Oxford Public International Law

Part III The Sources of International Responsibility, Ch.18 The Rules of Attribution: General Considerations

Luigi Condorelli, Claus Kress

From: The Law of International Responsibility
Edited By: James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (Assistant)

Content type: Book content
Series: Oxford Commentaries on International Law
ISBN: 9780199296972

Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 20 May 2010

Subject(s):

Responsibility of states — Wrongful acts — Responsibility of international organizations — Circumstances precluding wrongfulness — Attribution — Armed conflict, international — Individual criminal responsibility — War crimes

(p. 221) Chapter 18 The Rules of Attribution: General Considerations

1 Introduction

By all accounts, none of the subjects of international law belonging to the *genus* of collective entities (States, international organizations, etc) is able to carry out its activities, whatever they may be, other than through individuals. 'Attribution' (or 'imputation') is the term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of a positive action or an omission, is to be characterized, from the point of view of international law, as an 'act of the State' (or the act of any other entity possessing international legal personality). In other words, by the term 'attribution', reference is made to the body of criteria of connection and the conditions which have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State (or other subject of international law) which has acted in the particular case. In that case (and only for that purpose), the actual author of the act, ie the individual, is, as it were, forgotten, and is perceived as being the means by which the entity acts, a tool of the State (or other subject of international law) in question.

From this point onwards, repetition of the formula 'State or other subject of inter national law' will be avoided, and reference will be made only to 'the State', it being understood that the points discussed are generally equally applicable to the case of attribution of acts to an (p. 222) international organization. However, it is necessary to clarify at the outset that this is so only in principle, as has been emphasized by the Special Rapporteur of the International Law Commission on the Responsibility of International Organizations, G Gaja,[1] and as results from the text of the draft Articles proposed in relation to the question of attribution of conduct to international organizations.[2] Some adaptations appear necessary to the extent that, on the one hand, international organizations, even if they possess their own international legal personality, nevertheless remain instruments of cooperation between States, and on the other, that States play an essential role within each international organization, for example by sitting as members within their most important decision-making organs. Inevitably, that situation gives rise to extremely delicate problems in relation to the identification of the subject(s) of international law responsible for any given conduct, but also may give rise to the possibility of cumulative responsibility (of both the organization and its member States), in particular due to the phenomenon of 'double attribution'. Although it is not possible here to discuss the various solutions which have been proposed, some reservations may be expressed as to the idea that the organization may, in an appropriate case, see its own responsibility engaged by reason of conduct which is not attributable to it, but is only attributable to its member State(s), and which violates an obligation which is binding on both the organization and the member States. Rather, it would seem appropriate that the responsibility of the organization should be seen as being based not directly on the conduct of the State in question, but rather upon the organization's own conduct: that of not having used all the means at its disposition to ensure that its member States act

in accordance with the obligations binding upon them. Such an analysis is based, *mutatis mutandis*, on the principle of the 'catalyst' for responsibility discussed below.

Traditionally, the notion of attribution has been discussed solely in the context of international responsibility for wrongful acts. It is of course true that it is in that area that the question of attribution has been of the greatest practical importance, in particular due to the frequency of international disputes raising the question of whether a particular injury suffered by a State gives rise to the responsibility of another State (therefore bringing into play the obligation to make reparation); where the injury has been caused by the actions of individuals, the attribution of conduct to the putatively responsible State is often the cause of substantial dispute. Of course, in a work dedicated to the topic of international responsibility, it is to be expected that the subject of attribution should be discussed solely insofar as it relates to that topic under discussion, as indeed is the case in the following sections. However, it bears emphasizing that the significance (at least analytically) of the process of attribution and its relevance extends far beyond the particular field of international responsibility; in principle, the question of attribution can be raised in relation to any conduct of the State in relation to which a norm of international law attaches any legal significance, and not only those producing the characteristic effects attaching to an 'internationally wrongful act'.[3] Therefore, for example, the relevant State practice for the purposes of the identification of customary norms can only consist of acts and conduct which is attributable to the State; the same is true for all unilateral acts, such as recognition,

References

(p. 223) renunciation, protest, etc, and also for acts in the context of the law of treaties. Accordingly, for this simple reason alone, it may be stated that the topic of attribution is one of fundamental importance for the international legal system as a whole.

It should be emphasized in this regard that the categories of conduct the evaluation of which requires a process of attribution are no less numerous than the various categories of international legal effects: conduct giving rise to international responsibility entails legal consequences which in no way correspond to the aims of the State to which the conduct is attributable, while conduct which manifests the consent of a State to be bound on the international plane produces, at least in principle, precisely this effect. Of course, in the two situations, attribution is normally but one constitutive element among others required in order to produce the legal effect in question.[4] In relation to the legal effects resulting from responsibility, the question will be dealt with in Section 2 of this Chapter. As concerns acts manifesting the consent of a State to be bound on the international plane, it suffices to observe that attribution is not sufficient on its own in order to produce the legal consequence desired: in addition, it is necessary that the act should be internationally valid according to the relevant rules of the law of treaties.[5] In relation to the category of 'defects in consent' which might result in invalidity of this type, reference may be made to the invalidity that may result from the violation of the internal constitutional rules as to the treaty-making power;[6] if such a defect is validly invoked in a given case, what is affected is the international validity of the act in question, which however remains nevertheless an 'act of the State', even if incapable of producing the effect of binding the State to the treaty. Therefore, for example, in its decision in *Land and Maritime Boundary between Cameroon and Nigeria*,[7] the International Court of Justice made clear that in addition to the attribution to the Parties of the act of signing the Maroua Decaration of 1975 by their respective Heads of State, it was necessary in order for those signatures to be capable of producing the effect of binding the two States that they were in conformity with the international principles relative to the competence of an organ to bind the State on behalf of which it acted. The fact that fundamental norms of domestic constitutional law had been violated did not invalidate the agreement, given that the violation in question could not be qualified as 'manifest' for the other Party in accordance with the rule embodied in article 46 of the Vienna Convention. As it had been the Head of State of Nigeria who had signed the Declaration, his representative character (as recognized by article 7(2) of the Vienna Convention) as a matter of principle precluded the invalidity on the international plane of the agreement entered into by him, even if *ultra vires* from the point of view of domestic constitutional law.[8] However, it should go without saying that if the objection had been upheld, the invalidity of the signature caused by the lack of capacity of the organ would in no way have contradicted the attribution to the State of that same act: the signature would have remained an 'act of the State', even if incapable of producing the effect of the conclusion of an international agreement.

References

(p. 224) 2 Attribution and State responsibility for internationally wrongful acts

(a) The significance of attribution in the theory and practice of international responsibility

In the Articles on State Responsibility, the ILC has developed an extremely clear and simple analytic model as to the origin of State responsibility for internationally wrongful acts. It is useful to briefly describe that model in order to make clear the place of attribution within this international legal régime. According to article 1, every internationally wrongful act of a State entails its international responsibility. However, it results from article 2, read in conjunction with Chapter V of Part One, that an internationally wrongful act is the product not of two conditions or constitutive elements, as article 2 would seem to suggest, but of three such elements: attribution, breach (ie that the conduct attributable to the State in question is contrary to its international obligations), and the absence of any circumstance precluding wrongfulness. The ILC's basic conception is a faithful reflection of international practice; at least since the judgment in *United States Diplomatic and Consular Staff in Tehran*,[9] the 'tripartite model' for the origin of State responsibility for internationally wrongful acts has been the explicit basis underlying the approach of the International Court of Justice.

Attribution accordingly has acquired a pre-eminent place in the process of establishing the international responsibility of a State for an internationally wrongful act. The importance of attribution (sometimes referred to as the 'subjective' element of international responsibility), reflects universal support in academic writing 'from Grotius to Ago'[10] for the basic idea that a State's responsibility may not be engaged except as a result of its own acts.

However, attribution is not only an analytical category; it also plays an extremely important substantive role. As noted by J Crawford, 'the rules of attribution play a key role in distinguishing the "State sector" from the "non-State sector" for the purposes of responsibility'.[11] Of course, that statement does not necessarily imply that the distinction between the State and non-State sectors depends exclusively on the rules of attribution. Rather, in order to be able to say whether (or to what degree), the process of attribution exercise a real substantive influence on the definition of the 'State sector' for the purposes of responsibility, first it is necessary to ascertain whether (or to what degree), the process of attribution goes beyond a simple reference to the public institutions or organs of the State concerned. That fundamental question will be discussed in some detail below.

(b) The rules of attribution as secondary rules of international responsibility

The ILC approached the formulation of the rules of attribution on the basis that those rules form part of a body of secondary rules on responsibility, with the consequence that

References

(p. 225) the process of attribution takes place, in principle, in a single and uniform manner in relation to all substantive, primary rules of international law. However, among the academic criticisms of the work of the ILC in relation to State responsibility, a large number of writers take issue with precisely the distinction between primary and secondary rules, a distinction that was the inevitable consequence of the decision taken by the ILC to codify the law of responsibility, the whole of the law of responsibility, and nothing but the law of responsibility.[12] Some writers went so far as to characterize the rules of attribution as entirely deprived of practical utility: a striking proof, so it was said, of the abstract or even totally artificial character of the distinction between primary and secondary rules. Essentially, the criticism in question is based on the idea that it is not possible to formulate general rules of attribution, applicable in an identical manner, independent of the applicable primary rule; instead, the process of attribution is seen to be inextricably linked to the substantive primary rule in question and that attribution may take widely varying forms, depending upon the primary rule to be applied.[13]

These criticisms merit a nuanced response; there undoubtedly exists a close link, in some cases extremely close, between the applicable primary rule and the rules of attribution. This is particularly the case in relation to conduct consisting of an omission, given that inaction cannot be identified except by identifying precisely what active conduct is required by the primary obligation.[14] It is also true, as will be seen in more detail below, that a primary rule may, in certain cases, be accompanied by a special rule of attribution, ie a secondary rule specially conceived in order to permit the operation of the primary rule in question. In such circumstances, the distinction between the primary rule and the special rule of attribution *ratione materiae* becomes extremely subtle, and, to a large extent, theoretical.[15] However, even admitting that this is the case, it in no way precludes adoption of the view that it is not only entirely correct, but also useful to recognize the existence of general rules of attribution. Such an approach is correct since, even in the case of conduct consisting of an omission, the distinction between the operation of attribution and the question of violation of the obligation to act remains analytically possible. It is useful because the existence of a special rule of attribution *ratione materiae* constitutes very much the exception, such that normally it is necessary to rely on the general (secondary) rules of attribution.

(c) The normative approach to attribution and its implications

Article 2(a) of the ILC's Articles refers to conduct attributable to the State 'under international law'. That formulation clearly reflects a 'normative' approach to questions of attribution. In essence, such an approach recognizes that the operation of attribution is a legal operation consisting of the application of rules forming part of international law. However, that approach (which is in complete harmony with the international case law)[16] is not unanimously accepted by academic writers: in fact, it has been the object of

References

(p. 226) a radical critique based on a 'factual' approach.[17] According to that critique, attribution is not a legal operation, but a simple empirical statement by the interpreter in question of a factual situation. The underlying idea is that the State—in its quality as the principal subject of international law—precedes the international legal order, which, being based on sovereign States, therefore presupposes them. Accordingly the structure of the State cannot be determined by rules forming part of the international legal order.

Although the limited space available in these brief general considerations in relation to attribution precludes a detailed discussion of this theory, it may be noted that even if one shares the approach according to which the State precedes the international legal order, it remains perfectly possible (and may even be said to be a logical necessity) that international law identifies what is the State, not in order to define or structure it, but so as to allow the rules of international law to regulate effectively the relations between States.[18] It should be added that even according to the 'normative' approach, the organization of the State results from a multitude of 'facts'. However, acceptance of the factual character of the structures of the State from the viewpoint of international law does not prevent recognition of the possibility, or even of the necessity, that international legal criteria must take account of the factual elements which form part of those structures and which play a role for the purposes of the application of international rules.

The 'normative' approach implies a series of important consequences. Most importantly, if the operation of attribution is not the empirical statement of a simple fact, but a legal operation involving the application of rules of international law, the evolution of the relevant rules, resulting in a modification of the criteria for attribution, cannot be excluded. However, given that the international principles relating to attribution contribute to the delimitation of the public domain for the purposes of international responsibility, in distinguishing it from what is essentially the private sphere, it is hardly suprising that the question of whether particular rules of attribution should be modified is the subject of divergent views which are based on different conceptions of general legal policy. Accordingly, some participants in the debate adopt a position which is essentially hostile to any extension of the public sphere, on the basis that such an expansion would involve a growth of State control over the activities in question and would thereby endanger individual freedoms, since State interference into the (formerly) private domain would be required by international law so as to avoid State responsibility.[19] Others emphasize to the contrary that more effective control over acts of individuals should be imposed upon States in order to ensure better protection of human rights.[20]

A separate question is whether the rules of attribution have in fact been the subject of any modification in recent times. A comprehensive response to that question clearly is beyond (p. 227) the scope of these general introductory considerations. However, reference may be made in this regard to the position of Crawford according to which the rules of attribution have not been substantially modified in the recent past.[21] There is no reason to contradict that conclusion, although it is appropriate to draw attention to an interesting recent development (albeit extremely nuanced, and probably not yet stabilized) in the direction of facilitating the attribution of conduct 'controlled by a State', as dealt with by article 8.[22] In fact, international practice evidences a tendency to move beyond a rigorously restrictive conception, according to which the attribution to the State of the conduct of an individual not forming part of its organic apparatus was not possible unless it was established that the particular conduct had been ordered or directed by the State in question. On the other hand, it is also true that this question now has to be considered in the light of the decision of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that has, essentially, confirmed a restrictive approach.[23]

A second consequence of the 'normative' approach is the possibility of the existence of special rules of attribution, a possibility which is expressly recognized by article 55. In this regard, it is necessary to distinguish between two categories of special rules. On the one hand, a specific group of States may adopt by way of treaty special rules of attribution regulating their relations with each other; on this hypothesis, the special nature of the rules is *ratione personae*.[24] On the other hand, it is possible that a special rule of attri bution may co-exist with a particular primary rule or a collection of specific primary rules; in such a situation, one may talk of a special rule of attribution *ratione materiae*.[25] The possibility of the existence of a special rule of attribution ratione materiae is more than a theoretical possibility, as recognized by the Appeals Chamber of the ICTY in the appeal on the merits in *Tadić*.[26] For instance, the law relating to outer space has been identified as providing a particularly clear example, given the existence of the principle that renders the State responsible for all national activities in space in all circumstances, whether carried out by private or governmental entities.[27] On the other hand, international humanitarian law has long recognized a special criterion for attribution, according to which violations of the applicable rules perpetrated in the context of an armed conflict by members of the armed forces of a State are in all circumstances attributable to, and engage the international responsibility of, that State. This is the case even if the soldiers in question are not, or are no

References

(p. 228) longer, acting under the control and as organs of the State, including situations in which the soldiers have become lost.[28] In its judgment in *Armed Activities on the Territory of the Congo*, the Inter national Court of Justice has recently clearly reaffirmed this particular feature of international humanitarian law, holding that 'by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda'.[29] The Court went on to emphasize the 'well-established rule of a customary nature'[30] in this regard, without pausing to dwell on the question of whether or not that rule constitutes *lex specialis*. Recently it also has been suggested that it is possible to interpret State practice in relation to international terrorism as disclosing the formation of a special principle, according to which it is possible to attribute terrorist actions to States which support terrorist groups to a substantial degree by harbouring them or providing them shelter on their territory.[31]

The possibility of the attribution of conduct to several States (or to a State and to another subject of international law) may be seen as being a third consequence of the normative approach. That possibility is only raised in passing here, given that it is the subject of a separate chapter in this work.[32]

Finally, the normative approach suggests that a certain degree of caution is necessary as to the question of the extent to which it is possible to derive legal consequences directly from the rules of attribution in areas of international law other than that of responsibility for internationally wrongful acts. In reality, although the content of the rules of attribution is to a certain extent influenced by the specific aims of international responsibility, it is equally the case that the specific goals of the law of international immunities may militate in favour of a different, autonomous approach. Put briefly, the attribution to a State of particular conduct does not necessarily imply, as a matter of course, either immunity from jurisdiction of the State itself before the courts of another State in relation to that conduct, or the immunity of the individual/organ which actually carried out the conduct in question. However, on the other hand, it

remains the case that, if a State invokes immunity from jurisdiction in relation to a particular act, in principle it acknowledges that the conduct in question is attributable to it.[33]

(d) The different bases of attribution of conduct to a State under international law and the role of the domestic law of the State

The different bases of attribution under contemporary international law, as enumerated in Chapter II of Part One of the ILC's Articles on State Responsibilty may be divided into

References

(p. 229) four categories. The first category covers the situations foreseen by articles 4, 5, and 6, that is to say, the conduct of *de jure* organs, conduct of persons or entities exercising elements of governmental authority and conduct of organs placed at the disposal of a State by another State. The second category principally includes the conduct of persons acting under the direction, control, or on the instructions of an organ of the State and the conduct of persons or entities acting in the absence or default of the official authorities (sometimes referred to as 'agents of necessity'), as regulated by articles 8 and 9, respectively. Finally, the attribution of conduct of insurrectional or other movements under article 10 and attribution of conduct recognized and adopted by a State as its own pursuant to article 11, form two separate and distinct categories. The four categories are distinguishable in particular according to the degree of 'intervention' of international law in the process of attribution and according to the relative importance of the domestic law of the State.

The first category of bases of attribution is undoubtedly the most important from a practical point of view; the different hypotheses covered reflect what may be said to constitute the 'normal' basis for attribution. In that regard, the role of international law in relation to the operation of attribution is relatively passive; it is the domestic law of the State which plays the decisive role. This is particularly evident in relation to the attribution of the conduct of *de jure* organs of a State. Given the right of States to determine their own internal organization,[34] it is each State which determines the identity and status of its own organs. As a general rule, international law does no more than to take account of the decisions taken in this regard internally and to extrapolate the consequences in that regard on the international plane of inter-State relations. Article 4(2) adopts this logic, stating that the notion of (*de jure*) 'organ', 'includes any person or entity which has that status in accordance with the internal law of the State'.

The process of attribution operates in essentially the same manner in relation to persons and entities authorized by domestic law to exercise elements of governmental authority: in that regard, the relevant connection to the State is not the status of organ under domestic law, but the authorization to exercise elements of governmental authority; in this regard also, the connection is essentially determined by domestic law. Similarly, in the case of an organ of another State placed at the disposition of a State by that other State, the State in question decides under its internal law to authorize the organ placed at its disposal to exercise elements of governmental authority. Accordingly, in relation to the first category of bases of attribution, the general observation made by Crawford may be adopted, according to which:

> Without a fixed prescription for State authority, international law has to accept, by and large, the actual systems adopted by States, and the notion of attribution thus consists primarily of a *renvoi* to the public institutions or organs in place in the different States.[35]

However, even in relation to this first category, in certain circumstances international law may play a much more active role. A first example is in relation to those organs the status of which (including the question of which persons in fact qualify as organs) is regulated by international law itself; in this regard, diplomats are a clear and classic example.[36] In addition, the rule relating to the attribution to the State of conduct *de jure* organs

References

(p. 230) acting *ultra vires*, as referred to in article 7, can only be considered to be the imposition by international law of an autonomous standard.

In its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice has enunciated a particularly interesting clarification in relation to the notion of State organs. The Court stated—for the first time in an unequivocal fashion—that, in exceptional circumstances, the status as an organ of a State may be recognized even where the person or entity does not have that status under the domestic law of the State. A person, group or entity may be assimilated to a *de jure* organ (with the consequence that all of its acts performed in that capacity are attributable to the State, even if *ultra vires*), ' … even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument.'[37] The Court emphasized that, in this regard, it is necessary to look beyond the formal legal status in order to grasp the reality of the relationship so as to avoid the possibility that States may escape international responsibility through subterfuge or a fiction, as would be the case if a person, group or entity who in fact played a role identical to that of an organ was not legally categorized as such according to the State's domestic law. It is not possible here to analyse in depth this important development; however, it may be noted that it is entirely consistent with, and may be seen as forming a part of, what may be called the 'expansionist' tendency, discussed above. Further, it may be noted that the expansion of the bases of attribution has been carried out by the International Court of Justice through interpretation of the principle consecrated in article 4 of the ILC's Articles. By contrast, the Appeals Chamber of the ICTY in *Tadić* had resorted to an expansive interpretation of the rule contained in article 8 (relying upon a criteria of 'overall control', rather than of 'effective control'); as a result, it was strongly criticized by the International Court of Justice.[38]

The position changes considerably when one comes to examine the second group of bases of attribution. Neither persons acting under the direction or control, or upon the instructions of organs of the State,[39] nor 'agents of necessity', are incorporated, whether formally, or on on a practical level, into the apparatus of the State. As a consequence, domestic law is much less important for the process of attribution; instead, it is international law which directs the process and provides the applicable standards. This is particularly the case in relation to so-called 'agents of necessity', who act in the absence or default of the official authorities. However, it is also true for the case, which is much more important in practice, where persons *de facto* act on behalf of the State 'in respect of each operation in which the alleged violations occurred'.[40] This is so given that the relevant control over an individual or a group of individuals, who form the *longa manus* of the State without being integrated into its organic structure, is independent of any formal basis in the domestic law of the State in question. It has been suggested that as regards 'agents of necessity', and individuals acting on behalf of the State under its direction or control, or upon its instructions, the connection of the conduct to be attributed is so different compared to that which exists in relation to *de*

References

(p. 231) jure organs that the justification for the legal qualification of that conduct as 'State action' is plainly lacking.[41] Such criticism, however, goes too far. The conceptual differences between the two categories of attribution in no way negates the close relationship between them on a deeper level; ultimately, they both result from the freedom of the State to determine its own internal organization. The principle underlying the second category is that of the 'effective' organization of State activity, rather than the formal organization of the State which forms the essential point of reference for the first category. It should also be noted that the situation foreseen by article 17, ie the situation in which a State directs and controls another State, can be conceived of as another form of an 'effective' organization of the activity of the directing and controlling State.

As for the attribution of the conduct of an insurrectional or other movement, as provided for in article 10, the situation is relatively complex. In contrast to the first two categories discussed above, attribution in such situations is *ex post facto*; this is the case both in relation to attribution of conduct of a movement which has subsequently become the new government of a State which previously existed (article 10(1)) as well as in relation to a movement which has succeeded in establishing a new State (article 10(2)). Quite apart from that difference, the question of the extent to which the considerations underlying the first two categories of bases of attribution are likewise relevant, *mutatis mutandis*, to attribution of conduct to such movements in the end depends upon the structure of the movement in question. If at the time of the conduct in question, the movement has already established State-like institutions, it may be appropriate to recognize the '*de jure* organs'of the movement as the result of a *renvoi* to the 'internal law of the movement'. In a situation in which there is a movement which is State-like, it may even be possible to consider that there exist *de facto* organs.[42] However, the drawing of a distinction between the 'formal'

structures of a movement and its 'effective' organization is not possible in relation to a movement which is only loosely organized.

The situation of conduct which is acknowledged and adopted by the State as its own, as dealt with in article 11, constitutes a second example of *ex post facto* attribution. This basis of attribution constitutes something of a novelty when seen against the long history of the ILC's codification of the law of responsibility, its introduction having been promoted by Crawford only in 1998.[43] Attribution on the basis of the acknowledgment and adoption by the State of particular conduct as its own may be considered as the most extreme consequence of the normative approach to attribution, given that it permits attribution on the sole basis of a declaration made by the State in question, without the any other connection with the conduct in question being required. Although there are no objections of principle against that rule, it is very doubtful whether it has a sufficiently solid basis in international practice;[44] in particular, it is somewhat surprising that, in support of the rule contained in article 11, the ILC relied primarily on the judgment of the International Court of Justice in *United States*

References

(p. 232) Diplomatic and Consular Staff in Tehran which in fact says exactly the opposite![45] In *United States Diplomatic and Consular Staff in Tehran*, the Court emphasized that the subsequent approval by the highest organs of a State of conduct, carried out by private individuals not having acted on behalf of the State, was not capable of modifying *a postierori* the initially independent and unofficial character of the conduct in question.[46] Arguably, the *ex post facto* approval referred to by the Court in *United States Diplomatic and Consular Staff in Tehran* may be seen as a sort of admission by Iran of its implication in the facts from the outset. From this viewpoint, *ex post facto* recognition is to be reconceptualized not as a legal basis for attribution, but as furnishing sufficient and conclusive proof of the fact that, at the moment at which the conduct in question took place, a legal basis for attribution was in fact present. The ILC could have avoided its confusion between the means of proof and the subjectmatter of the proof, if it had duly considered the pertinent observations of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*.[47] There the Court, in discussing the relevance of official declarations made by State authorities after the fact, observed that such declarations may constitute 'evidence of specific facts and of their imputability to the States in question'.[48] In other words, such declarations may 'certainly [be] a recognition as to the imputability of some of the activities complained of'.[49]

The final reworking of the Articles in 2001 resulted in the expurgation of article 11 of the 1996 draft; in the end, the provision was was considered to be superfluous and thus deleted. Article 11 of the 1996 draft concerned acts of private individuals which were not attributable to the State on any of the other criteria for attribution; although emphasizing that such conduct was not attributable to the State, article 11(2) made clear that this was without prejudice to the possibility (nor to the need to verify) that such acts might operate, to use the evocative terminology of the Special Rapporteur at the time, Roberto Ago, as 'catalysts' for the international responsibility of the State.[50] It is possible that the acts of private individuals may reveal, for example, that the organs of a State are responsible in respect of omissions with respect to the conduct of the individuals concerned on the basis that State organs could have prevented that conduct from occuring and failed to do so despite the fact the State concerned was obliged to take steps to prevent such conduct. For instance, the fact that gunshots are fired by an individual at a foreign Head of State on an official visit is not conduct which is attributable to the host State; however, it may reveal that the State in question failed to take all the necessary protective measures required by international law in order to avoid such events. While it is not suggested that any mourning is required for the passing of the provision in question, its excision may still be regretted since the recognition of the possibility of 'catalysing' acts had a clear didactic value: it could have served as a reminder not to close investigation of possible State responsibility too early after having concluded that certain action was not attributable to the State, but rather to consider whether there was some other, closely related basis on which the State might nevertheless be held responsible. This additional step in legal reasoning is of parti cular relevance whereever international obligations of 'due diligence' are at stake.

References

(p. 233) (e) Attribution or imputation? Some remarks on terminology

Finally, a number of remarks as to terminology are apposite. At the outset of the work of the ILC on State responsibility, the preferred term was 'imputation', rather than 'attribution'.[51] Whilst the former term formerly enjoyed and continues to have some currency in international practice,[52] as well as in academic writing, the ILC in the end preferred the term 'attribution' in order to avoid any suggestion that the legal operation of connecting conduct to the State involved a kind of fiction.[53] In the present chapter, the term 'attribution' adopted by the ILC has been used in most cases, although without thereby wishing to endorse the ILC's preference. In any case, it should be underlined that the choice of terms has no substantive implications whatsoever. Roberto Ago was correct to state 'no matter whether the term adopted was "attribution" or "imputation", or even "attachment", the idea it was intended to express was still the same'.[54]

In the opinion of various members of the ILC, the term 'attribution', while avoiding any connotation of a genuine legal fiction, also better expresses the normative character of the process of attribution.[55] The well-foundedness of that position may be doubted; in fact, both terms equally expess the normative character of attribution. Also, the two terms evoke, in a very similar manner, the idea of the 'active' role of public international law in the process of attribution. As noted above, that idea is not entirely correct; in the majority of cases covered by articles 4, 5 and 6 of the Articles, international law does not play the central role in an operation which consists of 'attributing' or 'imputing' particular acts to one or another State. In such circumstances, to the contrary, the role of international law is 'passive', since it consists simply of taking note of situations which are not regulated by international law but only recognized by it, in order to derive the appropriate consequences on the inter-State plane. It is principally in the context of the situations dealt with by articles 8, 9 and 11 that international law adopts a more 'interventionist' role. It is thus in those specific cases that the use of the terms 'attribution' and 'imputation' is truly appropriate.

3 Attribution of conduct to the State as a preliminary question in the context of the criminal responsibility of individuals and the distinction between international and non-international armed conflicts

The jurisprudence of the *ad hoc* criminal tribunals has highlighted the fact that the question of the attribution of acts of individuals to the State may play a very important role in the context of individual criminal responsibility, in particular in the context of war crimes. At the present time, differences remain in the law on war crimes relating to international

References

(p. 234) armed conflicts and the respective law applicable in non-international armed conflicts. It follows that in war crimes proceedings there will often be a preliminary issue as to whether the conduct in question took place in an international or non-international armed conflict. Apart from the special case of wars of national liberation, applying the definition contained in common article 2 of the 1949 Geneva Conventions, in order to establish whether an armed conflict is international or non-international, it will be necessary to ascertain whether the hostilites are between two or more States, that is to say, whether the acts of violence carried out by the individuals fighting on each side are 'State acts'. The question is whether the principles of attribution as codified in the Articles should be applied to decide that preliminary question.

The better view would appear to be yes.[56] The contrary view adopted by the ILC[57] shared by certain authors,[58] and recently endorsed somewhat hastily[59] by the International Court of Justice in its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[60] is seriously flawed. Of course, caution is necessary, because, in a war crimes trial, the ultimate purpose of the delimitation between international and non-international armed conflict is to identify legal consequences in an area other than that of the responsibility of States for internationally wrongful acts. For international criminal responsibility of individuals is one thing, while State responsibility is clearly another, as the ILC stressed with some insistance.[61] However, all this is of very little relevance as the preliminary question to be resolved is not one of individual criminal responsibility, but remains the interpretation of the notion of international armed conflict. That notion turns, as a matter of contemporary international law, on the very existence of an armed conflict between two or more States, which cannot mean anything other than that the armed forces involved form part of the 'formal' or

'effective' organization of the States which are party to the conflict. In other words, the normal criteria for attribution are perfectly applicable in that context. In 1986, in *Military and Paramilitary Activities*, the International Court of Justice adopted precisely this line of reasoning.[62] Of course, it is true that, as emphasized by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 'logic does not require the same test to be adopted in resolving the two issues [sc. that of attribution and that of the nature of the armed conflict], which are very different in nature'.[63] In other words, it is entirely conceivable that the characterization of an armed conflict as international is to be assessed using criteria different from those governing the attribution to States of the activities of their armed forces. However, such reasoning

References

(p. 235) would appear to be entirely hypothetical and incapable of changing the law as it currently exists. Put shortly, for so long as the instruments in force relative to international criminal law do not adopt autonomous definitions of the concepts of international and noninternational armed conflict based on criteria other than those of the attribution to the State of the acts of its armed forces, the catalogue of war crimes which are relevant for each of the two types of armed conflict have to be applied on the basis of the existing definitions of those concepts.[64]

Further reading

CF Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 *Revue égyptienne de droit international* 91

G Arangio-Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance', *Le droit international au service de la paix, de la justice et du développement; Mélanges Michel Virally* (Pedone, Paris 1991) 25

T Becker, *Terrorism and the State. Rethinking the Rules of State Responsibility* (Hart Publishing, Oxford and Portland, 2006)

DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules', in R Lillich & D Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational, Irvington-on-Hudson, 1998) 109

A Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *EJIL* 649

GA Christenson, 'The Doctrine of Attribution in State Responsibility', in RB Lillich, *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia, Charlottesville, 1983) 321

C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *EJIL* 387

L Condorelli, 'La réparation des dommages catastrophiques causés par les activités spatiales', Faculté de droit de l'Université Catholique de Louvain, *La réparation des dommages catastrophiques. Les risques technologiques majeurs en droit international et en droit communautaire* (Brussels, Bruylant, 1990) 263

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

L Condorelli & H Dipla, 'Solutions traditionnelles et nouvelles tendances en matière d'attribution à l'État d'un fait internationalement illicite dans la Convention de 1982 sur le droit de la mer', *Le droit international à l'heure de sa codification. Etudes à l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol 3, 65

N Croquet, 'La responsabilité internationale de l'État du fait des particuliers et la notion d'organe de fait à la lumière de l'affaire Celebici: Innovation ou continuité?' (2002) 41 *Revue de droit militaire et de droit de la guerre* 43

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

H Dipla, *La responsabilité de l'État pour violation des droits de l'homme* (Paris, Pedone, 1994)

A Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (Nomos Verlagsgesellschaft, Baden-Baden, 1992)

(p. 236) J Griebel, *Die Zurechnungskategorie der de facto-Organe im Recht der Staatenverantwortlichkeit* (Münster, Lit, 2004)

J Griebel & M Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia* v. *Serbia*' (2008) 21 *Leiden Journal of International Law* 601
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 développement récents' (2001) 105 *RGDIP* 93
M Milanovic, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) 22 *Leiden Journal of International Law* 307
P Palchetti, *L'organo di fatto dello stato nell'illecito internazionale* (Milan, Giuffrè, 2007)
J Wolf, *Die Haftung der Staaten für Privatpersonen nach Völkerrecht* (Berlin, Duncker & Humblot, 1992)

Footnotes:

1 G Gaja, Second Report on the Responsibility of International Organizations, 2004, A/CN.4/541 .

2 See now the Draft Articles on the Responsibility of International Organizations, as adopted on first reading in 2009, Report of the ILC, 61st Session, 2009, A/64/10, 19ff.

3 See also the comments of the last Special Rapporteur: J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33 (para 147) .

4 For a more detailed analysis, see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 39ff .

5 This distinction appears not to have been drawn by Crawford in the passage referred to above in which he discussed this issue: J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33 (para 147 and note 182) .

6 See arts 7 & 46 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331.

7 *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), ICJ Reports 2002*, p 303.

8 Ibid, 430 (para 265).

9 *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, p 4, 28ff (para 56ff).

10 GA Christenson, 'The Doctrine of Attribution in State Responsibility', in RB Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, University Press of Virginia, 1983), 321, 327 .

11 J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33–34, (para 154) .

12 For an overview of the criticisms, see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 22ff .

13 See eg I Brownlie, *Principles of Public International Law* (7th edn, Oxford, OUP, 2008), 419 .

14 In this regard, see the particularly relevant observations by J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33–34 (para 154) .

15 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 développement récents' (2001) 105 *RGDIP* 93, 124, fn 128 .

16 See the general remarks in this regard, ibid, 122 .

17 See in particular, G Arangio-Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance', in *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally* (Pedone, Paris 1991), 25 ; G Arangio-Ruiz, Second Report on State Responsibility, ILC Yearbook 1989, Vol II(1), 1, 48–53 (paras 165–180) ; see also CF Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 *Revue égyptienne de droit international* 91, 92 , who characterizes attribution as an 'intellectual exercise'.

18 See in this regard, the observations of H Kelsen, *The Pure Theory of Law* (Berkeley, University of California Press, 1970), 320ff .

19 See eg DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules', in R Lillich and D Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational, 1998) 109, 127 .

20 C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *EJIL* 387 .

21 J Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 *EJIL* 435, 439 ; for similar views, see H Dipla, *La responsabilité de l'État pour violation des droits de l'homme* (Paris, Pedone, 1994), 100ff ; J Griebel, *Die Zurechnungskategorie der de facto-Organe im Recht der Staatenverantwortlichkeit* (Münster, Lit, 2004), 178ff and 253ff .

22 For a detailed analysis, see 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 développement récents' (2001) 105 *RGDIP* 93 ; see also J Griebel, *Die Zurechnungskategorie der de facto-Organe im Recht der Staatenverantwortlichkeit* (Münster, Lit, 2004), 179ff , who favours such a development de lege ferenda.

23 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007.

24 See eg J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33–34 (para 154) .

25 For a more detailed discussion, see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 117ff .

26 ICTY, *Prosecutor v Tadić*, Case No IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para 90.

27 L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 121ff ; L Condorelli, 'La réparation des dommages catastrophiques causés par les activités spatiales', in Faculté de droit de l'Université Catholique de Louvain, *La réparation des dommages catastrophiques. Les risques technologiques majeurs en droit international et en droit communautaire* (Brussels, Bruylant, 1990), 263 .

28 L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 145ff .

29 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 168, 242 (para 213).

30 Ibid, 242 (para 214).

31 C Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen in Fällen staatlicher Verwicklung in Gewaltakte Privater* (Berlin 1995), 314ff ; L Condorelli, 'Conclusion générale', in R Mehdi (ed), *Les Nations Unies et l'Afghanistan* (Paris, Pedone, 2003), 205ff ; T Becker, *Terrorism and the State. Rethinking the Rules of State Responsibility* (Hart, Oxford and Portland, 2006), 359ff ; J Griebel, *Die Zurechnungskategorie der de facto-Organe im Recht der Staatenverantwortlichkeit* (Münster, Lit, 2004), 216ff favours such a development de lege ferenda.

32 See below, Chapter 20.

33 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, para 196; for a more detailed analysis, see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 76 ; J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33 (para 147 and note 182) ; for a specific example, see 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 développement récents' (2001) 105 *RGDIP* 93, 132, fn 155 .

34 As to which, see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 26ff .

35 J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 34 (para 154) .

36 L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Receuil des cours* 9, 33ff .

37 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007, 140 (para 392).

38 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007, 144–145 (paras 403–406).

39 Traditionally denominated *de facto* organs, although this terminology will no doubt have to be revised in the light of the judgment of the Court in *Bosnia Genocide*: ibid.

40 Ibid, 143 (para 400).

41 J Wolf, *Die Haftung der Staaten für Privatpersonen nach Völkerrecht* (Berlin, Duncker & Humblot, 1992), 148 .

42 For an interesting example drawn from international arbitral practice, see DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules', in R Lillich and D Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational, 1998), 109, 146ff .

43 J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 54–55 (paras 278–282) .

44 See the criticisms by 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 développement récents' (2001) 105 *RGDIP* 93, 121 ; J Griebel, *Die Zurechnungskategorie der de facto-Organe im Recht der Staatenverantwortlichkeit* (Münster, Lit, 2004), 222ff .

45 Commentary to art 11, para (4) (referring to *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, p 3, 35 (para 74)).

46 *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, p 3, 29–30 (para 59).

47 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986*, p 14, 43–45 (paras 71–74).

48 Ibid, 43 (para 71).

49 Ibid, 45 (para 74).

50 R Ago, Fourth Report on State Responsibility, *ILC Yearbook 1972*, Vol II, 71, 97 (para 65) .

51 See eg the remarks of R Ago, Second Report on State Responsibility, *ILC Yearbook 1970*, Vol II, 177, 187–189 ; and see L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984) 189 *Recueil des cours* 9, 41 .

52 See eg ICTY, *Prosecutor v Blaskic*, Case No IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, 122 *ILR* 1, 50 (para 100).

53 J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 33 (para 146) Find it in your Library.

54 *ILC Yearbook 1973*, Vol I, 49 (para 8) (1212th meeting) Find it in your Library.

55 See eg the comments of B Simma (Chairman of the Drafting Committee), *ILC Yearbook 1998*, Vol I, 288 (para 74) (2562nd meeting) Find it in your Library (quoted by C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *EJIL* 387, fn 4 Find it in your Library).

56 See in this regard, ICTY, *Prosecutor v Tadić*, Case No IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para 103ff.

57 See Commentary to art 8, para 5.

58 See eg T Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *AJIL* 236 Find it in your Library; see also the doubts expressed by AJJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Facts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *BYIL* 255, 289 Find it in your Library.

59 A Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *EJIL* 651 Find it in your Library.

60 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007, 144 (paras 404–405).

61 Commentary to art 8, para 5.

62 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986*, p 14, 112–113; 114 (paras 216, 219).

63 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits*, Judgment, 26 February 2007, 144 (para 405).

64 See in this regard, C Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook on Human Rights* 115 Find it in your Library; N Croquet, 'La responsabilité internationale de l'État du fait des particuliers et la notion d'organe de fait à la lumière de l'affaire Celebici: Innovation ou continuité?' (2002) 41 *Revue de droit militaire et de droit de la guerre* 43 Find it in your Library.
