INTERNATIONAL STATE RESPONSIBILITY FOR ACTS OF ENTITIES THAT EXERCISE ELEMENTS OF GOVERNMENTAL AUTHORITY

Mafalda Maria da Cunha Coutinho Vilela Veloso

Under the supervision of Prof. Dr. Eduardo Correia Baptista

Master's Degree in Law and Legal Practice

Specialization in International Law and International Relations

2024

This dissertation was prepared within the scope of the Master's Degree in Law and Legal Practice – Specialization in International Law and International Relations, under the supervision of Prof. Eduardo Correia Baptista.

The dissertation was submitted in accordance with the requirements set forth in articles 53 and 54 of the Regulations for the Master's and Doctoral Programs of the University of Lisbon Faculty of Law, approved and republished in the annex to Order No. 8673/2021 issued the Honorable Director of the University of Lisbon Faculty of Law, Prof. Dr. Paula Vaz Freire, published in the Diário da República, 2nd series, No. 170, of 1 September 2021.

Lisbon, 10 October 2024.

NOTE TO READER

References made in this dissertation to any consulted sources, regardless of their nature, are contemporized with the meaning conferred to them in those sources.

The symbol "¶" signals paragraphs; “p.” means page and “pp.” means pages. The expression "*Id.*," in italic, means the repetition of the previously cited source; when referring to different paragraphs or pages, the use of the expression is accompanied by the respective reference to pages and paragraphs (e.g., *Id.*; *Id.*, p. 26).

Repeated references to cases are signaled in the first citation with the respective short cite in bold and italics (e.g., **“*Noble Ventures*”**), to avoid unnecessary repetition. Similarly, documents that constitute normative acts, reports, communications, or other non-normative sources, when repeated, only carry their common designation and the respective page.

For the preparation of this dissertation, the following sources were consulted, in addition to the Author's personal library, elements provided to the author by colleagues and friends, and materials available online in open access: Library of the University of Lisbon Faculty of Law (including VPN access to research platforms and databases), Library of the Faculty of Law of the Portuguese Catholic University (Lisbon), Library of the Attorney General of the Republic’s Office, Virtual Library of New York University and Library of the George Washington School of Law (Jacob Burns Law Library).

The statements made in this dissertation, as well as any typos or omissions, are the sole responsibility of the Author.

ABSTRACT

This dissertation studies the international rule of attribution to the State of acts of entities that exercise governmental authority.

The study is focused on article 5 of the ARSIWA, which establishes that 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.

The present work discusses the legal framework, historical background, legal nature, scope, and implications of article 5 of the ARSIWA. The legal nature of the rule embodied in article 5 of the ARSIWA is analyzed in this study, in light of general principles of law and the constituent elements of customary international law.

In this context, it is concluded that article 5 reflects the principles of non subordination of international law to internal law and of the unity of the State from the international standpoint and it constitutes a rule of customary international law. Moreover, the analysis of article 5 covers sources, concepts, criteria, and evidence of international law and examines the application of article 5 in international disputes, particularly concerning investment and trade claims.

The concepts of State organs and de facto organs are explored to find the universe of entities that fall within the scope of article 5. For the same purpose, the attribution of acts of territorial public entities, State-owned enterprises and private corporations is also studied in this dissertation. The concept of governmental authority is examined by reference to similar concepts used in sovereignty claims and under the rules of State immunity.

RESUMO

O presente trabalho estuda a regra internacional de imputação ao Estado de atos de entidades que exercem poderes públicos, com base no artigo 5.º dos ARSIWA, adotados pela ILC em 2001.

Neste contexto, a dissertação analisa o quadro jurídico, o contexto histórico, a natureza jurídica, o âmbito, os conceitos, os critérios e as implicações do artigo 5.º dos ARSIWA, tendo em conta as fontes e os elementos probatórios reconhecidos pelo direito internacional, nomeadamente as convenções internacionais, o direito internacional consuetudinário, os princípios gerais do direito, as decisões judiciais e os ensinamentos dos publicistas mais qualificados. Além disso, a dissertação explora a aplicação prática do artigo 5.º em litígios internacionais, com alguns exemplos de casos de investimento e comércio que ilustram os desafios e as complexidades atuais da imputação de atos de entidades ao Estado e, em especial, empresas públicas.

A responsabilidade internacional do Estado ocorre quando há um ato internacionalmente ilícito e que é composto por dois elementos constitutivos: a imputação e a ilicitude. A imputação é o mecanismo que liga a conduta de uma pessoa ou entidade ao Estado com base em critérios determinados pelo direito internacional. Por sua vez, a ilicitude pressupõe a verificação de uma situação de incumprimento de uma obrigação internacional à qual o Estado se encontrava vinculado.

O artigo 5.º dos ARSIWA estabelece que a conduta de uma pessoa ou entidade que não seja um órgão do Estado ao abrigo do artigo 4.º, mas que seja autorizada pela lei desse Estado a exercer prerrogativas de poderes públicos, será considerada um ato do Estado ao abrigo do direito internacional, desde que a pessoa ou entidade esteja a agir nessa capacidade no caso particular.

A análise cobre a evolução histórica do artigo 5.º, desde as suas origens até à adoção final pela ILC em 2001, com destaque para os debates e nas controvérsias

que moldaram a sua formulação. O artigo 5.º foi o resultado de 85 anos de pensamento jurídico. Os Relatores Especiais e membros da ILC inicialmente começaram a analisar a atribuição de atos de entidades públicas territoriais e outras entidades públicas autónomas sob o antigo projeto de artigo 7.º e de atos de entidades privadas que exerciam funções públicas sob o antigo projeto de artigo 8.º A terminologia a adotar para se referir a "poderes públicos" também gerou muito debate, devido à variedade de significados ao abrigo do direito interno de cada Estado.

Na versão final do ARSIWA, as entidades públicas territoriais foram consideradas órgãos do Estado e ficaram abrangidas pelo artigo 4.º, e outras entidades públicas autónomas e entidades privadas que exerciam poderes públicos foram consideradas abrangidas pelo artigo 5.º. O termo inicialmente proposto "funções públicas" também foi abandonado e substituído por "poderes públicos".

O presente trabalho propõe-se ainda a discutir a natureza jurídica da regra consagrada no artigo 5.º dos ARSIWA, nomeadamente à luz dos princípios gerais do direito. A regra que determina que os Estados são responsáveis por atos de entidades que exercem poderes públicos deriva dos princípios da não subordinação do direito internacional ao direito interno e da unidade do Estado do ponto de vista internacional. Como tal, o artigo 5.º visa assegurar que os Estados não podem evadir-se das suas responsabilidades internacionais ao delegar funções públicas a entidades que não fazem formalmente parte do aparelho estatal.

Além disso, com base nos comentários e declarações feitos pelos Estados e nas reconvenções apresentadas perante mecanismos internacionais de resolução de litígios, a dissertação defende que o artigo 5.º dos ARSIWA reflete uma regra costumeira. Estes elementos probatórios alicerçados nos conceitos de aquiescência e reconhecimento providenciam demonstrações relevantes do preenchimento dos dois elementos constitutivos do costume.

Adicionalmente, os princípios da boa-fé e do *estoppel* levam a reconhecer que a extensão da imunidade do Estado a entidades que exercem poderes públicos impede esses mesmos Estados de, posteriormente, negarem a existência ou a

aplicabilidade de uma regra de direito internacional que imputa a conduta dessas entidades ao Estado que concedeu anteriormente a imunidade.

A dissertação identifica três requisitos para a imputação de atos de entidades que exercem poderes públicos ao Estado: em primeiro lugar, os atos devem ser praticados por uma pessoa ou entidade que não seja um órgão do Estado ao abrigo do artigo 4.º; em segundo lugar, a entidade deve estar autorizada pela lei do Estado a exercer prerrogativas de poderes públicos; e, em terceiro lugar, a entidade deve estar a agir nessa capacidade no caso particular. Nessa medida, a dissertação analisa os requisitos enquadrando-os no âmbito pessoal e material do artigo 5.º.

O Artigo 5.º não se refere a categorias específicas de entidades, mas estabelece um critério de delimitação negativa que exclui entidades que são consideradas órgãos do Estado ao abrigo do artigo 4.º. Nesse sentido, pessoas ou entidades que têm o estatuto de órgão ao abrigo do direito interno do Estado, entidades públicas territoriais e órgãos de facto ficam fora do âmbito pessoal do artigo 5.º.

Os critérios e testes para identificar um órgão de facto não são consensuais entre a doutrina e os mecanismos de resolução de disputas. Constata-se que a maioria dos casos que envolvem a aplicação do artigo 5.º dos ARSIWA dizem respeito a empresas públicas ou outras entidades públicas.

Em alguns casos, o ICSID considerou que empresas públicas eram órgãos de facto abrangidas pelo artigo 4.º. Contudo, na maioria dos casos, as empresas públicas são analisadas à luz dos requisitos estabelecidos no artigo 5.º. Para averiguar a existência de órgãos de facto, o ICSID recorre, ainda, ao teste da completa dependência que foi desenhado pelo Tribunal Internacional de Justiça no contexto de casos que envolviam milícias militares e paramilitares. Como tal, suscita-se a necessidade de adaptação do teste à realidade das disputas de investimento, uma vez que as questões são substancialmente distintas. São considerados elementos probatórios relevantes para provar que uma entidade constitui um órgão de facto: a criação e detenção inteiramente ou maioritariamente pelo Estado; e o envolvimento do Estado no financiamento da entidade, na nomeação de gestores ou membros, na aprovação do orçamento ou das atividades.

O presente estudo aborda também os conceitos “autorizada pela lei do Estado” e “prerrogativas de poderes públicos”, bem como o requisito que determina que a entidade deve estar a agir nessa capacidade no caso particular, com referência a casos concretos no âmbito de mecanismos de resolução de disputas de investimento e de comércio.

Regra geral, os mecanismos internacionais de resolução de disputas não concordam com um único critério para a interpretação e aplicação dos requisitos contidos no âmbito material do artigo 5.º. No entanto, existe um certo consenso quanto à natureza das funções desempenhadas por uma entidade ser decisiva para a atribuição ao abrigo do artigo 5.º. No entanto, o artigo 5.º não define o que são prerrogativas de poderes públicos, deixando essa determinação para ser feita caso a caso.

O conceito de autoridade governamental não é aplicado uniformemente no direito internacional. Para efeitos de atribuição ao abrigo do artigo 5.º, os mecanismos internacionais de resolução de disputas têm entendimentos muito distintos quanto à tipologia de funções que são consideradas “públicas”. Nessa medida, o presente trabalho propõe-se a interpretar o conceito de “poderes públicos” à luz do seu significado ordinário e referindo-se a conceitos semelhantes utilizados em reivindicações territoriais de soberania e nas regras relativas à imunidade do Estado.

Esta dissertação visa dar um contributo académico para a discussão relativa à atribuição de atos de entidades ao Estado e, em especial, ao artigo 5.º, antecipando que os desafios e complexidades envolvidos evidenciam a necessidade de mais investigação e desenvolvimento nesta matéria.

KEYWORDS

- International State Responsibility
- Attribution
- Entities
- State-Owned Enterprises
- Governmental Authority

PALAVRAS-CHAVE

- Responsabilidade Internacional Do Estado
- Imputação
- Entidades
- Empresas Públicas
- Poderes Públicos

CONTENTS

RESUMO 4

KEYWORDS 8

ACKNOWLEDGMENTS 12

ABBREVIATIONS 13

I. Introduction 15

II. General framework 17

1. International State responsibility 17

2. Constituent elements 20

2.1. Attribution 20

2.2. Breach 22

III. Legal framework 23

1. Article 5 of the ARSIWA 23

2. Historical background 24

IV. International legal nature 37

1. Sources of international law 37

2. The nature of the ARSIWA 39

3. The nature of article 5 39

3.1. General principles of law 42

3.1.1. Non-subordination of international law to internal law 42

3.1.2. Unity of the State from the international standpoint 43

3.2. Customary law 47

3.2.1. Constituent elements 47

3.2.2. Customary evidence 49

3.2.2.1. Acquiescence and recognition 50

3.2.2.2. Estoppel 53

V. Personal scope 56

1. ILC considerations 56

1.1. Preparatory work 56
1.2. Final commentary 60
2. Case law 61
2.1. Investment disputes 62
2.2. Trade disputes 67
3. Our analysis 69
3.1. Person or entity 69
3.2. Not an organ of the State under article 4 71
3.2.1. Attribution of acts of State organs 71
3.2.2. State organs 72
3.2.3. De facto organs 74
3.2.3.1. Legal framework 74
3.2.3.2. The complete dependence test 76
4. Our position 79
4.1. State-owned enterprises and other public entities 79
4.2. Private corporations and other entities 83
VI. Material scope 84
1. Empowered by the law of the State 84
2. Governmental authority 86
2.1. ILC considerations 86
2.1.1. Preparatory work 86
2.1.2. Final commentary 89
2.2. Case law 90
2.2.1. Investment disputes 90
2.2.2. Trade disputes 93
2.3. Our analysis 94
2.3.1. The ordinary meaning 95
2.3.2. Territorial sovereignty 96
2.3.3. Sovereign authority (acta jure imperii) 98
2.3.3.1. The restrictive doctrine of State immunity 98
2.3.3.2. The commerciality exception 100
2.4. Our position 103

3. Acting in that capacity in that particular instance 106

VII. Conclusion..... 108

BIBLIOGRAPHY 112

ACKNOWLEDGMENTS

I would like to express my sincere gratitude to Professor Eduardo Correia Baptista, for his invaluable guidance, encouragement, and detailed feedback throughout the development of this dissertation. His supervision and expertise were determinant in shaping the direction and quality of my work.

I thank my coaches from the 2019 Philip C. Jessup International Law Moot Court Competition, namely Diogo Conchinhas, Diogo Santana Lopes, Leonor Catela, and Professor Rui Tavares Lanceiro. The experience and knowledge gathered during the Jessup are the reason of my inspiration and motivation in writing this dissertation.

I am also deeply grateful to my friends for their loyalty and patience throughout this journey, despite my frequent absences. I would like to thank the people that I have worked with that became friends, namely Ana, Eva, Joana, Marta, Sandra, and Sofia, because their support and motivation have been invaluable in my personal and professional growth. I must also specially thank my co-agents António, Francisco and Mafalda, because they were a big source of inspiration for this dissertation. A special thanks should also be given to Tatiana, who always stood by me in everything, and to Teresa, for the unlimited and unconditional supply of friendship and support throughout this journey.

I also thank my parents and brother for their unconditional love, support, understanding and encouragement. I am deeply grateful to my grandparents as well; their memory has been a guiding light. I also extend my gratitude to my great-aunt and godmother and the rest of my family, for their continuous support.

At last, I thank my husband Paulo for his unwavering companionship, inspiration, and devotion. His constant support and belief in me have been a source of immense strength and motivation throughout this journey.

ABBREVIATIONS

APAPS – Authority for the Privatization and Management of the State Ownership

ARSIWA – Article on Responsibility of States for Internationally Wrongful Acts

BUGG – Beijing Urban Construction Group Co. Ltd.

CJEU - Court of Justice of the European Union

CJISP – Convention on Jurisdictional Immunities of States and their Property

CPE – Council of State Holdings

CSR – *Combinatul Siderurgic Resita*

DACR – Draft Articles on Consular Relations

DADII – Draft Articles on Diplomatic Intercourse and Immunities

DAJISP – Draft Articles on the Jurisdictional Immunities of States and their Property

DALT – Draft Articles on the Law of Treaties

ECSI – European Convention on State Immunities

EGOTH – Egyptian Company for Tourism and Hotels

ENPI – National Company for Real Estate Promotion

EU – European Union

FRY – Federal Republic of Yugoslavia

ICJ – International Court of Justice

ICSID - International Centre for Settlement of Investment Disputes

ILC – International Law Commission

KEXIM – Export-Import Bank of Korea

LPP – Logements Promotionnels Publics

MLC - *Mouvement de libération du Congo*

OECD – Organisation for Economic Cooperation and Development

OLA/ALRECC – Société OLA/ALRECC Ortiz Construction SpA

PCA – Permanent Court of Arbitration

PCIJ – Permanent Court of International Justice

PPL – Polish Airports State Enterprise

SCA – Suez Canal Authority

SCM – Subsidies and Countervailing Measures

SODIGA – *Sociedad para el Desarrollo Industrial de Galicia*

SOF – Romanian State Ownership Fund

UAE - United Arab Emirates

UK – United Kingdom of Great Britain and Northern Ireland

UN – United Nations

US – United States of America

VCCR – Vienna Convention on Consular Relations

VCDR – Vienna Convention on Diplomatic Relations

VCLT – Vienna Convention on the Law of Treaties

VRS – Army of Republika Srpska

WTO – World Trade Organization

I. INTRODUCTION

The law of international responsibility plays a crucial role in international relations. The rules of international responsibility allow States to coexist in a minimally safe and predictable manner. As in any other legal order, it is only possible to ensure the effectiveness and compliance with rights and obligations if there are clearly defined and typified responsibility rules.

Being abstract legal entities, States necessarily act through individuals or entities when they contravene their international obligations. To that extent, the international rules of attribution constitute the legal bridge that links the conduct of a given individual or entity to the State for purposes of international responsibility.

However, the rules of attribution are not always straightforward, especially when the persons or entities involved are not part of the formal structure of the State. Frequently, the rules of attribution raise complex questions related to legal nature, concepts, interpretative criteria, and doctrinal divisions. The rule that allows for the attribution of acts practiced by entities that exercise elements of governmental authority is no exception.

The rule that foresees the international State responsibility for acts of entities that exercise elements of governmental authority is provided for in article 5 of the ARSIWA, adopted by the ILC in 2001. This legal framework ensures that States cannot evade their international responsibilities by outsourcing public functions to entities that are not formally part of the State apparatus.

The purpose of this dissertation is to examine the legal nature and scope of article 5, which is one of the most controversial and debated provisions of the ARSIWA. This dissertation aims to understand the applicability of this rule and to provide a useful academic contribution to the study of international law, and particularly to the law of State responsibility. For this purpose, this dissertation will analyze the historical background, legal nature, scope, requirements, and concepts, in light of the sources and probatory elements recognized by international law,

namely international conventions, customary law, general principles of law, judicial decisions, and teachings of the most highly qualified publicists.

Understanding the rule embodied in article 5 of the ARSIWA is essential for addressing the challenges posed by the attribution of acts of State-owned enterprises and private corporations to the State. The attribution of acts of these entities is frequently brought before international mechanisms for dispute resolution, such as ICSID and WTO Panels. As such, this dissertation will explore how article 5 has been applied in various international disputes and the implications of its application for the accountability of States.

The dissertation is structured as follows: Chapter II will discuss the general concept and constituent elements of international State responsibility, focusing on the role and function of attribution as a precondition for the existence of an internationally wrongful act. Chapter III will explore the legal framework and historical evolution of article 5 of the ARSIWA, tracing its origins and development with a special focus on the preparatory work of the ILC. Chapter IV will examine the international legal nature of article 5, in light of the sources of international law, and its relationship with other rules and principles of international law. Chapter V will investigate the personal scope of article 5, identifying the types and categories of persons or entities that may fall within its scope, as well as the criteria and methods for determining their status and relationship with the State. Chapter VI will scrutinize the material scope of article 5, interpreting its concepts and defining its conditions and limits.

This dissertation aims to provide a comprehensive analysis of article 5 of the ARSIWA, shedding light on its significance for the law of State responsibility and its impact on the accountability of States in the international legal order. By examining the historical, doctrinal, and practical aspects of article 5, this dissertation aims to contribute to a deeper understanding of the principles governing international law and particularly international State responsibility.

II. GENERAL FRAMEWORK

1. INTERNATIONAL STATE RESPONSIBILITY

Responsibility is "*le corollaire necessaire du droit.*"[1] The rule of law necessarily implies enforcement mechanisms that arise whenever a person does not act in accordance with the law. Under internal law, these mechanisms generally foresee measures that establish the legal consequences for breaking the law and ultimately operate as a discouragement to break the law, generating – even if only to a certain extent – an expectation of compliance.[2] Similarly, international rules on State responsibility aim to ensure a minimum degree of certainty and stability in international relations.[3]

States are commonly referred to as the classical subjects of international law because they enjoy full international legal personality, i.e. they not only possess rights and obligations, but are also able to exercise such rights and be accountable for any breach of obligations under international law.[4] International responsibility

---

[1] *Biens Britanniques au Maroc Espagnol*, Spain v. United Kingdom, Ad hoc Arbitration, Award, 1 May 1925 (**"*Biens Britanniques au Maroc Espagnol*"**), pp. 617, 641. See also, N. Quoc Dinh et al., DROIT INTERNATIONAL PUBLIC (8th Ed., 2009), p. 848, ¶468; A. Pellet, "The Definition of Responsibility in International Law", in THE LAW OF INTERNATIONAL RESPONSIBILITY (Crawford, Pellet and Olleson, eds., 2010), p. 4; J. Crawford, 'State Responsibility', in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2006), ¶1.

[2] See, H, Kelsen, PURE THEORY OF LAW (Translation by Max Night, 1967), p. 119; F. Schauer, THE FORCE OF LAW (2017), pp. 2-5, 20-23; E. Correia Baptista, DIREITO INTERNACIONAL PÚBLICO, (Vol. II, 2015), p. 549; G. Lamond, *Coercion and the Nature of Law*, 7 LEG 35 (2001), p. 39.

[3] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed., 2012), pp. 16, 539; A. Pellet, DROIT INTERNATIONAL PUBLIC (1981), p. 114; A. Pellet, "The Definition of Responsibility in International Law", pp. 4-5; H. Kelsen, PURE THEORY OF LAW, p. 320; E. Correia Baptista, DIREITO INTERNACIONAL PÚBLICO, p. 549; International Law Commission, Third Report on State Responsibility by Mr. Robert Ago, UN Doc. No. A/CN.4/246 and Add. 1-3 (Vol. II(1), 1971) ("**Mr. Robert Ago, Third Report on State Responsibility"**), p. 205, ¶31; League of Nations, Reply of the Government of Switzerland to The Juridical Basis of International Responsibility, Point II of the Bases of Discussion for the Conference Drawn up by the Preparatory Committee in Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners (1929), p. 24; L. Hoppenheim, INTERNATIONAL LAW: A TREATISE (5th Ed., 1937), pp. 272-273, ¶148; International Law Commission, *Yearbook of the International Law Commission*, UN Doc. No. A/56/10, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" (Vol. II, Part Two, 2001) ("**DARSIWA"**), p. 33.

[4] J. BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 115; M. Shaw, INTERNATIONAL LAW (6th Ed., 2008), p. 195; *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion, 1949 (***"Reparation for Injuries"***),

is the branch of international law that governs the relationship that arises from an internationally wrongful act.[5] International rules on State responsibility are considered to be secondary in the sense that they do not target (at least directly) States' conduct, while primary rules of international law (directly) address conduct, by prescribing substantive rights and obligations in different sub-areas of international law.[6]

International responsibility was not identified as a legal category before the 17th century.[7] GROTIUS is usually seen as the starting point of the legal thinking on the topic of responsibility.[8] GROTIUS addressed the topic under the law of nature, recognizing the existence of an obligation to make reparation *"if the wrong be*

pp. 174, 177; M. Luísa Duarte, "O Estado e os Outros: quem é quem no Direito Internacional" in ORDEM JURÍDICA GLOBAL DO SÉCULO XXI: SUJEITOS E ATORES NO PALCO INTERNACIONAL (Duarte, Lanceiro, Abreu Duarte, eds., 2020), pp. 22, 26; A. Gonçalves Pereira, F. de Quadros, MANUAL DE DIREITO INTERNACIONAL PÚBLICO (3rd Ed., 2011), p. 299.

[5] J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014), pp. 51, 62-63; A. E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?", in THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 39, No. 1, 1990, pp. 8-10; *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, France-New Zealand Arbitration Tribunal, France v. New Zealand, Award, 1990 ("***Rainbow Warrior***") p. 251; *Biens Britanniques au Maroc* Espagnol, p. 641, UN General Assembly, Resolution No. 56/83 (Annex), "Articles on the Responsibility of States for Internationally Wrongful Acts" (2001) (**"ARSIWA"**), Art. 1; DARSIWA, pp. 32-33; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, pp. 539-540; M. Shaw, INTERNATIONAL LAW, p. 778; J. Crawford and S. Olleson, "The Nature and Forms of International Responsibility" in M. Evans, INTERNATIONAL LAW (2003), pp. 445-470, 449; *Case Concerning the Factory at Chorzów*, Germany v. Poland, PCIJ, Judgement No. 9, 1927 (**"*Factory at Chorzów*"**), p. 29; *Case Concerning the Gabčikovo-Nagymaros Project*, Hungary v. Slovakia, ICJ, Judgement, 1997 (**"*Gabčikovo-Nagymaros*"**), ¶152.

[6] DARSIWA, p. 31; M. Milanovic, "Special Rules of Attribution of Conduct in International Law", in INTERNATIONAL LAW STUDIES (Vol. 96, 2020), pp. 295-393; E. David, "Primary and Secondary Rules" in THE LAW OF INTERNATIONAL RESPONSIBILITY, pp. 27-33; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, pp. 64-66; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 540; J. Griebel and M. Plucken, "New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia", in 21 LEIDEN JOURNAL OF INTERNATIONAL LAW (2008), pp. 601-622, 603.

[7] See J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 10; K. Zweigert and H. Kötz, AN INTRODUCTION TO COMPARATIVE LAW (3rd Ed., 1998), p. 597.

[8] See, J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 10; Alain Pellet, "The Definition of Responsibility in International Law, pp. 3, 5; K. Zweigert and H. Kötz, AN INTRODUCTION TO COMPARATIVE LAW, p. 597.

accompanied with damage".[9] Despite the subsequent advances in distinct aspects of responsibility, the efforts made after GROTIUS lacked systematization and still considered damage as a condition to give rise to responsibility.[10]

As the 19th century was deeply marked by war, the Hague Conferences of 1899 and 1907 sought to offer a certain degree of stability to international relations.[11] Hence, at the gates of the 20th century, State responsibility caught the attention of scholars and emerged as an independent legal category, an achievement commonly attributed to TRIEPEL[12] and ANZILOTTI[13], which heavily marked and inspired the most relevant systematic works thereafter.[14] In particular, ANZILOTTI addressed responsibility as *"the new legal relationship between the State to which the act is imputable, which is obliged to make reparation, and the State with respect to which the unfulfilled obligation existed, which can demand reparation"* generated by *"the wrongful act (...) generally speaking, the violation of an international obligation"*.[15]

The doctrine evolved and it is now a well-established principle of international law that every internationally wrongful act triggers international responsibility.[16]

---

[9] H. Grotius, THE RIGHTS OF WAR AND PEACE (Translation by William Whewell, 1853), p. 205.

[10] See, J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, pp. 11-17; M. de Vattel, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (Livre III, 1758), in THE CLASSICS OF INTERNATIONAL LAW, James Brown Scott (ed) (Vol. II, 1916), p. 159.

[11] M. Abbenhuis, THE HAGUE CONFERENCES AND INTERNATIONAL POLITICS 1898-1915 (2018), pp. 9-10; F. Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces", in 40 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 827 (1991), p. 830.

[12] H. Triepel, VÖLKERRECHT UND LANDESRECHT (1899), pp. 324-371.

[13] D. Anzilotti, COURS DE DROIT INTERNATIONAL (Translation by Gilbert Gidel, 1999), p. 467

[14] See, J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, pp. 22-24; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, pp. 121-122.

[15] D. Anzilotti, COURS DE DROIT INTERNATIONAL, p. 467.

[16] ARSIWA, Article 1; Mr. Robert Ago, Third Report on State Responsibility, p. 205, ¶30; A. Pellet, "The Definition of Responsibility in International Law, pp. 8-9; ; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 540; *Phosphates in Morocco*, Italy v. France, PCIJ, Judgment, 1938 (***"Phosphates in Morocco"***), ¶48; *The Corfu Channel Case*, United Kingdom v. Albania, ICJ, Judgement, 1949 (***"Corfu Channel"***), p. 23; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, Nicaragua v. United States of America, ICJ, Judgement, 1986 (***"Nicaragua Case"***), ¶292; *Gabčikovo-Nagymaros*, ¶47; *Reparation for Injuries*, p. 184; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ, Advisory Opinion, 1950 (***"Interpretation of Peace Treaties"***), p. 221; *Armstrong Cork Company Case*, Italian-United States Conciliation Commission, Decision No. 18, 22 October 1953, p. 163.

2. CONSTITUENT ELEMENTS

The constituent elements of an internationally wrongful act are attribution and breach, i.e., there is an internationally wrongful act whenever a conduct is attributable to the State under international law and constitutes a breach of an international obligation of the State.[17] Damage and reparation are no longer seen, respectively, has a necessary precondition and consequence of State responsibility. As the ILC has put it "*in international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances*."[18] International State responsibility may, thus, be defined as the legal relationship that arises from an internationally wrongful act and generates legal consequences that can include but are not limited to reparation for injury.[19]

2.1. ATTRIBUTION

As juridical abstractions, States necessarily act through natural or legal persons, i.e. individuals or entities.[20] The mechanism which links the conduct of a person to the State, for purposes of international law, is commonly referred to as *attribution*.[21] It is an essentially normative concept that refers to a legal operation based on criteria prescribed by international law.[22] According to the ILC, "[t]*he attribution of conduct to the State as a subject of international law is based on criteria determined*

[17] ARSIWA, Art. 2; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 215; DARSIWA, p. 32; M. Shaw, INTERNATIONAL LAW, p. 778; *Phosphates in Morocco*, ¶48; *Case Concerning United States Diplomatic and Consular Staff in Tehran*, United States v. Iran, ICJ, Judgement, 1980 (***"Tehran Hostages"***), ¶56; *Nicaragua Case*, ¶113, 226; *Gabčikovo-Nagymaros*, ¶78; *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, General Claims Commission, 1931 (***Dickson v. Mexico"***), p. 678.

[18] DARSIWA, pp. 32-33.

[19] ARSIWA, Article 1; DARSIWA, pp. 32-33; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, pp. 539-540; M. Shaw, INTERNATIONAL LAW, p. 778; J. Crawford and S. Olleson, "The Nature and Forms of International Responsibility", p. 449; *Factory at Chorzów*, p. 29; *Gabčikovo-Nagymaros*, ¶152.

[20] *Certain Questions Relating to Settlers of German origin in the Territory Ceded by Germany to Poland*, PCIJ, Advisory Opinion, 1923, p. 22; J. Crawford and Simon Olleson, "The Nature and Forms of International Responsibility", p. 454; H. Kelsen, PURE THEORY OF LAW, p. 291; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 113; M. Milanovic, "Special Rules of Attribution of Conduct in International Law", p. 302.

[21] See C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION (2020), p. 5; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 113; DARSIWA, p. 36.

[22] J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 113; DARSIWA, pp. 38-39, 113.

by international law and not on the mere recognition of a link of factual causality."[23] Paradoxically, attribution is described as the subjective element of an internationally wrongful act, but mainly relies on objective elements to establish its criteria.[24]

This mechanism is prescribed in several sub-areas of international law, such as responsibility law, diplomatic law or treaty law.[25] These sub-areas share the common feature of attaching the State to the person that is *in fact* carrying an unlawful conduct, enjoying immunity or consenting to be bound by a treaty.[26] Under the law of responsibility, attribution acts as a "legal bridge" between the conduct *in fact* carried out by an individual or entity and the State, so as to be *legally* regarded as an act of the State.[27] Both acts and omissions may be attributable to the State depending on the obligation in question, as States may also be held responsible for its failure to comply with obligations, e.g. to prevent transboundary harm or human rights violations.[28]

The ARSIWA contain a chapter dedicated to attribution, which is composed of 8 articles that establish criteria for attributing a conduct to a State. The general rule is that the only conducts which are attributable to a State are the ones carried out by "*its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State*."[29]

The rules of attribution set out in the ARSIWA may not apply in all situations by virtue of *lex specialis*.[30] Accordingly, article 55 of the ARSIWA determines that the "*articles do not apply where and to the extent that the conditions for the*

---

[23] DARSIWA, pp. 38-39.
[24] See C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, pp. 7-9; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 113; DARSIWA, p. 34.
[25] See, M. Milanovic, "Special Rules of Attribution of Conduct in International Law", pp. 295-393, 302.
[26] *Id.*, pp. 295-393, 303.
[27] C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 5.
[28] DARSIWA, p. 34; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 543; *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 1996 (***"Nuclear Weapons"***), ¶29; *Pulp Mills on the River Uruguay*, Argentina v. Uruguay, ICJ, Judgement, 2010 (***"Pulp Mills"***), ¶101; *Certain Activities carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River*, Costa Rica v. Nicaragua and Nicaragua v. Costa Rica, ICJ, Judgement, 2015 (***"Construction of a Road"***), ¶153; *Case of Velásquez-Rodríguez v. Honduras*, IACHR, Merits, 29 July 1988, ¶172.
[29] DARSIWA, p. 38.
[30] ARSIWA, Art. 55; DARSIWA, p. 42; M. Milanovic, "Special Rules of Attribution of Conduct in International Law", pp. 295-393, 303.

existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[31] This principle has been applied in relation to attribution in the context of international disputes.[32] Nevertheless, the general rules of attribution remain particularly relevant in the absence of special rules.

2.2. BREACH

The legal operation of attributing a conduct to a State cannot be employed as a stand-alone approach to ascertaining the existence of an internationally wrongful act. The second precondition – constituting a breach of an international obligation – must also be met.

As set forth in article 12 of the ARSIWA, "*there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character*."[33] This terminology was chosen by the ILC, amongst other possible references used by international courts, such as "*breach of an engagement*" or "*any violation by a State of any obligation*".[34] The objective was to address any international obligation of the State, whether of a customary or conventional nature, which is legally binding to the signatory State.[35] As noted in the ILC commentaries to the ARSIWA, "*what matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State*."[36]

---

[31] ARSIWA, Art. 55.
[32] *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, ¶59-63; *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (***"Mesa Power v. Canada"***), ¶362; United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Panel, WTO Panel WT/DS379/R, 22 October 2010 (***"US Anti-Dumping Panel Report"***), ¶8.90; *Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶321.
[33] ARSIWA, Art. 12.
[34] DARSIWA, p. 35; *Factory at Chorzów*, p. 29; *Reparation for Injuries*, pp. 174, 184.
[35] DARSIWA, p. 35.
[36] *Id.*, p. 36.

III. LEGAL FRAMEWORK

1. ARTICLE 5 OF THE ARSIWA

The rule of attribution which allows States to be accountable for acts of entities that exercise elements of governmental authority is reflected in article 5 of the ARSIWA, as follows:

> *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.*[37]

The ARSIWA were drawn up by the ILC and compose the legal framework of international State responsibility.[38] They constitute the most widely recognized instrument of codification of the law of State responsibility, frequently mentioned in ICJ rulings.[39]

Article 5 of the ARSIWA imposes three requirements for the attribution of acts of entities that exercise governmental authority: firstly, the acts must be carried out by "*a person or entity which is not an organ of the State under article 4*"; secondly, the entity must be "*empowered by the law of that State*" to "*exercise elements of the*

---

[37] ARSIWA, Art 5.

[38] DARSIWA, pp. 26-30; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 45.

[39] *Certain Iranian Assets*, Islamic Republic of Iran v. United States of America, ICJ, Judgement, 2023, ¶226, 232; *Armed Activities on the Territory of the Congo*, Democratic Republic of the Congo v. Uganda, ICJ, Judgement, 2022, ¶70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Croatia *v.* Serbia, ICJ, Judgment, 2015 (***"Croatia v. Serbia"***), ¶104, 128; *Jurisdictional Immunities of the State*, Germany *v.* Italy (Greece interveening), ICJ, Judgement, 2012, ¶99, 58, 93, 137; *Pulp Mills*, ¶273; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, Mexico v. United States of America, ICJ, Judgement, 2009 (***"Avena and Other Mexican Nationals"***), ¶63; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, ICJ, Judgement, 2007 (***"Bosnia v. Serbia"***), ¶173, 385, 398, 407, 414; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 2004 (***"Construction of a Wall"***), ¶140; *Gabčíkovo-Nagymaros*, ¶51.

governmental authority", and, finally, must also be "*acting in that capacity in the particular instance*".[40]

Article 5 does not explicitly refer to specific categories of entities, but rather refers to "*a person or entity which is not an organ of the State under article 4*",[41] thereby providing a criterion of negative delimitation according to which, in theory, only entities which are not organs of the State under article 4 may be considered an entity for the purposes of article 5.[42]

In addition, the person or entity must also be "*empowered by the law of the State to exercise elements of the governmental authority*".[43] These concepts raise, at least, two key questions for the application of article 5: what can be regarded as "*elements of the governmental authority*" and what are the means through which a person or entity can be "*empowered by the law of the State*".

Lastly, the conduct may only be considered as an act of the State under international law "*provided that the person or entity is acting in that capacity in the particular instance*".[44]

2. HISTORICAL BACKGROUND

The practice of resorting to other entities outside the formal State's machinery to perform particular functions goes back to Ancient Rome, where public construction, weaponry provision and tax collection were entrusted, through State contracts, to entities (*societates publicanorum*) that were owned by private persons (*publicani*).[45] From the Middle Age until the late 18th century, European monarchies promised powers and privileges to external entities that pursued public interests, such as tax collection, healthcare provision, colonial and territorial management and also for imperial expansion purposes and commercial purposes related to international trade.[46] The industrial revolution boosted these practices,

[40] ARSIWA, Art. 5.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] H. Hansmann et al, "Law and the Rise of the Firm", in 119 HARVARD LAW REVIEW (2005), p. 1360; P. Costa Gonçalves, ENTIDADES PRIVADAS COM PODERES PÚBLICOS (2005), pp. 34-37.
[46] M. J. Estorninho, A FUGA PARA O DIREITO PRIVADO (1996), p. 24; A. Pellet, "The Definition of Responsibility in International Law", pp. 3-4; P. Costa Gonçalves,

which increased in the 19th and 20th century, with a two-fold practice being adopted worldwide - States were resorting to both public and private corporate entities to pursue public objectives.[47] States created public enterprises and nationalized private companies, but also made concession agreements with private companies to manage public services, such as railways and water and energy systems.[48] During this period, BORCHARD[49] questioned whether a State should be responsible for the acts of a person to which it has issued a license or granted a monopoly of a public service, and concluded that neither issuing a license nor granting a monopoly of a public service made the licensee or monopolist an agent of the State and, thus, their wrongful acts did not engage the direct international responsibility of the State.[50] After the First World War, States reduced the delegation of functions to private companies, which mainly resulted from the Great Depression and other financial crises, the Second World War and the end of the colonial empires.[51] Instead, States started to reserve administrative tasks and, in particular, the exercise of public powers to their own structure of public administration, which led to extensive nationalizations and to the creation of State-owned corporations, in particular in the sectors of transportation, energy and banking.[52] In some States, governmental functions were also exercised by political parties, such as the Communist Party in the Union of Soviet Socialist Republics, the Fascist Party in Italy and the

---

ENTIDADES PRIVADAS COM PODERES PÚBLICOS, p. 39-42; H. J. Laski, "The Early History of the Corporation in England", in 30 HARVARD LAW REVIEW 6 (1917), p. 586; J. Micklethwait and A. Wooldridge, THE COMPANY : A SHORT HISTORY OF A REVOLUTIONARY IDEA (2003), p. 17.

[47] H. Hansmann et al, "Law and the Rise of the Firm", p. 1375; P. Costa Gonçalves, ENTIDADES PRIVADAS COM PODERES PÚBLICOS, p. 43; IMF, State-Owned Enterprises in Middle East, North Africa, and Central Asia: Size, Costs, and Challenges, IMF Doc. No. DP/2021/019 (2021), p. 7.

[48] H. Obinger et al, THE POLITICAL ECONOMY OF PRIVATIZATION IN RICH DEMOCRACIES (2016), pp. 6-9; H. Hansmann et al, "Law and the Rise of the Firm", p. 1375; P. Costa Gonçalves, ENTIDADES PRIVADAS COM PODERES PÚBLICOS, pp. 43-44.

[49] E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1916), p. 190.

[50] *Id.*

[51] Notwithstanding, a few inherited situations of delegation were maintained, e.g. private companies that had concession agreements in the management of certain public services. Cfr. OECD, "Corporate Governance of State-Owned Enterprises: A survey of OECD countries" (2005), available at https://read.oecd-ilibrary.org/governance/corporate-governance-of-state-owned-enterprises_9789264009431-en#page38.

[52] P. Costa Gonçalves, ENTIDADES PRIVADAS COM PODERES PÚBLICOS, p. 44; OECD, "Corporate Governance of State-Owned Enterprises: A survey of OECD countries", p. 20.

Kuomintang in China.[53] Despite acknowledging that those political parties were "*frequently indistinguishable*" from the government, LAUTERPACHT concluded that an act of a political party "*associated with, influencing, and, possibly, appointing the government is not sufficient to saddle the State with international responsibility*."[54] LAUTERPACHT acknowledged that such state of affairs could potentially lead to situations where States resort to private persons to carry out unlawful acts without engaging direct responsibility, but accepted it as the position of international law at the time.[55] Differently, PREUSS considered that a State cannot evade responsibility by "*dissociating itself from the acts of an organization which, although lacking governmental character by national law, enjoys the substance of power*."[56] In the same sense, FRIEDMANN stated that "*there is nothing sacred in these established rules (...) and it is better to play havoc with them than to maintain an old rule completely out of contact with political reality*."[57]

In 1924, the Assembly of the League of Nations, proposed to establish a Committee of Experts with the purpose of identifying the topics to which international agreement was *"most desirable and realizable"*[58]. Following the suggestion of the Assembly, the Council established the Committee,[59] which would proceed on drawing up reports noting points of agreement or divergency, which would serve as "*basis of discussion*" for the first codification conference of the

[53] H. Lauterpacht, "Boycott in International Relations", in 14 BRITISH YEARBOOK OF INTERNATIONAL LAW (1933), p. 125.
[54] *Id.*, p. 134
[55] *Id.*, pp. 125, 134.
[56] Preuss noted that since the end of World War I, States had been evading responsibility by carrying unlawful acts "through organizations which are formally of a non-governmental character, but which are so closely identified with the government concerned as to be, in fact, indistinguishable therefrom". Furthermore, the "existing rules as to state responsibility were evolved under a political situation in which it was possible to make a sharp distinction between governments and private person". See L. Preuss, "International Responsibility for Hostile Propaganda Against Foreign States", in 28 AMERICAN JOURNAL OF INTERNATIONAL LAW (1938), p. 649.
[57] W. Friedmann, "The Growth of State Control over the Individual, and its Effect Upon the Rules of International State Responsibility", in 19 BRITISH YEARBOOK OF INTERNATIONAL LAW (1938), pp. 118, 144.
[58] Resolution of 22 September 1924, reproduced in "United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947), p. 103.
[59] Resolution of 12 December 1924, reproduced in "United Nations Documents on the Development and Codification of International Law" 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947), p. 104.

League of Nations.[60] The list of subjects for preliminary examination included State responsibility.[61] In the request for information addressed to the Governments, point VI addressed the *"acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)*" and point VII addressed the acts of private persons.[62] After receiving replies from different Governments, the Committee identified the following basis of discussion related to point VI:

> *A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.*[63]

On the other hand, the basis of discussion of point VII only addressed the responsibility of the State for acts of private persons in situations where the State has either failed to act in due diligence to protect the foreigner or punish the author of the damage or put an end to the right of reparation enjoyed by a foreigner against a private person.[64] Despite the efforts and developments on the subject under the auspices of the League of Nations, the Committee in charge of the subject of responsibility was unable to complete its study and, thus, deliver a report to the

---

[60] Hence, the "basis of discussion" for the Codification Conference were based on provisions "upon which agreement appears to exist, or which do not give rise to divergences of view so serious as to make it impossible to anticipate that an agreement may be reached after consideration, and if necessary, modification and amendment". See "United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947), p. 76; League of Nations Conference for the Codification of International Law, Doc. No. C.75.M.69.1929.V (Vol. III, 1929), p. 5.

[61] Although, at the time, the subject of State responsibility was named "liability of states for injury caused on their territory to the person or property of foreigners and related problems of inquiring into the facts which may involve liability and of prohibiting recourse to measures of coercion before exhausting means for pacific settlement", it was ultimately named "Responsibility of States for Damage done in their territory to the Person or Property of Foreigners" as reflected in Resolution of 27 September 1927 of the League Assembly. See "United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947), p. 68; Resolution Adopted by the Assembly of the League of Nations, 27 September 1927 in "United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947), p. 105.

[62] League of Nations Conference for the Codification of International Law, pp. 90-103.

[63] Point VI, Basis of Discussion No. 16, League of Nations Conference for the Codification of International Law, Doc. No. C.75.M.69.1929.V (Vol. III, 1929), pp. 90-92.

[64] League of Nations Conference for the Codification of International Law, pp. 96-103.

Hague Codification Conference of 1930.[65] Concurrently, private bodies carried out their own codification projects on State responsibility and some adopted the same terminology as the League of Nations.[66] In the session of 1927, the Institute of International Law drew a broader rule than the one that was drawn up by the Preparatory Committee of the League of Nations and reflected in Basis of Discussion No. 16. Article II of the resolution was alluding to the responsibility of the State "for the act of corporate bodies exercising public functions on its territory."[67] The outbreak of the Second World War along with the collapse of the League of Nations suspended the codification of the law of State responsibility, which was only resumed by the ILC, once duly established at the UN by the General Assembly, in 1947.[68]

[65] Section C, Final Act of the Conference for the Codification of International Law held at the Hague in March-April 1930, in League of Nations, Acts of the Conference for the Codification of International Law, Plenary Meetings (Vol. I, 1930), p. 169; See also, S. Rosenne, THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY (1991), pp. 2-17; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, pp. 28-32; United Nations Documents on the Development and Codification of International Law, p. 82.

[66] Yearbook of the International Law Commission, American Institute of International Law 1925 Project No. 15 on Responsibility of Governments (Vol. II, 1956), pp. 173, 227; Institute of International Law, International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners, in 'Resolutions of the Institute of International Law Adopted at Lausanne, 1927' 22 AJIL No. 1, 1928 Supp. Pp. 330-333; Professor Strupp, Draft Treaty Concerning the Responsibility of a State for Internationally Illegal Acts (1927) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1969), pp. 125,151-152; Harvard Law School, Draft Convention and Comments on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, in 'The Law of State Responsibility for Damage Done in Their Territory to the Person or Property of Foreigners' 23 AJIL 2 (Supp. 131, 1929), pp. 133-242; Deutsche Gesellschaft für Völkerrecht, Draft Convention on the Responsibility of States for Injuries Caused in their Territory to the Person or Property of Aliens (1930), in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1969) pp. 125, 149-151; Professor Roth, Draft Convention on the Responsibility of States for Internationally Wrongful Acts (1932), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1969), pp. 125, 152; Resolution on "International Responsibility of the State", Seventh Conference of American States (Montevideo, 1933) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1956), pp. 173, 226-227.

[67] "Resolutions of the Institute of International Law Adopted at Lausanne, 1927", in 22 THE AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp. 330, 1928).

[68] See S. Rosenne, THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY, p. 1; UN General Assembly, Resolution 174(II) 123rd plenary meeting, 21 November 1947; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 34.

State responsibility was one of the first topics to be selected for codification by the ILC, due to its generally recognized importance.[69] In 1953, the General Assembly challenged the ILC to engage in a process of codification of the principles of international law governing State responsibility by way of a request.[70]

Before the commencement of discussions on attribution at the ILC, the question of whether a State could be responsible for the acts of public separate entities was brought before the ICJ. In *Certain Norwegian Loans*, France claimed that Norway was responsible for the acts of Norwegian banks, which were autonomous public bodies under domestic law, and argued that the independent legal personality of the banks under domestic law was not transposable to international law, because the Norwegian banks and the State of Norway were the same, as demonstrated by a previous Norwegian claim of State immunity for the Mortgage Bank.[71]

In his third report, the ILC Special Rapporteur on State Responsibility, Mr. Roberto Ago, introduced the topic of attribution to the State of acts carried out by entities that were separate from the State. The subject was divided in two different articles, as follows:

> *Article 7. Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State*
>
> *The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law.*[72]
>
> *Article 8. Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on*

---

[69] Although some members showed reluctance or were even against that choice, due to the unsuccess of the topic in the 1930 Hague Codification Conference, the general opinion was in favor of adding State responsibility to the list of topics for codification. Cfr. International Law Commission, 1st session, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1949), pp. 50-59.

[70] UN General Assembly, Resolution 799(VIII) of 7 December 1953.

[71] *Case of Certain Norwegian Loans*, France v. Norway, ICJ, Oral Arguments (Public hearing of 15 May 1957), 1957 (***"Certain Norwegian Loans – Oral Arguments"***), p. 72.

[72] Mr. Robert Ago, Third Report on State Responsibility, p. 262 (emphasis added).

behalf of the State

The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.[73]

The ILC Special Rapporteur observed the growing phenomenon of decentralization of certain public functions *ratione materiae* which resulted in the proliferation of public corporations[74] and noted that "*it would be absurd to conclude, on the basis of this distribution, that an act or omission in the performance of one and the same public function should, from the international standpoint, be considered as an act of the State in one case and not in another*."[75] However, the Special Rapporteur considered that the attribution to the State of acts of organs of public institutions separate from the State[76] was still not established in practice, but reflected the progressive development of international law.[77] A different conclusion was drawn with regards to the attribution to the State of the acts of persons in fact acting on behalf of the State[78]: it was considered to be well established under international law.[79] During the ILC plenary discussions, some ILC members referred to the attribution of acts of public institutions separate from

[73] Mr. Robert Ago, Third Report on State Responsibility, p. 267 (emphasis added).
[74] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session (6 May – 26 July 1974), Doc. No. A/CN.4/SER.A/1974, (1975), p. 8.
[75] Mr. Robert Ago, Third Report on State Responsibility, p. 256
[76] *Article 7. Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State - The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law.* See Mr. Robert Ago, Third Report on State Responsibility, p. 262.
[77] Mr. Robert Ago, Third Report on State Responsibility, p. 256.
[78] ***Article 8. Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State*** **-** *The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.* See Mr. Robert Ago, Third Report on State Responsibility, p. 267.
[79] Mr. Robert Ago, Third Report on State Responsibility, p. 264.

the State as "*unassailable from the point of view of doctrine and State practice*"[80] and as "*completely acceptable, since it expressed the position of States, jurisprudence and doctrine*."[81] In response, the Special Rapporteur affirmed that "*all the rules in the draft were now customary rules, except a few which represented progressive development of international law* (…)" and found "*by no means surprising that international law should attribute to the State something which was not attributed to it by internal law; for it was as a subject of international law that the State had attributed to it by international law acts for which, as a subject of internal law, it was not responsible in internal law*."[82]

Notwithstanding, the interrelationship and possible overlapping of articles 7 and 8 was widely commented during the plenary discussions.[83] In this regard, Mr. Kearney proposed a combined version of articles 7 and 8, which were previously proposed in separate, as follows:

Combined text for articles 7 and 8

1. The conduct of an organ of a territorial governmental entity, when acting in that capacity in the case at issue, shall be considered to be an act of the State under international law.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity shall be considered to be an act of the State under international law when, under the internal law of the State or the internal law of a territorial governmental entity, the entity is specifically designated as having governmental status and has acted in that capacity in the case at issue or is authorized to exercise elements of the governmental authority of the State or territorial governmental entity and has exercised that authority in the case at issue.

3. The act of any such organ relating to the establishment or fulfilment of a contractual obligation shall be considered as an act of the State under

[80] However, Mr. Elias was not fully convinced that the current draft of article 7 properly expressed such a principle. See YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 14.
[81] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 18.
[82] *Id.*, p. 28.
[83] *Id.*, pp. 33-34.

international law only to the extent permitted under the internal law of the State in effect at the date of the entry into force of the contract. [84]

However, while some members, such as Mr. Kearney, were in favor of having a combined version of the two articles, others, such as Mr. Reuter, were in favor of having separate articles.[85] After the plenary discussions, the Chairman suggested that both articles should be referred to the Drafting Committee. Accordingly, the Committee proposed the following texts for articles 7 and 8:

Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.[86]

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; or

(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.[87]

---

[84] *Id.*, p. 33.
[85] *Id.*, p. 34.
[86] *Id.*, pp. 151-152.
[87] *Id.*, pp. 152-153.

Afterwards, the ILC provisionally adopted articles 7 and 8 on first reading at its twenty-sixth session.[88] The ILC reaffirmed that draft article 7 reflects a principle of attribution which is a corollary of the unity of the State from the international standpoint.[89] For that purpose, draft article 7 disregards the distinction between "*the various entities which, under internal law, perform specific services for the community and, in so doing, exercise functions which constitute elements of the governmental authority*."[90] In respect of the rule envisaged in paragraph 2 of article 7, the ILC conceded that such rule "*stems from, and is designed to cover, the need to take into account a typical phenomenon of our times: the proliferation of entities which, within a given community, are empowered to exercise some governmental authority*."[91] The ILC also recalled the purpose of article 7 as a whole, i.e. "*the State should not be able to evade its international responsibility in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the State machinery proper*" and concluded that "*there is already an established rule on the subject*".[92]

Meanwhile, as a general tendency from the early 1980s through the 1990s, the traditional administrative State (the welfare State) engaged in a downsizing process and privatization arose as a widespread tendency mainly in Europe, Mexico, Turkey and Australia.[93] This growing phenomenon used private persons as a mechanism of execution of public functions and pursuit of the public interest.[94] Nonetheless, State-

[88] Since the final version of draft article 8 had a clearly distinct scope from draft article 7, which does not fall under the scope of this dissertation, we will not address the commentaries of the ILC in that regard. Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974, Official Records of the General Assembly, twenty-ninth session Supp. No. 10 in Yearbook of the International Law Commission, 1974, vol. II(1), 276-277.

[89] Report of the International Law Commission on the work of its twenty-sixth session, p. 277.

[90] *Id.*, p. 278.

[91] *Id.*, p. 281.

[92] *Id.*, p. 282.

[93] See, Ali Farazmand, "Globalization and Public Administration", in 59 PUBLIC ADMINISTRATION REVIEW 6 (1999), pp. 517-518; OECD, "Corporate Governance of State-Owned Enterprises: A survey of OECD countries", p. 22; IMF, "State-Owned Enterprises in Middle East, North Africa, and Central Asia: Size, Costs, and Challenges", p. 7; P. Costa Gonçalves, ENTIDADES PRIVADAS COM PODERES PÚBLICOS, p. 45.

[94] *Id.* Examples of such practice can be found in multiple situations where States have empowered private military and security companies to exercise traditional public security functions. See, The Geneva Centre for the Democratic Control of Armed Forces, Legislative Guidance Tool for States to Regulate Private Military and Security Companies

owned enterprises remained relevant especially in the sectors of transportation, electricity, gas, water supply, banking and insurance, broadcasting, natural resources extraction and telecommunications.[95]

During the ILC work on State responsibility, the attribution of acts of a non-State entity was brought before the Iran-US Claims Tribunal. In *Hyatt International Corporation*, the Tribunal had to analyze whether the actions carried out by the Foundation for the Oppressed were attributable to the Government of Iran.[96] The Government of Iran held that the Foundation was "*a non-Governmental charity organization*" which was not controlled by the Government and, therefore, its actions could not be attributed to the Government.[97] However, the facts demonstrated that the Foundation was established by order of the Iranian Head of State and approval of the Iranian Government,[98] the Head of State appointed the President and Central Council of the Foundation, the functions of the Foundation included "*the holding of properties confiscated by the Government and the management of those properties for public purposes, particularly for the provision of housing and other needs of the poor*"[99], the Foundation was also "*empowered to call upon governmental agencies and institutions for aid*"[100] and the financial and business affairs of the Foundation were supervised by the office of the Prime Minister of Iran.[101] Ultimately, the Tribunal found that the Foundation had

(2016), p. 1, available at: https://www.mdforum.ch/pdf/Legislative-Guidance-Toolkit.pdf; UNODC, State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety, Criminal Justice Handbook Series (2014), pp. 1-3, available at: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf (last accessed on 2 February 2021); The Geneva Centre for the Democratic Control of Armed Forces A Contract Guidance Tool for Private Military and Security Services: Promoting Accountability and Respect for Human Rights and International Humanitarian Law (2017), p. 7, available at: https://www.mdforum.ch/pdf/contract-guidance-tool.pdf.

[95] OECD, "Corporate Governance of State-Owned Enterprises: A survey of OECD countries", p. 38.

[96] *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, 9 Iran-USCTR 12 (1985) (***"Hyatt International Corporation"***), p. 6.

[97] *Hyatt v. Iran*, pp. 6-7.

[98] A. Mohammadighalehtaki, ORGANISATIONAL CHANGE IN POLITICAL PARTIES IN IRAN AFTER THE ISLAMIC REVOLUTION OF 1979. WITH SPECIAL REFERENCE TO THE ISLAMIC REPUBLIC PARTY (IRP) AND THE ISLAMIC IRAN PARTICIPATION FRONT PARTY (MOSHAREKAT) (2012), p. 92.

[99] *Hyatt v. Iran*, pp. 10-11.

[100] *Id.*, p. 11.

[101] *Id.*

governmental status and constituted an instrumentality controlled by the Government of Iran.[102]

A few years later, the first report of the new ILC Special Rapporteur on State Responsibility, Mr. James Crawford proposed the following text for article 7:

> *Article 7. Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority*
>
> *The conduct of an entity which is not part of the formal structure of the State but which is empowered by the law of that State to exercise elements of the governmental authority shall also be considered as an act of the State under international law, provided the entity was acting in that capacity in the case in question.*[103]

The Special Rapporteur took into consideration "*the comments of States and developments in doctrine and practice since the adoption of part one*"[104] and left the coordination of the articles and other unresolved issues to the second reading.[105] Similarly to the process observed on the first reading, the ILC took into consideration the first report of the Special Rapporteur during the plenary discussions. Ultimately, it was agreed to refer article 7 to the Drafting Committee.[106] In 1998, the Drafting Committee made slight changes to the text of the article proposed by the Special Rapporteur, Mr. James Crawford, and adopted the following version:

> *Article 7. Attribution to the State of the conduct of entities exercising elements of the governmental authority*
>
> *The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under*

[102] *Id.*, pp. 11-12.
[103] First Report on State responsibility, by Mr. James Crawford, Special Rapporteur. Doc. No. A/CN.4/490 and ADD.1-7 (24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998) (**"Mr. James Crawford, First Report on State Responsibility"**), p. 56.
[104] *Id.*, p. 5.
[105] *Id.*
[106] Summary record of the 2553rd meeting, Yearbook of the International Law Commission (Vol. I, 1998) (20 April-12 June 1998 and 27 July-14 August 1998), p. 246.

international law, provided the entity was acting in that capacity in the case in question.[107]

Notwithstanding, the Commission decided not to adopt the draft articles yet, but instead it took note of the report of the Drafting Committee.[108] In 2000, at the fifty-second session, the Committee provisionally adopted the draft articles on second reading.[109] The Committee did not make any substantive changes to article 7, which was previously adopted in 1998, but changed the numbering of the articles and, therefore, article 7 turned into article 5 and article 5 was renumbered as article 4.[110] Finally, in 2001, at the fifty-third session, the Committee adopted the articles on second reading.[111] The final version of article 5 suffered a small change on its wording and the scope was extended to "the conduct of a person or entity".[112] Thereafter, the Commission adopted the draft articles proposed by the Committee along with the commentaries.[113]

Despite the long and complex process of codification, article 5 achieved its final form in 2001,[114] and the General Assembly took note of the ARSIWA,[115] apparently closing the chapter of legal drafting the rules on State responsibility.

---

[107] Draft Articles proposed by the Drafting Committee on second reading, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. I, 1998), (20 April-12 June 1998 and 27 July-14 August 1998), 288.
[108] *Id.* 291-292.
[109] UN General Assembly, Draft Articles provisionally adopted by the Drafting Committee on second reading, (2000).
[110] Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading, International Law Commission, 2001, 53rd session, 26 July 2001, A/CN.4/L.602/Rev.1.
[111] Article 5, Draft Articles provisionally adopted by the Drafting Committee on second reading, General Assembly, 2000, 21 August 2000, A/CN.4/L.600.
[112] Draft Articles proposed by the Drafting Committee on second reading, Yearbook of the International Law Commission, 2001, Vol. I (23 April-1 June and 2 July-10 August 2001), 92-93.
[113] Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, 25.
[114] ILC 'Articles on Responsibility of States for Internationally Wrongful Acts' in Yearbook of the International Law Commission, 2001, vol. II (Part Two) UN Doc A/56/10 iii, 26-29, art 5.
[115] Resolution 56/83 of 12 December 2001 85th plenary meeting, UN Doc No. A/RES/56/83. According to Decision 55/488, the term "*takes note of*" used by the General Assembly with regards to the ARSIWA is neutral and thereby does not constitute approval nor disapproval. UN General Assembly 111th plenary meeting Decision 55/488 of 7 September 2001, UN Doc. No. A/DEC/55/488.

IV. INTERNATIONAL LEGAL NATURE

1. SOURCES OF INTERNATIONAL LAW

Article 38(1) of the ICJ Statute is commonly known as the main reference to the sources of international law.[116] According to PELLET, "[t]*he sources are concerned with the law-creating process; the norms with the content of the law*."[117]

Despite its popularity, article 38(1) is not exempt from criticism, especially for not being exhaustive.[118] Leaving exhaustion theories aside, article 38(1) sets forth the sources of international law that the ICJ shall apply to formulate its decision and thereby refers to international conventions, international custom, the general principles of law and judicial decisions and teachings of the most highly qualified publicists of the nations.[119]

International conventions, international custom and general principles of law constitute the so-called formal sources of international law, which are involved in the law-creation process, while judicial decisions and teachings of the most highly qualified publicists constitute subsidiary means for the determination of rules of law which are involved in the law-determination process.[120]

International conventions or treaties[121] may be defined as "*international agreement*[s] *concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*".[122] Once in force, treaties become legally binding for its signatory parties as set forth in article 29 of the VCLT, thereby constituting a source of international law.[123] According to the

---

[116] A. Pellet, "Decisions of the ICJ as Sources of International Law?, in Decisions of the ICJ as Sources of International Law?", GAETANO MORELLI LECTURES SERIES (Vol. 2, 2018), pp. 42, 46.
[117] *Id.*
[118] *Id.*, pp. 42, 47.
[119] STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38(1).
[120] A. Borda, "A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals", 24 EJUL 2 (2013), p. 653; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38(1); A. Pellet, "Article 38", THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (Zimmermann et al, 3rd Ed., 2019), p. 200, ¶296.
[121] A. Pellet, "Article 38", p. 160, ¶178.
[122] VIENNA CONVENTION ON THE LAW OF TREATIES, 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331 art. 2(1)(a) (**"VCLT"**).
[123] D. B. Hollis, "Defining Treaties", in THE OXFORD GUIDE TO TREATIES (2nd Ed., 2022), p. 13.

ICJ, "*conventions must, moreover, be seen against the background of customary international law and interpreted in its light.*"[124]

International customary law may be defined as unwritten law deriving from the evidence of a general practice accepted as law.[125] In general, States are legally bound by a rule of customary law[126], regardless of its codification into international conventions.[127]

General principles of law are "*direct sources of rights and obligations according to which the Court must decide while, on the contrary, both jurisprudence and doctrine are subsidiary means which must be used to determine, e.g., the general principles themselves*."[128]

Judicial decisions and teachings of the most highly qualified publicists are particularly relevant to identify the existence of a customary rule of international law.[129] To formulate a decision, the ICJ frequently recalls its previous judgments,[130] and refers to the opinions of the ILC.[131] Not often does the ICJ refer to the opinions of other international bodies.[132]

---

[124] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Canada v. United States of America, ICJ, Judgement, 1984 (***"Gulf of Maine***), ¶83.

[125] International Law Commission, "Draft conclusions on identification of customary international law with commentaries" in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, Part Two, 2018), UN Doc No. A/73/10 iii, p. 122.

[126] Except in the cases of (i) regional/local custom which is only binding upon the members of a given territorially circumscribed community of States, and (ii) States that are persistent objectors to a certain rule of general customary international law. Cfr. M. Shaw, INTERNATIONAL LAW, pp. 91-92.

[127] *North Sea Continental Shelf*, Germany v. Netherlands, ICJ, Judgement, 1969, ¶63; *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. United States of America, ICJ, Judgement, 1984, ¶73; *Nicaragua Case*, ¶179.

[128] A. Pellet, "Article 38", p. 200, ¶296.

[129] "Draft conclusions on identification of customary international law, with commentaries", pp. 142-151.

[130] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, Ukraine v. Russia, ICJ, Judgement, 2024; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Nicaragua v. Colombia, ICJ, Judgement, 2023 (***"Maritime Delimitation between Nicaragua and Colombia"***); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Gambia v. Myanmar, ICJ, Judgement 2022; *Construction of a Road*; *Pulp Mills*; *Bosnia v. Serbia*.

[131] *Certain Iranian Assets*, ¶226, 232; *Armed Activities on the Territory of the Congo*, ¶70; *Croatia v. Serbia*, ¶104, 128; *Jurisdictional Immunities of the State*, ¶99, 58, 93, 137; *Pulp Mills*, ¶273; *Avena and Other Mexican Nationals*, ¶63; *Bosnia v. Serbia*, ¶173, 385, 398, 407, 414; *Construction of a Wall*, ¶140; *Gabčíkovo-Nagymaros*, ¶51.

[132] *Ahmadou Sadio Diallo*, Republic of Guinea v. Democratic Republic of the Congo, ICJ, Judgement, 2010, ¶66; *Ahmadou Sadio Diallo*, Republic of Guinea v. Democratic Republic of the Congo, ICJ, Judgement, 2012, ¶13.

2. THE NATURE OF THE ARSIWA

The ARSIWA are not a convention, but most of the articles reflect well-established rules of international law and a few others are aimed at promoting the progressive development of international law.[133]

Although ILC articles usually serve as basis for a convention (e.g. the DALT, the DADII, the DACR and, respectively, the VCLT, the VCDR, and the VCCR)[134], the ARSIWA did not follow the same path. In this regard, CRAWFORD noted that the conversion of the ARSIWA into a convention could have an undesired effect on the law of State responsibility, as States might not be interested in ratifying such convention and that could impair the process of legal development.[135]

Attribution is unanimously recognized as a precondition for international responsibility,[136] as well as its first principle reflected on article 4 of the ARSIWA, according to which acts of State organs are attributable to the State.[137] Differently, the legal nature of article 5 is not as widely recognized.

3. THE NATURE OF ARTICLE 5

Article 5 of the ARSIWA was the result of, at least, 85 years of legal thinking. During the work of the ILC, article 5 (or former draft article 7) was identified as a corollary from the principle of unity of the State from the international standpoint and of the non-subordination of international law to internal law.[138] However, in the

---

[133] DARSIWA, p. 31; Summary record of the 1256th meeting, (8 May 1974) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 28; G. Guillaume, "Overview of Part One of the Articles on State Responsibility", in THE LAW OF STATE RESPONSIBILITY, p.188; J. Crawford and S. Olleson, "The Nature and Forms of International Responsibility", p. 449.

[134] Draft Articles on the Law of Treaties of 1966; Vienna Convention on the Law of Treaties of 1969; Draft Articles on Diplomatic Intercourse and Immunities of 1958; Vienna Convention on Diplomatic Relations of 1961; Draft Articles on Consular Relations of 1961; the Vienna Convention on Consular Relations of 1963.

[135] J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, pp. 90-92; J. Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", in 96 AJIL 4 (2002), p. 889;

[136] *Phosphates in Morocco*, ¶48; *Tehran Hostages*, ¶56; *Nicaragua Case*, ¶113, 226; *Gabčikovo-Nagymaros Project*, ¶78; *Dickson v. Mexico*, p. 678.

[137] DARSIWA, p. 40; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ, Advisory Opinion, 1999 (***"Immunity from Legal Process of a Special Rapporteur"***), p. 62, ¶62; *Armed Activities on the Territory of the Congo*, ¶213; *Bosnia v. Serbia*, ¶385.

[138] Report of the International Law Commission on the work of its twenty-sixth session, p. 277.

final version of the commentary to article 5, the ILC does not address the legal nature of the rule.[139]

Article 5 (or former draft article 7) has been referred to in the context of international disputes brought before the ICJ,[140] and other dispute settlement systems in the fields of international investments,[141] and trade.[142] Due to these references, some international scholars assume that article 5 reflects customary international law.[143] However, international courts and tribunals have avoided clarifying once and for all what is the legal nature of article 5.

---

[139] DARSIWA, pp. 42-43.

[140] *Armed Activities on the Territory of the Congo*, ¶160; *Bosnia v. Serbia*, ¶414.

[141] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (***Maffezini***), ¶78; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (***"Noble Ventures"***), ¶70; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (***"Jan de Nul"***), ¶155; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (***"Toto Costruzioni"***), ¶44; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (***"Hamester v. Ghana"***), ¶172; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 (***"Bosh International v. Ukraine"***), ¶151; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (***"Tulip v. Turkey"***), ¶292; *Mesa Power v. Canada*, ¶348; *Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award, 12 August 2016 (***"Flemingo DutyFree"***), ¶437; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 (***"Ampal-American v. Egypt"***), ¶136; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (***"Masdar Solar v. Spain"***), ¶168; *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award of the Tribunal, 6 October 2020 (***"Interocean v. Nigeria"***), ¶297; *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Partial Award (Jurisdiction and Liability), 5 February 2021 (***"Venezuela US v. Venezuela"***), ¶194.

[142] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Panel*, WTO Panel No. WT/DS103/AB/R WT/DS113/AB/R, 17 May 1999 (***"Canada Dairy Panel Report"***), p. 182, footnote 427; *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body*, WTO Appeal *WT/DS379/AB/R*, 11 March 2011 *(**"US Anti-Dumping Appeal"**)*, ¶308.

[143] C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 14; R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), p. 199; B. Stern, "The Elements of An Internationally Wrongful Act", in THE LAW OF INTERNATIONAL RESPONSIBILITY, p. 204; K. Hobér, "State Responsibility and Attribution", in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Muchlinski, Ortino, Schreuer, ed., 2008), p. 553.

In *Bosnian Genocide,*[144] the ICJ analyzed whether Serbia and Montenegro (former FRY) were responsible for the genocide committed in Srebrenica.[145] The ICJ considered that "[t]*he acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5)*" and, as such, it did "*not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case*." [146]

In *Armed Activities on Congo,*[147] the Democratic Republic of the Congo submitted that Uganda violated its international obligations due to the acts carried out by some military groups, such as the MLC.[148] The ICJ considered that the conduct of MLC could not be attributed to Uganda under article 5 of the ARSIWA but did not provide an explanation for that specific conclusion, nor addressed the legal nature of the rule.[149]

In most arbitral proceedings involving article 5, both ICSID and PCA provide thorough analysis, but generally also avoid addressing the legal nature of the said rule.[150] Notwithstanding, in *Toto Costruzioni,*[151] ICSID referred to the rule embodied in article 5 as a "*principle"*.[152]

---

[144] *Bosnia v. Serbia*.
[145] *Id.*, ¶379.
[146] *Id.*, ¶414.
[147] *Armed Activities on the Territory of the Congo*.
[148] *Armed Activities on the Territory of the Congo*, ¶24, 33.
[149] *Armed Activities on the Territory of the Congo*, ¶160.
[150] *Maffezini*, ¶78; *Noble Ventures*, ¶70; *Jan de Nul*, ¶155; *Hamester v. Ghana*, ¶172; *Bosh International v. Ukraine*, ¶151; *Tulip v. Turkey*, ¶292; *Mesa Power v. Canada*, ¶348; *Flemingo Duty Free*, ¶437; *Ampal-American v. Egypt*, ¶136; *Masdar v. Spain*, ¶168; *Interocean v. Nigeria*, ¶297; *Venezuela Us v. Venezuela*, ¶194.
[151] In *Toto Costruzioni*, the Claimant alleged that the Lebanese Government, through the *Conseil Executif des Grands Projets* (CEGP) and its successor, the Council for Development and Reconstruction (CDR), breached its obligations under a treaty. ICSID noted that Lebanon would only be responsible if the conducts of CEGP and CDR were attributable to that State. *Toto Costruzioni*, ¶17, 43.
[152] *Toto Costruzioni*, ¶47.

3.1. GENERAL PRINCIPLES OF LAW

3.1.1. NON-SUBORDINATION OF INTERNATIONAL LAW TO INTERNAL LAW

It is well-established in international law that States cannot rely on their internal law to disregard the application of international law.[153] This principle was reiterated during the ILC plenary discussions, where members of the ILC noted that international law "*should not surrender to internal law the duty of characterizing the situations with which international law was concerned*"[154], that "*it was the standpoint of international law, not of internal law, that had to be defined*"[155] and that "*an act could be lawful in internal law and wrongful in international law*"[156].

An opposite understanding – i.e., making international law subordinate to States internal law – could potentially impair the international legal order and lead to differentiated legal treatments for similar factual situations, where certain tasks are carried out by separate entities for evasion purposes.

This principle is without prejudice to the prerogative of international law to rely on internal law whenever deemed appropriate, e.g., to establish a criterion, to provide evidence on a case, to fill in a gap or to ascertain State practice.[157] For instance, article 4(2) of the ARSIWA expressly refers to internal law determining that "[a]*n organ includes any person or entity which has that status in accordance with the internal law of the State."*[158] In *Nottebohm*, the ICJ also relied on internal law to establish a criterion, and asserted that the rules on acquisition of nationality should be settled by States' own legislation.[159] In *Barcelona Traction*, the ICJ has also recognized the validity of referring to internal law whenever "*there are no corresponding institutions of international law to which the Court could resort*."[160]

Notwithstanding, reliance on internal law is a prerogative of international law, that "*does not entail a mechanism of renvoi such as that operating in private international law.*"[161] Internal law classifications are useful to determine, for instance, the existence of *de jure* organs, because international law established that as a criterion. However, "*internal law is not automatically received and incorporated in international law*",[162] because international law is neither bound by nor dependent on internal law. Furthermore, international law is more concerned with reality rather than what States establish under their internal law.[163] Thus, internal law cannot be decisive for purposes of attribution of acts to a State.[164]

3.1.2. UNITY OF THE STATE FROM THE INTERNATIONAL STANDPOINT

According to the ILC, "[t]*he principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility*."[165]

In this sense, article 4(1) of the ARSIWA disregards internal divisions of the State for purposes of attribution, stating that "*the conduct of any State organ shall be considered an act of that State under international law* (…) *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.*"[166] The ILC clarified that "*the reference to a State organ in article 4 is intended in the most general sense.* (…) *It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.*"[167] It further noted that this principle "*has long been recognized*" and "*was strongly supported during the preparatory work for the 1930 Hague Conference*."[168]

---

[153] *Certain Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, Advisory Opinion, 1932, pp. 4, 24; *The Case of the S.S. "Lotus"*, PCIJ, Judgment, 1927, pp. 5, 24; *The Greco-Bulgarian "Communities"*, PCIJ, Advisory Opinion 1930, pp. 5, 32; *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, United States of America v Italy, ICJ, Judgement, 1989, ¶73, 124; VCLT, Art. 27; ARSIWA, Art. 3; P. Dupuy, "Relations between the International Law of Responsibility and Responsibility in Municipal Law" in THE LAW OF INTERNATIONAL RESPONSIBILITY, p. 177.
[154] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 22.
[155] *Id.*, p. 16.
[156] *Id.*, p. 19.
[157] *Case Concerning Certain German Interests in Polish Upper Silesia*, Germany v. Poland, PCIJ, Judgment, 1926, pp. 5, 19; *Barcelona Traction, Light and Power Company, Limited*, Belgium v. Spain, ICJ, Judgement, 1970 (***"Barcelona Traction"***), ¶50; *Jurisdictional Immunities of the State*, ¶56.
[158] ARSIWA, Art 4(2).
[159] *Nottebohm Case*, Liechtenstein v. Guatemala, ICJ, Judgment, 1955, p. 20.
[160] *Barcelona Traction*, ¶50.
[161] C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 30.
[162] *Id.*
[163] *Serbia v. Montenegro*, ¶291; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 225; E. Correia Baptista, DIREITO INTERNACIONAL PÚBLICO, p. 566.
[164] R. Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 198; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 122.
[165] DARSIWA, p. 40.
[166] ARSIWA, Art. 4(1).
[167] DARSIWA, p. 40.
[168] DARSIWA, p. 41.

Even though the ILC commentaries do not expressly refer to the principle of unity of the State from the international standpoint in relation to article 5, the ILC has recognized, during its work on State responsibility, that it was also the reasoning behind article 5 (former draft article 7).[169] During the drafting process, the acts of territorial governmental entities, public corporations, semi-public entities and public agencies were considered to be attributable to the State under draft article 7.[170] However, territorial governmental entities were excluded from that article and were instead considered to be covered by article 4.[171] But still, the reasoning behind attribution of acts of territorial governmental entities and other autonomous public entities remained the same, i.e., not allowing States to evade responsibility due to their internal choices of administrative organization.

In the Sixth Committee of the 28th session of the General Assembly, the representative of the German Democratic Republic asserted that "*the internal organization of States could take a great variety of forms, ranging from complete centralization to very advanced decentralization of the exercise of public functions.*"[172] The ILC Special Rapporteur Mr. Roberto Ago also noted that decentralization may take many forms but the purpose remains the same, i.e., to supplement the functions provided directly by the State.[173] Indeed, while some States have a more centralized method of administration, others adopt a more decentralized system by which separate entities – whether they are regarded as parastatal, public or private under domestic law – pursue government policies and operational tasks.[174] In spite of the wide variety of administrative systems that can

[169] Mr. Robert Ago, Third Report on State Responsibility, pp. 256, 264; YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, pp. 14, 16, 17, 21; Report of the International Law Commission on the work of its twenty-sixth session, p. 278.
[170] Mr. Robert Ago, Third Report on State Responsibility, pp. 253-267; Report of the International Law Commission on the work of its twenty-sixth session, p. 277, 282-283.
[171] Mr. James Crawford, First Report on State Responsibility, p. 37; DARSIWA, p. 40, 43.
[172] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 10.
[173] Mr. Robert Ago, Third Report on State Responsibility, pp. 256-262.
[174] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 544; R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 198; D. Freitas do Amaral, CURSO DE DIREITO ADMINISTRATIVO (Vol. I, 4th Ed., 2016), pp. 92-110.

be more or less centralized, States cannot evade international responsibility due to their internal choices of State organization reflected in their internal law.[175]

In *Certain Norwegian Loans*, the French government held that distinct legal personality of the Norwegian banks under internal law could not be transposed into international law[176] During the public hearings, the French government held the following:

> *C'est donc tout naturellement que le Gouvernement de la République française a été amené à conclure que la Banque hypothécaire et la Banque des propriétés agricoles et habitations ouvrières, dont la situation est identique de l'avis des deux Parties, sont des organismes publics qui, sans doute, ont reçu une certaine autonomie administrative en droit interne norvégien, mais que cette autonomie est sans effet sur la responsabilité internationale de l'État norvégien.*
>
> *En droit interne, en effet, la création d'un établissement public répond à un besoin de décentralisation: il peut être nécessaire d'accorder une certaine indépendance à certains établissements ou organismes; soit pour des motifs budgétaires, soit en raison du but qu'ils poursuivent, par exemple un but d'assistance ou de culture. Cette indépendance est réalisée par l'octroi dans le droit interne de la personnalité morale.*
>
> *Nais si, en droit interne, la personnalité juridique des établissements publics, distincte de celle de l'État, entraîne comme conséquence que les procès relatifs à ces établissements doivent être dirigés contre eux et non contre l'État, comme l'indique la loi norvégienne sur les tribunaux (citée par*

---

[175] *Certain Norwegian Loans – Oral Arguments*, p. 72; League of Nations Codification Conference 1930 bases of discussion, pp. 19-38; YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 10; Mr. Robert Ago, Third Report on State Responsibility, p. 256; Report of the International Law Commission on the work of its twenty-sixth session, p. 282; L. Preuss, "International Responsibility for Hostile Propaganda Against Foreign States", p. 649; R. Dolzer, C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 198; C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 40; B. Stern, "The Elements of An Internationally Wrongful Act", p. 204.

[176] *Case of Certain Norwegian Loans*, France v. Norway, ICJ, Separate Opinion of Judge Sir Hersch Lauterpacht, 1957 (***"Certain Norwegian Loans"***), p. 72. Although the ICJ did not address this matter (because it accepted a preliminary objection raised by the Norwegian government and, as such, declared that it had no jurisdiction to adjudicate the dispute), Judge Hersch Lauterpacht and Judge Read were also not convinced with the Norwegian argument according to which Norway could not be made respondent in respect of the claim that concerned the banks. *Certain Norwegian Loans*, Dissenting Opinion of Judge Read, p. 96.

la duplique, par. 34, p. 446), cette conséquence n'a pas à être transposée dans le droit international comme le soutient le Gouvernement norvégien. Au point de vue du droit international, ces personnes publiques se confondent avec l'État comme le Gouvernement norvégien nous l'a expliqué lui-même dans son avis de 1931 lorsqu'il a revendiqué pour la Banque hypothécaire l'immunité d'État. [177]

A similar rationale can also be found in EU jurisprudence. In *Konle*, the CJEU established that "*a Member State cannot (…) plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis*."[178] In *Haim*, the CJEU recalled the *Konle* jurisprudence and affirmed that responsibility also may arise with regards to "(…) *those Member States, whether or not they have a federal structure, in which certain legislative or administrative tasks are devolved to territorial bodies with a certain degree of autonomy or to any other public-law body legally distinct from the State*."[179]

As such, internal choices that States make for their administrative organization are irrelevant for purposes of attribution under international law.[180] Pursuant to the principle of unity of the State from the international standpoint, the acts of entities that are empowered by the law of a State to exercise elements of governmental authority should be regarded as acts of that State.[181]

---

[177] *Certain Norwegian Loans*, p. 72. Although the ICJ did not address this matter (because it accepted a preliminary objection raised by the Norwegian government and, as such, declared that it had no jurisdiction to adjudicate the dispute), Judge Hersch Lauterpacht and Judge Read were also not convinced with the Norwegian argument according to which Norway could not be made respondent in respect of the claim that concerned the banks. *Certain Norwegian Loans*, Dissenting Opinion of Judge Sir Hersch Lauterpacht, p. 36; *Certain Norwegian Loans*, Dissenting Opinion of Judge Read, p. 96.

[178] *Konle Case*, CJEU Case No. C-302/97, Judgment, 1999, ¶62; *Haim Case*, CJEU Case No. C-424/97, Judgment, 2000 (***"Haim"***), ¶28.

[179] *Haim*, ¶31.

[180] C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 40; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 122.

[181] DARSIWA, pp. 32, 40; C. de Stefano ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 42; R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 198; B. Stern, "The Elements of An Internationally Wrongful Act", p. 204.

3.2. CUSTOMARY LAW

3.2.1. CONSTITUENT ELEMENTS

General practice and *opinio juris* are the two elements and essential conditions of customary law.[182] General practice is considered the "material" or "objective" element of custom, because it regards the conduct that evidences a certain practice.[183] On the other hand, *opinio juris* is known as the "subjective" or "psychological" element of custom and refers to the "sense", "feel" or "belief" of having a certain right or obligation.[184] Due to this subjectiveness, the process of identifying a customary rule of international law is, as described by PELLET, "*a process which remains partly mysterious but leads to a globally acceptable result*."[185]

In *North Sea Continental Shelf*, the ICJ held that "*although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.*"[186] Furthermore, in *Nicaragua*, the ICJ held the following:

> *"The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court*

[182] STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38(1)(b); *Asylum*, Colombia v. Peru, ICJ, Judgement, 1950, pp. 276-277; *Continental Shelf* , Libya v. Malta, ICJ, Judgement, 1985 (***"Continental Shelf"***), ¶27; *Maritime Delimitation Between Nicaragua and Colombia*, ¶46; "Draft conclusions on identification of customary international law", draft conclusion 2; ILC 'Draft conclusions on identification of customary international law with commentaries' IN YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, Part Two, 2018), UN Doc. No. A/73/10 iii, pp. 122, 125.

[183] ILC "Draft conclusions on identification of customary international law, with commentaries, pp. 122, 129.

[184] A. Pellet, "Article 38", p. 175, ¶223; ILC "Draft conclusions on identification of customary international law, with commentaries", p. 138; *Continental Shelf*, ¶77; *North Sea Continental Shelf*, ¶77.

[185] A. Pellet, "Article 38", p. 181, ¶240.

[186] *North Sea Continental Shelf*, ¶74.

deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[187]

As such, in order to fulfill the "material" element of international customary law, practice must be general in terms of extension in a sense that it is not only carried out by States whose interests are specially affected but also by others; and also, consistent and uniform, even though it might not always be rigorous and, exceptionally, some acts may be seen as inconsistent with such practice.[188] In *Jurisdictional Immunities*, the ICJ held that judgments of national courts, national legislation, claims before foreign courts and statements made by States provided "*State practice of particular significance*"[189].

In order to assess whether "*there is a general practice that is accepted as law* (opinio juris)"[190] the ILC prescribes that "*regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found*."[191]

To ascertain *opinio juris*, in *North Sea Continental Shelf*, the ICJ held that "*not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.*"[192] That said, it is not enough to ascertain a general practice without States "believing" that they are acting in compliance with a right or legal obligation.[193] In *Jurisdictional Immunities*, the ICJ found *opinio juris* "*in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign*

[187] *Nicaragua Case*, ¶186.
[188] A. Pellet, "Article 38", p. 174, ¶221.
[189] *Jurisdictional Immunities of the State*, ¶55.
[190] ILC "Draft conclusions on identification of customary international law", draft conclusion 2.
[191] *Id.*, draft conclusion 3(1).
[192] *North Sea Continental Shelf*, ¶77.
[193] *Id.*; A. Pellet, "Article 38", p. 175.

States."[194] The ICJ further recalled and reaffirmed the ILC conclusion on State immunity as a general rule of customary law and noted the following:

> *"That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity."* [195]

Notwithstanding, an express assertion or acknowledgement by States of a given rule is not the only way to evidence the existence of customary international law.[196] In this regard, SHAW notes that "[c]*ustomary law is thus established by virtue of a pattern of claim, absence of protest by states particularly interested in the matter at hand and acquiesced by other states. Together with related notions such as recognition, admissions and estoppel, such conduct or abstinence from conduct forms part of a complex framework within which legal principles are created and deemed applicable to states."* [197]

3.2.2. CUSTOMARY EVIDENCE

It is not an easy task to identify a rule of customary international law, particularly when such rule is essentially used in the context of arbitral disputes that do not address its legal nature. As noted by the ILC, "*regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found*."[198]

---

[194] *Jurisdictional Immunities of the State*, ¶55.
[195] *Jurisdictional Immunities of the State*, ¶56.
[196] M. Shaw, INTERNATIONAL LAW, pp. 89-90.
[197] *Id.*, 89.
[198] ILC "Draft conclusions on identification of customary international law", draft conclusion 3(1).

3.2.2.1. ACQUIESCENCE AND RECOGNITION

Silence or lack of protest can be interpreted as acquiescence in the sense of a tacit agreement.[199] On the other hand, recognition implies "*consent expressed by affirmative action*."[200] While acquiescence derives from silence, recognition derives from an express statement or conduct that implies an implicit recognition.[201]

In *Gulf of Maine*, the ICJ noted that "*acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent*" [202] It stems from the principles of good faith and equity.[203] According to CRAWFORD, "[t]*he requirements for acquiescence include: the notoriety of the facts and claims, their prolonged tolerance by the state(s) whose interests are specially affected, and general toleration by the international community."*[204] SHAW considers that "*where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of opinio juris or concurrence in the new legal rule."* [205]

During the ILC discussions on State responsibility, many States made comments to article 5 (which was, at that time, draft article 7). In 1979, Chile stated that "*for the purposes of international law, and particularly of responsibility under that system, the State is indivisible*." [206] In 1980, Canada showed its concerns with the rule embodied in draft article 7, noting that "*further study should be given to the question* (…) *the circumstances in which a State may be held responsible for such*

[199] M. Shaw, INTERNATIONAL LAW, pp. 89-90; N. Antunes, "Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement", Rachel Bradley and Clive Schofield (eds.) Boundary & Territory Briefing, International Boundaries Research Unit, Vol. 2 No. 8, 2000, 3.
[200] *Id.*.
[201] *Id.*.
[202] *Gulf of Maine*, ¶130.
[203] *Id.*.
[204] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 419.
[205] M. Shaw, INTERNATIONAL LAW, 6th edition, p. 90.
[206] ILC, Observations and comments of Governments on chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/328 and Add.1-4, 1980, 87, 96. Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_328.pdf.

actions must be more restrictively delineated."[207] In subsequent years, France,[208] the German Democratic Republic,[209] Greece,[210] Japan,[211] the Netherlands,[212] Spain,[213] Switzerland,[214] and the UK,[215] also made comments to the said article, but did not challenge nor opposed to that rule of attribution.

In general, counterclaims presented by several States in arbitral proceedings do not deny the legality or validity of the rule embodied in article 5 of the ARSIWA.[216]

In *Jan de Nul*,[217] the Claimants alleged that Egypt committed treaty violations, through the acts and omissions of the SCA, a public authority established under Egyptian law to manage, maintain, and develop the Suez Canal.[218] The Claimants argued that the conduct of the SCA was attributable to Egypt under article 5 of the ARSIWA.[219] In its contention, Egypt did not challenge the validity of article 5, and

---

[207] ILC, Observations and comments of Governments on chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/328 and Add.1-4, 1980, 87, 94. Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_328.pdf. However, 36 years later, in *Mesa Power v. Canada*, Canada did not challenge the existence of article 5 as a rule of international law, and merely contested its applicability due to the *lex specialis* rule set forth in article 55 of the ARSIWA. *Mesa Power v. Canada*, ¶349.

[208] ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/488 and Add. 1–3, 25 March, 30 April, 4 May, 20 July 1998], 81, 106-107, Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_488.pdf.

[209] ILC Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts, DOCUMENT A/CN.4/414, 20 April 1988, 1, 3, cfr. https://legal.un.org/ilc/documentation/english/a_cn4_414.pdf.

[210] ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/492, 10 February 1999, 101, 104 Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_492.pdf.

[211] ILC, Comments and observations received from Governments DOCUMENT A/CN.4/515 and Add.1–3, 19 March, 3 April, 1 May and 28 June 2001, 33, 48-49. Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_515.pdf

[212] *Id.*

[213] ILC Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/351, Add.1-2 & Add.2/Corr.1, Add.3 & Corr.1 , 1982, 15, 16, cfr. https://legal.un.org/ilc/documentation/english/a_cn4_351.pdf.

[214] ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/488 and Add. 1–3, 25 March, 30 April, 4 May, 20 July 1998], 81, 106, Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_488.pdf.

[215] ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/488 and Add. 1–3, 25 March, 30 April, 4 May, 20 July 1998], 81, 106-107, Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_488.pdf; ILC, Comments and observations received from Governments DOCUMENT A/CN.4/515 and Add.1–3, 19 March, 3 April, 1 May and 28 June 2001, 33, 49. Cfr. https://legal.un.org/ilc/documentation/english/a_cn4_515.pdf

[216] *Noble Ventures*, ¶67;

[217] *Jan de Nul*.

[218] *Id.*, ¶45, 113.

[219] *Id.*, ¶143.

merely argued that not all prerequisites for attribution under the said article were met in that case.[220] In subsequent cases, similar positions towards article 5 were followed by several States, such as Ghana,[221] Ukraine,[222] Turkey,[223] Canada,[224] Poland,[225] Nigeria,[226] and Venezuela.[227]

In *Masdar Solar*,[228] the Claimant alleged that Spain implemented measures that modified the regulatory and economic regime of renewable energy projects, which caused damages to the Claimant.[229] The Respondent (Spain) adopted an interesting approach arguing that ICSID lacked jurisdiction "*ratione personae*", because the dispute was not between an investor and a State, but between two States.[230] Spain argued that the conduct of the Claimant was attributable to the UAE, specifically to Abu Dhabi.[231] In doing so, Spain referred to the content of the rule embodied in article 5 of the ARSIWA as a principle,[232] and noted that the ARSIWA "*are evidence of the existence of principles of international customary law on attribution*."[233]

The aforementioned positions and counterclaims presented by States evidence the existence of the two necessary preconditions to hold that article 5 is a customary rule of international law.

[220] *Id.*, ¶154. In a more recent case, Egypt followed a similar approach towards article 5. *Ampal-American v. Egypt*, ¶136.
[221] *Hamester v. Ghana*, ¶167.
[222] *Bosh International v. Ukraine*, ¶160.
[223] *Tulip v. Turkey*, ¶264.
[224] *Mesa Power v. Canada*, ¶349.
[225] *Flemingo DutyFree*, ¶391.
[226] *Interocean v. Nigeria*, ¶169.
[227] *Venezuela US v. Venezuela*, ¶195.
[228] *Masdar Solar v. Spain*, ¶145.
[229] *Id.*, ¶5.
[230] *Id.*, ¶145.
[231] *Id.*, ¶145.
[232] *Id.*, ¶146.
[233] *Id.*, ¶147.

3.2.2.2. ESTOPPEL

Estoppel is a general principle of law that stems from the principles of good faith and equity,[234] and it "*is linked to the idea of preclusion*". [235]

According to this principle, States cannot argue the inexistence or inapplicability of a rule of international law if they have previously acted in a way that demonstrates their recognition of such rule.[236] In *North Sea Continental Shelf*, the ICJ recalled that a situation of estoppel would preclude Germany "*from denying the applicability of the conventional régime by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice*."[237]

In *Certain Norwegian Loans*, France presented a compelling argument regarding the responsibility of Norway for the actions of Norwegian banks, which were autonomous public entities under domestic law.[238] France contended that the Norwegian banks and Norway were the same for purposes of international law, and that Norway could not evade responsibility for the acts of the Norwegian banks, because it had previously granted State immunity to those banks.[239] Although the ICJ did not address this matter (because it accepted a preliminary objection raised by the Norwegian government and, as such, declared that it had no jurisdiction to adjudicate the dispute), Judge LAUTERPACHT and Judge READ were not convinced that Norway could not be made responsible in respect of the claim that concerned the banks.[240] As stated in the dissenting opinion of Judge Read, "*it is a sound doctrine that a party cannot blow both hot and cold at the same time, and*

---

[234] *Gulf of Maine,* ¶130*;* T. Cottier and J. Müller, "Estoppel", in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007), p. 5; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW p. 421.
[235] *Gulf of Maine,* ¶130.
[236] *North Sea Continental Shelf,* ¶30; *Guld of Maine*, ¶130*; Nicaragua Case*, ¶186; T. Cottier and J. Müller, "Estoppel", p. 5; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW p. 420.
[237] *North Sea Continental Shelf ,* ¶30.
[238] *Certain Norwegian Loans – Oral Arguments,* p. 72.
[239] *Id.*.
[240] *Certain Norwegian Loans,* Separate Opinion of Judge Sir Hersch Lauterpacht, p. 36; *Certain Norwegian Loans,* Dissenting Opinion of Judge Read, p. 96.

Norway cannot retreat from the position of complete identification taken in 1931 (…) for the purpose of preventing this Court from adjudicating upon the matter."[241]

The original rule of State immunity was based on the Latin maxim *par in parem non habet imperium*, which means that an equal has no authority over an equal and thereby a State could not be subject to the jurisdiction of another State in any case, regardless of the circumstances.[242] Although, nowadays, most States adopted a restrictive approach towards State immunity,[243] the rationale behind the rule remains the same, i.e., States are equal and, therefore, cannot exercise jurisdiction over one another.[244] This regime is also intended to facilitate the performance of public functions by preventing the State and its representatives from being sued or prosecuted in foreign courts.[245]

In *Jurisdictional Immunities*, the ICJ reaffirmed that the rule of State immunity is a rule of customary international law, according to which "*there is a right to*

---

[241] *Certain Norwegian Loans (France v. Norway)* (Judgement, Dissenting Opinion of Judge Read) [1957] ICJ Rep 9, page 96.

[242] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 488; H. Fox, THE LAW OF STATE IMMUNITY (2nd Ed., 2008), p. 374; M. Shaw, INTERNATIONAL LAW, p. 701.

[243] The majority of the permanent members of the Security Council of the United Nations follow the restrictive doctrine of State Immunity. Although France does not have legislation on the matter, it follows the UN Convention on Jurisdictional Immunities of States and Their Property. On the other hand, China adopts the absolute immunity doctrine. See, State Immunity Act 1978 (UK); Foreign Sovereign Immunities Act 1976 (USA); Federal Law on Jurisdictional Immunity of a Foreign State 2015 (RU); United Nations Convention on Jurisdictional Immunities of States and Their Property (opened for signature 17 January 2005, did not enter into force yet) adopted during the 65th plenary meeting of the UN General Assembly by Resolution A/59/38 of 2 December 2004; A. Godwin, "State immunity", in CHINA BUSINESS LAW JOURNAL (2018). Other members of the United Nations also follow the restrictive doctrine. See, European Convention on State Immunity (opened for signature 16 May 1972, entered into force 11 June 1976) 1495 UNTS 181, ratified by Austria, Belgium, Cyprus, Federal Republic of Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom; Singapore State Immunity Act 1979 (SG); Pakistan State Immunity Ordinance 1981 (PK); South Africa Foreign States Immunities Act 1981 (ZA); Canada State Immunity Act 1985 (CA); Foreign Sovereign Immunities Act 1976 (USA); Federal Law on Jurisdictional Immunity of a Foreign State 2015 (RU); Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009 (JP); Ley Nº 24.488 Imunidad de Jurisdiccion de Los Estados Extranjeros Ante los Tribunales Argentinos 1995 (AR); Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en Espanã y las Conferencias y Reuniones internacionales celebrades en Espanã 2015 (ES). See also, H. Fox, THE LAW OF STATE IMMUNITY, p.1778.

[244] H. Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization", in 53 THE YALE LAW JOURNAL 2 (1944), pp. 207, 209.

[245] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 487.

immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity."[246]

Under the United Nations Convention on Jurisdictional Immunities of States and Their Property, State enterprises and other entities that exercise "*sovereign authority of the State*" can enjoy immunity from the jurisdiction of foreign courts.[247] Similarly, the ECSI foresees that legal entities may enjoy immunity from jurisdiction "*in respect of acts performed by the entity in the exercise of sovereign authority (acta jure imperii)*."[248] Likewise, States that have enacted laws on State immunity generally accept that entities may enjoy immunity before foreign courts when they are exercising sovereign authority.[249]

When States allow entities that exercise sovereign authority to enjoy State immunity, they are recognizing that these entities are an extension (*longa manus*) of the State and that, for this reason, they should not be subject to the jurisdiction of another State. This recognition precludes States from denying attribution of the same entities under article 5 of the ARSIWA. In this way, States may find themselves in a zero-sum game due to the interrelationship between State immunity and attribution.[250]

As such, even if States did not acquiesce to nor recognize the rule embodied in article 5 of the ARSIWA, their position towards State immunity could – at least in

---

[246] *Jurisdictional Immunities of the State*, ¶56.

[247] See, United Nations Convention on Jurisdictional Immunities of States and Their Property, Arts. 1 and 2(1)(iii); ILC "Draft Articles on the Jurisdictional Immunities of States and Their Property, with Commentaries", UN Doc No. A/46/10 (1991), pp. 13, 17.

[248] ECSI, Art. 27 cfr.

[249] See, United Nations Convention on Jurisdictional Immunities of States and Their Property, Art. 2(1)(iii); State Immunity Act 1978 (UK), Section 14(2); Foreign Sovereign Immunities Act 1976 (USA), Section 1603(b); Federal Law on Jurisdictional Immunity of a Foreign State 2015 (RU), Article 2(1)(c); Singapore State Immunity Act 1979 (SG); Pakistan State Immunity Ordinance 1981 (PK); South Africa Foreign States Immunities Act 1981 (ZA); Canada State Immunity Act 1985 (CA); Foreign Sovereign Immunities Act 1976 (USA); Federal Law on Jurisdictional Immunity of a Foreign State 2015 (RU); Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009 (JP); Ley Nº 24.488 Imunidad de Jurisdiccion de Los Estados Extranjeros Ante los Tribunales Argentinos 1995 (AR); Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en Espanã y las Conferencias y Reuniones internacionales celebrades en Espanã 2015 (ES). See also, The International Court of Justice, THE INTERNATIONAL COURT OF JUSTICE HANDBOOK (6th Ed., 2013), p. 33; J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 122; ILC "Draft Articles on the Jurisdictional Immunities of States and Their Property, with Commentaries", pp. 13, 17.

[250] In the same sense, but using different concepts, Ca. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 17.

some cases – preclude them from arguing the nonexistence or inapplicability of such rule.[251]

V. PERSONAL SCOPE

1. ILC CONSIDERATIONS

1.1. PREPARATORY WORK

During the preparatory work, the ILC began discussing separately the attribution to the State of acts of public entities (draft article 7) and acts of private persons in fact performing public functions (draft article 8).[252]

In the third report of the ILC Special Rapporteur on State responsibility, draft article 7 addressed the conduct of a person which had the status of an organ of a "*public corporation*", "*autonomous public institution*" or "*territorial public entity*" under internal law.[253] Draft article 8 addressed the conduct of private persons which did not "*formally possess the status of organs of the State or of a public institution separate from the State*" under internal law.[254]

With regards to draft article 7, the Special Rapporteur clarified that the phenomenon of decentralization may take a variety of forms of distribution of functions within a State, but the purpose remained the same in all of them, i.e. to supplement the functions provided directly by the State.[255] For instance, in some cases the State may adopt a distribution *ratione loci*, through territorial entities, and in other cases, *ratione materiae*, through other institutions or corporations.[256] Hence, draft article 7 was designed in a way that a State should also be responsible for the acts carried out by entities "(…) *which possess an organization of their own and which, side by side with the State but separate from it, provide services and perform tasks of a public character* (…)", the so-called para-State institutions.[257]

[251] However, this assessment needs to be made on a case-by-case basis, taking into account the specific situation of a given State and its previous positions and statements.
[252] Mr. Robert Ago, Third Report on State Responsibility, pp. 253-267.
[253] *Id.*, p. 262.
[254] *Id.*, p. 267.
[255] *Id.*, pp. 256-262.
[256] *Id.*, pp. 256-262.
[257] *Id.*, p. 254.

On the other hand, draft article 8 involved situations where a private person "*having no official status under the internal legal order does in fact have occasion to perform a function which should normally be performed by an organ of the State administration or of one of the other public institutions or entities, or is called upon to provide a service or perform a specific task on behalf of the State, without thereby acquiring the status of a State official*."[258] In this respect, the Special Rapporteur noted that " (…) *the State is often considered responsible for the acts of private natural or legal persons commissioned to provide a particular public service, or of individuals or groups carrying out any kind of mission for the State. The State, as a subject of international law, should, a fortiori it seems, bear responsibility for the acts of these various classes of person where they relate to one of the functions, tasks or missions mentioned above and have resulted in a breach of an international obligation of the State. The underlying principle in international law* (…) *requires that the criterion should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed, rather than the formal link between the State organization and the person whose conduct is in question*."[259]

During the plenary discussions, the reasoning behind draft article 7 was almost uncontested, but draft article 8 raised some doubts between the members the ILC, since it targeted private entities.[260]

The nature of an entity and the criterion to determine if an entity was "*public*" were widely discussed.[261] For some members of the ILC, a public entity would be created and funded by the State but autonomous from it.[262] For others, it was not relevant the way the entity was entrusted to perform public functions.[263] Others agreed that having a separate legal personality from the State and performing

[258] ILC 'Documents of the twenty-third session: Reports of the Special Rapporteurs and report of the Commission to the General Assembly' in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, UN Doc No. A/CN.4/SER.A/1971/Add.1 (Vol. II, Part One, 1971), p. 262.
[259] Mr. Robert Ago, Third Report on State Responsibility, p. 264.
[260] The Chairman was one of the members which was convinced with the applicability of the rule reflected in article 8, noting that sometimes it could be difficult to determine if the acts were performed as a public function or on behalf of the State. See YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 44.
[261] *Id.*, pp. 13-27.
[262] *Id.*, p. 18.
[263] *Id.*, p. 34.

functions of a public character would describe the entities as "*para-State institutions*".[264] Mr. Ushakov believed that "(…) [t]*he case of municipalities, on the other hand, was quite different* [than the cases of a national railway company or a private bank to which the State had delegated public powers]: *they* [municipalities] *were not bodies to which the State delegated public power, but organs of the State which exercised the State power within the limits of their autonomy*."[265] Some members of the ILC were of the opinion that the criterion for attribution under draft article 7 should fall upon the nature of the function and not the nature of the entity.[266] Mr. Kearney further noted that "[w]*hen an organization was not specifically established as a governmental organ by internal law, however, it was for international law to determine whether the State was responsible for a particular act or acts*" and "[t]*the principal criterion would be whether the act or acts were performed by the organization in the exercise of either a general delegation of governmental authority or a limited grant of that authority*."[267] With regards to the distinction between both articles, Mr. Tammes considered that while draft article 7 addressed formal organs, i.e. "*an integral part of the State's constitutional structure*", article 8 referred to *de facto* organs, i.e. "*persons in fact performing public functions and persons in fact acting on behalf of the State*."[268] Differently, Mr. Ushakov understood that, on the one hand, article 7 dealt with the situation of persons or group of persons which were members of an institution, that was not an organ of the State, but was authorized by the State to perform public functions; on the other, article 8 dealt with the exceptional situation of a person or group of persons which did not formally possess the character of an organ of the State under internal law, but "*in fact performed public functions, which implied that they were part of de facto organs*."[269] In this regard, Mr. Martínez Moreno agreed that article 8 dealt with a special category of cases which were different from the situations covered by article 7.[270]

[264] *Id.*, p. 8.
[265] *Id.*, p. 31.
[266] *Id.*, pp. 17-25.
[267] *Id.*, p. 25.
[268] *Id.*, p. 34.
[269] *Id.*, p. 35.
[270] *Id.*, pp. 37-38.

Following the points raised by the members of the ILC, the Special Rapporteur clarified that: on the one hand, draft article 7 dealt with the acts of entities which are not regarded as acts of the State under internal law, but can nevertheless be attributed to the State under international law; on the other hand, draft article 8 dealt with an even more exceptional case, regarding the attribution of acts of *de facto* organs of the State, i.e. "*persons who, while not State organs in law, had acted in fact as though they were State organs*." [271] With regards to the alleged interrelationship between article 7 and 8, the Special Rapporteur did not find an overlapping between the two and left the decision to the Drafting Committee.[272]

The ILC re-drafted articles 7 and 8, combining them into a single article (draft article 7) which covered territorial governmental entities (paragraph 1) and other entities which are not "*part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority*" (paragraph 2).[273] The ILC held that the entities covered "*are required under internal law to perform certain tasks in the interest of the community but which possess, in the eyes of the law, an organization and a personality of their own, separate from those of the State."*[274] The chosen term "*entity*" would cover "*bodies as different as territorial governmental entities, public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies*."[275] In this regard, the ILC considered that:

> *"The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent, and so on, do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs. Hence the Commission has come to the conclusion*

[271] *Id.*, p. 45.
[272] *Id.*, p. 45.
[273] Report of the International Law Commission on the work of its twenty-sixth session, p. 277.
[274] *Id.*, p. 281.
[275] Emphasis should be given to this quotation, as it was the first statement of the Commission (either as a whole and through its members) that private companies may also fall under the scope of article 7. *Id.*, pp. 282-283.

that the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State. The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority."[276]

Later on, the new ILC Special Rapporteur, Mr. James CRAWFORD, understood that draft article 7 dealt with the conduct of "*bodies which are not organs in the sense of* [draft] *article 5*",[277] and, in his opinion, "*territorial governmental entities*" were already covered by such article.[278] In this sense, the Special Rapporteur recommended to delete the reference to "*territorial governmental entities*" from draft article 7.[279]

As such, the last version of former draft article 7 (current article 5 of the ARSIWA) was reduced to "*a person or entity which is not an organ of the State under article 4*".[280]

1.2. FINAL COMMENTARY

In the commentary to article 5, the ILC assumes that "*the generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority* (…) [and] *They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies* (…)".[281]

The ILC acknowledges that article 5 was designed to take account of parastatal entities and former State corporations that were privatized, but exercise governmental authority.[282] According to the ILC, the reasoning for attributing the conduct of parastatal entities to the State "*lies in the fact that the internal law of the*

[276] *Id.*, p. 282.
[277] Article 5 was then renumerated and currently corresponds to article 4 of the ARSIWA. Mr. James Crawford, First Report on State Responsibility, p. 37.
[278] *Id.*, p. 38.
[279] *Id.*, p. 39.
[280] ARSIWA, Art. 5.
[281] DARSIWA, pp. 31, 43.
[282] *Id.*, pp. 31, 42.

State has conferred on the entity in question the exercise of certain elements of the governmental authority."[283] Other examples of entities that the ILC considers that would fall under article 5 are: private security firms that are contracted to exercise public powers; private or State-owned airlines with delegated governmental powers; railway companies that exercise police powers; and autonomous foundations established by the State for charitable purposes and subject to governmental control.[284]

With regards to the criteria, the ILC highlights that "[t]*he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control —these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority."*[285]

In sum, the ILC assumes that public corporations, semi-public entities, public agencies and private companies are not organs of the State in the sense of article 4 and their acts may be attributable under article 5, as long as they are empowered by the law of the State to exercise elements of the governmental authority and were acting in that capacity.[286] For the ILC, these requirements constitute the decisive criteria for attribution under article 5.[287]

2. CASE LAW

International mechanisms for dispute resolution do not always agree on the negative delimitation of the personal scope of article 5 and do not adopt the same tests for purposes of attribution of acts to the State.[288] The most controversial

[283] *Id.*, pp. 31, 43.
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (***"Amco Asia v. Indonesia"***), ¶162-163; *Maffezini*, ¶89; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (***"Maffezini Award"***), ¶77; *Noble Ventures*, ¶70, 80; *Beijing Urban Construction Group Co., Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30,

question addressed by these international mechanisms concerns the attribution of acts of State-owned enterprises.

2.1. INVESTMENT DISPUTES

In some cases, ICSID did not consider that State-owned enterprises were State organs and adopted a functional test to assess the nature of the functions performed by the entities.[289] In other cases, ICSID did not have to engage in the analysis of the article 5 of the ARSIWA, because it considered that the State-owned enterprises were *de facto* organs of the State under article 4.[290]

In *Amco Asia v. Indonesia*[291], ICSID addressed whether the acts of a limited liability company named PT Wisma, which was fully owned by a cooperative of the Indonesian Army named Inkopad, could be attributed to Indonesia.[292] ICSID considered that "*the acts of such entities are not normally to be attributed to their shareholders*" and carried out an evaluation of the nature of the functions performed by PT Wisma, which led to the conclusion that the acts of PT Wisma were not attributable to the Government of Indonesia.[293]

In *Maffezini*,[294] ICSID dealt with a dispute involving a private commercial corporation named SODIGA, which was created by a decree issued by the Ministry of Industry of Spain, that authorized the *Instituto Nacional de Industria* (National Institute for Industry), a national State agency, to establish SODIGA owning no less than 51% of its capital.[295] At a procedural stage, ICSID had to analyze, firstly, whether SODIGA was a State entity for purposes of determining its jurisdiction and, secondly, if the actions and omissions of SODIGA were attributed to the

---

Award, 31 May 2017 (***"BUCG v. Yemen"***), ¶41; *Flemingo DutyFree*, ¶435-436; *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020 (***"Ortiz Construcciones "***), ¶262; *Korea - Measures Affecting Trade in Commercial Vessels – Report of the Panel*, WTO Panel WT/DS273, 7 March 2005 (***"Korea Measures"***), ¶7.50; *US Anti-Dumping Panel Report*, ¶8.94; *US Anti-Dumping Appeal*, ¶317; *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India Carbon Steel*, WTO Appeal WT/DS436/AB/R, Report of the Appellate Body, 8 December 2014 (***"India Carbon Steel"***), ¶4.52.

[289] *Amco Asia v. Indonesia*, ¶162-163; *Maffezini*, ¶89; *Maffezini Award*, ¶77; *Noble Ventures*, ¶70-80; *BUCG v. Yemen*, ¶41.

[290] *Flemingo DutyFree*, ¶262.

[291] *Amco Asia v. Indonesia*.

[292] *Id.*, ¶9, 163.

[293] *Id.* ¶162-163.

[294] *Maffezini*.

[295] *Id.*, ¶83.

Kingdom of Spain.[296] Even though SODIGA was a private corporate entity, ICSID acknowledged that "*a State will not necessarily escape responsibility hiding behind the corporate veil (…). Many countries besides Spain have created regional development agencies. These agencies have been created around the world and operate as governmental entities, whether in the form of direct State agencies, territorial or regional agencies or, as in the case of SODIGA, as corporations.*"[297] At the time of this decision, the ARSIWA were still on the making, so ICSID took into consideration the draft rules that were not yet in their final form.[298] To analyze whether SODIGA was a State entity, ICSID presented the structural, functional and control tests after making reference to former paragraph 2 of article 7 of the ARSIWA[299], as follows:

> *The question whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.*[300]

Furthermore, ICSID considered that the structural, functional and control tests did not have to be cumulative,[301] but "*because of the many forms that State enterprises may take and thus shape the manners of State action, the structural test by itself may not always be a conclusive determination*" to determine the status of an entity as a State organ.[302] In this sense, ICSID considered that "*the intent of the*

---

[296] *Id.*, ¶75.
[297] *Id.*, ¶78, 88.
[298] *Id.*, ¶78.
[299] The former article 7 paragraph 2 of the ARSIWA held the following: "The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State under international law, provided the organ was acting in such capacity in the case in question." See DARSIWA, Art. 7(2).
[300] *Maffezini*, ¶77.
[301] *Id.*, ¶81.
[302] *Id.*, ¶79.

State to create still another a corporate entity, particularly one which is intended to operate in the private sector, even if State owned, is not sufficient to raise the presumption of an entity being an organ of the State" and that "*more is required in terms of the functional test*".[303] Afterwards, ICSID acknowledged that SODIGA met "*both the structural test of State creation and capital ownership and the functional test of performing activities of a public nature*" and, therefore, concluded that SODIGA was a State entity.[304] Notwithstanding, the question of attribution of SODIGA's acts to Spain was left to be decided "*during the proceedings on the merits of the case.*" [305]

In the award decision of *Maffezini*,[306] ICSID recalled that *"*[t]*he Kingdom of Spain has continuously relied on the structure of the Spanish public administration to argue that SODIGA did not fall in this category and that it is merely a financial company created as a private corporation*"[307] and held that "*even if the structural test is applied, it is clear that financial companies such as SODIGA could not at the period relevant to the present dispute be held to fall entirely outside the overall scheme of public administration. In fact, there existed a variety of public entities that were governed by private law but which would occasionally exercise public functions that were governed by public law.*"[308] Here, ICSID reaffirmed the relevance of the principle of unity of the State from the international standpoint, but relied on the functional test to check whether SODIGA's acts could be attributable to Spain without explaining why it considered that the structural test was insufficient for that purpose.[309] ICSID then proceeded to analyze whether the nature of each action was purely commercial or "*performed in the exercise of SODIGA's public or government functions*" in which case they would be attributable to Spain.[310]

In *Noble Ventures*[311], ICSID was presented with a dispute that emerged from a privatization agreement made between an American company named *Noble*

[303] *Id.*, ¶84.
[304] *Id.*, ¶89.
[305] *Id.*, ¶89.
[306] *Maffezini Award*.
[307] *Id.*, ¶47.
[308] *Id.*, ¶48.
[309] *Id.*, ¶52.
[310] *Id.*, ¶77.
[311] *Noble Ventures*.

Ventures and the SOF concerning the acquisition, management, operation and disposition of CSR.[312] SOF was a Romanian public institution with legal personality that exercised the function of privatization of Romanian State-owned enterprises, such as CSR, which was controlled by the Romanian Government through an ownership of 95% of shares of the enterprise.[313] After privatization, SOF was replaced by the APAPS.[314] ICSID had to analyze whether the actions of SOF and APAPS could be attributed to Romania under article 4 of the ARSIWA and concluded that "[t]*his rule concerns attribution of acts of so-called de jure organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as de jure organs.*[315] The tribunal then proceeded with the analysis in light of article 5 of the ARSIWA and concluded that the alleged violation of the Bilateral Investment Treaty committed by SOF/APAPS was attributable to Romania, because the agreement was concluded by SOF/APAPS "*when acting as the empowered public institution under the Privatization Law (…) acting as a governmental agency*".[316]

In *Beijing Urban Construction,* ICSID considered that "*a publicly funded and wholly state-owned entity established by the Chinese Government*",[317] named BUGG "*was performing its work on the airport site under a construction contract as a commercial contractor and not as an agent of the Chinese Government*" and went on with the analysis on whether it exercised elements of governmental authority.[318]

In *Flemingo DutyFree*[319], ICSID addressed whether the acts and omissions of the PPL were attributed to Poland "*for the purpose of determining the jurisdiction and competence of the Tribunal*".[320] PPL was an entity with legal personality entirely owned by the Polish State Treasury and controlled by the Ministry of Transport through the Minister's power to appoint, suspend and dismiss the

[312] *Id.*, ¶, 2.
[313] *Id.*, ¶3, 5.
[314] *Id.*, ¶6.
[315] *Id.*, ¶69.
[316] *Id.*, ¶70, 80.
[317] *BUCG v. Yemen*, ¶32.
[318] *Id.*, ¶41.
[319] *Flemingo DutyFree*.
[320] *Id.*, ¶418.

management of PPL and audit and assess PPL performance and operations.[321] ICSID referred to articles 4(2) and 3 of the ARSIWA and noted that "*the circumstance that an entity is not considered a State organ under domestic law does not prevent that entity from being considered as such under international law for State responsibility purposes.*"[322] Guided by the decision in *Maffezini*[323], ICSID concluded that PPL was a *de facto* State organ under article 4 of the ARSIWA[324] due to a wide variety of factors (including the functions performed by the entity) and further noted that "*if PPL would not have been a State organ, alternatively for the purpose of Article 5 of the ILC Articles, the Tribunal accepts that PPL is an entity empowered by the law of Poland to exercise elements of governmental authority*".[325]

In *Ortiz Construcciones*[326], ICSID dealt with a dispute involving various Algerian entities including the Ministry of Housing, the CPE, the ENPI and a public economic enterprise named OLA/ALRECC.[327] ICSID recalled the ICJ jurisprudence to evaluate whether those entities could be regarded as *de facto* State organs through the complete dependence test.[328] The Parties agreed on the use of this test to evaluate if an entity is a *de facto* organ of the State under article 4 of the ARSIWA,[329] but disagreed on the elements that should be considered to meet the test: on the one hand, the Claimant considered that the test should be assessed by looking at the shareholding, status, functions, powers, relationship with other entities and control exercised by the State over the social organs of the entities; on the other hand, the Respondent adopted a purely structural approach contesting the relevance of the shareholding or functions for the complete dependence test.[330] ICSID concluded that the Ministry of Housing and the CPE were State organs of Algeria under article 4 of the ARSIWA, but the acts of ENPI and OLA/ALRECC could not be attributed to Algeria under articles 4 and 5 of the ARSIWA.[331] To

[321] *Id.*, ¶427-430.
[322] *Id.*, ¶433.
[323] *Id.*, ¶426.
[324] *Id.*, ¶435-436.
[325] *Id.*, ¶437.
[326] *Ortiz Construcciones*.
[327] *Id.*, ¶228.
[328] *Id.*, ¶167.
[329] *Id.*
[330] *Id.*, ¶168.
[331] *Id.*, ¶262.

evaluate whether the entities fulfilled the complete dependence test, ICSID recalled the understanding of the Tribunal in *Almås*, which considered relevant the "*performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy*".[332]

2.2. TRADE DISPUTES

The WTO Agreement on SCM[333] foresees the rules on the use of subsidies that could potentially distort trade and the application of countervailing duties. Article 1.1(a)(1) of the SCM Agreement determines that a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member of the WTO.[334] However, it does not define what can be regarded as a public body and, as such, WTO bodies have been addressing and interpreting this concept in light of the ARSIWA and ILC commentaries.

In *Korea Measures*, for the purpose of interpreting the term "public body" of article 1.1(a)(1) of the SCM Agreement, the WTO Panel analyzed which entities may constitute a "public body". The Panel concluded that "*an entity will constitute a "public body" if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government* (…)".[335] The Panel's reasoning was based on several factors, including the fact that the entity in question - KEXIM - was 100% owned by the Korean government or other public bodies, the operations of the entity were presided and assisted by persons appointed and dismissed by the President of the Republic of Korea and the Minister of Finance and Economy, and the annual operations programs of the entity in question required ministerial approval.[336]

In *US Anti-Dumping Panel Report*, the WTO Panel also addressed article 1.1(a)(1) of the SCM Agreement.[337] Similarly to *Korea Measures*, the Panel also

[332] *Id.*, ¶169; *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016 (***"Almås v. Poland"***), ¶207.
[333] WTO, Agreement on Subsidies and Countervailing Measures (15 April 1994) 1869 UNTS 14.
[334] *Id.*, Art 1.1(a)(1).
[335] *Korea Measures*, ¶7.50.
[336] *Id.*.
[337] *US Anti-Dumping Panel Report*, ¶8.134.

understood that a public body was "*any entity controlled by a government*", [338] and considered that "(…) *government ownership to be highly relevant (indeed potentially dispositive) evidence of government control.*"[339] However, subsequently, China requested the Appellate Body to reverse the finding of the Panel.[340] In this regard, China held the following:

> *In China's view, the Panel failed to interpret Article 1.1 of the SCM Agreement in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose, and further failed to take account of the International Law Commission's (the "ILC") Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles") in its interpretation. China submits that, when the term is properly interpreted, the defining characteristic of a "public body" is that it exercises authority vested in it by the government for the purpose of performing functions of a governmental character.*[341]

Afterwards, the Appellate Body decided to reverse the finding of the Panel regarding the meaning of the term "public body".[342] In light of "*the interpretative elements prescribed by Article 31 of the Vienna Convention*", the Appellate Body considered "*what essential characteristics an entity must share with government in the narrow sense in order to be a public body and, thus, part of government in the collective sense*"[343]. The Appellate Body also analyzed the term "private body" to find "*the essential characteristics of public bodies, because the term 'private body' describes something that is not 'a government or any public body'*."[344] In this regard, the Appellate Body referred to the dictionary and noted that "*both the definition of 'public' and of 'private' encompass notions of authority as well as of control (…) [and] differ, most notably, with regard to the subject exercising authority or control.*"[345] It further concluded that a "public body" under the

[338] *Id.*, ¶8.134.
[339] *Id.*, ¶8.94.
[340] *US Anti-Dumping Appeal*, ¶21.
[341] *Id.*, ¶22.
[342] *Id.*, ¶322.
[343] *Id.*, ¶290.
[344] *Id.*, ¶291.
[345] *Id.*, ¶292.

SCM Agreement "must be an entity that possesses, exercises or is vested with governmental authority."[346] Nonetheless, the Appellate Body acknowledged that:

> "(…) *as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense. In some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body. We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved*."[347]

Similarly, in *India Carbon Steel*, the Appellate Body referred to the position adopted in *US Anti-Dumping Report Panel* and considered relevant to understand whether the functions could be classified as "*governmental*" to determine whether an entity is a "*public body*".[348]

3. OUR ANALYSIS

3.1. PERSON OR ENTITY

Even though article 5 refers to a "*person or entity*",[349] the ILC commentary to article 5 is reduced to the discussion of the term "*entity*. Notwithstanding, in the commentary to article 4, the ILC clarified that the term "person or entity" included

[346] *Id.*, ¶317.
[347] *Id.*, ¶317-318 (emphasis added).
[348] *India Carbon Steel*, ¶4.52.
[349] ARSIWA, Art. 5.

in articles 4, 5 and 7 "*is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc*."[350]

The term "*entity*" used in the ARSIWA was considered the most neutral and wide enough term in all the working languages of the UN,[351] but the ILC does not provide a definition of this term.

From the international standpoint, an entity is a collective or legal person that is established under domestic law with a separate legal personality from its members, owners or the State and thereby it can be subject to rights and obligations under domestic law.[352]

Entities are generally not considered subjects of international law, i.e., do not possess full international legal personality or legal personality *lato sensu*.[353] Notwithstanding, they are rather relevant at the international level because they may also engage in direct economic relations with other States and sometimes, even though they are closely associated with the State, they can be used as a means for States to avoid accountability for their actions – and that was one of the reasons why the ILC drafted the rules of attribution embodied in the ARSIWA.[354]

The ILC commentaries to the ARSIWA make a distinction between territorial entities (e.g. federal states, municipalities, communes, provinces) and other autonomous entities (e.g., State-owned enterprises, public corporations, semi-public entities, public agencies and private companies) that are created, owned or contracted by the State: territorial entities are State organs under article 4(1) of the

---

[350] DARSIWA, p. 42.

[351] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 152, ¶33; ILC, Report of the Commission to the General Assembly, Doc No. A/9610/Rev.1 (6 May-26 July 1974), pp. 282-283.

[352] ILC "Draft Articles on Diplomatic Protection with Commentaries", in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, UN Doc. No. A/61/10 (Vol. II, Part Two, 2006), pp. 26, 43; BLACK'S LAW DICTIONARY, "Entity", "Person" (9th Ed., 2009), pp. 612, 976; *Barcelona Traction*, ¶38-40.

[353] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, pp. 121-122; A. Aust, HANDBOOK OF INTERNATIONAL LAW (2nd Ed., 2010), pp. 12-13; E. Correia Baptista, DIREITO INTERNACIONAL PÚBLICO, p. 541; Peter T. Muchlinski, "Corporations in International Law", in MPEPIL (2014), ¶6.

[354] League of Nations codification conference 1930 bases of discussion page 19 – 38 pdf; YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, p. 10; Mr. Robert Ago, Third Report on State Responsibility, p. 256; Report of the International Law Commission on the work of its twenty-sixth session, p. 282.

ARSIWA;[355] and other entities may fall under article 5, provided that they meet the remaining requirements for attribution under the said article.[356]

However, article 5 refers to "*a person or entity which is not an organ of the State under article 4*",[357] thereby prescribing a criterion of negative delimitation that does not allow for the determination of its personal scope without previously analyzing article 4.

3.2. NOT AN ORGAN OF THE STATE UNDER ARTICLE 4

3.2.1. ATTRIBUTION OF ACTS OF STATE ORGANS

Article 4 is the point of departure of the legal framework on attribution and was drawn up by the ILC, as follows:

> *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.*[358]

Pursuant to article 4(1), the conduct of all State organs is attributable to the State.[359] This rule constitutes the most well-established principle of attribution and reflects customary international law.[360]

For purposes of attribution under article 4(1), the functions or position held by a State organ are not relevant.[361] In the commentary to article 4, the ILC clarified

---

[355] ARSIWA, Art. 4(1); DARSIWA, p. 41.
[356] DARSIWA, p. 43.
[357] ARSIWA, Art. 5.
[358] ARSIWA, Art. 4.
[359] *Id.*, Art. 4(1).
[360] DARSIWA, p. 40; *Immunity from Legal Process of a Special Rapporteur*, p. 62, ¶62; *Armed Activities on the Territory of the Congo*, ¶213; *Bosnia v. Serbia*, ¶385.
[361] ARSIWA, Art. 4(1); DARSIWA, p. 40; D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in THE LAW OF INTERNATIONAL RESPONSIBILITY, p. 239; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", in 22

that "[i]*t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as acta iure gestionis.*"[362] It is also not relevant whether the conduct was carried out by superiors or subordinates.[363]

According to article 7 of the ARSIWA, the State may be held responsible for the conduct of a State organ "*even if it exceeds its authority or contravenes instructions",* as long as they were acting in their official capacity.[364]

3.2.2. STATE ORGANS

Article 4 also stems from the principle of unity of the State from the international standpoint, thereby disregarding internal divisions of the State for purposes of attribution.[365]

In the commentary to article 4, the ILC notes that "*the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level*."[366]

Entities that compose the traditional executive, legislative, and judicial branches of the State are considered State organs under article 4,[367] even though some of them enjoy a certain (or total) level of independence and autonomy towards the government (e.g., national courts or tribunals).

The attribution of acts of territorial entities to the State under article 4 is well-established in international law, in spite of their distinct personality under internal

---

LEIDEN JOURNAL OF INTERNATIONAL LAW (2009), p. 8; *LaGrand*, Germany v. United States of America, ICJ, Decision on Provisional Measures, 1999 (***"LaGrand"***), ¶28; *Avena and Other Mexican Nationals*, ¶65; *Bosnia v. Serbia*, ¶386.

[362] DARSIWA, p. 41.

[363] *Id.*

[364] ARSIWA, Art. 7. See also DARSIWA, p. 41; J. Griebel and M. Plucken, "New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia", p. 613; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", p. 8; H. Kelsen, PURE THEORY OF LAW, p. 150.

[365] DARSIWA, p. 40.

[366] *Id.*

[367] *Id.*; D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", p. 239; *Salvador Commercial Company*, UNRIAA (Vol. XV, 1902), pp. 455, 477. See also J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, pp. 119-123.

law.[368] In this regard, the ILC commentary to article 4 states that "[i]*t does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations*."[369]

In addition, article 4(2) determines that the mere status of an organ under internal law is sufficient to be considered a State organ under article 4.[370]

State organs that have that status under internal law are also known as *de jure* organs.[371] Identities, definitions and classifications under internal law are, thus, relevant for purposes of international responsibility.[372]

Notwithstanding, the wording "*includes*" foreseen in article 4(2) is not intended to limit the scope of article 4, but rather to show that the categorization as a State organ is not limited to *de jure* organs.[373] The ILC confirmed this idea in the commentary to article 4, as follows:

> "(...) *it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems*

[368] DARSIWA, p. 41; D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", p. 239; *LaGrand*, ¶28.
[369] DARSIWA, p. 41.
[370] ARSIWA, Art. 4(2).
[371] *Bosnia v. Serbia*, ¶386; C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 34.
[372] ARSIWA, Art. 4(2); *Bosnia v. Serbia*, ¶386; DARSIWA, p.42; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", p. 8; H. Kelsen, PURE THEORY OF LAW, p. 150. Notwithstanding, establishing a criterion by reference to internal law does not mean that international law is bound by or dependent of internal law.
[373] DARSIWA, p. 42; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken', Leiden Journal of International Law", p. 8; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 124.

the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State. Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2."[374]

3.2.3. DE FACTO ORGANS

Persons or entities which do not formally possess the status of a State organ under internal law may be exceptionally regarded as *de facto* organs, for purposes of international responsibility.[375] This concept stems from the principle of non-subordination of international law to internal law, and is intended to prevent States from escaping international responsibility on the grounds of their internal law.[376] Moreover, it reaffirms that separate legal personality under internal law is not decisive to determine the autonomy of an entity towards the State.[377] However, there is no consensus regarding the legal framework applicable to *de facto* organs.

3.2.3.1. LEGAL FRAMEWORK

While some scholars consider that *de facto* organs are only covered by article 4,[378] others understand that *de facto* organs are embodied in other rules of the ARSIWA, such as article 8.[379]

---

[374] DARSIWA, p. 42 (emphasis added).

[375] In the same sense, C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 49; *Bosnia v. Serbia*, ¶397; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 124; DARSIWA, p. 42; ; E. Correia Baptista, DIREITO INTERNACIONAL PÚBLICO, p. 566.

[376] *Bosnia v. Serbia*, ¶392; *Prosecutor v. Dusko Tadič*, ICTY, Judgement, 15 July 1999, ¶117; *Maffezini*, ¶78; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 126; DARSIWA, p. 42; C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION, p. 48.

[377] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 122.

[378] M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken", p.126.

[379] A. Cassese, "The Nicaragua and Tadič Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", in 18 EJIL (2007), pp. 649-650; J. Griebel and M. Plücken, "New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia", p. 615.

CRAWFORD and MILANOVIĆ hold that *de facto* organs are only embodied in article 4, while article 8 deals with another rule of attribution for acts of non-State organs.[380] Under this doctrine, the mere qualification as an "*organ*" gives rise to responsibility.[381] On the contrary, the conduct of other persons or entities that act under the instructions or control of a State is not *necessarily* attributable to the State, namely because additional criteria and requirements need to be met.[382] In this regard, MILANOVIĆ noted that "[i]*t is precisely because the conduct is not one of a State organ, either de jure or de facto, that the law requires, for example, proof of a state's instructions, or its control over a specific act, or its positive acknowledgment of an act as its own.*"[383] Following this rationale, MILANOVIĆ defined *de facto* organs as "*entities that (1) are (obviously) not de jure organs (2) but nonetheless, by virtue of the strength of the connection between them and the state, the same rules that apply to de jure organs apply to them as well, even if they do not possess organ status under the state's domestic law."*[384]

According to CASSESSE, the ICJ decision in *Bosnian Genocide* addressed *de facto* organs in the application of article 8 of the ARSIWA and used the "*effective control*" test in that evaluation.[385] Similarly, GRIEBEL and PLUCKEN consider that the "*complete dependence*" test is not the only test for acknowledging the existence of *de facto* organs, by referring to article 8 of the ARSIWA and to the ICJ decision in *Military and Paramilitary Activities in Nicaragua*.[386] However, in *Bosnian Genocide*, the ICJ analyzed whether Republika Srpska, VRS and the paramilitary militias constituted *de facto* organs of Serbia,[387] in the context of its analysis of the question of attribution under article 4 of the ARSIWA.[388] The ICJ

---

[380] M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken", p. 126.
[381] DARSIWA, p. 41; J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 126; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", p. 8; H. Kelsen, PURE THEORY OF LAW, p. 150.
[382] J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 126; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", p. 8.
[383] M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", page 8.
[384] *Id.*, page 7.
[385] A. Cassese, "The Nicaragua and Tadič Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", pp. 649-650.
[386] J. Griebel and M. Plücken, "New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia", p. 615.
[387] *Bosnia v. Serbia*, ¶390.
[388] *Id.*, ¶385.

only turned to the question of attribution under article 8 of the ARSIWA,[389] after making a previous introduction expressly stating that:

"(…) *the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs de facto, even though not enjoying that status under internal law (…) Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control*." [390]

In this sense, we understand that the ICJ considered that the legal framework applicable to *de facto* organs was article 4 of the ARSIWA. Notwithstanding, to determine whether the entities in question constituted *de facto* organs of Serbia, the ICJ had to rely on additional criteria and requirements to make an assessment, precisely because the "*organ*" status did not result from internal law.

3.2.3.2. THE COMPLETE DEPENDENCE TEST

In *Bosnian Genocide*, the ICJ held that an entity may be regarded as a *de facto* organ if there is a "*complete dependence*" on the side of the entity and "*control*" on the side of the State, in a way that the entity has no independence or autonomy towards the State.[391] For this purpose, the ICJ recalled its decision in *Military and Paramilitary Activities in Nicaragua*[392] and laid down the "*complete dependence*" test to identify a *de facto* organ as follows:

"*(…) according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on*

[389] *Id.*, ¶398.
[390] *Id.*, ¶397 (emphasis added).
[391] *Id.*, ¶391-394.
[392] *Id.*, ¶391; *Nicaragua Case*, ¶109.

the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious."[393]

In this regard, the ICJ considered that these exceptional situations require proof of a "*particularly great degree of State control*" of which the person or entity acting is "*merely the instrument"* and "*so closely attached [to the State] as to appear to be nothing more than its agent*".[394]

The "*complete dependence*" test was first enunciated in *Military and Paramilitary Activities in Nicaragua.* In that case, the ICJ had "*to determine* (...) *whether or not the relationship of the contras to the United States Government 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 Govemment*."[395] While addressing Nicaragua's argument according to which "*the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States*"[396], the ICJ held that:

"[t]*his would mean that they have no real autonomy in relation to the Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces under the latter's command.*"[397]

To evaluate whether the *contras* fulfilled the "*complete dependence*" test, the ICJ took into consideration the form of creation of the *contras*, which was "*an independent force*", and the "*only element of control exercised by the United States*", which – according to the evidence provided – was "*cessation of aid*".[398] With regards to US aid, the ICJ concluded that "*despite the heavy subsidies and*

[393] *Bosnia v. Serbia*, ¶392.
[394] *Id.*, ¶392 and 393.
[395] *Nicaragua Case*, ¶109.
[396] *Id.*, ¶114.
[397] *Id.*
[398] *Id.*, ¶109.

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."[399] Furthermore, the ICJ found that even though US military aid was no longer authorized at a certain point in time, "*the sharing of intelligence and the provision of 'humanitarian assistance' (...) may continue*."[400] With regards to these indicators and the evidence provided, the ICJ concluded the following:

> "[i]*n sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand. it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is afortiori unable to determine that the contra force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras.*"[401]

In this sense, the ICJ found that the *contras* have been during a period "*so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States* (...) [but] *adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect*."[402]

As CRAWFORD summarized it, the ICJ took into consideration the following indicators to evaluate whether there was a relationship of "*complete dependence*" between the United States and the *contras*: *"(a) whether the non-state entity was*

[399] *Id.*
[400] *Id.*, ¶110.
[401] *Id.*
[402] *Id.*, ¶111.

created by the state; (b) whether state involvement exceeded the provision of training and financial assistance; (c) whether complete (as opposed to a degree of or potential for) control was exercised in fact; and (d) whether the state selected, installed or paid the political leaders of the group."[403]

4. OUR POSITION

Article 5 refers to "*a person or entity which is not an organ of the State under article 4*".[404] In this sense, all entities that are not State organs under article 4 may fall under the personal scope article 5.

4.1. STATE-OWNED ENTERPRISES AND OTHER PUBLIC ENTITIES

The legal criteria under internal law for an entity to be regarded as public may vary from State to State and entity to entity, e.g. based on State creation or ownership, nationalization, or other way of State intervention and their legal nature. Entities may have a public, private or public-private nature and assume a wide variety of forms and categories under domestic law, such as corporations that usually emerge as a business with a profit-making purpose.[405] On the other hand, State-owned entities or enterprises are usually classified as public based on the level of State association or intervention, regardless of their form, that is more related to their purpose of incorporation.[406] For instance, in the universe of OECD members, a State-owned or public enterprise is a corporation owned either entirely, predominantly, or even minority by the State and established under internal law as such.[407] While some State-owned enterprises are established under and subject to rules of private law (e.g. private limited liability companies or joint stock companies), others take the form of public law institutions.[408]

---

[403] J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 125.
[404] ARSIWA, Art. 5.
[405] "Draft Articles on Diplomatic Protection with Commentaries", pp. 26, 43; BLACK'S LAW DICTIONARY, "Entity", "Person", pp. 391, 612, 976; *Barcelona Traction*, ¶38-40; Peter T. Muchlinski, "Corporations in International Law", ¶1; "Draft Articles on Diplomatic Protection with Commentaries", pp. 26, 37.
[406] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 544; "Draft Articles on Diplomatic Protection with Commentaries", pp. 37, 43; BLACK'S LAW DICTIONARY, "Entity", "Person", pp. 391, 611-612.
[407] OECD, "OECD Guidelines on Corporate Governance of State-Owned Enterprises", p. 9.
[408] *Id*, p. 36.

Despite the wide variety of internal classifications that States may adopt, international law is not subordinate to internal law. Even though article 4(2) relies on internal law to establish a criterion, the ILC has acknowledged that "*the reference to a State organ in article 4 is intended in the most general sense*"[409] without being "*sufficient to refer to internal law for the status of State organs.*"[410] In this regard, international law does not refer to internal law to accommodate internal determinations, but rather to gather probatory elements to determine whether an entity fulfills a criterion that is established by international law. As such, article 4 is not limited to the attribution of acts of *de jure* organs.

Even though territorial public entities may often have an autonomous personality under internal law and not have an organ status under internal law, international law determined that from the international standpoint they should be regarded as State organs.[411] This determination shows that article 4 also stems from the principles of unity of the State from the international standpoint and non-subordination of international law to internal law.

By acknowledging that territorial entities are State organs, article 4 disregards internal divisions adopted by States for purposes of the internal organization of their public administration (*lato sensu*) and demonstrates that international law is not dependent on nor bound by internal law.

Territorial entities and other autonomous legal entities may have different characteristics and diverse degrees of State involvement, but they all share the same common purpose: they are created, owned, or contracted by the State to supplement the functions provided directly by the *de jure* organs.[412] When States resort to territorial entities, they are adopting a distribution of functions *ratione loci* and, when they resort to other entities, they are adopting a distribution of functions *ratione materiae*.[413] Notwithstanding, the purpose remains the same, which is to supplement the functions provided directly by the State.[414]

---

[409] DARSIWA, p. 40.
[410] *Id.*, p. 42 (emphasis added).
[411] DARSIWA, p. 41; D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", p. 239; *LaGrand*, ¶28.
[412] Mr. Robert Ago, Third Report on State Responsibility, pp. 253-267; Report of the International Law Commission on the work of its twenty-sixth session, pp. 277, 282-283.
[413] Mr. Robert Ago, Third Report on State Responsibility, pp. 256-262.
[414] *Id.*, pp. 253-267; Report of the International Law Commission on the work of its twenty-sixth session, p. 277, 282-283.

Moreover, some autonomous public entities are created/established and entirely or majority owned by the State, have their managers or board members being appointed by the Government, are financed by the State and possess varying degrees and forms of State involvement (e.g. through budget or annual accounts approval, approval of their activities plan). Some of these entities might even have greater connection with the central Government than territorial entities, which may possess a great level of autonomy.

According to the ICJ, to be considered a *de facto* organ, the entity needs to meet the complete dependence test.[415] However, the requirements and indicators of the complete dependence test created by the ICJ are not fit for all situations, because this test was designed in the context of two specific cases related to military or paramilitary militias. Differently, cases involving investment and trade usually deal with legal entities of a well-established structure and nature under internal law (e.g., State-owned enterprises, public corporations, or agencies) that are created, owned, or controlled by the State. Notwithstanding, in these cases, "*reality* should [also] prevail *over appearances*",[416] and, therefore, the test should be adapted accordingly.

In some cases, ICSID has considered that State-owned enterprises were *de facto* organs under article 4, due to several factors including State ownership and control.[417] Notwithstanding, ICSID considered that the functions exercised by the entities were also relevant to assess their condition as a *de facto* organ,[418] which is contrary to the principle embodied in article 4(1). The nature of the functions performed by State organs is irrelevant for purposes of attribution under article 4.[419] This is one of the key differences for attribution under article 4 and 5, because (unlike article 4) article 5 demands an analysis of the functions performed by the entity.[420]

---

[415] *Nicaragua Case*, ¶109; *Bosnia v. Serbia*, ¶391-394.
[416] *Bosnia v. Serbia*, ¶291. See also, J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART, p. 225.
[417] *Flemingo DutyFree*, ¶435-436; *Ortiz Construcciones*, ¶167.
[418] *Flemingo DutyFree*, ¶437; *Ortiz Construcciones*, ¶169; *Almås v. Poland*, ¶207.
[419] ARSIWA, Art. 4(1); DARSIWA, p. 40; D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", p. 239; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", p. 8; *LaGrand*, ¶28; *Avena and Other Mexican Nationals*, ¶65; *Bosnia v. Serbia*, ¶386.
[420] ARSIWA, Art. 5.

In this sense, we do not follow the WTO Appellate Body's approach, in *US Anti-Dumping Appeal*, to find the meaning of the term "public body". The Appellate Body used a methodology that seems correct, which was to seek the ordinary meaning of the term "*public body*" in accordance with article 31 of the VCLT.[421] However, the methodology was applied to false premises, which necessarily led to a misleading conclusion. Due to the argument raised by China – which basically invoked the content of article 5 of the ARSIWA, that requires the exercise of governmental authority for attribution purposes – the Appellate Body confused the public nature of an entity with the public nature of the functions performed by an entity.[422]

The same approach can be seen throughout several ICSID decisions.[423] Even though, in *Maffezini,* ICSID acknowledged that SODIGA met the structural test, it still had to proceed with the functional test to conclude that SODIGA was a State entity.[424] In *Flemingo DutyFree,*[425] ICSID referred to *Maffezini* and considered that a State enterprise was a *de facto* organ under article 4 of the ARSIWA.[426] Although we agree with ICSID's conclusion in *Flemingo DutyFree,* we cannot agree with the adopted methodology, as the nature of the functions should be irrelevant for purposes of attribution under article 4.[427]

Hence, even though State-owned enterprises or other autonomous public entities are not *de jure* organs, international law should take into consideration the elements presented by these entities to analyze whether they may be regarded as *de facto* organs, in which case their acts would be attributable under article 4 regardless of the nature of the functions performed by the entity.

As such, from the universe of entities listed by the ILC in the commentary to article 5, we understand that "*public corporations, semi-public entities,* [and] *public*

---

[421] *US Anti-Dumping Appeal*, ¶290.
[422] *Id.*, ¶317.
[423] *Amco Asia v. Indonesia*, ¶162-163; *Maffezini*, ¶84; *Maffezini Award*, ¶52; *Noble Ventures*, ¶69; *Ortiz Construcciones*, ¶169; *Almås v. Poland*, ¶207.
[424] *Maffezini*, ¶89.
[425] *Flemingo DutyFree*.
[426] *Id.*, ¶435-436.
[427] ARSIWA, Art. 4(1); DARSIWA, p. 40; D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", p. 239; M. Milanovic, "State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken", p. 8; *LaGrand*, ¶28; *Avena and Other Mexican Nationals*, ¶65; *Bosnia v. Serbia*, ¶386.

agencies of various kinds"[428] may fall out of the personal scope of article 5, because they can be regarded as State organs under article 4.[429]

4.2. PRIVATE CORPORATIONS AND OTHER ENTITIES

The ILC Special Rapporteur, Mr. Roberto Ago, could not have stressed more – and on several different occasions – that the criterion for attribution under article 5 falls upon the nature of the function and not the legal form of the entity.[430]

Notwithstanding, the commentary of the ILC shows some reluctance in accepting without reservations that article 5 may cover any and every entity which is not an organ of the State under article 4 and that is empowered by the law of the State to exercise elements of the governmental authority.

The ILC commentary refers that article 5 may include private companies *"in special cases*".[431] Considering that the ILC also refers that article 5 was designed to take account of former State corporations that were privatized,[432] the ILC seems to anticipate that not all private entities may fall under the scope of article 5.

However, pursuant to article 5, all entities that are not State organs under article 4 may fall under the personal scope of article 5.[433] Taking into consideration that State-owned enterprises and other autonomous public entities may be regarded as State organs under article 4, the personal scope of article 5 is practically reduced to private entities,[434] regardless of their form (e.g., corporations or companies, foundations, or associations).

Thus, we hold that private corporations may fall under article 5, as long as they also fulfill the material scope of the said article.[435]

---

[428] DARSIWA, p. 43.
[429] Notwithstanding, the attribution of acts of any entity needs to be assessed on a case-by-case basis taking into account the specific aspects of the entity and the State. For this reason, we do not assume that all acts of autonomous public entities would necessarily be attributable to the State under article 4, but consider that the reference to these entities in the commentary to article 5 can be misleading.
[430] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, pp. 14-17.
[431] DARSIWA, pp. 31, 43.
[432] *Id.*, pp. 31, 42.
[433] ARSIWA, Art 5.
[434] Even though the personal scope refers to a "person or entity", we are nor referring to persons because it falls out of the scope of the present thesis.
[435] Differently, B. Stern, "The Elements of An Internationally Wrongful Act", p. 204.

VI. MATERIAL SCOPE

1. EMPOWERED BY THE LAW OF THE STATE

The commentary of the ILC to article 5 states that "*the internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community*." [436]

During the plenary discussions, the Special Rapporteur, Mr. Roberto Ago, noted that the main criterion under draft article 7 was the "*distribution of the exercise of prerogatives of public power*" by law[437] and, as such, State ownership, control and the percentage of shares held by the State were irrelevant – the State could still be held responsible without filling any of those conditions, merely on the basis of having delegated the exercise of public power.[438] With regards to draft article 8, some members had the intention to use the expression "*internal legal order*" instead, aimed at covering not only statute law, but the entire regulatory system of the State.[439]

International mechanisms for dispute resolution have analyzed the concept of "*empowered by the law of the State*" to assert whether a given mechanism of delegation of governmental functions was admissible for attribution purposes.

In *Helnan,* ICSID acknowledged that "*even if EGOTH has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatization process are attributable to the Egyptian Stat*e" because "*EGOTH was an active operator in the privatization of the tourism industry on behalf of the Egyptian Government. Egypt's privatization program (…) always included EGOTH's assets. The different announcements proposing to invest in Egypt, on the Ministry of Investment website, all refers to Egypt, the Holding Company and EGOTH*."[440] Differently, in *Ortiz Construcciones*[441], ICSID considered that the public economic enterprise named OLA/ALRECC was not

[436] DARSIWA, p. 43.
[437] On the other hand, article 8 dealt with situations of fact, not of law. Summary record of the 1256th meeting, UN Doc. No. A/CN.4/SR.1252 (Vol. I, 8 May 1974) p. 27.
[438] *Id.*, pp. 28, 30.
[439] *Id.*, p. 38.
[440] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006, ¶93.
[441] *Ortiz Construcciones*.

authorized to exercise "*prérogatives de puissance publique*" because it did not have an express authorization under Algerian law.[442]

In *US Anti-Dumping Appeal*, the Appellate Body of the WTO noted that "(…) *the absence of an express statutory delegation of authority* [does not] *necessarily precludes a determination that a particular entity is a public body* (…) *what matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved* [as] [t]*here are many different ways in which government in the narrow sense could provide entities with authority*"[443] In the same sense, in *US – Carbon Steel (India)*, the Appellate Body also considered that "*the absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body*."[444]

Notwithstanding, in *US Anti-Dumping Appeal*, the Appellate Body further noted that *"apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority."*[445]

Even though article 5 expressly states that the entity should be "*empowered by the law of the State"*[446] and the ILC commentary to article 5 also refers to the need of having a specific authorization under "*internal law*"[447], these references should be interpreted in the widest sense.

Considering that internal procedures and mechanisms of delegation of functions may vary from State to State, attribution should not be contingent on having a law

[442] *Id.*, ¶232.
[443] *US Anti-Dumping Appeal*, ¶318.
[444] *India Carbon Steel*, ¶4.29.
[445] *US Anti-Dumping Appeal*, ¶318.
[446] ARSIWA, Art. 5.
[447] DARSIWA, p. 43.

or a legal act *stricto sensu* specifically delegating governmental functions to a given entity. In this sense, international law shall also take into consideration other mechanisms (e.g., administrative acts or contracts) that empower entities to exercise governmental authority. Having a different understanding potentially allow States to evade responsibility.

2. GOVERNMENTAL AUTHORITY

2.1. ILC CONSIDERATIONS

2.1.1. PREPARATORY WORK

Although article 5 refers to "*governmental authority*", the term that was initially proposed by the Special Rapporteur Mr. Roberto Ago was "*public functions*".[448] The Special Rapporteur noted in his third report that the functions regarded as public "*vary widely and may be at the highest or lowest level and of a general or special character; but they are, nevertheless, always public functions which serve the interests of the community*."[449] But the English term "*public functions*" raised several questions and divided opinions in the ILC. During the plenary discussions on the third report of the Special Rapporteur, Mr. Reuter asserted that he preferred the expression "*prerogatives of public power*" which involved the exercise of juridical, legislative, judicial, executive, physical or other compulsory power and further noted that acts of a commercial nature, such as acts of exchange or sale, were never attributable to the State even if carried out by a State organ.[450] Differently, Mr. Ushakov stressed that the term "*public power*" should be avoided, as sometimes it was used in connection with the term "*public property*" which relied on the notion of ownership and, therefore, could be interpreted as covering every corporation owned by the State.[451] The Special

[448] According to proposed article 8 "[t]*he conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law*." Mr. Robert Ago, Third Report on State Responsibility, p. 267 (emphasis added).
[449] *Id.*, p. 254.
[450] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 16.
[451] Mr. Ushakov further explained his concern by reference to the situation in the Soviet Union, where private property did not exist and every corporation belonged to the State. *Id.*, p. 19.

Rapporteur welcomed the expression "*prerogatives of public power*" proposed by Mr. Reuter[452] and commented the point made by Mr. Ushakov clarifying that "*for the purposes of article 7, it was sufficient that, under the internal legal order, an entity exercised some part of the prerogatives of public power, whether by delegation or not.*"[453] Mr. Reuter showed his concerns regarding the terms "*public*" and "*public functions*", as both raised issues with the translation to English.[454] Likewise, Mr. Hambro did not believe in the existence of a recognized definition in international law both on the nature and scope of the expression "*public functions*" and, since there was also no common meaning of the expression under internal law, it could not be used in international law.[455] Notwithstanding, Mr. Elias suggested the replacement of the words "*public functions*" for "*State functions*" or "*governmental functions*".[456] Mr. Tsuruoka stressed that the term "*public functions*" should be understood as "*prerogatives of the State*".[457] Sir Francis Vallat considered that the term "*governmental functions*" was more suitable than the term "*public functions*", as it was closer to the intended meaning.[458] Mr. Quentin-Baxter did not share the view that the term "*public functions*" created difficulties for common law countries, but acknowledged that it could be the case for the term "*public corporation*".[459] Mr. Sette Câmara was concerned with the scope and definition of "*public functions*" and held that the existence of a legal nexus between persons and the State within the internal law of that State should be mandatory for purposes of attribution.[460] Mr. Kearney drew attention to the fact that some of the terms used in the drafting could have different technical meanings under the internal law of each State, e.g. the term "*public*" was "*too vague in English to serve as a basis for the allocation of State responsibility*."[461] Hence, Mr. Kearney suggested to replace the term "*public*" with the term "*governmental*", for purposes of coherency in its meaning according to the internal law of each State.[462] In this regard, the Special

[452] *Id.*, p. 28.
[453] *Id.*, p. 29.
[454] *Id.*, pp. 34-35.
[455] *Id.*, p. 35.
[456] *Id.*, p. 36.
[457] *Id.*
[458] *Id.*
[459] *Id.*, p. 39.
[460] *Id.*
[461] *Id.*, p. 24.
[462] *Id.*

Rapporteur also acknowledged the translation problems and the need to find equivalent terms in English and Russian.[463] Nonetheless, the Special Rapporteur did not consider advisable to abandon the use of the term "*public*" in French and Spanish.[464] Notwithstanding, the Drafting Committee decided to adopt in the English version the term "*governmental authority*" due to the different meanings that the term "*public*" could have in different languages and legal systems, as it considered that the term "*governmental authority*" was the equivalent to the term "*publique*" used in French.[465]

During plenary discussions, the terminology was not the only controversial topic. The substance of what could be regarded as a "*public*" or "*governmental*" function also generated a lot of debate. Some members considered that internal law was the best criterion to determine the character of a certain function due to the variety of considerations that States may have in their internal legal systems.[466] But others considered that the functions should correspond to a "*State power*", in the sense of "*legislative, executive or judicial power".*[467] In this regard, the Chairman stressed that corporations that exercised "*legislative, executive or judicial functions would be covered by the notion of State organs*"[468] In its commentaries, the ILC notes that the "(…) *particular characteristic* [of entities that are empowered to exercise governmental authority] *is that the internal legal system confers upon them, to a greater or lesser extent, the exercise of certain elements of the governmental authority, usually of a regulatory or executive nature*".[469] To exemplify some of the functions, the ILC enunciated the case of a bank of issue and a railway company entitled to exercise police powers.[470]

Afterwards, the Special Rapporteur, Mr. James Crawford, noted in his first report to the Commission that this rule addressed a "*very interesting and important problem of the exercise of public powers by entities which were not part of the structure of the State itself: airlines exercising control of immigration, private*

[463] *Id.*, p. 45-46.
[464] *Id.*, p. 46.
[465] *Id.*, pp. 33, 152.
[466] *Id.*, p. 19.
[467] *Id.*, p. 19, 25.
[468] *Id.*, p. 26.
[469] Report of the International Law Commission on the work of its twenty-sixth session, p. 281.
[470] *Id.*, p. 277-282.

companies managing prisons, and so forth"[471], but reinforced his position against the attempt of providing a definition of "*public power*".[472] With regards to the term "*elements of the governmental authority*", Mr. Brownlie considered that it "*raised many questions: its scope, for example, not to mention ideological considerations" and, in alternative, introduced the term "delegation of State functions*".[473] Mr. Hafner considered that the comments of the Special Rapporteur on the content of the term "*elements of the governmental authority*" made it similar to the term "*State function*", but "*there were in fact two different concepts in play, for "elements of the governmental authority*" referred to the practice and "*function*" referred to the content.[474] Additionally, Mr. Hafner pointed out that the article was limited only to "*elements of the governmental authority*", but those "*were only a part of the powers of the State*" and "*it certainly implied much more than that*."[475] Mr. Goco stressed his concerns with regards to the exact definition of "*government*", as, in his opinion, "*the Government represented the whole of the State*".[476] In this regard, the Special Rapporteur clarified that "*'Government' should be understood to mean the executive, the legislature and the judiciary; the phrase "elements of the governmental authority" was just as widely accepted*."[477] Mr. Goco further noted that the language proposed by the Special Rapporteur for article 7 "*whether the organ exercises constituent, legislative, executive, judicial or any other functions*" was "re*strictive and redundant as long as the meaning of "organ" was clear*."[478] In this regard, Mr. Goco found that "*constituent*" and "*administrative*" functions entrusted to the private sector could also be regarded as elements of authority.[479]

2.1.2. FINAL COMMENTARY

The final version of the ILC commentaries to the ARSIWA did not introduce a definition of "*governmental authority*". Instead, the commentary to article 5 foresees that the concept of "*governmental authority*" does not have a strict scope,

[471] Summary record of the 2553rd meeting, p. 229.
[472] *Id.*
[473] *Id.*, p. 231
[474] *Id.*, p. 237.
[475] *Id.*
[476] *Id.*, p. 238.
[477] *Id.*
[478] *Id.*, p. 245.
[479] *Id.*

as "*beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions*."[480] Notwithstanding, the ILC commentaries provide criteria for the application of a general standard, which must be subject to an assessment on a case-by-case basis:

> *Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.*[481]

Furthermore, the commentary of the ILC to article 5 states that the conduct of the entity "*must accordingly concern governmental activity and no other private or commercial activity in which the entity may engage*."[482] In this regard, the commentary also provides as an example "*the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock)*."[483]

2.2. CASE LAW

International mechanisms for dispute resolution have been interpreting the concept of "*governmental authority*" for purposes of attribution of acts (mainly of State-owned enterprises) to the State.

2.2.1. INVESTMENT DISPUTES

In *Amco Asia v. Indonesia,* ICSID analyzed whether the acts of the limited liability company PT Wisma could be attributable to Indonesia. For that purpose, ICSID observed PT Wisma's purpose *"to administer the organization and methods of work of its members in an effort to achieve the well-being of soldiers and their families"* and tasks, which included "*to encourage savings by its members, organizing activities in, among other things, general travel, low-cost housing, the*

[480] DARSIWA, p. 43.
[481] *Id.*
[482] *Id.*
[483] *Id.*

hotel industry, tourism, consulting and construction, providing guidance to members in their various ventures, providing education to "members of the Indonesian army and society in general to increase their knowledge" of cooperatives."[484] ICSID found that the acts of PT Wisma were not attributable to the Government of Indonesia,[485] but noted that "*some economic activities which in some countries are taken care of by private or public owned companies are run in Indonesia by people who belong to or are retired from the military establishment. This fact cannot in the opinion of the Tribunal change the legal evaluation that PT Wisma is an economic entity which has its own profit-seeking goal. This goal is by nature not different from the objective of other private economic entities, but is certainly very different from the normal purpose of a government: i.e. public administration in its widest sense."*[486]

In *Maffezini,* ICSID relied on a "*functional test*" to analyze whether the acts of SODIGA were commercial or governmental, because "[c]*ommercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed.*[487] ICSID analyzed the nature of each act and considered that "[a] *decision to increase the investment taken not by Mr. Maffezini but by the entity entrusted by the State to promote the industrialization of Galicia, cannot be considered a commercial activity. Rather, it grew out of the public functions of SODIGA*."[488] In this sense, ICSID concluded that "[b]*ecause the acts of SODIGA relating to the loan cannot be considered commercial in nature and involve its public functions, responsibility for them should be attributed to the Kingdom of Spain.*"[489]

In *Noble Ventures,* ICSID addressed the nature of the functions performed by SOF/APAPS, which included the conclusion of agreements with investors, the management of the legal relationship with such investors and all acts related to the implementation of the investments.[490] Addressing the Respondent's contention that commercial acts were not attributable to the State, ICSID noted that "*in the context of responsibility, it is difficult to see why commercial acts, so called acta iure*

[484] *Amco Asia v. Indonesia*, ¶9.
[485] *Id.*, ¶162.
[486] *Id.*, ¶163.
[487] *Maffezini Award*, ¶52.
[488] *Id.*, ¶79.
[489] *Id.*, ¶83.
[490] *Noble Ventures*, ¶79.

gestionis, should by definition not be attributable while governmental acts, so called acta iure imperii, should be attributable."[491] ICSID further noted that "[t]*here is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor*."[492] On those grounds, ICSID considered that the acts of SOF/APAPS were attributable to Romania.[493]

In *Hamester v. Ghana*, ICSID identified the "*two cumulative conditions"* for attribution under article 5: "*an entity empowered with governmental authority; and an act performed through the exercise of governmental authority*."[494] ICSID understood that Cocobod (Ghana Cocoa Board) was "*a public entity empowered with some "prerogatives de puissance publique"*[495], because "[a]*mong others, it has the mission to regulate the marketing and export of cocoa, coffee and sheanuts; to encourage the development of all aspects of cocoa production and transformation; and to fight diseases of cocoa beans.*"[496] But this was not sufficient to attribute the acts of Cocobod to Ghana.[497] ICSID recalled its position in *Maffezini* and distanced from the position that was adopted in *Noble Ventures*, by noting that "*all acts – including acts de jure gestionis – of State organs*" were attributable to the State, but not all acts of entities exercising governmental authority would be attributable to the State – in this case, only acts *jure imperii* would be attributable to the State.[498] ICSID then went on with the analysis of each act carried out by Cocobod to understand whether "*Cocobod acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers*."[499] In this regard, ICSID considered that "*all the acts of Cocobod, a public entity as described in Article 5 of the ILC Articles,*

[491] *Id.*, ¶82.
[492] *Id.*
[493] *Id.*, ¶83.
[494] *Hamester v. Ghana*, ¶176.
[495] *Id.*, ¶193.
[496] *Id.*, ¶190.
[497] *Id.*, ¶193.
[498] *Id.*, ¶180.
[499] *Id.*, ¶202.

dealing with the shortage of beans during the year 2002 are acts de jure gestionis and as such not attributable to the Government of Ghana."[500]

In *Ortiz Construcciones*[501], ICSID considered that the functions exercised by the Algerian public economic enterprise named OLA/ALRECC (namely, relaying ministerial instructions to its partner Ortiz, adopting a passive attitude in efforts to obtain a workload plan, aligning with the position of ENPI regarding LPP housing prices, and slowing down the process of increasing the capital of the joint venture) could not be considered as "*prérogatives de puissance publique*".[502]

2.2.2. TRADE DISPUTES

In *Canada – Dairy*, the United States of America and New Zealand presented claims against Canada alleging that Canada was providing subsidies on dairy products through its provincial milk marketing boards, in contravention of the General Agreement on Tariffs and Trade 1994.[503] In particular, the United States and New Zealand argued that the milk marketing boards acted in the exercise governmental authority.[504]

In this context, the Panel analyzed the functions exercised by the milk marketing boards and concluded that they acted "*under explicit delegated governmental authority* (…) [because they received] *the authority from the governments to regulate certain areas*" and, thus, they could be "*presumed to act as an agency of the government*".[505]

Subsequently, Canada appealed certain aspects covered by the Panel Report, which led to a new analysis from the Appellate Body.[506] Notwithstanding, with regards to the Panel's conclusion regarding the governmental nature of the milk marketing boards, the Appellate Body agreed with the Panel.[507] To interpret the term "*governmental*" and find the ordinary meaning of the word, the Appellate

[500] *Id.*, ¶266.
[501] *Ortiz Construcciones*.
[502] *Ortiz Construcciones*, ¶233.
[503] *Canada Dairy Panel Report*, ¶1.5-1.6.
[504] *Id.*, ¶4.30-4.35.
[505] *Id.*, ¶7.78.
[506] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Appellate Body*, WTO Appeal Decision WT/DS103/AB/R WT/DS113/AB/R, 13 October 1999 (***"Canada Dairy Appeal")***, ¶4.
[507] *Id.*, ¶102.

Body referred to the Black's Law Dictionary and concluded that *"*[a] *"government agency" is, in our view, an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character, that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens."*[508] The Appellate Body further noted that the "[t]*he "governmental" character of the boards' functions, as well as the extent of their regulatory control, is underlined by the fact that their orders and regulations are enforceable in courts of law*."[509]

Similarly, in *US Anti-Dumping Appeal*, the Appellate Body also referred to a dictionary to the find the meaning of the term "*government*" and reproduced it as the "*continuous exercise of authority over subjects; authoritative direction or regulation and control*."[510]

2.3. OUR ANALYSIS

Finding out what can be regarded as "*elements of the governmental authority*" is not only relevant for article 5 of the ARSIWA, but also for other branches of international law. In this regard, FOX noted that "*the exercise of public powers, as opposed to the engagement in private relationships, has been a constant theme in political theory and is used as a justification in many branches of the law*".[511]

However, the exercise of discovering what can be regarded as "*governmental"* or "*publique"* is grounded on a dichotomy that affects different fields of international law.[512]

---

[508] *Id.*, ¶97.
[509] *Id.*, ¶100.
[510] *US Anti-Dumping Appeal*, ¶290.
[511] H. Fox, THE LAW OF STATE IMMUNITY, p. 392.
[512] *Id.*, p. 1656; J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", in 54 BRITISH YEARBOOK OF INTERNATIONAL LAW 75 (1983), p. 89; N. Rosemary Okany, "Private Law Analogies and the Evolution of International State Responsibility for Acts of Non-Governmental Entities Exercising Decentralized/Privatized Governmental Functions", in WAVES IN CONTRACT AND LIABILITY LAW IN THREE DECADES OF IUS COMMUNE (Anne L.M., Keirse, Marco B.M. Loos, eds., 2017), p. 189.

2.3.1. THE ORDINARY MEANING

Even though the ARSIWA are not a convention, we shall follow the general principles of treaty interpretation,[513] to find the ordinary meaning of the term "*governmental authority*" in its context.[514]

In *Kasikili/Sedudu Island*, the ICJ sought to determine the ordinary meaning of terms "*by reference to the most commonly used criteria in international law and practice*".[515] Since the parties did not agree on all aspects pertaining to the criteria for the determination of the term "*main channel*"[516], the ICJ could not "*rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another*."[517] Hence, the ICJ resorted to a dictionary, a glossary and other scientific works to achieve a conclusion as to the ordinary meaning of the term.[518] Similarly, WTO bodies have also referred to dictionaries in order to find the ordinary meaning of terms.

The term "*governmental authority*" does not appear *ipsis verbis* in Black's Law Dictionary nor Barron's Law Dictionary. The Black's Law Dictionary defines "*governmental function* [or] *activity*" as "*a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general.*[519] Similarly, the Barron's Law Dictionary defines "*government*" as "*the exercise of authority in the administration of the affairs of a state, community, or society* (…) *an instrument to preserve an ordered society* (…) *the authoritative direction and restraint exercised over the actions of men*" and "*governmental functions*" as "*activity done or furnished for general public good*".[520]

---

[513] With regards to the usage of the principles of interpretation to interpret other instruments rather than treaties, see, M. C. Wood, "The Interpretation of Security Council Resolutions", available at: https://www.mpil.de/files/pdf2/mpunyb_wood_2.pdf. See also, R. Gardiner, TREATY INTERPRETATION (2nd Ed. 2015), p. 22.
[514] VCLT, Art. 31(1).
[515] *Kasikili/Sedudu Island*, Botswana v. Namibia, ICJ, Judgement, 1999, ¶27.
[516] *Id.*, ¶28.
[517] *Id.*, ¶30.
[518] *Id.*
[519] BLACK'S LAW DICTIONARY, "governmental", p. 765.
[520] BARRON'S LAW DICTIONARY, (7th Ed., 2016), p. 244.

Considering that the ILC adopted the term "*governmental authority*" noting that it was the equivalent term to "*prérogatives de puissance publique*",[521] we shall also explore the ordinary meaning of the French term. According to the *Lexique des Terms Juridiques*, the term "*prérogatives de puissance publique* refers to the set of extraordinary legal means recognized by common law to the Administration and, where applicable, to other organizations to enable them to fulfill their missions of general interest".[522] The term "*publique*" refers to "*the power and the authority of the state*"[523], thereby bearing a similar meaning as the term "*governmental*".

2.3.2. TERRITORIAL SOVEREIGNTY

Even though – up until now – neither the PCIJ nor the ICJ have addressed the concept of "*governmental authority*" under the law of State responsibility, they have had to analyze similar concepts in the context of claims of sovereignty over specific territories.

In *Legal Status of Eastern Greenland*,[524] the PCIJ asserted that "*a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."*[525] In *Frontier Dispute,* the ICJ had to analyze the dispute in light of the principle of "*uti possidetis juris"*, i.e., the "*principle of the intangibility of frontiers inherited from colonization*."[526] In this context, the ICJ addressed the "*conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period*", as the so-called "*colonial effectivités"*.[527]

In *Sovereignty over Pulau*,[528] to address Indonesian and Malaysian claims over small islands, the ICJ had to analyze which acts constituted "*a relevant display of*

[521] See ARSIWA (French version). See also YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session, p. 152.
[522] LEXIQUE DES TERMS JURIDIQUES 2017-2018 (25th Ed. 2017), p. 1587.
[523] J. Auby, "Public/Private" in THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW (Cane et al, eds., 2021), p. 469.
[524] *Legal Status of Eastern Greenland*, Denmark v. Norway, PCIJ, Judgement, 1933.
[525] *Id.*, pp. 45-46.
[526] *Frontier Dispute*, Burkina Faso v. Republic of Mali, ICJ, Judgment, 1986, ¶20.
[527] *Id.*, ¶63.
[528] *Sovereignty over Pulau Ligitan and Pulau Sipadan*, Indonesia v. Malaysia, ICJ, Judgment, 2002.

authority which leave no doubt as to their specific reference to the islands in dispute as such" and noted that "[r]*egulations or administrative acts of a general nature can therefore be taken as effectivités with regard to Ligitan and Sipadan only if it is clear from their terms or their effects that they pertained to these two islands*.[529] The ICJ admitted that activities carried out by private persons could be "*seen as effectivités if they* (…) *take place on the basis of official regulations or under governmental authority"*.[530] In this sense, the ICJ considered that "*both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory"*.[531] The ICJ also considered that – even though the construction and operation of lighthouses and navigational aids were not usually considered "*manifestations of State authority*" – they could be "*legally relevant in the case of very small islands*", as it had previously stated in *Maritime Delimitation and Territorial Questions*.[532] In other words, the ICJ took into consideration the singularities and context of the case to assess whether certain acts could be regarded as "*manifestations of State authority*", thereby opening the concept and making it flexible to variations from State to State, territory to territory and case to case.[533]

In *Territorial and Maritime Dispute in the Caribbean Sea,*[534] the ICJ noted that "*a sovereign title may be inferred from the effective exercise of powers appertaining to the authority of the State over a given territory"* and recalled the PCIJ's jurisprudence on sovereignty claims.[535] The ICJ considered that "[t]*he permit extended by Honduras to the DEA to overfly the "national air space", together with the specific mention of the four islands and cays, may be understood as a sovereign act by a State, amounting to a relevant effectivité in the area."*[536] It also considered that "[t]*he issuance of work permits and visas to Jamaican and Nicaraguan nationals exhibit a regulatory power on the part of Honduras. The visits to the*

[529] *Id.*, ¶136.
[530] *Id.*, ¶140.
[531] *Id.*, ¶145.
[532] *Id.*, ¶147.
[533] *Id.*, ¶147.
[534] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Nicaragua v. Honduras, ICJ, Judgment, 2007.
[535] *Id.*, ¶172.
[536] *Id.*, ¶185.

islands by a Honduran immigration officer entails the exercise of jurisdictional authority, even if its purpose was to monitor rather than to regulate immigration on the islands."[537] Furthermore, the ICJ found that "*Honduran-regulated fishing boats and construction on the islands is also legally relevant for the Court under the category of administrative and legislative control*"[538] and "*the permits issued by the Honduran Government allowing the construction of houses in Savanna Cay and the permit for the storage of fishing equipment* (…) *may also be regarded as a display, albeit modest, of the exercise of authority, and as evidence of effectivités with respect to the disputed islands*".[539] The ICJ also observed that the placement of an antenna by the Geophysical Services Inc. in the context of authorized oil exploration activities/concessions constituted *"effectivités which support Honduran sovereignty over the islands in dispute."*[540]

2.3.3. SOVEREIGN AUTHORITY (ACTA JURE IMPERII)

2.3.3.1. THE RESTRICTIVE DOCTRINE OF STATE IMMUNITY

The original rule of State immunity was based on the Latin maxim *par in parem non habet imperium*, which means that an equal has no authority over an equal and thereby a State could not be subject to the jurisdiction of another State in any case, regardless of the circumstances.[541]

In the 18th and 19th centuries, this rule did not create too much struggle.[542] However, in the beginning of the 20th century, States increasingly started to engage in "*private pursuits*" of a commercial nature, which led to an extensive abandonment of the doctrine of absolute immunity in favor of a more restrictive approach.[543]

---

[537] *Id.*, ¶189.
[538] *Id.*, ¶195.
[539] *Id.*, ¶196.
[540] *Id.*, ¶207.
[541] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 488; H. Fox, THE LAW OF STATE IMMUNITY, p. 374; M. Shaw, INTERNATIONAL LAW, p. 701.
[542] M. Shaw, INTERNATIONAL LAW, p. 701.
[543] See, H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", in 28 BRIT. Y.B. INT'L L. (1951), p. 220; *Victory Transport Inc v. Comisaria General*, US Court of Appeals (2nd Circuit), 1964; H. Fox, THE LAW OF STATE IMMUNITY, pp. 394, 1874; M. Shaw, INTERNATIONAL LAW, p. 701.

Unlike the absolute immunity theory (according to which States enjoyed absolute immunity merely based on their sovereign status), the doctrine of restrictive immunity looks at the nature of the acts in order to concede immunity to the State.[544] Under the restrictive doctrine, a State can enjoy immunity with regards to "*governmental activity, but not where the state was engaging in commercial activity*."[545] Hence, this doctrine entails a distinction between the so-called acts "*involving the exercise of governmental authority*"[546], sovereign acts or *acta jure imperii*, and the so-called commercial acts or *acta jure gestionis.*[547]

As a general rule, separate entities only enjoy immunity from foreign jurisdiction when they are empowered to exercise governmental authority and carry out acts in the exercise of such authority.[548] This position may be found under the doctrine of restrictive immunity, which looks at the nature of the acts instead of the mere sovereign status in order to concede immunity to the State.[549]

The CJISP establishes that "*agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State*"[550] are regarded as the "*State*" for the purpose of the convention and, therefore, enjoy immunity from the jurisdiction of foreign courts.[551] However, this convention did not gather a lot of support, having only 23 States parties.[552]

In the commentaries to the DAJISP, the ILC held that, in theory, "*State enterprises or other entities established by the State performing commercial transactions*", as well as private entities could enjoy State immunity "*but only to the extent that they are entitled to perform acts in the exercise of prérogative de la*

---

[544] H. Fox, THE LAW OF STATE IMMUNITY, p. 466.
[545] M. Shaw, INTERNATIONAL LAW, p. 701.
[546] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, p. 488.
[547] M. Shaw, INTERNATIONAL LAW, p. 701; J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", p. 88.
[548] See, D. Gaukrodger, "Foreign State Immunity and Foreign Government Controlled Investors" in OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2010/02, 2010), p. 16.
[549] H. Fox, THE LAW OF STATE IMMUNITY, p. 466.
[550] See, United Nations Convention on Jurisdictional Immunities of States and Their Property, Art. 2(1)(iii).
[551] *Id.*, Art. 1.
[552] The references to the UN Convention on Jurisdictional Immunities of States and Their Property serve merely as a reference to understand the meaning that is given to the words under other international instruments and do not constitute an assumption (nor denial) of its bindingness.

puissance publique."[553] The ILC further noted that "[t]*he Commission discussed whether in the English text 'sovereign authority' or 'governmental authority' should be used and has come to the conclusion that 'sovereign authority' seems to be, in this case, the nearest equivalent to "prérogatives de la puissance publique.*"[554] This sentence demonstrates that during the work on State immunity, the ILC was confronted with the same conceptual difficulties it had during its work on State responsibility.

The ECSI foresees that "*the expression 'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions*"[555] and, as such, "*proceedings may be instituted against any* [of these entities] *(…) in the same manner as against a private person*"[556]. However, the ECSI prescribes that "*the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (acta jure imperii)*."[557]

The common feature of these instruments is that they do not provide a definition for governmental acts, thereby leaving the restrictive doctrine of State immunity contingent on the commerciality exception.

2.3.3.2. THE COMMERCIALITY EXCEPTION

Although most States have adhered to the restrictive doctrine of State immunity, the commercial or private exception does not have a standard criterion for its determination and form of application.[558] Despite the fact that some also

[553] DARSIWA, pp. 13, 17.
[554] DARSIWA, pp. 13, 16.
[555] ECSI, Art. 27(1).
[556] *Id.*, Art. 27(2).
[557] *Id.*, Art. 27(2).
[558] The majority of the permanent members of the Security Council of the United Nations follow the restrictive doctrine of State Immunity. Although France does not have legislation on the matter, it follows the UN Convention on Jurisdictional Immunities of States and Their Property. On the other hand, China adopts the absolute immunity doctrine. See, State Immunity Act 1978 (UK); Foreign Sovereign Immunities Act 1976 (USA); Federal Law on Jurisdictional Immunity of a Foreign State 2015 (RU); United Nations Convention on Jurisdictional Immunities of States and Their Property; A. Godwin, "State immunity". Other members of the United Nations also follow the restrictive doctrine. See, ECSI; Singapore State Immunity Act 1979 (SG); Pakistan State Immunity Ordinance 1981 (PK); South Africa Foreign States Immunities Act 1981 (ZA); Canada State Immunity Act 1985 (CA); Foreign Sovereign Immunities Act 1976 (USA); Federal Law on Jurisdictional

argued that this distinction is not sufficient criterion for determining the grant of immunity[559], it is undeniable that it plays a central role in the regime of restrictive immunity.[560] However, even under the law of State immunity, finding a widely-accepted definition and scope of governmental and commercial acts is not that easy.

According to the CJISP, the State cannot invoke immunity from jurisdiction before a foreign domestic court regarding "*commercial transactions*",[561] namely:

> *(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.*[562]

Furthermore, the CJISP provides that "*reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction*."[563] In this sense, States parties to the convention could not (in theory), plead immunity from jurisdiction before foreign courts whenever their acts are regarded as "*commercial transactions*" either by nature or by purpose. In this regard, FOX considers that the purpose test has proven to be "*over-inclusive in relation to economic activities of the State*." [564]

Immunity of a Foreign State 2015 (RU), ; Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009 (JP); Ley Nº 24.488 Imunidad de Jurisdiccion de Los Estados Extranjeros Ante los Tribunales Argentinos 1995 (AR); Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en Espanã y las Conferencias y Reuniones internacionales celebrades en Espanã 2015 (ES). See also, H. Fox, THE LAW OF STATE IMMUNITY, p. 1778.

[559] FOX argues that relevance should also be given to "the extent of the participation of the State, in its regulatory superior role, the context in which the act is performed (…)". See *Id.*, p. 457.

[560] J. Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions", p. 91.

[561] United Nations Convention on Jurisdictional Immunities of States and Their Property, Arts. 10, 17.

[562] *Id.*, Art. 2(1)(c).

[563] *Id.*, Art. 2(2).

[564] H. Fox, THE LAW OF STATE IMMUNITY, pp. 1802-1803.

In *Jurisdictional Immunities,*[565] the ICJ addressed a claim concerning an alleged violation of Germany's jurisdictional immunity by Italian courts related to "*acts perpetrated by German armed forces and other organs of the German Reich*".[566] Considering that neither Italy nor Germany were parties to the CJISP, the ICJ had to determine whether there was a customary rule of international law "*conferring immunity on States and, if so, what is the scope and extent of that immunity*."[567] Despite not having developed the distinction between acts "*jus imperii*" and "*jus gestionis*", the ICJ endorsed a method of assessment "*by reference to the law governing the exercise of sovereign power (jus imperii) or the law concerning non-sovereign activities of a State, especially private and commercial activities (jus gestionis).*"[568] FOX noted that a similar test was frequently employed by national courts to determine whether a specific transaction enjoyed immunity.[569] Notwithstanding, there is no international consensus on a single definition and criteria to determine the commerciality of an act and, therefore, a wide variety of methods may be found in State practice.[570]

Under domestic law, two different approaches are followed in defining a "*commercial*" nature.

The UK chose to enumerate specific transactions which are considered to be a "*commercial*", such as "*(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority*".[571]

---

[565] *Jurisdictional Immunities of the State*.
[566] *Id.*, ¶52.
[567] *Id.*, ¶55.
[568] *Id.*, ¶60.
[569] H. Fox, THE LAW OF STATE IMMUNITY, p. 1726.
[570] *Id.*, pp. 1795-1796; J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", p. 89.
[571] See, State Immunity Act 1978 (UK), Section 3(3). Section 3(3)(c) of the UK State Immunity Act refers only to transactions or activities which are not covered by sections 3(3)(a) or (b) and even if those transactions are carried out 'in the exercise of sovereign authority' they are not under immunity, despite the guarantee expressed in article 24(1) of the ECSI, which was ratified by the UK, i.e. "*any State may (…) declare that (…) its courts shall be entitled to entertain proceedings against another Contracting State to the extent*

Differently, the US tried to develop a general definition, by establishing that "*a 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act.*"[572] CRAWFORD considered that the definition of "*commercial activity*" was intentionally left less elaborated in order to "*leave the matter substantially for the courts to decide.*"[573] Notwithstanding, section 1603(d) of the Foreign State Immunity Act of the US foresees that "(…) *the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose*."[574] In this regard, the US Supreme Court asserted that "*the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives.* (…) *Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods*".[575]

2.4. OUR POSITION

The dichotomy between "*governmental*" or "*commercial*" and "*public*" or "*private*" is, sometimes, influenced by the classical view of the role of the State.[576]

---

that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (acta jure imperii)." (emphasis added) .See, ECSI, Article 24(1). See also, J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", pp. 92-93.

[572] Foreign Sovereign Immunities Act 1976 (USA), Section 1603(d).

[573] J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", p. 93.

[574] Foreign Sovereign Immunities Act 1976 (USA), Section 1603(d).

[575] *Republic of Argentina and Banco Central de la Republica Argentina v Weltover, Inc.*, et al., Supreme Court of the United States, 1992.

[576] N. Rosemary Okany, "Private Law Analogies and the Evolution of International State Responsibility for Acts of Non-Governmental Entities Exercising Decentralized/Privatized Governmental Functions", p. 205.

The traditional State theory holds that the State is composed of three elements: population, territory and power exercised by a government.[577] Accordingly, KELSEN considered that the functions that can be attributed to the State "*fall into three categories: legislation, administration (including government) and jurisdiction*."[578] KELSEN considered that "*the relationship designated as state power is distinguished from other power relationships by the fact that it is legally regulated, which means that the individuals who exercise this power* (…) *are authorized by a legal order to exercise this power by creating and applying legal norms*."[579] Traditionally, this power was considered to be shown "*only in the specific means of power which are at the disposal of a government; in the fortresses and prisons, the guns and gallows, the individuals uniformed as policemen and soldiers*."[580] Similarly, BORCHARD observed the threefold functions of the State (legislative, judicial and executive or administrative) as public powers for purposes of State responsibility.[581] More recent studies of international scholars and international jurisprudence in different international law fields show that this doctrine is now outdated.[582]

Notwithstanding, the fact that States have different terms, definitions, and criteria under internal law to classify and determine what are "*governmental*" or "*publique*" acts, makes it very difficult for international law to find a single definition or criteria.[583] In this context, CRAWFORD raised the question of "[h]*ow can it be said that international law requires a distinction to be drawn between "sovereign" and "private" activities of States, when it is clear that there is no international consensus on the "proper" scope of governmental acts in many fields?*[584]

---

[577] H. Kelsen, PURE THEORY OF LAW, p. 287; A. Gonçalves Pereira and F. de Quadros, MANUAL DE DIREITO INTERNACIONAL PÚBLICO, p. 328; Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (opened for signature 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Art. 1.
[578] H. Kelsen, PURE THEORY OF LAW, p. 294.
[579] *Id.*, p. 289.
[580] *Id.*, p. 290.
[581] E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International* Claims, p. 125.
[582] Rose-Ackerman et al., "Comparative Administrative Law: Outlining a Field of Study", 28 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 2 (2010), p. 445.
[583] J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", p. 89.
[584] *Id.*

The reports to the work of the ILC on State responsibility, generally demonstrate that "*governmental authority"* intends to encompass functions of a "*regulatory or executive nature*"[585], including the exercise of police powers[586] immigration control and prison management.[587] Likewise, international jurisprudence generally accepts that regulatory and executive functions have governmental character.

However, the ILC also admits a certain flexibility to what can be regarded as *"governmental"*, according to each "*society, its history and traditions*"[588] and considers that the "*content of the powers*" is not the only relevant element for purposes of attribution under article 5.[589] For the ILC, the "*way*" the powers "*are conferred on an entity*" and "*the purposes for which they are to be exercised*" should also be taken into consideration.[590]

Even though, under the law of State immunity, commercial acts are exempt from immunity, the commerciality exception is not automatically transposed to the law of State responsibility. In this regard, during the preparatory work of the ARSIWA, the UK made a comment stating that "[t]*he principles developed for the purpose of deciding whether bodies are entitled to State immunity are not necessarily applicable for the purpose of deciding whether the State is responsible for the acts and omissions of those bodies.*"[591]

In this context, ICSID has adopted a flexible posture towards the classification of activities as "*elements of the governmental authority"* and considered, in certain cases, that activities related to investments[592], loans[593] and natural resources[594] fulfilled the functional test to be regarded as "*elements of the governmental authority*".

Furthermore, the nature of a function may vary from case to case, depending on the characteristics of that case, the State, and its society.[595] In this regard, the Iran-

[585] Report of the International Law Commission on the work of its twenty-sixth session, p. 281.
[586] *Id.*, p. 277-282.
[587] Summary record of the 2553rd meeting, p. 229.
[588] DARSIWA, p. 43.
[589] *Id.*
[590] *Id.*
[591] ILC, Comments and observations received from Governments, Doc. No. A/CN.4/515 and Add.1, pp. 3, 33, 49.
[592] *Maffezini Award*, ¶79; *Noble Ventures*, ¶79, 83;
[593] *Maffezini Award*, ¶83.
[594] *Hamester v. Ghana*, ¶190.
[595] DARSIWA, p. 43.

US Claims Tribunal has considered that activities carried out in the exercise of "*religious authority*" may constitute an exercise of "*governmental authority*" due to "*the regime established by the Constitution*."[596]

These approaches also demonstrate that the traditional view of the role of the State is outdated. Increasingly, States engage in activities that could have been seen as falling out of the scope of their traditional functions, namely through their involvement in activities of an economic character. But the law is not immutable and must adapt to the reality that surrounds it, or it risks becoming outdated.[597]

3. ACTING IN THAT CAPACITY IN THAT PARTICULAR INSTANCE

The ILC holds that an act is only attributed to a State under article 5 of the ARSIWA if it is carried out in the exercise of the said "*governmental authority*."[598] In this sense, ICSID developed a dual functional test which not only looks at the nature of the functions that were generally conferred to on an entity but also to the specific nature of act.[599]

However, the duality of this test can be too restrictive for attribution in the case of public entities – which we already considered that should fall under article 4 and not article 5. In *Hamester v. Ghana*, even though ICSID was addressing a public entity and considered that Cocobod exercised "*governmental authority*"[600], it decided that the actions of Cocobod could not be attributable to Ghana because "*Cocobod acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers*."[601] Differently, in *Noble Ventures,* ICSID did not consider that the acts (also of a public entity) had to be governmental in nature in order to be attributable to the State.[602]

The evaluation carried out by ICSID demonstrates the importance of qualifying a situation under article 4 or 5 of the ARSIWA. In *Hamester v. Ghana*, if Cocobod

---

[596] *Hyatt International Corporation*, p. 12.
[597] See, A. Aust, HANDBOOK OF INTERNATIONAL LAW, p. 12; P. T. Muchlinski, "Corporations in International Law", ¶6; F. de Abreu Duarte, "Multinational Companies as Subjects of International Law: Are we missing the point?", in ORDEM JURÍDICA GLOBAL DO SÉCULO XXI: SUJEITOS E ATORES NO PALCO INTERNACIONAL (Duarte, Lanceiro, Abreu Duarte, eds., 2020), pp. 565-566.
[598] ARSIWA, Art. 5.; DARSIWA, p. 43.
[599] *Maffezini Award*, ¶83; *Hamester v. Ghana*, ¶176.
[600] *Hamester v. Ghana*, ¶193.
[601] *Id.*, ¶202.
[602] *Noble Ventures*, ¶82.

was considered a State organ under article 4, its actions should have been attributable to Ghana regardless of their nature, because the nature of the acts is irrelevant for purposes of attribution under article 4.[603]

[603] ARSIWA, Article 4(1); DARSIWA, p. 41.

VII. CONCLUSION

This dissertation has analyzed the legal framework, historical background, legal nature, scope, concepts, criteria and implications of article 5 of the ARSIWA, which is one of the most controversial and debated provisions of the ARSIWA. Furthermore, it has also explored how article 5 has been applied in various international disputes and the challenges posed by the attribution of acts of State-owned enterprises and private corporations to the State.

In this context, the main findings and arguments of the dissertation can be summarized as follows:

I. It is a well-established principle of international law that State responsibility occurs when there is an internationally wrongful act. The constituent elements of an internationally wrongful act are attribution and breach. As such, there is an internationally wrongful act whenever a conduct is attributable to the State under international law and constitutes a breach of an international obligation of the State.

II. The international rules of State responsibility are embodied in the ARSIWA. The ARSIWA are not *per se* a legally binding instrument, but some of its rules reflect well-established principles and customary international law, and others are aimed at promoting the progressive development of international law.

III. The rule of attribution that holds States responsible for the acts of entities that exercise elements of governmental authority is embodied in article 5 of the ARSIWA. Article 5 constitutes a subsidiary rule of attribution that applies in situations where a person or entity is not regarded as an organ of the State under article 4 of the ARSIWA.

IV. Article 5 of the ARSIWA was the result of 85 years of legal thinking. It generated a significant debate during the preparatory work of the ARSIWA. The Special Rapporteurs and members of the ILC initially began attributing the acts of territorial public entities and other autonomous entities under

former draft article 7 and the acts of private entities that exercised public functions under former draft article 8. The concepts "*public functions*" and "*governmental authority*" also generated a lot of debate, due to the different meanings they had under the internal law of each State. In the final version of the ARSIWA, territorial public entities were considered State organs and fell under article 4, and other autonomous public entities and private entities that exercised governmental authority fell under article 5. The initially proposed term "*public functions*" was also abandoned and substituted by "*governmental authority*".

V. Article 5 stems from the principles of non-subordination of international law to internal law and of the unity of the State from the international standpoint. Moreover, article 5 is consistent with other rules and principles of international law, such as the principle of good faith, and the principle of estoppel.

VI. Article 5 reflects a rule of customary international law. Comments and declarations made by States and their counterclaims presented before international dispute settlement mechanisms provide evidence of relevant State practice and *opinio juris.* Furthermore, the recognition and extension of State immunity to entities that exercise governmental authority precludes States from denying the existence or applicability of a rule of international law that attributes the conduct of those entities to the State that has granted immunity.

VII. The rule of attribution reflected in article 5 has been applied in various international disputes, especially in the context of investment and trade claims. The application of the rule has raised complex questions related to the identification and interpretation of the criteria and concepts involved. Most cases involving the application of article 5 of the ARSIWA concern State-owned enterprises or other public entities.

VIII. The rule embodied in article 5 imposes three requirements for the attribution of acts of entities that exercise elements of governmental authority to the

State: firstly, the acts must be carried out by a person or entity which is not an organ of the State under article 4; secondly, the entity must be empowered by the law of the State to exercise elements of the governmental authority; and thirdly, the entity must be acting in that capacity in the particular instance.

IX. Article 5 does not refer to specific categories of entities, but rather establishes a criterion of negative delimitation that excludes entities that are regarded as State organs under article 4. In this sense, persons or entities that have an organ status under the internal law of a State, territorial public entities and *de facto* organs fall outside of the personal scope of article 5.

X. The criteria and tests for the identification of a *de facto* organ are not consensual among scholars and international mechanisms of dispute resolution. In some cases, ICSID considered that State-owned enterprises were *de facto* organs under article 4. But, in most cases, State-owned enterprises are analyzed in light of the requirements set forth in article 5. Notwithstanding, State enterprises and other autonomous public entities that are created and entirely or majority owned by the State can be regarded as *de facto* organs of the State, falling out of the scope of article 5. The involvement of the State in financing the entity, appointing managers or members and approving the budget or activities are also relevant aspects to prove that an entity constitutes a *de facto* organ.

XI. International mechanisms of resolution of disputes do not agree on a single criterion for the interpretation and application of the requirements contained in the material scope of article 5. In some cases, "*empowered by the law of the State"* was interpreted in a more restrictive manner and it was found that the absence of an express authorization under the law precluded attribution under article 5. In others, it was considered that the absence of an express delegation does not necessarily preclude attribution if the entity exercises governmental functions.

XII. The nature and context of the functions performed by an entity are decisive for attribution under article 5. However, article 5 does not define what constitutes elements of the governmental authority, but rather leaves it to be determined on a case-by-case basis. The concept of governmental authority is not uniformly applied in international law. For purposes of attribution under article 5, international mechanisms of dispute resolution found "*governmental"* character in a wide variety of functions, including some associated with economic purposes.

XIII. For purposes of attribution under article 5 it is also required to prove that the entity was "*acting in that capacity in that particular instance".* In this sense, international mechanisms of dispute resolution have analyzed the concrete nature of the acts to assess whether the State could be held responsible under article 5. ICSID developed a dual functional test that evaluates the nature of the generic functions that were delegated by the State as well as the specific nature of the conduct.

This dissertation has intended to contribute to deeper understanding of the principles and rules governing international law and, particularly the law of State responsibility. Notwithstanding, the challenges and complexities involved in determining the nature, scope, and applicability of article 5 of the ARSIWA evidence the need for further research and development of the law and practice in this area.

BIBLIOGRAPHY

BOOKS

A. Aust, HANDBOOK OF INTERNATIONAL LAW (2nd Ed., 2010)

A. Gonçalves Pereira, F. de Quadros, MANUAL DE DIREITO INTERNACIONAL PÚBLICO (3rd Ed., 2011)

A. Mohammadighalehtaki, ORGANISATIONAL CHANGE IN POLITICAL PARTIES IN IRAN AFTER THE ISLAMIC REVOLUTION OF 1979. WITH SPECIAL REFERENCE TO THE ISLAMIC REPUBLIC PARTY (IRP) AND THE ISLAMIC IRAN PARTICIPATION FRONT PARTY (MOSHAREKAT) (2012)

A. Pellet, DROIT INTERNATIONAL PUBLIC (1981)

C. de Stefano, ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION (2020)

D. Anzilotti, COURS DE DROIT INTERNATIONAL (Translation by Gilbert Gidel, 1999)

D. B. Hollis, "Defining Treaties", in THE OXFORD GUIDE TO TREATIES (2nd Ed., 2022)

D. Freitas do Amaral, CURSO DE DIREITO ADMINISTRATIVO (Vol. I, 4th Ed., 2016)

Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008)

E. Correia Baptista, DIREITO INTERNACIONAL PÚBLICO, (Vol. II, 2015)

E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1916)

F. Schauer, THE FORCE OF LAW (2017)

G. Lamond, *Coercion and the Nature of Law*, 7 LEG 35 (2001)

H, Kelsen, PURE THEORY OF LAW (Translation by Max Night, 1967)

H. Fox, THE LAW OF STATE IMMUNITY (2nd Ed., 2008)

H. Grotius, THE RIGHTS OF WAR AND PEACE (Translation by William Whewell, 1853)

H. Obinger et al, THE POLITICAL ECONOMY OF PRIVATIZATION IN RICH DEMOCRACIES (2016)

H. Triepel, VÖLKERRECHT UND LANDESRECHT (1899)

J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed., 2012)

J. Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2014)

J. Micklethwait and A. Wooldridge, THE COMPANY : A SHORT HISTORY OF A REVOLUTIONARY IDEA (2003)

K. Zweigert and H. Kötz, AN INTRODUCTION TO COMPARATIVE LAW (3rd Ed., 1998)

L. Hoppenheim, INTERNATIONAL LAW: A TREATISE (5th Ed., 1937)

M. Abbenhuis, THE HAGUE CONFERENCES AND INTERNATIONAL POLITICS 1898-1915 (2018)

M. de Vattel, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (Livre III, 1758), in THE CLASSICS OF INTERNATIONAL LAW, James Brown Scott (ed) (Vol. II, 1916)

M. J. Estorninho, A FUGA PARA O DIREITO PRIVADO (1996)

M. Shaw, INTERNATIONAL LAW (6th Ed., 2008)

N. Quoc Dinh et al., DROIT INTERNATIONAL PUBLIC (8th Ed., 2009)

P. Costa Gonçalves, ENTIDADES PRIVADAS COM PODERES PÚBLICOS (2005)

R. Gardiner, TREATY INTERPRETATION (2nd Ed. 2015)

S. Rosenne, THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY (1991)

ARTICLES, PAPERS & JOURNALS

A. Borda, "A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals", 24 EJUL 2 (2013)

A. Cassese, "The Nicaragua and Tadič Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", in 18 EJIL (2007)

A. E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?", in THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 39, No. 1, 1990

A. Godwin, "State immunity", in CHINA BUSINESS LAW JOURNAL (2018)

A. Pellet, "Article 38", THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (Zimmermann et al, 3rd Ed., 2019)

A. Pellet, "Decisions of the ICJ as Sources of International Law?, in Decisions of the ICJ as Sources of International Law?", GAETANO MORELLI LECTURES SERIES (Vol. 2, 2018)

A. Pellet, "The Definition of Responsibility in International Law", in THE LAW OF INTERNATIONAL RESPONSIBILITY (Crawford, Pellet and Olleson, eds., 2010)

Ali Farazmand, "Globalization and Public Administration", in 59 PUBLIC ADMINISTRATION REVIEW 6 (1999)

B. Stern, "The Elements of An Internationally Wrongful Act", in THE LAW OF INTERNATIONAL RESPONSIBILITY

D. Gaukrodger, "Foreign State Immunity and Foreign Government Controlled Investors" in OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2010/02, 2010)

D. Momtaz, "Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority", in THE LAW OF INTERNATIONAL RESPONSIBILITY

E. David, “Primary and Secondary Rules” in THE LAW OF INTERNATIONAL RESPONSIBILITY

F. de Abreu Duarte, “Multinational Companies as Subjects of International Law: Are we missing the point?”, in ORDEM JURÍDICA GLOBAL DO SÉCULO XXI: SUJEITOS E ATORES NO PALCO INTERNACIONAL (Duarte, Lanceiro, Abreu Duarte, eds., 2020)

F. Kalshoven, “State Responsibility for Warlike Acts of the Armed Forces”, in 40 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 827 (1991)

G. Guillaume, “Overview of Part One of the Articles on State Responsibility”, in THE LAW OF STATE RESPONSIBILITY

H. Hansmann et al, “Law and the Rise of the Firm”, in 119 HARVARD LAW REVIEW (2005)

H. J. Laski, “The Early History of the Corporation in England”, in 30 HARVARD LAW REVIEW 6 (1917)

H. Kelsen, “The Principle of Sovereign Equality of States as a Basis for International Organization”, in 53 THE YALE LAW JOURNAL 2 (1944)

H. Lauterpacht, “Boycott in International Relations”, in 14 BRITISH YEARBOOK OF INTERNATIONAL LAW (1933)

H. Lauterpacht, “The Problem of Jurisdictional Immunities of Foreign States”, in 28 BRIT. Y.B. INT'L L. (1951)

J. Auby, “Public/Private” in THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW (Cane et al, eds., 2021)

J. Crawford and S. Olleson, “The Nature and Forms of International Responsibility” in M. Evans, INTERNATIONAL LAW (2003)

J. Crawford, ‘State Responsibility’, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2006)

J. Crawford, “International Law and Foreign Sovereigns: Distinguishing Immune Transactions”, in 54 BRITISH YEARBOOK OF INTERNATIONAL LAW 75 (1983)

J. Crawford, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect”, in 96 AJIL 4 (2002)

J. Griebel and M. Plucken, “New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia”, in 21 LEIDEN JOURNAL OF INTERNATIONAL LAW (2008)

K. Hobér, “State Responsibility and Attribution”, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Muchlinski, Ortino, Schreuer, ed., 2008)

L. Preuss, “International Responsibility for Hostile Propaganda Against Foreign States”, in 28 AMERICAN JOURNAL OF INTERNATIONAL LAW (1938)

M. Luísa Duarte, “O Estado e os Outros: quem é quem no Direito Internacional” in ORDEM JURÍDICA GLOBAL DO SÉCULO XXI: SUJEITOS E ATORES NO PALCO INTERNACIONAL (Duarte, Lanceiro, Abreu Duarte, eds., 2020)

M. Milanovic, “Special Rules of Attribution of Conduct in International Law”, in INTERNATIONAL LAW STUDIES (Vol. 96, 2020)

M. Milanovic, “State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Pluecken”, in 22 LEIDEN JOURNAL OF INTERNATIONAL LAW (2009)

N. Antunes, “Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement”, Rachel Bradley and Clive Schofield (eds.) Boundary & Territory Briefing, International Boundaries Research Unit, Vol. 2 No. 8, 2000

N. Rosemary Okany, “Private Law Analogies and the Evolution of International State Responsibility for Acts of Non-Governmental Entities Exercising Decentralized/Privatized Governmental Functions”, in WAVES IN CONTRACT AND LIABILITY LAW IN THREE DECADES OF IUS COMMUNE (Anne L.M., Keirse, Marco B.M. Loos, eds., 2017)

P. Dupuy, “Relations between the International Law of Responsibility and Responsibility in Municipal Law” in THE LAW OF INTERNATIONAL RESPONSIBILITY

Peter T. Muchlinski, “Corporations in International Law”, in MPEPIL (2014)

Rose-Ackerman et al., “Comparative Administrative Law: Outlining a Field of Study”, 28 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 2 (2010)

T. Cottier and J. Müller, “Estoppel”, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007)

W. Friedmann, “The Growth of State Control over the Individual, and its Effect Upon the Rules of International State Responsibility”, in 19 BRITISH YEARBOOK OF INTERNATIONAL LAW (1938)

CASE LAW

- **PCIJ/ICJ**

Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo, ICJ, Judgement, 2010

Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo, ICJ, Judgement, 2012

Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, Ukraine v. Russia, ICJ, Judgement, 2024

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Gambia v. Myanmar, ICJ, Judgement 2022

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia *v.* Serbia, ICJ, Judgment, 2015

Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda, ICJ, Judgement, 2022

Asylum, Colombia v. Peru, ICJ, Judgement, 1950, pp. 276-277; *Continental Shelf* , Libya v. Malta, ICJ, Judgement, 1985

Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain, ICJ, Judgement, 1970

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro, ICJ, Judgement, 2007

Case Concerning Certain German Interests in Polish Upper Silesia, Germany v. Poland, PCIJ, Judgment, 1926

Case Concerning Elettronica Sicula S.p.A. (ELSI), United States of America v Italy, ICJ, Judgement, 1989

Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States of America, ICJ, Judgement, 1986

Case Concerning the Factory at Chorzów, Germany v. Poland, PCIJ, Judgement No. 9, 1927 *Case Concerning the Gabčikovo-Nagymaros Project*, Hungary v. Slovakia, ICJ, Judgement, 1997

Case Concerning United States Diplomatic and Consular Staff in Tehran, United States v. Iran, ICJ, Judgement, 1980

Case of Certain Norwegian Loans, France v. Norway, ICJ, Dissenting Opinion of Judge Read, 1957

Case of Certain Norwegian Loans, France v. Norway, ICJ, Oral Arguments (Public hearing of 15 May 1957), 1957

Case of Certain Norwegian Loans, France v. Norway, ICJ, Separate Opinion of Judge Sir Hersch Lauterpacht, 1957

Certain Activities carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River, Costa Rica v. Nicaragua and Nicaragua v. Costa Rica, ICJ, Judgement, 2015

Certain Iranian Assets, Islamic Republic of Iran v. United States of America, ICJ, Judgement, 2023

Certain Questions Relating to Settlers of German origin in the Territory Ceded by Germany to Poland, PCIJ, Advisory Opinion, 1923

Certain Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, PCIJ, Advisory Opinion, 1932

Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada v. United States of America, ICJ, Judgement, 1984

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ, Advisory Opinion, 1999

Frontier Dispute, Burkina Faso v. Republic of Mali, ICJ, Judgment, 1986

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, ICJ, Advisory Opinion, 1950

Jurisdictional Immunities of the State, Germany v. Italy (Greece interveening), ICJ, Judgement, 2012

Kasikili/Sedudu Island, Botswana v. Namibia, ICJ, Judgement, 1999

LaGrand, Germany v. United States of America, ICJ, Decision on Provisional Measures, 1999

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 2004

Legal Status of Eastern Greenland, Denmark v. Norway, PCIJ, Judgement, 1933

Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 1996

North Sea Continental Shelf, Germany v. Netherlands, ICJ, Judgement, 1969, ¶63; *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. United States of America, ICJ, Judgement, 1984

Nottebohm Case, Liechtenstein v. Guatemala, ICJ, Judgment, 1955

Phosphates in Morocco, Italy v. France, PCIJ, Judgment, 1938

Pulp Mills on the River Uruguay, Argentina v. Uruguay, ICJ, Judgement, 2010

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast, Nicaragua v. Colombia, ICJ, Judgement, 2023

Reparation for Injuries Suffered in the Service of the United Nations, ICJ, Advisory Opinion, 1949

Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals, Mexico v. United States of America, ICJ, Judgement, 2009

Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia v. Malaysia, ICJ, Judgment, 2002

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Nicaragua v. Honduras, ICJ, Judgment, 2007

The Case of the S.S. "Lotus", PCIJ, Judgment, 1927

The Corfu Channel Case, United Kingdom v. Albania, ICJ, Judgement, 1949

The Greco-Bulgarian "Communities", PCIJ, Advisory Opinion 1930

- **International Investment Decisions**

Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, 3 November 2015

Amco Asia Corporation and Others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award, 20 November 1984

Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017

Beijing Urban Construction Group Co., Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Award, 31 May 2017

Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award, 25 October 2012

Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, 13 November 2000

Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000

Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL, Award, 12 August 2016

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010

Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006

Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20, Award of the Tribunal, 6 October 2020

Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008

Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018

Mesa Power Group, LLC v. Canada, PCA Case No. 2012-17, Award, 24 March 2016

Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland, PCA Case No. 2015-13, Award, 27 June 2016

Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005

Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/17/1, Award, 29 April 2020

Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009

Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014

United Parcel Service of America Inc. v. Canada, ICSID Case No. UNCT/02/1, Award, 24 May 2007

Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34, Partial Award (Jurisdiction and Liability), 5 February 2021

- **International Trade Decisions**

Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Panel, WTO Panel No. WT/DS103/AB/R WT/DS113/AB/R, 17 May 1999

Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Appellate Body, WTO Appeal Decision WT/DS103/AB/R WT/DS113/AB/R, 13 October 1999

Korea - Measures Affecting Trade in Commercial Vessels – Report of the Panel, WTO Panel WT/DS273, 7 March 2005

United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India Carbon Steel, WTO Appeal WT/DS436/AB/R, Report of the Appellate Body, 8 December 2014

United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Panel, WTO Panel WT/DS379/R, 22 October 2010

United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body, WTO Appeal *WT/DS379/AB/R*, 11 March 2011

- **Other International Decisions**

Armstrong Cork Company Case, Italian-United States Conciliation Commission, Decision No. 18, 22 October 1953

Biens Britanniques au Maroc Espagnol, Spain v. United Kingdom, Ad hoc Arbitration, Award, 1 May 1925

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, France-New Zealand Arbitration Tribunal, France v. New Zealand, Award, 1990

Case of Velásquez-Rodríguez v. Honduras, IACHR, Merits, 29 July 1988

Dickson Car Wheel Company (U.S.A.) v. United Mexican States, General Claims Commission, 1931

Haim Case, CJEU Case No. C-424/97, Judgment, 2000

Hyatt International Corporation v. The Government of the Islamic Republic of Iran, 9 Iran-USCTR 12 (1985)

Konle Case, CJEU Case No. C-302/97, Judgment, 1999

Salvador Commercial Company, UNRIAA (Vol. XV, 1902)

- **National Judicial Decisions**

Republic of Argentina and Banco Central de la Republica Argentina v Weltover, Inc., et al., Supreme Court of the United States, 1992.

US Court of Appeals (2nd Circuit), 1964

REPORTS, STATEMENTS & OTHERS

"Resolutions of the Institute of International Law Adopted at Lausanne, 1927", in 22 THE AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp. 330, 1928)

"United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947)

"United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947)

BARRON'S LAW DICTIONARY, (7th Ed., 2016)

BLACK'S LAW DICTIONARY (9th Ed., 2009)

Deutsche Gesellschaft für Völkerrecht, Draft Convention on the Responsibility of States for Injuries Caused in their Territory to the Person or Property of Aliens (1930), in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1969)

Harvard Law School, Draft Convention and Comments on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, in 'The Law of State Responsibility for Damage Done in Their Territory to the Person or Property of Foreigners' 23 AJIL 2 (Supp. 131, 1929)

ICJ, THE INTERNATIONAL COURT OF JUSTICE HANDBOOK (6th Ed., 2013)

ILC 'Articles on Responsibility of States for Internationally Wrongful Acts' in Yearbook of the International Law Commission, 2001, vol. II (Part Two) UN Doc A/56/10

ILC 'Documents of the twenty-third session: Reports of the Special Rapporteurs and report of the Commission to the General Assembly' in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, UN Doc No. A/CN.4/SER.A/1971/Add.1 (Vol. II, Part One, 1971)

ILC 'Draft conclusions on identification of customary international law with commentaries' IN YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, Part Two, 2018), UN Doc. No. A/73/10

ILC "Draft Articles on Diplomatic Protection with Commentaries", in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, UN Doc. No. A/61/10 (Vol. II, Part Two, 2006)

ILC "Draft Articles on the Jurisdictional Immunities of States and Their Property, with Commentaries", UN Doc No. A/46/10 (1991)

ILC Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts, DOCUMENT A/CN.4/414, 20 April 1988

ILC Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/351, Add.1-2 & Add.2/Corr.1, Add.3 & Corr.1, 1982

ILC, "Draft conclusions on identification of customary international law with commentaries" in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, Part Two, 2018), UN Doc No. A/73/10

ILC, 1st session, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1949)

ILC, Comments and observations received from Governments DOCUMENT A/CN.4/515 and Add.1–3, 19 March, 3 April, 1 May and 28 June 2001

ILC, Comments and observations received from Governments DOCUMENT A/CN.4/515 and Add.1–3, 19 March, 3 April, 1 May and 28 June 2001

ILC, Comments and observations received from Governments, Doc. No. A/CN.4/515 and Add.1

ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/488 and Add. 1–3, 25 March, 30 April, 4 May, 20 July 1998]

ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/492, 10 February 1999

ILC, Comments and observations received from Governments, DOCUMENT A/CN.4/488 and Add. 1–3, 25 March, 30 April, 4 May, 20 July 1998]

ILC, Draft Articles on Consular Relations with commentaries, Yearbook of the International Law Commission, 1961, Vol. II

ILC, Draft Articles on Diplomatic Intercourse and Immunities, Yearbook of the International Law Commission, 1958, Vol. II

ILC, Draft Articles on the Law of Treaties, Yearbook of the International Law Commission, 1966, Vol. II

ILC, Draft Articles proposed by the Drafting Committee on second reading, Yearbook of the International Law Commission, 2001, Vol. I (23 April-1 June and 2 July-10 August 2001)

ILC, Draft Articles proposed by the Drafting Committee on second reading, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. I, 1998), (20 April-12 June 1998 and 27 July-14 August 1998)

ILC, Draft Articles provisionally adopted by the Drafting Committee on second reading, General Assembly, 2000, 21 August 2000, A/CN.4/L.600

ILC, First Report on State responsibility, by Mr. James Crawford, Special Rapporteur. Doc. No. A/CN.4/490 and ADD.1-7 (24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998)

ILC, Observations and comments of Governments on chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/328 and Add.1-4, 1980

ILC, Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, 2001, Vol. II, Part Two

ILC, Report of the Commission to the General Assembly, Doc No. A/9610/Rev.1 (6 May-26 July 1974)

ILC, Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974, Official Records of the General Assembly, twenty-ninth session Supp. No. 10 in Yearbook of the International Law Commission, 1974, vol. II(1)

ILC, Summary record of the 1256th meeting, UN Doc. No. A/CN.4/SR.1252 (Vol. I, 8 May 1974)

ILC, Third Report on State Responsibility by Mr. Robert Ago, UN Doc. No. A/CN.4/246 and Add. 1-3 (Vol. II(1), 1971)

ILC, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session (6 May – 26 July 1974), Doc. No. A/CN.4/SER.A/1974, (1975)

ILC, Yearbook of the International Law Commission, American Institute of International Law 1925 Project No. 15 on Responsibility of Governments (Vol. II, 1956)

ILC, *Yearbook of the International Law Commission*, UN Doc. No. A/56/10, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" (Vol. II, Part Two, 2001)

IMF, State-Owned Enterprises in Middle East, North Africa, and Central Asia: Size, Costs, and Challenges, IMF Doc. No. DP/2021/019 (2021)

Institute of International Law, International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners, in 'Resolutions of the Institute of International Law Adopted at Lausanne, 1927' 22 AJIL No. 1, 1928 Supp.

League of Nations Conference for the Codification of International Law, Doc. No. C.75.M.69.1929.V (Vol. III, 1929)

League of Nations, Point VI, Basis of Discussion No. 16, League of Nations Conference for the Codification of International Law, Doc. No. C.75.M.69.1929.V (Vol. III, 1929)

League of Nations, Reply of the Government of Switzerland to The Juridical Basis of International Responsibility, Point II of the Bases of Discussion for the Conference Drawn up by the Preparatory Committee in Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners (1929)
LEXIQUE DES TERMS JURIDIQUES 2017-2018 (25th Ed. 2017)

OECD, "Corporate Governance of State-Owned Enterprises: A survey of OECD countries" (2005)

OECD, "OECD Guidelines on Corporate Governance of State-Owned Enterprises"

Professor Roth, Draft Convention on the Responsibility of States for Internationally Wrongful Acts (1932), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1969)

Professor Strupp, Draft Treaty Concerning the Responsibility of a State for Internationally Illegal Acts (1927) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1969)

Resolution Adopted by the Assembly of the League of Nations, 27 September 1927 in "United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947)

Resolution of 12 December 1924, reproduced in "United Nations Documents on the Development and Codification of International Law" 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947)

Resolution of 22 September 1924, reproduced in "United Nations Documents on the Development and Codification of International Law", in 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 29 (1947)

Resolution on "International Responsibility of the State", Seventh Conference of American States (Montevideo, 1933) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (Vol. II, 1956)

Section C, Final Act of the Conference for the Codification of International Law held at the Hague in March-April 1930, in League of Nations, Acts of the Conference for the Codification of International Law, Plenary Meetings (Vol. I, 1930)

Summary record of the 1256th meeting, (8 May 1974) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 26th session

Summary record of the 2553rd meeting, Yearbook of the International Law Commission (Vol. I, 1998) (20 April-12 June 1998 and 27 July-14 August 1998)

The Geneva Centre for the Democratic Control of Armed Forces A Contract Guidance Tool for Private Military and Security Services: Promoting

Accountability and Respect for Human Rights and International Humanitarian Law (2017)

The Geneva Centre for the Democratic Control of Armed Forces, Legislative Guidance Tool for States to Regulate Private Military and Security Companies (2016)

Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading, International Law Commission, 2001, 53rd session, 26 July 2001, A/CN.4/L.602/Rev.1

UNGA, 111th plenary meeting Decision 55/488 of 7 September 2001, UN Doc. No. A/DEC/55/488

UNGA, Draft Articles provisionally adopted by the Drafting Committee on second reading, (2000)

UNGA, Resolution 174(II) 123rd plenary meeting, 21 November 1947

UNGA, Resolution 56/83 of 12 December 2001 85th plenary meeting, UN Doc No. A/RES/56/83

UNGA, Resolution 799(VIII) of 7 December 1953

UNGA, Resolution No. 56/83 (Annex), "Articles on the Responsibility of States for Internationally Wrongful Acts" (2001)

UNODC, State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety, Criminal Justice Handbook Series (2014)

TREATIES & OTHER INTERNATIONAL LEGAL INSTRUMENTS

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, 2 December 2004, did not enter into force yet, adopted during the 65th plenary meeting of the UN General Assembly by Resolution A/59/38

EUROPEAN CONVENTION ON STATE IMMUNITY, opened for signature 16 May 1972, entered into force 11 June 1976, 1495 UNTS 181

CONVENTION ON RIGHTS AND DUTIES OF STATES ADOPTED BY THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, 26 December 1933, entered into force 26 December 1934, UNTS 165

VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 18 April 1961, entered into force on 24 April 1964, UNTS, vol. 500

VIENNA CONVENTION ON CONSULAR RELATIONS, 24 April 1963, entered into force on 19 March 1967, UNTS, vol. 596

VIENNA CONVENTION ON THE LAW OF TREATIES, 23 May 1969, entered into force on 27 January 1980, UNTS, vol. 1155

INTERNAL LAW

Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009 (JP)

Canada State Immunity Act 1985 (CA)

Federal Law on Jurisdictional Immunity of a Foreign State 2015 (RU)

Foreign Sovereign Immunities Act 1976 (USA)

Ley Nº 24.488 Imunidad de Jurisdiccion de Los Estados Extranjeros Ante los Tribunales Argentinos 1995 (AR)

Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en Espanã y las Conferencias y Reuniones internacionales celebrades en Espanã 2015 (ES)

Pakistan State Immunity Ordinance 1981 (PK)

Singapore State Immunity Act 1979 (SG)

South Africa Foreign States Immunities Act 1981 (ZA)

State Immunity Act 1978 (UK)