CHAPTER 10

State Responsibility for Wrongful Conduct

10.1 For Whose Conduct does the State Bear Responsibility?

The identification of State actors for the purposes of State responsibility are well developed in articles four to ten of the ILC Articles on State Responsibility, widely accepted as constituting customary international law.\(^1\) It is by now well established that States do not bear general responsibility for every individual entity under their jurisdiction but only for the conduct of limited types of entities. Indeed, this principle can be traced through centuries of legal thought.\(^2\) The entities for which States bear responsibility are:

- organs of the State, almost always defined as such under municipal law and only otherwise in ‘exceptional circumstances’ based on a test of complete dependence\(^3\);
- non-State entities exercising elements of governmental authority\(^4\);
- organs of one State at the disposal of (the organ of) another State\(^5\);
- agents of the State: persons or entities acting on the instructions of or under the effective control of a State organ\(^6\);

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3. ILC Articles on State Responsibility (n 1) article 4; see Genocide Convention case (n 1) para 393.
4. ILC Articles on State Responsibility (n 1) article 5; for example, private security firms operating in the police or prison services; airlines in the context of immigration; see ibid commentary to article 5, para 2.
5. Ibid article 6; for example, military troops placed under the immediate command of another State; but beyond ‘mere aid or assistance’; see ibid commentary to article 6, para 3.
6. Ibid article 8 (and only to the extent that the conduct complained of was integral to the operation and either part of the State’s instructions or under the State’s effective control. This must be contrasted with the actions of organs, for which the State bears responsibility.
• entities or persons exercising elements of governmental authority in a state of emergency when there is no State organ able to act;  
• insurrectional movements which later become the government of the State.

In addition, a State can bear responsibility if its government ‘acknowledges and adopts’ conduct of non-State actors as its own. This was the basis of Iranian responsibility following the hostage crisis in Tehran but parallels in environmental catastrophes are improbable.

This list is exhaustive; in the absence of a treaty (lex specialis) there are no other scenarios in which a State will bear responsibility itself for the activities of a non-State entity:

Whatever the range of State obligations in international law, the ways of identifying the State for the purposes of determining breach appear to be common…Rarely (and never, as far as I am aware, by implication) is the State taken to have guaranteed the conduct of its nationals or of other persons on its territory, even when it has entered into obligations in completely general terms. The rules of attribution are thus an implicit basis of all international obligations so far as the State is concerned.

In respect of hydrocarbon exploration and exploitation in the Arctic, it is difficult to envisage circumstances where the State so defined would directly engage in activities that would damage or threaten to damage the international environment. State ownership of a corporation which is run on an economic basis is not sufficient to consider that corporation an organ or agent for the purposes of State responsibility. The ‘corporate veil’ stands between the corporate entity and its governmental owners. The ILC commentary explains:

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7 Ibid article 7.  
8 Ibid article 9.  
9 Ibid article 10.  
10 United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3; but see de Frouville (n 2) 273–275 (arguing that it was really about State responsibility for failing to exercise due diligence to protect the embassy in the first place).  