

# Oxford Public International Law

## **Part III The Sources of International Responsibility, Ch.19.1 Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority**

**Djamchid Momtaz**

From: The Law of International Responsibility

Edited By: James Crawford, Alain Pellet, Simon Olleson, Kate Parlett

**Content type:** Book content

**Product:** Oxford Scholarly Authorities on International Law [OSAIL]

**Series:** Oxford Commentaries on International Law

**Published in print:** 20 May 2010

**ISBN:** 9780199296972

### **Subject(s):**

Ultra Vires conduct — Wrongful acts — Exhaustion of local remedies — Responsibility of states —  
Codification — Sovereignty — Prerogative — National liberation movements — Geneva Conventions 1949

## **(p. 237) Chapter 19.1 Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority**

### **1 State organs 239**

- (a) Organs that pertain to the structure of the State 239
- (b) Organs of territorial communities that are subordinate to the State 241
- (c) 'De facto' organs 243

### **2 Entities empowered to exercise elements of governmental authority 244**

- (a) The identification of entities exercising prerogatives of public power 244
- (b) The attribution of acts by entities exercising powers of the public prerogative to the State in international case law 245

#### *Further reading 246*

In order for an act contrary to international law to be classified as internationally wrongful with the consequence of engaging State responsibility, the act must be attributable to the State. But the State, as an abstract entity, can only act with the aid of one or more persons that are classed, either generally or for the particular purpose, as State agents.

For the purposes of attribution, the agents of the State used to be treated as identical with it. In the *Moses* case, a decision of the Mexico-United States Mixed Claims Commission, the arbitrator relied on this idea in order to confirm that 'a functionary or a person vested with authority represents *pro tanto* his government which, from an international point of view is the ensemble of all the functionaries and of all persons vested with authority'.<sup>1</sup> The PCIJ also referred to this idea in its decision in *German Settlers in Poland*. According to the Court, 'States can only act by and through their agents and representatives'.<sup>2</sup> This approach was maintained by academic commentators; for example, Dionisio Anzilotti affirmed that 'the activity of a State is nothing but the activity of individuals that the law imputes to the State'.<sup>3</sup>

(p. 238) The term 'organ' in this context seems to have appeared for the first time in the work of the Hague Conference on the codification of international law (1930). It was recognized that '[i]nternational responsibility is incurred by a State if there is any failure on the part of its organs'.<sup>4</sup> Special Rapporteur Ago used this expression: in his view, an organ is nothing but a human being or collection of human beings.<sup>5</sup> In conformity with draft article 5, presented on first reading, which is titled '[a]ttribution to the State, subject of international law, of the acts of its organs',<sup>6</sup> '[t]he conduct of a person or group of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of the State from the standpoint of international law'. Some members of the ILC were concerned about the consequences that this simultaneous reference to the terms 'persons' and 'organs' could have. It could indeed cause confusion between the behaviour of an organ and that of persons who make up this organ.<sup>7</sup> It was argued that, so far as the exercise of public power of the State is concerned, it is the organs of the State, and not the individuals who constitute such organs, that act in its name.<sup>8</sup>

Taking into account these criticisms Special Rapporteur Ago deleted all references to the behaviour of persons or groups of persons from draft article 5, attributing the behaviour of organs purely to the State.<sup>9</sup> This modification was justified by the necessity in order to 'avoid entering into theoretical problems concerning the definition of the notion of an organ itself'.<sup>10</sup>

During the second reading of the draft articles, the term 'State organ' was considered by some too restrictive, 'any State organ or agent' was preferred.<sup>11</sup> The new Special Rapporteur, Crawford, was inclined to agree, while preferring the term 'person' over 'agent', which was used by Ago. Thus, article 4 adopted on second reading, entitled 'Conduct of organs of a State', specifies in paragraph 2 that 'an organ includes any person or entity which has that status in accordance with the internal law of the State'. The expression 'person or entity' is also taken up in article 5, which concerns the conduct of a person or entity, not within article 4, but empowered by the law of the State to exercise elements of the governmental authority. According to the Commentary to article 4, the term 'entity' is employed in a similar sense to the one in the Draft Articles on Jurisdictional Immunities of States and their Property adopted by the ILC in 1991.<sup>12</sup> According to article 10 of the 1991 Draft Articles, an 'entity' is a separate legal person emanating from the State.<sup>13</sup> In this way, not only State organs properly so-called but also entities empowered to exercise elements of the governmental authority can engage the responsibility of the State.

## **(p. 239) 1 State organs**

All State organs can commit internationally wrongful acts. There is no exception to this rule; it is the corollary to the principle of the unity of the State from the view point of international law. By virtue of its sovereignty the State is free to organize itself in any way and determine what its organs are. The downside of this liberty is that international law attributes the behaviour of its organs to the State. Article 4 simply translates this reality when it states that '[t]he conduct of any State organ shall be considered an act of that State under international law ...'. The term 'State organ' is therefore to be understood in its widest meaning and encompasses organs that pertain directly to the structure of the State as well as territorial communities that have been accorded a distinct but subordinate personality under domestic law. Further, in addition to these '*de jure*' organs, in certain exceptional circumstances, persons or entities which do not form a part of the State in any sense are nevertheless to be regarded as '*de facto*' organs, such that all of their conduct is attributable.

### **(a) Organs that pertain to the structure of the State**

Acts and omissions by organs that are part of the State apparatus are considered acts of the State. Whether the functions of these organs are international or internal, and whether the position they hold in the framework of the State is superior or subordinate, has no relevance as concerns the attribution of these acts to the State.

Historically, it was sometimes considered that only reprehensible behaviour of State organs that were in charge of external relations could constitute wrongful acts of the State, engaging its responsibility on the international level. According to Ago, this theory should be considered out of date and erroneous.<sup>14</sup> It is inadmissible where organs that exercise purely internal functions can equally be called on to apply rules of international law, potentially breaching the international obligations of the State.<sup>15</sup> This way, even though the State may be internationally represented by specialized organs, it remains nevertheless the case that its responsibility on the delictual level can be engaged by all its organs, whichever

function they may assume at the national level. The Franco-Italian Conciliation Commission came to a similar conclusion in *Verdol*.<sup>16</sup>

Thus acts that relate to legislative, judicial, and executive powers can engage the responsibility for the State. This was the position adopted by States in response to a request for information formulated by the Preparatory Committee for the Hague Conference and was taken up in the Conference itself.<sup>17</sup> In fact, the separation of powers is a principle of internal political organization of the State; it cannot be relied on *vis-à-vis* other States on the international level. Anzilotti already confirmed that it is 'undoubtedly a mistake to deny that a State can be held responsible for judgments of its courts by reason of the independence of the judiciary, which does not permit that the executive interferes with the administration of justice'.<sup>18</sup> At the Hague Conference several delegations insisted that (p. 240) the principle of judicial independence was not relevant to international law and refused to accord it any significance in the attribution of conduct of organs to the State. Basis of Discussion No 5, prepared in 1929 by the Preparatory Committee for the Hague Conference, insisted on the fact that State responsibility will be engaged if the injury suffered results from a definitive judicial decision that is incompatible with the international obligations of the State.<sup>19</sup> In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*<sup>20</sup> the International Court had to deal with the question whether decisions taken by the Malaysian courts, in violation of international obligations of the State, would engage Malaysia's responsibility. In its Advisory Opinion the Court concluded that '[a]ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State'.<sup>21</sup> According to the Court, this rule was expressed in article 6 of the draft articles on State responsibility adopted on first reading and has taken on a customary character.

In the same manner, the position of legislative organs is no different to that of other State organs when attributing an act to the State. In its decision in *Certain German Interests in Polish Upper Silesia* the Permanent Court specified that '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.<sup>22</sup> A law will not be given effect at the international level if it is contrary to the international legal order. Indeed in such a case it may give rise in itself to State responsibility.<sup>23</sup> In the same way, if the legislative power refuses to adopt legislation the enactment of which is required by a treaty to which the State is a party, such an omission may be considered an internationally wrongful act that engages State responsibility.

Thus, it was not maintained by the ILC that the sovereign character of parliament as well as the independence of the judiciary can prevent attribution of their behaviour to the State. Article 4(1) of the ILC Articles in fact specifies that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

In the same manner, whatever the position of the organ in the framework of the State organization may be, this is of no consequence in attributing a wrongful act to the State. According to a school of thought favoured by American States in the 19th century, it was only the conduct of superior organs that was attributable to the State in international law. The State would therefore not be accountable for the act of a subordinate organ unless its behaviour was explicitly or implicitly endorsed by superior organs.<sup>24</sup> According to Ago, this theory was largely based on a confusion with the rule of exhaustion of local remedies. According to this rule there would be no violation of an international obligation as long as

there is an organ on the local level that is capable of correcting the defect. If it is true (p. 241) that an internationally wrongful act cannot be classified as such before local remedies have been exhausted, it is nevertheless the case that the act may be classified as an act of the State as soon as it has been committed.<sup>25</sup>

Thus, in terms of attribution, the act or omission of a subsidiary organ is an act of the State.<sup>26</sup> This was the dominant opinion of States at the Hague Conference in 1930. Taking into account the answers of governments to a questionnaire, the Preparatory Committee, while elaborating Basis of Discussion No 12, rejected any difference in treatment between the behaviour of superior and subsidiary organs. In many cases claims commissions did not hesitate to indemnify the victims of acts by inferior State organs. In the decision of the United States-Mexico General Claims Commission in the *Massey* case, the arbitrator referred to a 'sound general principle' according to which the misconduct of an individual engages State responsibility, whatever that person's individual status or rank may be.<sup>27</sup>

The mixed commissions that were formed after the Second World War often dealt with the behaviour of subsidiary organs and have expressed similar opinions. In *United States Diplomatic and Consular Staff in Tehran*, the International Court did not make any distinction based on some hierarchical order between the different organs of Iran that were involved in the commission of the wrongful acts.<sup>28</sup> State responsibility is thus engaged for the behaviour of all organs of the State, regardless of their administrative level.<sup>29</sup> Any such distinction would introduce a serious element of uncertainty in international relations.

## **(b) Organs of territorial communities that are subordinate to the State**

Article 7(1) of the Draft Articles adopted on first reading, which deal with the case of a 'territorial governmental entity within a State' under the rubric of 'other entities empowered to exercise elements of the governmental authority to the State'. By contrast the final version of the ILC Articles included territorial communities in the general list of State organs: under article 4, the conduct of an organ of a 'territorial unit of the State' is equally an act of the State under international law. It has been suggested that 'the principle of the responsibility of the State for the acts of its territorial units, far from being weakened is in fact reaffirmed and even reinforced by this global approach'.<sup>30</sup> Such an approach has the advantage of clearly distinguishing organs of communities that are part of the State's own structure (eg component units of federal States), from separate entities created by domestic and empowered to exercise governmental authority in particular cases: these belong to a different category.

The principle according to which the State is answerable for acts and omissions of organs of public territorial communities as well as communes, provinces and regions has long (p. 242) been established and has furthermore been confirmed several times in the case law. The authority normally cited is the 1951 decision by the Franco-Italian Conciliation Commission in the case concerning the *Heirs of the Duc de Guise*. According to the Commission, the autonomy granted to the Sicilian region by the public law of the Italian Republic could not disengage Italy's responsibility for the conduct of the region.<sup>31</sup>

This decision conforms to the opinions expressed by States during the preparations for the Hague Conference. The responses to the request of information presented by the Preparatory Committee confirmed in clear language that State responsibility is engaged for acts or omissions of the communities as well as communes or provinces that exercise public legislative or administrative functions.<sup>32</sup> This principle has also been unanimously endorsed in the doctrine.<sup>33</sup>

Article 4 does not expressly mention the case of the federal State. Nevertheless, since federalism is only the most developed manifestation of decentralization, the attribution of the conduct of organs to the federation should work in the same way as it does where communities and regions are concerned. This was clearly the approach adopted by the States answering the questionnaire of the Preparatory Committee to the Hague Conference. The fact that the federal State enjoys full autonomy by virtue of domestic law does not in itself exclude its responsibility for the acts of the member States of the federation.<sup>34</sup> Based on these responses, the Special Rapporteur of the Committee, Guerrero, came to the conclusion that '[a]ll that has been said in regard to centralized States applies equally to federal States'. For a federal State 'international responsibility which may be incurred by one of the member States of a federation devolves upon the federal Government, which represents the federation from the international point of view; the federal Government may not plead that, under the constitution, the member States are independent or autonomous'.<sup>35</sup>

The principle of federal State responsibility for the conduct of its constituent units has long been established in international case law. In its decision of 7 June 1927 in *Galvan* the United States-Mexico Mixed Claims Commission established the responsibility of the United States for a denial of justice committed by courts of the State of Texas.<sup>36</sup> A few years later, the same Commission confirmed this principle in the famous *Pellat* decision, specifying that '[t]his indirect responsibility cannot be denied, even where the federal Constitution deprives the central government of the right of control over individual States or the right to enforce their compliance with international law'.<sup>37</sup> This case law has been followed consistently and was confirmed by the Court in *LaGrand*.<sup>38</sup> The doctrine is also unanimous. Article 2 of the Resolution of the *Institut de Droit International*, adopted in 1927, is wholly in line with the case law of the United States-Mexico Claims Commission at that time: 'the State is responsible for the acts of communities that exercise (p. 243) public functions on its territory'.<sup>39</sup> The same is true for the 1929 Harvard Research.<sup>40</sup> The responsibility of the federal State for the behaviour of the constituent state undeniably represents a principle of general international law.<sup>41</sup>

The only way a derogation from this principle can be achieved is by the insertion of a clause, known as a federal clause, in treaties entered into by the federal State. This expressly disengages responsibility for the federal State's incapacity to make the component units comply with the treaty. But it does so by qualifying the extent of the primary obligation.

### **(c) 'De facto' organs**

Article 4(2) states that 'An organ includes any person or entity which has that status in accordance with the internal law of the State'. Accordingly, the domestic law of the State is the starting point for the consideration of whether a person or entity constitutes an organ the conduct of which is attributable; however, domestic law is not the end of the matter. As the Commentary makes clear, in some legal systems the status and function of particular bodies may be determined not only by law but also by practice; further, the internal law of a State may not classify, whether exhaustively or at all, which bodies are to be regarded as organs as a matter of internal law. As a consequence, a State cannot avoid responsibility of a body which in fact constitutes an organ 'merely by denying it that status under its own law'.<sup>42</sup>

In addition, the International Court of Justice in the *Bosnian Genocide* case has recently made clear that, quite apart from such issues and even if a person or entity can in no way to be classified as having the status of an organ under the internal law of the State in question, a person, group or entity may in exceptional circumstances be equated to an organ of a State, due to the particularly close relationship which exists with the State. The Court formulated the threshold in this regard as being that 'the persons, groups or entities

act in “complete dependence” on the State, of which they are ultimately merely the instrument’.<sup>43</sup> As the Court went on to explain:

In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.<sup>44</sup>

However, the Court emphasized that attribution on this basis ‘must be exceptional, for it requires proof of a particularly great degree of State control’.<sup>45</sup> However, once a sufficiently close relationship exists, all acts of the ‘*de facto*’ organ are attributable to the State.<sup>46</sup>

## **(p. 244) 2 Entities empowered to exercise elements of governmental authority**

To respond to the need of decentralization, not *ratione loci* as in the case of the creation of public territorial communities, but *ratione materiae*, States more and more frequently authorize private institutions to exercise sovereign authority. The origin of this recent and widespread phenomenon is to be found in the aftermath of the First World War. For instance, the boycott of Japan between 1931 and 1932 was entrusted to the Kuomintang, a single political party that was not within the structure of the Chinese State, although still closely linked to it.<sup>47</sup>

Apart from the single political parties of totalitarian regimes that in reality act in the name of the State and monopolize political power, it is often the case today that private institutions are called upon to exercise elements of governmental authority. One example is that of airline companies which exercise functions of immigration control, another is private companies managing prisons. A further example are central banks that have their own legal status in many countries, distinct from the State and in no way tied to its economic policies.

In response to the request for information by the Preparatory Committee of the Hague Conference some States likened the case of these entities to public territorial units, observing that acts resulting from these entities should be capable of attribution to the State.<sup>48</sup> Thus, the Committee was led to discuss the question within the context of the Basis for Discussion No 16. According to it, the acts or omissions of autonomous institutions that exercise public functions of a legislative or administrative character engage responsibility if they are contrary to the State’s international obligations.

The ILC was heavily influenced by this document when it adopted draft article 7 on first reading. The two paragraphs classify in turn the conduct of public territorial units and of separate entities as acts of the State. It was only on the second reading that the idea arose that an article of the draft should be specifically dedicated to entities empowered to exercise elements of the governmental authority. Where these entities are not integrated into the structure of the State, unlike public territorial units, this new approach seems more logical. Thus, in conformity with Article 5 of the Articles as adopted on second reading, the conduct of a person or entity that is not an organ of the State but is empowered by domestic law to exercise elements of the governmental authority is considered as an act of State in international law.

### **(a) The identification of entities exercising prerogatives of public power**

The proliferation of entities empowered to exercise elements of governmental authority in so-called market economy countries makes it all the more difficult to choose a criterion to identify them. Their activities take place in a wide range of areas and the legal regimes governing them are very different. If it is true that the common characteristic of these entities is that they enjoy a legal personality separate from that of the State, this does not mean that their other characteristics are not highly diverse. The participation of the State in their capital can be more or less significant. The same is true for the control that the (p. 245) State exercises over their activities. These factors could be considered as reliable indicators for the attribution of their behaviour to the State, but are not in themselves decisive. This is the conclusion to which the ILC came.

For the ILC, 'the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State'.<sup>49</sup> It goes without saying that the State needs to have had a link to a part of the activities with which the entity has been charged in exercising governmental authority in order for the behaviour of the entity to be attributed to the State. The solution that has been maintained is compatible with the position taken in the doctrine as well as in the international case law.<sup>50</sup>

### **(b) The attribution of acts by entities exercising powers of the public prerogative to the State in international case law**

After the Second World War, the Franco-Italian Conciliation Commission was in charge of looking at the question of attributing behaviour of entities that are not truly State organs to the State. In its decision in *Dame Mossé*,<sup>51</sup> the Commission was concerned with the question whether the confiscation of goods belonging to a French national by members of the Fascist entity that was restored in the Republic of Saló could be imputed to the Italian State, and whether the entity effectively exercised public prerogative powers or not. For the Commission, internal organization is in the eyes of international law what really exists within the State. International law does not consider the order specified by internal rules as such: its concern is with the situation that effectively and positively exists. Further, attribution extends to whoever possesses true public authority inside the State.<sup>52</sup> On the basis of this argument the Commission attributed the internationally wrongful acts committed by the Fascist entity.

The Iran-United States Claims Tribunal came to an identical conclusion in *Hyatt International Corporation v Government of the Islamic Republic of Iran*.<sup>53</sup> The question was whether the seizure of goods belonging to foreigners by a charitable foundation could be attributed to the State of Iran. The Tribunal decided in the affirmative, arguing that the Iranian authorities had empowered the entity in question to exercise true governmental authority and to identify and confiscate wealth that had been illegally accumulated during the pre-revolutionary period.<sup>54</sup>

In *Military and Paramilitary Activities in and against Nicaragua*,<sup>55</sup> it was the International Court that was concerned with entities empowered to exercise elements of the governmental authority. The case dealt with so-called 'Unilaterally Controlled Latino Assets' in the language of the CIA, persons paid by the United States and acting under the direct instructions of military personnel or intelligence services of the United States. The Court took into account the fact that this State participated in the preparation, command, (p. 246)



and support of attacks carried out by these persons and concluded that their behaviour could be attributed to the United States.<sup>56</sup>

Judge Ago sought to justify the decision of the Court in his separate opinion by reference to the work of the ILC concerned with State responsibility. According to him '[t]he Court was also right to consider as acts of the United States of America the conduct of persons or groups that, without strictly being agents or organs of that State, belong nevertheless to public entities empowered within its domestic legal order to exercise certain elements of the government authority'.<sup>57</sup> Indeed the decision of the Court conforms with article 7 adopted on first reading and taken up in article 5 adopted on second reading.

Thus, as a general rule, the behaviour of all State organs and of all entities empowered to exercise elements of the governmental authority by domestic law is attributable to the State. Domestic law does not constitute in itself the decisive criterion for attribution. According such a position to domestic law in this subject area would be equivalent to giving the State the possibility of determining the extent of its responsibility itself on the international level; domestic law would provide States with a way out of responsibility.

The domestic arrangement of powers and the fact that one or more persons may not have any official quality under domestic law do not mean that their behaviour cannot be attributed to the State. What is crucial in attribution to the State is the degree of control that the State exercises over the person at the time when the internationally wrongful act was committed. In addition to the exceptional category of '*de facto*' organs identified by the International Court of Justice in the *Bosnian Genocide* case, attribution of the acts of which requires a particularly high degree of control, the ILC has also clarified the criteria under international law that permit attribution of behaviour to a State in articles 8 and 9 which concern other persons who lack any kind of formal nomination but supposedly act in the State's name.

### **Further reading**

L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite' (1984-V) 188  
*Recueil des cours* 9

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

SFDI, *Les collectivités territoriales non-étatique dans le système juridique international* (Paris, Pedone, 2002)

### **Footnotes:**

**1** JB Moore, *International Arbitrations* (Washington, Government Printing Press, 1871), vol III, 3127.

**2** 1923, *PCIJ, Series B, No 6*, 22.

**3** D Anzilotti, *Cours de droit international* (1929) (Paris, Panthéon Assas, 1999), 469.

**4** Article 1 was adopted on first reading by the Third Commission of the Conference; reproduced in *ILC Yearbook 1956*, Vol II, Annex 3, 225.

**5** *ILC Yearbook 1973*, Vol I, 56 (para 30) (1213th meeting).

**6** R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol II(1), 238.

**7** *ILC Yearbook 1973*, Vol I, 53-54 (paras 58-60) (1212th meeting) (Vallat); cf Ago's response, *ibid*, 57 (para 32) (1213th meeting).

**8** *Ibid*, 49 (para 4) (1212th meeting) (Ushakov).

- 9** Report of the ILC, 25th Session, *ILC Yearbook 1973*, Vol II, 191 (draft art 5).
- 10** Commentary to draft art 5, para 12; *ibid*, 193.
- 11** Suggestion of France, A/CN.4/488, 36.
- 12** Commentary to art 4, para 12, citing *ILC Yearbook 1991*, Vol II(2), 14–18.
- 13** Cf *United Nations Convention on Jurisdictional Immunities of States and their Property*, annexed to GA Res 59/38, 2 December 2004.
- 14** *ILC Yearbook 1973*, Vol I, 57 (para 42) (1213th meeting).
- 15** E Jiménez de Aréchaga, ‘International Responsibility’, in M Sørensen (ed), *Manual of Public International Law* (London, Macmillan, 1978), 544.
- 16** Cf *Différend Société Verdol—Décisions Nos 20 et 34, 15 April and 16 November 1949*, 13 RIAA 94.
- 17** Answers to points III, IV and V of the request for information, *ILC Yearbook 1973*, Vol II, 195 (para 6).
- 18** D Anzilotti, *Cours de droit international* (1929) (Paris, Panthéon Assas, 1999), 479.
- 19** The bases of discussion are reproduced in *ILC Yearbook 1956*, Vol II, Annex 2, 223.
- 20** *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, p 62.
- 21** *Ibid*, 87–88 (para 62).
- 22** *Certain German Interests in Polish Upper Silesia, 1926*, PCIJ, Series A, No 7, p 4, 19.
- 23** Cf G Scelle, *Manuel de droit international* (Paris, Domat Montchrestien, 1948), 921.
- 24** Note of US Secretary of State Bayard to the British Ambassador in Washington, 1 June 1885, JB Moore, *A Digest of International Law* (Washington, Government Printing Office, 1906), Vol VI, 742.
- 25** *ILC Yearbook 1973*, Vol I, 58 (para 45) (1213th meeting) (Ago).
- 26** *ILC Yearbook 1973*, Vol I, 58 (para 46) (1213th meeting) (Ago).
- 27** *Gertrude Parker Massey (USA) v United Mexican States*, 15 April 1927, 4 RIAA 155, 159.
- 28** *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, p 3, and see C Coustère ‘L’arrêt de la Cour sur le personnel diplomatique et consulaire américain à Téhéran’ (1980) 26 *AFDI* 215.
- 29** J-P Quéneudec, *La responsabilité internationale de l’État pour les fautes personnelles de ses agents* (Paris, LGDJ, 1966), 55.
- 30** J Crawford & M Mauguin, ‘Les collectivités territoriales non-étatiques et le droit international de la responsabilité’, in SFDI, *Les collectivités territoriales non-étatiques dans le système juridique international* (Paris, Pedone, 2002), 158.
- 31** *Héritiers de SAR Mgr le Duc de Guise*, 3 April, 18 December 1950, 15 September 1951 & 20 November 1953, 13 RIAA 150.
- 32** Responses of States to the list of points. Supplement to Volume III. Bases of discussion established by the Preparatory Committee for the Work of the Conférence, LN doc C.75.M. 69. 1929 V, 90.
- 33** See eg H Accioly, ‘Principes généraux de la responsabilité internationale d’après la doctrine et la jurisprudence’ (1959) 96 *Receuil des cours* 388.

- 34** Commentary on draft art 7 adopted on first reading, paras 5–10, *ILC Yearbook 1974*, Vol II(1), 279–280.
- 35** The conclusions are reproduced in *ILC Yearbook 1956*, Vol II, Annex 1, 222.
- 36** *Salam Lerma Vda de Galvan (United Mexican States) v United States of America*, 21 July 1927, 4 RIAA 273.
- 37** *Estate of Hyacinthe Pellat (France) v United Mexican States*, 7 July 1929, 5 RIAA 534, 536.
- 38** *LaGrand (Germany v United States of America), Merits, ICJ Reports 2001*, p 466, 495 (para 81).
- 39** Institut de Droit International, *Resolution on Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers* (Lausanne, 1 September 1927), art 2, available at <<http://www.idi-iil.org>>.
- 40** Draft reproduced in *ILC Yearbook 1956*, Vol II, Annex 9.
- 41** M Sørensen ‘Federal States and the International Protection of Human Rights’ (1952) 46 *AJIL* 195, 210.
- 42** Commentary to art 4, para 11.
- 43** *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, para 392; the language of ‘complete dependence’ is taken from *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986*, p 14, 62–63 (paras 109–110).
- 44** *Ibid.*
- 45** *Ibid*, para 393.
- 46** See the discussion, *ibid*, para 397, distinguishing attribution on this basis from that where a person or entity has acted on the instructions, direction and control of a State.
- 47** C de Visscher, *Théories et réalités en droit international* (Paris, Pedone, 1960), 356.
- 48** Cf especially the response of Germany, reproduced in part in Commentary to draft art 7, para 15, Report of the ILC, 26th Session, *ILC Yearbook 1974*, Vol II(1), 281.
- 49** Commentary to draft art 7, para 18: Report of the ILC, 26th Session, *ILC Yearbook 1974*, Vol II(1), 282.
- 50** L Condorelli, ‘L'imputation à l'État d'un fait internationalement illicite’ (1984) 188 *Receuil des Cours* 63.
- 51** *Dame Mossé*, 7 January & 6 October 1953, 13 RIAA 486, 493.
- 52** *Ibid*, 493.
- 53** *Hyatt International Corporation v Government of the Islamic Republic of Iran* (1985) 9 *Iran-US CTR* 72.
- 54** *Ibid*, 93.
- 55** *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986*, p 14.
- 56** *Ibid*, 50–51 (para 86).
- 57** Separate Opinion of Judge Ago, *ibid*, 187–188 (para 15).