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-

[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

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[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.
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> …
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> 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]

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[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

[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]

[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

[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]

[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

[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.