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Dayna L. Kaufman

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### Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I would like to thank my fiancé, Jason Lorentz, for his unending support and friendship. I would also like to thank Nicole Coward, James Jung, and Amy Wood for fanning the Jessup spark that led to this Note, and Professor Martin Flaherty for his insightful input. Finally, I owe a debt of gratitude to my parents and little brother for their love and encouragement over the years.

# DON'T DO WHAT I SAY, DO WHAT I MEAN!: ASSESSING A STATE'S RESPONSIBILITY FOR THE EXPLOITS OF INDIVIDUALS ACTING IN CONFORMITY WITH A STATEMENT FROM A HEAD OF STATE

Dayna L. Kaufman\*

## INTRODUCTORY QUERY

On September 17th, 2001, President George W. Bush, in response to a journalist's question as to whether he wanted Osama bin Laden dead, stated, "I want him—hell, I want—I want justice. And there's an old poster out West—as I recall—that said, 'Wanted, dead or alive.'"<sup>1</sup> The Federal Bureau of Investigation ("FBI") subsequently promulgated a Most Wanted list of twenty-two Al Qaeda members, including bin Laden.<sup>2</sup> In conjunction with the list, the FBI offered a reward of up to \$5 million, which included protection of the informant's identity and possible relocation of his or her family,<sup>3</sup> for "information leading to the arrest or conviction" of these individuals.<sup>4</sup> The reward for bin Laden subsequently rose to \$7 million,<sup>5</sup> and ultimately to \$25 million.<sup>6</sup> The State Department indicated that the reward was only offered for the "'arrest or conviction' of bin Laden—

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1. *America's New War: Return to Normalcy* (CNN television broadcast, Sept. 17, 2001).

2. Tom Farmer, *War on Terrorism; U.S. Shines Spotlight on Most-Wanted Terrorists*, Boston Herald, Oct. 11, 2001, at 5; U.S. Fed. Bureau of Investigation, *Most Wanted Terrorists*, at <http://www.fbi.gov/mostwanted/terrorists/fugitives.htm> (last visited Apr. 7, 2002).

3. Stewart M. Powell, *Special Report: Reward for bin Laden \$7 Million Bush Backpedals on 'Dead or Alive,'* Ark. Democrat-Gazette, Oct. 10, 2001, at A8 [hereinafter Powell, *Special Report*].

4. *America Responds: Latest Developments*, Atlanta J. & Const., Oct. 10, 2001, at 3A; see Farmer, *supra* note 2.

5. Powell, *Special Report*, *supra* note 3.

6. *All Things Considered: Continuing Hunt for Osama bin Laden in Afghanistan* (Nat'l Pub. Radio radio broadcast, Dec. 24, 2001) [hereinafter *All Things Considered*].

and not to so-called bounty hunters who might seek to deliver bin Laden 'dead or alive.'"<sup>7</sup> This caveat, however, did not receive the same amount of publicity as the original mandate.

The reward for bin Laden's capture is broadcast for 135 minutes a day in Afghanistan over the Voice of America radio system in Afghanistan's two main languages, Pashto and Dari.<sup>8</sup> The length of the broadcast was expanded by thirty minutes to include daily crime alerts that promote the reward offer exclusively.<sup>9</sup> In addition, the faces and other identifying characteristics of the wanted men were placed on posters, matchbooks, fliers, and newspaper ads distributed around the world<sup>10</sup> and dropped from United States military planes in Afghanistan.<sup>11</sup>

In Afghanistan, individuals carry around leaflets displaying bin Laden's picture with "'Reward, \$25 million'" written in large, Pashto letters.<sup>12</sup> One man admitted to using threats of violence on townsfolk in his quest for the \$25 million reward: "I gathered all the villagers who live in Tora Bora. I told them that if you keep any Arab . . . I'll bomb the village . . ." <sup>13</sup> This same individual stated that he searched the Tora Bora region on foot with some other men, looking for any sign of bin Laden, "as President Bush says, dead or alive."<sup>14</sup>

What if this man followed through with his threat to bomb the civilian village? What if President Bush's call for help with finding Osama bin Laden led to gross violations of human rights, such as the mass murder of innocent villagers as calculated by the quoted Afghani interviewee? What if the President's statement led to the torture and murder of bin Laden? Would the United States of America be responsible for these acts? Disregarding the formidable practical considerations that make such a suit unlikely,<sup>15</sup> the consideration of

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7. *Reward for Bin Laden's Arrest*, Seattle Post-Intelligencer, Oct. 10, 2001, at A15.

8. Stewart M. Powell, *Bush Backs Away From 'Dead or Alive' Comment: U.S. Offers \$7 Million for Information Leading to Arrest, Conviction*, Ventura County Star, Oct. 10, 2001, at A5 [hereinafter Powell, *Bush Backs Away*].

9. *Id.*

10. Joseph Curl, *Bush Targets 'Most Wanted'; 22 Terrorists Make List; Cash Reward an Incentive*, Wash. Times, Oct. 11, 2001, at A1.

11. *All Things Considered*, *supra* note 6.

12. *Id.*

13. *Id.*

14. *Id.*

15. A claim against the United States for any such human or humanitarian rights violations is unlikely in the current legal setting. For the United States to be held liable for such actions, another State or individual would have to bring the claim against the United States. The political climate in Afghanistan and its relative dependency on the United States' support suggest that it would not jeopardize that support by bringing a claim against the United States. See Craig Nelson, *War on Terrorism: Rebuilding Afghanistan: Progress Comes Inch by Inch*, Atlanta J. & Const., Feb. 20, 2002, at 6A (describing Afghanistan's dependence on foreign aid in general); *World Mainheadlines*, Middle East News Online, Mar. 29, 2002, LEXIS, Nexis

these questions is important to better understand the responsibility a state can bear for the statements of its officials.

This Note seeks to establish a standard for what kinds of statements from an organ of the State will attach liability to the State for an individual's actions in conformity with that statement. This Note draws on the history of state responsibility and decisions in the International Court of Justice, international criminal tribunals, regional judicial bodies, and arbitral claims commissions to formulate a standard. Part I examines the history of holding a State responsible for the actions of individuals. This history includes both the development of the law of state responsibility in international law and the codification of that law by the International Law Commission of the United Nations. Part II lays out the various standards that have been used by courts to determine whether a State should be held responsible for the results of an individual's actions in conformity with a statement made by an organ of that State. The two standards on which Part II focuses are the strict standard, which requires a specific command and effective control, and the flexible standard, which varies the level of command and control according to the factual circumstances. Part III compares the standards in these decisions with the standard iterated in the United Nations Articles on State Responsibility<sup>16</sup> to determine what kinds of statements should attach liability to a State in the future. Part IV considers whether the United States should be held responsible for the actions of individuals heeding President Bush's command to capture Osama bin Laden, dead or alive. After applying the standard developed by this Note, Part III concludes that only the strict standard is valid under the precedent, the Articles on State Responsibility, and customary international law. Under this standard, the United States cannot be

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Library, MENO file (discussing Afghanistan's military dependence). Additionally, the United States withdrew itself from the compulsory jurisdiction of the International Court of Justice, and, thus, the fora available for such a claim are limited. *World Court Makes Its Mark*, *Legal Times*, Sept. 21, 1998, at 7. One of the only available fora for a State's claim would be the United Nations Human Rights Committee; however, no State has ever been sued by another State in that Committee due to the political consequences of such a suit. A State could try to have the United Nations arbitrate a claim; however, few, if any, Nations would attempt to hold the United States accountable in the United Nations given its immense international political sway. Moreover, an individual would find few fora open to her suit, as the United States has not signed the Optional Protocol for the Human Rights Committee granting such a private right of action. See generally Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2d ed. 2000). Therefore, the threat of litigation posed in this Note is largely hypothetical.

16. *Responsibility of States for internationally wrongful acts*, G.A. Res. 83, U.N. GAOR, 56th Sess., Annex, Agenda Item 162 at 3, U.N. Doc. A/RES/56/83 (2001), available at <http://www.un.org/documents/ga/res/56/a56r083.pdf> [hereinafter U.N. Articles]. This Note refers to these Articles in the text as the Articles on State Responsibility, as opposed to the Responsibility of States for internationally wrongful acts.

held responsible for an individual's actions taken in accordance with President Bush's statement.

## I. A BRIEF HISTORY OF STATE RESPONSIBILITY

The doctrine of state responsibility developed over the centuries from general principles derived from ancient texts.<sup>17</sup> The process of codifying this vast body of law began more than fifty years ago, and culminated in the General Assembly of the United Nations' adoption of the International Law Commission's Articles on State Responsibility in the Fall of 2001.<sup>18</sup> First, this section lays out the general principles of international law underlying the doctrine of state responsibility. Second, this section explains the development of the Articles on State Responsibility within the United Nations. Third, this section narrows the scope of this Note's inquiry into the doctrine of state responsibility to focus on a state's responsibility for an individual acting in conformity with a statement from a head of state.

### A. *International Law and the Doctrine of State Responsibility*

International law is the body of law that governs relationships between sovereign states.<sup>19</sup> One of the conceptual foundations underlying international law is that every state is sovereign and equal.<sup>20</sup> Each state has equal standing under international law and all international organizations are based on this inherent equality.<sup>21</sup> Because states are regarded as equal entities under international law, there exist rights and duties necessary to protect that equality.<sup>22</sup> These rights and duties comprise the obligations under international law to which each state is held responsible.<sup>23</sup>

Although states acknowledge their consent to be bound by some rules through signing and ratifying treaties and other agreements,<sup>24</sup> there are certain rules that states must follow regardless of any

17. Clyde Eagleton, *The Responsibility of States in International Law* 3-25 (Kraus Reprint Co. 1970) (1928).

18. U.N. Articles, *supra* note 16, ¶¶ 3-4, at 2; *Draft Articles on State Responsibility*, [1973] 2 Y.B. Int'l L. Comm'n ¶¶ 4-5, at 174-75, U.N. Doc. A/9010/REV.1 [hereinafter 1973 Yearbook].

19. Black's Law Dictionary 822 (7th ed. 1999).

20. See Ian Brownlie, *Principles of Public International Law* 289 (5th ed. 1998) [hereinafter Brownlie, *Principles*].

21. U.N. Charter art. 2, para. 1 ("The [United Nations] is based on the principle of the sovereign equality of all its Members.").

22. 1973 Yearbook, *supra* note 18, ¶ 4 n.49, at 174; Eagleton, *supra* note 17, at 5.

23. Eagleton, *supra* note 17, at 10. For a more complete explanation of the historical foundations of the doctrine of state responsibility, see *id.* at 3-25 and Ian Brownlie, *System of the Law of Nations: State Responsibility (Part I)* 1-9, 35-52 (1983) [hereinafter Brownlie, *State Responsibility*].

24. See Brownlie, *Principles*, *supra* note 20, at 436-37; Eagleton, *supra* note 17, at 5.

express consent to do so.<sup>25</sup> Such rules are contained in the body of international law known as custom.<sup>26</sup> Customary international law is formed where there is (1) a widespread, uniform state practice that (2) states follow out of belief that international law demands their conformity with that practice, a belief known as *opinio juris*.<sup>27</sup> Customary international law is binding upon a state because the state is a part of a community of nations and does not depend on the express consent of the State:<sup>28</sup> “[m]embership in the community of nations . . . presupposes the acceptance of the existent rules of that community; and it is upon this agreement to observe the rules of the community that international responsibility is founded.”<sup>29</sup>

The doctrine of state responsibility is a fundamental principle of international law, the substance of which has developed through the customary practices of states.<sup>30</sup> Thus, as a form of customary international law, it is binding on every nation, regardless of the nation’s consent.<sup>31</sup> The law of state responsibility is based on the notion that because the State is a person under international law, it can be held responsible for its actions as such.<sup>32</sup> Like any other person, when a State breaks a law, it must receive some form of punishment.

The difficult question, however, is when exactly the State has broken international law. A State can only act through individuals, whether officials of the State, like its military or police forces, or unofficial auxiliary forces of the State.<sup>33</sup> Therefore, determining when

25. Oppenheim’s International Law 29-30 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) [hereinafter Oppenheim].

26. See *id.* at 24-25.

27. See North Sea Cont’l Shelf (F.R.G. v. Den. & F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 74, at 43 (Feb. 20); see also Brownlie, Principles, *supra* note 20, at 4-9; Oppenheim, *supra* note 25, at 25-31.

28. Oppenheim, *supra* note 25, at 29-30 (“[E]stablished rules of customary international law are binding on a new or existing state notwithstanding that it may dissent from some particular rule . . .”). However, customary international law is dependent in some way on the general consent of states. *Id.* at 24. For example, before a certain principle is determined to be customary international law, there must be a clear and continuous practice among the majority of states, showing that there is some general consent to the practice as a law to which all should be bound. *Id.* at 27-28.

29. Eagleton, *supra* note 17, at 5.

30. See 1973 Yearbook, *supra* note 18, ¶ 53, at 172, ¶ 4, at 174; Philip C. Jessup, A Modern Law of Nations: An Introduction 95 (1968) (“The history of [the responsibility of states] . . . exemplifies the way in which a body of customary law develops . . .”); see also Brownlie, Principles, *supra* note 20, at 436; Eagleton, *supra* note 17, at 21.

31. See *supra* notes 25-29 and accompanying text.

32. Oppenheim, *supra* note 25, at 500-01.

33. Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 183-84 (1953) (“From the fact that States are juridical persons it follows that they must act through physical persons. . . . ‘States can act only by and through their agents and representatives.’” (quoting Advisory Opinion No. 6, German Settlers in Poland, 1923 P.C.I.J. (ser. B) No. 6, at 22)).

a State, as opposed to the individual in her own right, has violated international law is complicated. The law of state responsibility provides a basis for determining what actions by an individual constitute the State's violation of international law.<sup>34</sup> Although many authors have written on the subject from a scholarly position,<sup>35</sup> this body of law has been authoritatively codified by the International Law Commission of the United Nations in the Articles on State Responsibility.<sup>36</sup>

### B. *The United Nations' Articles on State Responsibility*

The International Law Commission of the United Nations ("ILC") began consideration of the doctrines encompassing the law of state responsibility at its first session in 1949.<sup>37</sup> The ILC was formed by the United Nations General Assembly in conformity with its powers under Article 13 of the United Nations Charter. During the drafting conferences for the United Nations Charter, the delegates decided that the General Assembly should not have legislative power to enact binding rules of international law.<sup>38</sup> The delegations, however, did desire some work on international law to take place within the United Nations, and so they included Article 13(1)(a) in the United Nations' Charter:

The General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.<sup>39</sup>

In its first session, the General Assembly adopted Resolution 94(I), which created a committee to consider how the General Assembly could meet its Article 13 obligations.<sup>40</sup> The result of this committee's discussions was the ILC.<sup>41</sup>

As stated in Article 13, the dual jobs of development and codification were originally conceived of as complementary.<sup>42</sup> Because "codification" alone seemed too "rigid," the term "development" was included to allow some "provision for

34. Brownlie, *Principles*, *supra* note 20, at 439 ("Thus in principle an act or omission which produces a result which is on its face a breach of a legal obligation gives rise to responsibility in international law.").

35. *See, e.g.*, Brownlie, *State Responsibility*, *supra* note 23. For a more complete listing of authors who have written on the subject of state responsibility, see Oppenheim, *supra* note 25, at 499-500.

36. *See* 1973 Yearbook, *supra* note 18, ¶¶ 37-57, at 169-73.

37. United Nations, *The Work of the International Law Commission* 89 (4th ed. 1988).

38. Herbert W. Briggs, *The International Law Commission* 9 (1965).

39. U.N. Charter art. 13, para. 1(a); Briggs, *supra* note 38, at 11.

40. Briggs, *supra* note 38, at 12-14; *see* G.A. Res. 94(I), U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. A/64/Add.1 (1946).

41. Briggs, *supra* note 38, at 15-17.

42. *Id.* at 11-12.



modification” while maintaining “a nice balance between stability and change.”<sup>43</sup> The ILC attempted to distinguish between the dual tasks of codification and development: they conceived of the former as “the more precise formulation and systematization of the law in areas where there has been extensive state practice, precedent and doctrine,” and the latter as drafting “on a subject which has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of states.”<sup>44</sup> In the end, however, the ILC was unable to conceive of any distinction between the two tasks of codification and development, and declared that “the distinction established in the Statute between these two activities [codification and development] can hardly be maintained.”<sup>45</sup>

Although the ILC may develop international law as it codifies it, the ILC does not see this as a radical task involving revolutionary change; rather, the task is meant to “preserve everything that was valid in the old rules,” while allowing for some change to account for new situations in international law.<sup>46</sup> The ILC’s role within the United Nations complements that of the International Court of Justice (“ICJ”).<sup>47</sup> The ICJ is charged with the development of international law as it applies to particular cases, while the ILC develops international law in view of the body of law as a whole.<sup>48</sup> Thus, the ILC is the legislative branch that complements the judicial branch found in the ICJ.<sup>49</sup> In formulating its legislative policy, the ILC looks to precedent contained in customary international law, decisions of the ICJ as well as other judicial tribunals, comments of other bodies of the United Nations, and input from governments provided at every stage of the ILC’s work.<sup>50</sup> The pronouncements of the ILC are not binding on any state, but they do act as evidence of the development of customary international law, representing both the widespread practice of states and *opinio juris*.<sup>51</sup>

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43. *Id.* at 12 (quoting the drafting subcommittee for the Charter of the United Nations).

44. *Id.* at 137 (quoting the committee’s report on the drafting of the Statute of the ILC).

45. *Id.* at 140 (quoting the 1956 Report of the ILC); *see also* B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law 21 (1977)* (“The Commission has not, on the whole, distinguished between rules of international customary law which it codifies and rules which it puts forward by way of progressive development.”); United Nations, *supra* note 37, at 15.

46. Ramcharan, *supra* note 45, at 165 (quoting Roberto Ago, member of the ILC and the ICJ, and former Special Rapporteur on State Responsibility).

47. *Id.* at 15.

48. *Id.*

49. *Id.*

50. *Id.* at 16; United Nations, *supra* note 37, at 21-24.

51. Ramcharan, *supra* note 45, at 19, 24.

During its first session in 1949, the ILC selected the subject of state responsibility as a suitable topic for consideration, a choice that was supported by the General Assembly.<sup>52</sup> The topic went through many different formulations during its development, first focusing on a state's responsibility for injuries to aliens, and then expanding that focus to what the Articles cover today.<sup>53</sup> The Articles as adopted cover (1) the responsibility of states, as opposed to other international organizations, companies, or individual heads of state; (2) a state's responsibility for its internationally wrongful acts, as opposed to its responsibility arising from lawful acts, such as space exploration or nuclear testing;<sup>54</sup> and (3) general rules governing when a state could be responsible for an internationally wrongful act, as opposed to defining rules that impose obligations on states, the violation of which would constitute a source of responsibility.<sup>55</sup> The general rules are applicable to any situation in which one State's internationally wrongful act, as defined under any type of document, occasioned some injury to another State, and "govern all the new legal relationships which may follow" from that situation.<sup>56</sup>

The Draft Articles on State Responsibility were provisionally adopted upon their first reading in 1980.<sup>57</sup> An incredibly detailed Commentary written primarily by Roberto Ago, Special Rapporteur for the topic, accompanied the Draft Articles, which is "probably of greater general significance and value than the draft Articles themselves."<sup>58</sup> The ILC gave the Draft Articles a second reading from 1998 to 2000 to update them in "light of comments by Governments and developments in State practice, judicial decisions and literature."<sup>59</sup> This second reading produced the Articles on State Responsibility as adopted.<sup>60</sup>

The Draft Articles were "fairly straightforward, conservative in fact and, while certainly clarifying the law, d[id] not contain much in the way of innovation."<sup>61</sup> The two Articles relating to the topics discussed in this Note reveal in their Commentaries that they were crafted in alignment with the law as it existed.<sup>62</sup> Draft Article 8, "Attribution to

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52. United Nations, *supra* note 37, at 89.

53. *Id.* at 89-100.

54. *Id.* at 91.

55. 1973 Yearbook, *supra* note 18, ¶¶ 39-40, at 169.

56. *Id.* ¶ 42, at 170.

57. *Report of the International Law Commission*, U.N. GAOR, 55th Sess., Supp. No. 10 ¶ 34, at 30, U.N. Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc/reports/2001/2001report.htm> [hereinafter U.N. Articles Commentary].

58. Shabtai Rosenne, *The International Law Commission's Draft Articles on State Responsibility* 28 (1991).

59. U.N. Articles Commentary, *supra* note 57, ¶ 39, at 32 (footnote omitted).

60. *Id.* ¶¶ 40-41, at 32.

61. Rosenne, *supra* note 58, at 28.

62. See, e.g., *Draft Articles on State Responsibility*, [1974] 2 Y.B. Int'l L. Comm'n art. 8 cmt. ¶¶ 4-6, at 284, U.N. Doc. A/9610/REV.1 [hereinafter 1974 Yearbook]; see

the State of the conduct of persons acting in fact on behalf of the State," states, in pertinent part:

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.<sup>63</sup>

This section was changed before it was adopted and now provides the following:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>64</sup>

This change may be understood as a clarification of what "on behalf of [the] State" means in Draft Article 8 because both Commentaries refer to the same arbitral cases in their analysis of the provision.<sup>65</sup>

Thus, the standard under Article 8 remains in some measure the same between the Draft Articles and the Articles as adopted. One conceptual development in Article 8 as adopted is that of "control," a result of the ICJ's decision in *Military and Paramilitary Activities*.<sup>66</sup> As the ICJ stated in that case the standard for control is based on a determination of what actions constitute actions on behalf of the State.<sup>67</sup> The addition of this factor to Draft Article 8's "on behalf of [the] State" standard, however, does not necessarily change the standard, but rather expands the analysis required under that Article to include the ICJ's interpretation.

The most significant change between the Draft Articles and the Articles as adopted occurred with respect to Article 11. In its draft form, Article 11, "Conduct of persons not acting on behalf of the State," reads as follows:

*also* 1973 Yearbook, *supra* note 18, ¶ 53, at 172. The Draft Commentary states that [t]he Commission and the Special Rapporteur . . . display their preference for an essentially *inductive* method, rather than for deduction from theoretical premises, at least whenever considerations of State practice and judicial decisions make it possible to follow such a method for determining the content of the rules relating to State responsibility.

*Id.*

63. 1974 Yearbook, *supra* note 62, art. 8, at 283.

64. U.N. Articles, *supra* note 16, art. 8, at 3.

65. Compare 1974 Yearbook, *supra* note 62, art. 8 cmt. ¶¶ 4-5, at 284, with U.N. Articles Commentary, *supra* note 57, art. 8 cmt. n.161, at 104.

66. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); see U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶¶ 3-5, at 104-05; see also *infra* Part II.B.

67. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 109, at 62 ("[T]here is no clear evidence of the United States having actually exercised such a degree of control . . . as to justify treating the contras as acting on its behalf." (emphasis omitted)).

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph. . . .<sup>68</sup>

Article 11 was changed to read, in its adopted form:

Conduct which is not attributable to a State under the preceding Articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.<sup>69</sup>

The original restrictive language of Article 11 does not appear anywhere in the Articles as adopted, although similar text was placed in the Commentary to Adopted Article 11.<sup>70</sup> The standard contained in Article 11 as adopted, however, is actually one of the alternative standards for attaching liability to the State mentioned in the Commentary to Draft Article 11. The Commentary to Draft Article 11 elaborates on the distinction between a State's responsibility as a result of an individual's act being imputable to it and a State's responsibility as a result of an act or omission of its own organs.<sup>71</sup> A State's responsibility under Adopted Article 11 is incurred not because the individual's action is attributable to it, but because the State's own organs approve of the individual's actions and adopt them as the State's own.<sup>72</sup> Therefore, Adopted Article 11 codifies a part of the original Commentary to Draft Article 11.

The important point, however, is not the relative consistency of the two sets of Articles, but the fact that, in adopting the Articles, the ILC shed all language restricting the liability of the State. By removing the old language of Article 11, which affirmatively stated that there was certain conduct that was not attributable to the State, the Articles now focus entirely on standards for holding the State responsible for certain activity. Whereas once the language strictly forbade imposing liability for individuals not acting on behalf of the State, the Articles now explicitly state a circumstance under which such liability could attach to the State. The Articles on State Responsibility as adopted, therefore, show that, in writing the Articles, the ILC sought to

68. *Draft Articles on State Responsibility*, [1975] 2 Y.B. Int'l L. Comm'n art. 11, at 70, U.N. Doc. A/10010/REV.1 [hereinafter 1975 Yearbook].

69. U.N. Articles, *supra* note 16, art. 11, at 4.

70. U.N. Articles Commentary, *supra* note 57, art. 11 cmt. ¶ 2, at 119.

71. 1975 Yearbook, *supra* note 68, ¶¶ 13-36, at 73-82. The Draft Commentary states that "although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned." *Id.* ¶ 35, at 82.

72. See U.N. Articles Commentary, *supra* note 57, art. 11 cmt. ¶ 6, at 121.

enumerate the circumstances under which states could be held responsible, expanding possible sources for such liability.

The Articles on State Responsibility, after more than fifty years of development, codify the circumstances under which a State can be held responsible for various actions. Between the first and second drafts of the Articles, the ILC moved to include language that expands liability for the state. Part III.B explores further this notion of expansion. The Articles, however, will provide the touchstone for the analysis in this Note. The next section tightens the focus of the analysis of Article 8 by first examining Article 8's conceptual subject matter.

### C. *The Law of State Responsibility for the Actions of Private Individuals Acting as De Facto Agents of the State*

The umbrella of state responsibility covers the many different situations in which a state will be held responsible for a breach of international law. It includes a state's responsibility for the actions of individuals. This responsibility can be categorized as liability for the actions of individuals who are formal agents of the state and liability for the actions of those who are not. Finally, the law of state responsibility delineates a state's liability resulting from a statement made by an organ of the state and an individual's actions in conformity with that statement. This Note focuses on a state's responsibility for the actions of an individual, who is not a formal agent of the state, taken in conformity with a statement by that state.

#### 1. A State's Responsibility for the Actions of Individuals

Even though a state can only act through individuals, there is a difference between holding the State responsible for the individual's actions and holding the individual responsible for his own actions. Take, for example, the International Criminal Tribunal for the former Yugoslavia.<sup>73</sup> In the cases before the Tribunal, officials of the former Yugoslavian and Serbian states have been prosecuted as individuals for their actions as officials. Compare this situation with the situation in *Military and Paramilitary Activities*.<sup>74</sup> In that case, the United States was held accountable as a *state* for the actions of its organs. The individuals who committed the acts were not on trial.

Before liability for the actions of an individual is imposed on a State, that State's actions with respect to the individual must meet a strict and burdensome standard. The Commentary to Article 8 of the

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73. See, e.g., Initial Indictment, Prosecutor v. Milosevic, No. IT-02-54 (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber III May 24, 1999), available at <http://www.un.org/icty/ind-e.htm>.

74. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

Articles on State Responsibility provides that “[a]s a general principle, the conduct of private persons or entities is not attributable to the State under international law.”<sup>75</sup> To attach liability to the State for the actions of an individual, it must be shown that (1) the individual was a formal agent or organ of the State, or that (2) the individual was “in fact acting on the instructions of, or under the direction or control of, that State in carrying out [his or her] conduct,” which would make the individual a de facto agent of the State.<sup>76</sup> There must be some legal nexus, in the form of a formal agency or an informal de facto agency relationship, between the individual and the State for the State to be held responsible for that individual’s actions.<sup>77</sup> For example, a State can be held liable for the actions of its military officers, who are its agents; however, a State can also be held liable for the actions of private individuals who are commanded by its military officers to act on the State’s behalf, because the individuals, by that command, became de facto agents of the State.<sup>78</sup>

The distinction between these two means of imputing the activity of individuals to a State, however, must be maintained. The *Janes*<sup>79</sup> arbitration sets forth the clearest delineation of the difference between these two forms of liability.<sup>80</sup> *Janes* concerned whether the Mexican government was liable for the damages suffered by the Janes family as a result of Byron Janes’ murder in El Tigre, Mexico, at the hands of a Mexican citizen, Pedro Carbajal.<sup>81</sup> Byron Janes worked in Mexico as the Superintendent of the El Tigre Mining Company, and

75. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 1, at 103; *see also id.* art. 11 cmt. ¶ 2, at 119.

76. U.N. Articles, *supra* note 16, art. 8, at 3.

77. 1974 Yearbook, *supra* note 62, art. 8 cmt. ¶ 2, at 283; *see also* U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 1, at 104 (stating that “[i]t is necessary to take into account . . . the existence of a real link between the person or group performing the act and the State machinery”).

78. *See, e.g.,* *Zafiro* (Gr. Brit. v. U.S.), 6 R.I.A.A. 160 (Gen. Claims Comm’n 1925); *Stephens* (U.S. v. Mex.), 4 R.I.A.A. 265 (Gen. Claims Comm’n 1927). In *Zafiro*, the United States Navy registered the *Zafiro* as a United States ship, yet maintained its original British and Chinese crew, and utilized the ship as a supply ship for the Navy under civilian guise. *Zafiro*, 6 R.I.A.A. at 161. The question before the Arbitral Commission was whether the United States could be held responsible for the looting of a port village by the Chinese crew members. *Id.* The United States was held responsible for failing to control the crew members of its vessel when it knew the crew was engaging in the looting. *Id.* at 164-65. In *Stephens*, the Claims Commission held Mexico responsible for the murder of an American citizen who was shot by “some Mexican guard or auxiliary forces” while driving toward a military check point. *Stephens*, 4 R.I.A.A. ¶ 1, at 265. Although the Mexican guard lacked a uniform or insignia, the soldier nevertheless was deemed by the Commission to be “acting for Mexico.” *Id.* ¶ 4, at 267. This attribution was appropriate given the mandate from the Mexican government validating the actions of local “informal municipal guards” where the formal protections of the State were lacking. *Id.* ¶ 4, at 267.

79. *Janes* (U.S. v. Mex.), 4 R.I.A.A. 82 (Gen. Claims Comm’n 1925).

80. *See* Cheng, *supra* note 33, at 209-10.

81. *Janes*, 4 R.I.A.A. ¶¶ 1, 4, at 83.

Carbajal was a former employee of the mine who had been discharged.<sup>82</sup> Carbajal killed Janes in the company's office at the mine, in plain view of many people.<sup>83</sup> Carbajal casually walked away from the shooting, leaving El Tigre on foot.<sup>84</sup> The police delayed in apprehending Carbajal, waiting more than thirty minutes after the murder before forming a posse to go after him, and so Carbajal eluded capture.<sup>85</sup> Subsequent to Carbajal's escape on the day of the murder, the police were informed of several locations where Carbajal was rumored to be residing during the weeks and months following the murder, yet they failed to investigate any of these locations until the mining company offered a reward for Carbajal's capture.<sup>86</sup> By that time, Carbajal had escaped once again, and still remained at large eight years later, when the case came before the United States-United Mexican States General Claims Commission ("USMGCC"). The USMGCC found that, although Mexico was liable for failing to apprehend Carbajal, this failure did not result in the same level of responsibility as that of Carbajal in murdering Janes.<sup>87</sup> The Commission stated the following:

The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. . . . The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the non-punishment of the murderer.<sup>88</sup>

The findings of the commission suggest that there is a fine distinction between holding a State responsible for its own wrongdoing and holding it responsible for the wrongdoing of an individual. A court, therefore, must determine which activities are attributable to the State and which are not. A State may bear responsibility, for example, for aiding an operation against the interests of another State; however, the State might not, at the same time, be held responsible for the actions of the individuals who performed those operations.<sup>89</sup>

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82. *Id.* ¶ 3, at 83.

83. *Id.*

84. *See id.*

85. *Id.*

86. *Id.*

87. *Id.* ¶ 20, at 87.

88. *Id.*

89. *See, e.g.,* *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 292, No. 9, at 148 (June 27) (finding "that the United States of America . . . has encouraged the commission . . . of acts contrary to general principles of humanitarian law; but . . . not find[ing] a basis for concluding that any

## 2. A State's Responsibility for the Actions of Its Organs Versus Its Responsibility for the Actions of Other Individuals

A State is presumed liable for all of the actions of its officials and organs,<sup>90</sup> even actions taken by an official or organ that are technically beyond its authority, known as *ultra vires* actions.<sup>91</sup> An organ of the State is an official branch of the government, whether a legislative, executive, or judicial body of the government.<sup>92</sup> Article 7 of the Articles on State Responsibility codifies the doctrine of a State's liability for the *ultra vires* actions of its organs.<sup>93</sup> For example, in the *Caire* claim, Mexico was held responsible for the actions of a captain and a major in its armed forces who blackmailed a French individual and subsequently murdered him when he failed to pay a ransom.<sup>94</sup> The Commission stated that "[t]he State . . . bears an international responsibility for all acts committed by its officials or its organs . . . regardless of whether the official or organ has acted within the limits of his competency."<sup>95</sup>

A State is not similarly liable for the actions of individuals who are not part of its formal infrastructure.<sup>96</sup> If the individual acts as a de facto agent of the State, however, the State can be held responsible for a private individual's actions.<sup>97</sup> A de facto agent of the State is anyone who, by the totality of the circumstances surrounding his or her actions, is deemed to be acting on behalf of the State.<sup>98</sup> Liability for de facto agents is never assumed and must be proven by the totality of the circumstances.<sup>99</sup> The determination that an individual is a de facto agent of the State, as discussed in Part I.C.1, requires a high burden of proof.<sup>100</sup>

such acts which may have been committed are imputable to the United States of America as acts of the United States of America").

90. U.N. Articles, *supra* note 16, art. 4, at 2-3.

91. *Id.* art. 7, at 3.

92. *See id.* art. 4, at 2-3.

93. *Id.* art. 7, at 3; *see* U.N. Articles Commentary, *supra* note 57, art. 4 cmt. ¶ 13, at 91-92, art. 7 cmt. ¶ 7, at 102; Brownlie, Principles, *supra* note 20, at 452-55.

94. Jean Baptiste Caire (Fr. v. Mex.), 5 Ann. Dig. 146 (Mixed Claims Comm'n 1929); *see* Brownlie, Principles, *supra* note 20, at 453; Cheng, *supra* note 33, at 204-07.

95. Brownlie, Principles, *supra* note 20, at 453; *see also Caire*, 5 Ann. Dig. at 147-48.

96. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 1, at 103-04.

97. U.N. Articles, *supra* note 16, art. 8, at 3. There are some circumstances under which a State, through its acts or omissions after the fact, can become liable for an individual's acts; however, these situations are not relevant to this Note's inquiry. For a thorough discussion of these standards for attaching liability, *see* 1975 Yearbook, *supra* note 68, art. 11 cmt. ¶¶ 13-36, at 73-82.

98. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 58, at 29 (May 24); Brownlie, State Responsibility, *supra* note 23, at 160-61.

99. *See* U.N. Articles, *supra* note 16, art. 8, at 3, art. 11, at 4.

100. *See supra* notes 75-78 and accompanying text.



In *Diplomatic and Consular Staff*, the ICJ found Iran responsible for its police forces' failure to protect the United States Embassy in Tehran when it was attacked by a group of student militants.<sup>101</sup> The court distinguished between Iran's liability for the actions of its police forces and the actions of the student militants who had invaded the Embassy.<sup>102</sup> Although there was evidence that the head of State of Iran, the Ayatollah Khomeini, had commanded the students to undertake such an attack, the court found that the militants were not de facto agents of Iran because the Ayatollah's statement was too general.<sup>103</sup> The actions of the militants, therefore, were not attributable to Iran.<sup>104</sup> Iran was held responsible, however, for the failure of its police forces to protect the Embassy, even though there was no evidence that the government commanded the police to fail to protect the Embassy.<sup>105</sup> Police forces are considered organs of the State, and thus, Iran was liable for their actions, even if it did not command them to ignore their duty to protect the Embassy.<sup>106</sup>

### 3. A State's Responsibility for Individuals Acting in Conformity with a Statement

A State may be held liable for the actions of individuals under a limited number of circumstances.<sup>107</sup> For example, where a State approves of and adopts the conduct of an individual as its own, it can be held responsible for that individual's actions.<sup>108</sup> In *Diplomatic and Consular Staff*, Iran was held responsible by the ICJ for the second phase of the student militants' occupation of the American Embassy in Tehran,<sup>109</sup> even though it was released from responsibility for the

101. *Diplomatic and Consular Staff*, 1980 I.C.J. ¶ 67, at 32.

102. *See id.* ¶ 61, at 30. The court stated that the fact that the invasion by the student militants "cannot be considered as in itself imputable to the Iranian State does not mean that Iran is . . . free of any responsibility in regard to those attacks." *Id.*

103. *Id.* ¶ 59, at 29-30; *see infra* Part II.A.1.

104. *Diplomatic and Consular Staff*, 1980 I.C.J. ¶ 59, at 29-30.

105. *Id.* ¶ 61, at 30, ¶ 67, at 32.

106. *Id.* ¶¶ 63-64, at 31; *see* Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 Mich. J. Int'l L. 312, 332-35 (1991) (discussing Iran's liability in *Diplomatic and Consular Staff* for its officials' failure to protect the United States Embassy); *see also* U.N. Articles, *supra* note 16, art. 4, at 2-3.

107. *See* Brownlie, *State Responsibility*, *supra* note 23, at 159-63.

108. U.N. Articles, *supra* note 16, art. 11, at 4. Article 11, "Conduct acknowledged and adopted by a State as its own," provides the following:

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

*Id.* For further information regarding cases and factors to be considered in establishing liability under this standard, *see* U.N. Articles Commentary, *supra* note 57, art. 11 cmt., at 119-22.

109. *Diplomatic and Consular Staff*, 1980 I.C.J. ¶ 74, at 35.

militants' initial attack.<sup>110</sup> The ICJ found that the Ayatollah's unequivocal approval of the militants' actions, combined with his commands to the militants regarding their treatment of the Embassy hostages changed the militants' private actions into those of Iran.<sup>111</sup> If a State, therefore, expresses approval of an individual's actions and adopts those actions in some way, such as the State's perpetuation of the individual's actions,<sup>112</sup> the State will be held responsible for the results of those actions.<sup>113</sup>

The scope of this Note is limited to State liability arising from prior statements. Article 8 of the Articles on State Responsibility sets forth the standard for attaching liability to a State for the actions of an individual taken in conformity with a statement by that State.<sup>114</sup> Article 8, "Conduct directed or controlled by a State," provides as follows:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>115</sup>

The Commentary to Article 8 explains that the ILC considered this standard to be a fairly high burden, requiring either express and specific instructions or effective control of the individual by the State to attach liability.<sup>116</sup> The Commentary contemplates several scenarios in which liability could attach to the State under this Article.

First, a State may be liable for the actions of private "auxiliaries" authorized by official organs of the state to supplement their official activities.<sup>117</sup> This type of liability is defined under Article 8 as liability for "instructions" from the State.<sup>118</sup> Liability for instructions attaches when the private individual is told by the State to undertake some specific mission.<sup>119</sup> For example, the actions of individuals engaged in international abductions of foreign criminals could fall into this category.<sup>120</sup> Abduction is a tool utilized by many states' governments to bring a foreign criminal within a jurisdiction looking to prosecute

110. *Id.* ¶ 59, at 29-30.

111. *Id.* ¶ 74, at 35 ("The approval given to [the militants' occupation] by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.").

112. *Id.*; see also U.N. Articles Commentary, *supra* note 57, art. 11 cmt. ¶ 4, at 120.

113. U.N. Articles, *supra* note 16, art. 11, at 4.

114. *Id.* art. 8, at 3.

115. *Id.*

116. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶¶ 2-4, at 104-06.

117. *Id.* ¶ 2, at 104.

118. *Id.* ¶¶ 1-2, at 104.

119. *Id.* ¶ 2, at 104.

120. See generally Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 Cornell Int'l L.J. 383 (1996).

him.<sup>121</sup> The individuals in those cases are not normally official members of the abducting State's government, but are acting in conformity with the government to abduct the alleged criminal.<sup>122</sup>

Second, the Commentary suggests that where individuals are "directed or controlled [by the State for] the specific operation and the conduct complained of [is] an integral part of that operation," liability should attach to the State.<sup>123</sup> Although "direction" and "control" are never given as explicit a definition as "instruction" is, the ILC accepts the standard iterated by the ICJ in *Military and Paramilitary Activities* as the definition for these terms.<sup>124</sup> Both direction and control, therefore, depend on whether or not the individual would have committed the acts in question without the direction or enforcement of the State.<sup>125</sup> If the individual would have committed the acts regardless of the State's direction or control, no liability will attach to the State.<sup>126</sup>

The ILC notes that the factors to be considered in determining whether a situation rises to this level are "the relationship between the instructions given or the direction or control exercised and the specific conduct complained of."<sup>127</sup> The Commentary specifically states that "[i]n the text of article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them."<sup>128</sup> Thus, if a court establishes that a State instructed, directed, or controlled the activity of an individual or group of individuals who

121. *Id.* Often, to effectuate the arrest of an individual in a foreign jurisdiction, a State will utilize private or non-State actors in the actual kidnapping of the criminal. *See, e.g.,* United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (holding that the United States could maintain jurisdiction over Dr. Alvarez-Machain, even though he was illegally abducted by Mexican agents acting in conformity with directions from the Drug Enforcement Agency of the United States); Attorney General v. Eichmann, 36 I.L.R. 277, 304-06 (Isr. S. Ct. 1962) (upholding Israel's jurisdiction over Eichmann, even though Israel directed agents to abduct Eichmann from Argentina on charges relating to Eichmann's crimes against humanity during the Holocaust); Stocké v. Germany, 199 Eur. Ct. H.R. (ser. A) ¶¶ 54-55, at 19 (1991) (releasing Germany from liability under the European Convention on Human Rights because no connection could be established between Stocké's abductor and the German authorities). In *Eichmann*, although Israel formally claimed that the individuals who abducted Eichmann were not members of the Israeli government, subsequent statements by members of the Israeli State suggested otherwise. U.N. Articles Commentary, *supra* note 57, art. 11 cmt. ¶ 5, at 121; *see* S.C. Res. 138, U.N. SCOR, 16th Sess., 865th mtg. at 4, U.N. Doc. S/4349 (1960) (holding Israel responsible for Eichmann's abduction); Michell, *supra* note 120, at 422-24.

122. *See, e.g.,* Alvarez-Machain, 504 U.S. at 657 n.2; *see also* Michell, *supra* note 120, at 483-85.

123. U.N. Articles Commentary, *supra* note 57, art. 8 cmt ¶ 3, at 104.

124. *See id.* art. 8 cmt. ¶ 4, at 105-06 (citing *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115, at 64-65 (June 27)).

125. *See infra* text accompanying notes 191-203.

126. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 4, at 105-06.

127. *Id.* ¶ 7, at 108.

128. *Id.*

was not formally associated with the State, the State may be held responsible for the individual's actions.<sup>129</sup>

The Articles on State Responsibility codified the customary international legal principles underlying the doctrine of state responsibility. The Articles set forth a standard for when a State may be found liable for the actions of private individuals acting in accordance with a statement from that State.<sup>130</sup> As Part III explains, however, it is questionable whether the International Law Commission remained faithful to the customary law in the process of codifying it. To analyze whether the Articles on State Responsibility codify the law as it exists or the law as the ILC thinks it should be, the precedent underlying the ILC's standard must be examined. Part II describes the standards used by judicial bodies to determine whether to impose liability on the State for an individual's commission of an international wrongful act when the individual acted in response to a statement from that State. Part III then analyzes and compares the standards formed by the judicial precedent with those codified by the ILC in the Articles on State Responsibility.

## II. JUDICIAL PRECEDENT HOLDING A STATE RESPONSIBLE FOR INDIVIDUALS ACTING IN CONFORMITY WITH A STATEMENT FROM THE STATE

Several judicial bodies have had the opportunity to establish standards for determining when a State can be held responsible for an individual's actions in conformity with a statement from that State. These decisions were utilized by the ILC to formulate the standards codified in the Articles on State Responsibility. Part III of this Note analyzes how faithful the ILC remained to these judicial standards when codifying them in the Articles. This section of the Note, however, discusses the standards developed by courts and other judicial bodies for attaching liability to a State for an individual's actions in conformity with a statement. These courts have examined two major factors in analyzing state responsibility based on a statement: (1) the command itself<sup>131</sup> and (2) the level of control exercised by the State over the individual acting in conformity with that command.<sup>132</sup> With respect to the command issued by the State, the decisions focus on the specificity of the statement compared with the act or acts committed by the individual. With respect to control, the examination is focused on the circumstances surrounding the individual and his or her motivation for committing the act. The courts have considered these factors under two different standards:

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129. *Id.*

130. U.N. Articles, *supra* note 16, art. 8, at 3.

131. *See infra* Parts II.A.1, II.B.1.

132. *See infra* Parts II.A.2, II.B.2.

the strict standard and the flexible standard. The strict standard requires both elements of command and effective control before liability will attach to the State for an individual's actions. The flexible standard allows the court to consider the factual circumstances in each case to determine what level of command or control should attach liability to the State.

### A. *The Strict Standard as a Basis for Attaching Liability to the State*

The strict standard requires that the State have specifically commanded and effectively controlled an individual's actions before liability can be attached to the State. The command must be specific as to the action to be taken by the individual. Effective control requires that the totality of the circumstances show that the individual would not have taken such action without the State's inducement and facilitation. This standard developed primarily through two decisions in the ICJ, one dealing with command and one with control.

#### 1. Command Under the Strict Standard

In *Diplomatic and Consular Staff*, the ICJ had occasion to establish<sup>133</sup> a standard for liability resulting from statements of a head of state.<sup>134</sup> On November 4, 1979, several hundred armed student militants invaded the United States Embassy in Tehran and took over the Embassy compound, holding the staff and other individuals on the premises hostage.<sup>135</sup> On November 29, 1979, the United States brought suit against Iran seeking compensation for the damages caused by the militants and to force Iran to secure the release of the hostages.<sup>136</sup> One of the issues concerned whether Iran was responsible for the actions of the student militants in invading the Embassy.<sup>137</sup> The court determined that Iran could be held responsible for the militants' actions "only if it were established that, in fact, on the

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133. The ICJ does not regard its decisions as precedent, although the decisions are binding on the parties involved in the dispute. Past decisions of the ICJ are treated by the court as highly persuasive, but are not dispositive on an issue. See Statute of the International Court of Justice art. 38, para. 1(d), 1947 I.C.J. Acts & Docs 37. Other courts, tribunals, publicists, and international organizations, however, do regard the ICJ's decisions as dispositive. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶¶ 4-5, at 105-06; Shane Spelliscy, Note, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 Colum. J. Transnat'l L. 143, 158-59 (2001). But see Prosecutor v. Tadić ¶¶ 137-45 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber July 15, 1999) [hereinafter Tadić II (majority opinion)], available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (overturning the ICJ's approach to attribution and state responsibility in *Military and Paramilitary Activities*).

134. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

135. *Id.* ¶ 17, at 12.

136. *Id.* ¶ 8, at 5-8.

137. *Id.* ¶¶ 56-57, at 29.

occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation."<sup>138</sup>

The ICJ found that, under this standard, Iran was not responsible for the actions of the militants.<sup>139</sup> Although a spokesman for the militants referred to a statement made by the Ayatollah Khomeini, the religious leader of the country, to explain their invasion of the Embassy, the court felt that that statement alone could not attach liability to the Iranian State.<sup>140</sup> The statement referred to was the Ayatollah's statement on November 1, 1979, that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel."<sup>141</sup> The court found that this declaration was too general to attach liability to the State.<sup>142</sup>

The most critical factor for the ICJ's determination was the lack of specificity in the Ayatollah's statement.<sup>143</sup> The court held that, to attach liability, the statement needed to provide authorization from the Ayatollah, as the head of the Iranian State, "to undertake the specific operation of invading and seizing the United States Embassy."<sup>144</sup> The court found dispositive the fact that the militants "claimed credit for having devised and carried out the plan to occupy the Embassy."<sup>145</sup> At a minimum, therefore, the statement would need to have included specific plans for overtaking the Embassy to attach liability to Iran.

A comparison of the Ayatollah's November 1 statement, which did not attach liability to the State, and his statement issued on November 17, which did attach liability to the State for the militants' continued occupation of the Embassy,<sup>146</sup> further clarifies the ICJ's standard. The Ayatollah's November 17 statement was much more specific than his November 1 statement. The statement on November 17 declared that the militants should "hand over the blacks and the women, if it [were] proven that they did not spy," but that the "noble Iranian nation [would] not give permission for the release of the rest of [the hostages]."<sup>147</sup> This statement specifically laid out what actions the militants should and should not take. The ICJ found that this was enough to "fundamentally . . . transform the legal nature of the situation . . . [because t]he militants, authors of the invasion and jailers

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138. *Id.* ¶ 58, at 29.

139. *Id.*

140. *Id.* ¶ 59, at 29-30.

141. *Id.* (quoting the Ayatollah Khomeini).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* ¶¶ 73-74, at 34-35.

147. *Id.* ¶ 73, at 34 (quoting the Ayatollah Khomeini).

of the hostages, had now become agents of the Iranian State for whose acts that State itself was internationally responsible."<sup>148</sup> The specificity of the statement, therefore, in asking the militants to take some specific action—to release some hostages and maintain control over others—was dispositive in determining Iran's liability for this second phase of activity.<sup>149</sup> Thus, to attach liability under the standard established by the ICJ in *Diplomatic and Consular Staff*, the command of a State must include some particular instructions regarding the operation to be undertaken by the individuals.

The judicial examination of Iran's liability as a result of the statements of the Ayatollah Khomeini did not end with the decision in *Diplomatic and Consular Staff*. The United States-Iran Claims Commission ("USICC") continued to examine Iran's responsibility for various actions undertaken by supporters of the Ayatollah's government during the years of revolution following the ousting of the Shah.<sup>150</sup> These cases adopted and upheld the ICJ's standard in *Diplomatic and Consular Staff*.<sup>151</sup>

The decision in *Diplomatic and Consular Staff* established a strict standard for attaching liability to the State, following precedent set in arbitral cases such as the *Lehigh Valley Railroad* cases before the United States-German Mixed Claims Commission ("USGMCC").<sup>152</sup> These cases concerned various acts of sabotage committed by German individuals in the United States as a part of a campaign of sabotage advocated by the German government during World War I.<sup>153</sup> The acts of sabotage occurred in July, 1916, and January, 1917, and

148. *Id.* ¶ 74, at 35.

149. *See id.*

150. *See, e.g.*, Alfred L.W. Short v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 76, ¶ 17, at 80, ¶ 23, at 81 (1987); *Id.* ¶¶ 6-12, at 89-92 (Brower, J., dissenting).

151. *See, e.g.*, Eastman Kodak Co. v. Iran, 27 Iran-U.S. Cl. Trib. Rep. 3, ¶¶ 31-32, at 14 (1991) (holding Iran responsible for damages where it was shown that the Iranian government's representatives actively caused the harm and that it gave "direct authorization" for the actions alleged); Kathryn Faye Hilt v. Iran, 18 Iran-U.S. Cl. Trib. Rep. 154, 162 (1988) (rejecting the claim that Iran was responsible for Hilt's expulsion from Iran because there was no evidence that Hilt was "instructed" to leave Iran by the government or one of its agents); Flexi-Van Leasing, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 335, 349 (1986) (releasing Iran from responsibility because the evidence did not show that the harm was a result of "the instruction of the Government"); Schering Corp. v. Iran, 5 Iran-U.S. Cl. Trib. Rep. 361, 370 (1984) (releasing Iran from responsibility for the actions of the Workers' Council because there was no evidence "that there was any governmental influence... [or] governmental orders, directives or recommendations... to the Council or that it acted under instructions of any governmental body").

152. *Lehigh Valley R.R.* (U.S. v. F.R.G.), 8 R.I.A.A. 225 (Mixed Claims Comm'n 1939) [hereinafter *Lehigh Valley R.R. II*]; *Lehigh Valley R.R.* (U.S. v. F.R.G.), 8 R.I.A.A. 104 (Mixed Claims Comm'n 1932) [hereinafter *Lehigh Valley R.R. (Rehearing Grant)*]; *Lehigh Valley R.R.* (U.S. v. F.R.G.), 8 R.I.A.A. 84 (Mixed Claims Comm'n 1930) [hereinafter *Lehigh Valley R.R. I*].

153. *See* L.H. Woolsey, *The Arbitration of the Sabotage Claims Against Germany*, 33 Am. J. Int'l L. 737, 737 (1939).

destroyed a harbor terminal and an industrial plant along the New York Harbor in New Jersey, causing over \$20 million in damage.<sup>154</sup> The United States claimed that the sabotage was aimed at stopping the flow of supplies to the Allied war effort against Germany.<sup>155</sup> The case came before the USGMCC twice.<sup>156</sup> In the first decision, the court found in favor of Germany because the United States could not produce sufficient evidence on the issue of agency connecting the saboteurs to the German government.<sup>157</sup> A key piece of evidence in the first case was an intercepted transmission from the German foreign office to the German Military Attaché in Washington D.C., stating that “[i]n [the] United States sabotage can reach to all kinds of factories for war deliveries; [however] railroads, dams, bridges must not be touched there.”<sup>158</sup> This statement was not sufficient to attach responsibility to Germany.<sup>159</sup> The United States then uncovered evidence tying the two fires to Germany,<sup>160</sup> including “a secret message written with lemon juice in code in a magazine by an admitted German sabotage agent and transmitted by him in April, 1917, from Mexico to a co-saboteur in Baltimore,” which included references to the two sites at issue.<sup>161</sup> Additional evidence conclusively linked the individuals to the German government, including witnesses who testified that they were sent to America “on orders from the German Government.”<sup>162</sup> This new evidence showed that Germany had concealed relevant facts in the first hearing, and thus the USGMCC reopened hearings on the cases.<sup>163</sup> The USGMCC found “that the affirmative evidence established Germany’s responsibility in both cases.”<sup>164</sup>

These cases support the standard advocated in *Diplomatic and Consular Staff*.<sup>165</sup> Germany could only be held responsible for the saboteur’s actions when evidence of a specific command was found relating to the individual’s activity.<sup>166</sup> The more general reference to the sabotage in the first case was insufficient to establish Germany’s

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154. *Id.*

155. *Id.*

156. *See id.* at 738-40.

157. *Id.* at 738; *see Lehigh Valley R.R. I*, 8 R.I.A.A. at 100-01.

158. Woolsey, *supra* note 153, at 738 (quoting telegram to German military attaché).

159. *See id.*; *see also Lehigh Valley R.R. I*, 8 R.I.A.A. at 100-01 (relieving Germany of responsibility for the attacks).

160. Woolsey, *supra* note 153, at 738.

161. *Id.* at 738 n.3; *see Lehigh Valley R.R. (Rehearing Grant) (U.S. v. F.R.G.)*, 8 R.I.A.A. 104, 114-15 (Mixed Claims Comm’n 1932).

162. *Lehigh Valley R.R. II (U.S. v. F.R.G.)*, 8 R.I.A.A. 225, 332 (Mixed Claims Comm’n 1939) (emphasis omitted).

163. Woolsey, *supra* note 153, at 738-39.

164. *Id.* at 740; *see also Lehigh Valley R.R. II*, 8 R.I.A.A. at 339-45.

165. *See supra* text accompanying notes 143-49.

166. *Lehigh Valley R.R. (Rehearing Grant)*, 8 R.I.A.A. at 106.



liability.<sup>167</sup> Only once a specific command was located did the Commission attach liability to the State for the individual's actions.<sup>168</sup>

## 2. Control Under the Strict Standard

The leading case establishing the strict standard for control is *Military and Paramilitary Activities*,<sup>169</sup> decided by the ICJ in 1986. *Military and Paramilitary Activities* concerned the United States' involvement with a group of guerilla combatants fighting against the government of Nicaragua.<sup>170</sup> In July of 1979, the government of President Somoza in Nicaragua was overthrown and replaced by members of the revolutionary group that had led the armed opposition against the Somoza regime, the Sandinistas.<sup>171</sup> Some members of Somoza's National Guard managed to escape from Nicaragua into Honduras, and from there they launched "sporadic raids on Nicaraguan border positions."<sup>172</sup> Starting approximately in August, 1981, the United States worked with these rebel forces, known as the contras, to increase their numbers and to organize them more effectively.<sup>173</sup>

Nicaragua claimed that the United States was responsible for the ensuing actions of the contra forces, which included kidnappings, assassinations, torture, rape, and the killing of prisoners and civilians.<sup>174</sup> This claim relied on the fact that the United States was so thoroughly involved with the contras that they were essentially "bands of mercenaries which [had] been recruited, organized, paid, and commanded by the Government of the United States."<sup>175</sup>

There was ample evidence of the United States' extensive involvement in the contras operations.<sup>176</sup> The Central Intelligence

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167. *See id.* at 107-08.

168. *See Lehigh Valley R.R. II*, 8 R.I.A.A. at 339-45.

169. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

170. *Id.* ¶¶ 20-21, at 21-22.

171. *Id.* ¶ 18, at 20-21.

172. *Id.* ¶ 93, at 54 (quotation and citation omitted). Testimony during oral argument in this case elaborated on what exactly the activity of the contras consisted of prior to the United States' involvement. *Id.* ¶ 93, at 53-54. Prior to the United States' involvement, the contras were "just a few small bands very poorly armed, scattered along the northern border of Nicaragua . . . They did not have military effectiveness and what they mainly did was rustling cattle and killing some civilians near the borderlines." *Id.* ¶ 93, at 54 (citation omitted).

173. *Id.* ¶¶ 94-95, at 54-55. The United States at first the Sandinista government; however, it then cut off aid to Nicaragua in 1981 and began supporting the contras due to the Sandinistas' support for guerillas in El Salvador. *Id.* ¶¶ 18-19, at 20-21.

174. *Id.* ¶ 113, at 63-64.

175. *Id.* ¶ 114, at 64.

176. *See id.* ¶¶ 95-112, at 55-63 (documenting in detail all of the varied forms of assistance given to the contras by the United States).

Agency ("CIA") had several purposes in undertaking the covert operations in Nicaragua, including to:

"Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic [and] anti-Cuban . . .

Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.

Work primarily through non-Americans . . ."<sup>177</sup>

Financial support for the military operations of the contras was available in the United States budget from 1981 until 1984, amounting to approximately \$96.5 million over those three years.<sup>178</sup> All equipment, clothing, food, and artillery utilized by the contra forces were supplied by the CIA.<sup>179</sup> The CIA paid salaries to the contra forces, chose their leaders, and provided them with training in guerilla warfare, weaponry, and field communications.<sup>180</sup> Additionally, the CIA provided the contras with intelligence as to Nicaraguan troop movement and gave them tactical directives, such as not to destroy farms and crops.<sup>181</sup>

The ICJ's opinion provided multiple, and sometimes contradictory, standards for what level of participation in the contras' affairs was required before the United States could be held responsible for the contras' actions.<sup>182</sup> This unfortunate feature of the decision has led to much confusion over what standard, in fact, the court set.<sup>183</sup> The first standard put forth in the decision required a showing that the United States "created an armed opposition in Nicaragua."<sup>184</sup> This standard was reiterated later in the decision, stating that "the Court has not been able to satisfy itself that the [United States] 'created' the contra

177. *Id.* ¶ 99, at 59 (quoting from excerpts of a confidential CIA plan, fragments of which were published in the Washington Post).

178. *See id.* ¶¶ 95-96, at 55-57.

179. *Id.* ¶ 100, at 59 ("[A]ll arms, munitions and military equipment, including uniforms, boots and radio equipment, were acquired and delivered by the CIA.")

180. *Id.* ¶¶ 100-01, at 59, ¶ 112, at 63.

181. *Id.* ¶¶ 101-04, at 59-60.

182. *See id.* ¶ 18 & n.1, at 189-90 (Sep. Op. Ago, J.) ("I feel obliged to point out that the Judgment exhibits some hesitancy, a few at least apparent contradictions and a certain paucity of legal reasoning in seeking to substantiate the position the Court takes on the points in question.")

183. *Compare* Prosecutor v. Tadić ¶ 600 (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber II May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/tad-tj970507e.htm> [hereinafter Tadić I (majority opinion)], with Prosecutor v. Tadić ¶¶ 3-4 (Int'l Crim. Trib. for the Former Yugoslavia, Trial Chamber II May 7, 1997) (McDonald, J. dissenting), available at <http://www.un.org/icty/tadic/trialc2/judgement/tad-tsojmc970507e.htm> [hereinafter Tadić I (McDonald, J., dissenting)], and Tadić II (majority opinion), *supra* note 133, ¶¶ 99-115, at 40-47. *See* Spelliscy, *supra* note 133, at 160-68; *see also infra* notes 247-75 and accompanying text.

184. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 94, at 54.

force in Nicaragua.”<sup>185</sup> Under this standard, the United States would only be liable if it had invented the contra forces.<sup>186</sup>

The court stated a second standard for establishing liability at a later point in the decision: “that all the operations launched by the contra force, at every stage of the conflict, reflect[] strategy and tactics wholly devised by the United States.”<sup>187</sup> This standard appears to be very similar to that required in *Diplomatic and Consular Staff*.<sup>188</sup> If the contras followed specific commands from the United States in every one of their operations, liability would attach to the United States for the contras’ actions. However, this standard seems to have been expressly rejected by the court. A few pages after stating this standard, the court found that “United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and *the planning of the whole of its operation*, is still insufficient in itself” to establish responsibility for the contras actions.<sup>189</sup> The ICJ wavered on the standard several more times<sup>190</sup> before settling on a final standard, “effective control.”<sup>191</sup> If the United States had effective control over the contras’ operations, then the United States was liable for all of the contras’ actions: “it would in principle have to be proved that [the United States] had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>192</sup> Effective control is regarded as the criterion for attaching liability to a State for an individual’s actions under this decision.<sup>193</sup>

The meaning of effective control is not exactly defined by the court. Some of the relevant factors, however, can be gleaned from the

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185. *Id.* ¶ 108, at 61 (emphasis omitted).

186. *See id.*

187. *Id.* ¶ 106, at 61 (emphasis omitted). This standard was stated for a second time in the decision, requiring that “all contra operations reflected strategy and tactics wholly devised by the United States.” *Id.* ¶ 108, at 62 (emphasis omitted).

188. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 59, at 29-30 (May 24).

189. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 115, at 64 (emphasis omitted; remaining emphasis added).

190. The court stated that the standard is whether the contras were completely dependent on the United States’ aid, in all of its varied forms. *Id.* ¶ 110, at 62. This standard seems to then change into whether the contras “may be equated for legal purposes with the forces of the United States.” *Id.* ¶ 110, at 62-63.

191. *Id.* ¶ 115, at 65.

192. *Id.*

193. *See id.* ¶ 18 n.1, at 189 (Sep. Op. Ago, J.) (stating that “[t]he underlying idea is expressed most precisely in paragraph 115,” which includes the effective control standard); U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 4, at 105-06; Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 *Ariz. J. Int’l & Comp. L.* 635, 643-44 (1997); Spelliscy, *supra* note 133, at 162-64 (“[T]he better explanation of what the ICJ was attempting to do in [*Military and Paramilitary Activities*] is to use the dependence and control test and develop the notion of control to mean effective control.”).

context in which the standard is put forth.<sup>194</sup> The court stated that all of the varied and extensive forms of involvement that the United States had with the contras, including the financial support, the planning of their operations, and the selection of their targets, "even if preponderant or decisive," were insufficient to attach liability to the United States for the contras' actions.<sup>195</sup> Even if the United States had general control over the contra force, and even if the contras were highly dependent on the United States' aid, these factors alone could not attach liability to the State.<sup>196</sup> Nicaragua needed to produce evidence that the United States directed or enforced the perpetration of acts contrary to human rights and humanitarian law in such a way that the contras would not have committed those acts *but for* the United States' involvement.<sup>197</sup> Had Nicaragua produced such evidence, the ICJ may have found that the United States had effective control over the contras, and thus attach liability to the State.<sup>198</sup> The mere encouragement of the contras' acts contrary to human rights and humanitarian law was not enough to attach liability.<sup>199</sup> The court expressly held that the United States' encouragement via the "Psychological Operations" manual did not attach liability to the State for the contras' actions.<sup>200</sup> The dispositive point for the court, therefore, was the fact that the contras would have committed these acts with or without the United States' encouragement or involvement.<sup>201</sup>

The standard to be gleaned from this case with respect to statements from a head of state is twofold. First, no matter how specific a statement is regarding a particular operation, the statement alone will not attach liability to the State.<sup>202</sup> The court must undertake some analysis of control before attaching liability to the State. Second, the dispositive factor in each case is whether the individual, in light of the totality of the State's involvement, would have committed the acts without the State's intervention.<sup>203</sup> Therefore, any analysis of whether the wrongdoings of an individual acting in conformity with a statement from a head of State should attach liability to that State must look not only to the command from the head of State, but also to

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194. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 18 n.1, at 189 (Sep. Op. Ago. J.).

195. *Id.* ¶ 115, at 64-65.

196. *Id.*

197. *See id.*

198. *See id.*

199. *Id.* ¶ 256, at 130, ¶ 292, No. 9, at 148.

200. *Id.* ¶ 292, No. 9, at 148; *see infra* note 335 and accompanying text.

201. *Id.* ¶ 115, at 64-65.

202. *See id.* ¶ 115, at 64-65, ¶ 256, at 130. The "Psychological Operations" manual contained very explicit instructions. The court's refusal to attach liability on this fact alone suggests that a mere command in itself cannot attach liability. *See id.*; *see also infra* notes 331-39 and accompanying text.

203. *See Military and Paramilitary Activities*, 1986 I.C.J. ¶ 115, at 64-65.

the motivations behind the actions of the individual who responds to the command.

The standard created in *Military and Paramilitary Activities* seems to conflict with the decision in *Diplomatic and Consular Staff*, as the statements from the United States, which were specific as to the operations to be undertaken by the contras,<sup>204</sup> did not attach liability to the United States for the contras' actions in conformity with those statements. Judge Ago, however, in his Separate Opinion, clearly stated that these decisions are not in conflict.<sup>205</sup> Unfortunately, Judge Ago did not specifically state how the effective control standard related to the facts of *Diplomatic and Consular Staff*.<sup>206</sup> The comparison, however, is not a difficult one. The effective control standard relates to whether the individual in question would have acted regardless of the assistance and command from the head of State.<sup>207</sup> The student militants who attacked the United States Embassy in Iran on November 4, 1979, were part of a group of some 3000 demonstrators who were demonstrating against the United States' admittance of the former Shah of Iran into its borders, allegedly for medical treatment.<sup>208</sup> There had been a demonstration on November 1 of almost 5000 people in front of the United States Embassy, but on that day, announcements on the radio and by a religious leader at the main demonstration at another location in the city specifically told the demonstrators not to go near the Embassy.<sup>209</sup> This would suggest that without these exhortations to the contrary, the people would have attacked the Embassy. The demonstrators

204. See *infra* notes 331-39 and accompanying text.

205. *Military and Paramilitary Activities*, 1986 I.C.J. ¶¶ 18-19, at 190 (Sep. Op. Ago, J.). Judge Ago states that

I am above all inclined to regret that the Judgment does not refer explicitly to the precedent provided by the Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran*. The Court seems to me to have overlooked the fact that, at that time, it was faced with a situation in many ways similar to the present one. . . . I can only regret that the Court has not seized the opportunity to emphasize, by appropriate references [to *Diplomatic and Consular Staff*], a confirmation of the position it took before and of the theoretical reasoning developed in support, so as to underline the continuity and solidity of the jurisprudence.

*Id.* Judge Ago was the Special Rapporteur in charge of drafting the Articles on State Responsibility for the International Law Commission prior to being appointed to the International Court of Justice. See Rosenne, *supra* note 58, at 28.

206. Judge Ago merely states that the decision rested on the fact that the "militants" in question had no official status of any kind as agents or organs of the State and there was nothing to prove that they had in fact acted in the name and on behalf of the Iranian authorities," but does not connect this to the *Military and Paramilitary Activities*' standard of effective control. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 18, at 190 (Sep. Op. Ago, J.).

207. See *supra* notes 191-203 and accompanying text.

208. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, ¶¶ 15-17, at 11-12 (May 24).

209. *Id.* ¶ 16, at 11-12.

who overtook the Embassy on November 4, therefore, most likely would have attacked the United States Embassy regardless of the Ayatollah's address.<sup>210</sup> Therefore, like the Nicaraguan contras, the student militants would have attacked the Embassy without the Ayatollah's support.<sup>211</sup> This fact establishes, under the standard of effective control espoused in *Military and Paramilitary Activities*,<sup>212</sup> that Iran had no control over the militants and, therefore, that the State could not be held liable for their actions.<sup>213</sup> Additionally, the ICJ noted that the militants themselves "claimed credit for having devised and carried out the plan to occupy the Embassy," further suggesting that they would have attacked the Embassy with or without the Ayatollah's statement.<sup>214</sup> Therefore, these two cases create a similar standard, albeit from two different perspectives. *Diplomatic and Consular Staff* considered attaching liability through the specificity of the State's statement alone.<sup>215</sup> *Military and Paramilitary Activities* looked at the totality of the circumstances to determine whether the individuals in question would have acted a certain way regardless of the State's involvement.<sup>216</sup>

### B. *The Flexible Standard as a Basis for Attaching Liability to the State*

The flexible standard allows the court to consider the totality of the circumstances before determining what level of command or control by a State is necessary to attach liability to that State. The specificity of the command necessary to establish liability on the part of the State under the flexible standard varies with the type of action committed by the individual: the more specific the individual's actions, the more specific the command must be. The degree of control necessary depends on the characteristics of the individual or group of individuals controlled: the more organized the group is, the less control a State must exert over the group to attach liability. This standard was established in two separate cases that both advocated flexible standards meant to maximize the accountability of the State.

#### 1. Command Under the Flexible Standard

The flexible standard for control is most clearly established in the decision of the USICC in *Alfred Short v. Iran*.<sup>217</sup> Although the majority upheld the strict standard of specificity required by the ICJ in

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210. *Id.* ¶ 59, at 29-30.

211. *See id.*

212. *See supra* notes 191-203 and accompanying text.

213. *See Diplomatic and Consular Staff*, 1980 I.C.J. ¶ 59, at 30.

214. *Id.*

215. *See supra* notes 143-49 and accompanying text.

216. *See supra* notes 191-203 and accompanying text.

217. *Alfred L.W. Short v. Iran*, 16 Iran-U.S. Cl. Trib. Rep. 76 (1987).

*Diplomatic and Consular Staff*,<sup>218</sup> the dissenting judge, Judge Brower, iterated an alternative, flexible standard for attaching liability to Iran.<sup>219</sup>

In *Short*, Alfred Short sued Iran before the USICC for his wrongful expulsion from Iran as a result of the Ayatollah's exhortations against Americans and the Iranian citizens' response to those exhortations.<sup>220</sup> Short claimed that as a result of the Ayatollah's statements, "Americans were singled out in the course of the Islamic Revolution and threatened, harassed, beaten and in the most tragic cases, murdered, by the followers of the Ayatollah Khomeini."<sup>221</sup> Short himself was threatened and chased by mobs, shot at in his home, and stalked by an ominous man in black.<sup>222</sup> These actions eventually led him to send his family away and, finally, to remove himself from Iran at the behest of his employer, Lockheed-Martin.<sup>223</sup>

The USICC found that Iran was not responsible for damages resulting from Short's expulsion from Iran.<sup>224</sup> The commission based its decision on two factors. First, Short failed to identify a specific agent of the Iranian State that expelled him from the country.<sup>225</sup> Short's claim relied on the fact that the supporters of the revolution in Iran generally created an atmosphere within Iran that was hostile to United States citizens remaining there and that that atmosphere forced him to leave.<sup>226</sup> The USICC denied this basis of liability, stating that the actions of supporters of a revolution are not attributable to the State, unless the supporters rise to the level of de facto agents under *Diplomatic and Consular Staff*.<sup>227</sup> Second, the commission looked at whether the Ayatollah's statements against America and Americans within Iran could have made the supporters

218. See *supra* text accompanying notes 143-49.

219. *Short*, 16 Iran-U.S. Cl. Trib. Rep. ¶ 32, at 101 (Brower, J., dissenting).

220. *Id.* ¶ 17, at 80, ¶ 23, at 81.

221. *Id.* ¶ 17, at 80.

222. *Id.* ¶¶ 18-21, at 80-81.

223. *Id.* ¶ 20, at 80, ¶ 22, at 81.

224. *Id.* ¶¶ 34-35, at 85-86.

225. *Id.* ¶ 34, at 85; cf. *Kenneth P. Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987) (holding Iran responsible for damages resulting from the wrongful expulsion of Yeager and his wife by de facto agents of Iran). Yeager was successful in his claim because he was able to show (1) that he was forced to leave his home by individuals claiming to be members of the "Revolutionary Guards" who wore distinctive armbands of that organization, and (2) that he was detained in a hotel that was known to be held by these Guards. *Id.* ¶ 41, at 103; see Townsend, *supra* note 193, at 649-50. Liability in *Yeager* was easily established because Iran subsequently adopted the actions of these Guards, making their actions attributable to the State. Townsend, *supra* note 193, at 650; see U.N. Articles, *supra* note 16, art. 11, at 4. Short's claim, on the other hand, was based on a more general theory that the Ayatollah incited the Iranian populace to expel all American citizens. *Short*, 16 Iran-U.S. Cl. Trib. Rep. ¶¶ 17-21, at 80-81.

226. *Short*, 16 Iran-U.S. Cl. Trib. Rep. ¶¶ 17-21, at 80-81.

227. *Id.* ¶ 34, at 85; see *supra* text accompanying notes 143-49.

de facto agents of Iran in expelling American citizens.<sup>228</sup> The commission denied this basis for liability as well, finding that “these pronouncements were of a general nature and did not specify that Americans should be expelled *en masse*.”<sup>229</sup> The majority reiterated the standard established in *Diplomatic and Consular Staff* that the statement must be specific to and about the operation undertaken by the individuals for the State to be liable.<sup>230</sup>

Judge Brower’s dissent in *Short*, however, attempted to lay out a new standard under which liability could be attached to the State for an individual’s actions.<sup>231</sup> Judge Brower advocated finding liability under a standard of constructive eviction, allowing the claimant to recover damages if the claimant showed (1) that the circumstances in the country left him with no reasonable choice but to leave, (2) that behind these circumstances there was some intent to have the individual expelled, and (3) that these circumstances were attributable to the State.<sup>232</sup> Based on the voracity and consistency of the Ayatollah’s declarations against the United States, Brower felt that *Short* should be able to recover damages from Iran for constructive eviction.<sup>233</sup> Specifically, Brower noted that the Ayatollah had stated that “[f]inal victory will come when all foreigners are out of the country.”<sup>234</sup> Although Brower accepted the specificity requirement espoused in *Diplomatic and Consular Staff* when the action complained of is a singular, particular act, he denied that such a standard was necessary when the activity complained of involved “more general, less cataclysmic” activity by the individuals.<sup>235</sup> Judge Brower reasoned that, because the actions involved in constructive eviction are more general in nature, the statements required to attach liability to the State for the eviction need not be as specific as those required to attach liability for a single act.<sup>236</sup> Thus, under Judge Brower’s standard, a State could be held responsible for more general acts, such as constructive eviction or inciting mass violence,<sup>237</sup> even

228. *Short*, 16 Iran-U.S. Cl. Trib. Rep. ¶ 35, at 85-86.

229. *Id.* ¶ 35, at 85.

230. *Id.* ¶ 35, at 85-86.

231. *Id.* ¶ 2, at 87-88 (Brower, J., dissenting).

232. *Id.* ¶ 2, at 87 (Brower, J., dissenting). Judge Brower analogized this type of liability to the doctrine of constructive eviction in American property law. *Id.* (Brower, J., dissenting). Furthermore, the majority had expressly allowed for the possibility of constructive eviction in its decision. *Id.* ¶ 30, at 83-84; *id.* ¶ 2, at 87 (Brower, J., dissenting).

233. *Id.* ¶¶ 6-12, at 89-92 (Brower, J., dissenting) (documenting the many statements made by the Ayatollah against the United States).

234. *Id.* ¶ 11, at 92 (Brower, J., dissenting).

235. *Id.* ¶ 14 & n.10, at 93-94 (Brower, J., dissenting).

236. *Id.* ¶¶ 14-15, at 93-94 (Brower, J., dissenting).

237. *See id.* (Brower, J., dissenting). This standard could also be applied to situations such as the genocide of the Tutsis in Rwanda in 1994 and of the Muslims and Croats in Bosnia in the early 1990s. *See Tadić I* (majority opinion), *supra* note 183, ¶¶ 80-178; Philip Gourevitch, *We Wish To Inform You That Tomorrow We Will*



where the statements from the head of State were not very specific. This standard correlates the required specificity of the State's command with the specificity of the act alleged to determine whether liability should be attached.

## 2. Control Under the Flexible Standard

The standard of effective control espoused by the ICJ in *Military and Paramilitary Activities* was recently reconsidered by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Dusko Tadić*.<sup>238</sup> The Trial Chamber and Appeals Chamber's decisions demonstrate that the strict standard established in *Military and Paramilitary Activities* is neither completely settled nor entirely supported in the international community.

The *Tadić* decisions concern the actions of Dusko Tadić, alleged to have committed various acts of torture and murder on civilians at the Omarska concentration camp and during the Serbian attack on Kozarac and other villages in Bosnia.<sup>239</sup> Tadić was a Serbian national living in Bosnia, a supporter of the Greater Serbia cause, and a member of the Serb Democratic Party ("SDS").<sup>240</sup> The modern Greater Serbia movement began in the late 1980s as the Federal Republic of Yugoslavia began to break apart.<sup>241</sup> This movement eventually led to the reformation of Serbia, Kosovo, and Montenegro as the Federal Republic of Yugoslavia ("FRY") and the separation of the Serb population in Croatia, Bosnia, and Herzegovina from the other ethnic groups, forming Serbian municipalities within those countries, such as the *Republika Srpska* in Bosnia.<sup>242</sup> Tadić played a significant role in the Serbian politics of this region, and was rewarded for his efforts by being promoted to political leader of Kozarac after it was "ethnically cleansed."<sup>243</sup> In 1993, Tadić left his post in the Serbian

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Be Killed With Our Families: Stories From Rwanda (1998). In Rwanda, Hutu Power activists utilized the radio to disseminate propaganda against the Tutsis, which ultimately led to genocide. Gourevitch, *supra*, at 99-100, 110-15. The broadcasts from the radio were general in nature, advocating the mass murder, rape, and pillaging of the Tutsi population and their property, as opposed to directing a specific attack. *Id.* Similarly, in Yugoslavia from the late 1980s to the early 1990s the Serbs utilized local radio and television stations to incite the local Serbian population to commit violence and to terrify the Muslim and Croat populations. See Tadić I (majority opinion), *supra* note 183, ¶¶ 88-93. The Hutu Power government or the Federal Republic of Yugoslavia provide examples of states that could be held responsible for general, widespread acts by individuals in accordance with their more general statements.

238. Tadić I (majority opinion), *supra* note 183.

239. *Id.* ¶¶ 45-51.

240. *Id.* ¶ 188.

241. *Id.* ¶ 71.

242. *Id.* ¶¶ 97-102.

243. *Id.* ¶¶ 186-88.

government in Bosnia and fled to Germany, where he was finally arrested and transferred to the ICTY in The Hague.<sup>244</sup>

The relevant portion of the Trial Chamber's decision concerned whether the conflict in Bosnia qualified as an international conflict under the Geneva Conventions.<sup>245</sup> Specifically, the court had to determine whether the *Republika Srpska* and its armed forces were de facto agents of the government of the FRY, a determination that would qualify the conflict in Bosnia as international.<sup>246</sup> The Trial Chamber cited *Military and Paramilitary Activities* as containing the standard to be used in making this determination, specifically citing the effective control standard.<sup>247</sup> The Trial Chamber understood the effective control standard as requiring both "command and control."<sup>248</sup>

Under this standard, the court found that the *Republika Srpska* and its forces, the *Vojska Republika Srpska* ("VRS"), merely coordinated with the FRY and its army, the *Jugoslavenska Narodna Armija* ("JNA"),<sup>249</sup> and that "[c]oordination is not the same as command and control."<sup>250</sup> Although the VRS military received aid from the JNA, including plans, funding, and equipment, the court found that this was not equivalent to command and control by the JNA because there was no "evidence of orders having been received from [the FRY] which circumvented or overrode the authority of the [VRS] Corps Commander."<sup>251</sup> Like the Nicaraguan contras,<sup>252</sup> the VRS forces and the *Republika Srpska* would have acted with or without the support of the FRY. The court compared the support of the FRY to that of the United States in *Military and Paramilitary Activities*.<sup>253</sup> The Trial Chamber noted that, just as the United States' aid did not override but merely supported the contras' aims, so too did the FRY's support; therefore, the VRS and the *Republika Srpska* were not agents of the JNA or the FRY.<sup>254</sup> The *Republika Srpska* was a totally independent State, having declared independence on January 9, 1992, and, therefore, was not commanded or controlled by the FRY.<sup>255</sup> The Trial Chamber found that there was "no evidence on which [it could] confidently conclude that the armed forces of the *Republika Srpska*, and the *Republika Srpska* as a whole, were anything more than mere

244. *Id.* ¶ 192.

245. *Id.* ¶¶ 559-60.

246. *Id.* ¶ 584.

247. *Id.* ¶¶ 585, 595.

248. *Id.* ¶ 598.

249. See Spelliscy, *supra* note 133, at 164-65.

250. Tadić I (majority opinion), *supra* note 183, ¶ 598.

251. *Id.* ¶ 601.

252. See *supra* text accompanying notes 197-201.

253. Tadić I (majority opinion), *supra* note 183, ¶¶ 602-04.

254. *Id.*

255. *Id.* ¶ 599.

allies, albeit highly dependent allies, of the Government of the Federal Republic of Yugoslavia.”<sup>256</sup> The VRS and the *Republika Srpska* had the goal of a strong Serbian Nation as did the FRY; however, the two were separate forces.<sup>257</sup> The fact that the VRS and the *Republika Srpska* would have acted without the FRY or JNA’s aid meant that the FRY did not have effective control over the VRS or the *Republika Srpska* and could not be held responsible for their actions. The conflict, therefore, was not international and Article 2 of the Geneva Conventions did not apply.<sup>258</sup>

Judge McDonald dissented from the Trial Chamber’s decision for two alternative reasons: (1) the decision was wrong because the actions of the VRS and the *Republika Srpska* met the standard for effective control;<sup>259</sup> and (2) the decision was wrong because the standard of effective control was not applicable in this case.<sup>260</sup> Judge McDonald cited the fact that the VRS was created as a “legal fiction” in response to the United Nations’ demand that the FRY pull out of Bosnia, and remained substantially under the same direction and control as before its creation out of the JNA.<sup>261</sup> The actions of the VRS, therefore, met the effective control standard iterated in *Military and Paramilitary Activities*, because the VRS were not only effectively controlled by the JNA, but effectively *were* a renamed branch of the JNA.<sup>262</sup>

Alternatively, Judge McDonald argued that the standard of effective control was neither the standard created by *Military and Paramilitary Activities* nor the standard applicable in this case.<sup>263</sup>

256. *Id.* ¶ 606.

257. *Id.* ¶ 604.

258. *Id.* ¶¶ 607-08.

259. Tadić I (McDonald, J., dissenting), *supra* note 183, ¶¶ 5-15.

260. *Id.* ¶¶ 16-34 (McDonald, J., dissenting).

261. *Id.* ¶¶ 7, 10 (McDonald, J., dissenting).

262. *Id.* ¶¶ 7-8, 15 (McDonald, J., dissenting).

263. *Id.* ¶¶ 16-34 (McDonald, J., dissenting). Most authorities regard the effective control standard as the authoritative standard created by the ICJ in *Military and Paramilitary Activities*. See Tadić II (majority opinion), *supra* note 133, ¶ 145, at 62; Prosecutor v. Tadić ¶ 8, at 152 (Int’l Crim. Trib. for the Former Yugoslavia, App. Chamber July 15, 1999) (Sep. Op. Shahabuddeen, J.), available at <http://www.un.org/icty/Tadic/appeal/judgement/tad-aj990715e.pdf> [hereinafter Tadić II (Sep. Op. Shahabuddeen, J.)]; *supra* note 193 and accompanying text. Even if it were assumed, however, that dependency and control was the standard created in *Military and Paramilitary Activities*, Judge McDonald, in summarily stating that the facts meet this standard, ignored the detailed discussion in the Trial Chamber’s opinion of why the facts did not meet the standard for dependency and control. See Tadić I (majority opinion), *supra* note 183, ¶¶ 602-05. In *Military and Paramilitary Activities*, the ICJ stated that if the contras were dependent on the United States’ aid such that the United States had the potential to control them, and in fact utilized that potential for control, the contras would be de facto agents of the State. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 109-12, at 62-63 (June 27). Although this standard was merely a step in the development of the effective control standard, the ICJ held that the United States’ aid, even if evincing a

Judge McDonald stated that the ICJ created the effective control standard as an alternative basis for liability, establishing prior to that the standard of dependence and control.<sup>264</sup> Under the standard of dependence and control, Judge McDonald stated that the FRY would be responsible for the VRS and *Republika Srpska's* actions because they were so dependent on the JNA's financial and technical support that the JNA and FRY had control over them.<sup>265</sup>

Finally, Judge McDonald argued that the facts of *Tadić I* were significantly different from those considered in *Military and Paramilitary Activities*, such that the effective control standard was not applicable.<sup>266</sup> She stated that *Tadić I* was concerned with Tadić's responsibility as an individual as opposed to the State's responsibility.<sup>267</sup> Additionally, she noted that the VRS and *Republika Srpska* were in fact nationals of the FRY and wished to become a part of the FRY, unlike the contras and the United States, who wished to remain separate.<sup>268</sup> Judge McDonald held that these differences made the standard in *Military and Paramilitary Activities* inapposite.<sup>269</sup>

The Appeals Chamber's opinion in *Tadić II* established the flexible standard for control. In formulating this standard, the Chamber chose to disapprove of the ICJ's decision in *Military and Paramilitary Activities* and Judge McDonald's opinion in *Tadić I*.<sup>270</sup> The Appeals Chamber first concluded that *Military and Paramilitary Activities* provided the standard for agency in both considerations of individual and State responsibility.<sup>271</sup> The court held that the two types of responsibility were governed by the same standard because the preliminary question in analyzing both circumstances is on what

general situation of dependency, did not amount to de facto agency because there was no control on the part of the United States. *See id.* ¶¶ 112-15, at 63-65.

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.

*Id.* ¶ 115, at 64 (emphasis added). Similarly, the Trial Chamber stated that the FRY and the JNA merely had "the potential for control inherent in the relationship of dependency which such financing produced" over the *Republika Srpska* and VRS forces. *Tadić I* (majority opinion), *supra* note 183, ¶ 602. Although there was the potential for control inherent in the relationship between the JNA and the VRS, this potential was not acted upon. Judge McDonald did not address this argument. Therefore, even if this were the correct standard, the facts of this case did not meet it.

264. *Tadić I* (McDonald, J., dissenting), *supra* note 183, ¶¶ 22-25.

265. *Id.* ¶ 25 (McDonald, J., dissenting).

266. *Id.* ¶¶ 26-34 (McDonald, J., dissenting).

267. *Id.* ¶ 27 (McDonald, J., dissenting).

268. *Id.* ¶ 29 (McDonald, J., dissenting).

269. *Id.* ¶¶ 27-29 (McDonald, J., dissenting).

270. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *see Spelliscy, supra* note 133, at 166-68.

271. *Tadić II* (majority opinion), *supra* note 133, ¶¶ 102-05, at 41-42.

“conditions . . . under international law an individual may be held to act as a de facto organ of a State.”<sup>272</sup> The Appeals Chamber, therefore, committed itself to analyzing the decision in *Military and Paramilitary Activities*.<sup>273</sup> The court determined that the standard in *Military and Paramilitary Activities* was effective control,<sup>274</sup> rejecting Judge McDonald’s construction of a dual standard.<sup>275</sup> The Appeals Chamber, however, then determined that the *Military and Paramilitary Activities* standard was unpersuasive, arguing for its removal as the standard for state responsibility.<sup>276</sup>

The Appeals Chamber rejected the effective control standard for two reasons: (1) effective control thwarts the principle underlying the doctrine of state responsibility, which is accountability;<sup>277</sup> and (2) effective control does not conform with existing judicial and State practice.<sup>278</sup> The court found that the effective control standard was too strict in that it allowed a State to escape responsibility in a situation where the State generally controlled an organized group.<sup>279</sup> The Appeals Chamber held that the standard for de facto agency liability should remain a determination of whether the State had control over the individuals; however, the court stated that “[t]he degree of control may . . . vary according to the factual circumstances of each case.”<sup>280</sup> The Appeals Chamber found that the basic notion of accountability and of holding a State responsible for the actions of individuals with whom it conspires was not fostered by the burdensome standard of effective control.<sup>281</sup> The court held that

[i]t can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.<sup>282</sup>

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272. *Id.* ¶ 104, at 41-42 (emphasis omitted).

273. *Id.* ¶¶ 102-05, at 41-42.

274. *Id.* ¶¶ 106-14, at 42-46. Interestingly, the court defines the effective control standard as “the issuance of specific orders or instructions relating to single military actions.” *Id.* ¶ 145, at 62. In defining effective control as also requiring a specific command, the Appeals Chamber lends further support to the conclusion of this Note, that the standard created by the ICJ for effective control and command are intertwined, both being required to attach liability to the State. *See supra* Part II.A; *infra* Part III.A.1.

275. *Tadić II* (majority opinion), *supra* note 133, ¶¶ 106-14, at 42-46.

276. *Id.* ¶ 115, at 47.

277. *Id.* ¶¶ 116-23, at 47-51.

278. *Id.* ¶¶ 124-45, at 51-62.

279. *Id.* ¶¶ 120-22, at 49-50.

280. *Id.* ¶ 117, at 47.

281. *Id.* ¶ 121, at 49-50.

282. *Id.*

The court next addressed the disjunction between judicial and state practice and the effective control test. The Appeals Chamber upheld the effective control standard with respect to individuals and unorganized groups because state and judicial practice supported utilizing the effective control test in those cases.<sup>283</sup> With respect to militarily organized groups of individuals not formally associated with the State, however, the court found that state and judicial practice allowed for a more general situation of control to suffice in attaching liability to the controlling State.<sup>284</sup> The court cited several cases in support of this observation, all of which held the State responsible for the actions of an organized military group without making any findings as to the State's effective control over the group.<sup>285</sup> The Appeals Chamber held that this lack of investigation into the control exerted by the State created a lesser standard of general control that would be sufficient to attach liability to the State for the actions of a hierarchical organization.<sup>286</sup>

The court, in dicta, also noted the existence of a third standard for attaching liability to the State: "This test is the assimilation of individuals to State organs *on account of their actual behaviour within the structure of the State (and regardless of any possible requirement of State instructions)*."<sup>287</sup> The standard holds that where the individual is essentially assimilated into the structure of the organs of the State, the State should be held responsible for the actions of the individual.<sup>288</sup> Having established these three standards, the court moved on to discuss the application of the general control standard to the FRY and the *Republika Srpska*.

The Appeals Chamber found that the Bosnian Serb forces were de facto agents of the FRY because the VRS remained essentially the same branch of the JNS as before its renaming.<sup>289</sup> The court held that

[e]ven if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the [JNA] and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the [JNA] in Belgrade.<sup>290</sup>

Evidence of control by the FRY and the JNA overriding the authority of the leaders of the VRS was unnecessary because of the general

283. *Id.* ¶ 124, at 51.

284. *Id.* ¶ 124, at 51, ¶¶ 130-31, at 55-56.

285. *Id.* ¶¶ 125-29, at 51-55 (citations omitted); *see infra* notes 395-402 and accompanying text.

286. *Id.* ¶ 131, at 56.

287. *Id.* ¶ 141, at 60.

288. *Id.* ¶¶ 142-44, at 60-61.

289. *Id.* ¶ 151, at 63-66.

290. *Id.* ¶ 152, at 66-67.

situation of control between and the shared military objectives of the JNA and VRS.<sup>291</sup>

The standard advocated by the Appeals Chamber in *Tadić II* closely resembles the standard iterated by Judge Brower in *Short*.<sup>292</sup> In his dissent in *Short*, Judge Brower sought to establish a standard for command that would correlate the requisite amount of specificity in the command with the factual circumstances alleged.<sup>293</sup> The more specific the actions alleged, the more specific the command would have to be to attach liability to the State. This standard mirrors the standard established by the Appeals Chamber. The Appeals Chamber held that “[t]he degree of control may . . . vary according to the factual circumstances of each case.”<sup>294</sup> The difference between these two flexible standards is that the Appeals Chamber’s standard varies depending upon the individual or group of individuals concerned, while Judge Brower’s standard depends upon the totality of the circumstances. Nevertheless, both of these standards allow for flexibility in the analysis of command and control to maximize the accountability of states.

### C. Early Arbitral Courts’ Understanding of “Command” and “Control”

A comparison of two early arbitral awards might clarify the distinction between the specificity requirement in *Diplomatic and Consular Staff* and *Military and Paramilitary Activities*,<sup>295</sup> and the notion advanced by Judge Brower and the Appeals Chamber in *Tadić II* that a State can be liable for inciting more general actions.<sup>296</sup> *Donoughho* is an example of a specific action taken by a group of individuals that correspondingly required a more specific command from the official to attach liability to the State.<sup>297</sup> In *Donoughho*, the USMGCC awarded the heirs of Cyrus Donoughho compensation from Mexico for his murder during a raid by a State-organized posse.<sup>298</sup> Donoughho was one of several men employed by an American mining company to oversee its operations in Mexico.<sup>299</sup> One evening, the wife of a local carpenter sought refuge at the mine from her abusive husband.<sup>300</sup> The carpenter was enraged and sought the aid of a local judge, Don José Maria Salazar, in the retrieval of his

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291. *Id.* ¶ 153, at 67.

292. See *supra* notes 231-37 and accompanying text.

293. See *supra* text accompanying notes 235-36.

294. *Tadić II* (majority opinion), *supra* note 133, ¶ 117, at 47 (emphasis omitted).

295. See *supra* text accompanying notes 143-49, 191-203.

296. See *supra* notes 235-37, 276-91 and accompanying text.

297. *Donoughho* (U.S. v. Mex.), 3 Moore’s Arbitrations 3012, 3014 (Claims Comm’n 1864).

298. *Id.* at 3013-14.

299. *Id.* at 3012.

300. *Id.*

wife.<sup>301</sup> Salazar demanded that the fugitive wife, and the woman at the mine who was harboring her, appear before him.<sup>302</sup> In response, the women sent notice that they could not come because of the late hour.<sup>303</sup> Salazar then organized a posse of local men "with a view to their going to the company's house for the purpose of taking [the] wife by force."<sup>304</sup> After a second entreaty for the wife's return failed, Salazar sent his "*posse comitatus* . . . to proceed to the home and take the woman out by force."<sup>305</sup> The posse went to the company's house and a battle ensued wherein Donoughho was killed and two other Americans were wounded.<sup>306</sup>

The Claims Commission found the organization and conduct of the posse to be "most unjustifiable," and held Mexico responsible for Salazar's actions in organizing and directing it.<sup>307</sup> Salazar's actions attached liability to the State because he was an organ of the State,<sup>308</sup> however, the actions of the posse in murdering Donoughho were also attributed to the Mexican State.<sup>309</sup> Because Salazar created the posse and told them what to do and where to go, the posse was deemed to be a *de facto* agent of the State.<sup>310</sup> The command to retrieve the fugitive wife was very specific and thus corresponded to the specific nature of the operation itself.<sup>311</sup> Since the operation undertaken was very specific, Salazar's involvement with the posse also must have satisfied a specific standard to impose liability on Mexico.<sup>312</sup>

A comparison can be made between the standard for liability in *Donoughho* and that in *Jeannotat*.<sup>313</sup> In *Jeannotat*, the USMGCC held Mexico responsible for damage to the complainant's store caused by prisoners released from a local jail by an officer of the Mexican army.<sup>314</sup> General Salgado released the prisoners from the jail and incited them and some other members of the town to loot and plunder the village, during the course of which *Jeannotat's* store was damaged.<sup>315</sup> The Commission found that "without the arrival of the military force . . . there would [not] have been any inclination to

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301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 3013.

306. *Id.*

307. *Id.* at 3013-14.

308. See U.N. Articles, *supra* note 16, art. 4, at 2-3, art. 7, at 3.

309. *Donoughho*, 3 Moore's Arbitrations at 3014.

310. See *id.* at 3013-14.

311. See *id.*

312. *Id.* The Claims Commission expressly stated that "the disastrous consequences of that night were entirely due to the improper conduct of the authorities [Salazar] on the occasion." *Id.* at 3014

313. *Jeannotat* (U.S. v. Mex.), 4 Moore's Arbitrations 3673 (Claims Comm'n 1875).

314. *Id.* at 3673.

315. *Id.* at 3674.



commit such acts of violence.”<sup>316</sup> The command in this case was merely inciting the individuals to commit general acts of violence and destruction. The general nature of the actions, however, meant that the command did not have to be very specific to attach liability to the State as under Judge Brower’s standard in *Short*.<sup>317</sup>

*Jeannotat* closely mirrors the flexible standard iterated in Judge Brower’s opinion in *Short* and the Appeals Chamber’s decision in *Tadić II*.<sup>318</sup> The more general violence in *Jeannotat* attached liability even though the court did not find specific commands.<sup>319</sup> As Judge Brower opined in *Short*, where the act complained of is of a more general nature, a more general command should be enough to attach liability to the State.<sup>320</sup> Furthermore, in accordance with the standard iterated in *Tadić II*, the control exercised by the State in *Jeannotat* was more general, allowing the factual circumstances to be considered before liability was imposed.<sup>321</sup> This more general standard for liability can be compared with the strict standard utilized in *Donoughho*, which mirrors that of the ICJ in *Diplomatic and Consular Staff and Military and Paramilitary Activities*.<sup>322</sup> In *Donoughho*, the USMGCC noted as dispositive the fact that Salazar organized and directed the posse to commit the specific act of retrieving the fugitive wife.<sup>323</sup> The specific nature of the command corresponded to the specific nature of the act, mirroring the specificity requirement expounded in *Diplomatic and Consular Staff*.<sup>324</sup> The posse would also not have acted without Salazar’s direction, which would meet the standard for effective control under *Military and Paramilitary Activities*.

### III. CREATING A STANDARD FROM THIS PRECEDENT

Having explored the myriad of cases, the pieces must now be put together. This part seeks to combine and reconcile the standards found within the Articles on State Responsibility, discussed in Part I, with the notions of command and control espoused by the courts. An examination of these authorities demonstrates the disjunction

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316. *Id.*

317. See *supra* notes 235-37 and accompanying text.

318. See *Jeannotat*, 4 Moore’s Arbitrations at 3674.

319. See *id.*

320. See *supra* notes 235-37 and accompanying text.

321. See *supra* text accompanying notes 280-82, 316. The *Tadić* Appeals Chamber, however, would most likely not have attached liability in *Jeannotat* because the mob was unorganized. The State’s action, therefore, would have had to have met the strict standard of effective control under that opinion. See *supra* notes 275-86 and accompanying text.

322. Compare *Donoughho* (U.S. v. Mex.), 3 Moore’s Arbitrations 3012, 3014 (Gen. Claims Comm’n 1864), with *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, ¶ 59, at 29-30 (May 24).

323. *Donoughho*, 3 Moore’s Arbitrations at 3014.

324. See *supra* text accompanying notes 143-49.

between the standard codified in the Articles on State Responsibility and that contained within the decisions of the ICJ and other judicial bodies. Furthermore, this part outlines possible rationales for this disjunction, looking at trends in the doctrine of state responsibility, and how they might affect the future understanding and implementation of the Articles on State Responsibility.

*A. Combining the Standards Embodied Within Precedent with Those Codified in the Articles on State Responsibility*

Although the Commentary to the Articles on State Responsibility implies that Article 8 was developed in correlation with the decisions of the ICJ and other courts,<sup>325</sup> this implication is not entirely true. A comparison of these standards reveals that the Articles establish a more lenient standard for imposing liability on a State than that developed by the courts.

1. The Discrepancy Between the Articles on State Responsibility and the Courts

The Articles on State Responsibility emphasize in the Commentary to Article 8 that a State's "instructions," "direction," or "control" may attach liability to the State for the actions of individuals.<sup>326</sup> Thus, if a State merely gives instructions to the individual, which she then carries out, the State is liable for her actions.<sup>327</sup> An examination of either direction or control would not be necessary.<sup>328</sup> This standard does not coincide with the judicial precedent.

The decisions of judicial bodies on the subject of state responsibility for the actions of individuals suggest that all three of these factors must exist before liability will be attached to the State.<sup>329</sup> Although the courts have not expressly connected these three factors together, it is clear from the decisions as a whole that all three of these requirements must be met for liability to attach.<sup>330</sup>

In *Military and Paramilitary Activities*, the ICJ carefully avoided saying that the manual disseminated by the United States regarding psychological warfare tactics was a "direction" or "instruction" to

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325. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶¶ 3-5, at 104-07.

326. *Id.* art. 8 cmt. ¶¶ 7-8, at 108-09.

327. *Id.* ¶ 2, at 104.

328. *Id.* ¶¶ 7-8, at 108-09.

329. *Cf.* Alfred L.W. Short v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 76, ¶ 2, at 87 (1987) (Brower, J., dissenting).

330. See, e.g., *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115, at 64-65 (June 27) (finding that even if the United States had planned the whole of the contras' operation, liability for the contras' actions would not attach to the State because the "acts could well be committed by members of the contras without the control of the United States" (emphasis omitted)).

undertake any actions contrary to international humanitarian law.<sup>331</sup> Judge Jennings, in his dissenting opinion, noted this quirk in the language chosen by the court to describe the manual, musing that using a catch word, like “instruction” or “direction,” would attach liability to the State, and that the court, therefore, opted for the non-legal phrase of “encouragement.”<sup>332</sup>

The facts of *Military and Paramilitary Activities*, however, show that the United States both directed and instructed the contras to undertake specific operations.<sup>333</sup> The court found “it clear that a number of military and paramilitary operations by [the contras] were decided and planned, if not actually by United States advisors, then at least in close collaboration with them.”<sup>334</sup> Additionally, the manual given to the contra forces by the CIA contained extremely specific instructions:

If possible, professional criminals will be hired to carry out specific selective “jobs.”

....

Specific tasks will be assigned to others, in order to create a “martyr” for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons, who would become the martyrs, a situation that should be made use of immediately against the régime, in order to create greater conflicts.<sup>335</sup>

Such statements appear to meet Article 8’s standard.<sup>336</sup> The Commentary expressly states that liability should attach to a State for the actions of individuals “who, though not specifically commissioned by the State and not forming part of its police or armed forces, . . . are instructed to carry out particular missions abroad.”<sup>337</sup> Although the ICJ did not use the terms “instruction” or “direction,” the United States did give instructions and directions to the contras under the Article 8 standard.<sup>338</sup> The ICJ’s failure to attach liability to the United

331. *Id.* ¶¶ 121-22, at 68-69, ¶ 255, at 129-30, ¶ 292, No. 9, at 148.

332. *Id.* at 538 (Jennings, J., dissenting). Judge Jennings stated that “the dissemination of this manual does not, in international law, make unlawful acts of the contras into acts imputable to the United States. This is presumably why the Court’s rebuke is in the non-technical terms of ‘encouragement’ of unlawful acts.” *Id.* (emphasis omitted).

333. *Id.* ¶ 101, at 59-60.

334. *Id.* ¶ 106, at 61.

335. *Id.* ¶ 118, at 66 (quoting from the report provided by the CIA to the Nicaraguan contra forces entitled “Psychological Operations,” a section entitled “Control of mass concentrations and meetings”).

336. U.N. Articles, *supra* note 16, art. 8, at 3.

337. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 2, at 104.

338. See *supra* notes 331-35 and accompanying text.

States given these specific commands suggests that the court required additional evidence of an agency relationship, beyond instruction or direction, to attach liability.<sup>339</sup>

The dispositive factor for the ICJ in this case was the lack of control the United States exerted over the contras.<sup>340</sup> The fact that the contras were in existence before the United States' involvement and continued to fight against the Sandinista government after the United States ceased to aid them showed that the United States did not control the contras in the manner required to attach liability.<sup>341</sup> The actions of the contras had to be on behalf of the United States and solely because of the United States' instruction and involvement in order for the United States to be liable.<sup>342</sup> Even given the clarity of instruction and depth of the involvement of the United States in the operations of the contras, the court refused to find the United States responsible for the contras' actions because it did not control them in this manner.<sup>343</sup> The ICJ held that the contras would have committed the alleged acts of violence with or without the United States' commands; hence the contras were not controlled by the United States.<sup>344</sup> Therefore, the precedent does not support the contention in the Commentary to Article 8 that a finding of either instruction or

339. The Articles on State Responsibility were still in their draft form at the time of the *Military and Paramilitary Activities* decision. See *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 18 n.1, at 189 (Sep. Op. Ago, J.). The ICJ, therefore, was dealing with a different standard for attaching liability under Article 8 than that contained in the Adopted Articles. See *supra* Part I.B. Discussing this decision in relation to the Adopted Articles is legitimate, however, because the standard under Draft Article 8 is comparable to the one adopted in the present Article 8. The Commentary to Draft Article 8 states that, where "the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, . . . they performed a given task at the instigation of those organs." 1974 Yearbook, *supra* note 62, at 285. This is substantially similar to paragraph 2 of the adopted Commentary accompanying Article 8. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 2, at 104. Furthermore, the ICJ never quoted the Articles on State Responsibility in coming to its decision, thus the decision can be viewed independently of the Draft Articles' standard. Only Judge Ago mentioned the Draft Articles, although perhaps that is because he wrote the Draft Articles. See Rosenne, *supra* note 58, at 25-30.

340. See *supra* text accompanying notes 191-203.

341. *Military and Paramilitary Activities*, 1986 I.C.J. ¶ 108, at 61-62. The court stated the following:

[i]t seems certain that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the [United States] took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis [Nicaragua].

*Id.*; see also *supra* text accompanying notes 194-201.

342. See *Military and Paramilitary Activities*, 1986 I.C.J. ¶¶ 114-15, at 64-65.

343. *Id.* ¶ 115, at 64-65.

344. *Id.*

control attaches liability.<sup>345</sup> On the contrary, it appears from this decision that both must exist to find liability.

## 2. Analysis of the Standard Created by Article 8

The question that remains is whether Article 8 does, in fact, advocate for liability when there is no control. The Commentary clearly states that the factors of command and control can each individually attach liability. The way the Commentary defines these terms through examples, however, suggests otherwise. In fact, the Commentary suggests, through the way it uses and defines the terms "instructions" and "directions," that these terms already contain some aspect of control.<sup>346</sup> It is disingenuous, therefore, to say that any of these factors alone will attach liability, as each term already contains the other two.

The first term defined in the Commentary is "instructions."<sup>347</sup> The Commentary defines this term as "conduct in fact authorized" by the State.<sup>348</sup> The case examples given to support this definition are *Zafiro*,<sup>349</sup> *Stephens*,<sup>350</sup> and the *Lehigh Valley Railroad*<sup>351</sup> cases. In *Zafiro*, the court held the United States responsible for not stopping the crew of a private merchant ship from raiding a village while it was docked there.<sup>352</sup> The ship's officers stood by and let the crew run wild.<sup>353</sup> This act was attributable to the United States because the vessel was under the direct command of the Navy and was being used as a naval supply ship.<sup>354</sup> The "instructions" in *Zafiro* were more than simple statements; the relationship between the United States and the individuals evinced the elements of effective control described in *Military and Paramilitary Activities*.<sup>355</sup> The crew of the *Zafiro* would not have been in that port if the United States had not commanded it to be there.<sup>356</sup> As a result, the ship's directions to go to the port already inherently contained the notion of control that the United States had over the vessel.

345. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 7, at 108.

346. See *id.* art. 8 cmt. ¶¶ 2-3, at 104.

347. See *id.* art. 8 cmt. ¶ 2, at 104.

348. *Id.*

349. (*Gr. Brit. v. U.S.*), 6 R.I.A.A. 160 (Arbitral Trib. 1925); see *supra* note 78 and accompanying text.

350. (*U.S. v. Mex.*), 4 R.I.A.A. 265 (Gen. Claims Comm'n 1927); see *supra* note 78 and accompanying text.

351. (*U.S. v. F.R.G.*), 8 R.I.A.A. 225 (Mixed Claims Comm'n 1939); (*U.S. v. F.R.G.*), 8 R.I.A.A. 104 (Mixed Claims Comm'n 1932); (*U.S. v. F.R.G.*), 8 R.I.A.A. 84 (Mixed Claims Comm'n 1930); see *supra* text accompanying notes 152-64.

352. *Zafiro*, 6 R.I.A.A. at 161, 164-65.

353. *Id.* at 161, 164.

354. See *id.* at 161.

355. See *supra* text accompanying notes 194-203.

356. See *Zafiro*, 6 R.I.A.A. at 164.

*Stephens* involved auxiliaries of the Mexican army who had shot an American citizen.<sup>357</sup> The USMGCC held Mexico responsible for the actions of the auxiliaries because, even though the auxiliaries were not a part of the formal structure of the State, they were acting on behalf of Mexico.<sup>358</sup> Again, this example inherently contains the notion of control espoused in *Military and Paramilitary Activities*. The auxiliaries would not have been standing at that post were it not for the declaration of the Mexican government ordering them to be there.<sup>359</sup> The important analysis in the case was not the specificity of the instructions given by the Mexican government, but rather the control the government had over these auxiliaries.<sup>360</sup>

The *Lehigh Valley Railroad* cases concerned the same assignment of control. In these cases, there was significant analysis of what the German authorities actually communicated to the individuals carrying out the sabotage missions in America. The case, however, turned on whether Germany controlled these individuals or whether they simply committed the acts of sabotage on their own.<sup>361</sup> The examination of the statements was a precursor to determining whether the individuals were controlled by Germany in the sense that they would not have committed the acts of sabotage but for the German government's instructions.<sup>362</sup>

These case examples all demonstrate that even though the Commentary says that it is only describing "instructions" from the State, this is actually a misleading statement. In all of these examples, although there was analysis of instruction, that analysis was focused on the level of control evinced by those instructions and the totality of circumstances. Therefore, the Commentary's definition of "instruction" already contains an element of control.

The analysis undertaken in the case examples is similar to the reasoning behind the decision in *Diplomatic and Consular Staff*. In that case, the ICJ's analysis also focused on the instructions given by the Ayatollah Khomeini;<sup>363</sup> however, as Judge Ago noted in his Separate Opinion in *Military and Paramilitary Activities*,<sup>364</sup> the rationale in *Diplomatic and Consular Staff* is consistent with the standard of effective control. Therefore, the failure of the instruction

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357. *Stephens* (U.S. v. Mex.), 4 R.I.A.A. 265, ¶¶ 4-6, at 266-67 (Gen. Claims Comm'n 1927).

358. *Id.*

359. *See id.*

360. *See id.*

361. *See* *Lehigh Valley R.R. II* (U.S. v. F.R.G.), 8 R.I.A.A. 225 (Mixed Claims Comm'n 1939); *Lehigh Valley R.R. (Rehearing Grant)* (U.S. v. F.R.G.), 8 R.I.A.A. 104 (Mixed Claims Comm'n 1932); *Lehigh Valley R.R. I* (U.S. v. F.R.G.), 8 R.I.A.A. 84 (Mixed Claims Comm'n 1930).

362. *See* Woolsey, *supra* note 153, at 738-40.

363. *See supra* text accompanying notes 139-45.

364. (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 18, at 190 (June 27) (Sep. Op. Ago, J.).

from the Ayatollah to attach liability to Iran for the students' actions was because of both the lack of specificity of the statement itself, as well as the lack of control Iran had over the students' actions.<sup>365</sup>

The effective control standard in *Military and Paramilitary Activities* was formulated as a command and control standard in the Trial Chamber's opinion in *Tadić*.<sup>366</sup> This formulation supports Judge Ago's statement that the standards in *Diplomatic and Consular Staff* and *Military and Paramilitary Activities* were meant to be complementary.<sup>367</sup> Even the Appeals Chamber considered there to be a significant aspect of command inherent in the notion of effective control.<sup>368</sup> The ILC's construction of the term "instructions," in following with precedent, thus contains the standard of control within it. To state, therefore, that a finding of either of these two factors, as opposed to both, is sufficient to attach liability to the State is disingenuous, as "instruction" has been defined so as to already contain aspects of control.

The Commentary also undertakes an analysis of the meaning of the term "direction," but does not provide a definition.<sup>369</sup> The term is simply used in conjunction with the analysis of control: "Such conduct will be attributable to the State only if it directed or controlled the specific operation . . ." <sup>370</sup> The Commentary then goes on to discuss the meaning of "control" without giving "direction" a substantive definition of its own.<sup>371</sup> It is, therefore, reasonable to assume that the analysis demanded to find "direction" is, in essence, the same as was necessary under "instruction".<sup>372</sup> for a State to be liable because of directions given, there must be some evidence of control.

The final term, "control," is defined in the Commentary as the standard espoused by the ICJ in *Military and Paramilitary Activities*.<sup>373</sup> Therefore, control under Article 8 is effective control.<sup>374</sup> The ILC refers to three other cases in a footnote to elaborate on its definition of control.<sup>375</sup> All three of these cases, however, fail to support the standard under Article 8.

The first case mentioned in the footnote is *Kenneth P. Yeager v. Iran*.<sup>376</sup> *Yeager* dealt with whether Iran was responsible for the actions

365. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 59, at 29-30 (May 24); see *supra* notes 139-45, 201-14 and accompanying text.

366. *Tadić I* (majority opinion), *supra* note 183, ¶¶ 598-606.

367. See *supra* note 205 and accompanying text.

368. See *supra* note 274 and accompanying text.

369. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 3, at 104.

370. *Id.*

371. See *id.* art. 8 cmt. ¶ 3, at 104-05.

372. See *supra* notes 346-68 and accompanying text.

373. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 4, at 105-06.

374. See *supra* text accompanying notes 191-203.

375. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5 n.169, at 107.

376. 17 Iran-U.S. Cl. Trib. Rep. 92 (1987); see *supra* note 225 and accompanying

of certain "Revolutionary Guards" who forcibly expelled Kenneth Yeager from Iran.<sup>377</sup> The court admits that, in the case, it is not considering any issue of de facto responsibility resulting from the statements of the Ayatollah.<sup>378</sup> Instead, the grounds the court found for attaching liability to Iran relied primarily on Draft Article 8(b),<sup>379</sup> a provision that attached liability to the State for the actions of individuals in fact acting with governmental authority in the absence of official governmental authority.<sup>380</sup> This provision is no longer a part of Article 8, having been adopted in the Articles as Article 9.<sup>381</sup> Therefore the standard in *Yeager* certainly would not illuminate the standard for control under Article 8.

The footnote also cites *Starrett Housing Corp. v. Iran*,<sup>382</sup> however, this case also fails to give insight into the meaning of control. The ILC cites to the court's unilateral statement that Iran is responsible for Starrett's damages,<sup>383</sup> but there is no explanation given for the court's finding on this matter.<sup>384</sup> Moreover, the issue in this case regards the Iranian government acting through its organs and appointees, not individuals acting as de facto agents.<sup>385</sup> Therefore, any analysis would most likely not offer meaningful insight into the standard for control established under Article 8.

The footnote additionally references *Loizidou v. Turkey*, a case before the European Court of Human Rights.<sup>386</sup> This case, however, is also inapposite on the issue of responsibility for de facto agents under Article 8 because *Loizidou* concerns Turkey's responsibility for the actions of its own military forces.<sup>387</sup> The court found that Turkey controlled the Turkish Republic of Northern Cyprus ("TRNC") for

text.

377. *Yeager*, 17 Iran-U.S. Cl. Trib. Rep. ¶ 35, at 101.

378. *Id.* ¶¶ 35-36, at 101.

379. *Id.* ¶ 42, at 103. Although the court does mention the "on behalf of the government" standard contained in Draft Article 8(a), the analysis of control focused on the fact that the guards were acting as organs of the government where no other governmental organs existed. *See id.* ¶¶ 39-40, at 102-03, ¶¶ 43-45, at 104-05. The court found that "[u]nder international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by [the Revolutionary Guards] and at the same time deny responsibility for wrongful acts committed by them." *Id.* ¶ 45, at 105.

380. 1974 Yearbook, *supra* note 62, art. 8(b), at 283.

381. *See* U.N. Articles, *supra* note 16, art. 9, at 3; *see also* U.N. Articles Commentary, *supra* note 57, art. 9 cmt. ¶ 2, at 109-10 (discussing *Yeager's* standard regarding liability under Article 9).

382. 4 Iran-U.S. Cl. Trib. Rep. 122 (1983); *see* U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5 n.169, at 107.

383. *See* U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5 n.169, at 107 (citing *Starrett*, 4 Iran-U.S. Cl. Trib. Rep. at 143).

384. *See Starrett*, 4 Iran-U.S. Cl. Trib. Rep. at 143.

385. *See id.* at 154-56.

386. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216; *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 7 (1995).

387. *See Loizidou (preliminary objections)*, 310 Eur. Ct. H.R. (ser. A) ¶¶ 62-63, at 23-24.



three reasons.<sup>388</sup> First, there was an immense Turkish military presence in the region that secured the entire border of the TRNC.<sup>389</sup> Second, this military controlled all lines of communication and transportation.<sup>390</sup> Third, all citizens in the TRNC were subject to Turkish military courts.<sup>391</sup> The standards iterated by the court for the basis of its decision all focus on the acts or omissions of the Turkish military, an organ of Turkey, and its effective control of the TRNC.<sup>392</sup> *Loizidou*, therefore, sheds little light on the issue of a State's responsibility for the actions of de facto agents.

The failure of these cases to address the issue of effective control with respect to de facto agents leaves only the standard found in *Military and Paramilitary Activities* as the guidepost for courts in interpreting Article 8. Courts, therefore, must establish aspects of specific command and effective control before attaching liability to the State for the actions of its de facto agents.

### 3. Article 8 Precludes the Use of the Flexible Standard

The Commentary includes a discussion of the legitimacy of the flexible standard set forth by the Appeals Chamber in *Tadić*.<sup>393</sup> The ILC states that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it."<sup>394</sup> The Commentary cites examples of cases where courts made some determination about the level of control that was necessary to attach liability to the State.<sup>395</sup> None of these cases

388. *Loizidou*, 1996-VI Eur. Ct. H.R. 2216, ¶¶ 16-17, at 2223, ¶ 56, at 2235-36.

389. *Id.* ¶ 56, at 2235-36.

390. *Id.* ¶ 16, at 2223.

391. *Id.* ¶ 17, at 2223; see also Press Release, Registrar of the European Court of Human Rights, Judgement in the Case of *Loizidou v. Turkey* (Dec. 18, 1996), available at <http://www.hr-action.org/chr/loizidou.htm> (last visited Mar. 24, 2002).

392. *Loizidou*, 1996-VI Eur. Ct. H.R. ¶ 52, at 2234-35. Though the words "effective control" appear in the decision, the analysis of liability focused on the immense presence and actual control exercised by the Turkish military in the TRNC. *Id.* ¶¶ 16-17, at 2223, ¶ 56, at 2235-36. The court also notes the international rejection of the TRNC as a State, emphasizing the fact that the TRNC was merely a puppet regime established by the Turkish Government. See *id.* ¶¶ 19-23, at 2223-25, ¶ 50, at 2233.

393. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5, at 106-07; see *Tadić II* (majority opinion), *supra* note 133, ¶ 117, at 47-48, ¶ 137, at 58-59. Although the Appeals Chamber in *Tadić II* rejected the ICJ's standard of effective control, the ILC makes the point of rejecting the ICTY's disapproval of the standard from *Military and Paramilitary Activities*. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5, at 106-07. The Commentary states that the Appeals Chamber did not need to "disapprove" of the ICJ's decision because the Appeals Chamber was dealing with the issue of individual responsibility, while the ICJ was concerned with state responsibility. *Id.*

394. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5, at 107.

395. See *id.* ¶ 5 n.169, at 107.

advocate for the use of a flexible standard; however, two of these cases were used by the Appeals Chamber to support its creation of the flexible standard.<sup>396</sup> The Appeals Chamber's use of these cases as support for its theory, therefore, is questionable.

The Appeals Chamber cites to *Stephens*, *Yeager*, and *Loizidou* as grounds for establishing the looser standard for control with respect to organized groups of individuals.<sup>397</sup> These cases, however, do not support the creation of a new standard for control under Article 8. *Stephens* discusses liability under Article 9, considering Mexico's responsibility for de facto governments and military organizations that sprung up in regions where the official government was non-existent.<sup>398</sup> The unofficial groups were authorized under an act of the State to perform these governmental functions.<sup>399</sup> Therefore, this case does not advocate a different standard for control under Article 8, but rather lays out liability under Article 9 for unofficial governmental organizations acting where there is a lack of official government bodies.<sup>400</sup> *Yeager* also establishes liability under the Article 9 standard.<sup>401</sup> *Loizidou* does not even consider liability for de facto agents, but merely construes the immense presence the Turkish military, in Cyprus and the illusory nature of the TRNC government, as establishing Turkey's control over Northern Cyprus.<sup>402</sup> These cases do not support the Appeals Chamber's decision to overturn the standard in *Military and Paramilitary Activities*; rather, they support standards under alternative Articles in the Articles on State Responsibility.

In addition to the lack of support in the precedent for the flexible standard, the standard created by the Appeals Chamber is illogical and unworkable. The Appeals Chamber's standard creates tiers of liability based on the composition of a group. If the group is unorganized, then the State must have effective control over it to attach liability to the State. If the group is hierarchically organized, then a finding of general control is sufficient. What this means, however, is that if a State was funding, arming, planning the operations of, and encouraging the actions of an unorganized group, the State could not be held responsible for the group's actions.

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396. See Tadić II (majority opinion), *supra* note 133, ¶¶ 125-26, at 51-52, ¶ 128, at 54.

397. See *id.*

398. See U.N. Articles, *supra* note 16, art. 9, at 3; see also *supra* notes 78, 357-60 and accompanying text.

399. See *Stephens* (U.S. v. Mex.), 4 R.I.A.A. 265, ¶¶ 4-6, at 266-67 (Gen. Claims Comm'n 1927).

400. See U.N. Articles, *supra* note 16, art. 9, at 3.

401. See *Kenneth P. Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, ¶ 43, at 104 (1987); see *supra* notes 376-81 and accompanying text.

402. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) ¶¶ 62-63, at 23-24 (1995); see *supra* notes 386-92 and accompanying text.

However, if the group then suddenly decided to organize itself and to create a hierarchy, those same actions of the State *would* attach liability to it. The State's actions have not changed, but in one circumstance liability would attach, and in the other it would not. This standard does not increase accountability, as the Appeals Chamber claims. Rather, it would merely encourage a State to suppress any evidence of the group's organization, or simply to work with disorganized mobs or single individuals to escape liability for the acts of the group. Therefore, the Appeals Chamber's standard is an illogical ground for holding a State responsible, as it does not focus on the State's activity to determine liability, but rather the structure of the independent group.

Moreover, the Appeals Chamber's veritable reversal of *Military and Paramilitary Activities* was unnecessary given the factual circumstances of each case. The facts that the Appeals Chamber cited in support of the conclusion that the VRS were de facto agents of the JNA are the exact same facts that Judge McDonald cited to establish that the JNA and VRS met the standard for effective control.<sup>403</sup> With respect to command, the Appeals Chamber concentrated on the lack of specific instructions from the JNA in connection with the specific acts of the VRS; however, Judge McDonald indicated that there was some evidence of specific commands coming from the FRY.<sup>404</sup> With respect to control, the factual situation in Yugoslavia, where the separation of the JNA and VRS was little more than a change of names, was significantly different from the situation in Nicaragua, where the contras existed and were actively fighting against Nicaragua prior to and after the United States' involvement. The JNA had effective control over the VRS because they were the same entity. Although the VRS had a separate name, it was merely a renamed branch of the JNA sloughed off to appease the United Nations. All of the VRS's directives came from the JNA or had been planned by the JNA while the VRS was still a part of it. On the basis of these factual differences, distinguishing *Tadić* from *Military and Paramilitary Activities* would have been the reasonable alternative, as opposed to attempting to overrule the effective control standard.

Furthermore, the ILC does not agree with the Appeals Chamber that the standard of control varies in each case.<sup>405</sup> Although the ILC admits that whether conduct is carried out under the control of the State is a determination that will be fact intensive, the standard for control that must be met in each case remains constant.<sup>406</sup> The ILC defines control as effective control, and agrees with the ICJ in *Military and Paramilitary Activities* that "a general situation of dependence

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403. See *supra* text accompanying notes 261-62.

404. See *Tadić I* (McDonald, J., dissenting), *supra* note 183, ¶¶ 8-10.

405. See U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 5, at 106-07.

406. *Id.* art. 8 cmt. ¶¶ 4-5, at 105-07.

and support would be insufficient to justify attribution of the conduct to the State.<sup>407</sup> The ILC, therefore, rejects the flexible standard for control stated in the *Tadić* opinion of the Appeals Chamber.

The ILC must also reject the standard set by Judge Brower in *Short*.<sup>408</sup> Judge Brower sought to attribute activity to Iran under a flexible standard, like that of the Appeals Chamber,<sup>409</sup> only with respect to the specificity of the command required for liability, as opposed to the degree of control necessary.<sup>410</sup> Although the Commentary does not specifically address Judge Brower's standard, because the Commentary rejects the flexible standard in *Tadić II*, and because these standards are so similar, the ILC must also reject the standard advocated in Judge Brower's dissent in *Short*.

The rejection of this standard is supported by the legal principles underlying the law of state responsibility.<sup>411</sup> The exception to the general rule that a State is not responsible for the acts of private individuals is meant to be a narrow one.<sup>412</sup> The flexible standard, however, allows a State to be held liable for a much wider variety of private activity. Additionally, a flexible formulation for liability would lead to confusion and inconsistency in the law.<sup>413</sup> States would have no notice of the actions for which they could be held responsible until the events happened, assuming, as the flexible standard does, that the standard changes with the circumstances. Courts would have no hard standard to guide them in trying to sort out what activities constitute a violation attributable to the State. Therefore, any flexible

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407. *Id.* art. 8 cmt. ¶ 4, at 105-06.

408. See *supra* notes 235-37 and accompanying text.

409. The Appeals Chamber, however, does not seem to support Judge Brower's standard. The Chamber cites the majority's opinion favorably as supporting a strict standard for individual liability. See *Tadić II* (majority opinion), *supra* note 133, ¶ 135, at 58. This suggests that the flexible standard in *Tadić II* is not so flexible, merely providing gradations in the standard for control, as opposed to a free reign approach, as Judge Brower supported.

410. See *supra* notes 235-37, 292-94 and accompanying text.

411. See *supra* notes 19-36 and accompanying text.

412. See, e.g., *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 16, at 188-89 (June 27) (Sep. Op. Ago, J.) (noting that only in rare instances "does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of the State, nor members of its apparatus even in the broadest acceptance of that term, may be held to be acts of that State"); Cheng, *supra* note 33, at 208-10; Oppenheim, *supra* note 25, at 549 (stating that the State's "responsibility for acts of private persons is limited"). Cheng notes that "acts of private individuals are not acts of the State . . . . In international law, States are not held responsible for acts committed by them." Cheng, *supra* note 33, at 208.

413. See H. Lauterpacht, *Codification and Development of International Law*, 49 *Am. J. Int'l L.* 16, 19-23 (1955). Discussing the evils of uncertainty in international law, Lauterpacht states that "[a]s a result [of a lack of codification], the uncertainties, gaps, and obscurities of the law are not merely perpetuated. They feed and grow on their own evil inasmuch as they are kept alive and magnified by the conflicting and extreme assertions of the parties to disputes." *Id.* at 20; see also Spelliscy, *supra* note 133, at 145, 152-57.

formulation that varies culpability with the factual circumstances is not a valid method for establishing liability under the Articles on State Responsibility.

The standard for when a State will be held responsible for an individual's actions in conformity with a statement from a head of State in light of the case law and Commentary to the Articles is simple: there must be some aspects of both command and control present to attach liability to the State. The command must refer specifically to the activity in question, and must specify the means and methods to be utilized in the operation.<sup>414</sup> The control must be such that the individual would not have undertaken the action without the involvement of the State.<sup>415</sup>

### B. *The Future of State Responsibility*

The Articles on State Responsibility are clearly at odds with the relevant precedent; therefore, there are two options for the future. One option is for the ILC to bring the Articles into conformity with the precedent by providing that elements of both command and control must be evident before liability can be attached to the State. Alternatively, the Articles on State Responsibility can be viewed by courts as changing the precedent and expanding on the concept of state responsibility for the actions of individuals.

The latter option is not very plausible. The Commentary itself seems to emphasize that elements of both command and control are required to find liability.<sup>416</sup> Furthermore, the Commentary emphasizes the narrow nature of the Article 8 exception to the general rule that the conduct of private individuals "is not attributable to the State."<sup>417</sup>

However, changes in the Articles on State Responsibility from their original draft form to their form as adopted suggest that perhaps the ILC sought to allow for greater state responsibility under the Articles as adopted.<sup>418</sup> Additionally, there is greater interest internationally in holding States responsible for their conduct with respect to private individuals, as evinced by recent General Assembly resolutions regarding terrorism.<sup>419</sup>

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414. See *supra* text accompanying notes 143-49.

415. See *supra* notes 191-203 and accompanying text.

416. See *supra* Part III.A.2.

417. U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 1, at 103.

418. See *supra* text accompanying notes 42-51 (discussing how the ILC is charged with development, as well as the codification of international law).

419. See G.A. Res. 1, U.N. GAOR, 56th Sess., 1st plen. mtg. ¶ 4, U.N. Doc. A/RES/56/1 (2001); G.A. Res. 110, U.N. GAOR, 54th Sess., 76th plen. mtg., U.N. Doc. A/RES/54/110 (2000); *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 60, U.N. GAOR, 49th Sess., 84th plen. mtg., Annex II ¶ 5(a), U.N. Doc. A/RES/49/60 (1994).

The ball is now in the ILC's court to take some action with respect to the Articles on State Responsibility. If the standard is to remain that of command and effective control, the ILC must revise the Commentary to Article 8 to reflect that standard.<sup>420</sup> If the ILC meant to expand on the standard of liability under the precedent,<sup>421</sup> the Commission must do more than simply change some language. The ILC must thoroughly explain the standard it is establishing and update the case references that the Commentary makes in support of the standard. As the cases currently cited in the Commentary emphasize the requirement of both command and control, if these factors are to be disjunctive, the precedent must either be ignored or explained in more than a footnote.

The Articles in their present state, however, support the conclusion that the ILC did not intend to expand upon the liability set forth in the precedent. Therefore, any analysis of a State's responsibility for an individual's actions in conformity with a statement from a head of state must entail both an analysis of command and control. The next part utilizes this standard to answer the query originally put forth: whether the United States would be liable for the actions of an individual who acts in conformity with President Bush's demand for Osama bin Laden, dead or alive.

#### IV. THE RESPONSIBILITY OF THE UNITED STATES FOR THE ACTIONS OF INDIVIDUALS IN CONFORMITY WITH PRESIDENT BUSH'S STATEMENT THAT HE WANTS OSAMA BIN LADEN, DEAD OR ALIVE

Assume that the individual mentioned in the Introduction actually did murder an entire village in response to President Bush's statement that he wanted Osama bin Laden, dead or alive.<sup>422</sup> Applying the standard set out in Part III, should the United States be held responsible for his actions? The specificity of President Bush's statement as a command must be considered in light of the control the United States exercised over this individual.

President Bush's statement could attach liability to the United States for several reasons. First, the actions of the individual would be a violation of international law, which is the first factor required to analyze whether the State can be held responsible under the Articles on State Responsibility.<sup>423</sup> Second, President Bush's statement is

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420. The paragraph of the Commentary that must be revised is paragraph 7 of the Commentary to Article 8, which states that "the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them." U.N. Articles Commentary, *supra* note 57, art. 8 cmt. ¶ 7, at 108.

421. As the ILC is charged to both develop and codify international law, it is perfectly legitimate for the Articles on State Responsibility to disagree with and expand upon the precedent from the courts. *See supra* Part I.B.

422. *See supra* text accompanying notes 10-14.

423. *See supra* notes 54-55 and accompanying text.

specific as to a target—Osama bin Laden. This is certainly more specific than the Ayatollah's general statement that the students should "expand with all their might their attacks against the United States and Israel."<sup>424</sup> Third, the United States has promoted taking measures to find and secure bin Laden's presence by establishing a substantial reward for his capture and advertising that reward via multiple media, including dropping pamphlets over Afghanistan.<sup>425</sup>

Under the standard of command and effective control, however, President Bush's statement should not attach liability to the United States. Following the principles established in *Diplomatic and Consular Staff*, to attach liability, President Bush's statement would have had to contain specific instructions regarding the means and methods to be used in capturing Osama bin Laden.<sup>426</sup> The statement itself was general; it failed to give explicit instructions regarding the means to be used or other actions to be taken by an individual. In addition, the administration pulled away from Bush's initial, rather heavy-handed "dead or alive" statement, endorsing only information as to bin Laden's whereabouts and expressly stating that the reward is not for bounty hunters.<sup>427</sup> This retraction of the original "dead or alive" mandate is what is now on the web page advertising the reward money,<sup>428</sup> and, therefore, the administration has taken as many steps as possible to quell whatever incitement was contained in Bush's original off-the-cuff response.

Furthermore, there is no evidence that the United States controls individuals acting in conformity with the statement. Unlike the situation in *Military and Paramilitary Activities*,<sup>429</sup> the United States has not sent troops to Afghanistan to train civilians in guerilla tactics to be used in capturing bin Laden, nor has any money or equipment been approved for use by individuals looking specifically for bin Laden. Most importantly, Bush's command itself was not specific enough so that it alone would tend to show control. In *Military and Paramilitary Activities*, it was held that mere statements regarding tactics in general were not enough to attach liability.<sup>430</sup> To attach liability, it would have to be shown that the individual in question would not be using such threats and tactics in his search for bin Laden without Bush's statement.<sup>431</sup> Considering the general nature of Bush's

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424. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 59, at 29-30 (May 24).

425. See *supra* text accompanying notes 8-11.

426. See *supra* text accompanying notes 143-49.

427. *Reward for Bin Laden's Arrest*, *supra* note 7.

428. U.S. Fed. Bureau of Investigation, *Most Wanted Terrorists: Usama Bin Laden*, at <http://www.fbi.gov/mostwanted/terrorists/terubl.htm> (last visited Mar. 24, 2002).

429. (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

430. See *supra* notes 331-45 and accompanying text.

431. See *supra* notes 191-203 and accompanying text.

statement and a lack of other circumstances evincing control, attaching liability under this standard is unlikely.

Therefore, the United States has little to worry about in terms of being held responsible for President Bush's statement expressing a desire for bin Laden's capture, dead or alive. Although any actions similar to those threatened by the individual quoted in the Introduction would be tragic, a State would be hard pressed to hold the United States responsible for those actions. Recourse would only be available against the individual for his actions.

### CONCLUSION

The Articles on State Responsibility codify the body of international law concerned with those actions for which a State can be held responsible. This Note expands on one of the many topics covered by the Articles, that of a State's responsibility for a private person who acts on behalf of the State in accordance with a statement from that State.

A careful examination of the case law reveals that there are two standards under which a State can be held liable for a statement: strict command and control, and a flexible standard. The Articles on State Responsibility reject the flexible standard, following the precedent that a State's responsibility for the actions of individuals must be narrowly tailored. The Articles adopt the first standard, providing for a State's responsibility where the State commands or controls the individual. The ILC's disjunctive standard, however, does not follow the precedent, which required both aspects of command and control to attach liability to the State. Furthermore, the Commentary to Article 8 does not support the disjunctive standard that it advocates.

To resolve this discrepancy, the ILC will either have to amend Article 8 to require both command and control to attach liability or rewrite the Commentary to explain and clarify this development of the law. Until the ILC takes such measures, courts should look to the strict standard set in cases like *Military and Paramilitary Activities*, which requires both command and control before attaching liability to the State for the actions of individuals in accordance with a statement from a head of state.