articles finally adopted by the International Law Commission in 2001 (more particularly articles 4 and 5), which it considered “a codification of customary international law”. The tribunal briefly described the contents of the two provisions it intended to apply.<sup>[157] 59</sup>

[A/62/62, para. 39]

<sup>[155] 57</sup> ICSID, *Noble Ventures, Inc. v. Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 69.

<sup>[156] 58</sup> *Ibid.*, para. 82.

<sup>[157] 59</sup> ICSID, *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, Case No. ARB/04/13, decision on jurisdiction, 16 June 2006, para. 89.

## WORLD TRADE ORGANIZATION PANEL

*European Communities—Selected Customs Matters*

In its 2006 report on *European Communities—Selected Customs Matters*, the panel noted that the European Communities had invoked article 4, paragraph 1, finally adopted by the International Law Commission in 2001 as a statement of “international law”, to contradict the United States allegation according to which only executive authorities, but not judicial authorities, of the member States should be recognized as authorities of the Community when implementing community law for the purposes of complying with article X.3(b) of GATT 1994.<sup>[158]</sup><sup>60</sup> According to the European Communities (EC):

4.706. The US arguments are . . . incompatible with principles of general international law regarding responsibility for wrongful acts. In this regard, the EC would refer to article 4(1) of the articles on responsibility of States for internationally wrongful acts elaborated by the International Law Commission.

4.707. It follows clearly from this provision that, when it comes to the acts of a State under international law, there is no distinction between acts of the legislative, executive and judicial organs. For this very same reason, it would seem unjustifiable to consider that only the executive authorities of the member States, but not the judicial authorities of the member States, can act as EC organs.

4.708. Similarly, it follows from the International Law Commission’s articles on state responsibility that the responsibility for internationally wrongful acts extends not only to organs of the central government, but also to organs of territorial units. Accordingly, the EC has never contested that it is responsible in international law for the compliance by EC member States with the obligations of the EC under the WTO Agreements.<sup>[159]</sup><sup>61</sup>

The panel found that “the European Communities may comply with its obligations under Article X.3(b) of GATT 1994 through organs of its member States”, on the basis of an interpretation of the terms of that provision. It further observed, in a footnote, that this finding also followed article 4 of the International Law Commission articles.<sup>[160]</sup><sup>62</sup>

[A/62/62, para. 40]

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<sup>[158]</sup> <sup>60</sup> Under that provision:

Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

<sup>[159]</sup> <sup>61</sup> WTO Panel Report, *European Communities—Selected Customs Matters*, WT/DS315/R, 16 June 2006, paras. 4.706–4.708.

<sup>[160]</sup> <sup>62</sup> *Ibid.*, para. 7.552 and [footnote] 932. This aspect of the panel report was not reversed on appeals: see WTO Panel Report, *European Communities—Selected Customs Matters*, WT/DS315/AB/R, 13 November 2006.

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*Azurix Corp. v. Argentina Republic*

In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp. v. Argentina* case observed that the claimant, in arguing that Argentina was responsible for the actions of the Argentine Province of Buenos Aires under the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America and customary international law, had referred in particular to “the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission”.<sup>[161]</sup><sup>63</sup> The tribunal considered, in this regard, that

[t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.<sup>[162]</sup><sup>64</sup>

[A/62/62, para. 41]

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA AND THE UNCITRAL RULES)

*Grand River Enterprises Six Nations Ltd. et al. v. United States*

In its 2006 decision on objections to jurisdiction, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA under the UNCITRAL rules to hear the *Grand River Enterprises Six Nations Ltd. et al. v. United States* case, having noted that the defendant acknowledged its responsibility under NAFTA for actions taken by states of the United States, referred in a footnote, inter alia, to the text and commentary to article 4 finally adopted by the International Law Commission in 2001.<sup>[163]</sup><sup>65</sup>

[A/62/62, para. 42]

## INTERNATIONAL COURT OF JUSTICE

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*

In its 2007 judgment in the *Genocide* case, the Court, in examining the question whether the massacres committed at Srebrenica (which it had found to be a crime of genocide within the meaning of articles II and III, paragraph (a), of the Genocide Convention) were attributable, in whole or in part, to the Respondent, considered the question whether

<sup>[161]</sup> <sup>63</sup> ICSID, *Azurix Corp. v. Argentina Republic*, Case No. ARB/01/12, award, 14 July 2006, para. 46.

<sup>[162]</sup> <sup>64</sup> *Ibid.*, para. 50.

<sup>[163]</sup> <sup>65</sup> NAFTA, *Grand River Enterprises Six Nations Ltd. et al. v. United States*, decision on objections to jurisdiction, 20 July 2006, para. 1, [footnote] 1. The arbitral tribunal referred in particular to paragraph (4) of the commentary to article 4 ([*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77).

those acts had been perpetrated by organs of the latter. The Court referred to article 4 finally adopted by the International Law Commission in 2001, stating that this question

relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility. . . .<sup>[164]</sup> 3

The Court thereafter applied this rule to the facts of the case. In that context, it observed inter alia that “[t]he expression ‘State organ’, as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC commentary to Art. 4, para. (1))”.<sup>[165]</sup> 4 The Court concluded that “the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent’s international responsibility”<sup>[166]</sup> 5 and it went on to consider the question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control (see [pages 79-81] below).

[A/62/62/Add.1, para. 2]

#### WORLD TRADE ORGANIZATION PANEL

##### *Brazil—Measures Affecting Imports of Retreaded Tyres*

In its 2007 report, the panel in the *Brazil—Measures Affecting Imports of Retreaded Tyres* case, cited, in a footnote, article 4 of the State responsibility articles, in support of its finding that Brazilian domestic court rulings did not exonerate Brazil from its obligation to comply with the requirements of article XX of the General Agreement on Tariffs and Trade 1994.<sup>[167]</sup> 10

[A/65/76, para. 15]

#### WORLD TRADE ORGANIZATION APPELLATE BODY

##### *United States—Measures Relating to Zeroing and Sunset Reviews, recourse to Article 21.5 of the DSU by Japan*

In its 2009 report in the *United States—Measures Relating to Zeroing and Sunset Reviews* case, the WTO Appellate Body referred to article 4 of the State responsibility articles in support of its assertion that:

<sup>[164]</sup> 3 [International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43], para. 385.

<sup>[165]</sup> 4 *Ibid.*, para. 388.

<sup>[166]</sup> 5 *Ibid.*, para. 395.

<sup>[167]</sup> 10 WTO Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, para. 7.305, footnote 1480.

[i]rrespective of whether an act is defined as “ministerial” or otherwise under United States law, and irrespective of any discretion that the authority issuing such instructions or taking such action may have, the United States, as a Member of the WTO, is responsible for those acts in accordance with the covered agreements and international law.<sup>[168] 11</sup>

[A/65/76, para. 16]

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<sup>[168] 11</sup> WTO Appellate Body, *United States—Measures Relating to Zeroing and Sunset Reviews, recourse to Article 21.5 of the DSU by Japan*, Case No. AB-2009-2, Report of the Appellate Body, 18 August 2009, para. 183 and footnote 466.



**Article 5. Conduct of persons or entities exercising elements of governmental authority**

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

*Commentary*

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

(2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal’s jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.<sup>[169] 127</sup>

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

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<sup>[169]</sup> 127 *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

when, by delegation of powers, bodies act in a public capacity, e.g., police an area . . . the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.<sup>[170] 128</sup>

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such . . . autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.<sup>[171] 129</sup>

(5) The justification for attributing to the State under international law the conduct of “parastatal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits

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<sup>[170]</sup> <sup>128</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . (see footnote [76] 88 above), p. 90. The German Government noted that these remarks would extend to the situation where “the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force”, *ibid.*

<sup>[171]</sup> <sup>129</sup> *Ibid.*, p. 92.

activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### IRAN-UNITED STATES CLAIMS TRIBUNAL

#### *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*

In its 1989 award in the *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* case, the Tribunal, in determining whether the Islamic Republic of Iran was responsible for expropriation of goods of the claimant when it allegedly took the latter's property interests through the National Iranian Oil Company (NIOC), observed in a footnote, with reference to draft article 7 provisionally adopted by the International Law Commission:<sup>[172] 66</sup>

International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. See article 7(2) of the draft articles on State responsibility adopted by the International Law Commission, *Yearbook International Law Commission 2* (1975), at p. 60. The 1974 Petroleum Law of Iran explicitly vests in NIOC "the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources". NIOC was later integrated into the newly-formed Ministry of Petroleum in October 1979.<sup>[173] 67</sup>

[A/62/62, para. 43]

### WORLD TRADE ORGANIZATION PANEL

#### *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*

In its 1999 reports on *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the panel referred to draft article 7, paragraph 2, adopted

<sup>[172] 66</sup> This provision was amended and incorporated in article 5 finally adopted by the International Law Commission in 2001. The text of draft article 7 provisionally adopted was as follows:

#### Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook . . . 1980*, vol. II (Part Two), par<sup>a</sup>. 34.)

<sup>[173] 67</sup> Iran-United States Claims Tribunal, [*Phillips Petroleum Co. Iran*] v. *Islamic Republic of Iran*, award No. 326-10913-2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 21 (1989), p. 79, para. 89, footnote 22.

by the International Law Commission on first reading<sup>[174]</sup> 68 in support of its finding that the Canadian provincial marketing boards acting under the explicit authority delegated to them by either the federal Government or a provincial Government were “agencies” of those Governments in the sense of article 9.1(a) of the Agreement on Agriculture, even if they were not formally incorporated as Government agencies. In a footnote, the panel reproduced the text of article 7, paragraph 2, and noted that this provision “might be considered as reflecting customary international law”.<sup>[175]</sup> 69

[A/62/62, para. 44]

#### INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

##### *Prosecutor v. Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, observed:

It would . . . seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as “a well-established rule of international law” [see page 39 above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.<sup>[176]</sup> 70

In a footnote,<sup>[177]</sup> 71 the Appeals Chamber quoted draft article 7 adopted by the International Law Commission on first reading, as well as the corresponding draft article provisionally adopted by the Commission’s Drafting Committee in 1998.<sup>[178]</sup> 72

Later in the same judgement, the Appeals Chamber twice referred to draft article 7 adopted by the ILC on first reading in the context of its examination of the rules applicable

<sup>[174]</sup> 68 Draft article 7 adopted on first reading was amended and incorporated in article 5 as finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook . . . 1996*, vol. II (Part Two), para. 65) was identical to that of article 7 provisionally adopted: see [footnote] [172] 66 above.

<sup>[175]</sup> 69 WTO Panel Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R and WT/DS113/R, 17 May 1999, para. 7.77, [footnote] 427.

<sup>[176]</sup> 70 International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 109 (footnotes omitted).

<sup>[177]</sup> 71 *Ibid.*, para. 109, [footnote] 130.

<sup>[178]</sup> 72 The text of draft article 5 (Attribution to the State of the conduct of entities exercising elements of the governmental authority) adopted by the International Law Commission Drafting Committee in 1998 was the following:

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question. (*Yearbook . . . 2000*, vol. II (Part Two), p. 65.)

for the attribution to States of acts performed by private individuals.<sup>[179] 73</sup> In a footnote corresponding to the statement that “the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives”,<sup>[180] 74</sup> the Appeals Chamber noted that

[t]his sort of “objective” State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in article 7 of the International Law Commission draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member states of federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy.<sup>[181] 75</sup>

Subsequently, the Appeals Chamber also observed that

[i]n the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State’s public entity.<sup>[182] 76</sup>

[A/62/62, para. 45]

#### INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

##### *Maffezini v. Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini v. Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading:

a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil. Paragraph 2 of article 7 of the International Law Commission’s draft articles on State responsibility supports this position.<sup>[183] 77</sup>

[A/62/62, para. 46]

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<sup>[179] 73</sup> For the complete passage of the Appeals Chamber’s judgement on that issue, see [pp. 66-67] below.

<sup>[180] 74</sup> International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 122.

<sup>[181] 75</sup> *Ibid.*, para. 122, [footnote] 140.

<sup>[182] 76</sup> International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 123 (footnotes omitted).

<sup>[183] 77</sup> ICSID, *Maffezini v. Kingdom of Spain*, Case No. ARB/97/7, decision on objections to jurisdiction, 25 January 2000, para. 78 (footnotes omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 29.

## INTERNATIONAL ARBITRAL TRIBUNAL

*Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention referred to article 5 (as well as article 4) finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 43] above.

[A/62/62, para. 47]

## INTERNATIONAL ARBITRAL TRIBUNAL

*In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Euroko BV and Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV v. Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, referred to the commentary to article 5 finally adopted by the International Law Commission in 2001.<sup>[184] 78</sup>

[A/62/62, para. 48]

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*Noble Ventures, Inc. v. Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc. v. Romania* case, in determining whether the acts of a Romanian “institution of public interest” (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 5 finally adopted by the International Law Commission in 2001:

The 2001 draft articles . . . attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by article 5 of the 2001 International Law Commission draft.<sup>[185] 79</sup>

[A/62/62, para. 49]

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<sup>[184] 78</sup> *In the matter of an Ad hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment between Euroko BV and Republic of Poland*, partial award, 19 August 2005, para. 132. The arbitral tribunal referred in particular to paragraph (1) of the commentary to article 5 ([*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77).

<sup>[185] 79</sup> ICSID, *Noble Ventures, Inc. v. Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 70.

*Consorzio Groupement LESI-DIPENTA v. People's Democratic Republic of Algeria and LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*

In its 2005 and 2006 awards, the arbitral tribunal constituted to hear the *Consorzio Groupement LESI-DIPENTA v. Algeria* and the *LESI and Astaldi v. Algeria* cases referred, inter alia, to article 6 finally adopted by the International Law Commission in 2001 in support of its finding according to which “the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence”.<sup>[186]</sup> 80

[A/62/62, para. 50]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE UNCITRAL RULES)

*Encana Corporation v. Republic of Ecuador*

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp. v. Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, after having found that the conduct at issue of Petroecuador, a State-owned and State-controlled instrumentality of Ecuador, was attributable to the latter, noted that it “does not matter for this purpose whether this result flows from the principle stated in article 5 of the International Law Commission’s articles on responsibility of States for internationally wrongful acts or that stated in article 8”, and quoted the text of these provisions as finally adopted by the Commission in 2001.<sup>[187]</sup> 81

[A/62/62, para. 51]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* case referred, inter alia, to article 5 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 52]

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<sup>[186]</sup> 80 ICSID, *Consorzio Groupement LESI-DIPENTA v. People's Democratic Republic of Algeria*, Case No. ARB/03/08, award, 10 January 2005, para. 19, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 2, 2004, pp. 455–456 (unofficial English translation by ICSID of the French original) and *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, Case No. ARB/05/3, award, 12 July 2006, para. 78. Although in these awards the tribunal inadvertently refers to article 8 (concerning the conduct of private persons directed or controlled by a State), the situation it was dealing with involved the conduct of a public entity exercising elements of governmental authority, which is covered by article 5 of the International Law Commission articles. These references are accordingly included under this section of the compilation.

<sup>[187]</sup> 81 Arbitral tribunal (under UNCITRAL arbitration rules), *Encana Corporation v. Republic of Ecuador*, London Court of International Arbitration Case No. UN3481, award, 3 February 2006, para. 154.

## INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*Helnan International Hotels A/S v. The Arab Republic of Egypt*

The arbitral tribunal in the *Helnan International Hotels A/S v. Egypt* case considered a challenge by the Respondent to its jurisdiction on the ground that the actions of the domestic entity under scrutiny in the case were not attributable to Egypt, despite the fact that the entity was wholly owned by the Government of Egypt. While the tribunal found that it did have jurisdiction on other grounds, it nonetheless proceeded to consider the Respondent's challenge and found that the claimant had convincingly demonstrated that the entity in question was "under the close control of the State". In making this finding, it referred to the commentary to article 5 of the State responsibility articles, first by way of acknowledgment that the "fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State".<sup>[188]</sup> <sup>12</sup> Nonetheless, the tribunal noted that "[the domestic entity] was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government" and proceeded to recall article 5 (which is quoted in full) and then held that "[e]ven if [the domestic entity] has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State".<sup>[189]</sup> <sup>13</sup>

[A/65/76, para. 17]

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<sup>[188]</sup> <sup>12</sup> Paragraph (3) of the commentary to article 5.

<sup>[189]</sup> <sup>13</sup> ICSID, *Helnan International Hotels A/S v. The Arab Republic of Egypt*, Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras. 92 and 93.



**Article 6. Conduct of organs placed at the disposal of a State by another State**

**The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

*Commentary*

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words “placed at the disposal of” in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.<sup>[190] 130</sup>

(3) Examples of situations that could come within this limited notion of a State organ “placed at the disposal” of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.<sup>[191] 131</sup>

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<sup>[190] 130</sup> Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others v. Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

<sup>[191] 131</sup> See also article 47 and commentary.

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ “placed at the disposal” of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the “beneficiary” State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.<sup>[192] 132</sup>

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be “acting in the exercise of elements of the governmental authority” of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of “transferred responsibility”. Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that “the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power.”<sup>[193] 133</sup> It is implicit in the Arbitrator’s finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul’s acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of “delegated” powers.<sup>[194] 134</sup> At the relevant time Liechtenstein was not a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzer-

<sup>[192] 132</sup> For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

<sup>[193] 133</sup> UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

<sup>[194] 134</sup> *X and Y v. Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights*, 1977, vol. 20 (1978), p. 372, at pp. 402–406.

land exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.<sup>[195] 135</sup>

(8) A further, long-standing example, of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.<sup>[196] 136</sup> There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.<sup>[197] 137</sup> In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

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<sup>[195] 135</sup> See also *Drozd and Janousek v. France and Spain*, Eur. Court H.R., Series A, No. 240 (1992), paras. 96 and 110. See also *Controller and Auditor-General v. Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan v. Davison*, *ibid.*, vol. 108, p. 622.

<sup>[196] 136</sup> For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

<sup>[197] 137</sup> See, e.g., article 89 of the Rome Statute of the International Criminal Court.

**Article 7. Excess of authority or contravention of instructions**

**The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

*Commentary*

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.<sup>[198] 138</sup> Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,<sup>[199] 39</sup> State practice came to support the proposition, articulated by the British Government in response to an Italian request, that “all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity”.<sup>[200] 140</sup> As the Spanish Government pointed out: “If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.”<sup>[201] 141</sup> At this time the United States supported “a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of

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<sup>[198] 138</sup> See, e.g., the “Star and Herald” controversy, Moore, *Digest*, vol. VI, p. 775.

<sup>[199] 139</sup> In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: “Only Son”, Moore, *History and Digest*, vol. IV, pp. 3404–3405; “William Lee”, *ibid.*, p. 3405; and Donougho’s, *ibid.*, vol. III, p. 3012. Where the question was expressly examined tribunals did not consistently apply any single principle: see, e.g., the Lewis’s case, *ibid.*, p. 3019; the Gadino case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the Lacaze case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the “William Yeaton” case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

<sup>[200] 140</sup> For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

<sup>[201] 141</sup> Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

their apparent authority”.<sup>[202]</sup> 142 It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed “by virtue of . . . official capacity”. In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee’s request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of “[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority”.<sup>[203]</sup> 143 The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

International responsibility is . . . incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.<sup>[204]</sup> 144

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.<sup>[205]</sup> 145 It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: “A Party to the conflict . . . shall be responsible for all acts committed by persons forming part of its armed forces”: this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and “correspond[s] to the general principles of law on international responsibility”.<sup>[206]</sup> 146

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

that the two officers, even if they are deemed to have acted outside their competence . . . and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.<sup>[207]</sup> 147

<sup>[202]</sup> 142 “American Bible Society” incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; “Shine and Milligen”, G. H. Hackworth, *Digest of International Law* (Washington, D. C., United States Government Printing Office, 1943), vol. V, p. 575; and “Miller”, *ibid.*, pp. 570–571.

<sup>[203]</sup> 143 League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . (see footnote [76] 88 above), point V, No. 2 (b), p. 74, and *Supplement to Vol. III* . . . (see footnote [102] 104 above), pp. 3 and 17.

<sup>[204]</sup> 144 League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . , document C.351(c)M.145(c).1930.V (see footnote [76] 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook* . . . 1975, vol. II, pp. 61–70.

<sup>[205]</sup> 145 For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that “an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity” (*Yearbook* . . . 1961, vol. II, p. 53).

<sup>[206]</sup> 146 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

<sup>[207]</sup> 147 *Caire* (see footnote [123] 125 above). For other statements of the rule, see *Maal*, UNRIIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica*, *ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916);

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.<sup>[208] 148</sup>

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority”.<sup>[209] 149</sup>

(8) The problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression “if the organ, person or entity acts in that capacity” in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.<sup>[210] 150</sup> In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e. only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by

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*Youmans*, (footnote [115] 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote [112] 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

<sup>[208] 148</sup> *Velásquez Rodríguez* (see footnote [43] 63 above); see also ILR, vol. 95, p. 232, at p. 296.

<sup>[209] 149</sup> *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

<sup>[210] 150</sup> One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.<sup>[211] 151</sup> Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.<sup>[212] 152</sup>

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### IRAN-UNITED STATES CLAIMS TRIBUNAL

#### *Yeager v. Islamic Republic of Iran*

In its 1987 award in the *Yeager v. Islamic Republic of Iran* case, the Tribunal, in determining whether an agent of Iran Air (which was controlled by the Iranian Government) had acted in his official capacity when he had requested an additional amount of money in order to get the claimant's daughter onto a flight for which she had a confirmed ticket, referred to the "widely accepted" principle codified in draft article 10 provisionally adopted by the International Law Commission,<sup>[213] 82</sup> and to the commentary to that provision:

It is widely accepted that the conduct of an organ of a State may be attributable to the State, even if in a particular case the organ exceeded its competence under internal law or contravened instructions concerning its activity. It must have acted in its official capacity as an organ, however. *See* International Law Commission draft article 10. Acts which an organ commits in a purely private capacity, even if it has used the means placed at its disposal by the State for the exercise of its function, are not attributable to the State. *See* commentary on the International Law Commission draft article 10, *Yearbook of the International Law Commission, 1975*, volume II, p. 61.<sup>[214] 83</sup>

<sup>[211]</sup> 151 See *ELSI* (footnote [73] 85 above), especially at pp. 52, 62 and 74.

<sup>[212]</sup> 152 See further article 44, subparagraph (b), and commentary.

<sup>[213]</sup> 82 This provision was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. Draft article 10 provisionally adopted read as follows:

#### Article 10

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. (*Yearbook . . . 1980*, vol. II (Part Two), para. 34.)

<sup>[214]</sup> 83 *Iran-United States Claims Tribunal, Yeager v. Islamic Republic of Iran*, award No. 324–10199–1, 2 November 1987, *Iran-United States Claims Tribunal Reports*, vol. 17 (1987-IV), p. 111, para. 65.

The tribunal found that, in the said instance, the agent had acted in a private capacity and not in his official capacity as an organ of Iran Air.

[A/62/62, para. 53]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

*Amco Asia Corporation and Others v. Republic of Indonesia*

In its 1990 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others v. Indonesia* case considered that draft article 10 provisionally adopted by the International Law Commission (as well as draft articles 3 and 5 provisionally adopted), which it quoted in extenso, constituted “an expression of accepted principles of international law”. The relevant passage is quoted [on page 16] above.

[A/62/62, para. 54]

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*Prosecutor v. Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals,<sup>[215] 84</sup> incidentally referred to draft article 10 adopted by the International Law Commission on first reading,<sup>[216] 85</sup> which it considered to be a restatement of “the rules of State responsibility”:

Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.<sup>[217] 86</sup>

The Appeals Chamber also indicated in this regard that:

In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State’s public entity . . . [I]nternational law

<sup>[215]</sup> 84 For the relevant passage of the Appeals Chamber’s judgement, see para. 45 above.

<sup>[216]</sup> 85 Draft article 10 adopted on first reading was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook . . . 1996*, vol. II (Part Two), para. 65) was identical to that of draft article 10 provisionally adopted (see [footnote] 82 above).

<sup>[217]</sup> 86 ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 121 (footnotes omitted).



renders any State responsible for acts in breach of international law performed . . . by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*) . . . <sup>[218]</sup> 87

[A/62/62, para. 55]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA AND THE ICSID ADDITIONAL FACILITY RULES)

*Metalclad Corporation v. United Mexican States*

In its 2000 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Metalclad Corporation v. Mexico* case, in considering Mexico's responsibility for the conduct of its State and local governments (i.e., the municipality of Guadalupe and the State of San Luis Potosí) found that the rules of NAFTA accorded "fully with the established position in customary international law", and in particular with draft article 10 adopted by the International Law Commission on first reading, which, "though currently still under consideration, may nonetheless be regarded as an accurate restatement of the present law". <sup>[219]</sup> 88

[A/62/62, para. 56]

*ADF Group Inc. v. United States of America*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc. v. United States* case, while noting that "even if the United States measures [at issue in the case] were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in article 1105(1)" of NAFTA, stated that "[a]n unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity", thereafter referring in a footnote to article 7 finally adopted by the International Law Commission in 2001. <sup>[220]</sup> 89

[A/62/62, para. 57]

HUMAN RIGHTS COMMITTEE

*Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights on communication No. 950/2000 (Sri Lanka)*

In its 2003 views on communication No. 950/2000 (Sri Lanka), the Human Rights Committee, with regard to the abduction of the son of the author of the communication

<sup>[218]</sup> 87 *Ibid.*, para. 123.

<sup>[219]</sup> 88 NAFTA (ICSID Additional Facility) *Metalclad Corporation v. United Mexican States*, award, 30 August 2000, para. 73, reproduced in *International Law Reports*, vol. 119, p. 634.

<sup>[220]</sup> 89 NAFTA (ICSID Additional Facility), *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, award, 9 January 2003, para. 190 (and footnote 184), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, p. 283.

by an officer of the Sri Lankan Army, noted that “it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer”<sup>[221]</sup> 90 In a footnote, the Committee referred to article 7 of the articles finally adopted by the International Law Commission, as well as to article 2, paragraph 3, of the International Covenant on Civil and Political Rights.<sup>[222]</sup> 91 It then concluded that, “in the circumstances, the State party is responsible for the disappearance of the author’s son”.

[A/62/62, para. 58]

#### EUROPEAN COURT OF HUMAN RIGHTS

##### *Ilaşcu and others v. Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others v. Moldova and Russia* case, the European Court, sitting as a Grand Chamber, in interpreting the term “jurisdiction” in article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>[223]</sup> 92 examined the issue of State responsibility and referred, inter alia, to article 7 finally adopted by the International Law Commission in 2001 in support of its finding that a State may be held responsible where its agents are acting *ultra vires* or contrary to instructions:

A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms], a State’s authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (see *Ireland v. the United Kingdom*, judgement of 18 January 1978, Series A no. 25, p. 64, § 159; see also article 7 of the International Law Commission’s draft articles on the responsibility of States for internationally wrongful acts . . . and the *Cairo* case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516).<sup>[224]</sup> 93

[A/62/62, para. 59]

#### INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

##### *Noble Ventures, Inc. v. Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc. v. Romania* case, having found that the acts of a Romanian “institution of public interest” (the State Ownership Fund (SOF), subsequently replaced by the Authority for Privatization and Management of the State Ownership (APAPS)) were attributable to Romania, noted

<sup>[221]</sup> 90 *Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights* [(*Sarma v. Sri Lanka*)], communication No. 950/2000: Sri Lanka, CCPR/C/78/D/950/2000, 31 July 2003, para. 9.2.

<sup>[222]</sup> 91 *Ibid.*, para. 9.2, [footnote] 13.

<sup>[223]</sup> 92 Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

<sup>[224]</sup> 93 European Court of Human Rights, Grand Chamber, *Ilaşcu and others v. Moldova and Russia* (Application No. 48787/99), judgement, 8 July 2004, para. 319.

that that conclusion would be the same even if those acts were regarded as *ultra vires*, as established by the “generally recognized rule recorded” in article 7 finally adopted by the International Law Commission in 2001:

Even if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in article 7 of the 2001 International Law Commission draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant’s perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.<sup>[225] 94</sup>

[A/62/62, para. 60]

*Azurix Corp. v. Argentine Republic*

In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp. v. Argentina* case observed that the claimant had argued that “Argentina is responsible for the actions of the [Argentine] Province [of Buenos Aires] under the [1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America] and customary international law”. The claimant had referred in particular to “the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission”.<sup>[226] 95</sup> The tribunal considered, in this regard, that

[t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.<sup>[227] 96</sup>

[A/62/62, para. 61]

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<sup>[225] 94</sup> ICSID, *Noble Ventures, Inc. v. Romania*, Case No. ARB/01/11, award, 12 October 2005, para. 81.

<sup>[226] 95</sup> ICSID, *Azurix Corp. v. Argentine Republic*, Case No. ARB/01/12, award, 14 July 2006, para. 46.

<sup>[227] 96</sup> *Ibid.*, para. 50.

**Article 8. Conduct directed or controlled by a State**

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.**

*Commentary*

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.<sup>[228] 153</sup> Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.<sup>[229] 154</sup> In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms

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<sup>[228] 153</sup> Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

<sup>[229] 154</sup> See, e.g., the *Zafiro* case, UNRIIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote [207] 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.) v. Germany (Sabotage cases): "Black Tom" and "Kingsland" incidents*, *ibid.*, vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

of the notion of “control”. On the one hand, it held that the United States was responsible for the “planning, direction and support” given by the United States to Nicaraguan operatives.<sup>[230] 155</sup> But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

...

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>[231] 156</sup>

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić* case, the Chamber stressed that:

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.<sup>[232] 157</sup>

The Appeals Chamber held that the requisite degree of control by the Yugoslavian “authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”.<sup>[233] 158</sup> In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal’s mandate is directed to

<sup>[230] 155</sup> *Military and Paramilitary Activities in and against Nicaragua* (see footnote [12] 36 above), p. 51, para. 86.

<sup>[231] 156</sup> *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

<sup>[232] 157</sup> *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

<sup>[233] 158</sup> ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.<sup>[234] 159</sup> In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.<sup>[235] 160</sup>

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion.<sup>[236] 161</sup> The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.<sup>[237] 162</sup> Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.<sup>[238] 163</sup> On the other hand, where there was evidence that the corporation was exercising public powers,<sup>[239] 164</sup> or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,<sup>[240] 165</sup> the conduct in question has been attributed to the State.<sup>[241] 166</sup>

<sup>[234] 159</sup> See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

<sup>[235] 160</sup> The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote [97] 101 above), p. 103. See also *Starrett Housing Corporation v. Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou v. Turkey, Merits*, *Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid.*, *Preliminary Objections*, *Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

<sup>[236] 161</sup> *Barcelona Traction* (see footnote [28] above), p. 39, paras. 56–58.

<sup>[237] 162</sup> For example, the Workers’ Councils considered in *Schering Corporation v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company v. The Islamic Republic of Iran*, *ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company v. The Government of Iran*, *ibid.*, vol. 17, p. 153 (1987).

<sup>[238] 163</sup> *SEDCO, Inc. v. National Iranian Oil Company*, *ibid.*, vol. 15, p. 23 (1987). See also *International Technical Products Corporation v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

<sup>[239] 164</sup> *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote [209] 149 above).

<sup>[240] 165</sup> *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. *Ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc. v. The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

<sup>[241] 166</sup> See *Hertzberg et al. v. Finland* (Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X v. Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human*

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### IRAN-UNITED STATES CLAIMS TRIBUNAL

#### *Yeager v. Islamic Republic of Iran*

In its 1987 award in the *Yeager v. Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(a) provisionally adopted by the International Law Commission<sup>[242]</sup> 97 as a provision codifying a principle “generally accepted in international law”:

*Rights*, 1971, vol. 14 (1973), p. 199; and *Young, James and Webster v. the United Kingdom*, *Eur. Court H.R., Series A, No. 44* (1981).

<sup>[242]</sup> 97 This provision was amended and incorporated in article 8 finally adopted by the International Law Commission in 2001. It provided that: “The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) It is established that such person or group of persons was in fact acting on behalf of that State; . . .”.

... attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State. See ILC draft article 8(a).<sup>[243]</sup> 98

[A/62/62, para. 62]

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*Prosecutor v. Ivica Rajić* (“*Stupni Do*”)

In its 1996 review of the indictment pursuant to rule 61 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia in the *Rajić* case, the Trial Chamber considered the issue of when a group of persons may be regarded as the agent of a State with reference to draft article 8 adopted by the International Law Commission on first reading:<sup>[244]</sup> 99

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 draft articles on State responsibility. Draft article 8 provides in relevant part that the conduct of a person or a group of persons shall ‘be considered as an act of the State under international law’ if ‘it is established that such person or group of persons was in fact acting on behalf of that State’. 1980 II (Part Two) *Yearbook International Law Commission* at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was

whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 109.)

It found that the United States had financed, organized, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not,

<sup>[243]</sup> 98 Iran-United States Claims Tribunal, *Yeager v. Islamic Republic of Iran*, award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987–IV), p. 103, para. 42.

<sup>[244]</sup> 99 This provision was amended and incorporated in articles 8 and 9 finally adopted by the International Law Commission in 2001. Draft article 8 adopted on first reading read as follows:

Article 8

Attribution to the State of the conduct of persons  
acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) It is established that such person or group of persons was in fact acting on behalf of that State

(b) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. (*Yearbook . . . 1996*, vol. II (Part Two), para. 65.)



however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasize that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the 'general control by the [United States] over a force with a high degree of dependency on [the United States]' was not sufficient to establish liability for violations by that force. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 115.) In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.<sup>245]</sup> 100

[A/62/62, para. 63]

*Prosecutor v. Duško Tadić*

In its 1997 judgement in the *Tadić* case (which was later reviewed on appeal<sup>[246]</sup> 101), the Trial Chamber invoked the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* with regard to the attribution to States of acts performed by private individuals. In this context, it reproduced a passage of the separate opinion of Judge Ago in that case, which referred to draft article 8 adopted by the International Law Commission on first reading:

It seems clear to the Trial Chamber that the officers of non-Bosnian Serb extraction were sent as "volunteers" on temporary, if not indefinite, assignment to the VRS [the Bosnian Serb Army]. In that sense, they may well be considered agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). In the *Nicaragua* case, by contrast, no evidence was led to the effect that United States personnel operated with or commanded troops of the *contras* on Nicaraguan territory. As Judge Ago, formerly the Special Rapporteur to the International Law Commission on State Responsibility, explained in the course of his Separate Opinion in the *Nicaragua* case:

[T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft [i.e., article 8 read together with article 11]. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases

<sup>[245]</sup> 100 International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Ivica Rajić ("Stupni Do")*, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95-12-R61, 13 September 1996, paras. 24–25.

<sup>[246]</sup> 101 For the relevant part of the judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see [pp. 76-77] below.

where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptance of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.<sup>[247] 102</sup>

[A/62/62, para. 64]

*Prosecutor v. Duško Tadić*

In its 1999 judgement in the *Tadić* case, reviewing the judgement of the Trial Chamber referred to above, the Appeals Chamber explained the reasons why it considered that the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* with regard to the attribution to States of acts performed by private individuals “would not seem to be consonant with the logic of the law of State responsibility”. In this context, it referred to draft article 8 as adopted by the International Law Commission on first reading, which it considered to reflect the “principles of international law concerning the attribution to States of acts performed by private individuals”. Its elaboration on this matter, which was later referred to by the International Law Commission in its commentary to article 8 finally adopted in 2001, read as follows:

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in article 8 of the draft on State responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the International Law Commission Drafting Committee. Under this article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

<sup>[247] 102</sup> International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Duško Tadić, Opinion and Judgement*, Case No. IT-94-1-T, 7 May 1997, para. 601, reproducing paragraph 16 of the Separate Opinion of Judge Ago in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see I.C.J. Reports 1986, pp. 188–189).

...

121. . . . Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organized group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organized group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State*. To a large extent the wise words used by the United States-Mexico General Claims Commission in the *Youmans* case with regard to State responsibility for acts of State military officials should hold true for acts of organized groups over which a State exercises overall control.

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organized groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organized groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.<sup>248]</sup> 103

[A/62/62, para. 65]

#### WORLD TRADE ORGANIZATION APPELLATE BODY

##### *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*

In its 2005 report on *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, the Appellate Body noted that the Republic of Korea, in support of its argument that the panel's interpretation of article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures—that a private body may be entrusted to take an action even when the action never occurs—was

<sup>[248]</sup> 103 International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999 (footnotes omitted).

legally and logically incorrect, had referred to article 8 of the articles finally adopted by the International Law Commission in 2001. According to the Appellate Body,

Korea explains that article 8, which is entitled “Conduct directed or controlled by a State”, provides that private conduct shall be attributed to a State only “if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” Korea finds “striking” the similarity of wording in the reference to “carrying out” a conduct and submits that the requirement of conduct taking place in order to establish State responsibility is a matter of “common sense”.<sup>[249] 104</sup>

In interpreting the said provision of the agreement, the Appellate Body subsequently referred, in a footnote, to the commentary by the International Law Commission to article 8:

... the conduct of private bodies is presumptively not attributable to the State. The commentaries to the International Law Commission draft articles explain that “[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority”. (Commentaries to the International Law Commission draft articles . . . , article 8, commentary, para. (6) . . . ).<sup>[250] 105</sup>

And later, the Appellate Body added, in another footnote:

The commentaries to the International Law Commission draft articles similarly state that “it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it”. (Commentaries to the International Law Commission draft articles . . . , article 8, commentary, para. (5), . . . (footnote omitted).<sup>[251] 106</sup>

[A/62/62, para. 66]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE UNCITRAL RULES)

*Encana Corporation v. Republic of Ecuador*

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp. v. Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, quoted, inter alia, article 8 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 57] above.

[A/62/62, para. 67]

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<sup>[249] 104</sup> WTO Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R, 27 June 2005, para. 69 (footnotes omitted).

<sup>[250] 105</sup> *Ibid.*, para. 112, footnote 179.

<sup>[251] 106</sup> *Ibid.*, para. 116, footnote 188.

## INTERNATIONAL COURT OF JUSTICE

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*

In its 2007 judgment in the *Genocide* case, the Court, in examining the question whether the massacres committed at Srebrenica were attributable, in whole or in part, to the Respondent, after having found that these acts had not been perpetrated by organs of the latter, went on to examine whether the same acts had been committed under the direction or control of the Respondent. The Court noted, with reference to article 8 finally adopted by the International Law Commission in 2001, that

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility . . .

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* . . . In that Judgment the Court, . . . after having rejected the argument that the *contras* were to be equated with organs of the United States because they were 'completely dependent' on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.' (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test [described in paragraphs 390–395 of the judgment] to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has . . . questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY [Federal Republic of Yugoslavia] under the law of State responsibility, was that of the ‘overall control’ exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS [the army of the Republika Srpska], without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the ‘overall control’ test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the ‘overall control’ test as equally applicable under the law of State responsibility for the purpose of determining—as the Court is required to do in the present case—when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons—neither State organs nor to be equated with

such organs—only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the ‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.<sup>252]</sup> 6

The Court concluded thereafter that the relevant acts could not be attributed to the Respondent on this basis.<sup>253]</sup> 7

[A/62/62/Add.1, para. 3]

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<sup>[252]</sup> 6 [International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43], paras. 398–407.

<sup>[253]</sup> 7 The Court did consider it necessary to decide whether articles 5, 6, 9 and 11 finally adopted by the International Law Commission in 2001 expressed present customary international law, it being clear that none of them applied in the case (*ibid.*), para. 414).

**Article 9. Conduct carried out in the absence or default of the official authorities**

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.**

*Commentary*

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase “in circumstances such as to call for”. Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:<sup>[254] 167</sup> in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus the position of the Revolutionary Guards or “Komitehs” immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.<sup>[255] 168</sup>

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by arti-

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<sup>[254] 167</sup> This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

<sup>[255] 168</sup> *Yeager* (see footnote [97] 101 above), p. 104, para. 43.



cle 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.<sup>[256] 169</sup>

(5) In respect of the second condition, the phrase “in the absence or default of” is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase “absence or default” seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term “call for” conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.<sup>[257] 170</sup>

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### IRAN-UNITED STATES CLAIMS TRIBUNAL

#### *Yeager v. Islamic Republic of Iran*

In its 1987 award in the *Yeager v. Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(b) provisionally adopted by the International Law Commission:<sup>[258] 107</sup>

<sup>[256]</sup> 169 See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Timoco* case (footnote [75] 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a government in exile might be covered by article 9, depending on the circumstances.

<sup>[257]</sup> 170 See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

<sup>[258]</sup> 107 This provision was amended and incorporated in article 9 finally adopted by the International Law Commission in 2001. Article 8(b) provisionally adopted read as follows: “The conduct of a person or group of persons shall also be considered as an act of the State under international law if: . . . (b) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.” (*Yearbook . . . 1980*, vol. II (Part Two), para. 34.)

. . . attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. . . . An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. *See* International Law Commission draft article 8(b).<sup>[259] 108</sup>

[A/62/62, para. 68]

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<sup>[259] 108</sup> Iran-United States Claims Tribunal, *Yeager v. Islamic Republic of Iran*, award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 103, para. 42.

*Article 10. Conduct of an insurrectional or other movement*

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.

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

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

*Commentary*

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions<sup>[260]</sup> 171 and arbitral tribunals<sup>[261]</sup> 172 have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a “well-established principle of international law”, that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.<sup>[262]</sup> 173 Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (a) the conduct of organs of an insurrectional movement could not be attributed as

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<sup>[260]</sup> 171 See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

<sup>[261]</sup> 172 See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote [20] 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

<sup>[262]</sup> 173 UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote [257] 170 above), p. 524.

such to the State or entail its international responsibility; and (b) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international obligation, and then only if such conduct constituted a breach of an international obligation of that State.<sup>[263] 174</sup>

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term “conduct” only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. 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. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) Paragraph 1 of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase “which becomes the new Government” is used to describe

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<sup>[263] 174</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . (see footnote [76] 88 above), p. 108; and *Supplement to Volume III* . . . (see footnote [102] 104 above), pp. 3 and 20.

this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) Paragraph 2 of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression “or in a territory under its administration” is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (art. 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”.

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include “insurrectional or other” movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a Government, despite the potential importance of such

distinctions in other contexts.<sup>[264] 175</sup> From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.<sup>[265] 176</sup> Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

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.<sup>[266] 177</sup>

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries “unless the revolution was successful”, since such acts then involve the responsibility of the State “under the well-recognized rules of public law”.<sup>[267] 178</sup> In the *Pinson* case, the French-Mexican Claims Commission ruled that:

if the injuries originated, for example, in requisitions or forced contributions demanded . . . by revolutionaries before their final success, or if they were caused . . . by offences committed by successful revolutionary forces, the responsibility of the State . . . cannot be denied.<sup>[268] 179</sup>

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: “A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure*

<sup>[264] 175</sup> See H. Atlam, “National liberation movements and international responsibility”, *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

<sup>[265] 176</sup> As ICJ said, “[p]hysical 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 (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16, at p. 54, para. 118.

<sup>[266] 177</sup> UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

<sup>[267] 177</sup> *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

<sup>[268] 179</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

or its officials or troops.”<sup>[269]</sup> 180 Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case the Supreme Court of Namibia went even further in accepting responsibility for “anything done” by the predecessor administration of South Africa.<sup>[270]</sup> 181

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement’s conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term “however related to that of the movement concerned” is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### IRAN-UNITED STATES CLAIMS TRIBUNAL

#### *Short v. Islamic Republic of Iran*

In its 1987 award in the *Short v. Islamic Republic of Iran* case, the Tribunal, in examining whether the facts invoked by the claimant as having caused his departure from the Iranian territory were attributable to the Islamic Republic of Iran, referred to draft articles 14 and 15 provisionally adopted by the International Law Commission,<sup>[271]</sup> 109 which it

<sup>[269]</sup> 180 League of Nations, Conference for the Codification of International Law, *Bases of Discussion* . . . (see footnote [76] 88 above), pp. 108 and 116; and Basis of discussion No. 22 (c), *ibid.*, p. 118; reproduced in *Yearbook* . . . 1956, vol. II, p. 223, at p. 224, document A/CN.4/96.

<sup>[270]</sup> 181 Guided in particular by a constitutional provision, the Supreme Court of Namibia held that “the new government inherits responsibility for the acts committed by the previous organs of the State”, *Minister of Defence, Namibia v. Mwandighi*, *South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd. v. Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

<sup>[271]</sup> 109 Those provisions were amended and incorporated in article 10 finally adopted by the ILC in 2001. The text of draft articles 14 and 15 provisionally adopted on first reading was as follows:

considered a confirmation of principles still valid contained in the previous case law on attribution:

The Tribunal notes . . . that it is not infrequent that foreigners have had to leave a country *en masse* by reason of dramatic events that occur within the country. It was often the case during this century, even since 1945. A number of international awards have been issued in cases when foreigners have suffered damages as a consequence of such events. . . . Although these awards are rather dated, the principles that they have followed in the matter of State international responsibility are still valid and have recently been confirmed by the United Nations International Law Commission in its draft articles on the law of State responsibility. See draft articles on state responsibility, adopted by the International Law Commission on first reading, notably articles 11, 14 and 15. *1975 Yearbook International Law Commission*, vol. 2, at 59, United Nations doc. A/CN.4/SER.A/1975/Add.1 (1975).<sup>[272] 110</sup>

The Tribunal further noted, with reference to the commentary to the above mentioned draft article 15, that:

Where a revolution leads to the establishment of a new government the State is held responsible for the acts of the overthrown government insofar as the latter maintained control of the situation. The successor government is also held responsible for the acts imputable to the revolutionary movement which established it, even if those acts occurred prior to its establishment, as a consequence of the continuity existing between the new organization of the State and the organization of the revolu-

#### Article 14

##### Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.
2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.
3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

#### Article 15

##### Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.
2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State. (*Yearbook . . . 1980*, vol. II (Part Two), para. 34.)

<sup>[272] 110</sup> Iran-United States Claims Tribunal, *Short v. Islamic Republic of Iran*, award No. 312-11135-3, 14 July 1987, Iran-United States Claims Tribunal Reports, vol. 16 (1987-III), p. 83, para. 28. Draft article 11, to which the passage also refers, was deleted by the International Law Commission on second reading (see [footnote] [99] 26 above).



tionary movement. See draft articles on State responsibility, *supra*, commentary on article 15, paras. (3) and (4), 1975 *Yearbook International Law Commission*, vol. 2 at 100.<sup>[273]</sup> 111

[A/62/62, para. 69]

*Rankin v. Islamic Republic of Iran*

In its 1987 award in the *Rankin v. Islamic Republic of Iran* case, the Tribunal, in determining the applicable law with regard to the claim, considered that draft article 15 provisionally adopted by the International Law Commission reflected “an accepted principle of international law”. It observed that

. . . several problems remain even though it is an accepted principle of international law that acts of an insurrectional or revolutionary movement which becomes the new government of a State are attributable to the State. See article 15, draft articles on State responsibility . . . First, when property losses are suffered by an alien during a revolution, there may be a question whether the damage resulted from violence which was directed at the alien or his property per se or was merely incidental or collateral damage resulting from the presence of the alien’s property or property interests during the period of revolutionary unrest. Second, even with respect to some property losses that are not the result of incidental or collateral damage—for example, losses resulting from acts directed by revolutionaries against the alien because of his nationality—a further question of attribution remains, that is, whether those acts are acts of the revolutionary movement itself, rather than acts of unorganized mobs or of individuals that are not attributable to the movement.<sup>[274]</sup> 112

In the same award, the Tribunal further referred to draft article 15 in determining that a number of statements made by the leaders of the Revolution, which it found to be inconsistent with the requirements of the Treaty of Amity between Iran and the United States and customary international law to accord protection and security to foreigners and their property, were “clearly . . . attributable to the Revolutionary Movement and thereby to the Iranian State”.<sup>[275]</sup> 113

[A/62/62, para. 70]

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<sup>[273]</sup> 111 *Ibid.*, p. 84, para. 33.

<sup>[274]</sup> 112 Iran-United States Claims Tribunal, *Rankin v. Islamic Republic of Iran*, award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 143–144, para. 25.

<sup>[275]</sup> 113 *Ibid.*, p. 147, para. 30.

**Article 11. Conduct acknowledged and adopted by a State as its own**

**Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.**

*Commentary*

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction . . . and eventually continued by her, even after the acquisition of territorial sovereignty over the island".<sup>[276] 182</sup> In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.<sup>[277] 183</sup> However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

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<sup>[276]</sup> 182 *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

<sup>[277]</sup> 183 The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.<sup>[278] 184</sup>

In that case it made no difference whether the effect of the “approval” of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.<sup>[279] 185</sup> In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.<sup>[280] 186</sup> This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann’s capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann’s captors as a “volunteer group”.<sup>[281] 187</sup> Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann’s captors were “in fact acting on the instructions of, or under the direction or control of” Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase “acknowledges and adopts the conduct in question as its own” is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.<sup>[282] 188</sup> ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as “approval”, “endorsement”, “the seal of official governmental

<sup>[278] 184</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote [39] 59 above), p. 35, para. 74.

<sup>[279] 185</sup> *Ibid.*, pp. 31–33, paras. 63–68.

<sup>[280] 186</sup> *Lighthouses* arbitration (see footnote [276] 182 above), pp. 197–198.

<sup>[281] 187</sup> *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

<sup>[282] 188</sup> The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

approval” and “the decision to perpetuate [the situation]”.<sup>[283] 189</sup> These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to “approval” or “endorsement” of conduct in some general sense but do not involve any assumption of responsibility. The language of “adoption”, on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State’s intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term “acknowledges and adopts” in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase “if and to the extent that” is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word “and”. The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

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<sup>[283] 189</sup> See footnote [39] 59 above.

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

## INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*Prosecutor v. Dragan Nikolić (“Sušica Camp”)*

In its 2002 decision on the defence motion challenging the exercise of jurisdiction by the Tribunal in the *Nikolić (“Sušica Camp”)* case, Trial Chamber II needed to consider the situation in which “some unknown individuals [had] arrested the Accused in the territory of the FRY [Federal Republic of Yugoslavia] and [had] brought him across the border with Bosnia and Herzegovina and into the custody of SFOR”.<sup>[284]</sup> 114 In this respect, the Trial Chamber used the principles laid down in the articles finally adopted by the International Law Commission in 2001, and in particular article 11 and the commentary thereto, “as *general* legal guidance . . . insofar as they may be helpful for determining the issue at hand”.<sup>[285]</sup> 115

60. In determining the question as to whether the illegal conduct of the individuals can somehow be attributed to SFOR, the Trial Chamber refers to the principles laid down in the draft articles of the International Law Commission on the issue of ‘responsibilities of States for internationally wrongful acts’. These draft articles were adopted by the International Law Commission at its fifty-third session in 2001. The Trial Chamber is however aware of the fact that any use of this source should be made with caution. The draft articles were prepared by the International Law Commission and are still subject to debate amongst States. They do not have the status of treaty law and are not binding on States. Furthermore, as can be deduced from its title, the draft articles are primarily directed at the responsibilities of States and not at those of international organizations or entities. As draft article 57 emphasizes,

[t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

61. In the present context, the focus should first be on the possible attribution of the acts of the unknown individuals to SFOR. As indicated in article I of Annex 1-A to the Dayton Agreement, IFOR (SFOR) is a multinational military force. It ‘may be composed of ground, air and maritime units from NATO and non-NATO nations’ and ‘will operate under the authority and subject to the direction and political control of the North Atlantic Council.’ For the purposes of deciding upon the motions pending in the present case, the Chamber does not deem it necessary to determine the exact legal status of SFOR under international law. Purely as *general* legal guidance, it will use the principles laid down in the draft articles [on State responsibility] insofar as they may be helpful for determining the issue at hand.

62. Article 11 of the draft articles [on State responsibility] relates to ‘Conduct acknowledged and adopted by a State as its own’ and states the following:

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

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<sup>[284]</sup> 114 ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić (“Sušica Camp”)*, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, Case No. IT-94-2-PT, para. 57.

<sup>[285]</sup> 115 *Ibid.*, para. 61.

63. The report of the International Law Commission on the work of its fifty-third session sheds light on the meaning of the article:

Article 11 ( . . . ) provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own. ( . . . ), article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes ‘nevertheless’ that conduct is to be considered as an act of State ‘if and to the extent that the State acknowledges and adopts the conduct in question as its own’.

Furthermore, in this report a distinction is drawn between concepts such as ‘acknowledgement’ and ‘adoption’ from concepts such as ‘support’ or ‘endorsement’. The International Law Commission argues that

[a]s a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to ‘approval’ or ‘endorsement’ of conduct in some general sense but do not involve any assumption of responsibility. The language of ‘adoption’, on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct.”<sup>[286] 116</sup>

The Trial Chamber observed that both parties in the case had used the same and similar criteria of “acknowledgement”, “adoption”, “recognition”, “approval” and “ratification”, as used by the ILC.<sup>[287] 117</sup> After having examined the facts of the case, it concluded that SFOR and the Prosecution had become the “mere beneficiary” of the fortuitous rendition of the accused to Bosnia, which did not amount to an “adoption” or “acknowledgement” of the illegal conduct “as their own”.<sup>[288] 118</sup>

[A/62/62, para. 71]

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<sup>[286]</sup> <sup>116</sup> *Ibid.*, paras. 60–63 (footnotes omitted).

<sup>[287]</sup> <sup>117</sup> *Ibid.*, para. 64.

<sup>[288]</sup> <sup>118</sup> *Ibid.*, paras. 66–67.