

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

^{[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:

^{[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. Mwandighi*, *South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd. v. Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

^{[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

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.