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Breach of International Obligations

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Chapter 2: Breach of International Obligations

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1. Introduction

When dealing with the objective element of the wrongful act, the International Law Commission (ILC) eventually decided that a differentiation according to the structure of the international obligation was neither necessary nor useful. However, such a differentiation might well be useful or even necessary in the context of cases of shared responsibility, both in cases in which the responsibility arises out of joint or concerted actions or omissions and in cases in which there is no such concerted action or omission, between different states, or states and international organisations, or states and non-state actors.[1] While the definition of the objective element of a breach of an international obligation contained in Articles 12 to 15 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[2] does not impede the determination of shared responsibility, it is maintained in this Chapter that a more varied definition would have enabled a better understanding of the different possible interplays of the responsibility of different actors.

After a brief comment on general issues, such as the existence of a breach and causality (section 2), the Chapter will enter into a discussion relating to the varying structures of international obligations (sections 3 to 6), and will end with some thoughts, from the perspective of the concept of breach of international obligations, on the prospects for shared responsibility between states and international organisations (section 7) and states and individuals (section 8).

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[1] See on these two forms of shared responsibility P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), Chapter 1 of this volume, at pp. ___; and more elaborately P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438, at 366–369.

[2] Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA). Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).

2. General issues

Article 12, which is the first provision of Part One, Chapter III, of the ARSIWA, deals with the breach of an international obligation. It reads as follows:

> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

As has been aptly said by James Crawford, Article 12 offers just the 'bare bones'.[3] Indeed it is a difficult task to add more details, without the risk of leaving the shores of secondary norms and being submerged in the ocean of primary obligations. Nevertheless, some observations on a few general issues, which would otherwise be eclipsed, are appropriate here.

2.1 Shared obligations

A preliminary question is whether shared responsibility presupposes that all actors are bound by a shared obligation. My assumption is that the twin concepts of sovereignty and equality prevent holding a state responsible for a wrongdoing that is not attributable to it. Therefore all concerned subjects must be bound by the same obligation, or at least by formally different obligations, but with an overlapping content.[4] However, the fact that Article 12 of the ARSIWA does not give any weight to the origin or character of the international obligation could, in the context of shared responsibility, give rise to some complications.

In the case of a treaty obligation, the issue is sufficiently clear-cut. The starting point is that third parties can never be held responsible *per se* for violations of treaty rules. This would exclude from the outset any possibility to hold parties and non-parties equally responsible. Subject to what we will see in section 7, this would also exclude the possibility to hold member states and international organisations jointly responsible for the violation of a treaty obligation,

[3] See J. Crawford, *State Responsibility – The General Part* (Cambridge: CUP, 2013), p. 215. For a similar characterisation of the concept of 'internationally wrongful act' see F. Latty, 'Actions and Omissions', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), p. 355, at 356: 'Notion which was deliberately left skeletal'.

[4] But see the contribution by J.D. Fry, 'Attribution of Responsibility', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), Chapter 4 of this volume, pp. ___ (noting that 'it is not necessarily true that both parties can bear the same obligation').

since, with the exception of mixed agreements, either the international organisation or the state(s) would not be party to the treaty in question.

In some specific cases, the treaty itself may exonerate certain parties from respecting some treaty obligations – as does, for instance, Part IV of the General Agreement on Tariffs and Trade (GATT)[5] with regard to developing countries – or it may even go so far as to exonerate some parties from respecting the core obligations of the treaty. This is famously the case of the Kyoto Protocol of 1997,[6] which, giving expression to the concept of 'common but differentiated responsibility' contained in Article 3 of the United Nations (UN) Framework Convention on Climate Change of 1992,[7] imposes the duty to abate so-called greenhouse gases only on certain categories of states, exonerating developing states from any such obligation. In both instances there is in principle no room for envisaging situations of shared responsibility between states that are subject to such obligations, on the one hand, and states that are exonerated, on the other.

In the case of customary law obligations, the answer is also sufficiently clear-cut, but exactly the opposite compared to the former example. By definition, and with the exception of regional custom, a true customary law obligation can be violated by any state or groups of states, or even by international organisations, so that the determination of shared responsibility should not pose any specific problem.

A difficulty could arise in the case of a breach of two formally different but substantially analogous obligations, such as a customary law obligation that has been codified in a treaty, or an originary treaty obligation that has become customary law. In this case a situation of shared responsibility could well arise. However, despite the substantial identity of the breach, it could happen that the responsibility of only some of the states involved in the breach could be invoked, due to some distinctive procedural features of the treaty.[8]

[5] The General Agreement on Tariffs and Trade, Geneva, 30 October 1947, in force 1 January 1948, 55 UNTS 187, Part IV.
[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, in force 16 February 2005, 2303 UNTS 148.
[7] The United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 1771 UNTS 107, Article 3.
[8] As for the related issue of the existence of circumstances precluding the wrongfulness of the conduct of only one or some of the states involved, see the contribution by H.P. Aust, 'Circumstances Precluding Wrongfulness', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), Chapter 6 of this volume, pp. ___.

2.2 Causation

While it is not within the scope of this Chapter to elaborate on the question of causality in the context of shared responsibility in general terms,[9] some observations on causation in relation to the breach of an international obligation are required.

As is well known, the issue of causality is dealt with variously in international law literature and case law because of the different traditions in civil and common law countries, and because of the different approaches in civil and criminal law. It is striking that the ARSIWA touch upon the issue only in Part Two (content of responsibility), namely in Article 31, with regard to the relation between the wrongful act and the damage. Yet this is only one aspect of causality – what German doctrine calls *tatsausfüllende Kausalität*, i.e. the causality that appertains to the consequences of the wrong. This must not be confused with the first question in which causality arises, an issue that appertains to the structure of the internationally wrongful act itself – what German doctrine calls *tatsbegründende Kausalität*. Special Rapporteur Ago approached this latter manifestation of causality in Article 23 when dealing with the breach of an obligation to prevent an event: 'There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.'[10] The ILC made the point even clearer, by reformulating Article 23 in the following terms: 'When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result'.[11] The reason for the proviso 'by the conduct adopted' was precisely to make explicit the necessity of a causal link.

It was not by chance that Ago approached the question at that precise point of his reports. Ago opposed the doctrinal trend that denies the relevance of attribution at all, and tends to solve all questions of attribution of responsibility as a matter of causality.[12] However, Ago was well aware that the issue of causality is particularly relevant when the state is held responsible for a breach of a duty to prevent, i.e. in relation to somebody else's injurious conduct. The ILC's

[9] On this see the contribution by P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), Chapter 7 of this volume, pp. ___.
[10] See R. Ago, 'Seventh Report on State Responsibility', ILC *Yearbook* 1978/II(1), 37, para. 19.
[11] Ibid.
[12] See I. Brownlie, *System of the Law of Nations – State Responsibility* (Oxford: OUP, 1983), p. 36; R. Quadri, 'Cours général de droit international public' (1964) 113 RCADI 457.

eventual decision to delete all Articles dealing with the varying structure of obligations could be a signal that the ILC thought that the issue of causality belongs to the primary norms.[13] The assumption of the ILC is neither necessarily right, nor, given the mentioned distinction between the two functions of causality, would it be sufficient in situations of shared responsibility.[14] It is unfortunate that the ILC did not pay more attention to the issue, with a general provision alongside that of the *tempus delicti commissi* of Article 14.[15] This certainly could have been relevant in situations where it would have to be determined whether states that failed to achieve a particular result would share a responsibility for that failure.

It is not easy to detect from a confused and opaque international case law a coherent picture of the issue of causation. If one were to adhere to the implicit idea of the ILC that the standard of causation would vary, depending on the structure of the primary obligation breached,[16] it could perhaps be possible to distinguish the concept as follows. The 'equivalent causal theory' – according to which every subject is held responsible for the harmful event as soon as it has put into existence a causal factor, no matter how distant in time or how determinant for the occurrence – could prevail in all those cases in which the primary obligation has a *jus cogens* character. This could be required either by the idea of the best possible protection of the victims, or by the idea of sanctioning the wrongdoers.

Apart from this particular (and admittedly to some extent debatable) case, the adequate (or efficient) causal theory seems more appropriate for all cases of negative obligations, in which the wrongful conduct typically consists of a specific act. According to this causal theory, among the possible multifarious causal factors, the one that has created the danger which has primarily led to the violation of the obligation will be selected.

Finally, the so-called 'protective purpose causal theory' (in original German, *Schutzzwecktheorie*) – according to which a certain course of conduct might be held causally

[13] This was expressly stated by the Drafting Committee in 2000, with regard to Article 31: 'The need for a causal link was usually stated in primary rules'; see ILC *Yearbook* 2000/I, 388, para. 17.
[14] For a similar criticism see B. Stern, 'The Obligation to Make Reparation', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) p. 564, at p. 570.
[15] For a different view see L. Castellanos-Jankiewicz, 'Causation and International State Responsibility', SHARES Research Paper 07 (2012), ACIL 2012-07 (available at www.sharesproject.nl), for whom the lack of a provision on causation is due to various structural reasons, such as the irrelevance of fault and damage in assessing international responsibility, the agency theory, and the functional distinctions between the domestic and international legal orders (at 26 ff.).
[16] As the ILC itself apparently believes, according to the Commentary to Article 31: '[T]he requirement of a causal link is not necessarily the same in relation to every breach of an international obligation'; see ARSIWA Commentary, n. 2, 93, para. 10.

relevant only if it runs counter to the specific guarantee that a subject had assumed through the obligation – seems better situated for cases of violations of positive obligations.[17] For the latter type of obligations, without such a corrective concept, a broad concept of causality would lead to unwarranted results.

The case law of the European Court of Human Rights (ECtHR or Court) clearly shows the awareness of a need to make the test of causation dependent on the type of norm. As we know, with time, and increasingly so in the last two decades, the ECtHR has drawn a whole series of positive obligations from the Articles of the European Convention on Human Rights (ECHR),[18] the text of which was strictly couched in terms of negative obligations: for instance, with regard to Articles 2, 3, or 8. In a case dealing with Article 2 of the ECHR, the applicant lamented that Italy had breached the right to life of his son, because he was killed by a group of criminals who had been granted prison leave and had tried to get hold of his car after a bank robbery.[19] The respondent government objected that the causal link was 'tenuous' and that the death of the applicant's son was due to a series of 'fortuitous, unforeseen and unforeseeable incidents'. The Court agreed that the occurrence was 'the result of the chance sequence of events.' This, and similar cases in which the Court insisted on the predictability of the chain of events in the particular circumstances of the case, has led some authors to hold that in the case of positive obligations, the ECtHR adopts an *ex post* foreseeability test.[20] I would go further and maintain that the Court proceeds on a case-by-case basis, taking into account the purpose of the norm allegedly violated.

It is submitted that in cases in which the responsibility arises out of joint or concerted actions or omissions, for example where some of the actors are bound by a negative obligation and some are bound by a positive one, this concept of causality, varied according to the different

[17] According to Castellanos-Jankiewicz, 'Causation and International State Responsibility', n. 15, at 47; this would be the causal test adopted by the ILC itself, as it would result from the Commentary to Article 31, where the ILC uses the phrase 'sufficient causal link that is not too remote'. The inference is, in my opinion, far from sure. For Ago, and presumably for the ILC at the time, the *conditio sine qua non* was the causal theory prevailing at least for the violations of the obligation to prevent; see 'Seventh Report on State Responsibility', n. 10. For Arangio-Ruiz the general causal test was that of 'normality' and 'predictability': see G. Arangio-Ruiz, 'Second Report on State Responsibility', ILC *Yearbook* 1989/II(1), 13.

[18] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).

[19] *Mastromatteo v. Italy*, App. No. 37703/97 (ECtHR, 24 October 2002), 164.

[20] See B. Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford: OUP, 2004) p. 129, at p. 135.

kinds of obligations violated, would permit better fine-tuning between the different responsibilities of different actors.

3. The specificity of *erga omnes* obligations

Together with the different obligations that the ILC had envisaged in the first reading, to which we will turn our attention in the next three sections, one type of obligations that is relevant for the determination of shared responsibility is that of *erga omnes* obligations. In the framework of the objective element of responsibility, Ago had thought to differentiate between international wrongful acts and international crimes, a differentiation which found expression in Article 19 as adopted on first reading.[21] Despite its popularity in some international legal literature,[22] the ILC was well advised to eventually eliminate the concept of international crimes of states, because it would have drawn inopportune, and at any rate unfounded, analogies with the different concept of international criminal responsibility of the individual.[23] To the contrary, the ILC introduced in the Articles the notion of obligations *erga omnes*.

This category of obligations seems especially suitable for developing a general concept of shared responsibility, if we consider what the Institut de Droit International said with regard to such obligations: 'certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community'.[24] While there are many studies on the consequences of a violation of obligations *erga omnes*, spurred on by the codification of the concept in Article 48 of the ARSIWA, the implications of the structure of obligations *erga omnes* as primary norms are still unexplored.

The shift from an obligation *erga omnes* to its symmetrical notion of a right *erga omnes* would appear to be particularly relevant from the perspective of shared responsibility. To give an example, the focus would not so much be on the prohibition of genocide, but on the right not to be subjected to any such egregious breach. It is curious to see that the shift, or better to say the

[21] See ILC *Yearbook* 1976/II (2), at p. 95.
[22] In the immense literature on the subject see the seminal collection of essays in J.H.H. Weiler, A. Cassese, M. Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin-New York: De Gruyter, 1989).
[23] See E.A. Wyler and L.A. Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), Chapter 9 of this volume, pp. ___.
[24] Institut de Droit International, 2005 Krakow Session, 'Obligations *erga omnes* in international law', Preamble.

upturning, was proposed by the International Court of Justice (Court or ICJ) in the *East Timor* case, at the same moment that the Court dismissed its jurisdiction for lack of the necessary third party. In the words of the Court: 'Where this [i.e. the absence of a necessary third party] is so, the Court cannot act, even if the right in question is a right *erga omnes*.'[25]

Letting aside the profound conceptual difficulties to which this shift of perspective leads with regard to the identification of the right-holder,[26] it is clear that, by employing the concept of a 'right *erga omnes*', the Court seems to imply that all states, and even international organisations, have a common obligation. But if this is the case, the dictum of the Court, drawn to its extreme consequences, brings us to the conclusion that such an obligation, by its very nature, may be simultaneously violated by all states, i.e. by some through positive acts, and by all the others through omissive conduct. In other words, any breach of an *erga omnes* obligation could give rise *ipso facto* to a case of shared responsibility. In the absence of some corrective devices – one of which could be the choice of a particular causality theory, such as the adequate causality or the protective purpose causality[27] – the application of the principles of shared responsibility would lead to unexpected, and possibly unwarranted, results.

Another way to restrict somehow an otherwise overflowing notion of a 'right *erga omnes*' is to make the consequences of the violation of the norm, and consequently the issue of a possible shared responsibility, dependent on the structure and content of the norm itself. Giorgio Gaja made the convincing point that the duty to ensure compliance by other states must not necessarily apply to each *erga omnes* obligation, but that the solution could be found in the primary norm, to the extent that the norm requires the state to prevent a breach by others. For this purpose he took the example of common Article 1 of the Four Geneva Conventions of 1949, which imposes on states parties the duty to 'respect and ensure respect'.[28]

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[25] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, at p. 102, para. 29.

[26] Whereas in the *East Timor* case the right at hand was that of self-determination, so that it would not be difficult to identify the right holder in the people entitled to self-determination, in a different case of *erga omnes* obligation, such as the prohibition of systemic violations of fundamental human rights, it would be difficult to identify the right holder, as distinct from the 'beneficiaries' of the obligation, i.e. the individuals concerned. On this point see A. Gattini, 'Alcune osservazioni sulla tutela degli interessi individuali nei progetti di codificazione della Commissione del diritto internazionale sulla responsabilità internazionale e sulla protezione diplomatica', in M. Spinedi, A. Gianelli and M.L. Alaimo (eds.), *Le codificazione della responsabilità internazionale degli Stati alla prova dei fatti : problemi e spunti di riflessione* (Giuffrè: Milano, 2006), p. 431.

[27] See section 2.2 above.

[28] See G. Gaja, 'Do states have a duty to ensure compliance with obligations erga omnes by other states?', in M. Ragazzi (ed.), *Essays in memory of Oscar Schachter* (Leiden: Njihoff, 2005), p. 31, at p. 35. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (75 UNTS 31); Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members

Be that as it may, with its dictum in the *East Timor* case, the ICJ earned the merit of having rebuffed the common wisdom, which sees in the obligations *erga omnes* nothing more than an apt set of tools (or faculties) at the disposal of the states, other than the injured one, desiring to react somehow to egregious breaches of international law.

The ICJ once again had the opportunity to disavow this comfortable mindset when dealing with the consequences of Israel's breach of the Palestinian right of self-determination in the *Wall* advisory opinion of 2004.[29] It will be recalled that the Court borrowed the language of Article 41 of the ARSIWA in order to detail states' obligations arising from an *erga omnes* violation committed by a third state, showing, if need be, the degree of artificiality in the distinction made by the ILC between the consequences of a grave breach of a peremptory norm, and the consequences of the violation of an *erga omnes* obligation.

It is interesting to note that Article 41 of the ARSIWA is formulated in terms which already hint at a shared responsibility. Article 41(1) imposes on all states the duty to 'cooperate' in order to bring the wrongful act to an end. Article 41(2) prohibits 'each state' from recognising as lawful the situation created by the wrongful act.[30] Obviously we cannot infer too much from this Article in order to grasp the primary obligations of states in relation to an *erga omnes* obligation, because it only deals with secondary norms, even if they are couched in terms of primary rules. Yet the model of 'positive/negative' obligations could be used here too. As states have the positive obligation to cooperate in order to bring the wrongful act to an end, it could be argued that they have an analogous positive obligation to cooperate in order to avert such an act. As states have the negative obligation not to recognise as lawful the situation created by the wrongful act, it goes without saying that they thus have *a fortiori* the negative obligation to abstain from committing such an act.

The question arises whether such obligations are not simply shared by different actors, but are joint obligations, meaning that they must be performed together, with the consequence that a violation will necessarily give rise to a case of shared responsibility. While the answer with

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of Armed Forces at Sea (75 UNTS 85); Geneva Convention relative to the Treatment of Prisoners of War (75 UNTS 135); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (75 UNTS 287).

[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 199 ff., paras. 154–160 (*Wall* advisory opinion). On this point see P. d'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion', in P.-M. Dupuy, B. Fassbender, M.N. Shaw and K.P. Sommermann (eds.), *Völkerrecht als Wertordung/Common Values in International Law: Festschrift für Christian Tomuschat/Essays in Honour of Christian Tomuschat* (Engel: Kehl, 2006), p. 463.

[30] See Wyler and Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms', n. 23, p. ___.

regard to the obligation of non-recognition is surely negative, given the clear text of Article 41(2), which speaks of the obligation of 'each state', the answer with regard to the obligation to cooperate in Article 41(1) could be more complex. The potentialities of this paragraph are multifaceted and not yet fully explored in the literature. It is not by chance that the ILC itself was keen to specify that the norm 'may reflect the progressive development of international law',[31] and nor is it by chance that the norm has been repeatedly conjured to give legal substance to the otherwise indistinct concept of 'Responsibility to Protect'.[32] However, the attempt made by the ILC to transform secondary norms into primary 'solidarity' obligations has met with criticism. Martti Koskenniemi, in a very critical appraisal of the ILC's treatment of the consequences of violations of obligations *erga omnes*, observed that the crux of the matter lies in the fact that any attempt at solidarity in secondary norms is doomed to fail by the lack of formulation of an agreed language about the content of the primary rules, which is due to 'the absence of a socially meaningful agreement about the direction of international cooperation'.[33] This critique would seem relevant to the possibility of inferring from the obligation to cooperate a ground for the establishment of a shared responsibility.

4. Obligations of means and obligations of result

It will be recalled that alongside some less debatable distinctions – such as composite or punctual breaches – Ago introduced a distinction between obligations of means and obligations of result. Ago's distinction did not correspond to the usual idea derived from the tradition of civil law. In civil law, an obligation of means is an obligation to endeavour, without the guarantee of the result, whereas an obligation of result is an obligation to attain a certain outcome. For Ago, instead, an obligation of means was also an obligation of result, but it was distinguishable from the latter because it specified the means through which that certain result had to be attained.[34]

[31] See ARSIWA Commentary, n. 2, 114, para. 3.
[32] On this point see A. Gattini, 'Responsibility to Protect and the Responsibility of International Organizations', in P. Hilpold (ed.), *Die Schutz-Verantwortung. Ein Paradigmenwechsel in der Entwickling des internationalen Rechts?* (Leiden: Nijhoff, 2013), p. 169.
[33] See M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 71 BYIL 337, at 355.
[34] In the language of Ago, they were breaches of an international obligation calling for a state to adopt a particular course of conduct: see R. Ago, 'Sixth Report on State Responsibility', ILC *Yearbook* 1977/II(1), 4.

Despite having been accepted by the ILC on the first reading of the Articles, the peculiar understanding of obligations of means was generally not well received by governments and in international legal literature.[35] The profound reason for the choice, however, mainly escaped the attention of commentators. Starting from the consideration that obligations of means are positive obligations, what Ago had tried to do was to strengthen those obligations, which would otherwise float in the relatively weak and opaque realm of 'due diligence'.

The fact that a more in-depth analysis of the content of such obligations would have drawn the ILC into the tangles of primary norms, together with the decision by the ILC to focus on the objective nature of the breach for all kinds of obligations, was probably one of the main reasons why the ILC eventually decided to dispose of most of the distinctions proposed by Ago. The distinction between obligations of means and obligations of result, however, finds a firm place in the case law of the ICJ,[36] and maintains a certain relevance for a situation of shared responsibility.

Taking the obligations of means, it is clear that if Ago was right, in order to hold a state responsible, it would be sufficient to demonstrate that it did not use the tools that the norm imposed upon it to use – for instance, the adoption of a domestic statute – regardless of the fact of whether other subjects could be held responsible for the harmful outcome as well, as a consequence of a breach of whatever other rule. In a way, the question of causality would be superseded by the mere ascertainment of the failure of the state.

In contrast, if we adhere to the traditional understanding of obligations of means, inevitably the question of the kind and degree of causality comes to the fore. So, for instance, we should ask to what extent a due diligence obligation imposed on the state would have been suitable to avoid the harmful event, and to what extent the conduct of other subjects might have been conducive to the harmful event. It is obvious that in this latter conceptual framework, the

[35] See J. Combacau, 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse', in P. Reuter, *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (Pedone: Paris, 1981), p. 181. Similarly, P.M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 EJIL 371; C. Economides, 'Content of the Obligation: Obligations of means and obligations of result', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), p. 371, at p. 375.

[36] See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, at p. 77 (*Gabčíkovo-Nagymaros*), where the Court adds the mysterious category of 'obligations of performance' alongside obligations of conduct and obligations of result; *Request of Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2009, 3, where the parties agreed, and the Court confirmed, that the obligation descending from para. 153(9) of the dispositif of the previous *Avena* judgment (see n. 76), was an obligation of result, although the parties argued on the consequences of such qualification.

distinction between obligations of means and obligations of result would be of some relevance for situations of shared responsibility. As we will see in the next section, the partial contradiction in which the ICJ entangled itself in the *Genocide* case of 2007, with regard to the causality of the breach on the part of Serbia of the obligation to prevent the occurrence of a genocide, was due to the Court's explicit qualification of the obligation at stake as an obligation of means.[37]

5. The obligation to prevent

According to Article 23 of the ARSIWA, adopted on first reading, there would be a violation of an obligation to prevent the occurrence of a given event 'only if, by the conduct adopted, the state does not achieve that result'.[38]

We have already evoked this provision with regard to the causality issue, as made explicit by the phrase 'by the conduct adopted'. What is also remarkable is that Ago did not conceive the obligation to prevent as a due diligence obligation, because of his understanding that all obligations, including those of due diligence, are in a way obligations of result, even if as in the present case the purpose of the norm is to guarantee a 'negative' result. That is the reason why various attempts to distinguish between obligations of prevention in a strict sense and obligations of due diligence, especially for the purpose of the time and consequences of their breach, are not fully convincing.[39] Article 14(3) of the ARSIWA is unmistakable in saying that the breach of an obligation to prevent occurs when the event occurs. Undoubtedly this rule becomes unpalatable under certain circumstances. This is the reason why, in most criminal codes, the concept of crimes of abstract danger (*Gefährdungsdelikte*) has been introduced, in order to punish certain dangerous conduct, regardless of the occurrence of the damaging event. However, it is difficult to transpose the concept into international law, and it may be wondered to what extent one may artificially separate certain obligations by labelling them as obligations of due diligence, for the purpose of holding the state responsible, even in the event that the apprehended result did not occur.

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, at p. 221, para. 430 (*Genocide* case).
[38] Article 23 ARSIWA, n. 2.
[39] See however J. Crawford, *State Responsibility*, n. 3, p. 227.

The difficulty with precisely assessing the content of obligations of prevention is not limited to customary international law. The obligation to prevent, albeit with different formulations, is enshrined in almost all conventions dealing with human rights and environmental protection. If one takes the well-known tri-partition of obligations with regard to human rights – i.e. the obligation to respect, the obligation to protect, and the obligation to fulfill[40] – it is easy to see that the first is an obligation to abstain from doing, and as such is immediately ascertainable, and the third is obviously an obligation to do something, and as such in most instances is dependent on a set of variables, for instance the domestic implementation of the obligation. However, the second type of obligation is not so clear-cut, and leaves room for different interpretations.

In truth, there is uncertainty and disagreement on almost every aspect of an obligation to prevent, concerning the scope of the obligation *ratione personae* (5.1), *loci* (5.2), *materiae* (5.3), and *temporis* (5.4).

5.1 Ratione personae

While the different conceptual constructions of an obligation to prevent, to which we have briefly referred previously, might have little impact in the case of a single wrongdoer, they may assume relevance in those cases where two or more states are obliged to prevent a certain 'harmful outcome'.[41] To the question of how to determine the responsibility of each state, one should add the question of whether each state would be responsible for the same violation or for a different violation, according to the qualification of their conduct. Furthermore, in most cases the violation will be caused by a failure to act, and this aspect adds another layer of complexity, i.e. the difficulty with grasping the causality of an omission.

The ICJ had to deal with this issue in its first case, the *Corfu Channel*[42] case. Albania was found responsible for having permitted a use of its territory that had caused damage to another state. In particular, the Albanian government had omitted to inform foreign ships of the

[40] See H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton: Princeton University Press, 1996), p. 51 ff.
[41] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 1, p. 367; see also Nollkaemper, 'Introduction', n. 1, p. ___.
[42] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Reports 1949, 4.

presence of mines (which had possibly been laid by Yugoslavia) in its territorial waters. The Court found that 'nothing was attempted'[43] by the Albanian authorities in order to prevent the damage. The case is frequently referred to as the leading case with regard to causality and shared responsibility,[44] although the Court did not make explicit its thoughts on either of the two issues. However, it was not by chance that the Court reached the conclusion of Albanian responsibility for the entire damage suffered by the United Kingdom, but only through the device of switching from a general obligation to prevent to the more specific and positive (but possibly at that time, non-existent *de lege lata*) obligation to inform. In this respect, the choice of a particular obligation as a basis for a finding of responsibility, and the construction of that obligation, may have clear relevance for questions of shared responsibility.

5.2 Ratione loci

The solution in the *Corfu Channel* case to concentrate all responsibility on Albania could still be justified, as this was the territorial state where the wrongful damage had occurred. However, the more difficult question arises as to whether obligations of prevention could or should have an extraterritorial application. We have already encountered this question, when dealing with the concept of obligations *erga omnes*. On the one hand, it is clear that when obligations of prevention would have an extraterritorial application, this would concern all states. On the other hand, it cannot be expected that all states have the same duties with regard to the fulfillment of the obligation, especially when it implies some positive action. While the responsibility of the territorial state will generally be easy to ascertain, the same cannot be said for the other states. Without entering into the general subject of extraterritorial application here, it must be said that the case law of the ICJ, as yet, is far from providing us with clear guidelines.

One could naively think that the first and most reliable guideline would be the text of the applicable convention, as Article 29 of the Vienna Convention on the Law of the Treaties[45]

[43] Ibid., at p. 23.
[44] See D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', n. 9, p. ___. See also P.A. Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', in E. Rieter and H. de Waele (eds.), *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (Leiden: Martinus Nijhoff, 2011), p. 199.
[45] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 29.

suggests. The ICJ held in the *Wall* advisory opinion that the International Covenant on Civil and Political Rights (ICCPR)[46] was applicable in the occupied Palestinian Territories, following the interpretation given by the UN Human Rights Committee of Article 2(1) of the ICCPR.[47] Albeit with some difficulty, the Court also affirmed the extraterritorial application of the International Covenant on Economic Social and Cultural Rights (ICESCR),[48] relying partly on Article 14 of the ICESCR and partly on the opinion of the Committee on Economic, Social and Cultural Rights.[49] The Court did not specify whether it made the extraterritorial application of the Covenants dependent on the effective control exercised by Israel as the occupying power, but from the circumstances of the case, that element could be considered present *in re ipsa*. In the *Armed Activities in the Territory of the Congo* case of 2005, the Court considered that Uganda's responsibility was engaged also for 'any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory', but there the Court specified in the same paragraph that Uganda was exercising 'effective control' over the territory.[50] While the mention of humanitarian law is obvious, since its extraterritorial application is self-evident, the mention of 'human rights law', especially if it lacks a precise definition, is less evident.

It was only with the *Genocide* judgment of 2007 that the Court seems to have set a watermark. The ICJ, after having denied that Serbia committed genocide or was complicit in the commission of genocide, found nevertheless that Serbia had violated Article 1 of the Genocide Convention,[51] because it had not prevented the commission of genocide abroad. Differently from the previous cases we have mentioned, the Court did not bother to ground the extraterritorial application on the text of the Article, and nor did it make that application dependent on the proof of effective control by the state on the activities of the wrongdoers. It is obvious why both courses were precluded for the Court. The text of the Article (and for that matter, its *travaux préparatoires*) did not provide any clue on the matter, and nor was it possible for the ICJ to find on the facts a case of effective control for the purpose of an

[46] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.
[47] *Wall* advisory opinion, n. 29, para. 109.
[48] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3.
[49] *Wall* advisory opinion, n. 29, para. 112.
[50] *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports 2005, 168, p. 231, para. 179.
[51] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention), Article 1.

extraterritorial application of the Convention, after having discarded it for the purpose of attribution. Therefore, the Court took the awkward path of maintaining that an extraterritorial application was dependent on the 'capacity of the state to effectively influence the actions of persons likely to commit'[52] the wrongful act – quite a vague concept, which has to be assessed *in concreto*. Interestingly, the ICJ specified that this capacity is dependent not only on factual criteria (geographical distance, political links with the tortfeasors), but also on legal criteria.[53]

However, it is very difficult, if not impossible, to understand what the Court meant by 'the particular legal position [of the state] vis-à-vis the situations and persons facing the danger, or the reality' of the wrongful act.[54] This sentence is a riddle. It is unclear how the particular legal relation between a state and the potential victims of a genocide should determine our opinion on the capacity of that same state to 'effectively influence' the actions of persons, who are by definition not its own organs. Even letting aside this logical *non sequitur*, one is still at odds with the exact meaning of the sentence itself. On one side of the spectrum, one could think that the state of nationality has a particular duty to prevent the commission of genocide of its citizens abroad, but then one may wonder why the Court did not spell this out more clearly. On the other side, one could also imagine that the ICJ wanted to hint at the general concept of humanitarian intervention, or responsibility to protect, but in that case the 'particular legal position' would equally affect all states, and consequently it would fail as a suitable criterion to distinguish the duty to prevent of any specific state. As a whole, the vagueness with which the Court left the concept of 'capacity to effectively influence' is regrettable. One may wonder whether the ICJ would not have fared better by saying that the concept of overall control, while not sufficient for purposes of attribution, could possibly have some value in the different context of an extraterritorial application of the duty to prevent.[55] A more stringent approach by the Court to the criterion of the 'capacity of the State to effectively influence' would have had the further advantage of better focusing on the issues of shared responsibility, which inevitably arises once an extraterritorial application of a particular obligation is admitted.

A year later, the Court had a fourth occasion to clarify its thoughts on the extraterritorial application of due diligence duties, in the case that Georgia brought against the Russian Federation on the application of the International Convention on the Elimination of All Forms

[52] *Genocide* case, n. 37, at p. 221, para. 430.
[53] Ibid.
[54] Ibid.
[55] For further observations on this topic see A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) EJIL 695.

of Racial Discrimination (CERD).[56] At the provisional measures stage, the ICJ did not consider it necessary to fully develop its argument, and it contented itself to say that 'the provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory', adding that 'in particular, neither Article 2 nor Article 5 of CERD (…) contain a specific territorial limitation'.[57] Here the Court's language is so generic that an over-enthusiastic scholar might be tempted to read this passage as an endorsement of a general extraterritorial application of all human rights treaties, regardless of their structure, content, or scope, and regardless of whether or not the state was exercising effective control outside its territory.[58]

If this is the case, one could detect, in a time span of just four years, a remarkable development of the ICJ's case law on the issue of the extraterritorial application of due diligence duties, with potentially far-reaching consequences for the possible determination of shared responsibility. This development is to some extent unfortunate, because the Court did not provide any hint of what the duties of due diligence should concretely resemble.

5.3 Ratione materiae

Herewith we reach the issue of the content of due diligence duties. Of course, one could put forward that the scope of the obligation *ratione materiae* is dependent on the primary obligation in question, and that therefore the task of determining such content for the purpose of secondary norms is both impossible and superfluous. Admittedly, the due diligence requisites may vary in different contexts and with regard to different sets of rules. Nevertheless, the structure of the obligation must present certain common features if one is not to leave the whole matter to the discretion of the judge.

In the *Armed Activities on the Territory of the Congo* case, one can understand that the Court did not find it necessary to specify the due diligence duties incumbent on the Ugandan forces 'in preventing violations of human rights and international humanitarian law by other actors

[56] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195 (CERD).
[57] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, 70, at paras. 108–109.
[58] For an attempt to reconcile 'the ICJ's somewhat expansive dictum' with a more orthodox methodological approach based on classic interpretative tools, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: OUP, 2011), p. 10, note 38.

present in the occupied territory',[59] since the circumstances of the case – a military occupation in a civil war-torn region – made clear what kind of conduct was meant, from ordinary police to straight military actions. On the contrary, in the *Genocide* case, the Court's insouciance in dealing more deeply with the due diligence duties on the part of Serbia is striking, and especially so given the fact that the violation of the duty to prevent was the only charge for which the ICJ ultimately found Serbia responsible. Admittedly, the Court had a relatively easy task because it found that, in any case, the Serbian authorities 'did nothing' in order to prevent the Srebrenica genocide. But the central question of what they should actually have done to prevent the genocide, which in the Court's words had not been previously planned and which took place over just two days, lingers. The awareness of the ICJ of the weakness of this part of its judgment transpires from the astounding decision by the Court not to grant any kind of reparation to Bosnia because the genocide 'would have happened anyway', even if Serbia had risen to its obligations.[60] By doing so, the Court seems to have mixed the *tatbegründende Kausalität* with the *tatsausfüllende Kausalität*, and without noticing the apparent contradiction, it turned a case of concurrent causation into one of alternative exclusive causation.[61] But if this is the case, i.e. if the Serbian conduct was ultimately irrelevant not only for the damages caused by the genocide, but for the commission of the genocide itself, one could wonder what purpose the finding of the breach did fulfill.

With regard to the duty to prevent, Ago, in his seventh report to the ILC in 1978, had given the example of an attack on a foreign embassy committed by individuals 'in circumstances which make it possible to establish that it [i.e. the attack] would certainly have succeeded and achieved its ends even if the State could not be accused of any negligence'.[62] Ago rightly reached the conclusion that the lack of causality between the conduct of the state and the event implied a lack of any breach on the part of the state. It seems, therefore, that the ICJ wanted to make a statement of principle, and to set a principle, to the extent that in case of an egregious breach of a *jus cogens* norm, such as genocide, a state has a specific duty to prevent, regardless of its territorial application and regardless of the causal relevance of its conduct. To say this in the words of the Court, 'the obligation on each contracting State to prevent genocide is both

[59] *Armed Activities in the Territory of the Congo*, n. 50, para. 179.
[60] *Genocide* case, n. 37, para. 430 and para. 462.
[61] See Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', n. 55, at 695.
[62] See Ago, 'Seventh Report on State Responsibility', n. 10, at 35, para. 14.

normative and compelling'.[63] This may sound impressive, but one might wonder what use such grandiose statements of principle can have in practice.

Indeed, until now, the Court has never specified what a duty of prevention actually implies.[64] It has been argued that the concept of due diligence was used by the ICJ in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996, where it spoke of the 'general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control'.[65] If this is true, the Court showed its reluctance to give more flesh to the obligation, by limiting itself one year later to a mere repetition of the same formula in the *Gabčíkovo-Nagymaros* case,[66] a bilateral dispute in which the issues at stake were much more concrete. The ICJ limited itself in that case to entrusting the care to the parties to envisage a joint operational regime – to ensure the achievement of the objectives of the bilateral 1977 treaty – through a common utilisation of shared water resources in a rational and equitable manner.[67] Some authors go even further in their criticism and argue that, by choosing to frame the general obligation of territorial states as a duty 'to respect', instead of one of 'not causing damage', the Court signaled its unwillingness to see the principle of due diligence as a rule of international law, but rather as a principle of equity.[68] Possibly aware of this risk, the ICJ endeavored to better substantiate the due diligence principle in the more recent *Pulp Mills*[69] case. It specified that an obligation to act with due diligence 'entails not only the adopting of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.'[70] Once again, the Court could have avoided the task of probing the effectiveness of

[63] *Genocide* case, n. 37, at 220, para. 427.
[64] For a better, and more in depth, analysis of the scope of an obligation of due diligence see the Advisory Opinion rendered by the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS) on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, 1 February 2011, (2011) 50 ILM 458. The task of the Seabed Dispute Chamber was made easier by the fact that Annex III, Article 4(4) of the 1982 UN Convention on the Law of the Sea (1833 UNTS 3) takes care to specify to some extent the content of the obligation of due diligence on the part of the sponsoring state. For an appraisal of the Advisory Opinion see R. Rayfuse, 'Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area' (2011) 54 GYIL 459.
[65] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at para. 29.
[66] *Gabčíkovo-Nagymaros*, n. 36.
[67] Ibid., at p. 78, para. 140.
[68] T. Koivurova, 'What is the Principle of Due Diligence?', in J. Petman and J. Klabbers (eds.) *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden: Martinus Nijhoff 2003), p. 341, at p. 346.
[69] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14 (*Pulp Mills*).
[70] Ibid., at p. 79, para. 197.

the definition by the evaluation of concrete facts and circumstances, because it found that the two parties had undertaken such a duty only by acting through the Uruguay River Commission, which had been established by the two parties in 1975. The absence of any indication of what a general duty of prevention actually implies is bound to complicate the determination of shared responsibility in situations where two or more states fail to prevent.

5.4 Ratione temporis

With regard to the applicability *ratione temporis* of the duty to prevent, the ILC has provided only partial answers. Article 14(3) of the ARSIWA states, in unmistakable terms, that 'the breach of an international obligation requiring a State to prevent a given event occurs when the event occurs'. But even that apparently unmistakable statement is put in doubt by those who observe that to the extent that the obligation to prevent implies positive obligations, or can be split into separate due diligence obligations, its violation could be judged independently of the actual circumstance of the occurrence of the event. Not surprisingly, this theory is linked to the further observation that the moment *a quo* of the violation of the obligation to prevent should not be the moment when the event occurs, but should also depend on the importance of the primary obligation breached.[71] A suitable example is that of the obligation to prevent environmental damage, which, being linked to the precautionary principle,[72] can be detailed into more specific obligations, each of which can be autonomously assessed in its own right. Examples are the obligation to proceed to an environmental impact assessment, or the obligation to provide information on the risks attached to a certain dangerous activity.

It seems that the potentialities of the obligation to prevent in terms of positive obligations have escaped the attention of both the ILC and the ICJ. The narrow understanding of the obligation to prevent was clear in Ago's seventh report, in which he said that

[71] See P.-M. Dupuy, 'Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to state responsibility' (1999) 10(2) EJIL 366, at 384.
[72] For such a link see ITLOS's Order of 27 August 1999 in the *Southern Bluefin Tuna* cases *(New Zealand v. Japan, Australia v. Japan)*, ITLOS Reports 1999, 274, at para. 77.

> where international law places an obligation on a State to prevent a certain type of event, observance of that obligation can be called in question and the responsibility of the State affirmed only if one of the events which it was the purpose of international law to prevent actually occurs.[73]

He compared the breach of the obligation to prevent to a chemical reaction, where the event is a catalysing agent, which, when put into contact with a certain substance (the state's conduct), provokes a certain reaction (the breach of the obligation).

Transposed to the topic of shared responsibility, all the preceding observations concerning the scope of application of an obligation to prevent leave the impression of too much latitude in which a court could move in charging a state for the breach of an obligation of prevention at a certain moment. The solution would be to envisage more specific and positive obligations of conduct (in Ago's meaning), but states obviously resist such a constraining option. The alternative would be to detect such obligations from general obligations of prevention, but this path entails a certain degree of arbitrariness. Further studies in this respect are needed in order to provide guidance for the case law.

6. Breach consisting of a composite act

The only category of breaches that the ILC eventually retained in a specific Article is the breach consisting of a composite act (Article 15). It is therefore interesting to analyse what relevance this type of breach could have for the issue of shared responsibility.

Ago had presented in his seventh report a single Article (Draft Article 24) on the *tempus delicti commissi*, distinguishing five different cases. As in so many instances, the ILC followed Ago's concept and terminology, but disaggregated the list into three Articles. The first Article dealt with the moment and duration of the breach of an obligation by an act of a state not extending in time; the second dealt with the moment and duration of the breach of an obligation by an act of a state extending in time; and the third dealt with the moment and duration of the breach of an international obligation to prevent a given event. In the second reading, due to the overarching goal to condense the text, the five different kinds of breaches could have been brought back under a single heading, following Ago's proposal. Curiously enough, the ILC

[73] Ago, 'Seventh Report on State Responsibility', n. 10, at 35, para. 14.

decided to separate the issue of the extension in time of the breach of an international obligation (now Article 14 of the ARSIWA) from the issue of a composite wrongful act.

Differently from Ago, and despite appearances, the main thrust of the ILC's Commentary is not so much on the moment and duration of the violation, but on the nature of a particular kind of obligation. As the ILC puts it, there are cases in which 'the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act'.[74] The underlying thought of the ILC is that the violation of particular obligations, such as the prohibition of apartheid or genocide, implies the adoption of a systematic policy or practice.

The utility of having singled out this kind of violation can be doubted. The ILC points to the ECtHR's case law, according to which the rule of the exhaustion of local remedies does not apply when the state's wrongful act concerns 'a practice as such' and not just single occurrences.[75] However, the relevance of such case law is dubious.[76] The ILC evokes another interesting issue with regard to proof,[77] but again it is not clear whether and how far this issue is linked as such to that of a composite wrongful act. It may well be that in order to prove a particular wrongful act, such as discrimination, evidence of a pattern of acts or a practice is required, but this does not change the fact that even a single act of discrimination may constitute an internationally wrongful act.

Also with regard to the topic of shared responsibility, it does not seem that the notion of a composite wrongful act could raise particular problems in general terms. The question of shared responsibility may arise when an act or omission, which taken together with the other acts or omissions is sufficient to constitute the wrongful act, is attributable to a state different from that state, or those states, to which the previous acts or omissions are attributable. Indeed, such a scenario could even be considered the prototype of shared responsibility.

However, a delicate question arises in all those cases in which the assessment of an act or omission, attributed to a certain state, and *per se* lawful, would change on account of the fact of

[74] ARSIWA Commentary, n. 2, 63, para. 4.
[75] *Ireland v. United Kingdom*, App. No. 5310/71 (ECtHR, 18 January 1978), at p. 64, para. 159.
[76] It will be recalled that the ICJ in the *Avena* case in 2004 rejected a similar preliminary objection by the United States with the different argument, that being a mixed claim the aspect of Mexico's own right was predominant in its complaint: see *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, 12, at p. 36, para. 40.
[77] ARSIWA Commentary, n. 2, 63, para. 6. The argument runs that in order to prove a composite act, it will often be required to produce evidence of a systemic pattern.

having been added up with other acts or omissions that are attributable to other states. In his seventh report, Ago expressly considered the possibility that in the sequence of courses of conduct making up the composite wrong, a sequence of actions 'taken separately, may be lawful or unlawful'.[78] As an example, Ago gave the scenario of the rejection of an application for employment by a worker of a particular nationality or race, which in his view 'may not, as such, qualify as a breach of an international obligation',[79] whereas the rejection of a series of applications by persons of the same category may constitute a 'discriminatory practice' prohibited by a treaty.[80] As we have argued above, Ago's view on the specific point of discrimination could be challenged. It is telling that the ILC, in its final Commentary to Article 15, distanced itself from Ago's interpretation by giving the same example, albeit with the specification that 'an individual act of racial discrimination by a state is internationally wrongful'.[81]

Indeed, there is no hint in the ILC Commentary that the single act or omission forming the composite wrongful act could be *per se* lawful. The ILC's neglect of this specific issue could be explained by the fact that at that point its attention was focused on the issue of the *tempus delicti commissi* and that it possibly took for granted that the entire sequence of conduct would be attributable to a single state. However, the picture drastically changes in the event of different courses of conduct by different states. Outside the context of attribution of responsibility, i.e. outside the situations dealt with in Articles 16 to 18 of the ARSIWA,[82] it is inconceivable that, through the concept of a composite act, a state could be made responsible only for the fact that an act or omission which is attributable to it, and which is *per se* perfectly lawful, is in a way causally linked to other wrongful acts or omissions attributable to other states.

Surely, what could happen is that a single wrongful act – such as an act of torture – could be seen as a part of a pattern, partly attributable to other states, and therefore constituting a grave breach of a peremptory norm of international law, triggering the consequences of Article 41 of the ARSIWA. But also in this case, we could still speak, at least in a somewhat extended meaning, of 'the same wrongful act'. The reason is that we are dealing neither with an act that would *per se* be lawful but for the qualification it assumes in relation to the previous acts by

[78] Ago, 'Seventh Report on State Responsibility', n. 10, at 47, para. 38.
[79] Ago, 'Fifth Report on State Responsibility', ILC *Yearbook* 1976/II(1), 23, para. 65.
[80] Ibid.
[81] ARSIWA Commentary, n. 2, 63, para. 6.
[82] See Fry, 'Attribution of Responsibility', n. 4, pp. ___.

other subjects, nor with a course of conduct that would constitute *per se* a different wrong. An even better example is that of genocide. It may well be the case that the genocide is composed of different acts attributed to different states, but it is also clear that each course of conduct constitutes a wrongful act *per se*. The ILC might be right in saying that 'genocide is different in kind from individual acts even of ethnically or racially motivated killing',[83] but it remains that in order to be qualified as constituting part of a genocide, each single act must be committed with the relevant intent, given the requirement of *dolus specialis* in the definition of genocide.

It is noticeable that while, on the one hand, the ILC retained and even highlighted the notion of a composite wrongful act, it deleted from the Articles the germane notion of a complex wrongful act, i.e. a breach consisting of a succession of actions or omissions by the same or different organs of the state. The reasons for the deletion are clear. Regardless of the multiple participation by different organs, what matters is whether the breach actually occurred, and whether it was immediate or continuous.

7. Shared responsibility of states and international organisations

After having considered the different structure of international obligations in general terms and the possible impact of their violation in a context of shared responsibility, it is appropriate to broaden the view and to address particular questions relating to the breach of an international obligation that may apply in the relationship between states and international organisations.

Compared to the ARSIWA, the attention the ILC gave to the aspect of shared responsibility in the Articles on the Responsibility of International Organizations (ARIO)[84] is remarkable. Besides Part Two of the ARIO, on the responsibility of an international organisation in connection with an act of the state, and Part Five of the ARIO (Articles 58 to 63), dealing with the responsibility of a state in connection with the conduct of an international organisation, there are some other Articles whose Commentary shows that the ILC was particularly aware of issues of shared responsibility. In the Commentary to Article 3 of the ARIO, whose title reads

[83] ARSIWA Commentary, n. 2, 63, para. 4.
[84] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

'International responsibility of an international organization for its internationally wrongful acts', the ILC makes the following comment:

> The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both. Another example may be that of conduct which is simultaneously attributed to an international organization and a State and which entails the international responsibility of both the organization and the State.[85]

Under Article 48 of the ARIO, entitled 'Responsibility of an international organization and one or more States or international organizations', the ILC – differently from what it had said in relation to the parallel Article 47 of the ARSIWA – considered joint responsibility to be the general rule, applicable in all cases of Part Two and Part Five. The ILC added to this the cases of European Union mixed agreements.[86] A possible explanation for this remarkable switch of perspective could be that, as distinct from the ARSIWA, joint responsibility as a general rule is easier to affirm when international organisations are involved. This is so because in this context the application of joint responsibility does not touch upon the sensitive issue of sovereignty, i.e. making a state responsible for the acts or omissions of another, which is the major stumbling block for affirming joint responsibility as a general rule in all cases of shared state responsibility.

While most of the observations we have made with regard to the ARSIWA could be repeated also in the context of the ARIO, for our purposes the most interesting and innovative part of the ARIO is, of course, Part Five. The ILC envisaged various possibilities for holding a state

[85] Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), p. 81, para. 6.

[86] The ILC forgot to add the most obvious example of space law (Article VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, London, Moscow, and Washington D.C., 27 January 1967, in force 10 October 1967, 610 UNTS 205 (Outer Space Treaty); and Article VII of the Convention on International Liability for Damage Caused by Space Objects, London, Moscow, and Washington D.C., 29 March 1972, in force 1 September 1972, 961 UNTS 187 (Liability Convention), where states are jointly and severally responsible with international organisations operating in space. For a practical application see the Agreement between the French Government and the European Space Agency (ESA) with respect to the Centre Spatial Guyanais of 1992, renewed in 2009. Under the Agreement, the ESA assumes full liability and safeguards France from any claims for damage resulting from the launches operated for ESA programmes. France legally protects the ESA and its member states against claims arising from commercial launch activities undertaken by Arianespace, leading to third-party liability claims against France. In the latter event Arianespace is required to reimburse the French government up to a maximum of 61 million euros per accident. See J. Hermida, 'Risk Management in Arianespace Space Launch Agreement' (2000) 25 Ann Air & Sp L 143.

responsible in connection with the wrongful act of an international organisation. However, despite the efforts made by the Special Rapporteur's reports and the final Commentaries, some of the situations envisaged – which are probably better assessed as cases in which the responsibility arises out of joint or concerted actions or omissions rather than cases in which there is no concerted action or omission – are far from clear when they are analysed through the lens of the breach of an international obligation.

Articles 58 and 59 of the ARIO, which deal respectively with the responsibility of a state for having aided or assisted an international organisation in the commission of a wrongful act, or having directed and controlled an organisation in the commission of a wrongful act, specify in their common paragraph 2 that '[a]n act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.' Significantly, the paragraph was added in the second reading in 2011, as a consequence of the critical observations of several governments. The effect of the paragraph is to exclude in general terms the possibility of shared responsibility whenever member states abide by the rules of the organisation, because of the lack of any breach. In the Commentary to Article 58, the ILC somewhat grudgingly acknowledged this limitation, by adding that the insertion of the words 'as such' in paragraph 2 'does not imply that the State would then be free to simply ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization'.[87] If this were the case, the ILC concludes, the state would then incur responsibility under the ARSIWA. This would open up the possibility of shared responsibility.

At first glance this observation could appear convincing, but with a closer look it is question-begging, and it may be doubted what added value the insertion of the words 'as such' provides. Assuming that the international obligation of the state is a positive one – like, for instance, in a 'Responsibility to Protect' context – and further assuming that the UN Security Council is

[87] ARIO Commentary, n. 85, p. 91, para. 5. It is interesting to note that the ILC did not take notice of the ECtHR's *Behrami* judgment, in which the ECtHR had clearly stated that the voting behaviour of permanent member states within the Security Council is not subject to control by the Court. See *Behrami and Behrami v. France*, App. No. 71412/01 (ECtHR, 2 May 2007); and *Saramati v. France, Germany and Norway*, App. No. 78166/01 (ECtHR, 2 May 2007), at para. 149: 'This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfillment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.'

asked to take action in order to impede or stop the violation of an *erga omnes* obligation – the voting behaviour of the Security Council's members (especially the permanent ones), which would eventually hinder the UN from taking action, is not necessarily a wrongful act. It simply means that a particular state does not wish that action to be taken by the international organisation, leaving open the question through which other means it intends to discharge its obligation to cooperate in order to stop the serious breach. It will be recalled that the ILC, in its Commentary to Article 41 of the ARSIWA, recommended states to cooperate in the framework of the UN to put an end to a grave breach of a peremptory norm, but expressly did not exclude unilateral actions.

The legal assessment of a situation in which the international obligation of the state was a negative one would be different, because its voting behaviour and its co-determining of the commission of the wrongful act by the international organisation would then be wrongful itself. The example made by the chairman of the Drafting Committee in June 2011 with regard to the scope of the new common paragraph 2 of Articles 58 and 59 of the ARIO was that of a state voting in favour of a decision by the Security Council that would lead to genocide. But then, if this were the case, one could ask what purpose the subsequent Article 61 of the ARIO, under the heading 'Circumvention of international obligations of a State member of an international organization', would have, since it seems more appropriate to capture exactly this kind of situation. Not surprisingly, the misleading example was finally deleted in the Commentary to Articles 58 and 59, so one still wonders what example the ILC had in mind when adding in paragraph 2 the proviso 'as such'.

Coming to Article 61 of the ARIO, this norm presents several problems as well, when read in the context of shared responsibility. As the ILC clarified, the wrongful act of the international organisation must have been 'caused'[88] by the conduct of the member state, but the member state's responsibility will not arise when the wrongful act of the international organisation has to be regarded as 'the unintended result' of the member state's behaviour, i.e. in the absence of *dolus*.[89] This specification indeed seems necessary; otherwise, one would end up always holding member states responsible when an international organisation committed a wrongful act. The only way to impede the international organisation from committing such a wrongful

[88] ARIO Commentary, n. 85, at 95, para. 7.
[89] ARIO Commentary, n. 85, at 93, para. 2. The specification of the necessity of *dolus* is very interesting, because it introduces, or one might say 'reintroduces', the element of fault in the ascertainment of international responsibility. This is being done in a different context from that in which the issue of fault has been traditionally confined: that is, the assessment of due diligence in the primary obligations to prevent.

act would be for each member state to reserve a right of veto with regard to any issue, but this solution would be paradoxical and would go against the purpose of international cooperation, which lies at the core of the very existence of international organisations.[90] On the other hand, it is interesting to note that the ILC refused to include in Article 61 of the ARIO a paragraph along the lines of paragraph 2 that was added to Articles 58 and 59, since this would have robbed Article 61 of any practical meaning.

All in all, it seems that the entire Part Five of the ARIO – with the exception of Article 62, which codifies the well-established rule of the subsidiary responsibility of member states for wrongful acts of an international organisation in some particular and well-defined instances – is more an abstract exercise *de lege ferenda* than *de lege lata*, which is still in need of many clarifications.

8. Shared responsibility of states and private actors

Another important and practical aspect of our study is the extent to which one or more states could be held responsible for the behaviour of individuals. Traditionally the issue was studied by focusing on attribution, given the prevailing view of the absence of personality under international law of individuals. In the present context, however, the investigation will focus on the objective element, i.e. the breach of an obligation.

The fact that in recent decades international law has developed concepts and rules relating to the international criminal responsibility of individuals with regard to certain crimes – where the quality of the author as state organ is irrelevant, such as in the case of genocide or other crimes against humanity – has not yet induced international law doctrine to conceive a general theoretical framework in which to put into perspective the two different kinds of responsibility. Only a few rules of thumb are readily available.[91] The first is that were an international criminal tribunal to find an individual state organ responsible for a crime, then its state would

[90] See however O. de Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility', in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerpen: Intersentia, 2010), p. 51, at p. 84, who criticises Article 61 ARIO for being too lenient towards member states, since 'the liability of the State will thus be limited whether or not the State has reserved the right to veto the decision within the internal decision-making procedures of the organization, or to block the implementation of the decision.'

[91] Groundbreaking: P.A. Nollkaemper, 'Concurrence between individual responsibility and State responsibility in international law' (2003) 52 ICLQ 615.

implicitly be held responsible as well, even if that finding would be outside the competence of the court or tribunal. However, the reverse would not be true; the finding of responsibility of a state by an international court does not imply the criminal responsibility of any particular individual state organ.

The main reason why it is difficult to envisage a general framework of shared responsibility between states and individuals is the uncertain state of the law on the issue of direct accountability of individuals for violations of customary international law, besides the already-mentioned and well-circumscribed instances of individual criminal responsibility. As is well known, an intense debate is being fought on the issue of civil responsibility of corporations under international law for violations of human rights, either directly or in aiding and abetting such violations by host states. Official statements are quite generically ambiguous on the point,[92] doctrinal views diverge widely, and national case law is scant. As was predicted, the United States Supreme Court decision in *Kiobel v. Royal Dutch Shell* did not help in clarifying matters, since the Court opted to decide the case on the different issue of the jurisdictional scope of the Alien Tort Statute.[93]

[92] The circuitous and 'gluey' developments of the concept can be nicely traced in the United Nations debates. In the 1999 UN Global Compact, the principles were assumed on a purely voluntary basis; in 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights concocted a breakthrough by adopting, without having been requested, a set of Draft Norms on the 'Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights', Principle 1 of which reads: 'States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups' (Res. 16/003). The attempt was stopped and rebuffed by the Economic and Social Council (ECOSOC), which confirmed Res. 116/2004 of the UN Commission on Human Rights to the effect that 'Document E/CN.4/Sub.2/2003/12/Rev.2 had not been requested by the Commission and, as a draft proposal, had no legal standing, and that the Sub-Commission should not perform any monitoring function in that regard' (ECOSOC, Res. 279/2004). Finally, the UN Human Rights Council endorsed the Guiding Principles issued by Special Representative Ruggie (A/HRC/RES17/4) in 2011. In Point 3 of the Resolution, the Council '*Commends* the Special Representative for developing and raising awareness about the Framework based on three overarching principles of the duty of the State to protect against human rights abuses by, or involving, transnational corporations and other business enterprises, the corporate responsibility to respect all human rights, and the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms.' In the Commentary to Principle 11 of the Foundational Principles on the corporate responsibility to respect human rights, Special Rapporteur Ruggie had shrewdly escaped the basic question of the applicability of international law by the following terms: 'The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.'

[93] See *Kiobel v. Royal Dutch Petroleum et al.*, 621 F 3d 111 (S. Ct. 2013). Strongly in favour of upholding universal civil jurisdiction, see J. von Bernstorff, M. Jacob and J. Dingfelder Stone, 'The Alien Tort Statute before

Leaving aside difficult questions relating to attribution, causality, and complicity – which are discussed in other Chapters of this volume – it is clear, however, that most issues of shared responsibility between states and individuals can only arise if one concedes that also individuals, and not only states or international organisations, can be held responsible for breaches of customary international law. The *amici curiae* of the petitioners in the *Kiobel* case maintained that if the defendant were right, even the celebrated *Filartiga v. Pena Irala* case should have been rejected by the Court of Appeals of the 2nd Circuit in 1980.[94] This observation unwittingly strikes at the core of matter. Indeed, from a strict viewpoint of positive international law prevailing at that time, that case could easily have been dismissed. This overly formalistic view, however, would fail to grasp the dynamic dimension of international law creation. Just four years after *Filartiga*, the UN Convention against Torture (CAT)[95] was adopted by the General Assembly, where under Article 14 each state pledges itself to ensure civil redress for the victim against the individual torturer. The facts that it took only two and a half years for the CAT to come into force, and that it has by now been ratified by 153 states all over the world, are evidence that the idea underlying the Convention was already shared by a vast number of states at the time of *Filartiga*. The same cannot be said with regard to the responsibility of corporations for whatever violation of human rights and/or environmental protection rules. In this regard, the position of states is quite adamantly negative, and the creative role of some domestic courts simply cannot substitute the lack of state practice and *opinio juris*.

On a deeper level of analysis, a major stumbling block to envisaging a general framework of where to place the shared responsibility of states and individuals, especially juristic persons, is the difficulty in sensing the respective content of the obligations and the limits of the two kinds of responsibility. The ILC can undoubtedly be criticised for not having taken thus far any opportunity to specify the possible interactions of state and individual responsibility. The reference here goes not so much to the saving clause of Article 56 of the ARSIWA, but to the codification of the prevention of transboundary harm from hazardous activities (Draft Principles of 2001),[96] and the subsequent codification on the allocation of loss in the case of

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the US Supreme Court in the *Kiobel* case: Does international law prohibit US courts to exercise extraterritorial civil jurisdiction over human rights abuses committed outside of the US?' (2012) 72 ZaöRV 579.

[94] *Filartiga v. Pena Irala*, 630 F 2d 876 (2d Cir. 1980).

[95] Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

[96] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, ILC *Yearbook* 2001/II(2).

transboundary harm arising out of hazardous activities (Draft Principles of 2006).[97] With regard to the latter, Article 4 on 'Prompt and adequate compensation' specifies in paragraph 2 that the measures of compensation foreseen by the state of origin 'should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault'. In the words of the ILC, 'state of origin' 'means the State in the territory or otherwise under jurisdiction or control of which the hazardous activity is carried out',[98] whereas the definition of 'operator' 'is based on a factual determination as to who has use, control, and direction of the object at the relevant time'.[99] In the Commentary to the Article the ILC limits itself to observing that the imposition of the primary liability on the operator, and not on the state of origin, 'is widely accepted in international treaty regimes and in national law and practice'.[100] This is surely true, but nowhere in the Draft Principles, or in the Commentaries thereto, is there an attempt to specify whether the operator's liability finds its origin in international or in domestic law, or to link the two kinds of liability/responsibility in whatsoever form. We only find a passing remark under the introductory general comment to the purpose that 'the attachment of primary liability on the operator (…) does not in any way absolve the State from discharging its own duties of prevention under international law'.[101]

In the defence of the ILC, it is true that apart from a general and, to some extent, dubious principle of 'polluter pays', there is very little, if any, guidance in customary international law with regard to responsibility for environmental damage. Moreover, and with the partial exception of compensation for nuclear damage, even under treaty law states are very careful not to get entangled in any liability scheme from which the step towards responsibility could be more easily made.[102]

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[97] Ibid.
[98] ILC Report on the work of its fifty-eight session, UN Doc. A/61/10 (2006), Commentary on Article 4, at 134.
[99] Ibid., at 139.
[100] Ibid., at 155.
[101] Ibid., at 113.
[102] For instance, in all compensation funds for oil pollution damages envisaged by the International Maritime Organization from 1971 to 1992 to 2003, the liable parties have been extended from ship owners to oil receivers, but not further to flag states or importing states. Even the compensation scheme for nuclear damage leaves much to be desired. As is well known, the limitation of liability of the 1960 Organisation for Economic Co-operation and Development (OECD) Paris Convention was soon superseded by the 1963 Brussels Convention, further revised in 1982, providing for a three-tiered compensation level with the contribution of the states. To the contrary, the International Atomic Energy Agency system is still stuck to the 1963 Vienna Convention with its liability limit of USD 5 million per accident, because the 1997 Convention on supplementary compensation, which would bring the liability regimes on par with the OECD, involving the liability of host states, has not yet entered into force, having up to this date been ratified by only four states.

That does not mean, of course, that a partition of responsibility cannot be found under domestic legislation. To the extent that several domestic statutes present similar features in the handling of problems and solutions, there would be some room to re-enter the realm of international law through the device of general principles of law. An interesting example of the interplay between domestic and international law with regard to the possibilities of a shared responsibility between states and individuals could be given by space law. Article VI of the Outer Space Treaty provides in its first part that:

> States parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried out on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.

The Article is interesting because of two different features.[103] The first is that it imposes direct responsibility upon the state for everything that is done by non-governmental entities. The second is that the Article specifically prescribes the obligations of the state in relation to the activities of such non-governmental entities, namely 'authorization and continuing supervision'. This being the state of international law on the matter, nothing excludes the fact that national legislation may envisage different solutions. A survey of major domestic legislation on space activities shows that appropriate insurance or other financial guarantees by the private operators is a common requirement in order to be granted a license, and clauses of indemnification for the sums that states might be asked to pay under the 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention) are usually provided for.[104]

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[103] B. Cheng, 'Revisited: International Responsibility, National Activities, and the Appropriate State' (1998) 27 JSL 529. Article VI of the Outer Space Treaty, however, leaves a margin of doubt on a central question, namely the identification of the 'appropriate state' that is deemed to perform the obligations mentioned. Bin Cheng comes to the convincing conclusion that, as Article VII of the Convention, under the heading of 'liability of the launching state', provides for joint liability of potentially four different states for damages caused by special objects (i.e. the state that launches; or the state that procures the launching; or the state from whose territory; or the facility from which the object is launched), thus analogically Article VI under 'appropriate state' means at the same time the state of registry of the space object operated by the individuals, the state of nationality of the individuals involved, and the state under which jurisdiction the individuals operate.

[104] See A. Kerrest de Rozavel and F.G. von der Dunk, 'Liability and Insurance in the Context of National Authorization', in F.G. von der Dunk (ed.), *National Space Legislation in Europe: issues of authorisation of private space activities in the light of developments in European space cooperation* (Leiden-Boston: Martinus Nijhoff, 2011), p. 125. There is no practice as yet, but it would be interesting to see how to deal with a case in which a civil action is brought by the victim directly against the private operator before a domestic court, as allowed for by Article XI(2) of the Liability Convention (which reads: 'Nothing in this Convention shall prevent a State, or natural or juridical persons it may represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State'), and at the same time the responsible state (or one of the responsible

9. Concluding observations

In the present Chapter we have tried to demonstrate that as a matter of principle, the objective element of international responsibility, i.e. the breach of an international obligation, does not pose major problems in the case of shared responsibility. What matters primarily is that the different subjects (states, international organisations and, possibly, individuals) are bound by the obligation the breach of which is alleged. Nevertheless, problems arise as soon as we try to investigate more closely the content and structure of an international obligation. The differentiation between different types of obligations might have proved superfluous in the context of the ARSIWA, but it can be useful, or even necessary, in the context of shared responsibility. The reason for this finding is that in contemporary international law, besides the well-circumscribed hypothesis of attribution of responsibility,[105] it is still not possible to hold a state liable in the absence of a specific breach of a specific obligation attributable to it.

states) is involved in the inter-state Claims Commission envisaged under Articles XIV–XX of the Liability Convention.

[105] See Fry, 'Attribution of Responsibility', n. 4, p. ___.