

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

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

Commentary

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

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:^{[677] 167} in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus the position of the Revolutionary Guards or “Komitehs” immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.^{[678] 168}

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

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

^{[677] 167} This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

^{[678] 168} *Yeager* (footnote [204] 101 above), p. 104, para. 43.

is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.^{[679] 169}

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

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term “call for” conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.^{[680] 170}

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

IRAN-UNITED STATES CLAIMS TRIBUNAL

Yeager v. Islamic Republic of Iran

In its 1987 award in the *Yeager v. Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(b) provisionally adopted by the International Law Commission:^{[681] 107}

... attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of the official authorities and in cir-

^{[679] 169} See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote [146] 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a government in exile might be covered by article 9, depending on the circumstances.

^{[680] 170} See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

^{[681] 107} This provision was amended and incorporated in article 9 finally adopted by the International Law Commission in 2001. Article 8(b) provisionally adopted read as follows: “The conduct of a person or group of persons shall also be considered as an act of the State under international law if: ... (b) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.” (*Yearbook ... 1980*, vol. II (Part Two), para. 34.)

cumstances which justified the exercise of those elements of authority. See International Law Commission draft article 8(b).^{[682] 108}

[A/62/62, para. 68]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Sergei Paushok et al. v. The Government of Mongolia

The arbitral tribunal in *Sergei Paushok et al. v. The Government of Mongolia* referred to articles 4, 5 and 9 as constituting “international law rules of attribution” applicable to the dispute “which are generally considered as representing current customary international law”.^{[683] 101}

[A/68/72, para. 74]

AFRICAN COURT OF HUMAN RIGHTS AND PEOPLES’ RIGHTS

African Commission on Human and Peoples’ Rights v. Libya

In *African Commission on Human and Peoples’ Rights v. Libya*, the African Court of Human Rights and Peoples’ Rights determined, while expressing “aware[ness] of the volatile political and security situation in Libya” cited article 9 of the State responsibility articles and found that it “is competent *ratione personae* to hear the instant case”.^{[684] 115}

[A/74/83, p. 22]

^[682] ¹⁰⁸ See footnote [204] 101 above, p. 103, para. 42.

^[683] ¹⁰¹ See footnote [299] 41 above, para. 576.

^[684] ¹¹⁵ ACHPR, Application No. 002/2013, Judgment on Merits, 3 June 2016, paras. 50 and 52.