076 SCSL-2003-11-PT 2918
(2918 – 2941)

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe
Registrar: Mr. Robin Vincent
Date: 30 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

REPLY TO THE PROSECUTION RESPONSE TO THE PRELIMINARY DEFENCE MOTION ON LACK OF JURISDICTION MATERIAE: NATURE OF THE ARMED CONFLICT

Office of the Prosecutor:
Mr. Desmond de Silva, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole

Defence Office:
Mr. Sylvain Roy, Acting Chief
Mr. Ibrahim Yillah

For Mr. Fofana:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Prof. André Nollkaemper
Dr. Liesbeth Zegveld

1. On 14 November 2003, the defence for Mr. Fofana filed a preliminary motion alleging lack of subject matter jurisdiction under Article 3 and 4 of the Statute. It argued that the jurisdiction of the Special Court under Articles 3 and 4 is limited to internal armed conflicts. The facts relevant to the armed conflict in Sierra Leone in the period covered by the indictment of Mr. Fofana, however, undoubtedly show that the conflict was of an international nature. It follows, according to the Defence motion, that the Special Court lacks jurisdiction *materiae* to deal with the crimes listed in Articles 3 and 4 of the Statute.

2. In its response, the Prosecution argued essentially that the nature of the conflict, internal or international, is irrelevant for the Court. The Prosecution argued that the defendant could be found culpable without the necessity of proving whether the conflict was internal or international. According to the Prosecution the element of internationality or otherwise does not form a jurisdictional (or other) element of the offences created by Articles 3 and 4 of the Statute.[1]

3. For the reasons given below, the Prosecution response should be dismissed in its entirety.

Articles 3 and 4 of the Statute apply to internal armed conflict only

4. The Prosecution's argument is contradictory and difficult to follow. On the one hand it argues that "it is not the essence of the Prosecution's allegation that the crimes were committed in an non-international armed conflict".[2] However, elsewhere, and decisive for the present motion, the Prosecution agrees with the Defence that the Statute of the Special Court should be understood as applicable to internal armed conflicts. The Prosecution notes that

> "from the way that the Statute of the Special Court was drafted, it is evident that the United Nations Secretary-General, the Security Council and the Government of Sierra Leone all considered the armed conflict of Sierra Leone to be non-international in character".[3]

[1] Prosecution Response, para. 5.
[2] Prosecution Response, para. 10.
[3] Prosecution Response, para. 22.

The Defence and the Prosecution thus agree on the fact that the Statute of the Special Court was intended and drafted to apply to an internal armed conflict.

5. It follows that the argument of the Prosecution that Article 4 of the Statute "could also have been taken from Article 8 (2) (b) of the ICC Statute, which deals with other serious violations of law and customs applicable in an international armed conflict",[4] is purely academic. As acknowledged by the Prosecution, the drafters of the Special Court Statute considered the armed conflict in Sierra Leone to be non-international in character. The submission of the defence should therefore be followed, that Article 4 of the Statute of the Special Court was taken from Article 8 (2) (e) of the ICC Statute, dealing with war crimes in armed conflicts not of an international character. With due respect to the prosecutor, the defence adds that, while the wording of Article 4 of the Statute is exactly the same as the wording of Article 8 (2) (e) of the Statute of the International Criminal Court, it is not identical to sub-paragraph (b) of the same article, to which the prosecution refers. In particular, the reference in Article 4 (c) of the Statute of the Special Court to enlisting children under the age of 15 "into armed forces or groups" is precisely the wording found in Article 8 (2) (e). This wording is not found in provision (2) (b) referred to by the prosecution.

6. For the same reason there is no need to add further reasoning to the argument that Article 3 of the Statute should be understood as applying to an internal armed conflict. The Prosecution does not contend that the inclusion of this article in the Statute of the Special Court was meant to apply to an international armed conflict.

Articles 3 and 4 of the Statute cannot be taken out of their context and be applied to international armed conflicts

7. Despite its acknowledgement that the Statute was intended to apply only to internal armed conflicts, the Prosecutor argues that the crimes with which the Accused is charged apply equally in both international and non-international armed conflicts, the nature of the conflict is irrelevant to the charges against the Accused and that the Trial Chamber would have to convict the Accused regardless of whether it were ultimately to find that the conflict

was international in character.[5] The Defence submits that this reasoning is erroneous for three reasons: first, it misconstrues the jurisdictional function of the Statute, second, it neglects that conditions for applicability are an essential component of the rules referred to in Article 3 of the Statute and, third, that it misrepresents the difference between internal and international armed conflict.

The Special Court is not permitted to exceed the jurisdiction granted by the Statute

8. The Prosecution consistently confuses, on the one hand, the question of the applicability of certain norms in internal armed conflict with, on the other, the question whether the Special Court has jurisdiction over violations of these norms. It also consistently confuses the criminal responsibility of a defendant[6] with the question of whether the Special Court has jurisdiction to determine such criminal responsibility.

9. In its motion on lack of subject matter jurisdiction under Article 3 and 4 of the Statute, the Defence does not enter into an abstract or academic debate on the question of whether or not the substance of the rules that apply in internal armed conflict also may apply in international armed conflicts, or whether or not someone may be criminally responsible for violations of such norms. The motion argues that, irrespective of the applicability of the substance of the rules that apply in internal armed conflict or in international armed conflicts, the jurisdiction of the Special Court is limited to the former.

10. The jurisdiction of the Special Court is limited by its Statute. Article 3 limits its jurisdiction to serious violations of Article 3 common to the Geneva Conventions of 12 August 1949, and of Additional Protocol II thereto of 8 June 1977. It may very well be that the *substance* of the norms contained in Article 3 common to the Geneva Conventions and of Additional Protocol II apply also in international armed conflicts, as is contended by the Prosecutor. It may well be that the drafters of the Statute could have given the Special Court jurisdiction over the same rules applicable in international armed conflict. However, the fact is that they have not done so. The jurisdiction of the Special Court under Article 3 of its

[4] Prosecution Response, para. 9.
[5] Prosecution Response, para. 10.
[6] E.g. para. 14.

Statue is based on specifically identified instruments that expressly apply to internal armed conflicts. The Special Court would exceed its jurisdiction if, contrary to the intention of the drafters and contrary to the text of its Statute, it were to assume jurisdiction over the same norms as applicable in international armed conflicts.

11. The same limitation applies to Article 4 of the Statute which, as noted above, was also intended to apply to internal armed conflicts. Here it might also be argued that the Special Court could have been given jurisdiction over these norms as they apply in international armed conflict. Again, the fact is that that jurisdiction has not been granted and that the Special Court would exceed its jurisdiction if, contrary to the intention of the drafters and contrary to the text of its Statute, it were to assume jurisdiction over the same norms as applicable in international armed conflicts.

12. In this respect the situation of the Special Court is not really comparable to that of the ICTY, since the ICTY has jurisdiction over both internal and international armed conflicts. The discussions on the nature of the conflict by the ICTY referred to by the Prosecutor, therefore are of limited relevance and cannot simply be transplanted to the context of the Special Court.

The jurisdictional limitations under Article 3 of the Statute extend to the conditions for applicability

13. A second argument why the Special Court cannot assume jurisdiction over violations of the rules contained in Article 3 of its Statute if the conflict is judged to be of an international nature, is that Article 3 does not only refer to substantive rules, but incorporates conditions for their applicability. Article 3 of the Statute empowers the Special Court to prosecute persons who have committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 and Additional Protocol II of 8 June 1977. Article 3 of the Statute thus embodies different treaties constituting the law to be applied by the Special Court. The mention of common Article 3 of the Geneva Conventions and Additional Protocol II should be understood as a reference to these instruments in their entirety, including their criteria for applicability.

14. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated in the Statute, are crimes considered to have had the character of customary international law at the time of their alleged commission. The selection, as the Prosecution proposes, of parts of Common Article 3 and Additional Protocol II to be included in Article 3 of the Statute, while leaving out criteria essential to their applicability, would amount to a rewriting of Common Article 3 and Additional Protocol II. Requirements of applicability are essential to any legal norm. They cannot be separated from the substantive norm without essentially affecting the meaning and substance of the norm.

Fundamental difference exists between internal and international armed conflicts

15. Third, the Prosecution disregards the singularity and individuality of international humanitarian law applicable in international and internal armed conflicts. As noted by the ICTY in the Tadic Appeal:

> "The emergence of ... general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[7]

16. One particularly important reason for not equating international humanitarian law applicable in internal armed conflicts with international humanitarian law applicable in international armed conflicts, is the legal relevance of the category of protected persons. Under international humanitarian law applicable in international armed conflicts, as defined by the Geneva Conventions, alleged crimes can only be committed against 'protected

[7] ICTY, Prosecutor v. Dusko Tadic, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, 2 October 1995, para. 126.

persons'. This means that the victims of the crimes must be of a nationality or ethnicity different from the perpetrator. If the conflict were to be considered as an international armed conflict, as the Defence alleges it should, a court should take into consideration this limitation.

Evidence as to the nature of the conflict

17. The Defence has submitted preliminary evidence that strongly indicates that the conflict was international in character. The Defence does not add further evidence at this stage and reserves the right to do so later. However, on one crucial point it has to address an erroneous argument of the Prosecutor. A strong argument for the international character of the conflict is that according to the Prosecutor himself, Mr. Charles Taylor, former president of Liberia, bears responsibility for crimes committed during the conflict. As indicated in the Defence motion, crimes committed by a person during his term as head of state automatically and necessarily imply the responsibility of the State and, in the circumstances of this case, the international nature of the conflict. The Prosecutor now alleges that Mr. Charles Taylor acted in a personal capacity and that the allegations in his indictment cannot be taken to show the involvement of Liberia.[8] This statement lacks any basis in international law. The rules of attribution, as laid down in Chapter II of the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission in November 2001, attribute state responsibility to conduct of persons empowered to exercise elements of governmental authority, even if they exceed their authority or contravene their instructions. Only private conduct can, under certain conditions, exclude state responsibility.[9] However, the support by a head of state of a civil war in another state cannot under any reading of the law of state responsibility be considered as private conduct. On the contrary, as noted in the Defence motion, it is well accepted that these type of individual acts necessarily implicate the state.

[8] Para. 20.
[9] Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session, November 2001, Article 7 & Commentary to Article 7.

The nature of the conflict should not be established at trial

18. In its response to the Motion, the Prosecution submits that, if the criminal responsibility of Mr. Fofana were to depend on the nature of the armed conflict, that nature should be determined by the Trial Chamber as part of its final judgment, based on all evidence led at trial.[10] The Defence for Mr. Fofana strongly objects to this solution of the problem, for the two following reasons.

19. Firstly, as explained above, the nature of the conflict directly affects the power of the Court to apply Articles 3 and 4 of the Statute. If the conflict in Sierra Leone was of an international character, as the Defence submits, the Court lacks the necessary subject-matter jurisdiction to try Mr. Fofana for all charges under Articles 3 and 4 of the Statute. As a matter of principle, the jurisdiction of the Court to try an accused should be established before the beginning of the trial. It is for this very reason that preliminary motions alleging a lack of jurisdiction can only be filed within 21 days following disclosure by the Prosecution to the Defence of the material supporting the indictment (Rule 72 (A) Rules of Procedure and Evidence). The sole purpose of the proceedings set out in Rule 72 is to allow matters of jurisdiction to be determined by the Trial or the Appeals Chamber before trial. The Defence submits that the Court, in fact, has no discretionary power to postpone jurisdictional decisions to the trial phase.

20. Secondly, it is also a matter of judicial efficiency to determine the nature of the armed conflict in the pre-trial phase. Determining the nature of the conflict now will avoid unnecessary discussions on this subject in the future, not only during Mr. Fofana's trial and possible appeal, but also during the trials and appeals of the other accused. In addition, the acts listed in Articles 3 and 4 of the Statute include certain elements specific to war crimes, which will have to be proved at trial. Should the court rule in favour of the defence so that charges under Articles 3 and 4 are dropped, leaving only the crimes against humanity charges under Article 2 of the Statute, it will not be necessary for the Prosecution to prove those elements.

[10] Prosecution Response, para. 14.

Conclusion

21. The Defence urges the Court to rule on its submission that the conflict in Sierra Leone was international in nature, and that, therefore, it lacks jurisdiction to try crimes charged under Articles 3 and 4 of the Statute. If the Court decides nonetheless to leave the determination of the nature of the conflict to trial, it must at least indicate, in the submission of the Defence, whether it agrees with the Defence argument that Articles 3 and 4 of the Statute only apply in non-international armed conflict, so that the Prosecution knows whether or not it has to establish the non-international nature of the conflict at trial.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman
Prof. Dr. André Nollkaemper
Dr. Liesbeth Zegveld

Defence Index of Authorities

1. ICTY, Prosecutor v. Dusko Tadic, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, 2 October 1995, para. 126.

2. Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session, November 2001, Articles 1-11.

3. Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session, November 2001, Article 7, pp. 99-103.

Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine*

lege in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

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INTERNATIONAL COURT OF JUSTICE

YEAR 1978

19 December 1978

1978
19 December
General List
No. 62

AEGEAN SEA CONTINENTAL SHELF CASE

(GREECE *v.* TURKEY)

JURISDICTION OF THE COURT

Pursuit of negotiations during judicial proceedings no impediment to exercise of jurisdiction—Existence of legal dispute.

Jurisdiction of the Court—Question of applicability of 1928 General Act for Pacific Settlement of International Disputes and relevance of reservation in Applicant's instrument of accession—Reciprocal enforcement of the reservation in the procedural circumstances of the case.

Interpretation of reservation—Whether single reservation or two distinct and autonomous reservations—Grammatical interpretation—Intention of reserving State having regard to the context—Generic meaning of term "disputes relating to territorial status"—Scope follows evolution of the law—Present dispute regarding entitlement to and delimitation of continental shelf areas relates to territorial status of Greece.

Joint communiqué issued by Heads of Government as basis of jurisdiction—Question of form not conclusive—Interpretation in the light of the context.

JUDGMENT

Present: *President* JIMÉNEZ DE ARÉCHAGA; *Vice-President* NAGENDRA SINGH; *Judges* FORSTER, GROS, LACHS, DILLARD, DE CASTRO, MOROZOV, Sir Humphrey WALDOCK, RUDA, MOSLER, ELIAS, TARAZI; *Judge* ad hoc STASSINOPOULOS; *Registrar* AQUARONE.

first, however, the Turkish side consistently maintained the position that reference of the dispute to the Court was to be contemplated only on the basis of a joint submission after the conclusion of a special agreement defining the issues to be resolved by the Court. Even the Greek Government, while arguing in favour of immediate submission of the dispute to the Court, referred to the drafting of a special agreement as "necessary" for submitting the issue to the Court (Notes Verbales of 2 October and 19 December 1975, Application, Ann. IV, Nos. 2 and 4). It is also significant that nowhere in the diplomatic exchanges or in the negotiations between the experts does the Greek Government appear to have invoked the Joint Communiqué as an already existing and complete, direct title of jurisdiction. Furthermore, although in a Note Verbale of 27 January 1975, before any Joint Communiqué existed, the Greek Government expressly reserved its "right to initiate Court proceedings unilaterally" (presumably having in mind the General Act), the Court has not found any mention by Greece, prior to the filing of the Application, of the possibility that the dispute might be submitted to the Court unilaterally on the basis of the Joint Communiqué.

107. Accordingly, having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court. It follows that, in the opinion of the Court, the Brussels Communiqué does not furnish a valid basis for establishing the Court's jurisdiction to entertain the Application filed by Greece on 10 August 1976.

108. In so finding, the Court emphasizes that the sole question for decision in the present proceedings is whether it does, or does not, have jurisdiction to entertain the Application filed by Greece on 10 August 1976. Having concluded that the Joint Communiqué issued in Brussels on 31 May 1975 does not furnish a basis for establishing the Court's jurisdiction in the present proceedings, the Court is not concerned, nor is it competent, to pronounce upon any other implications which that Communiqué may have in the context of the present dispute. It is for the two Governments themselves to consider those implications and what effect, if any, is to be given to the Joint Communiqué in their further efforts to arrive at an amicable settlement of their dispute. Nothing that the Court has said may be understood as precluding the dispute from being brought before the Court if and when the conditions for establishing its jurisdiction are satisfied.

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Draft articles on

Responsibility of States for internationally wrongful acts

adopted by the
International Law Commission
at its fifty-third session (2001)

(extract from the Report of the International Law Commission on the work of its Fifty-third session,
Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1)

November 2001

E. Text of the draft articles on Responsibility of States for internationally wrongful acts

1. Text of the draft articles

76. The text of the draft articles adopted by the Commission at its fifty-third session are reproduced below.

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

Attribution of conduct to a State

Article 4

Conduct of organs of a State

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

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

Article 5

Conduct of persons or entities exercising elements of governmental authority

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

Article 6

Conduct of organs placed at the disposal of a State by another State

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

Article 7

Excess of authority or contravention of instructions

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

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.

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.

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.

Article 11

Conduct acknowledged and adopted by a State as its own

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

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Commentaries to the draft articles on

Responsibility of States for internationally wrongful acts

adopted by the
International Law Commission
at its fifty-third session (2001)

(extract from the Report of the International Law Commission on the work of its Fifty-third session,
Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2)

November 2001

Article 7

Excess of authority or contravention of instructions

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

Commentary

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

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[144] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[145] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed

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

[145] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., *"The Only Son"*, Moore, *International Arbitrations*, vol. IV, pp. 3404, at pp. 3404-3405; *"The William Lee"*, ibid, vol. IV, p. 3405; the *Donoughho*, Moore, *International Arbitrations*, vol. III, p. 3012 (1876). Where the question was expressly examined tribunals did not consistently apply any single principle: see, e.g., *Collector of Customs: Lewis's Case*, ibid., vol. III, p. 3019; the *Gadino* case, *UNRIAA*, vol. XV, p. 414 (1901); *"The Lacaze"*, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290, at pp. 297-298; *"The William Yeaton"*, Moore, *International Arbitrations*, vol. III, p. 2944, at p. 2946.

by their agents by virtue of their official capacity".[146] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[147] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority".[148] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of ... official capacity". In any event, by the time of the Hague Codification Conference in 1930, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[149] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> "International responsibility is... incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State"[150]

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

[147] Note verbale by Duke Almodóvar del Rio, 4 July 1898, ibid.

[148] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", Hackworth, *Digest*, vol. V, p. 575; "Miller", Hackworth, *Digest*, vol. V, pp. 570-571.

[149] Point V, No. 2 (b), League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), Vol. III, p. 74; and *Supplement to Vol. III* (Doc. C.75 (a). M.69(a)1929.V.), pp. 3 and 17.

[150] Ibid., p. 238. For a more detailed account of the evolution of the modern rule see *Yearbook ... 1975*, vol. II, pp. 61-70.

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[151] It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949,[152] which provides that: "A Party to the conflict ... shall be responsible for all acts by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[153]

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

> "that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status."[154]

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

> "This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts

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[151] For example, the 1961 revised draft by Special Rapporteur F.V. García Amador provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity". *Yearbook ... 1961*, vol. II, p. 53.

[152] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3.

[153] International Committee of the Red Cross, *Commentary on the Additional Protocols* (Geneva, 1987), pp. 1053-1054.

[154] *UNRIAA*, vol, p. 516 (1929), at p. 531. For other statements of the rule see *Maal*, UNRIAA, vol. X, p. 730 (1903) at pp. 732-733; *La Masica*, *UNRIAA*, vol. XI, p. 549 (1916), at p. 560; *Youmans*, *UNRIAA*, vol. IV, p. 110 (1916), at p. 116; *Mallen*, ibid., vol. IV (1925), p. 173, at

of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[155]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority."[156]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[157] In short, the question is whether they were acting with apparent authority.

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p. 177; *Stephens*, ibid, vol. IV, p. 265 (1927), at pp. 267-268; Way, ibid, vol. IV, p. 391 (1925), at pp. 400-01. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931); A.D.P.I.L.C, vol 6, p. 442 is also often cited.

[155] *Inter-Am.Ct.H.R., Series C, No. 4* (1989), at para. 170; 95 *I.L.R.* 232, at p. 296.

[156] *Petrolane, Inc. v. Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64, at p. 92. See commentary to article 4, paragraph (13).

[157] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The Articles are not concerned with questions that would then arise as to the validity of the transaction (cf. Vienna Convention on the Law of Treaties, art. 50). So far as responsibility for the corrupt conduct is concerned, various

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e. only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[158] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[159]

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

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situations could arise which it is not necessary to deal with expressly in the present Articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

[158] See *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15, esp. at pp. 52, 62 and 74.

[159] See further article 44 (b) and commentary.