19.3

Private Individuals

Olivier de Frouville

In international law, attribution fulfils a double function in the theory of responsibility. The first consists of designating a responsible person (legal or natural) who will bear the consequences of this responsibility, even though the person in question may not necessarily be the direct author of the act. The second function lies in the triggering of the application of a particular regime of responsibility: international responsibility of the State or the organization where the conduct at issue is attributable to one of these legal persons, or criminal responsibility of the individual where it is attributable to a natural person. The application of the two regimes of responsibility can be simultaneous, as the two cases relating to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[1] at the International Court and the judgment of Slobodan Milosević, former president of the Federal Republic of Yugoslavia at the International Criminal Tribunal for the former Yugoslavia, show. In this instance there is a parallelism which means that there is no confusion. The two regimes have their own rules and pursue different objectives. Here, we will only discuss the international responsibility of the State, that is to say the situations in which an internationally wrongful act can be attributed to the State.

A reading of classical authors shows that, for the main part, the general principles of State responsibility for or in relation to the conduct of private individuals have hardly changed. But the theoretical assumptions which underpin these principles have been altered, so that the solutions maintained by the ILC Articles do not bear any resemblance to those proposed by Hugo Grotius.

The essentials of the subject can nevertheless be found in *The Rights of War and Peace*.[2] In this work Grotius approaches the question of attribution in two takes. In search of causes for which wars are undertaken he distinguishes two types of acts

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment*, 26 February 2007; merits pending in *Croatia v Yugoslavia*.

[2] H Grotius, *The Rights of War and Peace* (R Tuck (ed), Indianapolis, Liberty Fund, 2005). I would like to thank Professor Emmanuelle Jouannet for reading the lines that follow.

that give rise to reparation or punishment.[3] The first type relates to what would today be called civil responsibility, while the second is more concerned with criminal responsibility. One can be *a priori* surprised that the academic authors only refer to developments relating to criminal law contained in Chapter XXI (*Communication of Punishments*) of Book II and neglect Grotius' reflections on reparation for injuries in Chapter XVII (*Of the Damage done by an Injury, and of the Obligation thence arising*); it seems evident that the latter are more easily transferrable to international law, where the system or responsibility has more the character of civil than criminal responsibility. But on the one hand, Grotius himself writes that the rules on attribution are fairly similar in the criminal and civil field: 'For generally, by the same Means a Man may be Partaker of another's Crime, as he is made liable to the Reparation of such Damages'.[4] On the other hand, the specific topic of the responsibility of any kind of group for the act of an individual is not dealt with until Chapter XXI, which makes the formulations that can be found there *a priori* more interesting for an internationalist in search of teachings on the issue of State responsibility for the acts of individuals. In reality, this specificity is only evident through the intermediary of the person of the sovereign, with its own will. It is in Chapter XXI that the key idea can be found, stating that where the act in question does not have any link with the State, it should not be imputed to it as a collectivity:

> No civil Society, or other public Body, is accountable for the Faults of its particular Members, unless it has *concurred* with them, or has been *negligent* in attending to its Charge.[5]

Grotius, as always, relies on the practice and on the writings of classic thinkers. He notes in particular that:

> And the *Rhodians* beg of the Senate to distinguish betwixt the Fact of the Publick, and the Fault of particular Men; affirming that *there is no State which has not sometimes wicked Subjects and always an ignorant Mob to deal with.* So neither is a Father responsible for his Children's Crimes, nor a Master for his Servants, nor any other Superior for the Faults of those under his Care; if there be nothing criminal in his conduct, with respect to the Faults of those, over whom he has Authority.[6]

The principle of irresponsibility is thus nuanced by the theory of active or passive *complicity* of the State, to which the idea of co-responsibility in Chapter XVII corresponds. Grotius distinguishes complicity/co-responsibility by action where a person *contributes by his own act* to the act from complicity/co-responsibility by omission where it shows *negligence.*

Active co-responsibility is defined in Chapter XVII in the following manner:

> Besides the Person that doth the Injury himself, there are others also who may be responsible for it, either by *doing what they ought not, or not doing what they ought to have done*. By doing what they ought not to have done,

[3] Ibid, Book II, Chapter XXI, I, 1, 1053 and Chapter I.
[4] Ibid, Book II, Chapter XXI, I, 1, 1053.
[5] Ibid, Book II, Chapter XXI, II, 1, 1055 (emphasis added).
[6] Ibid, 1056.

> *Primarily*, or *Secondarily*. Primarily, as he who commands it to be done, he who gives the necessary Consent for doing it, he who assists in the Action, he who protects him that committed it, or becomes in any other manner a Party in doing the Injury. *Secondarily*, He that advises the doing it, or commends and flatters him who does it.[7]

As for responsibility for negligence, it does not apply under the same conditions for acts that are subject to punishment and acts entailing reparation.

The lack of action in relation to acts subject to punishment automatically engages responsibility in the form of passive complicity. According to Grotius, this negligence can occur in two forms: tolerance (*patientia*) and the offer of a retreat (*receptus*) or, in other words, the act of on the one side not having prevented the commission of a delict while having knowledge of the existence of this delict; and on the other hand the act of not having punished or handed over the criminal.[8]

On the other hand, negligence in relation to an act giving rise to reparation only engages responsibility in so far as the omission breaches an obligation of its author:

> *By not doing what he ought*, a Man is likewise bound to make Reparation, primarily, or secondarily. Primarily, when by his Station or Office he ought to hinder the doing it, by giving his Commands to the contrary, or to succour him that has the Wrong done him, and does it not …
>
> Secondarily, He that doth not dissuade when he ought, or conceals the Fact when he ought to have discovered it. In all which Cases the word *ought*, has Respect to that Right which is properly so called, and is the Object of expletive Justice whether it arise from the Law or from a certain Quality in the Person.
>
> For if it be due only by the Rules of Charity, the Omission of it is indeed a Fault, but not such an one as obliges one to make reparation; which, as I have already said, arises only from Right properly so called.[9]

In this theory, there is thus no co-responsibility in the sense of shared responsibility for the same act. The co-responsibility which is envisaged here is understood from the two responsibilities for two distinct acts, the first original and the second intervening in relation with the first. We find here the premises of responsibility by *catalysis* later described by Roberto Ago.

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7 Ibid, Book II, Chapter XVII, VI, VII, 887–888.

8 Ibid, Book II, Chapter XXI, I, 2, 1053ff.

9 H Grotius, *The Rights of War and Peace* (R Tuck (ed), Indianapolis, Liberty Fund, 2005), Book II, Chapter XVII, VIII, IX (888 ff). The distinction established by Grotius in Book I, Chapter I, VIII of his work between 'Expletive Justice' and 'Attributive Justice' constitutes a slightly deformed application of the Aristotelian distinction between commutative and distributive justice. The notion of 'Expletive Justice' refers *grosso modo* to commutative justice in Aristotle, but at the same time diverges from it since Grotius considers it as the only type that has 'perfect rights' as its objective, in other words rights that are binding and directly enforceable: see on this point E Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, Pedone, 1998), 167 ff.

Grotius' reflections on the question of attribution are, as we can see, rich and complex and the past and current presentations of the law in the area owe much to it. As for the past, the transposition of the Grotian doctrine to the modern framework of international law can be attributed to Emmerich de Vattel, whose work on the topic has enriched the doctrine and jurisprudence of the 19th and early 20th century.

In his masterpiece[10] Vattel follows, on the subject of attribution, a two-fold approach. The first consists in the confirmation of the irresponsibility of the State for the acts of individuals:

> However, as it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members.[11]

More than Grotius who adhered above all to the description of the 'practice', Vattel underlines the substantive foundation of the rule: it rests on the requirement of retributive justice linked to a recognition of the free will of the State, in other words a subjective conception of responsibility. This is in fact only possible from the moment when, to paraphrase Dionisio Anzilotti,[12] there exists a relationship between the material fact that is complained of and a determined *subject*. The transposition to international law naturally happens through the recognition of the State as a legal person, which constitutes the premise for the modern theory of international law, Vattel being the first to formulate it in a coherent manner.[13]

The second step in Vattel's analysis resides in the listing of 'exceptions' to the rule of irresponsibility. Here he takes up again the theory of complicity/co-responsibility put forward by Grotius, nevertheless restricting it to situations where the State has not participated directly in the alleged acts. Responsibility can thus result from the action of the State:

> But if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern and the injured party is to consider the nation as the real author of the injury, of which the citizen was perhaps only the instrument.[14]

Or its omission:

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[10] E Vattel, *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs and Nations and Sovereigns* (B Kapossy and R Whatmore (eds), Indianapolis, Liberty Fund, 2008), Book II, Chapter VI, 161ff.

[11] Ibid, Book II, Chapter VI, 299, para 73.

[12] D Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers' (1906) 13 *RGDIP* 5, 13.

[13] E Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, Pedone, 1998), passim.

[14] E de Vattel, *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs and Nations and Sovereigns* (B Kapossy and R Whatmore (eds), Indianapolis, Liberty Fund, 2008), Book II, Chapter VI, 299 (para 74).

> The sovereign who refuses to cause reparation to be made for the damage done by his subject, or to punish the offender, or finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.[15]

Beyond their own complexity, these writings immediately allow us to discern the essence of the subject that we are concerned with, which has hardly changed since 1625.

The basic rule appeared clearly in the writings of past and current authors: the State should not be held responsible for acts committed by private persons. Here, we can see that the regime of international responsibility was and remains a regime that is mainly articulated around a subjective conception of responsibility. Responsibility results from the imputation of an act to a *subject* of the international legal order, in other words a legal person endowed with sovereignty, this being nothing more than the equivalent for the State on the international level of the liberty of the individual on the domestic level.[16] The process of 'objectivization' of this regime by erasing harm and fault under the influence of ILC Special Rapporteur Ago has certainly weakened this subjective character, but has not completely eliminated it.[17] There are two 'exceptions' which are not really exceptions at all, in the sense that they do not really constitute special cases where the responsibility of the State is engaged by the act of individuals in derogation from the general rule, but rather situations where the responsibility of the State is engaged in an autonomous manner, following classical principles of imputation. The first situation is where the responsibility of the State is engaged by acts which are *a priori* attributable to individuals but which eventually turn out to be attributable to the State, because of the existence of a factual link between these acts and State activity.

The second situation concerns the case where the responsibility of the State is catalysed by the act of a private person: the responsibility of the State is engaged not on the basis of this act, but on the basis of an act of the State by which it violates its own obligations in international law.

1 The rule of non-attribution of the conduct of private persons to the State

First the statement of the rule must be examined, both from a theoretical and legal point of view, before determining its exact scope.

(a) The exposition of the rule

In international law, the State as a person is only responsible for acts which are attributable to it. This autonomy of the State person makes it in theory impossible to attribute to the State acts of persons or things that it does not 'watch over'. The rule ensues thus above all from a theoretical requirement: imputation only happens to an autonomous person and autonomy requires that only acts resulting from a free will

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15 Ibid, 300 (para 77).

16 Cf J Combacau, 'Pas une puissance, une liberté: la souveraineté internationale de l'État' (1993) 67 *Pouvoirs* 47.

17 See P-M Dupuy, 'Le fait générateur de la responsabilité internationale des États' (1984-V) 188 *Recueil des cours* 9, 32.

can be attributed to it. Objectified, this condition implies that only acts that can be attached to a State objectively through a legal, functional or factual link or through an organ can be attributed to that State.

In addition to this theoretical foundation, the rule is based on an important practical consideration: it cannot be required of a State that it is in control of all the events which take place on its territory, short of obliging it to become a totalitarian State. As a result, as the International Court held in *Corfu Channel*,[18] territorial sovereignty should not be considered as immediately entailing the responsibility of the State for all wrongful acts committed on its territory, or as implying a shift of the burden of proof of this responsibility.[19]

Such a systematic link between territorial sovereignty and responsibility can only result from a regime of objective responsibility 'for risk'. But responsibility is no longer based on the imputation of a wrongful act to the State. The rules which govern this type of responsibility do not have the character of 'secondary' rules, in other words rules the implementation of which is subordinate to the previous occurrence of a wrongful act, that is to say a breach of a 'primary' obligation. The rule which lays down the principle of objective responsibility is as such a new primary rule which prescribes reparation by the State for all harm caused on the territory, whoever the perpetrator of the harm may be.[20] From then on, there is no 'imputation' to the State of wrongful acts by private persons who are potentially the source of the harm, since responsibility does not require a wrongful act or the imputation of the act to this person for it to be engaged.

At the ILC, the rule of non-attribution was drawn up by Special Rapporteur Ago in his Fourth Report in 1972.[21] The Special Rapporteur proposed to state it in the first paragraph of the draft article headed 'Conduct of private individuals'. The second paragraph had the purpose of specifying that this rule is without prejudice to the engagement of the responsibility of the State for the breach of its own obligations in relation to the acts of individuals: '[t]he conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.'[22] The discussions of draft article 11 took place in 1975.[23] All the members agreed on the relevance of the principle stated in paragraph 1. Several members nevertheless highlighted the not very appropriate character of the term 'individual' and moved the Special Rapporteur and the Drafting Committe to replace it with the word 'person', which covers both legal and physical persons.

More profoundly, Paul Reuter observed during the discussion that article 11, as a whole, did not contribute anything to the draft articles in the sense that 'its only purpose was to explain the consequences of what had been stated in preceding articles and what would be stated in subsequent articles'. Therefore, 'if it did not appear in the draft articles, the substance of international law would not be changed'.[24]

Despite this lucid observation, article 11 was provisionally maintained in the draft and adopted by the Commission as revised by the Drafting Committee: '[t]he

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18 *Corfu Channel Case (United Kingdom v Albania), Merits, Judgment, ICJ Reports 1949*, p 4.
19 Ibid, 18.
20 On this point, see P-M Dupuy, *Droit international public* (6th edn, Paris, Dalloz, 2002), 464.
21 R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 71.
22 Ibid, 126 (para 146).
23 *ILC Yearbook 1975*, Vol I, 214.
24 *ILC Yearbook 1975*, Vol I, 31 (para 30).

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.'[25] At the presentation of the text, the president of the Drafting Committee explained that 'for the sake of precision, and in order to employ the language already used in article 8' which deals with the attribution to the State of the conduct of persons acting in fact on behalf of the State, the Committee preferred 'to replace the phrase "acting in a purely private capacity" by the phrase 'not acting on behalf of the State'.'[26]

In this form, article 11(1) in fact appeared to be the converse of article 8(a). This explains why, in 1980 Chile proposed in its comments on the draft articles to merge the provisions of article 11(1) with paragraph (a) of article 8,[27] while in 1998, the United States proposed the simple deletion of article 11. This option was preferred by the new Special Rapporteur James Crawford, and subsequently also by the ILC itself. In his report, the Special Rapporteur notes the lack of autonomous content of article 11:

> On analysis, it says nothing more than that the conduct of private individuals or groups is not attributable to the State unless that conduct is attributable under other provisions of chapter II. This is both circular and potentially misleading.[28]

James Crawford thus proposed the deletion of article 11, while suggesting that the substance of the commentary to the article should be maintained and redeployed elsewhere.

With the deletion of article 11(1), the draft articles have become undoubtedly less educational but more logical, in the sense that the subject of this part of the draft consists of the description of cases of attribution of conduct of private persons to the State. In fact, article 11(1) fulfilled no function because of its negative wording.

(b) The scope of the rule

The rule of non-attribution covers all acts of all private persons who do not act on behalf of the State, *including* acts of persons that have the status of State agents, but who, when they act, are doing it in their personal capacity.[29] In essence, we can find here the old distinction of French administrative law between personal fault and fault of service (*fautes de service*).[30]

But the whole difficulty consists in drawing the line between purely private acts and *ultra vires* acts, or in other words the act committed by a person under the cover of his official function but in excess of his authority or in contradiction to instructions given to him. The stakes are not low: where the purely private act of a State agent should not be attributed to the State, the *ultra vires* act will always be attributable by virtue of a well-established rule of international law, which is codified

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[25] Ibid, 214 (para 10).

[26] Ibid, 214 (para 12).

[27] *ILC Yearbook 1980*, Vol II(1) 97, cited in J Crawford, First Report on State Responsibility, *ILC Yearbook* 1998, Vol II(1), 1, 32 (para 246, footnote 146).

[28] Ibid, 32 (para 247).

[29] See for example J-L Brierly, 'Règles générales du droit de la paix' (1936-IV) 58 *Recueil des cours* 172.

[30] Cf *Pelletier case*, Tribunal des conflits, 30 July 1873, reproduced in *Les grands arrêts de la jurisprudence administrative* (13th edn, Paris, Dalloz, 2001), 8.

in article 7 of the ILC Articles, headed 'Excess of authority or contravention of instructions':

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[31]

To resolve this problem, international law uses the 'theory of appearance'. Thus in the commentary by the ILC to the first version of article 7 (then article 10) we can read:

> In international law, the State must recognize that it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity *appear* to be acting effectively in its name.[32]

The 'theory of appearance' apparently fulfils a protective function for the person or the victim State following 'an excusable error, that is to say done in good faith', in relation to an act of a functionary which appeared to be an official act.[33] It should thus not serve as a basis for the institution of a form of objective responsibility 'for risk'. In fact, the theory of appearance does not exclude the wrongful act of the State: it constitutes it through a fiction the purpose of which it is to protect the interests of the person and the State injured by the act having the appearance of an official act.

We now understand the necessity of defining 'the excusable error'—to draw the limit between what can reasonably be considered as an act of the State following appearances, and what is *manifestly* not State activity. Three awards given by the US/Mexico General Claims Commission deal with this difficulty by distinguishing between a 'simple fraud' and situations where one can speak of an 'excess of power'.[34] Inspired by this jurisprudence and other precedents, Special Rapporteur Ago distinguished the case where 'the individual organ obviously acts in an individual capacity and commits acts which have nothing to do with its place in the State machinery' from that of 'the individual organ' which 'is manifestly acting in the discharge of State functions and not in a purely personal capacity' but whose acts are:

> although allegedly committed in the name of the State, are so completely and manifestly outside his competence, or fall within the scope of State functions so visibly different from those of the official in question, that no one could be mistaken on that score.[35]

We can see here a development in international law of a distinction which in French administrative law would correspond to 'degrees' of personal fault, ranging

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[31] A rule which can also be based on international humanitarian law, as shown in *Case concerning armed activities on the territory of Congo (Democratic Republic of Congo v Uganda), Judgment*, 19 December 2005, para 214.

[32] *ILC Yearbook 1975,* Vol II, 67 (para 17) (emphasis added).

[33] J-P Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, LGDJ, 1966), 144–146.

[34] These awards are studied by Quéneudec, ibid, 142–143.

[35] R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 93 (para 55).

from pure personal fault to personal fault which is not without any link to the service. Ago translated this 'exception' to the rule of attribution of the *ultra vires* act into the text of his draft article 10(2), which is worded:

> However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest.[36]

Unfortunately, this important specification is not taken up in the version of the article adopted by the ILC on first reading, or in the current article 7, even though one can find a trace of it in the Commentary to article 7[37] and even though the words 'if the organ, person or entity acts *in that capacity*' can potentially be interpreted as excluding the case of manifest incompetence.[38]

The rule of non-attribution being so stated and specified in its scope, it is now necessary to see in what cases an act which is *prima facie* attributable to an individual can nevertheless engage responsibility of the State. A first group of situations concerns the case where the act of the private person considered is linked in some way to the State activity.

2 The attribution to the State of conducts of private person linked to the activity of the State

According to the ILC 'attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality.'[39]

Here, Dionisio Anzilotti's imprint can be seen: for him attribution can only be in any legal order 'an effect of the norms that compose it'.[40] Attribution thus constitutes a question of law before being a question of fact: it can only occur in the application of rules and fixed criteria of international law. Furthermore, these rules and criteria are defined in an autonomous manner by international law and take precedence over the rules of domestic law. That being the case, the domestic rules of attribution of competences should not determine the attribution of an act to the State, at least where international law does not designate them as relevant criteria.

As we have seen, the fundamental rule is that the acts that relate to the decision of the State as an autonomous person must be attributed to the State. This power of decision is presumed where the author of the act is an organ of the State, even though this presumption can be rebutted by showing that the organ-individual has acted in its personal capacity (on the other hand, as we have seen above, the fact that the organ acts *ultra vires* does not suffice). This is the sense of article 4 of the ILC 'Conduct of organs of a State'. Outside this situation, the power of decision can be established in two different ways: either by showing that the State has made the reproached conduct *a priori* his own: this is the situation envisaged by article 11 of

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[36] Ibid, 95 (para 60).

[37] Cf Report of the ILC, 53rd Session, 2001, A/56/10, 45-47, 46 (paras 7–8) (emphasis added).

[38] In this sense see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984-VI) 189 *Recueil des cours* 9, 84.

[39] Report of the ILC, 53rd Session, 2001, A/56/10, 38 (para 4).

[40] D Anzilotti, *Cours de droit international* (1st edn, Paris, Librairie du Recueil Sirey, 1929; reprinted, Paris, Ed. Panthéon-Assas, 1999), 469.

the ILC text 'Conduct acknowledged and adopted by a State as its own'; or by showing a link between the individual perpetrator of the act and the State (understood as the organ apparatus *or* as function): this link may be *de jure* or *de facto*. The first situation, the *de jure* link, is illustrated by article 5 of the ILC text 'Conduct of persons or entities exercising elements of governmental authority' as far as the person or entity concerned is, according to this article, 'empowered by the law of that State to exercise elements of the governmental authority'. The second situation is illustrated by articles 6 'Conduct of organs placed at the disposal of a State by another State', 8 'Conduct directed or controlled by a State', and 9 'Conduct carried out in the absence or default of the official authorities'.

Of these different situations, only three interest us in this study: on the one hand, the two cases of attribution based on a *de facto* link where the acts of private persons are taken into account (articles 8 and 9); and on the other hand the *a posteriori* endorsement of conduct which is originally not attributable to the State.

(a) Control of the State: the *de facto* organ (article 8)

The original version of article 8 presented by Ago in 1974, as well as the one adopted by the ILC in 1974, included the different concepts of the *fonctionnaire de fait* (the person who exercises elements of governemental authority in the absence or default of the official authorities) and of the *de facto* organ. The dissociation only took place at a later stage, under the initiative of James Crawford, and the current text comprises an article 8 on *de facto* organs and an article 9 on the *fonctionnaire de fait*.

It is nevertheless true that these two situations are based on similar logic: in both cases, international law bases the attribution of acts committed by private persons to the State on the existence of certain given facts, as opposed to an attribution based on an institutional or legal link. Ago's first draft takes note of this similarity in approach, but also of the substantial difference which divides the two concepts:

> The conduct of a person or group of persons who, under the internal legal order, do not formally possess the character of organs of the State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.[41]

In the first situation, it is the nature of the function which makes the act attributable to the State. In the second, it is the existence of a factual link between the private person and the State which allows one to deduce from it that the former acts on behalf of the latter.

The whole complexity of the notion of *de facto* organ lies in the explication of this notion of action undertaken 'on behalf' of the State, which can be found in the second version of the text, adopted by the Commission in 1974:

> The conduct of a person or group of persons shall also be considered as an act of the State under international law if

[41] *ILC Yearbook 1974,* Vol I, 32 (para 1).

> (a) it is established that such person or group of persons was in fact acting on behalf of that State …[42]

In the commentary adopted in relation to this article, the ILC explains that it intended to bring together two distinct phenomena: the first concerns cases where 'the organs of the State supplement their own action and that of their subordinates by the action of private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State.'[43] The second regroups the cases where the State entrusts private persons with the execution of 'duties and tasks' which it does not want to carry out directly: in other words, as Paul Reuter explains (with fewer circumlocutions), 'the lower work of the State: spying, provocation, sabotage, etc.' [44]

But the ILC provided only few elements to define the notion of an act completed on behalf of the State. It confined itself to drawing attention to the difficulty of showing proof for the *de facto* link:

> The Commission wishes nevertheless to make it quite clear that, in each specific case in which inter-national responsibility of the State has to be established, it must be genuinely proved that 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, that they performed a given task *at the instigation* of those organs.[45]

It was on exactly this point that the efforts of the new Special Rapporteur James Crawford would focus. In truth, he had more material to work with than Roberto Ago: between 1980 and 1998, several courts, quasi-courts and tribunals had decided on the issue of imputation relating to a situation of fact.

Thus, in his first report, Crawford cited several 'precedents': the judgment on the merits by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*,[46] the award of the Iran-US Claims Tribunal in *Yeager*;[47] the case of *Loizidou* where the European Court of Human Rights delivered two judgments on the preliminary objections[48] and the merits;[49] and finally the *Tadić* case which gave rise to two decisions of the International Criminal Tribunal for the former Yugoslavia in which the issue of the *de facto* organ is dealt with: a judgment of the Trial Chamber on 7 May 1997 and a judgment of the Appeals Chamber of 15 July 1999 (*Tadić II*).[50]

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42 *ILC Yearbook 1974*, Vol I, 152–153 (para 14).

43 *ILC Yearbook 1974*, Vol II(1), 283 (para 2).

44 P Reuter, 'La responsabilité internationale. Problèmes choisis (Cours de D.E.S. Droit public, 1955–1956)', in *Le développement de l'ordre juridique international. Ecrits de droit international* (Paris, Economica, 1995), 377, 461.

45 *ILC Yearbook 1974,* Vol II(1), 284 (emphasis added).

46 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14.

47 (1987) 17 *Iran-US CTR* 92 ff.

48 *Loizidou v Turkey* (App No 15318/89), *Preliminary Objections*, *ECHR Series A No 310*.

49 *Loizidou v Turkey* (App No 15318/89), *Merits and Just Satisfaction*, *ECHR Reports 1996-VI*.

50 ICTY, *Prosecutor v Tadić*, Case No IT-94-1-A, *Judgment, Trial Chamber*, 7 May 1997 and *Appeals Chamber*, 15 July 1999.

To this list we can add the report of the European Commission of Human rights on the case of *Stocké v Germany*[51] on the collusion between an informer and the German police with view to the arrest of a criminal, the judgments in *A v France*[52] and *MM v The Netherlands*[53] concerning phone tapping carried out by private persons on instigation by and under direction from the police, the judgments and decisions of the European Court of Human Rights that confirm the *Loizidou* case[54] as well as the decision of the working group on arbitrary detention in relation to the 'Handling of communications concerning detention at the Al-Khiam prison (southern Lebanon)' that bases its conclusions on the reasoning of the ICTY Appeals Chamber in the *Tadić II* judgment.[55]

Here, 'jurisdictionalization of international law' is at work! And, in light of this jurisprudence, it is easier to understand why some are concerned about the risks of 'fragmentation' which this multiplication of international courts could create for the international legal order.[56] In fact, the solutions devised for the same problem are very diverse and even sometimes contradictory. If we wanted to draw a rough sketch of the debate, we would say that there are the supporters of a strict conception of the *de facto* organ, based on the notion of 'complete dependence' or, at least, effective control of the State over the person or group of private persons on the one side, and the supporters of a supple conception based on the notion of global control on the other.

The former position was defined by the Court in *Nicaragua* in 1986 with relation to the link that the United States had with the *Unilaterally Controlled Latino Assets* 'UCLAs' on the one side, and the *contras* on the other.[57] As for the former, the Court recognized that their acts were imputable to the United States in so far as they were 'paid by, and acting on the direct instructions of, United States military or intelligence personnel.'[58] But the Court refused on the other hand to recognize the latter as *de facto* organs, even though they were financed, aided and supported in various ways by the United States: on the one hand, the *contras* were not a pure creation of the United States and were not, as such, in a state of 'complete dependence' that would permit them to be assimilated with an organ of the State; on the other hand, the United States did not exercise 'effective control' over them in all their military or paramilitary operations. Nothing in fact proved that the United States had specifically 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.'[59] In absence of any

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[51] *Stocké v Germany* (App No 11755/85), the report is reproduced after the judgment of the Court, *ECHR Series A Vol 199, 21 ff.*

[52] *A v France (App No 14838/89), Judgment (Merits and Just Satisfaction), ECHR Series A, No 277-B*.

[53] *MM v The Netherlands* (App No 39339/98), (2004) 39 *EHRR* 19.

[54] *Cyprus v Turkey* (App No 25781/94), *ECHR Reports 2001-IV,* paras 69–81; *Ilasçu and others v Moldova and Russia* (App No 48787/99), ECHR, Decision on Admissibility, 4 July 2001; *Adali v Turkey* (App No 38187/97), ECHR, Decision on Admissibility, 31 January 2002.

[55] Cf Report of the Working Group on Arbitrary Detention at the UN Commission on Human Rights, E/CN.4/2000/4.

[56] G Guillaume, 'The proliferation of international judicial bodies: The outlook for the international legal order', Speech to the Sixth Committee of the General Assembly, 27 October 2000, available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>.

[57] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14.

[58] Ibid, 45 (para 75); 50–51 (para 86).

[59] Ibid, 64 (para 115).

effective control, the *contras* could have committed these acts *outside* of the control of the United States.[60]

This position was energetically supported by Roberto Ago who had become a judge of the Court, in his separate opinion. For Ago, the position of the Court agreed perfectly with the ILC draft articles on the subject. According to him, it was impossible to impute *prima facie* the acts of the *contras* to the United States:

> Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them.[61]

In this context, the determination of the quality as *de facto* organ depends on the fulfilment of two conditions:

- the existence of a *de facto* link between the State and the person or group of private persons, in the form of, for example, 'United States participation ... 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'[62]; and
- either a complete dependence of the person or group of private persons on the State; or the exercise by the State of an *effective control* over those persons or groups, that allows to deduce from it that the acts in question have been ordered or imposed on this person by the State.

The existence of the second condition—which supplements the finding of a simple factual link—is in the end only the symptom or the consequence of a conception of responsibility that is still subjective, in which *fault* continues to play a roles as a generating fact. It is the idea that the act must come from the free will of the State which translates the condition of 'effective control', in other words, it must be *wanted* by the State-person. In a subjective conception of responsibility, this will is *presumed* where the author of the act is an organ of the State from a legal point of view or because of the organ structure. On the other hand, where the author is only linked to the State by an objective factual attachment that does not in itself suffice to determine attribution, this will must be demonstrated. This explains why, for Roberto Ago, the attribution of an *ultra vires* act may be possible in one case (where there is a State organ *de jure*), and impossible in the other case (where there is a *de facto* organ):[63] since the *ultra vires* act is by definition committed *without* the control of the State, by going beyond or breaching its orders or instructions.

It is to be noted that this strict conception of attribution has been repeated by the Court in its more recent ruling of 26 February 2007 in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. However, the Court took a slightly different stand by distinguishing between the hypothesis of the '*de facto* organ' and that of a private person acting under the 'effective control' or instructions by the State. The Court considered the former under

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60 Ibid, 64–65 (para 115).
61 Ibid, Separate Opinion of Ago, 188 (para 16).
62 Ibid, 64 (para 116).
63 R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 72 (footnote 4).

the heading of article 4 of the ILC Articles and the latter under the heading of article 8. This approach does not convince us, as it mixes two distinct cases of attribution, the one being based on legal or institutional links, and the other on factual links.

Contrary to what has been suggested in Crawford's First Report, the *Loizidou* judgments of the European Court of Human Rights are not on the same level as the *Nicaragua* judgment.[64] In this case, the Greek Cypriot applicant complained of a breach of her right for the respect for her possessions as guaranteed under Article 1 of the first Protocol to the Convention, following the occupation and persistent control of the Northern part of Cyprus by Turkish armed forces that had prevented several attempts to access her home. The Turkish government alleged that the acts raised by the applicant were not within its competence but in that of the 'Turkish Republic of Northern Cyprus' (TRNC), created in 1983 and recognized on an international level only by Turkey.

The Court did not at any time consider the question of classifying the TRNC as a *de facto* organ of Turkey. It immediately classified it as 'subordinate local administration' which echoes article 4 of the ILC text, rather than article 8:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[65]

Even though it invokes the notion of 'global control', this is not the point:

> It is obvious from the large number of troops engaged in active duties in northern Cyprus […] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' […]. Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.[66]

The use of the notion 'overall control' really aims at determining the factual sway of Turkey outside its national frontiers, on a territory and a population that does not belong to it. Within the context of the Convention, this test fulfils a double function: at the stage of admissibility, it is about knowing whether the persons who are in the Northern part of Cyprus fall within the 'jurisdiction' of Turkey within the meaning of Article 1 of the Convention; at the merits stage, the existence of overall control allows

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[64] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986*, p 14.

[65] *Loizidou v Turkey* (Application No 15318/89), *Preliminary Objections, ECHR, Series A, No 310*, para 62.

[66] *Loizidou v Turkey* (Application No 15318/89), *Merits and Just Satisfaction*, *ECHR Reports 1996-VI*, para 56.

one to establish that all acts committed by its organs *de jure* or *de facto* on this territory are attributable to Turkey. 'Overall control' thus expresses the extraterritorial dimension of the responsibility of State Parties to the Convention. But it has nothing to do with the definition of a *de facto* organ.

On this point, the contribution of the International Criminal Tribunal for the former Yugoslavia is more useful, even though it may seem unlikely if one relates it to the internal logic and the mandate of the Tribunal. It may be questioned why a court which is responsible for establishing the responsibility of individuals in international criminal law has reflected on the criteria of attribution in the framework of international State responsibility. In fact, the Tribunal has resorted to these criteria as a complement in the interpretation of the notions of humanitarian law, i.e. the concept of the protected person and the distinction between international and internal armed conflicts. It has thus ruled that after the retreat of the Federal Republic of Yugoslavia from the territory of Bosnia-Herzegovina on 19 May 1992, the Bosnian conflict could not be classified as international and the Muslim Bosnians subject to the power of the Serbs considered as protected persons under the Geneva Convention IV—unless the acts of the Bosnian Serb Army (VRS) were in fact attributable to the FRY, in other words if the VRS was a *de facto* organ of the FRY.

This means that the two regimes have been mixed up; in doing so the Tribunal ignored the specificity of the question of attribution, the criteria of which are only established for the purpose of establishing international responsibility of a State. The classification of a conflict as internal or international for the purposes of the application of international humanitarian law is a mere question of fact which calls for the evaluation of the degree of intervention of a State in an internal conflict. The forms of intervention can be very different, and, in any case, may have aspects other than 'control' exercised over one of the parties of the internal conflict.[67]

Even though it is possible to contest the opportunity of intrusion of the ICTY into the field of attribution, one cannot as such deny that its reasoning constitutes a useful approach to the question. The jurisprudence is set by the Appeals Chambers in the judgment of *Tadić II*.[68] In this judgment, the Appeals Chamber overruled the judgment of the Chamber at first instance of 7 May 1997, insofar that it resorted to the criterion of 'effective control' of the *Nicaragua* judgment to determine if the VRS could be considered as *de facto* organ of the FRY. The appeals chamber considered that this criterion does not reconcile neither with the 'Logic of the Law on Responsibility'[69] nor with 'Judicial and State Practice'.[70] In its place, it substituted a three-pronged criterion according to the type of situation that is encountered: 'specific instructions', approval or endorsement *ex post facto* for isolated persons or armed bands that are not structured; 'overall control', where we are dealing with a hierarchical group which is well organized, which means that the State has organized, coordinated, or planned the military action of the armed group, and has financed, trained, equipped or supplied it with operational support; finally, the Chamber envisaged a last situation, drawn from precedents in criminal law: where a person who

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67 See in this sense T Meron, 'Classification of Armed Conflicts in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *AJIL* 236; R Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2000) 71 *BYIL* 259, 277–278.

68 ICTY, *Prosecutor v Tadić*, Case No IT-94-1-A, *Judgment, Appeals Chamber*, 15 July 1999.

69 Ibid, 47 (para 115).

70 Ibid, 51 (para 124).

is not formally part of the administration of the State participates in its activities with all the appearances of the organ of the State[71]

In essence, this is reserving the criterion of 'effective control' to acts committed by isolated individuals or non-hierarchical groups. It is questionable what justifies this distinction. One can without doubt explain it with an argument of opportunity—it is more difficult to prove that the act has been committed on behalf of the State within the framework of a non-hierarchical group—and by a logical argument—there is a presumption of intention within the framework of a hierarchical structure. But in the end, the Tribunal remained in the same conceptual area as the International Court: requiring proof of control, whether 'effective' control or 'overall' control, relates to a subjective conception of State responsibility that does not really have a place any more, as from the moment where it was decided to objectivize responsibility by excluding fault and harm as conditions for responsibility.

From this point of view, the formulation that was chosen in the end by the ILC is a good compromise, in the sense that it is sufficiently vague to allow different interpretations. James Crawford was in favour of a more subjective conception of attribution, in keeping with Roberto Ago. His draft was worded as follows:

> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> (a) The person or group of persons was in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.[72]

The solution chosen by the ILC consisted in replacing in article 8 the 'and' between 'direction' and 'control' with 'or':

> 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.

The criterion of 'control' thus becomes an autonomous criterion, alternative in relation to two others.[73]

The ILC also abstained from qualifying the type of control that is required: that being the case, it can thus be understood either as a subjective condition of attribution—'effective' or 'overall' control—or as an objective condition, a form of factual link, just like an 'instruction' given or 'directives'.

The attempt of the ILC to settle the question of the *ultra vires* act of the *de facto* organ is less convincing:

> In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups

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71 Ibid, 60–62 (paras 137–141).

72 J Crawford, First Report on State Responsibility, *ILC Yearbook* 1998, Vol II(1), 1, 4.

73 See Commentary to art 8.

> have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.[74]

The theory of objective responsibility for a risk here erupts in an inopportune manner to distinguish two cases which are in the end not very different, if it is accepted that attribution is founded on the existence of a factual link between the State and the private person. The only notable difference is in fact temporal: in one case a factual link at a particular point, while in the other, 'control' constitutes a continuous factual link.

(b) The use of public power in the absence or default of the State (article 9)

Unlike the previous hypothesis, the use of public power hardly raises any difficulties. It has always been broadly agreed by the ILC, both in relation to its principle and the conditions of its application. Attribution rests mainly on the finding of the exercise of State functions by a private person in circumstances which make this exercise legitimate. This action is purely spontaneous: the individual acts from his own initiative.

The criterion of State activity which can be found in several places in the draft articles lies in the exercise of prerogatives of public power. The problem of incompetence is covered by the absence or default of the official authorities and by the fact that public functions would, in one way or another, be called for 'though not necessarily the conduct in question'. The ILC states in its commentary to article 9:

> Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative.[75]

In other words, public action is *necessary* as a principle considering the circumstances, which does not as such make the act of the individual who has intended to substitute himself for the failing public authorities lawful. This nuance was badly conveyed by the expression 'in circumstances which justified the exercise of those elements of authority' which was used in the version of the text adopted on first reading.[76] This is why Crawford proposed to replace 'which justified' with 'call for' to better express the idea that the conduct itself could not be 'justified', that is to say rendered lawful because of the circumstances. In the final version of the text, the ILC adopted an expression which translates the same idea 'in circumstances such as to call for the exercise of those elements of authority.'

In this form, what the successive Special Rapporteurs themselves have assimilated to the theory of the *fonctionnaire de fait* is not so much grounded on the theory of appearance, but rather on a particular form of the state of necessity—not the one that is recognized by the ILC text in article 25, insofar that the effect of necessity

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74 Commentary to art 8, para 8.

75 Commentary to art 9, para 1.

76 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted on First Reading, Report of the ILC, 48th Session, *ILC Yearbook 1996*, Vol II(2), 59, art 8.

is not, here, to exclude the wrongfulness of the act, but simply to proceed to the attribution to the State of a wrongful act committed under certain conditions. In fact, according to the text, it is not decisive that the private person is *apparently* competent to exercise public functions. Rather, the attribution results from the conjunction of the absence or insolvency of the authorities and from the necessity for the individual who is confronted with an exceptional situation, to act immediately by using the prerogatives that flow from public power.

Under these conditions, it may be asked whether article 9 includes the classic situation of the act which is adopted by an incompetent authority which nevertheless has, in the eyes of others, the appearance of authority normally vested with the exercised competence, when such an act is adopted under perfectly normal circumstances.[77] Roberto Ago had envisaged this case, but it seems that he lost sight of it afterwards. The same observation can be made concerning the theory of '*gestion d'affaire'*, where an individual finds himself in the position to make use of public finances and manages it.

Even though the principle was familiar to all national legal traditions, the examples in international law, as they emerge from the ILC reports, are not uniform. The theory of the *fonctionnaire de fait* seems to have been received first in international humanitarian law, through the idea of the *levée en masse*, which is expressed in article 2 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land, and in article 4(A)(6) of the Geneva Convention (III) relative to the Treatment of Prisoners of War.[78] These two provisions extend the category of 'belligerent' to the population of a non-occupied territory which, on approach by the enemy, spontaneously takes to the arms to fight invading troops. The acts of this improvised army are attributed to the attacked State.

The second 'precedent' cited by the ILC in its commentary to article 9 is the award given by the Iran-US Claims Tribunal in *Yeager*. But if the Tribunal had recourse to this hypothesis, then it was by reference to draft article 8 adopted in 1980. The hypothesis of the *fonctionnaire de fait* is not invoked exclusively, but is coupled with that of the *de facto* organ, the two paragraphs of article 8 thus constituting alternative foundations for the attribution to Iran of the acts of the 'Komitehs' or 'Revolutionary Guards' who had harmed the applicant.[79]

(c) *A posteriori* endorsement of conduct by a State (article 11)

The singularity of this last hypothesis was highlighted by Crawford in his first report to the ILC. Roberto Ago had not clearly distinguished it from the cases where a State does not show the diligence required to prevent or punish a wrong attributable to private persons, in accordance with its international obligations. The analysis of the award by the British-Colombian Mixed Commission in the *Cotesworth and Powell case* of 5 November 1875, presented in Ago's fourth report, shows that he skimmed

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[77] See for example in French administrative law, but in the framework of the dispute of legality: Conseil d'Etat 2 November 1923, *Assoc. des fonctionnaires de l'administration centrale des Postes*, *Rec. Lebon*, p. 699 and more recently Conseil d'Etat Sect, 16 May 2001, *Préfet de police c/ M. Ihsen Mtimet*, *Revue de Droit Public* 2001, no 3, 655–656, note by X Pretot, 645–654

[78] 75 *UNTS* 135.

[79] *Yeager v Iran*, 17 *Iran-US CTR* 92, 103 (para 42).

over the question, without reflecting on it as a separate issue. He cites the following thought-provoking passage from the award:

> One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender when such pardon necessarily deprives the injured party of all redress.[80]

The barely modified passages from *Droit des gens* by Vattel can be recognized (it was cited in the introduction to this chapter). But where Vattel carefully distinguished the two situations of co-responsibility for action and for omission, the award confuses them. What is worse, it makes out of the latter a modality of the former! The passage only interested Roberto Ago because of this contradiction: he is keen to show that the award goes astray by attributing the act of the individual to the State, while it is responsible only because of its own act, for having been negligent to punish or for having given amnesties to guilty parties. But then, he sidesteps the first hypothesis of attribution which is evoked by Vattel, based on the approval or ratification of the act of the individual by the State. It is this hypothesis that Crawford resurrected and that the ILC integrated in article 11 as finally adopted.

In the case of *negligence* as in the case of endorsement, the State does not directly participate in the commission of the act: it is committed by a third party entirely. But while responsibility is based in the former case on inaction in breach of international obligations of the State which is faced with the act of the private person, it results in the latter case from this act itself, that the State has made its own by approving it.

The case of *United States Diplomatic and Consular Staff in Tehran*[81] perfectly illustrates the passage from one hypothesis to the other. The International Court of Justice carefully distinguished two phases in the attack and occupation of the United States embassy in Tehran. In a first phase, it is evident that the militants who attacked the embassy did not have the status of agents of the State, whether *de jure* or *de facto*. Their acts are thus not imputable to Iran.[82] As such, the Court specifies, this does not excuse Iran from its responsibility for its own conduct in relation to its acts, conduct which was incompatible with its international obligations under various provisions of the 1961 and 1963 Vienna Conventions on diplomatic and consular relations: Iran in fact took no measures to protect the premises, staff, and archives of the mission of the United States against the attack of the militants. It also did not do anything to prevent this attack or to stop it from succeeding.

In a second phase, Iran not only did nothing to resolve the situation, but endorsed the acts of 'students' through the ministry of foreign affairs and through the Ayatollah Khomeini himself:

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[80] Cited in R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 101 (para 77).

[81] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), Judgment, ICJ Reports 1980*, p 3.

[82] Ibid, 29 (para 58).

> The approval given to these facts 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. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.[83]

In its commentary to article 11, the ILC sought to prevent errors such as the one in the *Cotesworth and Powell* award by affirming the contrast between approval-tolerance and approval-endorsement. The least that one can say is that there is a difference in degree that is not always easy to grasp:

> The phrase 'acknowledges and adopts the conduct in question as its own' is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement. … [A]s a general matter, conduct will not be attributable to the State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption', on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct.[84]

But how should adoption and simple approval be distinguished in practice? The commentaries of the ILC lack concrete illustrations in this regard to enlighten the reader. The impression of confusion is even more accentuated by this proposal, the substance of which is taken from old commentaries:

> Acknowledgement and adoption of conduct by a State might be express (as for example in the *Diplomatic and Consular Staff* case), or it might be inferred from the conduct of the State in question.[85]

If oral 'approval' does not suffice, it is difficult to see how simple 'conduct', even an ostensible one, could be so as to manifest the intention of the State to *adopt* the reproached conduct. Here again there is a lack of examples.

The originality of this case of attribution is due to the fact that it takes place *a posteriori*, after the commission of the act or during this commission, if it is a continuous act. In the latter case, the question of the *temporal scope* of the attribution may be raised: does the State assume it from the moment onwards when it makes it its own, or *ab initio*, in a retroactive fashion? For Crawford, 'If the adoption is unequivocal and unqualified … there is good reason to give it retroactive effect.'[86] The Special Rapporteur cites in this sense the *Lighthouses Arbitration* where an arbitral tribunal declared Greece responsible for breaching a concession agreement concluded by Crete when it was an autonomous territory of the Ottoman Empire,

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83 Ibid, 35 (para 74).

84 Commentary to art 11, para 6.

85 Ibid, para 9.

86 J Crawford, First Report on State Responsibility, *ILC Yearbook* 1998, Vol II(1), 1, 43 (para 283).

partly because the breach was 'endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island'.[87]

Another question is the *material scope* of attribution. This may vary depending on the content of the act by which the State takes position on the act of the individual. The State may in fact intend to assume only a part of this act. This idea is precisely translated in article 11 by the words 'if and to the extent that'.

In all the situations that we have just considered, the act which is *prima facie* attributable to a private person is *in fine* imputed to the State, because the deeper study of the situation reveals a link between this act and the State. These situations must thus be carefully distinguished from those where the act that is imputable to the private person only has the function of a catalyst for State responsibility. Responsibility is then the result of an act that pertains to the latter.

3 'Catalysis' of international State responsibility for conducts of private persons

The use of the notion of 'complicity' by a certain number of authors of the 19th century allow the establishment of an additional case of attribution of acts by natural persons to the State. Its rejection by the volontarist doctrine at the beginning of the 20th century has the effect of excluding this issue from the framework of this chapter: in the future, it is clearly recognized that the act of the individual can at the very most *catalyse* the responsibility of the State which is engaged on the basis of a distinct foundation.

(a) Rejection of the theory of complicity

The notion of complicity is employed by certain authors of the 19th century to establish State responsibility where it refuses to prosecute or where it grants amnesty to an act that causes harm to a foreigner: this acquiescence or tolerance is interpreted as a form of *participation* in the act, a contribution which engages State responsibility for this act.[88] From then on, the amount of reparation owed by the State is calculated on the basis of the harm caused by the act itself and on the degree of participation of the State in the commission of the act.

According to Paul Reuter[89] the Anglo-Saxon doctrine has thus come to distinguish two types of responsibility:

- primary (*original*) responsibility of the State where the act committed emanates from the government or a person acting as its agent; and

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[87] *Affaire relative à la concession des phares de l'Empire ottoman*, 24 July 1956, 12 *RIAA* 155, 198, cited in J Crawford, First Report on State Responsibility, *ILC Yearbook* 1998, Vol II(1), 1, 42 (para 282).

[88] See for example M Bluntschli, *Le droit international codifié* (2nd edn, Paris, Librairie de Guillaumin et Cie, 1873), 264.

[89] P Reuter, 'La responsabilité internationale. Problèmes choisis (Cours de D.E.S. Droit public, 1955–1956)', in *Le développement de l'ordre juridique international. Ecrits de droit international* (Paris, Economica, 1995), 377, 393.

- derived (*vicarious*) responsibility where the act emanates from any other person but the State has not taken the necessary measures to prevent or punish this conduct.

The notion of complicity is fiercely criticized by the volontarist authors at the beginning of the 20th century in the name of a dualist conception of the legal orders. The international and internal legal orders constitute two separate spheres, with their own subjects. As a result, the individual, subject of internal law, cannot breach international law under which he has no obligations. In the same way, the State should not be co-responsible or accomplice to a breach of internal law of the State by an individual. The duality of these legal orders leads to a watertight nature for the systems of responsibility. But that does not exclude that State responsibility can arise at the commission of a breach of internal law by an individual, as Dionisio Anzilotti explains:

> These acts, as done by individuals, are not contrary to international law, since individuals, being foreign to the rules of this law, should not breach its precepts; it is thus in the conduct of the State, that has omitted to prohibit these acts or to take measures necessary to prevent them, that the breach of international law is found: the wrongful act, from the point of view of international law, is, in such a case, the omission of the State and not the positive act of individuals; and the State is thus obliged because of *its* act, but not in its quality as *accomplice* of individuals, as has often been said since Grotius.[90]

Special Rapporteur Roberto Ago explains this mode of engaging responsibility with the idea of catalysis. The individual act is foreign to the act of the State. But it constitutes a *catalyst* element of its responsibility, insofar that, when confronted with this act, the State breaches its international obligations.[91]

In fact, from a theoretical point of view, the rejection of the idea of complicity is not necessarily linked to a dualist conception of the legal orders. It simply follows from the classical structure of normativity in international law which is articulated around the obligations, the only subjects of which are States and which are imposed on a more or less large circle of States which are bound by the same norm. Going beyond the dualist explanation seems necessary if one wishes to envisage certain phenomena that Anzilotti maybe could not distinguish clearly in his time.

First, contemporary international law directly imposes obligations on individuals, the breach of which can be the subject of criminal sanctions, this being the cases regardless of the position—official or not—of the author of the breach. So, a system of specific responsibility is associated with these obligations. The duality can thus be found at the level of international law: if the individual cannot be an 'accomplice' to a wrongful act of the State, the State can conversely not be the accomplice of an *international crime* within the meaning of international criminal law. However, this can find a clear exception when the norms that are breached do address both individuals and State at the same level. According to the ICJ, this is the

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[90] D Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 13 *RGDIP* 5–29, 285–309, 14–15.

[91] R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 97 (para 65) and fn 120.

case for the prohibition of genocide: in *Application of the Convention on Genocide*, the Court accepted the idea—although its conclusion was negative—that the Federal Republic of Yugoslavia could be found complicit in the crime of genocide perpetrated by the Republika Sprska—a non-State actor—in Srebrenica.[92]

In the same way, one cannot exclude that the notion of complicity can find a place in international law, if the renewed forms of normativity induced by the institutionalization and centralization of the international society are taken into account. More and more, international organizations in fact tend to formulate norms which equally address private persons and States. If a private person and a State are bound by the same norm of international law, why should they not be capable of being considered as accomplices in its breach? It is still necessary that they are effectively bound by this norm, whether they have both accepted it voluntarily, or whether it is imposed to them in an 'authoritarian' manner, a situation which mainly concerns, in the case of States, the norms enacted by the UN Security Council where it acts under the terms of Chapter VII of the Charter.[93]

If these situations resulting from the recent evolution of international law are taken aside, it is certain that the idea of complicity has not adapted in the great majority of norms of public international law, the only subject of which is the State.

(b) Responsibility of the State for its own act

Generally speaking the State thus does not make itself an accomplice to the act of the individual. But it may be that it breaches its own obligations in relation to such an act. The classic foundation for the form of 'responsibility by catalysis' can be found in the obligation of due diligence which falls on any State with regard to nationals of foreign States that are on its territory.[94] This general obligation conceals two main obligations: the obligation to prevent attacks on persons and the obligation to punish the perpetrators of such attacks. And these two main obligations come in a variety of contextualized obligations, specified by treaty law (for example the Vienna Conventions on diplomatic and consular relations) or even by the international judge, depending on the case submitted to the court.

In the subject matter of human rights the jurisprudence has transposed the classic doctrine of due diligence to give rise to the general obligation of the State to *protect* individuals who fall within its jurisdiction against acts committed by private persons and who would be susceptible to being qualified as a breach of their rights, in the sense of the considered treaty (this is thus not in any way a 'horizontal' effect of the Convention).[95] Under this logic, the judge recognizes implicit 'positive obligations' for the State party for every human right.

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[92] See Judgment of 26 February 2007, paras 416ff. On the link between the State's and individual's regimes of responsibility, see R Maison, *La responsabilité individuelle pour crime d'Etat en droit international public* (Brussels, Bruylant, 2004).

[93] On the notion of 'unilateral authoritarian act' ('acte unilatéral autoritaire') in public international law see H Ascencio, *L'autorité de chose décidée en droit international public* (thèse, Université Paris X-Nanterre, 1997).

[94] See T Koivurova, 'What Is the Principle of *Due Diligence*', in J Petman & J Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden, Martinus Nijhoff, 2003), 341; R Pisillo Mazzeschi, 'The *Due Diligence* Rule and the Nature of the International Responsability of States' (1992) 35 *German Yearbook of International Law* 9.

[95] Cf L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984-VI) 189 *Recueil des cours* 9, 149–156; G Cohen-Jonathan,

So, for example, in *Osman v The United Kingdom*[96] the European Court of Human Rights had to determine if the responsibility of the United Kingdom was engaged under article 2 of the Convention (the right to life) because of an omission of the police that could not prevent the murder of a private person by another private person. The Court considered on this occasion the extent of the obligation of due diligence that falls on States under article 2:

> The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction […]. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.[97]

Having stated the problem, the Court defined the following standard:

> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person […] it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. […] For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that *the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge*. This is a question which can only be answered in the light of all the circumstances of any particular case.[98]

In this particular context of the Convention, the State party that has to exercise due diligence—that is to say that to take all measures that can reasonably be expected of it—to prevent and sanction an act of a private person that intervenes in breach of article 2. But *in fine*, it is not the act of the private person that engages the responsibility of the State party, but rather the fact that the State itself is not in accordance with the required standard and thus with the positive obligation that falls upon it under article 2 of the Convention.[99]

'Responsabilité pour atteinte aux droits de l'homme', in SFDI, *La responsabilité dans le système international* (Paris, Pedone, 1991) 101, 112–115; H Dipla, *La responsabilité de l'Etat pour violation des droits de l'homme. Problèmes d'imputation* (Paris, Pedone, 1994).

[96] *Osman v The United Kingdom* (App No 23452/94), *ECHR Reports 1998-VIII*.

[97] Ibid, para 115.

[98] Ibid, para 116 (emphasis added).

[99] The jurisprudence offers many examples of responsibility by catalysis. See for example, in relation to article 8, *X and Y v The Netherlands* (App No 8978/80), *ECHR Series A No 91* (1985), concerning the impossibility of bringing criminal proceedings with regard to the perpetrator of sexual violence against a mentally handicapped minor. See also, with regard to article 3, *A v The United*

The European Court has pushed this logic to a height in its judgment on merits in *Ilaşcu*.[100] The applicants found themselves in the hands of the authorities of the Moldavian Republic of Transdniestria (MRT), situated on Moldovan territory but having declared independence, it was under *de facto* overall control by the Russian Federation. Rather than contenting itself with engaging the responsibility of the Russian Federation—to which the acts of the MRT were imputed according to the principles of the *Loizidou* jurisprudence—the Court ruled that responsibility of Moldova in relation to the acts of the MRT could be engaged under its positive obligations. In other words:

> even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[101]

More recently, the ICJ applied the same kind of reasoning on the basis of the obligations to 'prevent' and 'punish' under the Genocide Convention.[102]

Did the rule of responsibility by catalysis have a place in the Articles on State responsibility? At first, the ILC responded positively to this question, under the influence of Special Rapporteur Ago. He considered it necessary to accompany the statement of the rule of non-attribution of acts of natural persons to the State under article 11(1) with a 'reservation' or a type of safeguard clause. This was situated in article 11(2) and specified that notwithstanding the rule of non-attribution, the State remained responsible 'by their passive attitude towards the action of individuals'.[103] At the same time, Ago observed that it was necessary that 'no attempt whatsoever must be made to define, in this context, the content of the various obligations of protection incumbent upon the State with regard to foreign States, their official representatives or simply their nationals.'[104]

But during the discussions of this article, Ushakov remarked with clear-sightedness that the proposition of the Special Rapporteur contained a contradiction in terms:

> In referring to the way in which an organ ought to have acted according to a primary rule of international law—which required it to prevent or punish the conduct of an individual—the Commission was taking a subjective element into consideration and leaving the sphere of 'acts of the State' to enter that of wrongful acts of the State.[105]

Kingdom (App No 25599/94), *ECHR Reports 1998-VI*; or on the subject of the freedom of expression (art 10): *Özgur Gündem v Turkey* (App No. 23144/93), *ECHR Reports 2000-III*.

[100] *Ilaşcu and others v Moldova and Russia* (App No 48787/99), *ECHR Reports* 2004-VII.

[101] Ibid, paras 330–331. For a critical reading, see our commentary in the *chronique* edited by E Decaux & P Tavernier, (2005) 132 *JDI* 472–477.

[102] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, in particular para 430.

[103] R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 126 (para 145).

[104] Ibid.

[105] *ILC Yearbook 1975,* Vol I, 33 (para 51).

Ago rejected Ushakov's criticism but recognized that it was possible to detect in draft article 11 'a shift from the subjective element of attribution to the State, to the objective element of breach of an international obligation.'[106] During the discussion of the revised article by the Drafting Committee, Kearney observed that the paragraph could be deleted and replaced in the text of paragraph 1 with the idea that the rule of non-attribution does not prejudice the previously listed cases of attribution. But Ago stood fast and defended his paragraph with the help of explanations that Kearney judged to be 'not … entirely satisfactory.[107] The ILC thus adopted the article as revised by the Committee, with a paragraph 2 worded as follows:

> 2. Paragraph 1 [which states the rule of non-attribution of acts by private persons to the State] 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 and which is to be considered as an act of the State, by virtue of articles 5 to 10.[108]

Ushakov and Kearney were right: with this paragraph 2, Ago derogated from the distinction which he himself had carefully elaborated between primary and secondary obligation—a distinction which both constituted the starting point and in a way the parapet of the new codification attempt that was undertaken under his leadership.

But as we know, some twenty years later, the new Special Rapporteur Crawford decided to offer a radical solution to these problems by purely and simply eliminating article 11 from the Articles. Since it is not as such a case of attribution of a wrongful act to the State, the idea of responsibility by catalysis has its place in textbooks of international law rather than in the codification of international law.

Further reading

D Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers' (1906) 13 *RGDIP* 5 and 285

L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984-VI) 189 *Recueil des cours* 9

H Dipla, *La responsabilité de l'État pour violation des droits de l'Homme. Problèmes d'imputation* (Paris, Pedone, 1994)

AJJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsability, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *BYIL* 255

R Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2000) 71 *BYIL* 259

C Kress, 'L'organe *de facto* en droit international public. Réflexions sur l'imputation à l'État de l'acte d'un particulier à la lumière des développements récents' (2001) *RGDIP* 93

T Meron, 'Classification of Armed Conflicts in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *AJIL* 236

106 Ibid, 41 (para 20).
107 Ibid, 215 (para 16).
108 Ibid, 214.

J-P Queneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, LGDJ, 1966)

P Reuter, 'La responsabilité internationale. Problèmes choisis (Cours de DES Droit public, 1955–1956)', in *Le développement de l'ordre juridique international. Ecrits de droit international* (Paris, Economica, 1995) 377