



# ANU LAW STUDENTS' SOCIETY

## LAWS2264

# Advanced International Law 2<sup>nd</sup> Semester 2010

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## Question 2

70/100

It is the starting position of attribution in international law that the acts of private individuals, including attacks by terrorists, are not attributable to states under international law [✓].

However, there are several exceptions to this starting position. Article 8 of the ILC Articles on State Responsibility allows for the activities of private persons to be attributable to a state.

Furthermore, since *Bosnia*, article 4 has also been read to allow for the activities of persons not otherwise organs of the State under domestic law, to see their actions made attributable to the state [✓]. Furthermore, apart from the pre-*Bosnia* and *Bosnia* tests of attribution, another test, this time a primary rule (and not a secondary rule) has come into existence which deals specifically with the attribution of acts of aggression [✓]. This test seems easier to satisfy than the other two tests of attribution. If it were to be accepted, as the Belgian school of thought believes, that this test is a *lex specialis*, then in the event where the breach is that of aggression, the acts of private individuals will be easier to attribute to states than ever [actually no-fewer 'options'].

On the pre-*Bosnia* test, the acts of persons who weren't state organs were attributable under art 8. This is the article dealing with de facto organs. To satisfy this test, the person or group has to be dependent on the state and controlled by the state (*Nicaragua*). The training or funding or equipping of private individuals was held, on the *Nicaragua* test, not to be enough to satisfy this test [Confusion! Training + funding=by de jure organs (art 4)]. It is therefore relatively difficult to satisfy and the court in *Nicaragua* looked to the entirety of the relationship between the contra rebels [yes] and the USA in that case. However, it is not an impossibility, so it cannot be said that any acts of private individuals are not attributable to states under international law.

However, the *Bosnia* test does seem to propose stricter tests for the finding of attribution. *Bosnia* added a category of de jure organ into art 4 by using the non-exhaustive wording of art 4(2) [✓]. It said that an individual or group can be a de jure organ not only if it is one under law, but also if it is completely dependent on the state with no margin for manoeuvre [✓]. This test is stricter than the 'dependence' part of the art 8 test pre-*Bosnia*. In this way therefore, *Bosnia* made it less likely to attribute acts of individuals. It did so as well when it made the test of control under art 8 more difficult to satisfy as well. The test changed from dependence and control to 'effective control of each operation' [✓✓]. Although it is unclear what each operation means, if it were to mean every operation a group had ever undertaken, this would once again make attribution very difficult. However, *Bosnia*'s correctness has been doubted.

The introduction of a primary rule of responsibility in art 3(g) of the definition of aggression has the potential to make the acts of private individuals, including terrorists, much easier to attribute [if the breach=of 2(4) of UNC]. However, if, as the Geneva school says, this test is only an extra test, then the *Bosnia* and pre-*Bosnia* would still have to be satisfied [no], thus not making attribution easier. If only 3(g) has to be satisfied (Belgian school), then attribution for acts of aggression will be much easier. 3(g) says an act of aggression is attributable if private persons

are sent “by or on behalf of” the state or if the state is substantially involved in their activities [✓✓]. As 3(g) does not deal with de jure organs, then “substantial involvement” has to refer to activities such as the provision of infrastructure-it cannot be referring to acts by the de jure organs themselves [✓]. This is quite an easy test to apply and if the Belgian school is right, it will make acts of aggression and therefore many acts of terrorists, a lot more attributable. This is the closest that one can get to attribute the activities of Al-Qaida to Afghanistan (i.e. this second limb of 3(g)) [✓].

Therefore, it is completely possible to attribute the acts of private individuals to the state. The *Bosnia* test has made it somewhat more difficult. However, it is uncertain whether *Bosnia* was decided correctly [✓]. Article 3(g) eases the test for attribution in the case where the breach is that of aggression [✓]. If this test is a *lex specialis*, it will make attribution (including of terrorist acts) a lot easier (especially on its second limb). However, if it is not a *lex specialis*, the test of attribution will not be eased. Either way however, it is definitely not impossible to attribute the acts of private persons, including attacks by terrorists, to states under international law [✓].