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.[195] [92]

(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.[196] [93] 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.[197] [94]

(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

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[195] [92] 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 transsubstantive 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. Dipla, *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.

[196] [93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[197] [94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

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.[198] [95] 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.[199] [96] 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.[200] [97] 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.[201] [98] 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.[202] [99]

(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 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

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[198] [95] See *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above).

[199] [96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[200] [97] The point was emphasized, in the context of federal States, in *LaGrand* (footnote [150] 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[201] [98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[202] [99] See article 7 and commentary.

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*[203] [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".[204] [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 documents 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

[203] [100] See article 55 and commentary.

[204] [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).

to do so, and the central authorities [do] not have the legal or factual means available to enforce the International Tribunal's request".[205] [25] 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.[206] [26]

[A/62/62, para. 19]

World Trade Organization panel

United States—Certain Country of Origin Labelling (COOL) Requirements

The panel in *United States—Certain Country of Origin Labelling (COOL) Requirements* observed that the "relevant provisions" of the State responsibility articles are consistent with the notion that acts or omissions attributable to a WTO member are "in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".[207] [33]

[A/68/72, para. 30]

European Court of Human Rights

Kotov v. *Russia*

In *Kotov* v. *Russia*, the European Court of Human Rights referred to the commentary to Chapter II in describing the law relevant to the attribution of international responsibility to States.[208] [34]

[A/68/72, para. 31]

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[205] [25] ICTY, Appeals Chamber, *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.

[206] [26] *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). 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
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> 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.

[207] [33] WTO, Panel Reports, WT/DS384/R and WT/DS386/R, 18 November 2011, para. 7.16, footnote 41.

[208] [34] See footnote [16] 14 above, para. 30 (citing paragraph (6) of the commentary to Chapter II).

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal noted

> [t]he ILC Articles on State Responsibility are in point. … Chapter II, 'Attribution of Conduct to a State,' in its introductory commentary, observes that, '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'.[209] 39

[A/71/80, para. 35]

International arbitral tribunal (under the ICSID Convention) and *Ad Hoc* Committee (under the ICSID Convention)

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the arbitral tribunal "accept[ed] that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute".[210] 40 The *ad hoc* committee subsequently constituted to decide upon an application to annul the award in the case, noted that "[i]nternational law contains rules on attribution which the ILC codified and developed in Chapter II of its Articles on State Responsibility (Articles 4–11)".[211] 41

[A/71/80, para. 36]

European Court of Human Rights

Tagayeva and Others v. *Russia*

In *Tagayeva and Others* v. *Russia*, the European Court of Human Rights took note of the State responsibility articles, in particular of the principle stated in paragraph 3 of the commentary to chapter II, when indicating that "the conduct of private persons is not as such attributable to the State". As such, "human rights violations committed by private persons are outside of the Court's competence *ratione personae*".[212] 42

[A/71/80, para. 37]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* cited the commentary to Chapter II of the State responsibility when stating that

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[209] 39 See footnote [19] 7 above, para. 1466.

[210] 40 ICSID, Case No. ARB/11/28, Award, 10 March 2014, para. 281. (See also footnote [128] 16 above.)

[211] 41 See footnote [115] 25 above, para. 184.

[212] 42 ECHR, First Section, Application No. 26562, Decision, 9 June 2015, para. 581.

"ANR [the Polish Agricultural Property Agency] does not meet the criteria usually applied to determine whether an entity is a *de facto* State organ".[213] [26]

[A/74/83, p. 9]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, noted that it

does not have to decide whether CVG Bauxilum's conduct is attributable to Respondent under the ILC Draft Articles and whether a breach of contract could give rise to Respondent's liability under international law in light of CVG Bauxilum's State-granted monopoly over the supply of bauxite in Venezuela.[214] [27]

[A/74/83, p. 9]

Masdar Solar & Wind Cooperatief U.A. v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* characterized resolution 56/83 of 12 December 2001, containing the State responsibility articles, as "as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties".[215] [28]

[A/74/83, p. 9]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* observed that

the ILC Articles are the relevant rules on attribution that are widely considered to reflect international law. They concern the responsibility of States for their internationally wrongful acts, given the existence of a primary rule establishing an obligation. These principles of attribution do not operate to attach responsibility for 'non-wrongful acts' for which the State is assumed to have knowledge.[216] [29]

The tribunal also noted that

the rules of attribution under international law as codified in the ILC Articles do not operate to define the content of primary obligations, the breach of which gives rise to responsibility. Rather, the

[213] [26] PCA, Case No. 2015–13, Award, 27 June 2016, para. 210 (original emphasis).

[214] [27] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 536.

[215] [28] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 167.

[216] [29] ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 779 and 804.

rules concern the responsibility of States for their internationally wrongful acts. It follows that the rules of attribution cannot be applied to create primary obligations for a State under a contract.[217] [30]

[A/74/83, p. 9]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal "determine[d] the issues of attribution by reference to Articles 4, 5, 8 and 11 of the ILC's Articles on State Responsibility, being declaratory of customary international law, as argued by the Parties".[218] [31]

[A/74/83, p. 10]

[217] [30] *Ibid*., para. 856.

[218] [31] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.49 (see also para. 9.90).

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".[219] [102] There have been many statements of the principle since then.[220] [103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[221] [104] 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".[222] [105]

(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

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[219] [102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[220] [103] See, *e.g.*, *Claims of Italian Nationals* (footnote [35] 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).

[221] [104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion … (footnote [147] 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.

[222] [105] Reproduced in *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

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.[223] [106]

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.[224] [107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[225] [108] 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.[226] [109]

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[223] [106] See *Salvador Commercial Company* (footnote [220] 103 above). See also *Chattin* case, UNRIAA, 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).

[224] [107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (footnote [50] 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[225] [108] As to legislative acts, see, *e.g.*, *German Settlers in Poland* (footnote [86] 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote [134] 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote [28] 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 [30] 36 above); and *ELSI* (footnote [144] 85 above). As to judicial acts, see, *e.g.*, *"Lotus"* (footnote [135] 76 above); *Jurisdiction of the Courts of Danzig* (footnote [141] 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 [142] 83 above), at p. 65.

[226] [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".[227] [110] 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.[228] [111] 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,[229] [112] and it might in certain circumstances amount to an internationally wrongful act.[230] [113]

(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.[231] [114]

(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

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[227] [110] 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.

[228] [111] See article 3 and commentary.

[229] [112] 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.

[230] [113] 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).

[231] [114] 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 [223] 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* (footnote [144] 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.[232] [115]

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.[233] [116]

(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.[234] [117] 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".[235] [118] 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.[236] [119]

(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 enter into international agreements on its own account,[237] [120] the other party may well have agreed to limit itself to

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[232] [115] 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).

[233] [116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 90; *Supplement to Vol. III …* (footnote [221] 104 above), pp. 3 and 18.

[234] [117] 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 [232] 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 [197] 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).

[235] [118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[236] [119] *LaGrand, Provisional Measures* (footnote [150] 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 495, para. 81.

[237] [120] See, *e.g.*, articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

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.[238] [121] 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.[239] [122] 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[240] [123] 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 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.[241] [124] The latter action was, and the former was not, held attributable to the

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[238] [121] See, *e.g.*, article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[239] [122] 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.

[240] [123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[241] [124] *Mallén* (footnote [234] 117 above), at p. 175.

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".[242] [125] 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.[243] [126] 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[244] [27] and the commentary thereto.[245] [28] The Tribunal found, with regard to the taking of property, that 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 Dec-

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[242] [125] 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.

[243] [126] See paragraph (7) of the commentary to article 7.

[244] [27] 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.)

[245] [28] IUSCT, Award No. 196–302–3, 24 October 1985, Iran-United States Claims Tribunal Reports, vol. 9 (1985-II), p. 238, footnote 35.

laration of the Government of Algeria of 19 January 1981 (also known as the "General Declaration"),[246] [29] 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.[247] [30]

[A/62/62, para. 21]

International arbitral tribunal (under the ICSID Convention)

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

In its 1984 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 25] 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 with draft article 1,[248] [31] the text of draft article 5 adopted by the International Law Commission on first reading.[249] [32]

[A/62/62, para. 23]

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[246] [29] 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".

[247] [30] IUSCT, Award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 100–101, para. 33. (See also footnote [204] 101 above.)

[248] [31] See footnote [54] 10 and accompanying text above.)

[249] [32] ICTY, Trial Chamber II, *Decision on the Objection of the Republic of Croatia to the Issuance of Supoenae 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 [244] 27 above).

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.[250] [33] 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.[251] [34]

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.[252] [35]

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 the Statute itself, judges or a trial chamber could not address binding orders to State officials.[253] [36]

[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[254] [37] was "of a customary character" and constituted "a well-established rule of international law":

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[250] [33] See footnote [52] 8 above.

[251] [34] ICTY, Appeals Chamber, *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.

[252] [35] *Ibid*., para. 41.

[253] [36] *Ibid*., paras. 42–43.

[254] [37] 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:

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 … [255] 38

[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 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.[256] 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".[257] 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,[258] 41 which it considered "even clearer" in that regard.

[A/62/62, para. 26]

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.)

[255] 38 See footnote [50] 56 above, para. 62.

[256] 39 ICTY, Appeals Chamber, Case No. IT-94–1-A, 15 July 1999, para. 109 (footnotes omitted).

[257] 40 *Ibid*., para. 109, footnote 129.

[258] 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.)

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.[259] [42]

[A/62/62, para. 27]

Ad hoc arbitral tribunal (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 …)[260] [43]

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

[A/62/62, para. 28]

[259] [42] WTO, Panel Report, WT/DS163/R, 1 May 2000, para. 6.5, footnote 683.

[260] [43] MERCOSUR, *Ad Hoc* Tribunal, 9 January 2002, p. 39 (unofficial English translation).

Ad Hoc Committee (under the ICSID Convention)

Compañia 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 26 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."[261] [44]

[A/62/62, para. 29]

International arbitral tribunal (under 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.[262] [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",[263] [46] considered that its view was "in line with

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[261] [44] ICSID, *Ad Hoc* Committee, 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).

[262] [45] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 67, footnote 12, reproduced in *International Law Reports*, vol. 125, p. 130.

[263] [46] NAFTA (ICSID Additional Facility), 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" main-

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".[264] [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 65 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 federal parliament power to compel the component unit to abide by the State's international obligations. (para. (9) [*ibid.*]).[265] [48]

[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.[266] [49]

[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 par-

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tained "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".

[264] [47] *Ibid.*, p. 270, para. 166.

[265] [48] *Ibid.*, p. 270, para. 166, footnote 161.

[266] [49] ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original).

ticular with the principle according to which "[a] State is internationally responsible for the acts of its organs".[267] [50] 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".[268] [51]

[A/62/62, para. 33]

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].[269] [52]

[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.[270] [53]

[A/62/62, para. 35]

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[267] [50] Decision, 2 July 2003, para. 144, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 100.

[268] [51] *Ibid*., para. 145 (footnotes omitted), p. 101.

[269] [52] ICSID, Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 108 (footnote omitted).

[270] [53] ICSID, 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.

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":

> 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.[271] [54]

[A/62/62, para. 36]

International arbitral tribunal

Eureko B.V. v. *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,[272] [55] and later referred to the commentary thereto.[273] [56]

[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

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[271] [54] WTO, Panel Report, WT/DS285/R, 10 November 2004, para. 6.128 (footnotes omitted).

[272] [55] See footnote [55] 11 above, paras. 127–128.

[273] [56] *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).

article 4 finally adopted by the International Law Commission in 2001, which it considered to lay down a "well-established rule":

> 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.[274] [57]

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.[275] [58]

[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.[276] [59]

[A/62/62, para. 39]

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[274] [57] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 69.

[275] [58] *Ibid*., para. 82.

[276] [59] ICSID, 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.[277] [60] 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.[278] [61]

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.[279] [62]

[A/62/62, para. 40]

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[277] [60] 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.

[278] [61] WTO, Panel Report, WT/DS315/R, 16 June 2006, paras. 4.706–4.708.

[279] [62] *Ibid.*, para. 7.552 and footnote 932. This aspect of the panel report was not reversed on appeals: see WTO, Appellate Body, *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".[280] [63] 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.[281] [64]

[A/62/62, para. 41]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER 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.[282] [65]

[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 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

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[280] [63] ICSID, Case No. ARB/01/12, Award, 14 July 2006, para. 46.

[281] [64] *Ibid*., para. 50.

[282] [65] NAFTA, 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).

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 … . [283] 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))".[284] 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"[285] 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 144–146] 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.[286] 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:

[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.[287] 11

[A/65/76, para. 16]

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[283] 3 [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 385.

[284] 4 *Ibid.*, para. 388.

[285] 5 *Ibid.*, para. 395.

[286] 10 WTO, Panel Report, WT/DS332/R, 12 June 2007, para. 7.305, footnote 1480.

[287] 11 WTO, Appellate Body, Case No. AB-2009–2, Report of the Appellate Body, 18 August 2009, para. 183 and footnote 466.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[288] [36] The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[289] [37]

[A/68/72, para. 32]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

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

The *ad hoc* committee constituted to hear the annulment proceeding in the case of *Helnan International Hotels A/S* v. *Arab Republic of Egypt* referred to article 4 of the State responsibility articles in finding that: "the decision of a Government Minister, taken at the end of an administrative process … is one for which the State is undoubtedly responsible at international law, in the event that it breaches the international obligations of the State".[290] [38]

[A/68/72, para. 33]

[INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[291] [56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when

> the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8).[292] [57]

[See A/68/72, footnote 35 and para. 45]]

Alpha Projektholding GmbH v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the

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[288] [36] ICSID, Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 274 (quoting articles 4, 5 and 11).

[289] [37] *Ibid*., paras. 274 and 280.

[290] [38] See footnote [163] 28 above, para. 51, footnote 47.

[291] [[56] See footnote [105] 20 above, para. 172.]

[292] [[57] *Ibid*.]

ILC Articles".[293] [39] The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[294] [40]

[A/68/72, para. 34]

[World Trade Organization Appellate Body

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[295] [64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[296] [65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[297] [66]

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[298] [67]

[See A/68/72, paras. 50–51]]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in the *Sergei Paushok et al.* v. *The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[299] [41] While noting that the State responsibility articles "do not contain a definition

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[293] [39] ICSID, Case No. ARB/07/16, Award, 8 November 2010, para. 401.

[294] [40] *Ibid*., para. 402.

[295] [[64] See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, 1963, art. 31(3)(*c*)).]

[296] [[65] *Ibid*., para. 308.]

[297] [[66] *Ibid*., para. 309.]

[298] [[67] *Ibid*., para. 308; see below the text accompanying footnote [2156] 203 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid*., para. 314.]

[299] [41] Award on jurisdiction and liability, 28 April 2011, paras. 576 and 577.

of what constitutes an organ of the State",[300] [42] the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article's reference to "State organ".[301] [43]

The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[302] [44]

[A/68/72, paras. 35 and 36]

[*White Industries Australia Limited* v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[303] [87]

[See A/68/72, footnote 35 and para. 67]]

Permanent Court of Arbitration

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to the State responsibility articles and recalled that, "as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs … ".[304] [45]

[A/68/72, para. 37]

International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[305] [46] Upon consideration of article 4, Slovak law and the relevant factual circumstances, the tribunal determined that certain entities and individuals were State organs, "responsible for the actions they have performed in their official capacity in accordance with Article 4 of the ILC Articles",[306] [47] while others were not.[307] [48]

[A/68/72, para. 38]

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[300] [42] *Ibid*., para. 581.

[301] [43] *Ibid*., para. 582.

[302] [44] *Ibid*., para. 580.

[303] [[87] Final Award, 30 November 2011, para. 8.1.2.]

[304] [45] PCA, Case No. 2009–23, First Interim Award on Interim Measures, 25 January 2012, para. [2.10.2].

[305] [46] Final Award, 23 April 2012, paras. 150–151.

[306] [47] *Ibid*., para. 152.

[307] [48] *Ibid*., paras. 155 and 163.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Ulysseas, Inc. v. *The Republic of Ecuador*

The arbitral tribunal constituted to hear the *Ulysseas, Inc.* v. *The Republic of Ecuador* case relied upon article 4 in determining that certain entities were not organs of the Ecuadorian State, notwithstanding that they were "part of the Ecuadorian public sector and [were] subject to a system of controls by the State in view of the public interests involved in their activity … ".[308] 49

[A/68/72, para. 39]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. *The Republic of Ecuador*

The arbitral tribunal in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador* noted that, "[u]nder international law, a State can be found to have discriminated either by law, regulation or decree. Article 4.1 of the Articles on Responsibility of States for Internationally Wrongful Acts … is controlling".[309] 50

[A/68/72, para. 40]

[*Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise*

In its 2012 award, the arbitral tribunal constituted to hear the *Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise* case referred to article 4 in its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[310] 75

The tribunal also stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles".[311] 77

[See A/68/72, footnote 35 and para. 60]]

INTER-AMERICAN COURT OF HUMAN RIGHTS

Castillo González et al. v. *Venezuela*

In its judgment in *Castillo González et al.* v. *Venezuela, the Inter-American Court of Human Rights* indicated that articles 2 and 4 constituted part of "the basic principle of the law on international State responsibility".[312] 51

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[308] 49 PCA, Final Award, 12 June 2012, paras. 135 and 126.

[309] 50 ICSID, Case No. ARB/06/11, Award, 5 October 2012, para. 559.

[310] [75 ICSID, Case No. ARB/08/11, Award, 25 October 2012, para. 246.]

[311] [77 *Ibid*., para. 163. For additional discussion regarding the tribunal's treatment of the University and the question of attribution, see below under article 5.]

[312] 51 See footnote [108] 51 (quoting articles 2 and 4 of the State responsibility articles).

The Court also referred to article 4 in finding that "it is for the Court to determine whether or not the actions of a State organ, such as those in charge of the investigations, constitute a wrongful international act … ".[313] [52]

[A/68/72, paras. 41–42]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

The arbitral tribunal constituted to hear the *Electrabel S.A.* v. *The Republic of Hungary* case determined that "[t]here is no question that the acts of the Hungarian Parliament are attributable to the Hungarian State, in accordance with Article 4 of the ILC Articles … ".[314] [53]

[A/68/72, para. 43]

[*Teinver S.A., et al.* v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[315] [99] Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[316] [100]

[See A/68/72, footnote 35 and para. 73]]

Vannessa Ventures Ltd. v. *The Bolivarian Republic of Venezuela*

In its January 2013 award, the arbitral tribunal in *Vannessa Ventures Ltd.* v. *The Bolivarian Republic of Venezuela* cited the commentary to article 4 in support of the assertion that "[i]t is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt".[317] [54]

[A/68/72, para. 44]

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[313] [52] *Ibid*., para. 160, footnote 94 (citing article 4.1 of the State responsibility articles) (internal footnote omitted).

[314] [53] ICSID, Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.89. For an extended account of the tribunal's consideration of the State responsibility articles and the question of attribution under international law, see below p. 150.

[315] [[99] ICSID, Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 274.]

[316] [[100] *Ibid*., para. 275.]

[317] [54] ICSID (Additional Facility), Case No. ARB/(AF)/04/6, Award, 16 January 2013, para. 209, note 209 (citing para. (6) of the commentary to article 4).

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Chevron Corporation and Texaco Petroleum Corporation v. *The Republic of Ecuador*

In *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, the arbitral tribunal confirmed and restated its Third Order on Interim Measures,[318] [44] providing that

> as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as expressed in Chapter II of Part One [of the State responsibility articles] … If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission's Articles on State Responsibility.[319] [45]

[A/71/80, para. 38]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* found

> that as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made).[320] [46]

[A/71/80, para. 39]

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[321] [47]

[A/71/80, para. 40]

TECO Guatemala Holdings LLC v. *Republic of Guatemala*

In *TECO Guatemala Holdings LLC* v. *Republic of Guatemala*, the arbitral tribunal acknowledged, citing the text of article 4, that "[t]he conduct of a state organ such as the CNEE [National Commission of Electric Energy] is indeed attributable to the State".[322] [48]

[A/71/80, para. 41]

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[318] [44] PCA, Case No. 2009–23, Third Order on Interim Measures, 28 January 2011, paras. 2–3.

[319] [45] PCA, Case No. 2009–23, Fourth Interim Award on Interim Measures, 7 February 2013, paras. 55 and 77.

[320] [46] ICSID, Case No. ARB/11/23, Award, 8 April 2013, para. 347.

[321] [47] See footnote 17 5 above, para. 173, footnote 298.

[322] [48] ICSID, Case No. ARB/10/23, Award, 19 December 2013, para. 479.

European Court of Human Rights

Jones and Others v. *the United Kingdom*

In *Jones and Others* v. *the United Kingdom*, the European Court of Human Rights referred to article 4 as relevant international law[323] [49] and stated that the State responsibility articles "for their part, provide for attribution of acts to a State, on the basis that they were carried out … by organs of the State as defined in Article 4".[324] [50]

[A/71/80, para. 42]

International arbitral tribunal (under the ICSID Convention)

Renee Rose Levy de Levi v. *Republic of Peru*

The arbitral tribunal in *Renee Rose Levy de Levi* v. *Republic of Peru* considered it "important to reproduce Article 4(1) of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts".[325] [51]

[A/71/80, para. 43]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the arbitral tribunal quoted article 4, paragraph 2, which establishes that an "organ includes any person or entity which has that status in accordance with the internal law of the State".[326] [52] The tribunal accepted the submission of the respondent "that there is no 'quasi-state' organ for the purposes of Art. 4".[327] [53]

[A/71/80, para. 44]

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal stated that the respondent's argument that the acts of a State organ were not in breach of the Energy Charter Treaty because it was acting only in a commercial capacity "runs up … against the ILC Articles on State Responsibility". With reference to the text of article 4, the arbitral tribunal further explained that "[t]he commentary to this article specifies that '[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*"".[328] [54]

[A/71/80, para. 45]

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[323] [49] ECHR, Fourth Section, Application Nos. 34356/06 and 40528/06, Judgment, 14 January 2014, para. 107.

[324] [50] *Ibid*., para. 207.

[325] [51] ICSID, Case No. ARB/10/17, Award, 26 February 2014, para. 157.

[326] [52] See footnote [210] 40 and [128] 16 above, para. 285 (quoting article 4).

[327] [53] *Ibid*., para. 288.

[328] [54] See footnote [19] 7 above, para. 1479 (quoting para. (6) of the commentary to article 4).

African Court on Human and Peoples' Rights

Lohé Issa Konaté v. *Burkina Faso*

The African Court on Human and Peoples' Rights in *Lohé Issa Konaté* v. *Burkina Faso* relied on article 4 as support for the finding that "the conduct of the Burkinabé courts fall[s] squarely on the Respondent State".[329] [55]

[A/71/80, para. 46]

European Court of Human Rights

Čikanović v. *Croatia*

In *Čikanović* v. *Croatia*, the European Court of Human Rights listed article 4 as relevant international law.[330] [56] In stating that "[m]unicipalities are public-law entities which exercise public authority and whose acts or failures to act, notwithstanding the extent of their autonomy *vis-à-vis* the central organs, can engage the responsibility of the State under the Convention", the Court referred to the State responsibility articles, in particular article 4, as reflecting customary international law.[331] [57]

[A/71/80, para. 47]

International arbitral tribunal (under the ICSID Convention)

Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. *Romania*

The arbitral tribunal in *Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation* v. *Romania* determined that "AVAS' [Authority for State Assets Recovery] acts under the Contract are attributable to the State under international law based on Article 4" of the State responsibility articles.[332] [58]

[A/71/80, para. 48]

Permanent Court of Arbitration (under UNCITRAL Rules)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. *Government of Canada*

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that

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[329] [55] African Court on Human and Peoples' Rights, Application No. 004/2013, Judgment, 5 December 2014, para. 170, footnote 36 (quoting article 4).

[330] [56] ECHR, First Section, Application No. 27630/07, Judgment, 5 February 2015, para. 37.

[331] [57] *Ibid*., para. 53.

[332] [58] ICSID, Case No. ARB/10/13, Award, 2 March 2015, para. 323.

the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties.[333] [59]

The tribunal observed that "[a] body that exercises impartial judgment, however, can well be an organ of the state; Article 4 of the ILC Articles, just quoted, specifically includes those exercising 'judicial' functions".[334] [60] The tribunal further quoted the commentary to article 4 to explain that "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".[335] [61]

[A/71/80, para. 49]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. *The Argentine Republic*

The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic* cited article 4 of the State responsibility articles in concluding that the relevant wrongful acts, as "actions done by state organs, were clearly attributable to the Argentine State".[336] [62]

[A/71/80, para. 50]

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal stated that "[i]t is clear under Article 4 of the ILC Articles and the Commentary thereon that organs of State include, for the purposes of attribution, the President, Ministers, provincial government, legislature, Central Bank, defence forces and the police, *inter alia*, as argued by the Claimants", and that "[r]esponsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (*i.e.* it includes *ultra vires* acts performed in an official capacity). Only acts performed in a purely private capacity would not be attributable".[337] [63] The tribunal also noted that "indirect liability for the acts of others can also occur under Article 4—for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it".[338] [64]

[A/71/80, para. 51]

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[333] [59] PCA, Case No. 2009–04, Award on Jurisdiction and Liability, 17 March 2015, paras. 306–307.

[334] [60] *Ibid*., para. 308.

[335] [61] *Ibid*., para. 315 (quoting para. (11) of the commentary to article 4).

[336] [62] See footnote [63] 16 above, para. 25, footnote 14.

[337] [63] See footnote [114] 24 above, paras. 443–444.

[338] [64] *Ibid*., para. 445.

Inter-American Court of Human Rights

Case of Ruano Torres et. Al. v. *El Salvador*

In the *Case of Ruano Torres et. Al.* v. *El Salvador*, the Inter-American Court of Human Rights referred to the State responsibility articles in support of its assertion that

> en el diseño institucional de El Salvador, la Unidad de Defensoría Pública se inserta dentro de la Procuraduría General de la República y puede ser asimilada a un órgano del Estado, por lo que su conducta debe ser considerada como un acto del Estado en el sentido que le otorga el proyecto de artículos sobre responsabilidad del Estado por hechos internacionalmente ilícitos realizados por auxiliares de la administración de justicia.[339] [65]

[A/71/80, para. 52]

International arbitral tribunal (under the ICSID Convention)

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

The arbitral tribunal in *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman* referenced article 4 as support for the assertion that the attribution of the conduct of State organs to the State is "broadly supported in international law".[340] [66]

[A/71/80, para. 53]

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal referred to article 4 in finding that there was "no question that the acts of the Hungarian Parliament [were] attributable to the Hungarian State".[341] [67]

[A/71/80, para. 54]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal, "[o]n the basis of all the materials available to it … concludes that CVG FMO [Ferrominera del Orinoco] is not an organ of the State for the purposes of ILC Article 4 of the ILC Articles".[342] [68]

[A/71/80, para. 55]

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal referred to article 4 of the State responsibility articles as a reflection of customary international law when finding

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[339] [65] IACHR, Judgment, 5 October 2015, para. 160.

[340] [66] ICSID, Case No. ARB/11/33, Award, 3 November 2015, para. 344, footnote 706.

[341] [67] See footnote [22] 10 above, para. 7.89.

[342] [68] ICSID, Case No. ARB/12/23, Award, 29 January 2016, paras. 412–413.

that the Burundian authorities, who were aware of the damage on Claimant's investment, had not only failed to take the minimum measures necessary to protect this investment, but had also directly contributed to the damage.[343] 33

[A/74/83, p. 10]

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal, agreeing with the respondent, "conclude[d] that CVG FMO is not an organ of the State for the purposes of ILC Article 4…".[344] 34

[A/74/83, p. 10]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal found "no basis for holding that the OPA [the Ontario Power Authority], Hydro One and the IESO [the Independent Electricity System Operator] are organs of Canada under Article 4 of the ILC Articles".[345] 35

[A/74/83, p. 10]

Caribbean Court of Justice

Maurice Tomlinson v. *The State of Belize and The State of Trinidad and Tobago*

In *Maurice Tomlinson* v. *The State of Belize and The State of Trinidad and Tobago*, the Caribbean Court of Justice observed that:

> Article 4 clarifies that an act of State may be constituted by conduct of the legislature, executive or the judiciary. Accordingly, in deciding whether a State has breached its international obligation, it is necessary to examine the relevant acts of the State, that is to say, the relevant State practice, to ascertain whether those acts are inconsistent with the international obligation of the State. In this regard, acts of the legislature constitute important indications of State practice and as such warrant close examination.[346] 36

[A/74/83, p. 10]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* concluded, referring to article 4 and the commentary thereto, that "[i]n light of its

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[343] 33 ICSID, Case No. ARB/13/7, Award, 12 January 2016, paras. 172 and 175.

[344] 34 ICSID, Case No. ARB/11/26, Award, 29 January 2016, para. 413.

[345] 35 PCA, Case No. 2012–17, Award, 24 March 2016, para. 345.

[346] 36 CCJ, Judgment, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.

autonomous management and financial status, ANR [Polish Agricultural Property Agency] is not a *de facto* organ of the Polish State".[347] [37]

[A/74/83, p. 11]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[348] [38]

[A/74/83, p. 11]

Flemingo Duty Free Shop Private Limited v. *The Republic of Poland*

The arbitral tribunal in *Flemingo Duty Free Shop Private Limited* v. *The Republic of Poland* observed that the conduct of the Governor of Mazovia, the Polish courts, and the Polish custom authorities as State organs "can trigger Poland's international responsibility under Article 4 of the ILC articles".[349] [39] Holding that the Polish Airports State Enterprise (PPL) is a *de facto* State organ,[350] [40] the tribunal explained that "Article 4(2) of the ILC Articles, however, only provides that entities, which in accordance with the internal law of a State are qualified as State-organs, are State organs for purpose of State responsibility; it does not *per se* exclude entities which are not qualified as State organs under domestic law".[351] [41]

[A/74/83, p. 11]

Arbitration Institute of the Stockholm Chamber of Commerce

Busta and Busta v. *The Czech Republic*

In *Busta and Busta* v. *The Czech Republic*, the arbitral tribunal cited article 4 of the State responsibility articles, noting that "it is undisputed between the Parties that a State's police authorities are organs of that State".[352] [42]

[A/74/83, p. 11]

International arbitral tribunal (under UNCITRAL Rules)

Eli Lilly and Company v. *The Government of Canada*

In *Eli Lilly and Company* v. *The Government of Canada*, the arbitral tribunal, following a reference to article 4 of the State responsibility articles in the claimant's arguments,[353] [43]

[347] [37] PCA, Case No. 2015–13, Award, 27 June 2016, para. 213 (original emphasis).

[348] [38] PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.

[349] [39] PCA, Award, IIC 883 (2016), 12 August 2016, para. 424.

[350] [40] *Ibid.*, para. 435.

[351] [41] *Ibid.*, para. 433.

[352] [42] SCC, Case No. V (2015/014), Final Award, 10 March 2017, para. 400.

[353] [43] ICSID (UNCITRAL), Case No. UNCT/14/2, Final Award, 16 March 2017, para. 175.

stated that "the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility".[354] 44

[A/74/83, p. 11]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic* observed that "the Parties agree that insofar as the conduct of Mr. Cirielli as the Undersecretary of Air Transportation is concerned, the applicable principles are contained in Article IV of the ILC Articles on State Responsibility"[355] 45 and concluded "that the only conduct of Mr. Cirielli that was attributable to Respondent was his conduct while he was in office as Undersecretary of Air Transportation".[356] 46

[A/74/83, p. 11]

ECONOMIC COMMUNITY OF WEST AFRICAN STATES COURT OF JUSTICE

Wing Commander Danladi A Kwasu v. *Republic of Nigeria*

In *Wing Commander Danladi A Kwasu* v. *Republic of Nigeria*, the Economic Community of West African States Court of Justice referred to article 4 of the State responsibility articles when stating that

> [i]nternational Law admits the duty of due diligence which enjoins States to take action to prevent violations of human rights of persons within its territory. This obligation cannot be derogated from nor even by any purported agreement or consent. All actions of institutions or officials of States are imputed to a State as its own conduct.[357] 47

[A/74/83, p. 12]

Benson Olua Okomba v. *Republic of Benin*

In *Benson Olua Okomba* v. *Republic of Benin*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte* v. *Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, and concluded that "it is well-established that the conduct of any organ of a state is regarded as act of that state".[358] 48

[A/74/83, p. 12]

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[354] 44 *Ibid*., para. 221.

[355] 45 ICSID, Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 702.

[356] 46 *Ibid*., para. 711.

[357] 47 ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/04/17, Judgment, 10 October 2017, p. 25.

[358] 48 ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, pp. 21–22, citing Judgment No. ECW/CCJ/JUD/11/14.

Dorothy Chioma Njemanze and Others v. *Federal Republic of Nigeria*

In *Dorothy Chioma Njemanze and Others* v. *Federal Republic of Nigeria*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte* v. *Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, noting that "[a]part from any other acts or omission alleged on the part of the State or its officials, failure to investigate such allegations [following formal complaints] itself constitutes a breach of the States duty under International law".[359] [49]

[A/74/83, p. 12]

International arbitral tribunal (under the ICSID Convention)

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal citing article 4 and the commentary thereto, found that "[p]rovided that the acts in question are performed in an official capacity, they are attributable to the State. There is no dispute that the acts of the Municipality in this case were performed in an official capacity … All of the actions of the Municipality at issue in this case are therefore attributable to the Respondent".[360] [50] Moreover, the arbitral tribunal noted that "the nature of the Regulator as a State organ as understood under Article 4 of the ILC Articles may be inferred from provisions of the Public Utilities Regulators Act".[361] [51]

[A/74/83, p. 12]

Masdar Solar & Wind Cooperatief U.A. v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[362] [52]

[A/74/83, p. 12]

Economic Community of West African States Court of Justice

Hembadoon Chia and Others v. *Federal Republic of Nigeria and Others*

In *Hembadoon Chia and Others* v. *Federal Republic of Nigeria and Others*, the Economic Community of West African States Court of Justice explained that "[a] state cannot take refuge on the notion that the act or omissions were not carried out by its agents in their official capacity or that the organ or official acted contrary to orders, or exceed its authority under internal law".[363] [53] Referring to its earlier decision in *Tidjane Konte* v.

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[359] [49] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/08/17, Judgment, 12 October 2017, pp. 39–40, citing Judgment No. ECW/CCJ/JUD/11/14.

[360] [50] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 800–801.

[361] [51] *Ibid*., para. 804.

[362] [52] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.

[363] [53] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/21/18, Judgment, 3 July 2018, p. 15, citing Judgment No. ECW/CCJ/JUD/11/14.

Republic of Ghana in which it had relied on article 4 of the State responsibility articles, Community Court of Justice concluded that "the Nigerian Police and its officers are agents of the 1st Defendant who carried out the alleged act in their official capacity. Therefore, the 1st Defendant being responsible for the acts of its agents is a proper party in this suit".[364] [54]

[A/74/83, p. 13]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* cited the text of article 4 of the State responsibility articles and the commentary thereto when observing that

[the] conduct of an organ of the State in an apparently official capacity may be attributable to the State, even if the organ exceeded its competence under internal law or in breach of the rules governing its operations. The corollary of this is that acts that an organ commits in its purely private capacity are not attributable to the State, even if it has used the means placed at its disposal by the State for the exercise of its function."[365] [55] The tribunal concluded that "[i]t follows from Article 4 of the ILC Articles that the actions of the Bankruptcy Judge and the Bankruptcy Council are, at first sight, attributable to the Respondent.[366] [56]

[A/74/83, p. 13]

Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. *Republic of Cyprus*

The arbitral tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others* v. *Republic of Cyprus* recited the text of article 4 and

agree[d] with Claimants that such organs [of Cyprus] include: the President of the Republic, the Attorney General and the Deputy Attorney General, the CBC, the CySEC, the Cypriot courts, the Minister of Finance and the Cypriot Parliament. Consequently, any and all acts committed by these organs are attributable to Respondent pursuant to ILC Article 4.[367] [57]

[A/74/83, p. 13]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* found that "by the acts of its judicial branch, attributable to the Respondent under Article 4 of the ILC Articles on State Responsibility, the Respondent violated its obligations under Article II(3)(*c*) of the Treaty, thereby committing international wrongs towards each of Chevron and TexPet".[368] [58]

[A/74/83, p. 13]

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[364] [54] *Ibid.*

[365] [55] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 801.

[366] [56] *Ibid.*, para. 803.

[367] [57] ICSID, Case No. ARB/13/27, Award, 26 July 2018, paras. 670–671.

[368] [58] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 8.8.

International arbitral tribunal (under the ICSID Convention)

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal stated that

> [a]rticle 4 of the ILC Articles on State Responsibility confirms that, under international law, the conduct of a State's executive branch shall be considered as an act of that State. Hence, the conduct of the Ministry of Petroleum, as with other Ministries and the Council of Ministers, is attributable to the Respondent.[369] 59

The tribunal further stated that

> [a]ccording to the ILC Commentary to Article 4, '[t]he 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.' Of course, a State may become subject to obligations entered into on its behalf by entities other that organs of the State, but this is governed by general principles of the law of agency (not attribution).[370] 60

The tribunal concluded that the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were not an organs of the respondent "within the meaning of Article 4 of the ILC Articles on State Responsibility".[371] 61

[A/74/83, p. 13]

General Court of the European Union

Ahmed Abdelaziz Ezz et al. v. *Council*

In *Ahmed Abdelaziz Ezz et al.* v. *Council*, the General Court of the European Union did not accept:

> [t]he applicants' argument that the Council's assessment does not comply with 'general international law'… . In that regard, it suffices to note that the applicants refer to the concept of 'organ of the State', as defined in the commentary of the United Nations International Law Commission on the 2001 Resolution on Responsibility of States for Internationally Wrongful Acts and in international arbitral decisions ruling on responsibility of States in the context of disputes between States and private companies. Thus, those references, for reasons similar to those set out in paragraph 268 above, are irrelevant in the present case.[372] 62

[A/74/83, p. 14]

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[369] 59 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.92.

[370] 60 *Ibid*., para. 9.93.

[371] 61 *Ibid*., para. 9.112.

[372] 62 EU, General Court, *Ahmed Abdelaziz Ezz et al.* v. *Council*, Case T 288/15, Judgment of 27 September 2018, para. 272.

World Trade Organization Panel

Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines

The panel established in *Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines* "consider[ed] that Article 4(1) of these Articles [on State responsibility] is an expression of customary international law".[373] [63]

[A/74/83, p. 14]

[Inter-American Court of Human Rights

Women Victims of Sexual Torture in Atenco v. *Mexico*

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco* v. *Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[374] [79]

[A/74/83, p. 17]]

[World Trade Organization Panel

United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia

In *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[375] [83]

[A/74/83, p. 17]]

International arbitral tribunal (under the ICSID Convention)

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provi-

[373] [63] WTO, Panel Report, WT/DS371/RW, 12 November 2018, paras. 7.636 and 7.771 (note 1654); see also WTO, Panel Report, *Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines*, WT/DS371/R, 15 November 2010, para. 7.120.

[374] [[79] IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment of 28 November 2018, para. 205 and footnote 303.]

[375] [[83] WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.]

sions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[376] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[377] 97

[A/74/83, p. 20]]

Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. *Republic of Latvia*

The arbitral tribunal in *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia* noted that "[i]t is common ground that under Article 4, the conduct of a State organ acting as such is attributable to the State".[378] 29 The tribunal added that "a person or entity may be characterized as an organ of the State as a matter of international law even if it does not possess that character under the State's internal law".[379] 30

[A/77/74, p. 9]

Iran-United States Claims Tribunal

Award No. 604-A15 (II:A)/A26 (IV)/B43-FT

In a partial award rendered in 2020, the Iran-United States Claims Tribunal noted that "[u]nder international law, as expressed in Article 4 of the ILC Articles, the conduct of a State's judiciary is attributable to the State, since the judiciary is a branch of the State".[380] 31

[A/77/74, p. 9]

International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal referred to article 4 and the commentary thereto and noted that it was uncontested that "any person or entity having the status of a State organ under Algerian law is a *de jure* organ of the State of Algeria" and that "article 4 (2) does not exclude the possibility of a person or entity that does not have that status of a State organ under Algerian law nevertheless being a *de facto* organ, or of the acts or omissions of such a *de facto* organ being

[376] [96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

[377] [97 *Ibid*., para. 146.]

[378] 29 ICSID, Case No. ARB/16/38, Award, 28 February 2020, para. 312.

[379] 30 *Ibid*., para. 313.

[380] 31 IUSCT, Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, Partial Award, 10 March 2020, para. 1141.

attributable to the State of Algeria under article 4".[381] [32] The tribunal stressed that articles 4 to 11 reflected customary international law on the subject of State responsibility.[382] [33]

[A/77/74, p. 10]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "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." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[383] [70]

[A/77/74, p. 14]]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

The "Enrica Lexie" Incident (Italy v. *India)*

The arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in *The "Enrica Lexie" Incident (Italy* v. *India)* referred to article 4, suggesting that "there exists a presumption under international law that a State is right about the characterization of the conduct of its official as being official in nature".[384] [34]

[A/77/74, p. 10]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited the text of article 4, noting that as a consequence of such rule

a [WTO] Member is responsible for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government. Thus, the responsibility of Members under international law applies irrespective of the branch of government at the origin of the action having international repercussions.[385] [35]

[A/77/74, p. 10]

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[381] [32] ICSID, Case No. ARB/17/1, Award, 29 April 2020, paras. 160–161.

[382] [33] *Ibid*., para. 155.

[383] [[70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

[384] [34] PCA, Case No. 2015–28, Award, 21 May 2020, para. 858.

[385] [35] WTO, Panel Report, WT/DS567/R, 16 June 2020, para. 7.50.

International arbitral tribunal (under the ICSID Convention)

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal cited the commentary to article 4, noting that, except in the case of umbrella clauses contained in investment treaties, "in order for the international responsibility of a State to be engaged in connection with the breach of an investment treaty, the State must have acted in the exercise of sovereign prerogatives, not as a party in a contractual relationship".[386] [36]

[A/77/74, p. 10]

Arbitration Institute of the Stockholm Chamber of Commerce

State Development Corporation "VEB.RF" v. *Ukraine*

The arbitral tribunal in *State Development Corporation "VEB.RF"* v. *Ukraine* referred to article 4 in ascertaining whether the claimant investor should be characterized as an organ of the Russian Federation.[387] [37] The tribunal cited the commentary to article 4, paragraph 2, according to which "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".[388] [38] The tribunal concluded "that the internal law of the Russian Federation may be relevant in the characterization of the Claimant as a matter of international law, but it will not be determinative of that characterization".[389] [39]

[A/77/74, p. 10]

International arbitral tribunal (under UNCITRAL Rules)

Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia, S.L. v. *Republic of Colombia*

In *Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia, S.L.* v. *Republic of Colombia*, the arbitral tribunal analysed whether the national authorities could be responsible for the debt for non-payment of electricity bills by certain governmental entities to the investor's local company. The tribunal referred to article 4, noting that, "while the Tribunal recognizes that the concept of State organ is broadly defined in article 4 …, the Tribunal reads this article simply as attributing the debts of regional public entities to the State".[390] [40] However, it rejected the idea that all debts from decentralized entities, including city halls and clinics, could be considered attributable to the State.[391] [41]

[A/77/74, p. 11]

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[386] [36] ICSID, Case No. ARB/17/16, Award, 11 January 2021, para. 259.

[387] [37] SCC, Case No. V2019/088, Partial Award on Preliminary Objections, 31 January 2021, para. 153.

[388] [38] *Ibid*., para. 154.

[389] [39] *Ibid*., para. 155.

[390] [40] ICSID (UNCITRAL), Case No. UNCT/18/1, Award, 12 March 2021, para. 423.

[391] [41] See, generally, *ibid*., paras. 421–423.

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[392] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[393] [43]

[A/77/74, p. 11]

International arbitral tribunal (under the ICSID Additional Facility Rules)

América Móvil S.A.B. de C.V. v. *Colombia*

In *América Móvil S.A.B. de C.V.* v. *Colombia*, the arbitral tribunal recalled the duty of international judges to respect domestic judicial decisions concerning issues of domestic law, but noted that, pursuant to article 4, "in some cases, actions of the judiciary, like those of other branches of Government, may also give rise to State responsibility".[394] [44]

[A/77/74, p. 11]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* recalled that "under international law, the State is treated as a unity".[395] [45] Furthermore, the tribunal pointed out that "the unity of the State in international law is the reason why all conduct of any State organ is attributable to the State under ILC Article 4 … Thus, the conduct of central and local State organs will be attributable to the State, as will be the conduct of legislative, judicial or executive organs".[396] [46]

Furthermore, citing the commentary to article 4, the tribunal noted that "it is irrelevant if the State organ's conduct is sovereign or commercial in nature. While the nature of the conduct can be determinative for a liability analysis, for purposes of attribution under ILC Article 4, a State organ's commercial conduct will also be deemed an act of the State".[397] [47] It considered that

> the fact that an entity is not specifically classified as a State organ under domestic law, while relevant, is not outcome-determinative for the attribution inquiry under ILC Article 4, which is carried out pursuant to international law. Equally, the fact that an entity may have separate legal personality is not *per se* an impediment to that entity qualifying as a State organ.[398] [48]

The tribunal considered a number of factors to determine "whether an entity can be deemed a State organ in international law":

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[392] [42] Final Award, 26 March 2021, para. 72.

[393] [43] *Ibid*., paras. 72 and 134–135.

[394] [44] See footnote [191] 24 above, para. 345.

[395] [45] See footnote [128] 16 above, para. 742.

[396] [46] *Ibid*., para. 743.

[397] [47] *Ibid*., para. 744.

[398] [48] *Ibid*., para. 745.

(i) whether the entity carries out an overwhelming governmental purpose; (ii) whether the entity relies on other State organs for making and implementing decisions; (iii) whether the entity is in a relationship of complete dependence on the State; and (iv) whether the entity carries out the role of an executive agency, merely implementing decisions taken by State organs.[399] 49

The tribunal concluded that "the conduct of State ministries and State agencies, and the conduct of subdivisions of State, such as provinces and municipalities, are always attributable to a State under ILC Article 4".[400] 50

[A/77/74, p. 11]

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to article 4 in the context of attribution, and found that "Colombia should have ensured that its various arms took the necessary steps to comply with [its] … obligation".[401] 51

[A/77/74, p. 12]

Pawlowski AG and Project Sever s.r.o. v. *Czech Republic*

In *Pawlowski AG and Project Sever s.r.o.* v. *Czech Republic*, the arbitral tribunal concluded that "[t]he Mayor of Benice represents an organ of the Czech Republic at a territorial level, and in accordance with Article 4 of the ILC Articles her conduct must be attributed to the Czech Republic".[402] 52

[A/77/74, p. 12]

Inter-American Court of Human Rights

Manuela et al. v. *El Salvador*

In *Manuela et al.* v. *El Salvador*, the Inter-American Court of Human Rights analysed whether the actions of public defenders could be attributable to the State. It referred to article 4, noting that

[t]he Public Defenders' Unit is part of the Office of the Attorney General and can be considered an organ of the State; therefore, its actions should be considered acts of the State in the sense accorded to this by the articles on Responsibility of States for Internationally Wrongful Acts drawn up by the International Law Commission.[403] 53

[A/77/74, p. 12

[399] 49 *Ibid*., para. 746.

[400] 50 *Ibid*., para. 749.

[401] 51 ICSID, Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 821.

[402] 52 ICSID, Case No. ARB/17/11, Award, 1 November 2021, para. 373.

[403] 53 IACHR, Series C, No. 441, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 November 2021, para. 123.

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.[404] [127]

(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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[404] [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.[405] 128

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.[406] 129

(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

[405] 128 League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 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.*

[406] 129 *Ibid.*, p. 92.

not enough that it permits 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 1987 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:[407] [66]

> 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.[408] [67]

[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 by the International Law Commission on first reading[409] [68] in support of its finding that

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[407] [66] 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), para. 34.)

[408] [67] IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 21 (1989), p. 79, para. 89, footnote 22.

[409] [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

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".[410] 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 65 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.[411] 70

In a footnote,[412] 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.[413] 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 for the attribution to States of acts performed by private individuals.[414] 73 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 indi-

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(Part Two), para. 65) was identical to that of article 7 provisionally adopted. (See footnote [407] 66 above.)

[410] 69 WTO, Panel Report, WT/DS103/R and WT/DS113/R, 17 May 1999, para. 7.77, footnote 427.

[411] 70 ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 109 (footnotes omitted).

[412] 71 *Ibid*., para. 109, footnote 130.

[413] 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.)

[414] 73 For the complete passage of the Appeals Chamber's judgement on that issue, see [p. 128] below.

viduals must answer for their actions, even when they act contrary to their directives",[415] [74] 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.[416] [75]

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.[417] [76]

[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.[418] [77]

[A/62/62, para. 46]

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 69] above.

[A/62/62, para. 47]

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[415] [74] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 122.

[416] [75] *Ibid*., para. 122, footnote 140.

[417] [76] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 123 (footnotes omitted).

[418] [77] ICSID, 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

Eureko B.V. v. *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.[419] [78]

[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.[420] [79]

[A/62/62, para. 49]

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".[421] [80]

[A/62/62, para. 50]

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[419] [78] See footnote [55] 11 above, 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).

[420] [79] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 70.

[421] [80] ICSID, 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 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

International arbitral tribunal (under 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.[422] [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]

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.[423] [12]

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]

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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.

[422] [81] London Court of International Arbitration, Case No. UN3481, Award, 3 February 2006, para. 154.

[423] [12] Paragraph (3) of the commentary to article 5.

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".[424] [13]

[A/65/76, para. 17]

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[425] [36] The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[426] [37]

[See A/68/72, footnote 55 and para. 32]

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[427] [56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8)".[428] [57] The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[429] [58]

Upon consideration of the relevant law and facts, the tribunal concluded that, under article 5, the entity exercised "elements of governmental authority".[430] [59] Nonetheless, the tribunal indicated that such a conclusion

> in itself clearly does not resolve the issue of attribution … . [F]or an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity. This approach has been followed in national as well as international case law.[431] [60]

In applying article 5 to the particular acts at issue, the tribunal "concentrated on the utilisation of governmental power", and assessed whether the entity in question

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[424] [13] ICSID, Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras. 92 and 93.

[425] [[36] See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

[426] [[37] *Ibid*., paras. 274 and 280.]

[427] [56] See footnote [105] 20 above, para. 172.

[428] [57] *Ibid*.

[429] [58] *Ibid*., paras. 175–177.

[430] [59] *Ibid*., para. 192.

[431] [60] *Ibid*., para. 193.

acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers … . It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.[432] 61

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[433] 62

[A/68/72, paras. 45–48]

[*Alpha Projektholding GmbH* v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the ILC Articles".[434] 39 The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[435] 40

[See A/68/72, footnote 55 and para. 34]]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that certain rules on the liability of sponsoring States in UNCLOS

are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[436] 63

[A/68/72, para. 49]

World Trade Organization Appellate Body

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of

[432] 61 *Ibid*., para. 202; see also paras. 255, 266 and 284.

[433] 62 *Ibid*., para. 198.

[434] [39 See footnote [293] 39, para. 401.]

[435] [40 *Ibid*., para. 402.]

[436] 63 See footnote [12] 10 above, para. 182.

attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[437] [64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[438] [65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[439] [66]

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[440] [67]

The Appellate Body also indicated that, "despite certain differences between the attribution rules", its interpretation of the term "public body" as found in the SCM Agreement "coincides with the essence of Article 5".[441] [68]

In the light of its determination that article 5 supported, rather than contradicted, its interpretation of the SCM Agreement, and "because the outcome of [its] analysis [did] … not turn on Article 5", the Appellate Body indicated that it was "not necessary … to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law".[442] [69]

[A/68/72, paras. 50–53]

International arbitral tribunal (under UNCITRAL Rules)

[*Sergei Paushok et al.* v. *The Government of Mongolia*

The arbitral tribunal in the *Sergei Paushok et al.* v. *The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[443] [41] While noting that the State responsibility articles "do not contain a definition of what constitutes an organ of the State",[444] [42] the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article's reference to "State organ".[445] [43]

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[437] [64] See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(*c*)).

[438] [65] *Ibid.*, para. 308.

[439] [66] *Ibid.*, para. 309.

[440] [67] *Ibid.*, para. 308; see below, p. 537, for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid.*, para. 314.

[441] [68] *Ibid.*, para. 310.

[442] [69] *Ibid.*, para. 311.

[443] [41 See footnote [299] 41, paras. 576 and 577.]

[444] [42 *Ibid.*, para. 581.]

[445] [43 *Ibid.*, para. 582.]

The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[446] [44]

[See A/68/72, footnote 55 and paras. 35–36]

[*White Industries Australia Limited* v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently … not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[447] [87]

[See A/68/72, footnote 55 and para. 67]]

European Court of Human Rights

Kotov v. *Russia*

In its judgment in *Kotov* v. *Russia*, the European Court of Human Rights referred to the commentary to article 5 as part of its elaboration of the law relevant to the attribution of international responsibility to States.[448] [70] The Court quoted excerpts of the commentary relevant to the determination of which entities, including "parastatal entities", were to be regarded as "governmental" for the purposes of attribution under international law.[449] [71]

[A/68/72, para. 54]

International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic* noted that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[450] [72] Upon consideration of articles 5 and 8, the tribunal determined that, on the basis of the evidence presented, the acts of certain non-State entities and individuals could not be said to have been "carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State".[451] [73]

[A/68/72, para. 55]

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[446] [44 *Ibid*., para. 580.]

[447] [87 See footnote [303] 87 above, para. 8.1.2.]

[448] 70 See footnote [16] 14 above, paras. 31–32 (quoting paras. (3) and (6) of the commentary to article 5).

[449] 71 *Ibid*.

[450] 72 See footnote [305] 46 above, paras. 150–151.

[451] 73 *Ibid*., paras. 156–159; the tribunal added that, "if it were established that a State organ had acted under the influence of [a non-state entity], such acts would be attributable to the State."; see also *ibid*., para. 163.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Ulysseas, Inc. v. *The Republic of Ecuador*

The arbitral tribunal in the *Ulysseas, Inc.* v. *The Republic of Ecuador* case determined that the conduct of certain entities, despite not constituting organs of the Ecuadorian State, "may nonetheless fall within the purview of Article 5 of the ILC Articles and [the relevant] BIT to the extent governmental authority has been delegated to it with the consequence that some of their acts can be attributed to the State, provided that they are 'acting in that capacity in the particular *instance*'."[452] [74]

[A/68/72, para. 56]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise v. *Ukraine*

In its award, the arbitral tribunal in *Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise* v. *Ukraine* relied upon article 5 in its analysis of whether a university's conduct was attributable to Ukraine.

The tribunal considered (1) whether the university was "empowered by the law of Ukraine to exercise elements of governmental authority", and (2) whether "the conduct of the University relates to the exercise of that governmental authority".[453] [75]

With regard to the second aspect of its analysis, the tribunal relied upon the commentary to article 5 in indicating that "the question that falls for determination is whether the University's conduct in entering into and terminating the [relevant contract] can be understood or characterised as a form of 'governmental activity', or as a form of 'commercial activity'".[454] [76]

The tribunal also referred to article 5 as part of its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[455] [77]

[A/68/72, paras. 57–60]

[*Teinver S.A., et al.* v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[456] [99] Nonetheless, the tribunal

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[452] [74] See footnote [308] 49 above, para. 135 (quoting article 5).

[453] [75] See footnote [310] 75 above, para. 164 (citing James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002), p. 100).

[454] [76] *Ibid*., para. 176.

[455] [77] *Ibid*., para. 246. The tribunal stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles".

[456] [99 See footnote [315] 99 above, para. 274.]

accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[457] 100

[See A/68/72, footnote 55 and para. 73]]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Luigiterzo Bosca v. *Lithuania*

The arbitral tribunal in *Luigiterzo Bosca* v. *Lithuania* concluded that "[t]he SPF [State Property Fund] is an entity empowered to exercise governmental authority, as described in Article 5" of the State responsibility articles. The question for the arbitral tribunal was thus "whether the SPF was acting in a sovereign capacity".[458] 70

[A/71/80, para. 56]

EUROPEAN COURT OF HUMAN RIGHTS

Jones and Others v. *the United Kingdom*

The European Court of Human Rights in *Jones and Others* v. *the United Kingdom* referred to article 5 as relevant international law,[459] 71 and noted that the acts of "persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles" could be attributed to the State.[460] 72

[A/71/80, para. 57]

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights referred to article 5 of the State responsibility articles as relevant international law.[461] 73

[A/71/80, para. 58]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. *Government of Canada*

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that "the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties".[462] 59

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[457] [100 *Ibid*., para. 275.]

[458] 70 See footnote [169] 26 above, para. 127 (misnumbered).

[459] 71 See footnote [323] 49 above, paras. 107–109.

[460] 72 *Ibid*., para. 207.

[461] 73 See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

[462] [59 See footnote [333] 59 above, para. 308]

The arbitral tribunal, relying on article 5, agreed with the investor's contention that even if the Joint Review Panel was not "an integral part of the government apparatus of Canada … it is empowered to exercise elements of Canada's governmental authority".[463] 74

[A/71/80, paras. 49 and 59]

International arbitral tribunal (under the ICSID Convention)

Dan Cake S.A. v. *Hungary*

The arbitral tribunal in *Dan Cake S.A.* v. *Hungary* considered that "it is not relevant to the question whether the *liquidator* is, pursuant to Article 5 of the ILC Draft Articles on State Responsibility, 'a person or entity … which is empowered by the law of [the] State to exercise elements of the governmental authority'".[464] 75

[A/71/80, para. 60]

Inter-American Court of Human Rights

Gonzales Lluy et al. v. *Ecuador*

In *Gonzales Lluy et al.* v. *Ecuador*, the Inter-American Court of Human Rights cited the case of *Ximenes Lopes* v. *Brazil*, noting that in that case the Court had

> indicated that the assumptions of State responsibility for violation of rights established in the Convention may include the conduct described in the Resolution of the International Law Commission, 'of a person or entity that, although not a State body, is authorized by the laws of the State to exercise powers entailing the authority of the State. Such conduct, by either a natural or legal person, must be deemed to be an act of the State, provided that the latter was acting in this capacity'.[465] 76

[A/71/80, para. 61]

International arbitral tribunal (under the ICSID Convention)

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal noted that article 5 "provides a useful guide as to the dividing line between sovereign and commercial acts".[466] 77

[A/71/80, para. 62]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* stated that as regards attribution of the conduct of Emlak to Turkey under

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[463] 74 *Ibid.*

[464] 75 ICSID, Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, para. 158 (quoting article 5).

[465] 76 IACHR, Judgment, 1 September 2015, note 205 (quoting *Case of Ximenes Lopes* v. *Brazil, Merits, Reparations and Costs*, Judgment, 4 July, 2006, para. 86).

[466] 77 See footnote [340] 66 above, para. 324.

article 5 "it must be established both that (1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and (2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority".[467] [78]

[A/71/80, para. 63]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal considered the question

whether CVG FMO [Ferrominera del Orinoco] was empowered by Venezuela to exercise elements of governmental authority, and was so acting in the case of the Supply Contract, and, specifically, the discriminatory supply of pellets, such that its actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles.[468] [79]

[A/71/80, para. 64]

[The arbitral tribunal in *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela* was "mindful of Note 3 of the commentary to Article 5" of the State responsibility articles when rejecting the applicant's submission that "[CVG FMO]'s actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles".[469] [65]

[A/74/83, p. 14]]

[*Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[470] [52]

[A/74/83, p. 12]]

Permanent Court of Arbitration (under UNCITRAL Rules)

[*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[471] [38]

[A/74/83, p. 11]]

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[467] [78] See footnotes [210] 40 and [128] 16 above, para. 292.

[468] [79] See footnote [342] 68 above, para. 414.

[469] [[65] ICSID, Case No. ARB/11/26, Award, 29 January 2016, paras. 414–415.]

[470] [[52] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

[471] [[38] PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.]

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal relied on article 5 of the State responsibility articles to find that "the OPA [Ontario Power Authority] was acting in the exercise of delegated governmental authority. Thus, the OPA's acts in ranking and evaluating the FIT Applications are attributable to Canada".[472] [66]

[A/74/83, p. 15]

[In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal referred to article 55 of the State responsibility articles when finding that "Article 1503(2) [of NAFTA] constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles".[473] [249]

[A/74/83, p. 42]]

Ad hoc committee (under the ICSID Convention)

Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. *République Démocratique du Congo*

In *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud* v. *République Démocratique du Congo*, the committee established to annul the award found that the arbitral tribunal did not exceed its powers because, as its mandate required, it had verified the criteria for attribution of conduct under article 5 of the State responsibility articles.[474] [67]

[A/74/83, p. 15]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* found that "the termination of the Lease Agreement was not attributable to Poland under ILC Article 5"[475] [68] after deciding that the Polish Agricultural Property Agency's termination of the Lease Agreement took place in a "purported exercise of contractual powers".

[A/74/83, p. 15]

Flemingo DutyFree Shop Private Limited v. *The Republic of Poland*

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal noted that

[t]he Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles.[476] [69]

[A/74/83, p. 15]

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[472] [66] PCA, Case No. 2012–17, Award, 24 March 2016, para. 371.

[473] [[249] PCA, Case No. 2012–17, Award, 24 March 2016, paras. 359, 362 and 365.]

[474] [67] ICSID, Case No. ARB/10/4, Decision on Annulment, 29 March 2016, para. 185.

[475] [68] PCA, Case No. 2015–13, Award, 27 June 2016, para. 251.

[476] [69] PCA, Award, IIC 883 (2016), 12 August 2016, para. 439.

International arbitral tribunal (under the ICSID Convention)

Garanti Koza LLP v. *Turkmenistan*

The arbitral tribunal in *Garanti Koza LLP* v. *Turkmenistan*, citing article 5 of the State responsibility articles,

> confirm[ed] that the acts of TAY [State Concern 'Turkmenavtoyollary'] in furtherance of the Contract were attributable to Turkmenistan. Road and bridge construction is in any event a core function of government. Any entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of State.[477] [70]

[A/74/83, p. 15]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal noted that "although PDVSA is a State-owned company with distinct legal personality, its conduct is attributable to [the] Respondent pursuant to Article 5 of the ILC Draft Articles" because "[b]oth in its alleged function as a '*caretaker*' and its capacity as supervisor and promoter of the nationalization of the plant, PDVSA was vested with governmental authority".[478] [71]

[A/74/83, p. 15]

Permanent Court of Arbitration (under UNCITRAL Rules)

WNC Factoring Limited v. *The Czech Republic*

In *WNC Factoring Limited* v. *The Czech Republic*, the arbitral tribunal stated that "[b]ased on the material available to the Tribunal, there are serious issues which arise in attributing the conduct of CEB [Czech Export Bank] and GAP [Export Guarantee and Insurance Corporation] to the Respondent under Article 5 of the ILC Articles".[479] [72]

[A/74/83, p. 16]

International arbitral tribunal (under the ICSID Convention)

Beijing Urban Construction Group Co. Ltd. v. *Yemen*

In *Beijing Urban Construction Group Co. Ltd.* v. *Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[480] [73]

[A/74/83, p. 16]

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[477] [70] ICSID, Case No. ARB/11/20, Award, 19 December 2016, para. 335.

[478] [71] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 457–458.

[479] [72] PCA, Case No. 2014–34, Award, 22 February 2017, para. 376.

[480] [73] ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.

UAB E Energija (Lithuania) v. *Republic of Latvia*

The arbitral tribunal in *UAB E Energija (Lithuania)* v. *Republic of Latvia* stated:

> Like Article 4, Article 5 of the ILC Articles merely codifies a well-established rule of international law. […] There are thus three aspects to the analysis: (i) the Regulator must have exercised elements of governmental authority; (ii) it must have been empowered by the Respondent's law to do so; and (iii) it was acting in that capacity in regulating tariffs and granting or revoking licences.[481] 74

The tribunal found that "even if Rēzeknes Siltumtīkli and Rēzeknes Enerģija had been empowered to exercise any element of governmental authority, they were not exercising such authority 'in the particular instance', as Article 5 requires".[482] 75

[A/74/83, p. 16]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* cited article 5 of the State responsibility articles and noted that "[t]he Croatian Fund is an entity empowered by Croatian law to exercise elements of governmental authority, as exemplified above, and there is no suggestion that the Fund acted other than in its professional capacity. The Croatian Fund may thus be considered an entity within the ambit of Article 5."[483] 76 The tribunal concluded that "the Claimants have not made out any wrongful conduct in violation of the BIT on the part of the Croatian Fund that is to be attributed to the Respondent. The principles of attribution, as codified in the ILC Articles, do not otherwise operate in respect of the Croatian Fund".[484] 77

[A/74/83, p. 16]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the arbitral tribunal relied on article 5 of the State responsibility to find that:

> [t]he Tribunal does not consider that the Claimant's case is separately advanced by Article 5 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company]. The Claimant has not established that EGPC or EGAS are 'empowered' by Egyptian law to exercise governmental authority … The Tribunal has not been shown any provision of Egyptian law 'specifically authorising' EGPC to conclude the SPA [Natural Gas Sale and Purchase Agreement] in the exercise of the Respondent's public authority.[485] 78

[A/74/83, p. 16]

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[481] 74 ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 806–807.

[482] 75 *Ibid*., para. 816.

[483] 76 ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 810–811.

[484] 77 *Ibid*., para. 816.

[485] 78 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.114.

Inter-American Court of Human Rights

Women Victims of Sexual Torture in Atenco v. *Mexico*

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco* v. *Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[486] [79]

[A/74/83, p. 17]

International arbitral tribunal (under the ICSID Convention)

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[487] [96]

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

> were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[488] [97]

[A/74/83, p. 20]]

[*Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan*

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan* concluded, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[489] [101]

[A/74/83, p. 20]]

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[486] [79] IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 205 and footnote 303.

[487] [[96] ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

[488] [[97] *Ibid*., para. 146.]

[489] [[101] ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[490] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[491] [43]

[A/77/74, p. 11]]

International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal cited the text of article 5 and the commentary thereto,[492] [54] and noted that "jurisprudence consistently indicates that article 5 … imposes two conditions that must both be fulfilled, namely: (i) under national law, the entity in question is authorized to exercise elements of governmental authority, and (ii) the act in question involves the exercise of governmental authority."[493] [55] The tribunal noted that "acts *jure gestionis* of public or private entities cannot be attributed to the State in principle under article 5, since the article concerns precisely the determination of whether the entity in question is exercising the functions, or elements, of governmental authority".[494] [56]

Furthermore, the tribunal noted that, despite the absence in the State responsibility articles of a definition of the term "elements of governmental authority", it took the view that "this involves establishing in each case, in the light of the circumstances and evidence of the effective exercise of elements of sovereign authority, what the situation is",[495] [57] and that the commentary "provides certain criteria that make it possible to identify the scope of governmental authority, such as (i) the content of the powers, (ii) the way they are conferred on an entity, (iii) the purposes for which they are to be exercised and (iv) the extent to which the entity is accountable to government for their exercise".[496] [58]

[A/77/74, p. 12]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State

[490] [42 Final Award, 26 March 2021, para. 72.]

[491] [43 *Ibid*., paras. 72 and 134–135.]

[492] [54] See footnote [381] 32 above, paras. 193 and 195–197.

[493] [55] *Ibid*., para. 194; see also paras. 196–197.

[494] [56] *Ibid*., para. 200.

[495] [57] *Ibid*., para. 201.

[496] [58] *Ibid*., para. 202.

responsibility "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." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[497] [70]

[A/77/74, p. 14]]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

In *Strabag SE* v. *Libya*, the arbitral tribunal analysed whether Libya had entered into a contract with the investor through the conduct of local authorities.[498] [59] The tribunal considered that to interpret "Libya" as only the Government of Libya would fail to take into account that, as noted in the commentary to article 5, "States may operate through 'parastatal entities, which exercise elements of governmental authority in place of State organs …]'. The Tribunal therefore believes that [the text of the treaty] does not mean only the Government of Libya, but may also include other Libyan bodies".[499] [60]

[A/77/74, p. 13]

Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to article 5, noting that "[t]he concept of 'governmental authority' is not defined in the ILC Articles. What, however, is required is that the law of the State authorizes an entity to exercise some aspects of that State's power, that is, public authority".[500] [61]

[A/77/74, p. 13]

International arbitral tribunal (under the ICSID Convention)

Interocean Oil Development Company and Interocean Oil Exploration Company v. *Federal Republic of Nigeria*

In *Interocean Oil Development Company and Interocean Oil Exploration Company* v. *Federal Republic of Nigeria*, the arbitral tribunal recalled that "[i]n principle, State-controlled entities are considered as separate from the State, unless they exercise elements of governmental authority within the meaning of ILC Article 5".[501] [62]

[A/77/74, p. 13]

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[497] [[70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

[498] [59] ICSID (Additional Facility), Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 168.

[499] [60] *Ibid*., para. 170.

[500] [61] See footnote [126] 14 above, para. 198.

[501] [62] ICSID, Case No. ARB/13/20, Award, 6 October 2020, para. 297.

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.[502] 130

(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.[503] 131

(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.

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[502] 130 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.

[503] 131 See also article 47 and commentary.

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.[504] [132]

(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."[505] [133] 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.[506] [134] 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, Switzerland 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

[504] [132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[505] [133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[506] [134] *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.

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.[507] [135]

(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.[508] [136] 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.[509] [137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

[International arbitral tribunal (under the ICSID Convention)

Swisslion DOO Skopje v. *The Former Yugoslav Republic of Macedonia*

In its award, the arbitral tribunal in *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia* referred to articles 1 and 6 of the State responsibility articles in support of the assertion that, "under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary".[510] [17]

[See A/68/72, footnote 78 and para. 19]]

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[507] [135] 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.

[508] [136] 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).

[509] [137] See, *e.g.*, article 89 of the Rome Statute of the International Criminal Court.

[510] [[17] See footnote [57] 17 above, para. 261, footnote 323.]

European Court of Human Rights

Catan and Others v. *Moldova and Russia*

In its 2012 judgment in the case of *Catan and Others* v. *Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[511] [79]

[A/68/72, para. 61]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

The arbitral tribunal in *Electrabel S.A.* v. *The Republic of Hungary* referred to article 6 in considering the legal effect of a decision of the European Commission. Relying upon article 6 and the commentary thereto, the tribunal determined that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the [relevant treaty], for the purpose of applying Article 6 of the ILC Articles in the present case".[512] [80]

[A/68/72, para. 62]

European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[513] [80] In establishing jurisdiction in respect of the Netherlands, the Court could not find that

> the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility).[514] [81]

[A/71/80, para. 65]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal stated that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet

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[511] [79] ECHR, Grand Chamber, Application Nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012, para. 74.

[512] [80] See footnote [314] 53 above, para. 6.74.

[513] [80] ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.

[514] [81] *Ibid.*, para. 151.

by analogy be so regarded as a Contracting Party to the ECT, for the purpose of applying Article 6 of the ILC Articles in the present case".[515] [82]

[A/71/80, para. 66]

European Court of Human Rights

Big Brother Watch and others v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles

would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17).[516] [80]

[A/74/83, p. 17]

Big Brother Watch and others v. *United Kingdom*

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 6 would be relevant in a case of interception of communications by foreign intelligence services "if the foreign intelligence services were placed at the disposal of the receiving State and were acting in exercise of elements of the governmental authority of that State".[517] [63]

[A/77/74, p. 13]

[International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "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

[515] [82] See footnote [22] 10 above, para. 6.74.

[516] [80] ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.

[517] [63] ECHR, Grand Chamber, Applications No. 58170/13, No. 62322/14 and No. 24960/15, Judgment, 25 May 2021, para. 495.

articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[518] [70]

[A/77/74, p. 14]]

[518] [[70] See footnote [381] above, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

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.[519] [138] 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,[520] [139] 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".[521] [140] 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."[522] [141] 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 their apparent authority".[523] [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

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[519] [138] See, *e.g.*, the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[520] [139] 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.

[521] [140] 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.

[522] [141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

[523] [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.

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".[524] [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.[525] [144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[526] [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".[527] [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.[528] [147]

(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:

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[524] [143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (footnote [221] 104 above), pp. 3 and 17.

[525] [144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* , document C.351(*c*)M.145(*c*).1930.V (footnote [147] 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[526] [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).

[527] [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.

[528] [147] *Caire* (footnote [242] 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans*, (footnote [234] 117 above); *Mallén, ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote [231] 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.

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.[529] [148]

(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".[530] [149]

(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.[531] [150] 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 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.[532] [151] Equally, article 7 is not concerned with the admissibility of claims arising from

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[529] [148] *Velásquez Rodríguez* (footnote [84] 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[530] [149] *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.

[531] [150] 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.

[532] [151] See *ELSI* (footnote [144] 85 above), especially at pp. 52, 62 and 74.

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.[533] [152]

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,[534] [82] 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.[535] [83]

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]

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[533] [152] See further article 44, subparagraph (*b*), and commentary.

[534] [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.)

[535] [83] See footnote [204] 101 above, p. 111, para. 65.

International arbitral tribunal (under the ICSID Convention)

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

In its 1984 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 25] 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,[536] [84] incidentally referred to draft article 10 adopted by the International Law Commission on first reading,[537] [85] 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.[538] [86]

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 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*) … [539] [87]

[A/62/62, para. 55]

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[536] [84] For the relevant passage of the Appeals Chamber's judgement, see p. 65 above.

[537] [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 [534] 82 above.)

[538] [86] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 121 (footnotes omitted).

[539] [87] *Ibid*., para. 123.

International arbitral tribunal (under 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 Guadalcazar 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".[540] [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.[541] [89]

[A/62/62, para. 57]

Human Rights Committee

Sarma v. *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 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".[542] [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.[543] [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]

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[540] [88] NAFTA (ICSID Additional Facility), Award, 30 August 2000, para. 73, reproduced in *ILR*, vol. 119, p. 634.

[541] [89] NAFTA (ICSID Additional Facility), 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.

[542] [90] CCPR/C/78/D/950/2000, 31 July 2003, para. 9.2.

[543] [91] *Ibid*., para. 9.2, footnote 13.

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,[544] [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 [Caire] case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516).[545] [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 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 it 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.[546] [94]

[A/62/62, para. 60]

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[544] [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.

[545] [93] ECHR, Grand Chamber, Application No. 48787/99, Judgment, 8 July 2004, para. 319.

[546] [94] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 81.

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".[547] [95] 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.[548] [96]

[A/62/62, para. 61]

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

In its award, the arbitral tribunal in *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* recalled that, during the jurisdictional phase, it had found that, according to article 7, "even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State".[549] [81] The tribunal had concluded that the Republic of Georgia could not avoid the legal effect of its conduct by arguing that it was void *ab initio* under Georgian law.[550] [82]

[A/68/72, para. 63]

Court of Justice of the European Union

European Commission v. Italian Republic

The opinion of Advocate General Kokott in *European Commission* v. *Italian Republic* referred to article 7 in support of the assertion that, "even if it should be found that the [State] officials committed a criminal offence this would not stop their actions being imputable to the State".[551] [83]

[A/68/72, para. 64]

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[547] [95] ICSID, Case No. ARB/01/12, Award, 14 July 2006, para. 46.

[548] [96] *Ibid*., para. 50.

[549] [81] See footnote [288] 36 above, para. 273 (quoting ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 190).

[550] [82] *Ibid*., para. 273 (quoting Decision on Jurisdiction, para. 191).

[551] [83] CJEU, Case C-334/08, Opinion of Advocate General Kokott, 15 April 2010, paras. 29 and 30, and footnote 11.

European Court of Human Rights

El-Masri v. *The Former Yugoslav Republic of Macedonia*

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[552] [84]

[A/68/72, para. 65]

[International arbitral tribunal (under the ICSID Convention)

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[553] [47]

[A/71/80, para. 40]]

European Court of Human Rights

Jones and Others v. *the United Kingdom*

In *Jones and Others* v. *the United Kingdom*, the European Court of Human Rights referred to article 7 as relevant international law.[554] [84]

[A/71/80, para. 67]

Husayn (Abu Zubaydah) v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[555] [85]

[A/71/80, para. 68]

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[556] [82]

[A/74/83, p. 17]

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[552] [84] ECHR, Grand Chamber, Application No. 39630/09, Judgment, 13 December 2012, para. 97.

[553] [[47] See footnote [17] 5 above, para. 173, footnote 298.]

[554] [84] See footnote [323] 49 above, para. 108.

[555] [85] ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.

[556] [82] ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.

World Trade Organization Panel

United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia

In *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[557] [83]

[A/74/83, p. 17]

International arbitral tribunal (under the ICSID Convention)

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

In *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia*, the arbitral tribunal, referring to article 7 of the State responsibility articles, noted that

> it is not open to the State to plead the patent irregularities of a bankruptcy proceeding overseen and authorised at critical junctures by its own court or the making of an extraordinary loan approved by a senior government minister, which might or might not have been unlawful under Croatian law, in opposition to the BIT claim. Put another way, if this investment was not made in conformity with the legislation of Croatia, on the evidence before this Tribunal, this is due to the acts of organs of the State.[558] [84]

Discussing the question of legitimate expectations to ownership over property by the claimant, the arbitral tribunal held:

> [I]n *Kardassopoulos* the contracting entities were an organ of the State or an entity empowered to exercise elements of the governmental authority, such that their conduct was considered an act of the State under ILC Article 7. The concession was also signed and "ratified" by a ministry of the respondent government. Further, some of the most senior government officials were involved in the negotiation of the agreements. There are no comparable findings on the attribution of conduct to the Respondent in the instant case. For example, the Tribunal finds that the contracting entity was not an entity within the meaning of ILC Article 7, and the Respondent is not a party to the Purchase Agreement or otherwise bound. Further, the actions of the Liquidator are not attributable to the Respondent.[559] [85]

[A/74/83, p. 17]

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[557] [83] WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.

[558] [84] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 384.

[559] [85] *Ibid*., para. 1009, discussing *Ioannis Kardassopoulos* v. *Georgia*, Decision on Jurisdiction (footnote [549] 81 above).

Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* discussed article 7, and the commentary thereto, when finding that a judge had acted in his official capacity.[560] [86]

[A/74/83, p. 18]

Inter-American Court of Human Rights

Villamizar Durán et al. v. *Colombia*

In *Villamizar Durán et al.* v. *Colombia*, the Inter-American Court of Human Rights observed that the practice and *opinio juris* of States, as well as the jurisprudence of international courts, had confirmed the existence of an exception to the "general rule" in Article 7, namely when the organ or person was not acting in an official capacity, but rather acting in the capacity of a private entity or person. The Court further referred to the indication in the commentary to the provision that "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".[561] [87]

[A/74/83, p. 18]

Women Victims of Sexual Torture in Atenco v. *Mexico*

In *Women Victims of Sexual Torture in Atenco* v. *Mexico*, the Inter-American Court of Human Rights cited Article 7 when discussing the defendant's argument that its agents had acted *ultra vires*.[562] [88]

[A/74/83, p. 18]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

The "Enrica Lexie" Incident (Italy v. *India)*

The arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in *The "Enrica Lexie" Incident (Italy* v. *India)* noted that even if State agents were acting "*ultra vires* or contrary to their instructions or orders …, this would not preclude them from enjoying immunity *ratione materiae* as long as they continued to act in the name of the State and in their 'official capacity'". The tribunal recalled

[560] [86] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 8.48.

[561] [87] IACHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 364 (Spanish), Judgment, 20 November 2018, para. 139.

[562] [88] IACHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 165 and footnote 237.

article 7, according to which "conduct by a State organ acting in its official capacity shall be attributable to the State 'even if it exceeds its authority or contravenes instructions'".[563] 64

[A/77/74, p. 14]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

The arbitral tribunal in *Strabag SE* v. *Libya* analysed an argument presented by the respondent State "to the effect that that if damage was inflicted by Libya's military forces, it resulted from unauthorized conduct by forces acting outside of their orders". The tribunal referred to the commentary to article 7, indicating that

[a]s a matter of international law, the International Law Commission affirms that the responsibility of a State under Article 91 of Geneva Protocol I—that the State 'shall be responsible for all acts [committed] by persons forming part of its armed forces'—'clearly covers acts committed contrary to orders or instructions'.[564] 65

[A/77/74, p. 14]

[International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "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." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[565] 70

[A/77/74, p. 14]]

[563] 64 See footnote [384] 34 above, para. 860.

[564] 65 See footnote [498] 59 above, para. 319.

[565] [70 See footnote [381] above, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

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.[566] [153] 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.[567] [154] 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 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 opera-

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[566] [153] 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.

[567] [154] See, *e.g.*, the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote [528] 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).

tives.[568] [155] 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.[569] [156]

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.[570] [157]

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".[571] [158] 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 issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitar-

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[568] [155] *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 51, para. 86.

[569] [156] *Ibid*., pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid*., p. 189, para. 17.

[570] [157] *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.

[571] [158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

ian law.[572] [159] 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.[573] [160]

(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.[574] [161] 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.[575] [162] 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.[576] [163] On the other hand, where there was evidence that the corporation was exercising public powers,[577] [164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[578] [165] the conduct in question has been attributed to the State.[579] [166]

(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

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[572] [159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[573] [160] 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* (footnote [204] 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).

[574] [161] *Barcelona Traction* (footnote [46] 52 above), p. 39, paras. 56–58.

[575] [162] 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).

[576] [163] *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).

[577] [164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (footnote [530] 149 above).

[578] [165] *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).

[579] [166] 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 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).

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[580] [97] as a provision codifying a principle "generally accepted in international law":

> … 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*).[581] [98]

[A/62/62, para. 62]

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[580] [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; … ".

[581] [98] See footnote [204] 101 above, p. 103, para. 42.

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:[582] 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, 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

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[582] 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.)

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."[583] [100]

[A/62/62, para. 63]

Prosecutor v. *Duško Tadić*

In its 1997 judgement in the *Tadić* case (which was later reviewed on appeal[584] [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 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 acceptation 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

[583] [100] ICTY, Trial Chamber, *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.

[584] [101] For the relevant part of the judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see [pp. 142–143] below.

authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.[585] [102]

[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.

…

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

[585] [102] ICTY, Trial Chamber, 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)* (footnote [30] 36 above).

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."[586] [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 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".[587] [104]

[586] [103] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999 (footnotes omitted).

[587] [104] WTO, Appellate Body Report, WT/DS296/AB/R, 27 June 2005, para. 69 (footnotes omitted).

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) …).[588] [105]

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).[589] [106]

[A/62/62, para. 66]

International arbitral tribunal (under 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 103] above.

[A/62/62, para. 67]

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*

[588] [105] *Ibid*., para. 112, footnote 179.

[589] [106] *Ibid*., para. 116, footnote 188.

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.[590] [6]

The Court concluded thereafter that the relevant acts could not be attributed to the Respondent on this basis.[591] [7]

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

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[590] [6] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], paras. 398–407.

[591] [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).

[International arbitral tribunal (under the ICSID Convention)

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[592] [56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8)".[593] [57] The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[594] [58]

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[595] [59]

[See A/68/72, footnote 85 and paras. 45–48]]

[World Trade Organization Appellate Body

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[596] [64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[597] [65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[598] [66]

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, inso-

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[592] [56 See footnote [105] 20 above, para. 172.]

[593] [57 *Ibid.*]

[594] [58 *Ibid.*, paras. 175–177.]

[595] [59 *Ibid.*, para. 198.]

[596] [64 See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(*c*)).]

[597] [65 *Ibid.*, para. 308.]

[598] [66 *Ibid.*, para. 309.]

far as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[599] 67

[See A/68/72, footnote 85 and paras. 50–51]]

[International arbitral tribunal (under the ICSID Convention)

Alpha Projektholding GmbH v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the ILC Articles".[600] 39

[See A/68/72, footnote 85 and para. 34]]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber referred to the commentary to article 8 in support of the assertion that, "while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law".[601] 86

[A/68/72, para. 66]

International arbitral tribunal (under UNCITRAL Rules)

White Industries Australia Limited v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[602] 87

The tribunal determined that, under article 8, the salient attribution issue "turn[ed] on whether the facts in the record support a conclusion of whether [the entity] was in

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[599] [67 *Ibid*., para. 308; see below the text accompanying footnote [2156] 203 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid*., para. 314.]

[600] [39 See footnote [293] 39, para. 401.]

[601] 86 See footnote [12] 10 above, para. 112 (citing para. (1) of the commentary to article 8).

[602] 87 See footnote [303] 87 above, para. 8.1.2.

fact acting on the instructions of or under the direction or control of India".[603] [88] The tribunal further noted that the test under article 8 "is a tough one",[604] [89] "involves a high threshold",[605] [90] and "excludes from consideration matters of organisational structure and 'consultation' on operational or policy matters".[606] [91]

In addition, the tribunal took note of the International Court of Justice's "effective control" test, as well as the discussion of the test in the context of state-owned and controlled enterprises in the commentary to article 8.[607] [92] On the basis of that test, the tribunal determined that the claimant had to "show that India had both general control over [the entity] as well as specific control over the particular acts in question".[608] [93]

[A/68/72, paras. 67–69]

European Court of Human Rights

Catan and Others v. *Moldova and Russia*

In its 2012 judgment in the case of *Catan and Others* v. *Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[609] [94]

[A/68/72, para. 70]

[International arbitral tribunal (under the ICSID Convention)

Bosh International, Inc. v. *B & P Ltd. Foreign Investments Enterprise*

In its 2012 award, the arbitral tribunal constituted to hear the *Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise* case referred to article 8 in its analysis of the term "Party" as found in the relevant bilateral investment treaty. The tribunal concluded that, in the BIT provision at issue, the term "Party" refers "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[610] [75]

[See A/68/72, footnote 85 and para. 60]]

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[603] [88] *Ibid*., paras. 8.1.3–8.1.4 and 8.1.7.

[604] [89] *Ibid*., para. 8.1.4.

[605] [90] *Ibid*., para. 8.1.10.

[606] [91] *Ibid*., para. 8.1.8.

[607] [92] *Ibid*., paras. 8.1.11–8.1.15 (quoting ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), *Judgment*, *I.C.J. Reports 1986*, pp. 62, 65, paras. 109 and 115; ICJ, 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. 208, para. 400, as well as paras. (4) and (6) of the commentary to article 8).

[608] [93] *Ibid*., para. 8.1.18.

[609] [94] See footnote [511] 79 above.

[610] [75 See footnote [310] 75 above, para. 246.]

[International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[611] 46

[See A/68/72, footnote 85 and para. 38]]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

In its decision on jurisdiction, applicable law and liability, the arbitral tribunal in *Electrabel S.A.* v. *The Republic of Hungary* relied upon the State responsibility articles as a codification of the customary international law relevant to attribution.[612] 95 Largely on the basis of article 8 and its accompanying commentary, the tribunal determined that "[a]lthough the conduct of private persons or entities is not attributable to the State under international law as a general principle, factual circumstances could establish a special relationship between the person engaging in the conduct and the State".[613] 96

The tribunal indicated that, as "expressed in the clearest possible terms in the ILC Commentary under Article 8", a State acting "through a State-owned or State controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[614] 97 As a result, the tribunal found that it was required to assess whether the "private entity" at issue was acting either under the instruction or direction and control of the Hungarian Government.[615] 98

[A/68/72, paras. 71–72]

Teinver S.A., et al. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[616] 99 Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[617] 100

[A/68/72, para. 73]

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[611] [46 See footnote [305] 46 above.]

[612] 95 See footnote [314] 53 above, para. 7.60.

[613] 96 *Ibid*., para. 7.71, and paras. 7.64, 7.66 and 7.68.

[614] 97 *Ibid*., para. 7.95.

[615] 98 *Ibid*., paras. 7.64–7.71.

[616] 99 See footnote [315] 99 above, para. 274.

[617] 100 *Ibid*., para. 275.

[European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[618] [80] In establishing jurisdiction in respect of the Netherlands, the Court could not find that "the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility").[619] [81]

[A/71/80, para. 65]]

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

The arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* recited the text of article 8 and noted that

> [t]he commentary to Article 8 observes that: 'Questions arise with respect to the conduct of companies or enterprises which are State owned and controlled … The fact that the State initially establishes a corporate entity … is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. … 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 … [and] the instructions, direction or control [of the State] must relate to the conduct which is said to have amounted to an internationally wrongful act'.[620] [87]

[A/71/80, para. 69]

European Court of Human Rights

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights considered article 8, and the commentary thereto, as relevant international law.[621] [88] In assessing whether the conduct of a company could be attributed to the State, the Court held that "[l]a Cour doit examiner de manière effective le contrôle que l'État a excercé dans les circonstances de l'espèce. De l'avis de la Cour, cette approche est conforme tant à sa jurisprudence antérieure … qu'à l'interprétation donnée par la CDI à l'article 8 des articles sur la responsabilité de l'État".[622] [89]

[A/71/80, para. 70]

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[618] [[80] ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.]

[619] [[81] *Ibid*., para. 151.]

[620] [87] See footnote [19] 7 above, para. 1466 (quoting para. (6) of the commentary to article 8).

[621] [88] See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

[622] [89] *Ibid*., para. 73.

Liseytseva and Maslov v. *Russia*

In *Liseytseva and Maslov* v. *Russia*, the European Court of Human Rights listed article 5 and the text and commentary to article 8, as relevant international law.[623] [90] The Court also observed that the question of the independence of the municipalities was to be determined with regard to the actual factual manner of the control exerted over them by the State in the particular case, noting that "this approach is consistent with the ILC's interpretation of the aforementioned Article 8 of the Articles on State Responsibility".[624] [91]

[A/71/80, para. 71]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Lao Holdings N.V. v. *Lao People's Democratic Republic*

In *Lao Holdings N.V.* v. *Lao People's Democratic Republic*, the arbitral tribunal referred to the commentary to article 8 in support of the proposition that "a minority shareholding in a corporation is not sufficient in international law (as well as domestic law), of itself, to attribute the acts of a corporation to its shareholders. The result is no different where the minority shareholder is a Government".[625] [92] It also partly relied on article 8 in finding that "corporate acts may be attributed to the Government if the Government directs and controls the corporation's activities".[626] [93]

[A/71/80, para. 72]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal held that the simple encouragement of private persons by the Government, without evidence of a direct order or control, "would not meet the test set out in Article 8".[627] [94]

[A/71/80, para. 73]

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal observed that the State responsibility articles "set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the

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[623] [90] See footnote [21] 9 above, para. 128.

[624] [91] *Ibid*., para. 205 (see also para. 130, in which the Court refers to ECHR, Grand Chamber, *Kotov* v. *Russia*, Application No. 54522/00, Judgment, 3 April 2012, paras. 30–32 for a summary of other relevant provisions of the State responsibility articles).

[625] [92] ICSID (Additional Facility), Case No. ARB(AF)/12/6, Decision on the Merits, 10 June 2015, para. 81.

[626] [93] *Ibid*., para. 82.

[627] [94] See footnote [114] 24 above, para. 448.

conduct of a person or entity is closely directed or controlled by the State, although the parameters of imputability on this basis remain the subject of debate".[628] 95

[A/71/80, para. 74]

Electrabel S.A. v. *Republic of Hungary*

The arbitral tribunal in *Electrabel S.A.* v. *Republic of Hungary* relied on the commentary to article 8 to observe that "the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[629] 96 The tribunal stated that an "invitation to negotiate cannot be assimilated to an instruction" in the sense of article 8, which would have allowed for the attribution of conduct of the company in question to Hungary.[630] 97 Referring to article 8, the tribunal also found that Hungary did not use "its ownership interest in or control of a corporation specifically in order to achieve a particular result".[631] 98

[A/71/80, para. 75]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* stated that "[p]lainly, the words 'instructions', 'direction' and 'control' in Art. 8 are to be read disjunctively. Therefore, the arbitral tribunal need only be satisfied that one of those elements is present in order for there to be attribution under Art. 8".[632] 99 The tribunal accepted the respondent's submission that the relevant test was that of "effective control".[633] 100 It confirmed "that it is insufficient for the purposes of attribution under Art 8 to establish merely that Emlak was majority-owned by TOKI, *i.e.*, a part of the State".[634] 101 The tribunal further noted that for attribution of conduct under article 8, there must be "proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests".[635] 102 The *ad hoc* committee subsequently constituted to decide on the annulment of the award confirmed this interpretation with reference to the commentary to article 8.[636] 103

[A/71/80, para. 76]

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[628] 95 See footnote [340] 66 above, footnote 673 (quoting para. (6) of the commentary to article 8) (footnote omitted).

[629] 96 See footnote [22] 10 above, para. 7.95 (see also paras. 7.63–7.71, quoting article 8 and the commentary in detail).

[630] 97 *Ibid*. para. 7.111.

[631] 98 *Ibid*., para. 7.137 (quoting para. (6) of the commentary to article 8).

[632] 99 See footnotes [210] 40 and [128] 16 above, para. 303.

[633] 100 *Ibid*., para. 304.

[634] 101 *Ibid*., para. 306 (quoting para. (6) of the commentary to article 8).

[635] 102 *Ibid*., para. 326.

[636] 103 See footnote [115] 25 above, paras. 187–189.

[*Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[637] [52]]

[A/74/83, p. 12]]

[*Beijing Urban Construction Group Co. Ltd.* v. *Yemen*

In *Beijing Urban Construction Group Co. Ltd.* v. *Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[638] [73]

[A/74/83, p. 16]]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, "[h]aving concluded that the OPA [Ontario Power Authority], Hydro One and IESO [Independent Electricity System Operator] are state enterprises and that Article 1503(2) of the NAFTA governs attribution, the Tribunal [could] dispense with reviewing whether their acts are attributable to Canada pursuant to Article 8 of the ILC Articles".[639] [90]

[A/74/83, p. 19]

International arbitral tribunal (under the ICSID Additional Facility Rules)

MNSS B.V. and Recupero Credito Acciaio N.V. v. *Montenegro*

The arbitral tribunal in *MNSS B.V. and Recupero Credito Acciaio N.V.* v. *Montenegro*, observed that mere acts of supervision do not place a private bank "under the Central Bank's control for the purposes of Article 8 of the ILC Articles … It follows, therefore, that the Respondent is not responsible for Prva Banka's actions in this respect".[640] [91]

[A/74/83, p. 19]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* found "no evidence that ANR [Polish Agricultural Property Agency] acted under

[637] [52 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

[638] [73 ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.]

[639] [90] PCA, Case No. 2012–17, Award, 24 March 2016, para. 365.

[640] [91] ICSID (Additional Facility), Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 299.

Poland's instructions, direction or control when terminating the Lease, and correspondingly no basis for attribution under Article 8".[641] 92

[A/74/83, p. 19]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal found that "Antrix's notice of annulment is attributable to the Respondent under Article 8 of the ILC Articles".[642] 93

[A/74/83, p. 19]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "it is a well-established principle under international law that, in general, the conduct of private persons or entities is not attributable to the State. This general principle is clearly reflected, *inter alia*, in Article 8 of the ILC Draft Articles".[643] 94 The tribunal considered that "even though members of the SINPROTRAC union may have actually taken President Chávez '*at his word*,' […] they did not act '*on the instructions of, or under the direction or control of*' President Chávez within the meaning of Article 8 of the ILC Draft Articles".[644] 95

[A/74/83, p. 19]

Ampal-American Israel Corporation and others v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[645] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

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[641] 92 PCA, Case No. 2015–13, Award, 27 June 2016, para. 272.

[642] 93 PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 290.

[643] 94 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para.448.

[644] 95 *Ibid*., para.453.

[645] 96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[646] 97

[A/74/83, p. 20]

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, the arbitral tribunal, observing that the parties had agreed that article 8 of the State responsibility articles was applicable to the facts of the case,[647] 98 disagreed "that the conduct of the unions of which the Claimant complain can be attributed to Respondent".[648] 99 The tribunal further reiterated that the appropriate test to be applied was "effective control" and not "overall control".[649] 100

[A/74/83, p. 20]

Karkey Karadeniz Elektrik Uretim A.S. v. *Islamic Republic of Pakistan*

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan* concluded, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[650] 101

[A/74/83, p. 20]

Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. *Bolivarian Republic of Venezuela*

In *Koch Minerals Sàrl and Koch Nitrogen International Sàrl* v. *Bolivarian Republic of Venezuela* the arbitral tribunal determined that

FertiNitro [a series of joint venture companies] remained fully and effectively controlled by the Respondent, whereby FertiNitro was precluded by the Respondent from making any further *ad hoc* sales to KNI [the claimant] from 28 February 2012, just as it had been precluded from performing the Offtake Agreement from 11 October 2010 onwards. Throughout, FertiNitro (with Pequiven) thus acted under the Respondent's 'direction or control' within the meaning of Article 8 of the ILC Articles on State Responsibility.[651] 102

[A/74/83, p. 20]

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[646] 97 *Ibid*., para. 146.

[647] 98 See footnote [355] 45 above, para. 721.

[648] 99 *Ibid*., para. 724.

[649] 100 *Ibid*., paras. 722 and 724.

[650] 101 ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.

[651] 102 ICSID, Case No. ARB/11/19, Award, 30 October 2017, para. 7.46.

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal cited article 8 and the commentary thereto when affirming that "the Respondent instructed, directed or controlled Rēzeknes Siltumtīkli's or Rēzeknes Enerģija's bringing of the litigation which resulted in [the claimant's] bank accounts being frozen".[652] [103]

[A/74/83, p. 20]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia*, quoted article 8 and noted that "[a]n 'effective control' test has emerged in international jurisprudence, which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake".[653] [104] The tribunal explained that "due to the change in the control of Holding d.o.o. when the Emergency Board was appointed on 12 July 1991, it is necessary to consider whether the Respondent exercised 'effective control' before and/or after this date"[654] [105] and held that "Holding d.o.o. does not fall within Article 8 of the ILC Articles".[655] [106]

[A/74/83, p. 21]

Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. *Republic of Cyprus*

The tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others* v. *Republic of Cyprus* discussed the relevant case law on article 8 of the State responsibility articles and "note[d] that arbitral jurisprudence has consistently upheld the standard set by the ICJ. The Tribunal sees no reason to depart from this *jurisprudence constante*."[656] [107] The tribunal observed that:

> … Claimants have not demonstrated with evidence that these specific acts that they challenge were directed or controlled by Respondent. The evidence put forward by Claimants attempts to show Respondent's overall control over Laiki, but does not contain instructions or directions emanating from the Cypriot Government that Laiki and/or its Board of Directors adopt a specific conduct. For this reason alone, Claimants' case on attribution under ILC Article 8 must fail.[657] [108]

The tribunal further stated that even if it "were to adopt a less stringent test for attribution under ILC Article 8—a test which this Tribunal does not endorse—this would not assist Claimants' case".[658] [109] In particular, "[t]o the Tribunal, it is not sufficient for the Board of Directors to elect an executive who enjoyed the trust of the regulator in order to

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[652] [103] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 825 and 830.

[653] [104] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 828.

[654] [105] *Ibid*., para. 829.

[655] [106] *Ibid*., para. 831.

[656] [107] ICSID, Case No. ARB/13/27, Award, 26 July 2018, para. 675 (original emphasis).

[657] [108] *Ibid*., para. 679.

[658] [109] *Ibid*., para. 680.

establish attribution under ILC Article 8".[659] [110] Furthermore, "any coordination in strategies between Laiki and Cyprus as regards the financial crisis likewise does not support Claimants' contention that Respondent had complete control over the Bank".[660] [111] Finally,

> the Tribunal recall[ed] that the mere ownership of shares in Laiki by the Cypriot Government, along with the powers that this ownership entails, does not establish attribution under ILC Article 8. Claimants remain bound by the obligation to demonstrate that the challenged conduct was carried out under the instructions, direction or control of Cyprus.[661] [112]

[A/74/83, p. 21]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal stated that

> [u]nder Article 8 of the ILC Articles on State Responsibility, the conduct of a person (not being an organ of the State) shall be considered an act of a State under international law if the person is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. Its application, as the ILC Commentary states, depends upon 'a specific factual relationship' between the person engaging in the conduct and the State … Moreover, there is a distinction to be drawn between the conduct of the State itself and the conduct of a person attributable to the State, as was held by the ICJ in *Nicaragua* v. *USA*.[662] [113]

The tribunal did not consider that the acts of the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were attributable to the respondent "within the meaning of Article 8 of the ILC Articles".[663] [114]

[A/74/83, p. 22]

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal cited article 8,[664] [66] recalling that the commentary thereto clarified that "the three terms 'instructions', 'direction' and 'control' are disjunctive" and that "it is sufficient to establish any one of them".[665] [67] The tribunal analysed the degree of State control required over a company to apply article 8, and considered "that a mere recommendation or encouragement is not sufficient to satisfy the criterion of instruction."[666] [68] Instead, "there are two elements to determining effective control: first, determining whether the entity in question is under the general control of the State, and, second, determining whether the State has exercised specific control during the act whose attribution to the State is being sought".[667] [69]

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[659] [110] *Ibid*., para. 685.

[660] [111] *Ibid*., para. 687.

[661] [112] *Ibid*., para. 691.

[662] [113] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.116.

[663] [114] *Ibid*., paras. 9.117–9.118.

[664] [66] See footnote [381] 32 above, para. 238.

[665] [67] *Ibid*., para. 239.

[666] [68] *Ibid*., para. 242.

[667] [69] *Ibid*., para. 247.

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "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." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[668] 70

[A/77/74, p. 14]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited article 8, indicating that

[t]he fact that acts or omissions of private parties 'may involve some element of private choice' does not negate the possibility of those acts or omissions being attributable to a [WTO] Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organ of the Member).[669] 71

[A/77/74, p. 15]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

In analysing whether a contract entered into by local authorities could be considered contracts of the State, the arbitral tribunal in *Strabag SE* v. *Libya* considered, among other factors, the nature of the entities involved and of the contracts, and "the circumstances surrounding the conclusion and implementation of the contracts". It took the view that the entities had "acted at the direction of Libyan State organs" and, therefore, "[a]s confirmed by Article 8 of the ILC Draft Articles, their conduct has to be considered as an act of the Libyan State".[670] 72

[A/77/74, p. 15]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* referred to article 8, noting that the commentary "shows that the mere ownership of shares in a State-owned company is not sufficient in order to establish attri-

[668] 70 *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).

[669] 71 See footnote [385] 35 above, para. 7.51.

[670] 72 See footnote [498] 59 above, para. 176.

bution under ILC Article 8".[671] [73] In that case, no evidence had been adduced "that would demonstrate that Respondent was exercising both a general control over these entities at all relevant times and that it specifically controlled these same entities in connection with specific acts challenged in these proceedings".[672] [74] Instead, the tribunal was unconvinced that the acts and omissions of the entities, which were "not State organs", were "attributable to the State pursuant to Article 8 of the ILC Articles", as it had not been shown that the entities had, "at all relevant times, acted 'on the instructions of, or under the direction or control of, that State in carrying out the conduct'".[673] [75]

[A/77/74, p. 15]

Inter-American Court of Human Rights

Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. *Brazil*

In *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families* v. *Brazil*, the Inter-American Court of Human Rights addressed the attribution of State responsibility for the violation of the rights to life and to personal integrity resulting from especially hazardous activities, including the production of fireworks. It cited article 8, noting that "it is possible to attribute responsibility to the State in the case of … conduct that is under its direction or control".[674] [76] In this case, the Court found, that "[r]egarding this activity, owing to the specific risks that it involved for the life and integrity of the individual, the State had the obligation to regulate, supervise and oversee its exercise, to prevent the violation of the rights of those who were working in this sector".[675] [77]

[A/77/74, p. 15]

European Court of Human Rights

Carter v. *Russia*

In *Carter* v. *Russia*, the European Court of Human Rights referred to article 8, noting that "a factor indicative of State responsibility" for a particular operation would be that the conduct of the individuals involved in that operation "was directed or controlled by any State entity or official".[676] [78]

[A/77/74, p. 16]

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[671] [73] See footnote [128] 16 above, para. 775.

[672] [74] *Ibid*., para. 776.

[673] [75] *Ibid*., para. 777.

[674] [76] IACHR, Series C, No. 407, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 July 2020, para. 121 (footnote 202).

[675] [77] *Ibid*., para. 121.

[676] [78] ECHR, Third Section, Application No. 20914/07, Judgment, 28 February 2022, para. 166.

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:[677] [167] 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.[678] [168]

(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 article 9 presuppose the existence of a Government in office and of State machinery whose place

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[677] [167] 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.

[678] [168] *Yeager* (footnote [204] 101 above), p. 104, para. 43.

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.[679] 169

(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.[680] 170

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:[681] 107

> … 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 cir-

[679] 169 See, *e.g.*, the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote [146] 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.

[680] 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.

[681] 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.)

cumstances which justified the exercise of those elements of authority. *See* International Law Commission draft article 8(*b*).[682] [108]

[A/62/62, para. 68]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[683] [101]

[A/68/72, para. 74]

African Court of Human Rights and Peoples' Rights

African Commission on Human and Peoples' Rights v. *Libya*

In *African Commission on Human and Peoples' Rights* v. *Libya*, the African Court of Human Rights and Peoples' Rights determined, while expressing "aware[ness] of the volatile political and security situation in Libya" cited article 9 of the State responsibility articles and found that it "is competent *ratione personae* to hear the instant case".[684] [115]

[A/74/83, p. 22]

[682] [108] See footnote [204] 101 above, p. 103, para. 42.

[683] [101] See footnote [299] 41 above, para. 576.

[684] [115] ACHPR, Application No. 002/2013, Judgment on Merits, 3 June 2016, paras. 50 and 52.

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[685] [171] and arbitral tribunals[686] [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.[687] [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 such to the State or entail its international responsibility; and (*b*) only conduct engaged in by

[685] [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.

[686] [172] See, *e.g.*, *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[687] [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 [680] 170 above), p. 524.

organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[688] [174]

(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 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

[688] [174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (footnote [147] 88 above), p. 108; and *Supplement to Volume III* … (footnote [221] 104 above), pp. 3 and 20.

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.[689] [175] 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

[689] [175] 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.

from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[690] [176] 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.[691] [177]

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".[692] [178] 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.[693] [179]

(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* or its officials or troops." [694] [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

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[690] [176] 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.

[691] [177] 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).

[692] [178] *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).

[693] [179] *Ibid*., vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[694] [180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (footnote [147] 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.

further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[695] 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,[696] 109 which it considered a confirmation of principles still valid contained in the previous case law on attribution:

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[695] 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. *Mwandinghi, 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).

[696] 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:

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.

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).[697] [110]

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 revolutionary 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.[698] [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

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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.)

[697] [110] IUSCT, 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 (footnote [206] 26 above).

[698] [111] *Ibid*., p. 84, para. 33.

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.[699] 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".[700] 113

[A/62/62, para. 70]

International Court of Justice

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

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* the International Court of Justice

consider[ed] that, even if Article 10(2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles.[701] 104

[A/71/80, para. 77]

[699] 112 IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 143–144, para. 25.

[700] 113 *Ibid*., p. 147, para. 30.

[701] 104 See footnote [181] 38 above, para. 104.

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".[702] [182] 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.[703] [183] 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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[702] [182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[703] [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.[704] [184]

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.[705] [185] 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.[706] [186] 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".[707] [187] 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.[708] [188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[709] [189] These were sufficient in

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[704] [184] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 35, para. 74.

[705] [185] *Ibid.*, pp. 31–33, paras. 63–68.

[706] [186] *Lighthouses* arbitration (footnote [702] 182 above), pp. 197–198.

[707] [187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[708] [188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[709] [189] See footnote [80] 59 above.

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.

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".[710] [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":[711] [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.

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

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[710] [114] ICTY, Trial Chamber II, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, Case No. IT-94–2-PT, para. 57.

[711] [115] *Ibid*., para. 61.

> [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."[712] 116

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.[713] 117 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".[714] 118

[A/62/62, para. 71]

[International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[715] 36 The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[716] 37

[See A/68/72, footnote 102 and para. 32]]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that certain rules on the liability of sponsoring States in the United Nations Convention on the Law of the Sea

> are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[717] 103

[A/68/72, para. 75]

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[712] 116 *Ibid*., paras. 60–63 (footnotes omitted).

[713] 117 *Ibid*., para. 64.

[714] 118 *Ibid*., paras. 66–67.

[715] [36 See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

[716] [37 *Ibid*., paras. 274 and 280.]

[717] 103 See footnote [12] 10 above, para. 182.

Permanent Court of Arbitration (under UNCITRAL Rules)

Luigiterzo Bosca v. *Lithuania*

In *Luigiterzo Bosca* v. *Lithuania*, the arbitral tribunal, paraphrasing article 11, stated that "[i]n other words, where the State endorses the act, as here, the State is subject to international responsibility under international law".[718] [105]

[A/71/80, para. 78]

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. *Government of Canada*

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the tribunal found that "[o]n the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP [Joint Review Panel] were not one of its organs".[719] [106] The arbitral tribunal specified that "[t]here is no indication in the evidence of a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the JRP".[720] [107]

[A/71/80, para. 79]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal did not find that article 11 of the State responsibility articles was applicable in the case.[721] [108]

[A/71/80, para. 80]

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[722] [96]

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[718] [105] See footnote [169] 26 above, footnote 114.

[719] [106] See footnote [333] 59 above, paras. 321–322.

[720] [107] *Ibid*., para. 323.

[721] [108] See footnote [114] 24 above, para. 449.

[722] [96] ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

> were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[723] 97

[A/74/83, p. 20]]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal found that:

> by means of its conduct after the plant takeover of 15 May 2010 carried out by the members of the SINPROTRAC union, PDVSA [Gas S.A.] acknowledged and adopted the union's actions as its own. On the basis of the applicable principles of customary international law on State responsibility as reflected in Article 11 of the ILC Draft Articles, the plant takeover on 15 May 2010 therefore has to be considered as an act of Respondent. In any event, PDVSA took effective control over the plant and started the expropriation process shortly after 15 May 2010, as confirmed by its internal memoranda and reports of early June 2010.[724] 117

Relying on the commentary to article 11, the arbitral tribunal also explained: "In contrast to cases of mere State support, endorsement or general acknowledgment of a factual situation created by private individuals, attribution under this rule requires that the State clearly and unequivocally '*identifies the conduct in question and makes it its own*'".[725] 118

[A/74/83, p. 22]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal quoted article 11 of the State responsibility articles and the commentary thereto, based on the claimant's arguments, but did "not consider that Article 11 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company] separately advances the Claimant's case".[726] 119

[A/74/83, p. 23]

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[723] [97 *Ibid*., para. 146.]

[724] 117 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 456.

[725] 118 *Ibid*., para. 461 (original emphasis).

[726] 119 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 9.120–9.121.

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[727] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[728] [43]

[A/77/74, p. 11]]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited the text of article 11, which

> provides that '[c]onduct which is not attributable to a State … 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'. By its terms, the principle only applies to conduct that is not otherwise attributable to a State.[729] [79]

[A/77/74. p. 16]

European Court of Human Rights

Makuchyan and Minasyan v. *Azerbaijan and Hungary*

In *Makuchyan and Minasyan* v. *Azerbaijan and Hungary*, the European Court of Human Rights referred to article 11 in considering whether the conduct of an individual who was not a State agent could be attributable to Azerbaijan. The Court took the view that the current standard under international law, which stemmed from article 11 and the commentary thereto, set

> a very high threshold for State responsibility for an act otherwise non-attributable to a State at the time of its commission. That threshold is not limited to the mere 'approval' and 'endorsement' of the act in question … Article 11 of the Draft Articles explicitly and categorically requires the 'acknowledgment' and 'adoption' of that act.[730] [80]

The Court determined that, for State responsibility for the impugned acts to have been established, international law would have required "that the Azerbaijani authorities 'acknowledge' and 'adopt' them as acts perpetrated by the State of Azerbaijan—thus directly and categorically assuming responsibility for the killing of G.M. and the preparations for the murder of the first applicant.[731] [81]

[A/77/74. p. 16]

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[727] [42 Final Award, 26 March 2021, para. 72.]

[728] [43 *Ibid*., paras. 72 and 134–135.]

[729] [79] See footnote [385] 35 above, para. 7.161.

[730] [80] ECHR, Fourth Section, Application No. 17247/13, Judgment, 12 October 2020, para. 112.

[731] [81] *Ibid*., para. 113.