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Draft report

9. Introduction by the Special Rapporteur of the report concerning draft articles 5 to 8 and 10 of Chapter II of Part One (A/CN.4/490/Add.5)

(a) Introduction

1. The Special Rapporteur noted that Chapter II defined the conditions in which conduct was attributable to the State under international law. The articles contained in this chapter must be considered in the context of article 3, which set forth the two essential conditions for State responsibility: (a) an act or omission which is attributable to a State; and (b) a breach of an international obligation of that State. Chapter II dealt with the first of those conditions.

2. Although the draft articles in Chapter II had been thoroughly reviewed, it was reassuring to note that their basic structure and many of the formulations had not been challenged by State practice or judicial decisions over the past 20 years. Rather, the proposed changes in the draft articles were intended for the most part to clarify certain aspects and to deal with certain new problems, rather than to introduce any fundamental changes of substance.

3. The Special Rapporteur suggested that it was useful first to focus on articles 5, 6, 7, 8 and 10 concerning the ordinary and general conditions for attribution before turning to articles 9 and 11 to 15, which dealt with certain special problems, including the proposal for a new article 15 *bis*.

(b) Government comments

4. Government comments on articles 5 to 15 were quite substantial and were fully canvassed in the report. A number of Governments expressed concern that the basis for attribution should be sufficiently broad to ensure that States could not escape responsibility based on formal definitions of their constitutive organs, particularly in view of the recent developments concerning the increasing delegation of public functions to the private sector,

such as the maintenance of prison facilities. On the other hand, no Government had so far argued that the conditions for attribution should be more restrictively defined.

(c) Recent State practice

5. Since the articles contained in Chapter II were adopted in the 1970s, there had been a number of important decisions and other relevant practice in that field of international law. It was important to ensure that any important developments were fully reflected.

(d) Terminology

6. The Special Rapporteur noted that the Commission had elected to use the term "attribution" rather than "imputability". The Drafting Committee might wish to consider using the term "imputability" given its use in subsequent decisions of the International Court of Justice and of other tribunals, which might imply that the term "attribution" had failed to gain acceptance. However, the Special Rapporteur preferred to retain the term "attribution", which reflected the fact that the process was a legal process; by contrast, the term "imputability", at least in English, implied, quite unnecessarily, an element of fiction.

7. The Special Rapporteur also suggested replacing the title of Chapter II "The 'act of the State' under international law" by "Attribution of conduct to the State under international law" to correspond to article 3 and to avoid recalling the distinct notion of "act of State" recognized in some national legal systems.

(e) Basic principles underlying the notion of attribution

8. The Special Rapporteur drew attention to certain basic principles underlying the notion of attribution, namely the limited responsibility of the State, the distinction between State and non-State sectors, the unity of the State, the principle of *lex specialis* under which States could by agreement establish different principles to govern their mutual relations, and the distinction between attribution and breach of obligation, which was of fundamental importance.

(f) Article 5

9. Despite the proposal by one Government to replace the term "organ" with "organ or agent", the Special Rapporteur preferred to retain the distinction between organs and agents, which was addressed separately in articles 5 and 8 since different considerations applied to organs as compared with agents.

10. While noting that internal law was of primary relevance in determining whether a person or entity was to be classified as an organ, the Special Rapporteur agreed with a number of Governments that had suggested deleting the reference to internal law to avoid creating the impression that it was necessarily the decisive criterion. There were several reasons for doing so. First, internal law considered in isolation could be misleading, since practice and convention also played an important role in many legal systems. Secondly, internal law might not provide an exhaustive classification of State organs and indeed that law might not use the term "organ" in the same sense as international law for the purposes of State responsibility. Thirdly, in some cases, narrow classifications of "organs" under internal law might amount to an attempt to evade responsibility, which under the principle in article 4 a State should not be able to do. The relevance of internal law as an important criterion could be explained in the commentary.

(g) Article 6

11. That article was not so much a rule of attribution as an explanation of the scope of the term "organ" in article 5. It made clear that State organs could belong to the constituent, legislative, executive, judicial or any other branch of government, that they could exercise international functions or functions of a purely internal character, and that they could be located at any level of government. Although any uncertainty concerning these issues had been resolved well before 1945, at least two of the elements were sufficiently important to merit explicit recognition. In addition, article 6 confirmed that *all* conduct of a State organ acting as such was attributable to the State, without implying any limitation in terms of enumerated powers. Nor should there be any limitation or distinction for purposes of attribution of conduct to the State, in contrast to other areas of law, such as State immunity.

12. The reference in article 6 to the irrelevance of the distinction between functions of an international or an internal character was, however, unnecessary; it suggested too categorical a distinction between "international" and "internal" domains. The point was sufficiently obvious and undisputed; it could be sufficiently addressed in the commentary.

13. The reference to the "superior or subordinate" position of an organ was too narrow since it could be viewed as excluding intermediate or independent and autonomous organs. The Special Rapporteur considered it preferable to clarify that provision by referring to all State organs "whatever their position in the organization of the State".

14. The Special Rapporteur recommended that articles 5 and 6 be retained with the proposed drafting changes and combined in a single article, since the latter was really an explanation of the former rather than a distinct rule of attribution.

(h) Article 7

15. Paragraph 1 stated the well-established principle that the conduct of an organ of a territorial governmental entity was part of the structure of a State, even though it enjoyed a degree of autonomy within the State. That provision could, however, be deleted since the acts of such an entity were attributable to the State under the more clearly formulated article 5.

16. Paragraph 2 dealt with entities that were not part of the State but nonetheless exercised governmental authority, a situation which was of increasing practical importance given the recent trend towards the delegation of governmental authority to private sector entities. That provision had not been subject to any criticism by Governments; if anything, the concern was that the provision should be sufficiently broad to encompass the proliferation of those diverse entities. However, on balance the existing provision seemed to cope with the various difficulties, especially when read with article 8. The Special Rapporteur recommended that the provision be retained, and that the notion of governmental authority be further clarified in the commentary *inter alia* to reflect the diverse recent practice.

(i) Article 8

17. When an entity acted on behalf of a State pursuant to express instructions, its actions were clearly attributable to the State under paragraph (a). The question arose whether the conduct should also be attributable to the State when the entity acted under its direction and control. The subsequent jurisprudence provided some support for replacing the express authorization test by a broader effective control test. The Special Rapporteur recommended clarifying the paragraph to cover both situations of actual instructions and cases of direct and effective control where there was a nexus to the act in question. On the other hand, the provision should not be so widely drafted as to risk covering the activities of State-owned corporations, whose activities were not, in fact, directed or controlled by the State.

18. Paragraph (b) covered the rare but important case where a person or entity exercised governmental authority in the absence of an effectively functioning Government. However, the formulation of that provision was somewhat paradoxical since it suggested that potentially unlawful conduct entailing State responsibility was nonetheless "justified". The Special Rapporteur recommended retaining that provision with a clarifying amendment to replace the term "justified" with "called for".

(j) Article 10

19. That article addressed situations of unauthorized or *ultra vires* conduct, which was nonetheless attributable to the State provided that the conduct was performed "under cover" of the official capacity. The law of treaties took a strict view of the extent to which States could rely on their internal law to escape their international obligations; *a fortiori* this should be the case in the law of State responsibility. Subsequent jurisprudence and government comments indicated universal support for that principle. The Special Rapporteur recommended retaining the provision; the Drafting Committee might, however, consider using the phrase "acting in or under cover of that official capacity" to cover the notion of apparent capacity, and amending the concluding phrase to read "even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise" for reasons of clarity and consistency with the proposed deletion of the reference to internal law in article 5.

10. Summary of the debate on draft articles 5 to 8 and 10 of Chapter II of Part One

(a) General remarks

20. There was broad support for the Special Rapporteur's general approach to the articles contained in chapter II of Part One. Satisfaction was expressed with the absence of any serious or far-reaching changes in the draft, which had been cited with approval by the highest judicial bodies and had achieved widespread acceptance.

(b) Terminology

21. Support was expressed for retaining the term "attribution" rather than "imputability", as recommended by the Special Rapporteur.

22. In contrast, certain members asked whether the notion of "imputability" might be more appropriate in cases such as those covered by article 10 or in cases of vicarious liability. Some support was also expressed for the term "imputability" in the light of the relevant jurisprudence. It was suggested that both terms could be used in the draft articles and commentary as appropriate.

(c) Title of Chapter II

23. Support was expressed for the proposed new title of the chapter as a more accurate indication of its content and as a way to avoid possible confusion with the "act of State" doctrine.

(d) Article 5

24. Concern was raised regarding the infelicitous drafting and lack of clarity of the French version of the phrase "shall be considered", which, *inter alia*, did not indicate by whom. It was suggested that the phrase could be replaced by the word "is considered". However, a

preference was expressed for retaining that phrase in the English version, where it was less obtrusive, and possibly finding a different solution for the French version.

25. There was some support for the proposed deletion of the reference to internal law, as it was considered confusing and misleading, and instead clarifying the matter in the commentary. The view was expressed that the important role of internal law in determining the structure of the State should not be overestimated since international law played the decisive role in that determination for purposes of State responsibility, as indicated by the relevant jurisprudence cited in the report. Other cases where internal law had been disregarded included the Bantustans under the former apartheid regime in South Africa. Although those had been classified by South African law as independent and not as "organs" of the State, that classification had been ignored and rejected by the international community and by national courts in third States. While there was support for the proposed deletion for reasons of legal certainty, the view was also expressed that the term "internal law" was sufficiently broad to cover practice and convention.

26. However, there was considerable concern regarding the proposed deletion, given the essential relevance of internal law in determining the organs of a State. It was remarked that the organs of a State could only be defined by its internal law. It was also remarked that the reference was the *raison d'être* for that article, which was consistent with the right of States to determine their own internal structure in the absence of any a priori definition of State structure under international law. Different views were expressed concerning the relevance of the principle of self-determination and the legal personality of the State in that regard.

27. There were also different views as to whether the deletion of the reference to internal law was justified by the possibility that States would attempt to avoid responsibility by relying on their internal legal structures and, in particular, by *ex post facto* changes therein. The view was expressed that those matters were sufficiently addressed by articles 4, 7 and 8.

28. The necessity of the proposed introductory clause "For the purposes of the present articles" was questioned; on the other hand, it was pointed out that attribution for the purposes of State responsibility was a different exercise than attribution for the purposes of the law of treaties or unilateral acts.

29. While support was expressed for retaining the final clause of article 5, it was also described as unnecessary and too restrictive. There were different views concerning the proposed reformulation of the final clause. On the one hand, support was expressed for the reformulation as a useful clarification stated in more neutral terms. On the other hand, a question was raised as to the necessity and usefulness of referring to the functions and positions of State organs. According to that view, article 6 could simply be deleted and covered in the commentary.

30. It was suggested that, in the proposed definitions clause, it would be useful to define the term "State" to mean "any State according to international law, whatever its structure or organization whether unitary, federal or other". It was also suggested that the reference to the formal structure of the State in article 7 should be taken into account in referring to a State entity in article 5. It was further suggested that the notion of State entity could be clarified in the commentary.

(e) Article 6

31. There was support for deleting article 6 and combining it with article 5, as proposed by the Special Rapporteur. However, the view was also expressed that article 6 should be retained as a separate article in view of the importance of the principle reflected therein.

(f) Article 7

32. Agreement was expressed with the importance attributed by the Special Rapporteur to addressing the complex problem of delegating State functions to the private sector, with a question being raised as to whether it should be addressed under article 7 (2) or elsewhere. The view was expressed that it was difficult to define a priori the functions of a State because of the continuing evolution in the functions reserved for the public sector and those delegated to the private sector. Attention was also drawn to three different situations in that evolutionary process: (a) the State maintained a monopoly over its functions while delegating the exercise of some of them to public or private entities; (b) the State entirely abandoned its functions and handed them over to the private sector; and (c) the State retained its functions, but at the same time allowed parallel functions to be exercised by the private sector to encourage competition.

33. There were different views concerning the proposed deletion of the reference to territorial governmental entities. Some members emphasized the importance of including territorial governmental entities such as constituent units of a federal State, which were not the same as State organs. It was considered particularly important to confirm that the acts of those organs were attributable to the State on the same basis as organs of the central Government, even if they enjoyed the greatest degree of autonomy and had sufficient independent legal capacity to act on their own at the international level, for example, by entering into agreements. Attention was also drawn to regional entities of a State which might conclude transborder agreements. The view was expressed that the matter was of sufficient importance to merit its inclusion in the article under discussion. The concern about a possible overlap with article 5 could be addressed by including the reference to territorial governmental entities in article 5 itself. However, concern was expressed about addressing the matter in article 5, which could entail complicated drafting, lessen the clarity of article 5 and create undesirable *a contrario* implications.

34. The view was expressed that it would be preferable to use the term “functions”, which was broader than the term “governmental authority”, or at least to clarify the use of the latter term in the commentary.

35. In expressing support for retaining the proviso contained in the final clause, it was suggested that the proviso could be clarified by adding the phrase “it is established that” after the word “provided”.

(g) Article 8

36. Some members were of the view that the situations covered by the article needed to be clarified in both the text and the commentary. It was important to ensure that the provision was sufficiently broad to cover situations such as those addressed by the International Court of Justice in the *Nicaragua* case and the cases of disappearances in Latin America, which presented particularly difficult evidentiary problems and where evidence of actual instructions would naturally be difficult or impossible to obtain. Attention was drawn to situations in which States facilitated or encouraged individuals or groups to commit unlawful conduct without giving formal explicit instructions, or even exercising direct control.

37. Support was expressed for the Special Rapporteur’s proposal to amend article 8 (a) to reflect the control test, with attention being drawn to the varying degree of sufficient control required in different specific legal contexts. While supporting the proposed text, a question was raised as to whether it would cover situations in which a State set up a puppet State which was subject to its political control when there was no overt military control and the internal

law of the former indicated that it was not responsible for the latter. It was emphasized that "puppet States" should not be equated with territorial governmental entities.

38. On the other hand, concern was expressed that the proposed clarification could, contrary to the underlying intentions behind the proposal, result in a narrower and more rigid rule of attribution which would make it more difficult to determine responsibility. In response to the concern that the new formulation might be too restrictive, attention was drawn to two complementary factors, namely the new proposed article 15 *bis* and the responsibility of a State for the failure to prevent the actions of groups or individuals that were not attributable to it.

39. A preference was expressed for retaining the term "justified" in article 8 (b).

40. A question was raised concerning the use of the phrase "in fact" in article 8 (a) and (b).

(h) Article 10

41. The view was expressed that territorial governmental entities should not be included in the article.

42. A preference was expressed for retaining the term "competence", subject to further clarification in the commentary, rather than the term "authority", which might be narrower. It was also remarked that the French version of the term "competence" indicated a power exercised within a legal framework in contrast to a power exercised in fact.

11. The Special Rapporteur's concluding remarks on the debate on draft articles 5 to 8 and 10 of Chapter II of Part One

43. As regards the title of Chapter II, the Special Rapporteur noted that there was general agreement concerning the proposed amendment.

44. With regard to article 5, it was necessary to respond to the serious concerns raised by Governments about precluding a State from escaping responsibility for an entity which was in truth an organ because it was not labelled as such under internal law or might even be mischaracterized. In that regard, it was necessary to recognize the complementary role played by national and international law concerning the notion of the organ of a State. On the one hand, the term organ had a particular meaning in international law. On the other hand, the content of the organ of the State largely depended on the internal structure of the State as determined by internal law, including practice and convention within that State.

45. It was considered useful to use the formula "acting in that capacity" in article 5, to emphasize the distinction between the usual cases involving State organs covered by article 5 and the exceptional cases involving other entities covered by article 7 (2).

46. Regarding article 6, there seemed to be broad support for combining that provision with article 5.

47. As to article 7, territorial governmental entities could best be dealt with in article 5 to avoid any suggestion of overlap between those provisions while addressing the concerns expressed regarding the proposed deletion of article 7(1). In addition, the conduct of entities covered by article 7(2) clearly required more detailed consideration.

48. As regards article 8, it was necessary to ensure that the scope of paragraph (a) was sufficiently broad and sufficiently precise in view of the importance of that provision and the questions raised by subsequent jurisprudence. The proposed clarification to article 8 (a) had been intended as an amplification, not a narrowing, of the previous formulation, having regard

in particular to the discussion of the issues in the *Nicaragua* case. The Drafting Committee could, however, discuss whether some other formulation was to be preferred.

49. There seemed to be no objections to article 8 (b), which was a well-established principle recognized in the relevant jurisprudence. However, consideration should be given as to whether the proposed title of article 8 accurately reflected the content of that provision.

50. While article 10 reflected a universally agreed principle, its formulation might be improved, and useful suggestions in that regard had been made in the debate.