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DUE DILIGENCE UNDER INTERNATIONAL LAW: REAPPRAISING ITS SCOPE, FUNCTIONS AND LIMITS

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INTRODUCTION

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1. Research question

The notion of due diligence has a long history in international law. The term emerged ever since the 18th century in the *Alabama* case and had been subjected to careful doctrinal examinations up to the first half of the 20th century. However, most of the academic interest on due diligence centred on the nature of State responsibility and the relationship between due diligence and fault.

Recent pronouncements of the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) have added new perspectives to the contemporary debate on the nature and scope of due diligence in international law. Furthermore, the significance of due diligence is growing at a time where States and private entities are frequently operating on a equal footing, with international harmful acts being often carried out through the concerted actions of States and non-state actors (NSA). These settings call for the identification of the efforts that States need to make when preventing harmful activities originating in their territories or under their jurisdiction or control.

This work aims to discuss the nature and function of due diligence in contemporary international law. Drawing on the most relevant and recent pronouncements touching upon due diligence obligations, the research departs from classical approaches that tackled due diligence mainly from the perspective of secondary rules and in relation to the nature of international responsibility;

while State responsibility remains the primary domain for a thorough discussion on the function of due diligence in international law, the analysis will also take up the concept from the viewpoint of primary rules and shed new lights on arguably one of the most ambiguous term in contemporary international legal discourses.

2. Classical approaches toward due diligence in doctrine and practice

2.1 Origins of due diligence: standards of neutrality and the protection of aliens abroad

The term due diligence derives from the Latin definition *debita diligentia* and developed within the civil law tradition. The expression literally refers to the standard of care that a reasonable person shall exercise in order to avoid harm to other persons or their property.

Due diligence emerged as a concept in international law ever since its early developments. In 1872 in the Alabama Claims Arbitration case, the tribunal set to solve the dispute between Great Britain and the US introduced the notion of due diligence in dealing with obligations of neutrality of a non-belligerent State. The case consisted in a series of demands for damage sought by the United States from Great Britain for the attacks upon 68 ships of the Union by the Confederate cruiser Alabama, disguised as a merchant vessel and built in Britain. After the conclusion of the Civil War, the United States accused Great Britain of having violated its obligations of neutrality in sea warfare. According to the view expressed by the US, a neutral State should have 'used active diligence, proportional to the risk and possible consequences of negligent conduct';[1] on the contrary, Great Britain believed that due diligence could be met by 'such care that governments ordinarily employ in their domestic concern and may reasonably be expected to exert in matters of international interests and obligations'.[2] The Tribunal eventually adopted the definition proposed by the US and concluded that the standard of due diligence requires a neutral government to act in the exact proportion to the risks to which belligerents may be exposed from a failure to fulfil obligations of neutrality.[3]

Doctrine and subsequent arbitral decisions framed due diligence as the standard of conduct to be adopted by a State to fulfil its obligations of neutrality in relation to hostile acts committed by private individuals against another State. In the dissenting opinion of Judge Moore to the *Lotus* case, Moore affirmed that 'it is well settled that a State is bound to use due diligence to prevent the commission

[1] *Alabama Claims Arbitration* (United States/Great Britain) (1872), XXIX UNRIAA, 125, 129.
[2] Case presented on the Part of the Government of Her Britannic Majesty in *Papers relating to Foreign Relations of the United States Government Printing Office Washington* (1872), part. II vol. I, 412.
[3] *Alabama Claims Arbitration* (note 1) 129.

within its dominions of criminal acts against another nation or its people'.[4] Similarly, in the report presented at the Institut de Droit International in 1875 after the *Alabama* case, Charles Calvo contended that the Alabama judgement did not create new rules, but reflected already well-established principles of international law.[5]

Yet, it is especially in the early rich jurisprudence related to the protection of aliens that the notion of due diligence acquired particular relevance. Claims commissions and arbitral tribunals established in the 19th and early 20th century to set indemnities for States for injuries suffered by their nationals abroad made abundant recourse to due diligence as the 'international standard of justice'[6] to be evaluated against State's conduct. Numerous cases resorted to concept of due diligence when grounding State responsibility on the failure of State's authorities to prevent attacks to foreigners residing in the State's territory or on the failure of the judicial apparatus to compensate the victims and punish the perpetrators of the acts. In the *Wipperman* case for example, it was argued that States are not responsible for criminal acts of private individuals against foreigners 'as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs'.[7] The *Youman* case explicitly referred to due diligence as the standard to be adopted by a State in protecting foreign residing in a State territory from criminal actions committed by private individuals.[8] The standard of due diligence played a role not only to evaluate State behaviour vis-à-vis the prevention and protection of foreigners from injuries carried out by private subjects, but also with regard to the obligations of States to apprehend and punish those responsible for these crimes. Accordingly, in the *Kennedy* case instance, the arbitrators found Mexico responsible for lacking diligence in failing to adequately punish a Mexican citizen who had fired and severely injured an American national.[9] Other cases made reference to the degree of diligence employed by national authorities in apprehending and punishing the individuals responsible for illicit crimes committed against foreigners.[10] The centrality of due diligence in the context of protection of nationals abroad was also crystallised in 1929 by the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, with draft art 10 providing that 'a state is responsible if any injury to an alien results from its failure to exercise due diligence to prevent the

[4] *The Case of the SS "Lotus" (France v Turkey)* (1927) CPJI, Série A No 10, 88.
[5] Annuaire de L'Institut de Droit International (Gand 1877) Première Année, 34.
[6] C Eagleton, The Responsibility of States in International Law (NYU Press 1928) 131.
[7] J B Moore, *History and Digest of the International Arbitrations to which the United States has been a party* (Washington 1898.1906), III, 3041.
[8] *T Youmans (USA v United Mexican States)* (1926) UN RIAA IV, 110.
[9] *G A Kennedy (Usa v United Mexican States)* (1927) UN RIAA IV, 199.
[10] See for example *J D Chase (USA v United Mexican States)* (1928) UN RIAA IV, 339; L G *Sewell (USA v United Mexican States)* (1930) UN RIAA IV, 626. For an overview on the issue see R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of International Responsibility of States', (1992) 35 German YB Int'l, 25-30.

injury, if local remedies have been exhausted without adequate redress for such failure'.[11]

The development of due diligence as the international standard of justice for the protection of nationals abroad went hand in hand with the progressive presumption against international responsibility for acts committed by private individuals. Lack of due diligence in preventing and punishing illicit acts carried out by private individuals was to be regarded as a conduct of omission on the part of State' organs, and not as a form of complicity or participation of the State in the commission of the crime. For example, in a case involving the responsibility of Venezuela for the damage suffered by an Italian national following revolutionary acts carried out by private subjects in the territory of the State, it was noted that 'the ordinary rules is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which the responsibility is expressly assumed by it';[12] in circumstances where international harmful acts are in fact committed by private individuals, responsibility may flow exclusively from a lack of due diligence of the State in preventing damages from being inflected by revolutionists.[13] Many arbitral awards of the first part of the 20th century show that a State would not incur responsibility for the actions of private individuals, but rather for its own omissions through the failure to exercise diligence.[14] As for the content and the meaning of due diligence in the protection of aliens, due diligence was regarded mostly as the *reasonable* degree of care[15] that would be expected from a *civilized* State.[16]

2.2 State responsibility, fault and due diligence

The problem of fault has for long dominated the debate over the nature of State responsibility. It was Grotius during the course of the 17th century the first one to introduce the concept of fault in international law, which remained a dominant feature of responsibility up to the beginning of the 20th century. Grotius contended that a sovereign could become complicit in the crimes of individuals if he failed to abide by the principles of *patientia* and *receptus*.[17] While the principle of *patientia* provided that responsibility could arise if the ruler had failed to prevent

[11] Draft Convention on the International Responsibility of States for Injuries to Aliens, (1929) reprinted in 55 AJIL (1961), 548, art 10.
[12] *Sambiaggio* case (1903) UN RIAA, 512.
[13] Ibid, 524.
[14] See also *Poggioli case* (1902) UN RIAA, 669-692.
[15] *L.F.H. Neer and Pauline Neer* (USA v. United Mexican States) (Decision) General Claim Commission (Mexico and United States) (15 October 1926), IV UN RIAA, 61-62.
[16] García Amador, 'Second Report on State Responsibility' (1957) ILC YB/II, UN Doc. A/CN4/106, 122 para. 9.
[17] H. Grotius, *De Jure Belli ac Pacis, On the Laws of War and Peace*, (Francis w. Kelsey trans. William Hein & Co, 1995) (1646), book II chapter XXI, para. 2, 523, 526-527.

a crime committed by an individual, the principle of *receptus* required the ruler, in order to avoid responsibility, to punish or extradite those who had taken refuge from justice in his realm.[18]

Classic conceptions of international responsibility developed during the 18th and 19th century built around the notion of fault as the psychological requirement necessary for triggering the responsibility of a State.[19] Essentially, the understanding of international responsibility as grounded on psychological fault rested mainly on two accounts: the idea of the sovereign as the 'embodiment' of the State – which would allow to equate fault of the sovereign with fault of the State – and the idea that private individuals could carry out international wrongful acts. Supporters of fault-based responsibility referred largely to cases of the so-called 'responsibility of the State for acts of private individuals' in order to elaborate on the element of fault. Building on international practice related to the protection of aliens, scholars argued that the State refusing to repair a wrongful act committed by private individuals or to punish the perpetrators, would make itself culpable in relation to that crime and responsible for the consequences thereof.[20]

Doctrinal support on fault as a constituent element of international responsibility was broken down by Anzillotti at the beginning of the 20th century. In his *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Anzillotti construed the paradigm of international responsibility solely through the breach of an international obligation and the imputation of that breach to the State. Any psychological attitude of the organ of the State was ruled out, as *culpa* and *dolus* related exclusively to the attitude of individuals and could not attach to the State.[21] Anzillotti acknowledged that doctrinal consensus over a fault-based notion of responsibility ensued mostly from the analysis of international jurisprudence related to the protection of foreigners and from cases of international responsibility for acts of private subjects.[22] Yet, an 'objective' construction of State responsibility would read a State's failure to prevent or punish the perpetrator of the wrongful act not as a form of *culpa* or psychological

[18] Ibidem

[19] See for example S Pufendor, *De Jure Naturae et Gentium* (1672) vol III, 12; E De Vattel, *The Law of Nations or, the Principles of Natural law: Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Legal Classic Library 1916) 72.

[20] *Cotesworth & Powell* (*Great Britain v Colombia*) (1875), reprinted in JB Moore, 2 History and Digest of International Arbitration to which the United States has been a Party (1989), Vol. II, p. 2082; *Montijo (United States v Colombia)* (1898) JB Moore, *History and Digest of the International Arbitration to which the United States has been a party* (Washington Gov't Print Off, 1898), 1421; W E Hall, *A treatise on International Law* (Oxford Claredon Press 1904), 218.

[21] D Anzillotti, Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale (Lumachi Librario 1902) 156-170.

[22] Ibid. 170-171, where Anzillotti also acknowledges the usefulness for scholars to resort to the notion of *culpa* in these cases, so as to avoid interpretations that would provide for an excessive scope of State responsibility: 'Ed infatti io credo che essa abbia servitor ad evitare le conseguenze eccessive di un'erronea interpretazione dei doveri internazionali', at 171.

participation of the State to the commission of the act, but rather as the violation of an international obligation incumbent upon the State and requiring the latter not to tolerate certain conducts or to punish their occurrence.[23]

After Anzillotti, many scholars began to support the paradigm of objective responsibility over the course of the 20th century, looking at due diligence not as the expression of negligent attitude of the State in cases of international responsibility for acts of private individuals but as an international State's duty with a specific content.[24] However, they failed to completely wipe out theories favouring a fault-based approach. One of the most prominent modern legal scholars who argued in favour of a theory of international responsibility based on fault was certainly Roberto Ago, who understood fault as a necessary element as to the responsibility of a State for acts of private individuals and for acts of its organs.[25] But many numerous other authors continued to interpret responsibility for failure to exercise due diligence as a form of international responsibility based on fault. Oppenheim for example argued that in the context of responsibility of a State for acts of private persons, the State which 'either intentionally, maliciously or through culpable negligence' does not comply with its duties 'commits an international delinquency for which it has to bear original responsibility'.[26] During its work as a Special Rapporteur on State Responsibility, Garcìa-Amador defined due diligence as the 'expression *par excellence* of the so-called theory of fault, noting that in the context of State responsibility for acts of private individuals the harmful act committed by the private subject had to be accompanied by 'a specific attitude wilfully adopted by the organ or the official'.[27] Similar views have been shared by other scholars, who have often distinguished between objective responsibility of a States for acts of its organs and culpable negligence in cases of responsibility for failure to exercise due diligence.[28]

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[23] Ibid. 172.

[24] H Kelsen, *General Theory of Law and State* (Cambridge 1945) 367; C Eagleton, *The Responsibility of States in International Law* (New York 1928) 213; J Combacau, La responsabilité internationale, in H. Thierry, J. Combacau, S.Sur, C. Vallée, (ed*.), Droit international public* (Paris 1981), 678; E Borchard, *The Diplomatic Protection of Citizens Abroad* (New York 1915) 177.

[25] R Ago, La colpa nell'illecito internazionale, in *Scritti in Onore di Santi Romano* (Padova, 1939), 1-6.

[26] L Oppenheim, *International Law, A Treatise* (Longmans Green 1905), Vol I, 211.

[27] Garcìa-Amador, 'Second Report' (1957) ILC YB/II 121-122.

[28] For example P M Dupuy, Le fait génèrateur de la responsabilitè internationale des Etats, (1984) 188 Rev. Droit Comparè, 21, whereby the author argues that objective responsibility is the rule, however fault may play a role when responsibility of the State is to be judged by reference to the standard of diligence that the State should have adopted. As for modern supporters of fault-based approaches see G Arangio-Ruiz, State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance, in M M Virally (ed.) *Le droit international au service de la paix, de la justice et du développement*, (Paris, 1991), 25-26; R Luzzatto, Responsabilità e colpa in diritto internazionale, (1968) 51 Riv. Dir. Int., 53.

Overall, most of the scholarly contributions over the role of due diligence in international law have developed in parallel to the doctrinal debate over the nature of international responsibility.[29] In this regard, one of the most comprehensive attempts to systematise theories on fault vis-à-vis the notion of due diligence has come from Riccardo Pisilo-Mazzeschi and his famous monograph discussing due diligence from the perspective of international responsibility.[30] Pisillo-Mazzeschi's work is a detailed analysis of the recourse to the concept of due diligence in State practice, which serves the author to critically engage with classical approaches that fitted due diligence in the paradigm of fault. By distancing himself from any theory that would qualify due diligence as a form of culpable negligence on the part of the State, Pisillo-Mazzeschi offers an alternative way to engage with due diligence, namely by treating it as the content of a definite category of international obligations.

2.3 Due diligence in the works of the ILC

During the International Law Commission (ILC) works on the Articles of Responsibility of States for International Wrongful Acts (ARSIWA), the issue of due diligence was discussed mostly in the context of responsibility of a State for acts of private individuals. Special Rapporteur Garcìa-Amador devoted an entire section of his second report on the issue of due diligence, which was discussed mostly in the context of omissions of States' organs in cases of injuries to aliens committed by private individuals and in relation to cases of denial of justice. In this regard, the main goal for Garcìa-Amador consisted primarily in depicting due diligence as a constituent feature of the responsibility of States for acts of private individuals and to discuss its content as an international standard of justice.[31] But it is especially Special Rapporteur Roberto Ago that attempted to adequately systematise due diligence in a responsibility framework construed through the division between a subjective and an objective element of responsibility. References to the concept of due diligence emerge in two main sections of Ago's work: with regard to the attribution of conduct to the State of acts of private individuals, and in the context of the classification of the nature of international obligations. As for the first problem, which was covered extensively in Ago's fourth report, the main approach adopted by the Special Rapporteur consisted of a thorough critique of theories that appreciated State's responsibility for acts of private individuals as ensuing from the attribution to the State of wrongful acts carried out by the private subject. For Ago, the wrongful event caused by the action of private persons is only the premise for the breach by the State of its

[29] See for a recent reappraisal of due diligence as a form of State's fault, M S
[30] R Pisillo-Mazzeschi, *Due Diligence e Responsabilità Internazionale degli Stati* (Giuffré 1989).
[31] Garcìa-Amador, 'Second Report' (1957) ILC YB/II 121-125.

international obligations, but it has no bear on attribution of conduct - which takes place regardless of its occurrence and in relation to the State' organs failure to prevent it.[32] Hence, State responsibility for wrongful acts of private individuals must be understood exclusively as a form direct responsibility that flows from a particular type of State's omission.[33]

Fundamental conceptions about the nature of due diligence emerged also during the course of Ago's attempt to provide a classification of the structure and scope of international obligations.[34] It is through the construction of preventive obligations as obligations of result that one can understand the place that due diligence occupies for Ago in the realm of international responsibility. Due diligence operates as a component of preventive obligations and serves as a parameter against which the non-achievement of a given result shall be assessed.[35] This is because for Ago a breach of a preventive obligation requires the existence of two conditions, namely the occurrence of the event and a failure of the State's to adopt all the necessary measures to prevent it.

When the ILC eventually decided to devote its attention exclusively to secondary rules and deleted (almost) any reference to nature and scope of primary obligations, the issue of due diligence was left out of works on the ARSIWA. The final version of the document adopted by the Commission in 2001 refers to due diligence only in the Commentary under art 2, where the articles submit that no position is taken by the ARSIWA on the nature of international responsibility, whose "objective" or "subjective" character will depend exclusively on the content of primary rules.[36]

Yet, the ILC's attention over due diligence did not exhausted with the adoption of the ARSIWA. Parallel to the works on State responsibility, the Commission undertook a study on the International Liability for the Injurious Consequences of Acts Not Prohibited by International Law starting from 1973. Within the works on international liability, the focus over the concept of due diligence assumed a complete different dimension. Due diligence was thoroughly analysed as the content of the obligation to prevent significant transboundary harm and the standard of care that a good government shall adopt in order to minimise the risks of significant harm.[37] Admittedly, a certain degree of confusion underlined the initial works of the ILC when dealing with the consequences of a breach of an obligation of prevention requiring the exercise of due diligence. This was mainly

[32] R Ago, 'Fourth Report on State Responsibility' (1972) 2 YB ILC 71, UN Doc A/CN.4/264, 97.
[33] R Ago, 'Second Report on State Responsibility' (1970) YB ILC/II, UN Doc.A/CN.4/223, 188.
[34] ILC, 'Report of the International Law Commission on the works of its thirtieth session' (8 May-28 July 1978) UN Doc. A/33/10, 33 para 8.
[35] R Ago,'Second Report on State Responsibility' (1970) ILC YB/II UN Doc. A/CN.4/223, 34 para 11.
[36] Commentary to the ARSIWA art 2.
[37] R Q Quentin-Baxter, 'First Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1980) YB ILC/II, 252.

due to the methodology adopted by the Commission in tackling transboundary harm from the perspective of *acts not prohibited under international law*. By focusing on the non-illicit nature of the activities generating significant transboundary harm, it was initially arduous for the Commission to look at the consequences of failing to prevent as conditions triggering the international responsibility of a State.[38] However, after the turnaround that prompted the Commission to deal separately with the issue of prevention and the problems of liability for allocations of loss in cases of transboundary harm, the initial inconsistencies between the two accountability regimes fade away, with due diligence now operating as a shared element of the two.

3. Strategizing due diligence: Toward and "integrated" framework of State responsibility

The present work steers clear of classical theoretical approaches and aims to reappraise due diligence in the context of international responsibility from a different angle. Due diligence is understood as a tool that closely functions in connection with the attribution framework and fills the gaps of the current regime of international law of responsibility. Whenever wrongful acts cannot be attributed to the State through the attribution paradigm, a violation of due diligence obligations is expected in order to entail State responsibility. Conceiving an "integrated" and seamless responsibility framework that complements attribution with the rule of due diligence allows to capture the different levels of a State's involvement in the international harmful act of non-state actors. Through this integrated framework, international harmful acts carried out by the concerted and cooperative action of State and NSA are appreciated in a *continuum* that reflects the participation of the State in the commission of the act and its relation with the private subject.

At the core of the idea of due diligence as a complementary device to rules of attribution rest two main premises: the increasing power of NSA in carrying out international harmful acts and the public/private distinction ingrained in the international law of responsibility.

3.1 The progressive privatisation of international law and the increasing role of non-state actors

In the introduction to a symposium on the international legal order, David Kennedy noted

[38] Quentin-Baxter, 'Third Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1982) ILC YB, 58.

'Governance has become a matter private actors, non-governmental institutions, a matter of communication and legitimacy rather than acts of states. We see decentralization, disaggregation, proliferation, judiciary bodies overtaking plenaries, private parties surpassing public administration.'[39]

Contemporary international law is witnessing an era where NSA are increasingly taking up spaces traditionally reserved to the control and domain of States. States have progressively entrusted persons outside the structure of their organs with activities traditionally attributable to them. The outsourcing of government functions and service at the international level has invested a wide range of fields, to the extent of privatising also fundamental State obligations such as the maintenance of international peace and security.[40] NSA have also played a fundamental role in raising awareness as civil society to a variety of concerns, helping to articulate voluntary codes of conduct and soft law.[41]
At the same time, private individuals and groups have gathered enough power and strength to carry out international wrongs. The position of States vis-à-vis NSA has transformed from a hierarchical relationship to a coordinate one: NSA are not only capable of committing international wrongs that may affect other States of the international community, but State themselves often resort to NSA in order to carry out international wrongful acts. A number of attempts have been made to hold NSA bearers of international legal obligations and to attach legal consequences in terms of responsibility when violations of these norms occur.[42] However, conceptual and practical difficulties arise when confronted with these

[39] D Kennedy, Introduction to an International Symposium on the International Legal Order, (2003), Leiden Journal of International Law, 839, 842.
[40] For example, the increasing use of private military and security companies (PMSC) by States in armed conflicts has raised questions on the regulation of these non-state actors and the responsibility of States toward these companies. There is a growing body of literature on the issue, to mention a few examples: C Hoppe, Passing the Buck: State Responsibility for Private Military Companies, (2008) 19 EJIL, 989; L Cameron V Chetail, *Privatizing War, Private Military and Security Companies Under Public International Law* (CUP 2013); H Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (CUP 2011) 64-75; M Cottier, Elements for Contracting and Regulating Private Security and Military Companies, (2006) International Review of the Red Cross, 637. The prevalence of PMSC activities has been also identified as one of the greatest challenges to the legal government of warfare today: See ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report to the 31st International Conference of the Red Cross and the Red Crescent, Doc. No. 31IC/11/5.1.2 (October 2011). With regard to the problem of outsourcing governmental function to private actors see also C Chinkin, Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law, in J Nijman, A Nollkaemper, (ed) '*New Perspective on the Divide Between National and International Law*' (OUP 2007) 149-151.
[41] A Peter, L Kochlin, T Foster, G F Zinkernagel (ed) *Non-State Actors as Standard Setters* (CUP 2009).
[42] See for instance N Gal-Or, C Ryngaert and M Noortman (ed), Responsibilities of the Non-State Actor in Armed Conflict and the Market Place, *Theoretical Considerations and Empirical Findings* (Brill Nijhoff 2015).

demands, not least owing to a framework of international responsibility that has been designed to deal exclusively with wrongful conducts of States and international organisations.[43]

Focusing on the State and the rules of responsibility offered by the ILC, it appears that States have broad leverage to avoid responsibility when international wrongs are carried out through the concerted action of States and NSA. The attribution paradigm offered by the ARSIWA fails to capture a vast array of situations in which the occurrence of the wrongful event flows from the coordinated action of State with NSA and from a degree of State's involvement that is not sufficient to achieve the stringent threshold of 'effective control'. Suffice is the remind here that the notion of effective control as developed by the dominant jurisprudence requires more than 'financing, organising, training, supplying and equipping' armed groups, rebels or other non-state groups, as well as more than 'the selection of (…) military or paramilitary targets, and the planning of the whole operation'.[44]

A number of attempts have been made to broaden up the scope of rules of attribution, from the recourse to the more relaxed standard of overall control[45] to the attribution to States that harbour or sponsor terrorist groups of the harmful acts carried out by the latter.[46] Furthermore, the normative understanding of the very nature of 'attribution of conduct' has been subjected to a thorough critique aiming at exposing the flows and the risks of a crystallised framework of rules.[47] Yet, the predominant doctrinal position agrees on the existence of a customary law of attribution that precludes the appreciation of a factual relationship between the State and the act of the private subject falling outside the norms reflected in the ARSIWA.

3.2 Public/private distinctions in international law

Streams of literature have argued on the foundations of the public/private dichotomy that underpins international law and have critically engaged with its apparent neutrality. In elaborating on the liberal doctrine of politics and its effect on international law, Marti Koskenniemi notes that the division between the

[43] J D'Aspremont, A Nollkaemper, I Plakokefalos, C Ryngaert, Sharing Responsibility between Non-State Actors and States in International Law: Introduction, (2015) Neth Int Law Review, 49,50.

[44] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits,) [1986] para. 115.

[45] Prosecutor v. Tadic, IT-94-1-A, ICTY, Appeal Chamber, (15 July 1999), para. 108-109.

[46] See for example, V J Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Hart Publishing 2012) 61; D Jinks, State Responsibility for the Acts of Private Harm Groups, (2003) Chicago Journal of International Law, 83, 90; T Becker, Terrorism and the State: Rethinking Rules of State Responsibility (Hart Publishing 2006).

[47] G Arangio-Ruiz, State Responsibility Revisited: The Factual Nature of the Attribution of Conduct to the State (2017) Riv Dir Int, 1; G Arangio-Ruiz, Dualism Revisited: International Law and Interindividual Law (2003) Riv Dir Int, 910.

public and the private is a liberal fictional construction that serves the opposing demands of the international system for individual freedom and social order.[48] The public/private distinction makes the liberal theory possible insofar as it provides for the ascending argument whereby sovereign power is ultimately legitimised by individual freedom and ends; at the same time, the divide also poses a threat to the system because it assumes that a natural distinction exists to guarantee that liberty is not violated.[49] Yet, as the author points out, 'the content of those freedom can be justifiably established only by reference to individuals' view thereof'.[50]

The framework provided in the ARSIWA clearly reflects the dichotomy public/private. The attribution paradigm is grounded on the State organ principle and in the *summa divisio* between acts of State's organs and acts of private individuals that are nonetheless attributable to the State. Acts organs are treated as the "golden rule" of attribution whereas acts of NSA can only exceptionally be attributed to the machinery of the State for the purpose of responsibility. By contouring the domain of international law of responsibility, rules of attribution defines the functions that shall be considered as "public" from the perspective of international law and mark out the boundaries with a private sphere that avoid the control of the State. Yet, scholarly writing has shed lights over the political preferences that underpin private/public dimensions and has critically assessed the apparent neutrality of such division. First, the contours of the public/private divide rest on historical and philosophical conceptions that have grasped the "non-governmental" essentially in relation to the market, with the aim of saving voluntary relations between private individuals from the public authority of the State.[51] Second, the distinction has often served to reinforce and to translate in legal language a *status quo* that privileges certain groups of individuals over others.[52] Third, the classic dichotomy of the public and the private is accompanied by an affirmation of the supremacy of the first over the other, and by the

[48] M Koskenniemi, From Apology to Utopia: the Structure of International Legal Argument (CUP 2005), 83-87

[49] Ibidem, 84.

[50] Ibidem, 87.

[51] J Weintraub, The Theory and Politics of the Public/Private Distinction, in J Weintraub , K Kumar (ed), 'Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy' (University of Chicago Press 1997), 8; C Chinkin, A Critique of the Public/Private Dimension (1999) EJIL, 387, 392.

[52] This is for example the main critique that feminist legal scholars have advanced over (international) law, by pointing at the structural foundations of a system that through the continous reproduction of private/public dichotomies fosters the marginalisation of women and put them at the periphery of the (international) legal system: H Charlesworth, C Chinkin, S Wright, Feminist Approaches to International Law (1991), 85 American Journal of International Law, 613; H Charlesworth, C Chinkin, The Boundaries of International Law (Manchester University Press, 2000), 56; C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (CUP 1987) 75-77; M Thornton, The Cartography of Public and Private, Thornton (eds), *Public and Private, Feminist Legal Debates* (Oxford University Press 1995), 3-16; C MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 194.

understanding that central public power occupies a superior hierarchical position in relation to the private.[53] All these critiques apply to a system of international responsibility that strives to cope with the increasing strength and power that entities traditionally labelled as "private" have acquired at the international level. These "new" hierarchical relations between States and NSA challenge the scope of responsibility delimited by the attribution framework and calling for the development of different effective strategies.

4. Toward a general reconstruction of the nature of due diligence obligations

Responsibility based on attribution of conduct and responsibility for failure to exercise due diligence are premised on conceptually different grounds. Responsibility for failing to exercise due diligence flows from a State organs' breach of the standard of conduct set by a primary norm. This is why a comprehensive study on the function and scope of due diligence cannot be conducted exclusively from the perspective of secondary rules, but requires an in depth analysis of the nature of obligations that embody the due diligence rule.

4.1 Primary and secondary rules

Shifting from the perspective of international responsibility to the realm of primary rules in order to thoroughly examine due diligence does not entail a change of methodology in the analysis. Although the separation between issues related to responsibility and rules of conduct has in fact been crucial to the successful outcome of the ARSIWA, primary and secondary rules are to be understood in their mutual connection and not as distinct categories with completely separate existences.

The Commentary to the ARSIWA stresses that the articles are focused exclusively on secondary rules of State responsibility, namely 'general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences thereof'.[54] Definitions over the content of international obligations are to be left aside, since 'this is the function of primary rules, whose codification would involve restating most of the substantive customary and conventional international law'.[55] However, rather than premised on different conceptual underpinnings, the distinction appears to be mostly a functional one.[56] First, because the very process of attributing responsibility to a State requires the adoption of a holistic approach that looks at the content of

[53] N Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power* (Wiley 1989).
[54] Commentary to the ARSIWA, 31.
[55] Ibid.
[56] See J Crawford, 'The ILC's Articles on Responsibility of States for International Wrongful Acts: A Retrospect' (2002) AJIL, 874,879.

primary obligations.[57] In order to establish whether international responsibility has been triggered, the interpreter needs to necessarily assess whether the international obligation attributable to the State has been breached, an operation that implies looking at the content of the primary norm. Furthermore, the conceptual grounds on which the distinction is based become slippery when one acknowledges that secondary rules provided by the ARSIWA do create obligations that could be deemed as primary. This is true for art 16 for example, which sets out a primary obligation that requires a State 'not to render aid or assistance to the commission of the international wrongful act of another State'.[58] By the same token, Part II of the ARSIWA that relates to the consequences of an international wrongful act may as well be considered as dictating primary rules that can be subjected themselves to secondary norms once breached.[59]

But the mutual reciprocity between primary and secondary rules is detectable especially in the influence that secondary rules exercise over the content of primary obligations. Not only do primary rules affect the content of secondary norms in the sense that international responsibility arises once a breach of the primary obligation has been assessed; the same holds true for secondary norms, which inevitably affect the scope of primary obligations. Provisions of the ARSIWA in fact affect the nature of international obligations and contribute to define their content.[60] Such contribution is certainly visible when one undertakes a careful analysis of obligations of due diligence in the attempt to define their structure and nature: provisions under Chapter III, Part I of the ARSIWA – rules regarding the breach of an international obligation – and especially art 14(3) – extension in time of the breach of an international obligation to prevent – determine the scope of preventive obligations and have inevitably a bear on the conceptual understanding of due diligence norms. Hence, any study aiming at assessing the role played due diligence in the context of responsibility cannot overlook the analysis of the structure and content of these obligations.

4.2 Due diligence from the perspective of primary rules

Any comprehensive analysis of due diligence obligations must necessarily touch upon their genealogy. In this sense, what distinguishes obligations that require the exercise of due diligence from other primary rules is the element of *alea* or risk that links the State apparatus with the objective set forth by the norm. The State

[57] A Nollkaemper, D Jacobs, Shared Responsibility in International Law: A Conceptual Framework (2013) Mich J Int'L 359,411.
[58] V Lavonoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016), Chapter VII.
[59] J Crawford, 'Third Report on State Responsibility' para 7.
[60] G Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) Riv Dir Int, 981,984.

cannot be required to absolutely guarantee the attainment of the goal provided by the content of primary obligation, therefore it is "solely" asked to exercise through its machinery the best efforts vis-à-vis the goal in question. This constituent feature of obligations calling upon the exercise of due diligence makes them unique in character, and consequently different from other types of international norms.

Yet, speaking of *obligations* of due diligence brings about the question over their nature in light of the classification operated by Ago during its work as a Special Rapporteur on State Responsibility. Although the ILC eventually disregarded Ago's distinction between obligations of conduct, obligations of results and obligations of prevention, traces of its theoretical foundations have survived in the final version of the ARSIWA, leading subsequent scholars and international jurisprudence to some degree of conceptual confusion as to the understanding of due diligence and its relationship with obligations of prevention. Therefore, construing due diligence from the perspective of primary rules entails a reappraisal of the main theoretical approaches that have been adopted to classify international obligations. This process is substantiated by recent pronouncements that have enriched the debate over obligations of due diligence. International environmental law has certainly been one of the main areas where discourses on due diligence have developed. In this regard, the ICJ's decisions in *Pulp Mills* and in *Nicaragua v Costa Rica* and *Costa Rica v Nicaragua* shed lights on the structure of due diligence obligations, their relation with procedural norms and with the customary obligation to prevent transboundary environmental harm;[61] all these issues require in depth examination as to the rationale that underpins the World Court's approach toward due diligence and its understanding. But it is mostly the ITLOS that has got the opportunity to dwell upon the nature of due diligence duties in its advisory opinions on the obligations of sponsoring States in the Seabed Area and on the obligations of flag States in cases of illegal, unreported and unregulated fishing activities in the Exclusive Economic Zone of third party States.[62] All these recent pronouncements constitute therefore an invaluable opportunity to test the theoretical premises of due diligence obligations and add new perspectives over the study of topic.

[61] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Report; *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) (Merits) [2015] ICJ Rep; *Construction of a road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica) (Merits) [2015] ICJ Rep

[62] *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area (*Request for an Advisory Opinion submitted to the Seabed Dispute Chamber) ITLOS Reports 2011, 35 para. 111; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Case No. 21) ITLOS Reports 2015, 129 para 127.

5. Outline and structure of the work

The present work approaches due diligence in international law from a general rather than a sectorial perspective. The analysis is not focused on a particular area where obligations of due diligence are used but aims to construct a theoretical discourse which describes function, scope and limits of due diligence as they apply across international law.

Chapter one looks at the legal foundations of due diligence and deals with the topic from the viewpoint of international responsibility; the objective is to show how an "integrated" State responsibility framework that fill the gaps of the attribution paradigm can be conceived by resorting to the theory of due diligence.

Chapter two tackles due diligence within the domain of primary obligations. This constitutes arguably the most pioneering part of the work, since scholarly contributions on due diligence from the perspective of general international law have so far mostly discussed it in the context of secondary rules. Chapter three tests the validity of the arguments developed in the first part of the analysis with reference to States obligations in the cyber realm and international responsibility for cyber attacks. The choice of this area is explained by the fact that the problem of accountability is particularly relevant in the cyberspace, as one is faced with the issue of accommodating rules of international responsibility with a system in which transboundary cyber attacks are often carried out by NSA.

Finally, chapter four maps due diligence in shared responsibility settings. Dealing with due diligence from the perspective of shared responsibility helps illustrate how provisions of the ARSIWA that refers to situations where multiple States are responsible for an international wrongful act affect the scope of due diligence obligations. Squaring due diligence in the framework of shared responsibility brings about further insights on the nature of these obligations and clarifies the discourses emerging in the first part of the work.

CHAPTER ONE

Due diligence under the regime of responsibility under international law

SUMMARY: 1. Introduction – 2. Evolution of principles of State responsibility for private acts: a critical appraisal – 2.1 The doctrine of collective responsibility – 2.2 The theory of complicity and its formulations – 2.3 Indirect or vicarious responsibility – 2.4 The theory of objective responsibility – 3. Due Diligence and the codification of the rules on Responsibility of States for International Wrongful Acts – 3.1 The Hague Conference and early codification – 3.2 The ILC work on State responsibility – 3.3 Principles of State responsibility – 3.3.1 Attribution of Conduct – 3.3.1.1 Responsibility for wrongful acts of State bodies and entities empowered to exercise elements of governmental authority – 3.3.1.2 Responsibility for wrongful acts of private individuals – 3.3.1.3 Other cases of attribution – 4. State responsibility revisited: toward an integrated system of international responsibility through the theory of due diligence – 5. International liability and due diligence – 5.1 State responsibility and international liability: a necessary distinction – 5.2. International liability and due diligence: assessing the methodology of the ILC – 6. Concluding remarks.

1. Introduction

From a theoretical standpoint there is nothing to prevent the conduct of physical persons or group of persons that have no link with the organisation of the State and its apparatus from being attached to it for the purpose of international responsibility. For example, acts or omission of a State's nationals or individuals residing in its territory could theoretically be deemed as acts of the State for attributing responsibility. However, the study of international law shows that acts that do not belong to the State or its apparatus cannot generally be attributed to it. Whenever acts or omissions of private persons are involved, "[t]he orthodox view is therefore that the State is liable for acts of private persons only if it has neglected to take all reasonable measures for the prevention and punishment of the offence. In terms of the traditional doctrine, it is clearly a responsibility based on fault."[1] Although the notion of fault as an element of international

[1] MR Garcìa Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (The Hague Martinus Nijhoff 1962) 16.

responsibility has been progressively abandoned, especially during the works of the ILC on the topic of State responsibility for wrongful acts, the dominant discourse on international responsibility remains based on the principle of non-attribution of private conducts.

If one looks at rules of international responsibility from a historical perspective, it appears that principles of responsibility developed between two opposing tensions. On the one had, the rise of the liberal thought during the 17th century pushed for the establishment of concepts such as freedom and free will, which inevitably affected the development of international law. Accordingly, accountability of the sovereign could arise exclusively had the latter ben aware of the wrongful act and condoned it. In this sense, the progressive development of rules of international law pushed towards the crystallization of a distinction between the public and the private realm, whereby imputable to the State are only those acts that are directly connected with the sovereign, or with the machinery of the State.[2] Acts within the private sphere would instead not be linked to the State apparatus not only because of the unjust burden of attributing to the sovereign acts that do not depends on his "will", but also in order to preserve freedom within the private realm.[3] On the other hand, international law and international relations were still pervaded by natural law conceptions that required a legal and a moral duty among sovereigns to preserve the maintenance of peace and order. This implied that acts or omissions that would harm consociates within the same system had to be repaired and followed by a discharge of justice.

It is between these two dimensions that the theory of due diligence progressively emerged. In circumstances where the acts of a private individual or groups independent from the State organisation could be deemed in violations of another State, due diligence allowed the first State to be found responsible for having failed to exercise its duties in preventing the wrongful event or punishing the culprit. By punishing the State for private actions depending largely on its "fault" – to prevent or punish – the integrity of other States would still be preserved without giving up too much of a State freedom.

With the codification efforts made by the ILC during the second part of the 20th century, not only did the issue of fault lost appeal, but also the paradigm of responsibility was construed by the Commission as based exclusively on two grounds: attribution of conduct and breach of an international obligation. In this context due diligence, although widely discussed during the work of the ILC, was eventually dealt with as an issue pertaining to the content of primary norms and therefore ruled out of any further discussion. The topic was subsequently analysed during the ILC works on international liability.

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[2] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 76.

[3] Ibid.

Yet, in contemporary international law, the increasing role of non-state actors in cooperating and coordinating their actions with States along with the inherent accountability gaps that flow from a stringent attribution framework, calls for a reappraisal of rules of international responsibility and in particular on that of the role that the theory of due diligence can perform. In this regard, it is submitted that the theory of due diligence can provide for an "integrated" framework of international responsibility that can effectively cope with international harmful acts carried out by non-state actors (NSA). Whenever conduct of NSA falls short of the attribution paradigm, a violation of due diligence is expected by looking at the preventing obligations falling upon the State. This way, due diligence may offer an alternative strategy to engage with international responsibility and bridge the public/private divide.

A clarification over the terminology adopted is in order before outlining the structure of the analysis. From the perspective of an "integrated" framework of international responsibility, this Chapter employs the notion of "theory" of due diligence. It does so in order to avoid the notion of 'principle', whose meaning will be explained in the course of the second Chapter and compared with the notion of 'obligations' of due diligence. Suffice is to say here that by 'theory of due diligence' we include situations in which international responsibility flows from the a breach of obligations of due diligence (including obligations of prevention) and from the breach of what is often defined by doctrine as the 'principle' of due diligence, namely the duty of States 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'[4].

The reminder of the Chapter is structured as follows. After a reappraisal of evolution of principles of international responsibility applicable to conducts of private individuals, the analysis will focus the responsibility framework as provided by the ILC in the ARSIWA and in particular on rules of attribution of conduct. The aim is to look at the conceptual underpinnings of attribution and underline the stringent requirements that prevent from capturing different levels of State's involvement over the conduct of NSA and leave broad leverage to the former to avoid responsibility. Once the attribution framework will be examined, an "integrated" responsibility paradigm will be proposed through the application of the theory of due diligence. Finally, the Chapter will conclude with a reappraisal of the ILC works on international liability, where the issue of due diligence was discussed at length. In particular, a reassessment of his framework helps identify the intertwined relationship between the two accountability regimes, and the role played by due diligence in operating as a shared element of the two.

[4] Ibid 22.

2. Evolution of principles of State responsibility for private acts: a critical appraisal

2.1 The doctrine of collective responsibility

Normally, when dealing with the underpinnings of rules on State responsibility, one of the first pillars one may think of is the division between the public realm, in which the *corpus* of State activities conveys, and the private sphere, where there is no control on the part of the State. However, the distinction between the public and the private is essentially a product of the liberal thought, for the history of State responsibility shows that no such division was envisaged during the era that predated the system of independent States and, in particular, during the Middle Ages.
In elaborating on the structure of the medieval order, Marti Koskenniemi held that,

> 'The political organisation of the state had not freed itself from the structures of civil society. The liberal distinction between the private and the public was singularly absent. Consequently, the opposition which we now perceive between freedom and order is irrelevant, non-existent in medieval thought: Society was not seen as a system of antithetical, juxtaposed individuals. (…) There was no individual freedom, no private realm which would have independent legitimacy as against the world at large.'[5]

The structure of the system mirrored rules over the responsibility of the sovereign. Initially, a principle of collective responsibility governed the Middle Ages, whereby a collective entity would be automatically responsible for the injuries committed by any of its members to a third group or its subjects.[6] That means that the early reply to the acts committed by private individuals toward another entity was based on the notion of group solidarity; the group could be held collectively responsible for the acts caused by any of its members, and reprisals could be carried out as a mean of retaliation for the wrongful act.[7] Not only there was no distinction between the public and the private, but also the conception of responsibility precluded a clear separation between the responsibility of the individual and responsibility of the sovereign.
Things changed with the dissolution of the Pope and the Emperor's authorities and the progressive development of the liberal thought. The distinctiveness of the

[5] Ibid 76.
[6] JA Hessbruegge,'The Historical Developments of the Doctrine of Attribution and Due Diligence in International Law' (2004) 36 NYU J Int L & P 265, 276-279.
[7] EJ De Aréchaga, 'International Responsibility' in M Sorensen (ed), *Manual of Public International Law* (St. Martin's Press 1968) 558; see also FV Garcìa Amador, 'Fifth Report on State Responsibility' (1960) II YB ILC 41, UN Doc A/CN.4/125, 61; T Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing 2006) 13.

State as the source of final authority separated from its community took place, leading to the fictitious creation of a public domain where the power could be rightfully exercised, and a private sphere that allowed for limits on sovereign power.[8] But the shift away from the system of collective responsibility was progressive and nuanced, characterised by changes gradually observable in the approach adopted by the doctrine. For example, at the beginning of the 17th century, Alberico Gentili had already theorised that, in principle, only acts of the sovereign could justify war. Gentili argued that acts of private persons could not be charged against the community, unless the State had knowledge of the act and failed to prevent it. However, he also stressed that grounds for a war could still exist "in instances in which a private individual has done wrong and his sovereign or nation has failed to atone for his fault".[9] Basically, making amends and reparation would serve as a way of discharging State responsibility for acts committed by private individuals. Otherwise, the State could be held automatically responsible and acts of war could be taken in response.

It is only with Grotius that rules started to shift and the concept of non-attribution of private acts gained its momentum. Grotius can be rightly considered the father of the theory of culpability applied to international law and one of the first to pave the way towards the distinction between private acts of which the sovereign had no knowledge and no responsibility, and acts resulting from his action or fault, for which he should be held responsible.

2.2 The theory of complicity and its formulations

Theories of culpability as sources of State responsibility started to arise at the end of the 17th century and prevailed till the first part of the 20th century. They originated from principles of Roman law that exclude responsibility without fault and require the individual responsible for the illicit conduct to have acted intentionally or negligently. At the international level, the introduction of fault as an element of a State's wrongful act allowed for a restrictive scope of international responsibility, which otherwise would have continued to partly merge with that one of the individual.

Grotius transposed the conceptual framework of responsibility based on fault to international law and insisted on the notion *culpa* (or *dolus*) as a fundamental

[8] Koskenniemi (note 2) 84. See also F H Hinsley, *Sovereignty* (CUP 1986) 15-22.

[9] A Gentili, *De Iure Belli Libri Tres* (Claredon Press 1933) (1612), 99. In this regard, a few more recent scholars resumed the idea of collective responsibility of the State. For example, in one of his works Arangio-Ruiz seems to support the idea that the concept of solidarity of the group in the Germanic sense should be reverted and reconsidered, G Arangio-Ruiz, *Gli enti soggetti dell'ordinamento internazionale* (Giuffrè 1951) Vol. I, 366 note 468; See also G Aragio-Ruiz, 'Fifth Report on State Responsibility' (1993) YB ILC/II UN Doc A/CN.4/453 where the Special Rapporteur elaborates on the "collective" responsibility in case of commission of the so-called international crimes of State, at 38-41.

premise for the accountability of the sovereign. In dealing with the problem of responsibility of the sovereign, Grotius elaborated the notions of *patientia* and *receptus*. The principle of *patientia* provided that the sovereign could become responsible in the crime of one of its subjects if he knew of the crime thereof but failed to prevent it.[10] Similarly, under the concept of *receptus*, the ruler could be held responsible if he failed to punish or extradite those individuals who had committed the crime and sought refuge in his realm.[11] Grotius's theory clearly represents an evolution of the concept of collective responsibility, although it still embeds elements of it. The idea that the collectivity now embodied in the sovereign should participate to the crime of the individual rested largely on natural law conceptions, which grounded the responsibility of the sovereign for injurious acts of others in moral and legal accounts[12]. At the same time, Grotius's attempt to limit the responsibility of the king to the case of fault can be deemed as a response to the demand for individual freedom inherent to the liberal tradition that took over since the 17th century. Accordingly, the sovereign could not be deemed responsible unless it had personally failed to employ the remedies that, if implemented, would have prevented illicit acts.[13]

It is important to stress that Grotius did not distinguish between acts of organs, agents of the State or private individuals, for he simply established the notion of culpability of the sovereign and drew a link between the individual's crime and a sovereign's failure to prevent or punish it. Similarly, some of the theories of culpability that originated from Grotius did not dwell upon the problem of attribution of conduct of organs or individuals, and theorised State fault as the necessary component to construct the connection between the State and the wrongful act.[14] However, Grotius's arguments on fault played a pivotal role in

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[10] H Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam 1625) Vol II, 366.

[11] Ibid.

[12] Morally, the principle of State responsibility for private acts would originate from the duty of a State to contribute to the maintenance of peace and order, whereas legally, it would stem from the duty of the State to exercise its territorial sovereignty. See MR Garcìa Mora, (note 1) 18. The author contends that this system is somehow contradictory with a system founded on natural law conception, as the fault-based responsibility theory contributes to the denial of the very sense of community that the natural law doctrine were intended to postulate.

[13] Ibid, "A civil Community, just as any other community, is not bound by the acts of individuals, a part from some act or neglect of its own (…). But as we have said, to participate in a crime, a person must not only have knowledge of it, but also have the opportunity to prevent it. This is what the laws mean when they say that knowledge, when its punishment is ordained, is taken in the sense of toleration, so that he may be held responsible who was able to prevent a crime but did not so: and that knowledge to be considered here is that associated with the will, that is, knowledge has to be taken in connection with the intent".

[14] For example, at the end of the 19th century William Hall, despite having already internalised the concept of fault-based responsibility, maintained the idea that a State is in principle responsible for every wrongful acts occurring in its territory regardless of its public or private nature: 'Prima facie a state is of course responsible *for all acts of omissions* taking place within its territory by which another state or the subjects of the latter are injuriously affected. To escape responsibility it must be able to show that its failure to prevent the commission of the acts in questions, if not intended

shaping rules of State responsibility for private acts. Subsequent scholars took up on the idea that wrongful acts by private subjects could be a source of international responsibility provided that failure to prevent or punish the crime on the part of the State could be established.[15]

In particular, the notion of culpability of the State over private wrongful acts led part of the doctrine to develop the so-called theory of complicity. Basically, a State that approved or ratified a wrongful act committed by a private subject or refused to repair the damage caused by it, was "culpable" and therefore accomplice in the same crime.[16] Emerich de Vattel for example resumed the concepts of *patientia* and *receptus* and stressed that 'a sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal or, finally, to deliver him up, makes himself in a way an *accessory to the deed* and *becomes responsible for it*'.[17] He asserted that a State could not be held responsible for acts of his agents or private individuals, unless it became complicit in the act thereof, by approving those acts or by refusing to punish the perpetrators.

'If the nation, or its ruler, approve or ratify the act of the citizen, it takes upon itself the act, and may then by regarded by the injured party as the real author of the affront of which the citizen was perhaps only the instrument.'[18]

Elements of complicity can also be detected in some of the practice of the 19th century. In the *Cotesworth and Powell case*, the British Colombian Mixed Commission established to award claims for damages coming from illegal acts of private individuals in Colombia, found that

'One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a *public concern*, and the injured party may consider the nation itself the real author of the injury. And this approval, it is

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to be injurious, or its omission to do acts incumbent upon it, have been within the reasonable limits of error in practical matters, or if the acts or omissions have been intended to be injurious, that they could not have been prevented by the use of a watchfulness proportioned to the apparent nature of the circumstances, or by means at the disposal of a community well ordered to an average extent', W E Hall, *A treatise on International Law* (Oxford Claredon Press 1904) 217 (emphasis added).

[15] For example Pufendorf, who established a regime of presumptions whereby the State, under the concept of *patientia*, is in principle responsible of all wrongful acts caused by any of its subjects unless it proves to have acted faultlessly, S Pufendorf, *De Jure Naturae et Gentium* (1672) Vol VIII, 12.

[16] P Pradiér-Fodéré, *Traite De Droit International Public Européen and Américain: Suivant les Progrès De La Science Et De La Pratique Contemporaines* (Pedone-Lauriel 1885) 336.

[17] E De Vattel, *The Law of Nations or, the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Legal Classic Library 1916) 72 (emphasis added).

[18] Ibid. On the rejection of the concept of absolute responsibility, De Vattel affirmed that "it is impossible for the best governed State or for the most watchful and strict sovereign to regulate at will all the acts of their subjects and to hold them on very occasion to the most exact obedience; it would be unjust to impute to the nation, or the sovereign, all the faults of their citizens".

apprehended, need not to be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such measures are possible: or from its pardon of the offender when such pardon necessarily deprives the injured party of all redress.'[19]

Similarly, in the *Montijo case* the United States-Colombia Commission argued that Colombia would accept "as his owns" the liability of the revolutionists that had seized a US ship in the territorial jurisdiction of Colombia and who had been granted amnesty by the State.[20]
Thus formulated, the theory of complicity still equated the acts of the private perpetrator with the failure to prosecute him for his criminal responsibility, assuming fluid boundaries and no real separation between the "public" sphere of *concern* of the state and the criminal act of private individuals. Although the notion of complicity started to fade away as this separation grew stronger, the idea of the State as complicit in the crime committed by private subjects was somehow resumed by part of the later scholarship. At the beginning of the 19th century, Borchard for instance acknowledged that in principle private acts are not attributable to the State. However, in exceptional circumstances the State should be held responsible for acts of private individuals committed by

'manifestations of the *actual or implied complicity* of the government in the act, before or after it either by [the State] directly ratifying or approving the act, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the guilty individual, or to enable the victim to pursue his civil remedies against the offender.'[21]

Around the same time, William Hall argued that although the connection between the private persons and the State is more nuanced and less close than with its organs or agents, the State still holds a duty to exercise general control over everything within its territory. Hence the State

'[…] can only therefore be held responsible for such of them as it may reasonably be expected to have knowledge of and to prevent. If the acts done are undistinguisedly open

[19] *Cotesworth & Powell* (*Great Britain v Colombia*) (1875) reprinted in JB Moore, *2 History and Digest of International Arbitration to which the United States has been a Party* (1989), Vol. II, p. 2082 (emphasis added). It should be noted that in the Fourth Report on State Responsibility, Roberto Ago queried on whether, the passage "public concern", refers indeed to the failure of the State to punish a private crime as amounting to a public act of the State (making this way the State "complicit" to the crime), or whether by " public concern", the Commission simply meant that in the event of crimes committed towards aliens by private individuals, failure to punish or granting amnesty were actions contrary to the international duties of the State. See R Ago, 'Fourth Report on State Responsibility' (1972) 2 YB ILC 71, UN Doc A/CN.4/264 and Add 1, 101.
[20] *Montijo (United States v Colombia)* (1898) JB Moore, *History and Digest of the International Arbitration to which the United States has been a party* (Washington Gov't Print Off, 1898), 1421.
[21] E M Borchard, *The Diplomatic Protection of Citizens Abroad; or The Law of International Claims* (The Banks Law Publishing 1915) 217 (emphasis added).

or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them; if they are eventually concealed or if for sufficient reason the state has failed to repress them, it has obviously become responsible, *by way of complicity* after the act, if its government does not inflict punishment to the extent of its legal powers.'[22]

Despite the efforts of these few scholars, the theory of complicity could not survive the progressive establishment of the distinction between the public and the private realm as well as the idea of the State as the ultimate and only entity responsible for international wrongs. Those who invoked complicity had to create responsibility through legal fiction by imagining that a State, with its failure to prevent or punish, had intentionally or implicitly approved the commission of the wrongful act. Furthermore, the very notion of complicity rested on the premise that the two responsible subjects – the State and the private individual – had contributed jointly to the breach of the violation in question. This idea however held in stark contrast with the view of the predominant legal doctrine developing after Grotius and striving to maintain a neat separation between international responsibility (a matter of the international legal order) and the individual one (a question belonging to the domestic legal system). To overcome the difficulty of upholding the theory of State complicity for acts of private individuals, some scholars resorted to different conceptual notions. For example, the use of the term "condonation" evoked a more nuanced fictitious link between the State and the acts of the private subject. By replacing the term complicity with "condonation", it was suggested that failure of the State to prevent or punish the culprit of a private wrong amounted to a form of condonance on the part of the State. This approach found reason in the circumstance that the calculation of State's compensation on the basis of the injury caused by the individual could be interpreted as a form of direct responsibility of the State for the act in question.[23] From the perspective of the current system of international responsibility, the analysis of the early doctrine's reference to State's complicity in the individual's crime sheds also some lights on the complex relationship between due diligence

[22] Hall (note 14) 218 (emphasis added).

[23] For instance, C C Hyde, 'Concerning Damages Arising from Neglect to Prosecute' (1928) 22 AJIL,140. Ago argued that the condonation theory originated primary from the separate opinion of the American Commissioner Nielsen regarding a case before the Mexico-United State General Claims Commission involving the killing of a US national by his former employee at a Mexican mining company. Here the Commissioner affirmed that a State must be held responsible for the failure to punish the private persons who committed the wrong "because by such failure the nation condones the wrong and becomes responsible", *Laura MB Janes (USA v United Mexican States)* (1925) 4 RIAA 82, 92. Ago contends that the theory was elaborated as a way out to facilitate the calculation of compensation in cases of "non-punishment" on the basis of the injury cause by the private individual. In fact, practice shows that many arbitral tribunals appointed to solve disputes concerning the wrongdoings committed by private individuals toward a foreign State or its nationals assessed damages by reference to the financial loss originated by the private offender see Ago, 'Fourth Report' (note 19) 104.

and the concept of aid or assistance pursuant art 16 of the ARSIWA. Prior to the systematisation of these legal categories under the guidance of the ILC, no settled boundaries existed between responsibility for failing to exercise due diligence and responsibility for complicity. By framing complicity as a form of attribution of private conduct to the State, early international scholars pulled together, and sometimes even merged, the idea of failure to prevent and repress the crime - that traditionally attaches to due diligence – with the notion of complicity. If, on the one hand, this confusion has led scholars to grapple with the sources of complicity as an ancillary form of international responsibility,[24] on the other it serves to underline the conceptual proximity between "being negligent" and "being an accomplice" through omission. In this regard, one should bear in mind that complicity as framed in art 16 of the ARSIWA is a form of attribution of responsibility that applies in relation to the international wrongful act of another *State* and not in relation to a harmful act of private individuals. However, from the perspective of the content of primary obligations of due diligence and obligations not be complicit in an international wrongful act, what appear to structurally distinguish the current notion of aid or assistance through omission with responsibility for failure to prevent are an apparent stronger subjective requirement and a relationship of normative causality between negligent conduct of the aiding or assisting State and the international wrongful act of the aided or assisted entity. In practice however, such distinctions are often blurred so that the grounds for establishing responsibility through failure of due diligence ends up encompassing both responsibility for failure to prevent and responsibility for aiding or assisting through omission.[25]

2.3. Indirect or vicarious responsibility

Aligned with the condonation theory that sought to establish a link between the State and the "international" private wrong was the doctrine of indirect or vicarious responsibility, elaborated by the Anglo-American scholarship of the early 20th century. Vicarious responsibility was conceived mainly as the alternative option to direct responsibility of the State for acts of its organs. At the basis of vicariousness lied the presumption and the now accepted position that a fundamental distinction exists between a public realm of activity where the State operates and a residual private sphere of operation that cannot be attributed to it.

[24] See for example V Lavonoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016) 33-35. The author contends that the origins of complicity may be found in the rights and duties of a neutral State. Arguably, the law of neutrality is very much the source also of the principle of due diligence, as it will be demonstrated throughout the analysis of Chapter 2. On the customary origin of complicity see also P H Aust, Complicity and the Law of State Responsibility (CUP 2011), Chapter 4.

[25] See in this regard the discussion in Chapter 4 on relationship between failure to exercise due diligence and complicity through omission.

At the same time, proponents of vicarious responsibility still struggled to recognise the source of State responsibility for private conduct in a separate obligation of the State and therefore ended up recreating a fictitious category linking the State with the private wrong. This however led to a certain degree of confusion; first of all because the idea of "indirect" responsibility presupposes the international wrongful act being committed by a private individual and State responsibility assumed as a result of it.[26] Secondly, because responsibility is deemed as vicarious as long as the private wrong has already occurred and the State bears the duty to punish the perpetrators but has yet to act. However, as soon as the State refuses to exercise its duty and to act diligently, vicarious responsibility turns original and the State is consequently deemed responsible. Oppenheim for example branded "original" the responsibility of the State for its own acts, namely government actions, and "vicarious" the responsibility arising from acts of private individuals. Although vicarious responsibility implies the indirect responsibility of the State for unauthorised acts of its agents, subjects or aliens living within its territory,[27] responsibility turns original once the duty to punish the culprit and to repair the damage has not been fulfilled. As Oppenheim points out,

'The vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, or the wrongdoers. In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto *vicarious responsibility* turns ipso fact into original responsibility.'[28]

By the same token, Hershey distinguished between a *direct* form of responsibility of the State for its own actions through its officials or agents, and an *indirect* form of responsibility for the conduct of all those residing or domiciled within the jurisdiction of the State and subject to its laws.[29]

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[26] See also R. Ago, 'Fourth report' (note 19) 100.

[27] L Oppenheim, *International Law: A Treatise* (Longmans 1912), 208-209. The fictitious creation of the category of vicarious responsibility finds confirmation in the way Oppenheim describes the use of reprisals as a countermeasure to the commission of wrongful acts by private individuals. In describing the use of reprisals in international law, Oppenheim holds that "as reprisals are admissible in the case of international delinquency only, no reprisals are admissible in the case of such acts (private individuals) if the responsible State complies with the requirements of its vicarious responsibility. Should, however, the State, refuse to comply, its vicarious responsibility would turn into original responsibility and thereby an international delinquency would be created for which reprisals are admissible", at 38-40.

[28] Ibid 209.

[29] A S Hershey, *The Essentials of International Public Law* (The Macmillan Company 1912) 161-162.

In the mind of the supporters of the indirect responsibility theory, what qualifies responsibility as vicarious is also its relative nature. Oppenheim argues that vicarious responsibility is not an absolute form of international liability 'for the sole duty of the State is to procure satisfaction and reparation for the wronged State as far as possible by punishing the offenders and compelling them to pay damages where required'.[30] But aside from this, a State is not responsible for the act of the private subject since it has no duty to pay for damages when the culprit has not been able to do it.[31] Similarly, for Hershey the relative nature of indirect responsibility can be charted in the duty of the State to exercise reasonable due diligence or in the means at a State's disposal to prevent injuries on its territory.[32] Beyond this limit, no responsibility can be found.

It should be noted that despite the focus of the ILC on the genesis of international responsibility and regardless of the consolidation of the principle of non-attribution, the idea of an indirect responsibility has not been entirely turned down. A minority of current scholars still refers to indirect responsibility when there is no sufficient connection for attribution of conduct between the private act and the State.[33] Drawing on the concepts developed by Oppenheim, these authors have argued that in the context of the global war against terrorism international responsibility is moving toward a model or indirect responsibility as complementary to the classic paradigm of responsibility for attribution. This "Indirect" or "vicarious" responsibility would arise whenever a State fails to prevent terrorist attacks and to thwart a terrorist strike originating from its territory.[34] In this sense what the proponents of vicarious responsibility suggest is that failure to exercise due diligence to prevent terrorist attacks on foreign grounds by States that harbour or sponsor terrorism could underpin attribution with the attack.[35]

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[30] Ibid 222.
[31] Ibid.
[32] Ibid 162.
[33] See for example, V J Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Hart Publishing 2012) 61, arguing that the dichotomy between direct and indirect responsibility still remains a prevalent dimension of State responsibility.
[34] Proulx (note 33); D. Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self – Defence and Other Responses, (2003-2004), 11 Cardozo Journal of International and Comparative Law, 13.
[35] Talking about responsibility of the State for terrorist acts on foreign territories, Proulx observes: "The final analysis culminates in three possible scenarios: the acts of the state agents are binding on the host state; non-state actors are deemed to be de facto government agents; or the acts of terrorist groups or insurgents are directly attributable to the host state without labelling them former instrumentalities or agents of the state per se. When considering the events of 9/11, it seems improbable that the attacks could in fact be attributed to the Taliban Government, even if analysed through the lens of subsequent endorsement(…) it is nonetheless possible to conclude that, in some circumstances, the action of a non-state actor amount to the acts of the government itself, as though committed through a prolongation of the state". See also D Jinks, State Responsibility for the Acts of Private Harm Groups, (2003) Chicago Journal of International Law, 83, 90 where the author argues for a theory of complicity of the State with the private act, that

2.4 The theory of objective responsibility

Theories of complicity, condonation and indirect responsibility endeavoured to find elements of participation of the State to the private wrongful act. In their formulations, one can observe the attempt to strike balance between the emergence of international responsibility as an independent legal category separated from individual responsibility, with the need to ensure international justice for certain crimes. At the same time, the development of principles of international responsibility through the rise of the liberal thought facilitated the distinction between the (limited) sphere of control of the State – and thus the scope of responsibility – and the private realm governed by individual liberty and freed of State's intrusion.[36] In this context, resistance to the idea of attributing to the State responsibility from injuries resulting from the acts of private subjects took place and progressively fortified. Already in 1892, the US-Chile Claim Commission established to evaluate the killing of a governor of the local garrison by rebels in Chile, declared that 'an injury done by one of the subject of a nation is not to be considered as done by the nation itself'.[37] Similarly, in 1903 the Italian-Venezuela Commission was asked to decide on a case revolving around the question of responsibility of Venezuela for damages inflicted upon the Italian citizen Sambiaggio by revolutionary authorities. In this instance, the arbiter noted that '[t]he ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility of which is

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should suffice to establish responsibility: "the emergent "harbouring" or "supporting" rule represents a substantial relaxation of the traditional attribution regime- one that may signal a shift in the very nature of "state action". Consider the ILC Draft Rules concerning "complicity" as a basis for state responsibility. (…) Conversely (…) the Draft Rules render states responsible for ostensibly private conduct only if the state directs or controls the unlawful conduct of the "private" actors. The question arises why "complicity" establishes responsibility for the acts of another state, but not the acts of private entities. The structure of the rules suggest that the lower threshold suffices for imputing the conduct of another state because the public character of any such act is clear – that is other states clearly have international legal personality. Attribution of the private acts, on this view, is appropriate only if the nexus between the state and the ostensibly private actor confers a public character on the conduct in question – recasts the private acts as "state action". In this sense, the emergent rule arguably reconfigures the distinction between the public and the private conduct". See also Becker (note 7) arguing for a causation-based model of responsibility.

[36] Reflecting upon the changes of rules of international responsibility with the decline of the liberal thought and the rise of totalitarian or communist regimes during the first part of the 20th century is W Friedmann, 'The Growth of State Control Over the Individual, and its Effect upon the Rules of International State Responsibility' (1938) 19 British YB IL, 118, especially 119-120,139-143.

[37] JB Moore, *History and Digest of the International Arbitration to which the United States has been a party* (Washington Gov't Print Off 1898) Vol. III, 2991.

expressly assumed by it',[38] and that 'to apply another doctrine (…) would be unnatural and illogical'.[39]

But it is mostly the Italian and the German doctrine of the beginning of the 20th century that contributed to the understanding of international responsibility as a separate legal concept and to the development of theories of objective responsibility. Triepel was one of the first scholars to ground international responsibility on an objective conception of the international wrongful act and to argue that the individual who injures another State or its citizens never violates international law. To his mind, when an individual crime occurs that harms another State, the State does not become automatically responsible just because of its passivity. On the contrary, responsibility arises only when the State that could have prevented the crime and did not act or punish the culprit, is culpable of having violated its own obligations to exercise due diligence and to provide reparation.[40] Shortly after Triepel, Anzillotti concluded that the existence of a violation of international law and its attribution to the State are the only two conditions for international responsibility to arise. His main legacy however resides in the doctrinal attempt to eradicate the notion of fault from the theory of international responsibility. In this regard, Anzillotti's analysis strove to show that State responsibility for acts of its organs always steered clear of any evaluation on fault.[41] This notion had only played a role with reference to State responsibility for the injurious acts of private individuals. Anzillotti acknowledged the function that, historically, the theory of fault served in limiting the scope of international responsibility for private acts;[42] however he maintained that what triggers State responsibility in these cases is not a particular subjective attitude on the part of the State, but rather the violation by the latter of international obligations aimed at

[38] *Sambiaggio Case (Italy v Venezuela*), (1903) 9 UNRIAA, 499, 512. The case is also of some interest as it involved the demolition of properties by revolutionist. In assessing the responsibility of the State of Venezuela, not only did the judge stressed the principle of non-attribution of acts that do not belong to the State machinery, but he also pointed out that 'Government are responsible, as a general principle, for the acts of those they control', at 513.

[39] Ibid.

[40] E Triepel, *Diritto Internazionale e Diritto Interno* (Unione Tipografico Editrice Torinese 1913) 323-324. Despite being considered as one of the fathers of the theory of objective responsibility, Triepel eventually seems to contradict himself when he affirms that the State obligation to punish the culprit is a form of automatic responsibility of the State for the acts of individuals, at 330.

[41] In construing the responsibility of a State for wrongful acts of its organ, Anzillotti defines responsibility as an absolute requirement of the international legal order: "[L]a responsabilità si presenta piuttosto come un'assoluta esigenza dell'ordine giuridico internazionale, che come una conseguenza della pretesa colpa dello stato", see D Anzillotti, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale* (Firenze 1902) 163; as for the *ultra vires* acts of a State organ, Anzillotti argues that whenever the act is contrary to the domestic system and to the international one, this one can nonetheless be attributed to the State not by virtue of *culpa in eligendo* or *culpa in vigilando*, but rather because the State assumes responsibility for all the acts emanated within its jurisdiction, regardless of fault, at 166-170.

[42] Ibid 171.

ensuring a certain conduct from individuals under the State's jurisdiction.[43] Responsibility flows from a State's own act of being unable or unwilling to take actions against the crime committed by the private person.[44] In this sense, it is the inability or unwillingness to act that constitutes the conduct contrary to international law.[45] Hence, responsibility can never be vicarious or indirect, for it arises solely as a result of a wrongful conduct on the part of the State.

It should be borne in mind that the shift towards the complete separation between acts of private individuals and acts of the State did not entail the absolute rejection of the element of fault, for some scholars still treated it as a necessary condition of State responsibility for private acts.[46] According to latter, a failure of the State to protect from or to punish the private subject responsible for the international wrong could be deemed as the measure of fault or deviation from the standard of due care required by the State. But whether the omission of the State was treated as the result of its negligence, or simply as the non-observance of a State obligation of relative nature, it was clear that the private act could not be attributed to the State, operating solely as the occasion for responsibility to arise.

A series of arbitral cases also reinforced the postulate that responsibility centres not on the State's connection with the private wrongful act, but on the State's failure to comply with its own international obligations. The Mexico-United States General Claims Commission in the *Janes* case was one of the first arbitrary commissions to openly reject notions of complicity and to side with the "separate delict" formula.[47] After taking note of opinions that treated a State's 'serious lack

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[43] Ibid 172-173.

[44] D Anzillotti, *Corso di Diritto Internazionale* (CEDAM, 1955), Vol. I, 386.

[45] "(...) The acts committed by the subjects of a State against aliens do not, as such, involve the responsibility of the State: this is true unless the State has itself performed an act contrary to international law by not forbidding the acts in question, by being unable or unwilling to take action against the guilty individuals, by not giving the aliens concerned the means of obtaining justice and so on. In such cases, however, the punishment of the culprits is not, as has been said, the manifestation of effect of the responsibility of the State: it is rather the performance of the duty imposed on the State by international law; failure to punish is a breach of that duty," D Anzillotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 13 Revue générale de droit international public 5, translation taken by R Ago, 'Fourth report' (note 19) 123.

[46] See R Ago, 'La colpa nell'illecito internazionale' (ed), in *Scritti in Onore di Santi Romano* (Padova, 1939), 1-6; G Arangio-Ruiz, State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance, in M Virally (ed.) *Le droit international au service de la paix, de la justice et du développement* (Paris, 1991), 25-26; R Luzzatto, 'Responsabilità e colpa in diritto internazionale' (1968) 51 Riv. Dir. Int., 53; P M Dupuy, 'Le fait génèrateur de la responsabilitè internationale des Etats' (1984) 188 Rev. Droit Comparé, 21, whereby the author argues that objective responsibility is the rule, however fault may play a role when responsibility of the State is to be judged by reference to the standard of diligence that the State should have adopted.

[47] The term is drawn on Becker (note 7) 24. To highlight the ultimate step toward the general acceptance of the principle of non-attribution of private acts to the State, the author refers to the body of literature pointing to this direction as the "separate delict theory". The definition helps underline the shift towards the separation between acts of the State and acts of the private individual, without completely rejecting the theories of fault.

of due diligence in apprehending and/or punishing culprits' as a form of 'derivative liability, assuming the character of some kind of complicity with the perpetrator himself', the Commission established that

'A reasoning based on presumed complicity may have some sound foundation in cases of non-prevention where a Government knows of an intended injurious crime, might have averted it, but for some reason constituting its liability did not so. The present case is different (…). The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national: the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. (…) The State (…) has transgressed a provision of international law as to State duties.' [48]

The Commission went on also to note that even if the non-punishment by the State were conceived as some kind of approval, 'still approving of a crime has never bee deemed identical with being an accomplice to that crime'.[49] In the well-known decision *British Property in Spanish Morocco* Case in 1925, judge Huber contended that 'the State is not responsible for the revolutionary events themselves, [but] it may nevertheless be responsible for what the authorities do or do not do to mitigate the consequences as far as possible'.[50] Judge Huber went further and stressed that 'responsibility for the action or inaction of the public authorities is quite different from responsibility for acts that may be imputed to persons outside the control of the authorities or openly hostile to them'.[51] That responsibility of the State cannot consists in mere State's passivity, but originates from the violation of an obligation in relation to the wrongful act carried out by the private person, emerged clearly in arbitral awards of the first part of the 20th century. The *Brissot and other* case represented an early opportunity to assess the position of Venezuela towards the attack of an American commercial ship by a force of rebels; in this case the US-Venezuela Claim Commission stressed that 'Venezuela responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties'.[52] The State could be found responsible only if it failed to do all that could be reasonably be required in that behalf, otherwise, no responsibility could arise.[53] In the *Noyes* case of 1933, involving the injuries inflected to an American citizen by a drunken mob in Panama, the arbitral Commission contented that responsibility of Panama could be engaged for 'a general failure to comply with

[48] *L MB Janes et al. (USA) v. United Mexican States*, (1925) RIAA, Vol. IV, 86.
[49] Ibid 87.
[50] *British Property in Spanish Morocco*, (*United Kingdom v. Spain*)(1925), RIAA, 709.
[51] Ibid.
[52] *A de Brissot and others (USA v. Venezuela*), *Moore International Arbitration* Vol. III, 2967-2970
[53] Ibid.

their duty to maintain order, to prevent crimes or to prosecute or to punish criminals'.[54] By the same token, in the *Tellini* case, the Special Commission of Jurist appointed to speak out on questions arising from an incident between Italy and Greece, affirmed that 'the responsibility of the State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and punishment, arrest and bringing to justice of the criminal'.[55] Numerous cases awarded around this time and involving injuries to foreign assets or persons by mobs or rebels followed identical reasoning. Finally, practice from the 20th century along with the approach taken by the doctrine paved the way for future considerations of the matter by the ILC in its works on State responsibility for international wrongful acts.

3. Due Diligence and the codification of the rules on Responsibility of States for International Wrongful Acts

3.1 The Hague Conference and early codification

The starting point for the codification of rules on State responsibility can be traced back to the efforts of the League of Nations and later of the United Nations through the work of the ILC. In 1924 the League of Nations set up a Committee of Experts to provide a list of subjects of international law suitable for codification. In 1927 the Assembly identified three topics out of the five presented by the Committee of Expert, namely nationality, territorial waters, and responsibility of States. Three preparatory Committees were created in order to pave the way for a diplomatic conference that should have resulted in the adoption of a convention for each identified topic. [56] Admittedly, the scope of research of the Committee focusing on State responsibility consisted only of questions on responsibility for damage caused to foreigners or their property in a State territory, and did not include issues of general principle.

Prior to the conference set to discuss rules of international responsibility, in 1929 the Harvard Law School decided to undertake cooperative research on the topic with the aim of assisting the work of the League of Nations and the Hague Conference.[57] The Harvard Research Draft for the Responsibility of States for Damage done in their Territory to the Persons or Property of Foreigners was limited in scope and contained eighteen articles on the responsibility of a State for

[54] *W A Noyes, (United States v, Panama)* (1933) UN RIAA, 311.
[55] *Tellini case* (1923) 4 League of Nation Official Journal, 1349.
[56] M O Hudson, 'The First Conference for the Codification of International Law' (1930) 24 AJIL 447, 449-450.
[57] M O Hudson, 'Editorial Comment: Research in International Law' (1928) 22 AJIL 131, 151-152.

an injury to an alien or his property in its territory. The intent of the drafter was to reflect existing rules on international law and to propose changes necessary to promote the conclusion of a convention on international responsibility among States.[58]

As for The Hague Conference, this one did not result in the adoption of a Convention, although a tentative list of ten articles aiming to identify rules on responsibility for damage caused to foreigners and their properties was eventually approved. The Conference distinguished between responsibility arising out of enactment of legislation incompatible with international obligations, responsibility arising out of the non-enactment of legislation necessary for fulfilling a State's obligations,[59] and finally responsibility for actions of private individuals harming persons or property rights of a foreigner within their territory. With reference to the latter, the Conference established that had private persons within the territory of a State caused damage, the State could be found responsible for failing to take the measures to prevent, redress or inflict punishment for the those acts.[60] Furthermore, during the Conference it emerged clearly, through the positions adopted by Governments and presented to the Preparatory Committee, that international responsibility could only be engaged by the acts or omissions of a State's organ and never by the actions of private individuals.[61] Governments agreed that it is not the individual action that triggered responsibility but the omission of the State's bodies in exercising due diligence and provide protection.

3.2. The ILC works on State responsibility

After the Hague Conference, the League of Nations did not take any further action to focus systematically on questions on State responsibility. It was only with the UN that the issue was resumed and international responsibility was included in the lists of topics suitable for codification.

From the perspective of responsibility of States for injurious acts of private persons, the most substantial theoretical analysis on the issue ensued from the works of the first Special Rapporteur Garcìa-Amador and from Special Rapporteur Roberto Ago. Garcìa-Amador touched extensively upon the topics of due diligence and responsibility for private acts, primary because he tackled international responsibility mostly as responsibility for injuries caused to persons or property of foreigners. His understanding of the concept revolved around the

[58] Harvard Project, 1929, Introductory Comment, p. 140

[59] League of Nations, *Actes de la Conférence pour la Codification du Droit International tenue à la Haye du 13 Mars au 12 Avril 1930: Séances de Commissions. Vol VI, Procés Verbaux de la Troisième Commission: Responsabilité des Etats en ce qui Concerne les dommages causé sur leur territoire à la Personne ou aux Biens des Étrangers* (Geneva, Service de Publications de la Société des Nations 1930), art 6.

[60] Ibid art 10.

[61] Ago, 'Forth Report' (note 19)107.

existence of two conditions, mainly the breach or the non-performance by a State of an international obligation consisting of an act or omission, and the imputability of the wrongful conduct to the State.[62] By construing imputability as 'an indispensable condition for the existence of international responsibility'[63] Garcìa-Amador acknowledged the need to deal with imputability not only in the context of acts or omissions originating from the legislative, the judiciary, or the executive State apparatus, but also in cases of acts or omissions carried out by other entities, including private persons. Yet, imputability to the State of act of private persons was not treated as a question regarding the grounds upon which acts of a private subject may be regarded as acts of the State and thus attributed to it due to the *de facto* link with the latter's apparatus. On the contrary, Garcìa-Amador understood imputability in such cases as an "indirect process" whereby what is imputed to the State is not the act that had caused the injury, but rather the non-performance of the State of one of its obligations.[64] In other words, responsibility for acts of private persons was conceivable only as a form of responsibility for failure of the State to discharge its international obligations.

Two considerations are in order to fully capture the theoretical underpinnings of Garcìa-Amador's conceptions. Firstly, that State responsibility is conceived as separate from the private act that caused the injury and dependent on the existence of factors and conditions extraneous to the wrongful event.[65] Secondly, that despite being framed as autonomous, responsibility is nonetheless inextricably connected to the injurious act committed by the private subject. For, the Special Rapporteur argues, not only must there be a harmful act committed by an individual, but 'in addition, it must be possible to attribute to the State some conduct with respect to the act that implies a specific attitude wilfully adopted by the organ or the official'.[66] To elaborate further on these points, a relationship of causality must be necessarily established between the omission of the State and the harmful event.[67] However, causality is not per se sufficient, since responsibility requires also a further relationship between the State and the private act, namely a "deliberate attitude" on the part of the State organ identified with *culpa* or fault.[68] In this sense, Garcìa-Amador conditioned State responsibility for injuries of private individuals on the existence of a certain degree of fault of State, measurable with the State's lack of due diligence in preventing the harmful act or in punishing the culprit. Due diligence is in fact described in his analysis as 'the

[62] F V Garcìa-Amador, 'Second Report on State Responsibility' (1957) II YB ILC, UN Doc. A/CN.4/96, 105-106.
[63] Garcìa-Amador, 'First Report on State Responsibility' (1956) II YB ILC, UN Doc. A/CN.4/96, 185.
[64] Ibid 187.
[65] Garcìa-Amador, 'Second Report' (note 62) 121.
[66] Ibid.
[67] Ibid 106.
[68] Garcìa-Amador, 'First Report' (note 63) 187.

expression *par excellence* of the so-called theory of fault',[69] applicable to all those cases, 'in which it cannot be said that responsibility arises through the simple existence of a wrong'[70]. Fault would play a role only in such circumstances, as in case of positive acts or even certain omissions that give rise to direct responsibility, 'the animus of the State does not appear to have a bear on the imputation of responsibility'.[71]

It is important to note that Garcìa-Amador envisaged due diligence not just as a specific standard of fault to be assessed depending on the specifics of case, but also as an 'integral part of the international law relating to responsibility.'[72] This function of due diligence – defined as *the rule* of due diligence - was derived by the circumstance observed already by the ILC that international responsibility included also cases apparently involving no breaches of specific international obligations. Drawing on the Trail Smelter case, the Special Rapporteur noted that in this type of situations,

'There is admittedly no breach or non-performance of a concrete or specific obligation, but there is a breach of a general duty which is implicit in the functions of the State from the point of view of both municipal and international law, namely the duty to ensure that in its territory conditions prevail which guarantee the safety of persons and property.'[73]

Regardless the understanding of Trail Smelter as a case of liability for acts not prohibited under international law or as a case that still fits squarely into the paradigm of responsibility,[74] what is important is that Garcìa-Amador framed due diligence as an integral principle of the law of international responsibility, applicable to any case of negligence of the State in discharging its essential functions.[75]

With Special Rapporteur Roberto Ago, the ILC departed from the focus on responsibility for damage to foreign and their property and took up the problem in a more comprehensive manner. First of all, Ago introduced the distinction between primary and secondary rules of international law, prompting the ILC to focus exclusively on the latter, i.e. on international rules and consequences flowing from failure to fulfil obligations established by primary rules.[76]Furthermore, the Special Rapporteur broached the analysis on the fundamental grounds of an international wrongful act based on a conceptual

[69] Garcìa-Amador, 'Second Report' (note 62) 122.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] See in this regard para 4 on the conceptual relationship between due diligence and the ILC works on liability for acts not prohibited under international law.
[75] Garcìa-Amador, 'Second Report' (note 62) 122.
[76] R Ago, 'Second Report on State Responsibility' (1970) YB ILC/II, UN Doc.A/CN.4/223, 179.

division between the subjective and objective element of responsibility.[77] Accordingly, the subjective element would include rules regarding the attribution of conduct to the State, whereas the objective element would tackle the conditions whereby conduct attributed to the State is considered in breach of an international obligation.

As for the problem of attribution of conduct to the State of acts of private individuals, Ago clearly posited that the conduct of private individuals as such is not attributable to the State as source of international responsibility.[78] This does not exclude however that in certain circumstances the conduct of a private subject acting as a '*de facto* organ' or a '*de facto* official' of the State be attributed to the State apparatus.[79] In these situations though the conduct in question is not to be regarded as "private" but rather as a conduct belonging, although incidentally, to the machinery of the State.[80] Responsibility that a State may incur as a result of acts of *private* individuals is instead a form of direct responsibility flowing from a particular type of State's omission.

It is very much the structure of such omission that interests the work of the Special Rapporteur in his considerations on international responsibility for conduct of private subjects. Ago argues that responsibility for failure to take appropriate measures to prevent or protect the premises of a foreign embassy 'are really cases of responsibility of the State for omissions by its organs.'[81] Yet this omission differs from the omission a State may incur when it refuses for example to pass a bill in accordance to a treaty to which is bound. For while in this latter case the mere non-adoption of the act due constitutes the breach of the international obligation, in cases of omission through failure to prevent or protect 'there must be the additional element of an external event, if the State's conduct is to be regarded as a breach of an international obligation'.[82] The occurrence of the external event is deemed by Ago as a constituent element of all obligations of prevention.[83] In this regard, Ago maintains that it is the external event carried out by the private subject that triggers the relationship between the conduct of the State and that one of the individual.[84] Such event affects the determination of responsibility in so far as its occurrence operates as a 'catalyst on the wrongfulness of the conduct of the State organs in (…) [the] particular case.'[85]

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[77] Ibid 187.
[78] Ago, 'Fourth Report' (note 19) 124-125.
[79] R Ago, 'Third Report on State Responsibility' (1971) YB ILC/II, UN Doc. A/CN.4/246, 265-266.
[80] Ago, 'Fourth Report' (note 19) 95.
[81] Ago, 'Second Report' (note 76) 188.
[82] Ibid 194.
[83] The nature and structure of obligations of prevention constituted the object of a comprehensive analysis on the types of primary obligations conducted by Ago in his Sixth Report; as for the purposes of the present research, the issue will be dealt with in the course of Chapter II.
[84] Ago,'Fourth Report' (note 19), 97.
[85] Ibid.

Two corollaries ensue from this fundamental premise. The first one is that if the event functions as the *trait-d'union* between the conduct of the State and the acts of the private subject, then a relationship of normative causality must be established between State's conduct and the event in question. To better explain, while conduct of the private individual will be linked to the event by factual causality (in the sense that the event is the *natural* consequence of the individual's conduct), conduct of the State will be connected to the event because had the State taken the appropriate measures of diligence, that event would have been prevented.[86] The second corollary is that the event in question is never a condition for attributing to the State the conduct of its organs.[87] The event is the premise for the breach by the State of its international obligations but it has no bear on attribution of conduct - which takes place regardless of its occurrence. This is another way for Ago to say that what is attributable to the State is the omission consisting of failing to exercise due diligence and not the external event, which may or may not eventually materialise.[88]

It might appear redundant at this point to stress that in the case of State responsibility for acts of private individuals, attribution of conduct never concerns the external event but only the particular omission of State's organs in relation to that event. However, for Ago this constitutes a compelling point of his analysis for it allows the Special Rapporteur to critically engage with the problem of damage. Ago acknowledges that what drew certain scholars to conclude that in situations of responsibility for conducts of private individuals the wrongful event is attributed to the State is the fact that reparation sought for these international delinquencies often corresponded to the damage actually caused by the action of the individual.[89] This circumstance would arguably lead to imagine a link between the conduct of the State and the wrongful event. However, Ago contends that damage is not a constituent element but rather an accessory of the international wrongful act. The latter takes place exclusively as a result of conduct attributable to the State in breach of an international obligation. Damage instead is to be understood as no more than the material effect of the international wrongful act, what flows materially as the consequence of the actions or omissions of the State.[90] Accordingly, one should always distinguish between the injury – which corresponds to the very breach of the international obligation – and damage - which corresponds to the physical or moral effects that the injury might have

[86] See Ago, 'Second Report' (note 76), where he posited "it is not sufficient for the conduct per se and the event to have occurred independently from each other; there must be a link between the former and the latter such as the conduct can be regarded as the direct or the indirect cause of the event", at 194.
[87] Ago, 'Fourth Report' (note 19), 97.
[88] Ibid.
[89] Ibid.
[90] Ibid 98-99.

caused.[91] This is a fundamental distinction as it points to the thin yet crucial separation between causality for the purpose of the breach and causality for the purpose of reparation. Arguing that the breach of an international obligation to prevent and protect depends on the external event in question means to anchor the existence of the breach to the proof of the relationship of normative causality explained above.[92] In this sense, the injury will very much depend on such test of causality. Yet, for the purpose of reparation, a further causal relation will need to be established between the breach of the obligation (injury) and the material effect of such injury (physical damage). In cases of State's responsibility for acts of private individuals, what complicates the two tests is the fact that injury and damage will often coincide, being catalysed in the wrongful event carried out by the private subject. Nonetheless the two must be kept conceptually separated as their application may give rise to different results.

Ago's analysis of the premises of State responsibility for conduct of private individual represents not only one of the most substantial contributions to the topic in the work of the ILC, but it is still an invaluable point of reference when dealing with due diligence in the contemporary law of international responsibility. As it will be shown in following Chapter, his conceptual construction of obligations of prevention still has a bear on the understanding of due diligence as a self-standing primary obligation.

After Ago, Special Rapporteur Willem Riphager focused primary on the distinction between primary and secondary rules and in particular on the consequences that should flow from violating an international obligation. In this regard, Riphagen observed that primary rules influence the scope of secondary rules as well as "the modality" of their implementation.[93] Both primary rules and the breach of an international obligation that gives rise to 'new legal relationship' entail a limitation of sovereignty, taken as 'complete freedom of action'.[94] In this context, sovereigny encompasses the primary obligation of States to prevent the violation of their international commitments, being irrelevant whether this duty is 'a consequence of the continuing "validity" or "force" of the primary obligation or is a duty which arises as a consequence of the breach'.[95] Following the works of Riphagen and subsequently of Special Rapporteur Arangio-Ruiz, the ILC in 1996 provisionally adopted a full set of draft articles on responsibility of States for

[91] Ibid.

[92] It is worth querying whether Ago really intended the external event as a "constitutive" condition for the breach of an international obligation to prevent, or simply as the opportunity that allows the interpret to affirms that a breach of an obligation of prevention has indeed occurred. This problem will be discussed in detailed in Chapter II, however one should be reminded that the ILC eventually adopted the first approach and concluded that there is no international wrongful act so long as a particular external event has not occurred.

[93] W Riphagen, 'Second Report on State Responsibility' (1981) YB ILC/II UN Doc./A/Cn.4/344, 85-87.

[94] Ibid.

[95] Ibid.

international wrongful acts.[96] The articles reflected the now consolidated principle of objective responsibility and steered clear of any notion of fault that might have sparked further doctrinal controversy and debate. When in 1997 the ILC appointed James Crawford to complete the second reading of the draft articles, Crawford adopted a rather general approach, being preoccupied to achieve a wide range of consent among the members of the Commission as well as States in the UNGA Sixth Committee. In particular, Crawford recommended to delete references to the distinction of different sets of international obligations – including preventive obligation – as this would have entailed a "intrusion" by the ILC into the content of primary rules.[97] Eventually, in 2001 the ILC adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and shortly after the General Assembly annexed the text to a resolution suggesting to Governments a future adoption. The final version of the draft consisted of fifty-nine Draft articles on Responsibility of States for Internationally Wrongful Acts.

3.3 Principles on State responsibility

In the ARSIWA, the ILC organised the principles on international responsibility into four parts. The Commission decided to limit the scope of its work to secondary norms, and ruled out the identification of rules whose violation gives rise to responsibility. With that in mind the ILC managed to focus exclusively on the structural rules of international responsibility, and avoided the difficulties arising form the analysis of content and scope of primary rules.[98]
Part one of ARSIWA is devoted to the description of an international wrongful act. Part two deals with the consequences of a breach of an international obligation, thus with the content of secondary rules of State responsibility. Part three describes the rights of other States originating from international responsibility and finally part four contains a number of general provisions applicable to issues of international responsibility as a whole, touching for example upon the problem of individual responsibility or *lex specialis*. The articles were drawn at a high level of generality, in order to be applicable to the widest range of situations.

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[96] Draft Articles on State Responsibility With Commentaries Thereto (1996), YB ILC UN Doc.A/51/10.
[97] J Crawford, 'Second Report on State Responsibility' (1999) YB ILC/II UN Doc.A/CN.4/498, 28-29.
[98]The earlier versions of the ILC Articles attempted to include the analysis of substantive primary rules, such as human rights obligations or rules concerning the protection of aliens; however, a part from the problem of leaving aside the analysis of groups of obligations, the codification of primary rules would have involved the restatement of the entire body of conventional and customary international law, a task beyond the scope of the works of the ILC. See J Crawford, *State Responsibility: The General Part* (CUP 2013), 217.

The basic notion of international responsibility emerges in article one, according to which every international wrongful act of the State entails its international responsibility. Such international wrongful act may consist of an act or an omission of the State and it is the product of three different conditions: attribution of the particular act to the State, breach of an international obligation and the absence of any circumstance precluding wrongfulness.[99] Assessing the breach of an international obligation requires the examination of the content of the primary obligation, its formulation and meaning in the context of the circumstances surrounding the violation. In this regard, the breach may entail the infringement of the rights of another subject of international law, the infringement of the rights of multiple subjects or even the infringement of the rights of the international community as a whole.[100] Similarly, the international wrongful act might also be attributed to more than one State or to the State or an international organisation. But whether the injured subject is one or the whole international community will not affect the cognitive process necessary to ascertain the existence of the breach of the primary rule, namely the comparison between the conduct engaged by the State with the conduct prescribed by the international obligation. Obviously, the international wrongful act might consist of acts or omissions, provided that a legal duty to act exists and its significance can be assessed by reference to the content of that duty.[101] The analysis of the content of the primary norm dictates also whether the breach in itself is sufficient to trigger responsibility, or whether damage should also occur. The ARSIWA indicated that although attribution and breach are the sole necessary conditions for an international wrongful act, there might be cases that require the existence of other elements, such as damage to another State. However, given the absence of a general rule, the need of this element will depend exclusively on the content of the primary obligation.[102] The same applies also to the element of fault, which the ILC eventually defined as a possible element of a primary norm if specified in its content.[103] The content of the obligation might in fact indicate that only culpable omission on behalf of the State suffices to establish the breach.

The second principle of State responsibility concerns the elements of a State act. A conduct can be characterised as internationally wrongful as long as it is attributable to the State. The State is in fact a legal entity that cannot act by itself, but only through actions of omissions of individuals or groups of individuals. Attributing conduct means therefore to establish a *qualified* relationship between

[99] Art 2 of ARSIWA mentions only attribution of conduct and breach of an international obligation of the state as the two essential elements of an international wrongful act. However the third requirement, namely, the absence of circumstances precluding wrongfulness, emerges when article 2 is read in conjunction with Chapter V.
[100] ARSIWA, 35.
[101] T Honoré, *Responsibility and Fault* (Hart 2002) 47.
[102] Ibid.
[103] ARSIWA, 35.

the act or the omission of the individual and the State, provided that the act constitutes a breach of an international obligation.[104] Nature and scope of attribution will be thoroughly discussed in the next paragraph.

The last element required for an act or an omission to be considered as internationally wrongful is the absence of justifications and excuses[105] ruling out responsibility and set "to protect the State against an otherwise well-founded accusation of wrongful conduct".[106] Formally, circumstances precluding wrongfulness – that consist of consent (article 20), self-defence (articles 21), countermeasures in respect of an international wrongful act (article 22), *force majeure* (article 23)[107], distress (article 24) and necessity (article 25) – do not belong to the requirements necessary to label an act or an omission as attributable to the State and contrary to international law. They shall be distinguished from the constituent requirements of the obligation that operate as prerequisites for the issue of wrongfulness to arise.[108] However, they can be defined as negative elements that preclude the wrongfulness of the act and rule out responsibility.[109] Circumstances precluding wrongfulness operate as "exoneration clauses"[110] and

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[104] Attribution has been described as the "subjective" element of an international wrongful act, opposite to the breach of an international obligation, usually defined as the "objective element". However, the ARSIWA avoid this terminology, as there may be circumstances where the content of a primary obligation spells out intention or knowledge as requisite for its violation. See Commentary to the ARSIWA, at 34.

[105] Special Rapporteur Roberto Ago had vigorously rejected the use of terminology as justification of facts or excuses to describe circumstances precluding wrongfulness. However, James Crawford used equally expressions such as "justification", "defences" or "excuses". See J Crawford, 'Second Report on State Responsibility' (1999) ILC YB/II, UN Doc. A/CN.4/498, para. 216.

[106] Ibid. Crawford suggests that circumstances precluding wrongfulness operate more as a shield rather than a sword, as they do not affect the existence and the content of the primary obligation, but they only provide a justification for the non-performance of the obligation.

[107] In this regard, the qualification of force majeure as a circumstance precluding wrongfulness confirms the normative approach of the ARWISA in relying on notions of objective responsibility. From the standpoint of subjective responsibility, if fault is to be considered as a necessary element of an international wrongful act, it follows that a fortuitous event or a case of *force majeure* will rule responsibility *ab origine* proving the lack of fault on the part of the organs of the State. On the contrary, by requiring only the breach of a primary rule whose performance is attributable to the State, the theory of objective responsibility presumes that the State has the means to prevent and punish the wrongful conduct and sees the wrongful act as the result of the failure on the part of the organs of the State to take the necessary measures to prevent it. This means that *force majeure* acts as an exonerating cause that operates *ex post*, to excuse the State's failure to act according to the means at its disposal. See also S. Szurek, The Notion of Circumstances Precluding Wrongfulness, in J Crawford, A Pellet, S Olleson (ed) *The Law of International Responsibility* (OUP 2010), 433-435.

[108] ARSIWA Commentary to art 19.

[109] Crawford, State Responsibility (note 98), 275.

[110] As stressed in the text, this term shall be interpreted as "exculpatory circumstances" that classify the conduct of the State as "not wrongful". Some authors have contended however the use of this term fails to adequately recognise the distinction between the rights of an injured State to waive its entitlement to reparation, and the rights of that injured State to release the State of origin from its obligation to obey the law. In fact, breaches of international law are not always an exclusive matter of the injured State and even if the creation of obligation is essentially a bilateral matter, the violation of the obligation is not therefore exculpating conducts on the base of consent

are absolutely distinct from the exercise of due diligence as evidence of non-responsibility on the part of the State. When a harmful event occurs that should have been prevented by the State, the assessment of the performance by the State of the obligation of due diligence is part of the normative operation that allows to establish the breach of the primary norm of preventive character. To display that the obligation to prevent has been violated, the injured State will have to indicate the injury, the size of the damage, and negligence on the part of the State taken as failure to exercise its duty of due diligence. Only then the State of origin will have the option to invoke the existence of any circumstance precluding wrongfulness.[111] In other words, showing to have taken all the necessary measures prevents the breach of the primary norm in the first place and precludes the omission of the State from being described as contrary to international law.

3.3.1 Attribution of conduct

The ARSIWA state clearly that for a conduct to be qualified as an international wrongful act, it must be attributable to the State. [112] Responsibility is always minimally vicarious, as a State that cannot act physically of itself needs natural persons in order to carry out its activities. Attribution is therefore the operation that allows establishing a link between the action or omission performed by an individual or a group of individuals with the State apparatus.
A fundamental premise to be borne in mind for the present analysis is that the ARSIWA crystallise the process of legal separation between the State as an organised separate entity, and individuals operating outside the governmental agency and its manifestations that cannot, due to their status, carry out international wrongful acts. As shown in the previous section, this separation rests fundamentally on two grounds, namely the State organ principle and the public/private dichotomy. Under the State organ paradigm, acts of a State emanate in principle from its organs and representatives. Organs and representatives of the State are *de jure proprio* agents, in so far as their competence and function is determined by the State's own internal organisation and mostly by municipal law. From this perspective, the role of international law is first and foremost to take account of what municipal law qualifies as entity with the status of organ and regard such qualification as a condition for attribution of that organ's acts to the State. Although art 4 of the ARSIWA recognises that the status of organ should

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or distress may in certain cases impede the development of international law towards a public order. Therefore, the ILC should have better characterised these circumstances wrongful but "excused", rather than "exculpatory". See V Lowe, Precluding Wrongfulness or Responsibility: A Plea for Excuses (1999) EJIL, 405.
[111] PM Dupuy, J E Viñuales, *International Environmental Law* (CUP 2015), 254-255.
[112] Commentary to the ARSIWA, 35.

also encompass the conduct of bodies which 'in truth act' as State organs,[113] the primacy of internal law in defining the machinery of the State for the purpose of responsibility emerges clearly as a golden rule throughout the works of the ILC.[114]
At the opposite end of conduct emanating from a State's *de jure proprio* organisation stands the conduct of private individuals whose agency cannot in principle be assimilated to the State apparatus. Acts of private individuals are considered outside the sets of conducts attributable to the State because they are performed outside its authority. This does not mean however that under certain specific circumstances, international law cannot attach legal significance also to the conduct of private subjects. In this regard, the ARSIWA provide a detailed framework for all those situations in which the conduct of individuals may be regarded as conduct of *de facto* agents of the State and therefore attributed to it for the purpose of international responsibility. Yet, the possibility of expanding the realm of attribution beyond the paradigm of *de jure* organs does not counteract the structural dualism ingrained in the methodology adopted by the ILC and reflected in the *summa divisio* between 'conduct of organs' and conduct of persons that 'shall be considered an act of the State'.[115]
The second premise that underpins the conceptual foundation of attribution as construed by the ARSIWA is the public/private distinction. We have already illustrated that the distinction between the public and the private sphere in international law derives its legal substance from the liberal theory, with the purpose of setting the limits on State power.[116] According to the liberal view, imputing to the State exclusively those acts that are directly connected to its machinery preserves the State's free will and avoids the excessive burden of finding it responsible for any action occurring within its jurisdiction. At the same time, drawing a public/private line allows to safeguard individual freedom and prevents greater State's control over persons and entities within its jurisdiction - a circumstance that would be both impractical and undesirable.[117] In this context,

[113] Ibid, 42.
[114] See Ago, 'Third Report' (note 79), 238; Draft Articles on State Responsibility, (note 96) art 5 para 2.
[115] This conceptual distinction emerges in the ARSIWA - with art 3 to 7 providing for rules of attribution of organs, and rules 7 to 11 that deal with conduct of private persons, insurrectional movements, or entities outside the State machinery - but also in the dominant legal doctrine. See for example Part III of Crawford's thorough study of State Responsibility, distinguishing between attribution through organs and attribution through direction or control, see Crawford, State Responsibility (note 98), table of content; see also M Arcari, distinguishing between "conduct of organs " and "conduct of private individuals", in T Scovazzi (ed), *Corso di Diritto Internazionale* (Giuffré 2015), table of content.
[116] MJ Horwitz, 'The History of the Public/Private Distinction' (1992) 130 University of Pennsylvania Law review, 1423; Koskenniemi (note 2) 76-95.
[117] D D Caron, The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' in L Lillich, D Magraw (ed), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irwington on Hudson Transnational 1998), 109, 127; K Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) Mich J Int'L, 517, 555-556.

attribution fits into the public/private discourse as it serves primarily to mark out the "reserved domain" of the international (public) system.[118] Rules of attribution spell out the definition of "State sector"[119] and determine which acts are to be considered "acts of the State" and which activities or delinquencies shall be deemed as "private". Hence, by contouring the boundaries of the private sphere, principles related to attribution contribute from an international law perspective to single out the legal functions of the State that shall be considered quintessentially public.

In this sense, the purpose of attribution is with no doubt one of policy. As the ILC stressed in the Commentary to the ARSIWA, rules of attribution play a limitative function, as outside of the circumstances they cover, a State cannot be found responsible for the conduct of any persons or entity.[120] By contrast, the more expanded are the basis of attribution, the bigger will be the scope of the public sphere and higher the chances of establishing international responsibility. The question of attribution is therefore a question of legal policy for the expansion of the public sphere necessarily involves a higher level of State control and responsiveness over activities under State's jurisdiction.[121] But the contingent effect of the distinction between the public and the private does not end here. The normative significance attached to its discourse is in fact also reflected in the perceived hierarchical relationship that exists between States and NSA. The State, through its organs and exceptionally through subjects under its (effective) control, exercises greater power than purely private individuals and has greater opportunities than its private counterparts to prevent wrongful events. The rationale behind the public/private divide lays therefore also in the different scope of power and capacity that States and non-state actors hold vis-à-vis international

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[118] C Chinkin, 'A Critique of the Public/Private Dimenstion' (1999) EJIL, 387. 389.

[119] J Crawford, 'First Report on State Responsibility', (1998) ILC YB/II, 1, 33-34. De Visscher, *Theory and Reality in Public International Law* (Princeton University Press 1968), 289; C Eagleton, *The Responsibility of State in International law* (NYU Press 1928), 240-241. R Ago, 'Sixth Report on State responsibility' (1977) ILC YB/II, para 9-10.

[120] ARSIWA, 39 (8)

[121] Usually, advocates of international human rights law welcome the possibility of expanding State responsibility to cover also acts of private individuals that would ensure a better protection of international human rights; C Romany, State Responsibility Goes Private: A Feminist Critique of the public/private distinction in international human rights law, in R Cook (ed), *Human Rights of Women: National and International Perspectives* (UPenn 1994); J Burke-Martignoni, The History and Development of Due Diligence Standard in International Law and Its Role in the Protection of Women Against Violence, in C Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence,* (Martinus Nijhoff Publishers 2008); V Tzevelekos, 'Reconstructiing the Effective Control Criterion In Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence and Concurrent Responsibility', (2014) Mich J Int'l Law,129. However, see for example J Goldscheid, D Liebowitz, 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48 Cornell International Law Journal, 301 arguing that the emphasis of due diligence by the UN, the European and the Inter-American human rights system in preventing and fighting gender violence fails to take into account the risk of growing State's intervention that might limit individual freedom and eventually thwart rather than advance women's rights and gender equality.

wrongs. This applies not just to the capacity of the State to prevent such wrongs, but also to the opportunity to commit international wrongful act; as a matter of fact, the idea that underlines the separation between States and NSA is that private individuals are not as equipped as States to commit acts that may negatively affect other States or the international community and for such reason they stand at the bottom of the hierarchical scale.

So much is clear from a theoretical standpoint. Yet, the reality of attribution shows that States have broad leverage to avoid responsibility when international wrongs occur as a result of the coordinated or concerted action with non-state actors. In this regard, the threshold of attribution of conduct of private individuals as provided by ARSIWA and elaborated by the international jurisprudence is particularly high, to the extent of querying about the existence of gaps in the current regime of law of international responsibility. This is particular true when it comes to fulfilling the standard of "effective control" required for conduct of private individuals to be attributed to the State apparatus. Scholars identify a number of reasons behind these gaps, and we might point to two main arguments that serve the purpose of the present analysis. One is very much the critique to public/private dichotomy embedded in international law and reflected in the law of State responsibility. It should be reminded that scholars have defined the private/public dichotomy as a normative construct based on political preferences that allows for wrongs that ought to be concerns of the international community to be sheltered from international law.[122] This has occurred traditionally within the area of international human rights law and women's rights, where the public/private system has operated both to obscure the rights and to legitimise the oppresion of women.[123] But public/private discourses have also been at the forefront of criticism in the context of global terrorism, to the extent that that the logic behind ILC rules of attribution for private acts does not foresee modern terrorism and appears inadequate when assessing the responsibility of States that harbour or sponsor terrorists.[124] Essentially, what critics of the public/private dichotomy contend is that not only is the distinction a reflection of specific philosophical, cultural and political premises on the role that Governments should fulfil in serving society, but that differences between functions of State organs and other (private) bodies have progressively become blurred and uncertain. In this sense, one should very much acknowledge that in contemporary international law, State and non-state actors have developed a coordinated rather than a hierarchical relationship; States have been entrusting and outsourcing governmental functions to non-state actors, and at the same time private individuals and groups have gathered enough power and strength to carry out international wrongs. These

[122] Chinkin (note 118); H Charlesworth, C Chinkin, *The Boundaries of International Law. A feminist analysis* (Springer 2000) 21.
[123] For an overview see C Romany (note 121).
[124] V Proulx (note 33) 626; D Jinks (note 33), 90.

changes challenge the foundational validity of the private/public narrative and therefore also the capacity of the contemporary law of State responsibility to address and respond to these new realities.

Aside from the public/private critique, the framework of attribution as crystallised by the ILC can be subject to another critical analysis that touches upon the conceptual understanding of its nature. In dealing with the notion of attribution, the Commentary to the ARSIWA provides that "attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality".[125] Attribution is in other words perceived by the ILC as a normative operation whereby conduct of a subject is attributed to the State depending on the legal criteria set forth by international law. Supporters of the normative nature of attribution argue that it is international law that establishes the array of norms that need to be fulfilled in order to affirm that a State has acted in a particular case.[126] Yet, the conception of attribution as a legal operation is contested by those who exclude that international norms dictate criteria through which a conduct is linked to the apparatus of the State; attribution is, in their view, exclusively a question of facts. Proponents of attribution as a *questio facti* submit that attribution of conduct for the purpose of international responsibility is not covered by any rule of law, but it is rather a problem concerning the ascertainment of a factual link between the individual's or entity's conduct and the State.[127] According to this vision, what international law does is simply to take notice of the structural organisation of the State by national law, which appears from the viewpoint of the former as a mere factual element.[128] One moves then from this fundamental premise to note that the operation of attribution consists of registering the "actual strength of the factual

[125] Commentary to the ARSIWA, 38-39.

[126] See L Condorelli, C Kress, The Rules of Attribution: General Consideration, in J Crawford, A Pellet, S Olleson (note 107) 225-228. By referring back to Kelsen, the authors argue that "international law identifies what is the State, not in order to define or structure it, but so as to allow the rules of international law to regulate effectively the relations between State", at 226. See also C Condorelli,'L'imputation à l'Etat d'un fait internationalement illicite', *Recueil de Cours* (Hague Academy of International Law 1984); P Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (Giuffré 2007) 17-20, 259-260, where it is submitted "Non si intende qui mettere in discussione la concezione (…) secondo cui l'attribuzione del fatto illecito è un'operazione disciplinata, almeno in una certa misura, da regole giuridiche internazionali".

[127] The main supporter of this theory is Arangio-Ruiz, see G Arangio-Ruiz, 'State Responsibility Revisited: The Factual Nature of the Attribution of Conduct to the State' (2017) Riv Dir Int, 1; G Arangio-Ruiz, State Fault and the Forms and Degree of International responsibility (note 46) 25; G Arangio-Ruiz, 'Second Report on State Responsibility' (1989) ILC YB/II, 50-53 where he submits that "the "operation" that international law really carries out with regard to the conduct in question is the imputation to the State (…) of the *legal consequences* of that conduct.(…) The act (the conduct) "belongs" to a given State as a matter of fact", at 52; see also H S Amerasinghe, 'Imputability in the Law of state Responsibility for Injuries to Aliens' (1966) Revue égyptienne de droit international, 91.

[128] Arangio-Ruiz, 'Third Report' (note 127), 51; Arangio-Ruiz, State Responsibility Revisited (note 127), 138.

features of the relationship between the acting person or persons and the State involved, the only role of international law being that played by the primary rule or rules attributing responsibility".[129] In light of the present analysis, the factual critique on the nature of the operation of attribution serves our purpose in so far as it unveils some of the shortcomings of the normative approach and the consequences that flow from its application. In this regard, one of the main issues identified by the factual approach in the construction of attribution as a normative operation is the undemonstrated existence of a "customary law" of attribution. One may finds principles or criteria to guide the interpreter in the logical operation that assesses the factual link between conduct and the State, however the identification of norms as provided by the ILC would rests on a inductive process that lacks factual validity.[130] Once it is recognised that there is no such thing as a customary law of attribution, it also becomes clear why the dispute over the nature of this process is not a mere doctrinal quarrel but it bears consequences in terms of scope of responsibility. If what counts for the purpose of attribution of conduct is the assessment on a case by case scenario of the existence of a factual connection between the act and the State, then the interpreter will not be constrained in this operation by a "rigid" framework of norms whose non-fulfilment rules out the possibility of finding a State responsible. Accordingly, Arangio-Ruiz notes that

'One of the most unfortunate consequences of the normative theory is the belief that any tribunal's decision on attribution based upon a given rule or principle may constitute, at least for that tribunal, a binding precedent – as any matter of law does (by a broad understanding of *iura novit curia*) – for any future decision or similar issues.'[131]

It is through this lens that this author reads the ICJ's decisions over attribution of conduct in the *Nicaragua* and *Genocide* cases, arguing that by relying upon "an inadequately elaborated and hastily adopted, allegedly codified, "customary international law" of attribution", the Court did not even attempt "to ascertain the existence and contents of such a "law".[132] On the contrary, the conception of attribution as a factual operation would enable a better appreciation of the complexity of the factual relationship between individuals and the State, and its juridical relevance for the purpose of attributing conduct.

[129] Arangio-Ruiz, State Responsibility Revisited (note 127),143. The line of reasoning that lead Arangio-Ruiz to appreciate the structural organisation of the State as a factual entity from the standpoint of international law is his particular conception of the State and the rejection of the assumption of the State as a juridical person, see G Arangio-Ruiz, 'Dualism Revisited: International Law and Interindividual Law' (2003) Riv Dir Int, 910.
[130] Arangio-Ruiz, State Responsibility Revisited (note 127),14-16.
[131] Ibid 14.
[132] Ibid 5.

Whether the attribution process is a legal operation or is really a question of facts, what the critique helps identify are the limitations that a clearly defined framework of standards and thresholds may entail from the perspective of a comprehensive system of international responsibility. In other words, "rigid" rules of attribution may fail to capture situations of coordinated actions between States and NSA that by not reaching the threshold set forth by the ARSIWA risk to fall in the realm of non-responsibility. In this context, it is necessary to undertake a brief analysis of these standards since the delimitation of the scope of attribution sets also the premise for the appreciation of due diligence in the law of State responsibility. For obvious reasons, a detailed discussion of rules of attribution as set forth in the ARSIWA is beyond the scope of this Chapter. However, a brief reappraisal of their content is crucial to expose the inherent gaps of the law of State responsibility. The exact identification of the criteria of attribution that serves the distinction between acts of the State and private acts allows in fact to contour the contemporary scope of the theory of due diligence. Whenever wrongful conduct is performed by a private agent and is not directed or controlled by the relevant State body, nor is attributable to the State through the concept of apparent authority, international responsibility may still be engaged through the causal and normative connection between the State's failure to exercise due diligence and the outcomes arising from of the wrongful conduct. The act of the private agent may not be "directly" attributable to the State, yet it may be the result of a State breaching its international obligations requiring the prevention of such harmful private act. From this perspective, attribution and due diligence closely function in connection to each other since the interpreter is bound to ask, when rules of attribution do not apply, whether grounds exist for the application of the theory of due diligence. Furthermore, thus applied due diligence functions also as a device that bridges the public and the private dichotomy entrenched in international law because it penetrates the sphere of "non-responsibility". Hence, identifying the content of rules of attribution is the first step to identify the scope of application of the theory of due diligence.

The ARISWA consist in eight articles on attribution grouped into three sets of rules. The first one includes a list of acts attributable directly to the State, such as acts of its organs (art 4), official or persons exercising elements of governmental authorities (art 5), organs of foreign States places at the disposal of the State (art 6), even when these authorities acts contrary to or beyond what is institutionally required (art 7). The second category deals with those situations where a factual link rests upon the relationship between the act of the individual or the entity and the State, such as in the case of a person acting under the instructions, direction or control of the State (art 8). Finally, the third group comprises those cases where the State may adopt a certain conduct as its own after the latter has taken place, for example when a private person steps in to fulfil a State function in absence of

official authorities (art 9); or when the State assume responsibility for the conduct of an insurrectional movement that succeed in replacing the Government or in creating a new State by separation or secession (art 10); or when attribution occurs because the State has adopted the conduct in question as its own (art 11).

3.3.1.1 Responsibility for wrongful acts of State organs and entities empowered to exercise elements of governmental authority

The first general rule governing State responsibility relies on the acts or omissions of State bodies. Whatever function they might exercise o whatever position they hold within the organisation of the State, acts or omissions of legislative, executive, judicial bodies can result in the application of secondary rules of State responsibility.[133] Article 4 of ARSIWA clarifies that for attributing responsibility it is irrelevant what function the State body performs and which position it holds within the administrative structure of the State. Notions of a State organ shall not be limited to organs belonging to the central and territorial authorities, as they also include organs at the regional, provincial or local level, regardless of their level in the hierarchy or the function performed.[134] The ARSIWA provide that the identification of a State body is determined according to internal law, which therefore is the primary legal source that gives content to the notion of attribution.[135]

Referring exclusively to internal law as ground for defining an entity an organ of the State is however not sufficient, as that status might be granted also by practice and not just by specific provisions of statutory laws.[136] In some legal systems the law of the State may in fact fail to clarify the criteria for the identification of State bodies and in these cases it is the power of the entity and its relationship with the other State organ that determines whether the former shall be classified as organ. This rule rests on the presumption that international responsibility cannot be escaped for the conduct of a body that is deemed by practice to be or to act as an organ. The threshold beyond which the status of an entity shall qualify as organ of the State has been clarified, at least *in abstracto*, by the *Bosnian Genocide* case, according to which the exceptional status of a *de facto* organ shall be granted to groups of persons, individuals or entities that operate as instrument of the State as they are placed at its 'complete dependence'.[137]

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[133] ARWISA, art 4.
[134] ARSIWA, 40-41.
[135] J Crawford, 'First Report on State Responsibility' (1998) ILC YB/ II, 34.
[136] ARSIWA, 42(11)
[137] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Report, 391-395.

Whether classified as a *de jure* or *de facto* organ, each act or omission thereof will be considered as a possible ground for international responsibility. Private and personal motivations driving the individual towards the performance of State functions are considered irrelevant for attributing conduct, since what really counts is whether the act falls within the official capacity (colour of authority) of the organ.[138] A purely private conduct however, taken as an act that has no connection with the official functions of the organ and therefore is merely an act of a private individual, will not be regarded as a State act. Acts of purely private character shall be distinguished from cases of *ultra vires* conduct, which occur whenever the person or the entity that acts in an official capacity exceed its authority or contravenes instructions.[139]In these circumstances, responsibility of the State shall not be excluded as the *ultra vires* act is performed using the authority or cloaked by the authority provided to the entity by the State.[140] The concept of apparent authority applies not only in cases of acts of State bodies, but also when the *ultra vires* conduct is performed by a private entity or a person that has been empowered by the State to exercise elements of governmental authority. The ARSIWA recognise in the common phenomenon of entities exercising elements of governmental authority entities such as public corporations, semi-public entities, agencies and private companies that though not organs, may exercise functions of public character normally exercised by State organs.[141] Given the increasing practice of outsourcing government functions, the ARSIWA ensure that responsibility shall not be avoided whenever the entity toward which State functions have been outsourced, has been empowered by the State to exercise these elements of governmental authority. Defining the content of 'State power' and 'elements of governmental authority' may prove a challenging task, and the Commentary acknowledge that what can be defined as State power 'depends on the specific society, its history and traditions'.[142] However, content of such power, the way in which it is conferred to an entity, the purposes for which it shall be exercised and the extent to which the entity is accountable, are all elements that qualify as to the definition of the scope of 'governmental authority'.[143] If it can be established that the entity was officially authorised to act on behalf of the State, this one will be internationally responsible for acts and

[138] ARSIWA, 42 (13).
[139] ARSIWA art 7.
[140] ARSIWA, 46 (7). See in this regard, *Case Concerning Armed Activities on the Territory of the Congo* [2005](Merits), ICJ Report, para 213-214, where the Court indicated that acts or omission of the Uganda military forces (UPDF) were attributable to the State of Uganda and stressed that "the contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority".
[141] ARSIWA 43.
[142] Ibid.
[143] Ibid.

omissions of the former even when the authorisation provided for some discretionary power or independence on the part of the entity.
Finally, there may be situations where an organ of one State is placed at the disposal of another and acts for the latter's benefit and under its authority. In such cases, the fact that the organ is placed under the orders of another State and acts exclusively for its purposes and on its behalf suffices to attribute its conduct to the second State alone.[144] The Commentary clarifies that in order for an organ to be placed at the disposal or another State this organ shall be appointed to perform functions that pertain to the State the organ has been placed at the disposal of, and in conjunction with its machinery or under its exclusive direction.[145] The mere assistant of aid offer by an organ of a State to another does not suffice for the purpose of attribution.[146] Obviously, in order for art 6 of ARSIWA to apply, the entity placed at the disposal of the receiving State must be an organ within the meaning of art 4. Cases of organs placed at the disposal of another State are rare and may involve situations of health services of judges placed temporary under the orders of another country.[147]

3.3.1.2 Responsibility for wrongful acts of private individuals

As a general principle of State responsibility, acts and omissions of private individuals cannot be attributed to the State for the purpose of international responsibility. Yet, the behaviour of individuals or groups of individuals may be considered an act of the State should a specific factual link exists between the person carrying out the conduct, and the State. In this regard, what should provide for a State to be found responsible for acts of private entities is the public character of the function or mission that this private entity performs and that shall therefore justify responsibility.[148] By acting on behalf on the State, the conduct of the private entity turns instrumental to State functions and purposes, and shall be considered a State action. In *Tadic*, the ICTY pointed to the rationale behind the attribution of conduct to private individuals, arguing that the rule exists,

[144] ARSIWA art 6.
[145] ARSIWA, 44.
[146] Ibid.
[147] Ibid.
[148] ILC Yearbook 1971/II(1), 264 "The underlying principle of international law, which is increasingly becoming clear as our analysis progresses, requires that the criterion should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed, rather than some formal link between the State organization and the person whose conduct is in question. (…) Similarly, it is logical that the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at an international level".

to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility.[149]

Art 8 of ARSIWA takes up this concept and provides that the conduct of persons or a group of persons that act on the instruction of, or under the direction or control of that State shall be considered an act of the latter.[150] Instructions, direction and control by the State of individual acts are to be considered separately, as the existence of one of them suffices to the attribution of conduct to the State. However, while the case of persons acting on State instructions has been treated as an autonomous ground for attribution, direction and control of the State over private entities of individuals have been interpreted as a single standard of attributing State responsibility.[151]

The ILC Commentary indicates that cases of instruction arise whenever private persons or entities, despite being outside of the structure of the State, act as State "auxiliaries" by being recruited or instigated to perform certain activities.[152] It is therefore the State that decides to commit the unlawful act, although the latter is actually performed by the private individuals or entities.[153] In order to be attributed to the State, the conduct of persons acting under its instructions shall not be one of 'complete dependence', as it suffices that instructions have been given in respect of each operation in which the violation has occurred.[154] At the same time, a clear manifestation of the will of the State authorising a specific act will be necessary in order to establish that the acts were committed under its instructions.[155] Although formally the content and the meaning of instruction

[149] *Prosecutor v. Tadic, IT-94-1-A, ICTY, Appeal Chamber*, (15 July 1999), para. 108-109.
[150] ARSIWA art 8.
[151] Truthfully, the ILC Commentary of art 8 indicates that the cases of attribution of conduct to a State for acts of private individuals or groups shall be grouped as two, mainly attribution owing to instruction and attribution owing to direction or control. Yet, direction and control are in fact seen is two distinct categories, especially if one turns to the Commentary of art 17 of ARSIWA. Here the Commission specifies that the term control refers to "cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern"; on the other hand, the term "direction" shall refer not just to "mere incitement or suggestion but rather connotes actual direction of an operative kind", ARSIWA art 17, 69.
[152] ARSIWA, 47(2).
[153] C Kress, 'L'Organe the facto en droit international public. Réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents' (2001) 105 Revue générale de droit international public, 93-144, 137.
[154] *Genocide* case (note 137) 400.
[155] *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)* (Judgment), 1980, ICJ Rep. 3 para 59, where the ICJ noted that "the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and teological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah (…)". In this regard, the ICJ held that "it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the

might be relatively easy to assess, in practice difficulties may arise especially as to the level of instructions required – whether this one should consist of a specific order to perform a specific act, or whether a more general instruction would suffice to the meaning of art 8. This issue is particularly important with regard to cases where private entities or persons are entrusted with a lawful mission by the State, but they end up violating both the instructions and the international obligations of the State.[156] The ILC provides that when the acts go beyond the scope of the authorisation, one should determine 'whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it'.[157] The Commentary goes on indicating that generally 'a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way'.[158] Hence, in principle the unlawful conduct carried out by private groups and contrary to the instruction of the State will not qualify as an act of the latter, differently from what happens in cases of *ultra vires* acts of State organs. The only way for attributing responsibility will be to prove that the *ultra vires* conduct of private individuals or entities was incidental to the mission instructed. Although the ILC did not clarify the meaning of 'conduct incidental to the mission', it may be argued that the latter encompasses circumstances where the unlawful act was instrumental to the accomplishment of the mission instructed and it was carried out in contexts where the State, by giving vague and general instructions, had implicitly accepted the risk thereof.[159]

As for the criterion of direction or control, the ICJ considered this standard of attribution in the *Nicaragua case*, where it was asked to determine whether violations of international humanitarian law committed by various groups of individuals during the Nicaragua civil war were attributable to the United States. The ICJ needed to assess in particular whether the acts of the *contras*, the rebel group fighting against the Nicaraguan government, were attributable to the US for the purpose of State responsibility. The Court rejected the argument put forward

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people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy".

[156] This problem is especially relevant with regard to State responsibility for private military companies engaged in certain activities on State's behalf. Several authors have acknowledged the application of the rule of instruction provided by art 8 of ARSIWA to private military and security companies (PMSC), supporting the idea that if a private military company is instructed to commit an unlawful act, the state giving this instruction will be responsible for the conduct of the PMSC. The problem with PMSC is relevant especially in cases where a State gives lawful instructions to a PMSC, but the private company performs unlawful acts, for example when a private entity is instructed to interrogate a prisoner of war, and in doing so, tortures him. See L Cameron, V. Chetail, *Privatizing War: Public Military and Security Companies under International Law* (CUP 2013) 205-208, H Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2011) 114-117.

[157] ARSIWA, 48.

[158] Ibid.

[159] Cameron, Chetail (note 156), 207.

by Nicaragua that the conduct of the *contras* was attributable to the US, holding that the US participation 'even if preponderant or decisive, in financing, organising, training, supplying and equipping the contras, the selection of its military or paramilitary targets, and the planning of the whole operation' was still insufficient for the purpose of attributing responsibility on the ground of control.[160] According to the ICJ in fact, in order to attribute the violations of international humanitarian law committed by the *contras* to the United States, it was necessary to prove that the US had 'effective control of the military and paramilitary operations in the course of which the alleged violations were committed'.[161] Twice the ICJ confirmed the rather stringent 'effective control' threshold established in *Nicaragua*, first in 2005 in the *Congo* case[162] and then in 2007 in the *Genocide* case. In this latter instance, the ICJ did not attribute the acts of genocide committed by the Bosnian-Serb militia to Serbia, for Bosnia failed to prove that the forces had acted under the instructions or under the effective control of Serbia.[163] In particular, the Court stressed that for the standard of 'effective control' to be met, 'it must be shown that this "effective control" was exercised (…) in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[164]

The issue with the 'effective control' test is therefore that the establishment of a high threshold to be met often leads to non-attribution of private conducts to the State. That is why in 1999 the ICTY Appeal Chamber advanced an alternative standard in *Tadic*, by referring to the 'overall control' test. The Chamber had to establish whether Bosnian-Serb forces were acting on behalf of the Federal Republic of Yugoslavia, so that the armed conflict could be deemed as international in character and rules of international humanitarian law could apply. The ICTY departed from the approach of the ICJ in *Nicaragua* and argued for a

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[160] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits,) [1986] para. 115.

[161] Ibid, see also *Separate Opinion of Judge Ago*, para. 18. It should be noted however that the ICJ in this case attributed instead the attacks perpetrated by the "Unilaterally Controlled Latino Assets'" (UCLAs) in Nicaragua to the United States. The Court held in fact that "although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the UCLAs while the United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established", at para. 86.

[162] Here the ICJ though dealt with the standard incidentally, by merely confirming the approach on effective control taken in the Nicaragua case, "The Court has considered whether the MLC's conduct was "on the instructions of, or under the direction or control of Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control or paramilitaries (Military and Paramilitary Activities in and against Nicaragua)", *Congo* case (note 140) 160.

[163] *Genocide* case (note 137) 399.

[164] Ibid, para. 401.

looser threshold of control, which according to the Chamber may vary depending on the circumstances of the case.[165] It should be noted though that the Chamber distinguished between the level of control required with respect to an individual or a non-organised group and the level required for "organized and hierarchically structured groups",[166] arguing that only in this last case overall control would suffice for the purpose of attribution.[167] Furthermore, in this case, the overall control test was not applied for the purposes of State responsibility, as the Chamber was only concerned with the issue of individual criminal responsibility.[168]

The ARSIWA did not express support for one standard of control over the other and simply provide that attribution can be met only if the State has 'directed or controlled the specific operation and the conduct complained of was an integral part of that operation',[169] leaving aside conducts that are merely incidental or peripheral to the operation.[170] Yet, the steady jurisprudence of the ICJ along with its ruling in the *Genocide* case suggest that the matter shall be settled according to the standard of 'effective control'. That does not mean however that the overall control test has not found appeal within the literature, as some authors have contended that while the standard of effective control may be appropriate to paramilitary operations, the overall control test may be more suitable in the

[165] *Tadic* (note 149) para 108-109.
[166] Ibid 109.
[167] Ibid. The Chamber defended this double approach by stressing that only in cases or organized groups "a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group', adding that "consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State".
[168] This is an important point, as in his Separate Opinion, Judge Shalabuddeen criticised the approach taken by the Appeal Chamber stressing the very distinction between *Tadic* and the *Nicaragua case* and noting that while Nicaragua had dealt with State responsibility, *Tadic* was dealing with criminal responsibility, so the relevant question of the case was not whether the Former Republic of Yugoslavia (FRY) was responsible for breaches of international humanitarian law, but whether the FRY had used force through the militia against Bosnia Herzegovina, Tadic, Separate Opinion of Judge Shalabuddeen, para 17. See also Tonkin (note 156), 118, arguing that Judge Shalabuddeen separate opinion is persuasive as the assessment of the conduct of FRY as a State that used force through a non-state armed group belongs to the realm of primary norms and it has nothing to do with the problem of attributing conduct for the purpose of State Responsibility. Beside the issue of meaning of control in the context of attribution, States have in fact a direct obligation not to use force against other States, regardless of utilising non-state actors to carry out their activities. In other words the assessment of acts of force by non-state groups that operate as proxies to the State serves to ascertain the breach of a primary rule of international law, but in no way are the acts of the non-state actors attributed to the State for the purpose of international responsibility. If a non-state group is acting on behalf of the State in using force against another State, the former will be in breach of its primary obligation not to use force, without the need arising to attribute an unlawful act performed by the non-state group to the State, see M Noortmann, A Reinisch, C Ryngaert, *Non-State Actors in International Law* (Hart Publishing, 2015) 170-171.
[169] ARSIWA para (3) para. 47.
[170] Ibid.

context of terrorism.[171] Certainly, the strictness of the 'effective control' threshold limits the possibility of holding the State responsible for acts of private subjects and reinforces the distinction between the public and the private sphere. Such a high standard appears particularly problematic given the growing role of NSA in assuming State-like functions and in carrying out trans-national harmful activities. Furthermore, the increasingly coordinated action that characterised the relationship between States and NSA begs the question on the suitability of the test of effective control and the attribution framework to respond to new realities.[172]

3.3.1.3 Other cases of attribution

Before turning to the relationship between due diligence and State Responsibility, a brief look shall be also given to the residual rules of attribution of conduct which takes place when the State adopts a certain conduct as its own after the conduct has taken place. In this regard, art 9 of ARSIWA provides that when a private person or a group of persons exercise elements of governmental authority in the absence of default of the official authorities and in circumstances such as to call for the exercise of those elements of authority, their conduct shall be attributed to the State.[173] Cases as such as relatively rare, as they requires the State apparatus to be in a situation of total or at least partial collapse.[174] In this regard, the ILC specifies that in order to be attributable under art 9 or ARSIWA, the conduct of the private persons shall consists in the performance of some kind of governmental functions, as it is this very feature that provides for a formal link between the person and the State apparatus.[175] Furthermore, the circumstances surrounding art 9 should manifest that some exercise of governmental authority, although not necessarily blatantly required by the State, was in fact needed and that the private person in question had therefore acted on his/her own initiative in order to fulfil this need.

Finally, art 10 of ARSIWA deals with insurrectional movements and provides that the conduct of an insurrectional movement shall be deemed an act of the State if

[171] K N Trapp, 'Shared Responsibility and Organized Non-State Actors in the Terrorism Context' (2015) 62 Netherlands International Law Review, 141. See O. de Frouville, Attribution of Conduct to the State: Private individuals, in Crawford, Pellet, Olleson, (note 107), 270.

[172] This is why there has been an attempt on the part of the doctrine to look at alternatives and strategies to ensure accountability for international harmful acts carried out by NSA. In the context of armed opposition groups, see for instance V Bilkova, 'Armed Opposition Groups and State Responsibility' (2015) 62 Neth Int'l Review; as for multinational enterprise see M Karavias, 'Shared Responsibility and Multinational Enterprises (2015) Neth Int'l Review; for private military security company see J Cockayne, 'Private Military Security Companies', in A Clapham and P Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014).

[173] Art 9 ARSIWA

[174] ARSIWA, 49(5).

[175] ARSIWA, 49 (4).

the insurrectional movement becomes the new government of the State, or succeeds in establishing a new State in part of the territory of a pre-existing one or in a territory under its administration (in which case the acts will be attributed to the new State).[176] It is clear that this rule of attribution applies only should the movement be successful in its struggle against the sitting regime, either by seceding from the State or by overthrowing the existing government. This is because as a general rule, responsibility of States is not engaged for acts of insurrectional movements that operate within them, as their conduct presents itself as purely the conduct of private individuals – from the point of view of the State fighting the rebel movement. During the ILC works on ARSIWA, Ago suggested treating insurrectional movements establishing control over a portion of a territory as separate subjects of international law,[177] however the Commission eventually did not pursue this option and made no reference to the international personality of insurrectional movements. Crawford has noted that, outside the context of colonisation, attaching temporary legal personality and therefore responsibility to insurrectional movements is superfluous since the disappearance of the movement is at the end ensured either by its dismemberment or by its success.[178] Art 10 finds its reasoning mainly in the circumstances that, as the ILC Commentary explains, 'it would be anomalous if the new regime or the new state could avoid responsibility for conduct earlier committed by it'.[179] Furthermore, if the insurrectional movement succeeds in becoming the new government of the State, attribution – and therefore responsibility – is grounded in the principle of continuity that exists with the new State.[180] The reason for attribution shall in other words be found in the close organic link existing between the victorious movement and the State's structure.

If international responsibility is engaged when the insurrectional movement succeeds in establishing a new government or in overthrowing the existing one, it follows that should the insurgency fails, responsibility will not be attached.[181] Yet the victory of the original State over its insurrectional movements does not automatically exclude the possibility to call for State responsibility. First of all, the State will be responsible for the acts of its armed forces in suppressing the movement. Clearly, if State bodies violates international obligations in fighting the movement, for example in committing violations of human rights,

[176] ARSIWA art 10.
[177] Ago, 'Fourth Report' (note 19), 129.
[178] Crawford, State Responsibility (note 98),171.
[179] ARISWA p. 50(2).
[180] P Dunberry, 'New State Relationship for Internationally Wrongful Acts by an Insurrectional Movement' (2006) 17 EJIL 605, 611-612.
[181] This was originally provided by the first reading of the Draft Articles, where the text at art 14 provided that " the conduct of an organ of an insurrectional movement, which is established in the territory of a State or in another territory under its administration, shall not be considered as an act of the State under international law".

responsibility will be engaged following the application of art 4 of ARSIWA. At the same time, the State could also be found responsible for its failure to exercise due diligence in maintaining internal peace and order. In this case, responsibility will flow from the failure of the State to discharge its due diligence obligations over the conduct of insurrectional movements. In the *British Claims in Spanish Zone of Morocco* it was noted that,

'The State is bound to a certain vigilance (…) [A] State may not require another state, injured in the interests of its nationals, to remain indifferent if opportunities for relief are, without plausible reason, manifestly neglected, or it the authorities, warned in time, do not take any preventative measure, or if, again, protection is not granted under conditions equal to citizens of all nations.'[182]

4. State responsibility revisited: toward an integrated system of international responsibility through the theory of due diligence

The identification of the grounds and scope of attribution of conduct sets the premise for the study of due diligence as a complementary tool in the law of the State responsibility. It has been stressed how existing rules of attribution points to a strictness of the standard that leaves great leverage to States in terms of avoidance of responsibility when non-state actors participate or act as catalyst to the commission of international wrongful acts. Suffice is to remind that the notion of instruction, direction, and control provided by the Commentary to art 8 and further elaborated by practice, fails to capture situations where the connection between the State and the private entity - whether occasional or systematic - does not entail a stringent control over the operation or interference in its organised structure. The vast array of coordinated and inter-dependent actions of States and non-state actors that falls under the threshold of effective control begs therefore the question over the accountability gaps of the law of State responsibility and the identification of strategies to address them.

It is submitted that the theory of due diligence performs in this sense a complementary function to the paradigm of attribution, providing for a comprehensive framework of responsibility that can effectively cope with wrongful acts of non-state actors. This "integrated" framework is grounded on the idea that whenever wrongful acts of a private subject are not attributable to the State, a violation of due diligence is expected in order to engage with State responsibility. In particular, if State's participation or control over the conduct cannot be proved, responsibility can nonetheless arise by resorting to the State's failure to exercise diligence and prevent the wrongful event carried out by the private subject. Conceiving an "integrated" State responsibility framework that

[182] *British Claims in the Spanish Zone of Morocco* (note 50) 615,642.

complements attribution with the theory of due diligence permits also to capture the different degrees of involvement of a State in the international harmful act of the non-state actor. This is so because, despite being complementary, responsibility for direct attribution and responsibility for failure of due diligence are based on conceptually different grounds. To fully appreciate the difference, one needs to focus on the relationship between the act and the State. In cases of attribution, the factual *rattachement* between the act and the State is as tight that the former is "assumed" by the State as its own. As a result, the State is deemed responsible for the commission of the act to which is linked by a relationship of direct factual causality. On the contrary, in the case of responsibility for failure of due diligence, the *rattachement* with the State is loose to the point that the act cannot be regarded as part of the State's conduct. Yet, a connection between the act and the State may still be found in the circumstance that the conduct of the State is an indispensable complement to the private party's act in the occurrence of the wrongful event. This relationship is substantiated by the fact that had the State adopted appropriate measures or reacted promptly, the harmful event carried out by the private entity – which may or may not coincide with the act - would have been prevented. From a causal standpoint, the State is linked to the act or the outcome thereof by a relationship of normative rather than factual causality. Obviously, to say that a State is responsible because had it exercised proper diligence the international harmful act would have been avoided means that there was a duty falling upon the State to prevent the occurrence of that act. Hence, the establishment of the normative link between the State and the act is necessarily subject to minimum two conditions: that an obligation to act existed on the part of the State before the wrongful act took place and that the State exercised a minimum level of control over the territory or the conduct in question.

Before entering into the specifics of the scope of due diligence in the context of international responsibility, one needs to test the validity of the assumptions set above and to determine whether due diligence performs in fact a complementary function to the attribution framework. In this regard, the thin red line that separates responsibility through attribution of conduct and responsibility for failure of due diligence is traceable in within international jurisprudence. In the *United States and Diplomatic Consular Staff in Teheran*, the ICJ was faced with the question on whether Iran held responsibility for the taking over of the United States Embassy by a group of Islamic militants and for not ensuring the hostages' release. As for the phase of the events that occurred after the occupation of the US Embassy and the seizure of the Consulate by the militants, the Court found a sufficient link for attributing the conduct of the militants of holding the hostages directly to Iran. In particular, it was argued that the endorsement through repeated statements by Iranian authorities of the maintenance of seizure over the US Embassy had transformed the *legal nature* of the situation created by the

occupation and translated it into an act of the State of Iran.[183] The Court contended in fact that the militants that authored the invasion and held the hostages in capture became during this phase agents of the State of Iran for whose act the latter was directly responsible.[184] Yet, before the acts of the Islamic militants received the seal of government's approval necessary to turn them into acts of the State, the Court was still able to engage with the responsibility of Iran for the series of events that preceded the occupation of the Embassy and the detention of the hostages. In evaluating the acts of the militants in attacking the Embassy on the 4th of November 1979, the ICJ set aside the argument that the general declarations against the United States' government made by the Ayatollah Khomeini could be interpreted as authorisation on the part of the State to invade and seize the US Embassy. Thus, it was concluded that the initiation of the attack was not attributable to the State of Iran. Yet, the Court noted that that fact that attribution could not operate 'does not mean that Iran is, in consequence, free of any responsibility in regards to those attacks'.[185] Accordingly, the ICJ noted that in any event Iran was to be held responsible for failure to prevent the attack on the US Embassy and to take appropriate steps to ensure the protection of the US personnel.[186] If read through the paradigm of art 2 of the ARSIWA, responsibility of Iran for the attack to the US embassy is no exception to the rule set by the ILC. What the Court contested was the breach by the government of Iran and its organs of the primary obligation to protect the premises of the US Embassy provided by the Vienna Convention on Diplomatic Relations and by customary international law. However, from the perspective of responsibility of a State vis-à-vis conducts of non-state actors, the recourse to the theory of due diligence captures the different level of State's involvement in the harmful act and fills the responsibility gaps left by the attribution scheme.

The idea of an "integrated" framework of responsibility where conducts of non-state actors vis-à-vis the State are appreciated on a continuous scale emerged in particular through the ICJ's line of reasoning of the *Genocide* case. In the *Consular Staff*, the Court clearly separated the two distinct sets of acts that led

[183] *United States Diplomatic and Consular Staff in Teheran* (note 155) para 74, "The policy of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various context. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these fact by the Ayatollah Khomeini and other organs of the Iranian States, and the decision to perpetuate them, translated continuous occupation of the Embassy and detention of the hostages into acts of that State".

[184] Ibid.

[185] Ibid, 61.

[186] Ibid, 63. "The facts set out (…) establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion".

first to establish responsibility for Iran's failure to protect, and then Iran's direct responsibility for the occupation of the Embassy and the detention of the hostages. In the *Genocide* case instead, the Court clearly engaged with the possibility of establishing Serbia's responsibility through the alternative application of the due diligence theory and the attribution framework. The issue at stake revolved around the responsibility of Serbia in connection with the acts of genocide perpetrated by the militia of the Republic of Srpska (VRS) in Srebrenica in 1995. After contending that the Srebrenica's massacres amounted to a crime of genocide within the meaning of the respective Convention, the Court pointed to the opportunity to consider three alternatives in turn. First, the Court would have to determine 'whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility'.[187] Secondly, it should have been established if Serbia could be found responsible for complicity in the commission of genocide; and third, the Court would have to rule on whether Serbia 'complied with its twofold obligation deriving form Article I of the Convention to prevent and punish genocide'.[188] In this regard, the ICJ stated clearly that the three tests of responsibility stood in a hierarchical relationship whereby compliance with the test in the high-raking position would free the Court from assessing compliance with the other one(s). As for the breach of the obligation to prevent genocide and therefore responsibility for failure of due diligence, it was stressed that 'it is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of prevention'.[189]

Admittedly, the impossibility to satisfy both the test of attribution of conduct and the test of due diligence was grounded by the Court in the circumstance that 'a State cannot have satisfied an obligation to prevent genocide in which it actively participated'.[190] Yet, in the assessment of State responsibility, one may use the same logical sequence from the perspective of the relationship between the State and conduct carried out by a private subject. Asked to evaluate the conduct of the Bosnian-Serbia militia vis-à-vis the State of Serbia, the ICJ initially rejected the complainant's argument that the acts of genocide were directly attributable to the latter. It was noted that these para-military groups were neither in a relationship of 'complete dependence' nor were directed or controlled by the State of Serbia.[191] As for instruction, direction and control the Court did not gather sufficient evidence that instructions were issued by the Serbian federal authorities, nor that

[187] *Genocide* case (note 137), para 379.
[188] Ibid.
[189] Ibid, para 382.
[190] Ibid.
[191] Ibid, 391-395 for the qualification of conducts of the VRS and the Scorpions as *de facto* organs of Serbia; as for the attribution on the ground of instruction, direction and effective control, see para 413.

effective control had been exercised over the conduct of the militia. After having excluded any stringent factual link between Serbia and the conduct of non-state actors, the Court turned to the issue of complicity. Here the ICJ acknowledged that the degree of involvement of Serbia's over the acts of the VRS amounted to 'substantial aid of a political, military and financial nature' which started before the massacres and continued during those events.[192] However, after carefully examining the conditions set forth by art 16 of ARSIWA and the requirement of *dolus specialis* for complicity in genocide to arise, the Court found no sufficient proof that Serbia provided aid to the militias in full awareness that the latter would be use to commit genocide.[193] Finally, the Court turned to the issue of prevention of genocide and to the inherent duty to exercise due diligence entrenched within obligations to prevent. Focusing on the link between the conduct of Serbia and the conduct of the militias, the Court noted that

'The FRY was in a position of influence over the Bosnian-Serbs who devised and implemented the genocide in Srebrenica, unlike that of any other State parties to the Genocide Convention, owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.' [194]

Because of the duty to prevent genocide to which Serbia was bound and the capacity to influence the conduct of the militia, the Court found a violation of such obligation of prevention and held Serbia responsible accordingly. Setting aside for now the conditions for the obligation of due diligence to arise and for responsibility to flow as a result of its breach,[195]what needs to be emphasised here is the connection between the State and the acts of NSA that form the ground for

[192] Ibid 422.
[193] Ibid 423-424. In this sense, the assessment of Serbia's responsibility for complicity represents the intermediate test of accountability between responsibility for direct conduct and responsibility for failure to exercise due diligence. From the perspective of an "integrated" responsibility framework that can effectively capture all the layers of State's involvement in conduct of non-state actors, one may therefore query whether aid or assistance as per art 16 or the ARSIWA constitutes the missing block that stands between a very stringent degree of connection between State and NSA and a broad one. It has been argued indeed that despite being originally conceived as a form of ancillary responsibility based on the commission of an international wrongful act by another State, art 16 may also find application when NSA carry out the wrongful act. In this case, aid or assistance would operate not just as a form of attribution of responsibility for the international wrongful act of another State but rather as a form of attribution of conduct addressing forms of cooperation between States and NSA that fall short of effective control. Arguing for a theoretical responsibility framework of this kind is Lavonoy (note 24) Chapter 7; see also D Amoroso, 'Moving Towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law', (2011) Leiden Journal Int'l, 989. For a critique of these positions see instead M Jackson, *Complicity in International Law* (2015 OUP), Chapter 8.
[194] Ibid, 434.
[195] Sources, nature and conditions of obligation of due diligence will be thoroughly discussed in Chapter 2.

the application of the theory of due diligence *in lieu of* the attribution framework. In this regard, the strength of the political, military and financial links between Serbia and the VRS was not deemed sufficient for the purpose of attribution of conduct or complicity in genocide. Yet, the nature of such connection appeared stringent enough for the Court to sustain that had Serbia reacted promptly and diligently, genocide could have been averted.

A number of considerations are in order after briefly reviewing the rationale of the ICJ in dealing with the issue of responsibility of States for wrongful acts carried out by NSA. First, as it was sketched at the beginning of the present analysis, the premises of responsibility for failure of due diligence and responsibility of the State for direct attribution must be kept distinguished. Responsibility according to the theory of due diligence is not responsibility of the State *for* the wrongful conduct of private subjects, rather responsibility for the operations, or the lack thereof, of State's bodies in a position to influence the conduct of NSA or supervise any risk-generating activity carried out by the latter. Responsibility for direct attribution ensues from a breach of an international obligation "embodied" in the conduct physically performed by private subjects. With due diligence instead, responsibility flows from a breach of obligations of different kind, namely obligations "to prevent" or "to ensure" against the internationally harmful conduct of private subjects. Looking at the theory of due diligence as a strategy to accommodate the responsibility gaps does not mean therefore to reinterpret or broaden up the scope of rules of attribution as codified in the ARSIWA. In this sense, the question of responsibility through the application of the theory of due diligence is really a question of 'what duties are laid upon the state with regard to individuals within its boundaries by positive international law'.[196]

Second, if through the theory of due diligence responsibility flows from lack of vigilance and prevention on the part of the State, it follows necessary that the latter needs to be in the position *to prevent* the harmful act. After all, it would be unfair to allocate responsibility on the State for having failed to prevent a conduct when the latter had absolutely no power over the situation in question or the risk thereof. In this regard, in the *Genocide* case the Court anchored Serbia's responsibility to the capacity to influence the conduct of the militias. Without entering into the details of a discussion that will constitute the object of a separate Chapter, suffice is to note here that a certain degree of control of the State is expected on the territory or arguably over the conduct in question.

Third, although in responsibility for failure of due diligence the conduct of the State (and subsequently the nature of the breach) is distinct from the conduct of NSA, there is still a degree of connection between the two. As a matter of fact, not only needs the State to hold a generic and abstract power (in the form of control) that enables it to prevent the wrongful conduct; this power must also be assessed

[196] Eagleton (note 119) 77.

in concreto to ascertain that there was in fact room for the State to influence and prevent the conduct of the private subject in question. Such assessment *in concreto* can be very much regarded as the connection between the State and the conduct of the private entity. It is from this perspective that it is possible to conceive a responsibility framework which includes the theory of due diligence as an "integrated" framework vis-à-vis the conduct of NSA. Responsibility is in fact appreciated – through the recourse either to the attribution scheme or to the due diligence paradigm – based on the degree of connection between the conduct of the private subject and the State.

As for the juridical *nature* of this link, the position of scholars varies. We have previously pointed to the conception of Special Rapporteur Roberto Ago, according to whom the act of the private subject is merely a *condition* for the existence of State responsibility. Ago contends that the conduct of the private entity operates 'externally as a catalyst on the wrongfulness of the conduct of State organs'[197] in the particular circumstances of the case. This act (and the event that flows thereof) is seen in other words as the occasion that allows State responsibility to be established. What matters to Ago is to demonstrate that the link between the State and the act of the private subject shall not be sought in the subjective element of attribution, but rather in the objective one. In this sense, the Special Rapporteur concludes that the conduct of the NSA is what makes the State's failure of due diligence *concrete* and materialises the breach of the obligation of prevention.[198] Arangio-Ruiz on his part argues that the private party's injurious conduct becomes 'through the involvement of the State organ's action or omission, and despite the private party's relatively less intense connection with the State (…) a *material component* of the State's delict'.[199] The private subject's act remains in fact well outside the act of the State, however it "integrates" the State organ's unlawful conduct as the triggering event of State responsibility.[200] This conception of the private subject's conduct as an integral component of the international wrongful act of the State allows the author to conclude that

'a realistic construction of the phenomena in discourse [Responsibility for conducts of private subjects not directly attributable to the State] must move back, so to speak, (…) to the organic concept of the State and particularly to the barbaric concept of "group solidarity" in the Germanic sense (if not of "collective responsibility").'[201]

[197] Ago,'Fourth Report' (note 19), 97.
[198] R Ago, 'Seventh Report on State Responsibility' (1978) ILC YB/II, UN Doc A/CN.4/SER.A/1978, 36.
[199] Arangio-Ruiz, State Responsibility Revisited (note 128), 147 (emphasis added).
[200] Ibid 148.
[201] Ibid 147.

Finally, Dunn proposes a different way to interpret the juridical relationship between the act of the private subject and the State, through the lens of the theory of risk allocation. In this sense, a State would bear responsibility to the extent that the connection between the State apparatus and the wrongful act of the private entity integrates a situation which the State could have averted by exercising and fulfilling its essential governmental functions.[202] In particular, whenever the particular circumstances in question would interfere with the normal course of economic and social relations and the duty to prevent such situations could be borne by the usual governmental bodies of the State, responsibility may be allocated upon that State for failing to discharge such duties.[203]

Overall one should not read too much into the different theoretical underpinnings that scholars indicate to construe the link between private conduct and the State. While different theoretical conceptions might in fact have a bear on the nature of due diligence as a primary obligation,[204] they do not affect the understanding of due diligence as an effective tool to bridge the gaps of international responsibility when rules of attribution do not apply. From this perspective, what should be kept in mind is that whenever the link between the State and the conduct of the NSA falls short of the attribution framework, the possibility to engage with the theory of due diligence shall be explored by looking at the preventive obligations falling upon the State.

5. International liability and due diligence

5.1 State responsibility and international liability: a necessary distinction?

In appraising the role of due diligence in the context of international responsibility, some observations shall be also devoted to the topic of international liability and the works of the ILC that widely discussed notion and content of due diligence.

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[202] F S Dunn, *The Protection of Nationals: a study of application of International Law* (The John Hopkins Press 1932), 145-146

[203] Ibid, 144. It should be noted that Dunn applies the theory of risk allocation to the entire framework of international responsibility. Moved by the intent to steer clear of any theory of international responsibility based on fault, the author suggests that the State shall always take over the risk of misuses of governmental power and assume the risk thereof whenever derelictions and errors on the part of the government might become so numerous so as to make the social course of social and economic life difficult, at 133-143.

[204] We refer here to the issues connected to the relationship between the event carried out by the private subject and the breach of the obligation of prevention, which will be analysed during the course of Chapter 2. Suffice is to say here that conceiving obligations of prevention as obligations whose breach depends on the occurrence of the external event has a bear on the conception of due diligence as self-standing and autonomous category of obligations.

During its work on State responsibility for wrongful acts, the ILC came across the issue of liability[205] for harm resulting from lawful, state-authorised activities conducted within State territory. Following the advancement of modern technology and the proliferation of risk-based activities in the field of environmental, energy or space law for instance, the question of liability for damaging acts stemming from activities that may bring about relevant damages despite reasonable precautions taken by the State became pressing. Since the question of liability and compensation for damaged resulting from lawful activities reached far beyond the scope of the work done so far by the ILC on State responsibility, the Commission decided to focus on this separate focus aside its work on international responsibility for wrongful acts. Therefore, the ILC started to consider the issue of 'International Liability for the Injurious Consequences of Acts Not Prohibited by International Law' in 1973[206] and concluded its works in 2006, after more than 30 years of work on the topic. Eventually, the subject was split into two sub-topics closely linked to one-another, namely the 2001 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, and the 2006 *Draft Principles of Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities*.

Overall, the characteristic feature of international liability is that compensation for transboundary damage is allowed even when no international obligation has been breached, as the only thing that matters is the causal link between damage and the activity performed by the State. The basic requirements to trigger liability are therefore the existence of damage and a link of causality between such damage and a lawful risk-generating activity carried out in the territory, under the jurisdiction, or the control of the State. This means also that the claimant does not need to establish the existence of a breach of the law, but only harm suffered and the causal relationship between such harm and the activity. The liable subject - the State - is not necessarily the direct author of the damage, since the latter may have

[205] As noted by the first Special Rapporteur on International Liability, the English term liability was chosen to distinguish the obligation of States in case of international wrongful acts and consequences arising from lawful activities that implied the necessity to make reparation. The two "separate" regimes can be however distinguished in terms of formal language only in English, since a similar counterpart in French or Spanish does not exists, see R Q Quentin-Baxter, 'First Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1980) YB ILC/II, 250.

[206] ILC, 'Report of the Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1978) YB ILC/II 149, 152-153 where the Commission stated that "From the outset of its work on the topic of State Responsibility, the Commission agreed that that topic should deal only with the consequences of international wrongful acts" and stressed the difference between responsibility and liability by noting that "owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. Being obliged to accept the possible risks arising from the exercise of an activity which is itself lawful, and being obliged to face the consequences – which are not necessarily limited to compensation- of the breach of a legal obligation, are two different matters".

arisen from activities performed by private subjects. However, the State is still under the obligation to assume the consequences of the damage, regardless of any wrongful act.[207] Principles of liability can be found in treaties[208] that relate to different activities potentially causing harm – civil aviation,[209] oil pollution,[210] nuclear energy,[211] hazardous wastes[212] among the others. Within these regimes, primary liability falls usually on private persons or entities[213] operating within the State of origin, while States are under the obligation to allow for prompt and adequate compensation to non-resident victims of harm or damage caused within their territory, under their jurisdiction or control.

The typical features of liability prompted the ILC to make a clear distinction in terminology and scope between 'responsibility' and 'liability', with Special Rapporteur Ago noting that responsibility and liability are two completely separate issues as 'if injury caused by a lawful activity – that was to say, one that was not prohibited, such as activities in outer space – entailed an obligation to make reparation, that was not, strictly speaking, a matter of responsibility but of a guarantee'.[214] The Commission believed that it was better to proceed with the work on State responsibility by confining the topic to wrongful acts given the profound difference between 'obligations that arise from wrongful acts and others from acts which international law does not prohibit'.[215] According to the first

[207] C Nègre, 'Responsibility and International Environmental Law', in Crawford, Pellet, Olleson (note 107) 807.

[208] It is disputed whether international liability finds support also in customary international law. According to some scholars, the international liability principle widely accepted in treaties may have already passed into the realm of general international law, see Cheng, 'International Responsibility and Liability for Launch Activities' (1995) Air & Space Law, 297, 306; J Barboza, *The Environment, Risk and Liability in International Law* (Martinus Nijhoff Publishers 2011) 31. Others are more skeptical, for example PM Dupuy, *Droit International Public* (Dalloz, 1996) 366.

[209] Convention on International Liability for Damage Caused by Space Objects (adopted 29 November 1971, entered into force 1 September 1972), 961 UNTS 187.

[210] Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975), 973 UNTS.

[211] Paris Convention on Third Party Liability in the Field of Nuclear Energy (adopted 31 January 1963, entered into force 4 December 1974) 956 UNTS 251; Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963, entered into force 12 November 1977) 1063 UNTS 265.

[212] For example, Convention on Liability and Compensation in Connexion with the Carriage of Noxious and Hazardous Substances by Sea (adopted 1996, not yet in force).

[213] Cases of State liability are in fact very few: see the Convention of International Liability for Damage Caused by Space Objects and the United Nations Convention of the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), art 139 and 235.

[214] ILC Yearbook, (1973) Vol II 14. Similarly, in 1978 the ILC Working Group noted that the topic was a new one, see ILC, 'Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law', (1978) ILC YB/II, 150.

[215] ILC Yearbook (1980) Vol II, 248. Some members of the Commission went as far as to suggest that the topic of international liability arising out of acts not prohibited by international law should have been treated as an additional chapter to the topic of State responsibility: basically, the occurrence of transboundary harm or damage would take the place of a wrongful act or omission therefore giving rise to an obligation upon the State to provide reparation, see R Q Quentin-Baxter,

Special Rapporteur Quentin Baxter, the reason for treating responsibility and liability as two separate regimes stemmed from the contrast between acts prohibited by international law and acts not prohibited.[216] That does not mean however that the ILC failed to acknowledge the close relationship between responsibility and liability. Not only did the Commission stressed the need to clarify the distinction, but Special Rapporteur Baxter in his first report also noted the universality regime of international responsibility and acknowledged its application also in cases of international liability.[217] However, he also emphasised that the two regimes were working on different planes.[218] Basically, the principle that gives origin to international liability provides that when a State suffers substantial injury from acts or omissions of another State, a new legal relationship arises that obliges the State of origin to attempt in good faith to provide redress for the situation caused. Contrary to the regime of responsibility, the State cannot refuse cooperation claiming that the danger was not in his knowledge or under its control: although the injured State will not be in the position of demanding limitation in freedom of actions, the State of origin will have to provide redress.[219]
The idea of two regimes conceptually separated emerges clearly in the early works of the ILC: in the draft articles presented by the second Special Rapporteur Barboza at the ILC session in 1988 for example, proposed art 1 provided that international liability shall apply 'with respect to activities carried on under the jurisdiction of a State as vested by international law, or under its effective control when they create an appreciable risk of causing transboundary harm',[220] and art 5 clarified that 'the fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule under international law'.[221]
According to the Commission's view, reparation for injurious consequences was a primary obligation originating from the causation of harm and not based on the breach of a primary obligation. Initially, reparation was conceived as part of a

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'Fourth Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1983) ILC YB/II, 202.

[216] Quentin-Baxter, 'First Report' (note 205), 248. The Special Rapporteur also noticed that although treated in general terms, the regime of international liability applies especially to the context of environmental hazard.

[217] It should be noted however that the Special Rapporteur provided that only violations of the obligation to compensate can be seen as breach of primary norms that triggers State responsibility, as opposed to violation of obligations of prevention. This is because the general idea of Quentin-Baxter at the beginning was that a violation of the obligation of prevention triggers liability, which has to be established according to a more or less restrictive standard of due diligence, but in no way it triggers international responsibility.

[218] Quentin-Baxter, 'First Report' (note 205), 253.

[219] Ibid, 264.

[220] J Barboza, 'Fourth Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1988) ILC YB/II, draft art 1, 254.

[221] Ibid, draft art 2.

'compound' primary obligation that embodied prevention of the transboundary harm, minimisation of the risk, and reparation for the occurrence of damage. In other words, reparation triggered by wrongfulness – i.e. reparation as a secondary rule stemming from the breach of a primary obligation – had to be conceptually distinguished from reparation as part of a primary rule that imposed it as contingent upon the occurrence of a certain event – namely transboundary harm.[222] In this context, the primary obligation to prevent transboundary harm existed with no consequential responsibility for its breach in terms of secondary rules.[223] The ILC however departed from this approach and soon acknowledged that a failure to comply with the obligation to prevent transboundary harm could in fact trigger State responsibility for wrongful acts. Later, this prompted the Commission to separate the two subjects and to focus on the one hand on content and scope of obligations to prevent transboundary harm – whose breach would spark the application secondary rules, and liability as consequent to the occurrence of harm.[224] The regime of liability, intended as reparation for the transboundary damage, would instead operate if there were no agreed treaty regime between the State of origin and the affected State.[225] Liability could occur regardless of whether the harm was the result of a failure to comply with the obligation of prevention, and would obligate the State of origin to negotiate compensation whenever harm causally attributable to lawful activities set forth by the Commission had arisen.

[222] Quentin-Baxter, 'Fourth Report', (note 215), 213. The idea of reparation as part of a compound obligation composed of prevention and reparation was advanced by the first Special Rapporteur Baxter in his work presented to the ILC. Baxter explains the nature of this compound obligation as a primary rule that contains its own secondary element, namely the duty to provide reparation as consequential to the causation of harm. Prevention, in the mind of the Special Rapporteur, was a necessary measure – the first bit of this compounded obligation - to be adopted by the State of origin in order to avoid or minimize the risk of transboundary harm. However, the breach of the obligation regarding prevention did not give the affected State any right of action, as provided by rules of international responsibility for wrongful acts. Also the second Special Rapporteur Barboza initially supported Baxter's idea that failure to comply with the obligations provided within the scope of the duty to prevent did not give rise to the application of secondary rules of international law, see Barboza, 'Second Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1986) ILC YB/II, 149. The idea of prevention as linked exclusively with reparation is well described in the 1988 Report where the Special Rapporteur noted that "if prevention is linked exclusively with reparation, (…) the preventive effect, (…) is achieved through the conditions imposed by the regime with respect to reparation; whoever is carrying out the activity knows that he will have to compensate for injury without there being, in principle, any legal defense whatsoever, as a purely statistical operation. Naturally, he will try to take the preventive measures necessary to avoid the damage and thereby alleviate the burden of such expenses on the management of his enterprise". See Barboza, 'Fourth Report' (note 220) 266.

[223] Quentin-Baxter, 'Third Report on International Liability for Injurious Consequences arising out of Acts not Prohibited Under International Law' (1982) ILC YB/II, 58.

[224] UNGA, Res 53/102 (1998) UN Doc.A/RES/52/156.

[225] Barboza, 'Fourth Report' (note 215), 266-267.

At a closer look, the two accountability regimes appear coherent rather than opposed to one another. Both prevention and liability are in fact a set of primary norms covering international environmental law and the principles of precaution and prevention. International responsibility for wrongful acts as based on secondary norms can be invoked should a State fail to comply with its obligations described in primary norms. There is no need to distinguish separate regimes of international accountability, as secondary norms that trigger State responsibility can only be invoked when a breach of primary obligations occurs.[226] In other words, liability is not a "secondary element" of a particular causal relationship between the activity of the State and the harmful transboundary event, but rather a primary obligation that is triggered by the occurrence of certain factual circumstances. Rules of international responsibility for acts not prohibited by international law describe international obligations of States regarding both the obligation of prevention with regard to transboundary harm, and compensation for damage a State failed to prevent. These obligations are primary norms whose violation entails State responsibility.

The confusion with the existence of two separate regimes of accountability derived mainly by the clear distinction made by the ILC on the nature of the acts of the State as described within the realm of State responsibility and international liability. Distinguishing between wrongful *acts* that trigger responsibility and *activities* not prohibited by international law that occasion liability served to justify the separation between the two regimes. Liability would embody the legal regime applicable when a State conduct that is lawful and expression of exercise of sovereign rights, produces harmful transboundary effects.[227] On the contrary, international responsibility for wrongful acts would arise only as a consequence of performance of acts prohibited by international law. However, as Alan Boyle has noted, the distinction between acts prohibited by international law and activities not prohibited is arguably wrong as State responsibility is also concerned with categories of lawful activities that cause harm and it is only the content of the obligation that allows to establish the identification of a State act as illegal.[228]

Due to the difficulties of framing a regime of international liability, the ILC departed from the construction of a comprehensive State liability regime and eventually decided to distinguish two components of the subject pursuing separate works on obligations to prevent transboundary harm and liability rules.[229] Before

[226] See also A E Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: a necessary distinction?' 39 Int'l & Comp. L.Q, (1990), 1, 11.

[227] Barboza, 'Second Report' (note 222) 152.

[228] Boyle (note 226), 12-15.

[229] The reason that led the Commission to tackle the issue of prevention separately form the one of liability were explained by the newly appointed Special Rapporteur Rao in 1997, who noted that "the work of the Commission on 'prevention' was already at an advanced stage and (…) many of

proceeding separately with the two topics, the Commission tried to summarise the work already done on international liability and the duty of prevention by appointing a working group in 1996 to prepare a complete set of draft articles on international liability.[230] However, at its 49th session topic was split and of the 1996 draft articles received and transmitted to Governments for revision, the ILC kept only articles related to prevention. In 2001, the *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* were adopted. These articles shall be read as the effort by the ILC to spell out the contents of prevention principles in transboundary context.

As for the topic of State liability, the ILC approach significantly changed under the new Special Rapporteur Rao since the revision of the 1996 draft articles. The Commission acknowledged that no agreement could be reached among States for the establishment of primary rules that impose strict liability on States for damage caused by lawful activities of private parties.[231] Hence, more attention was devoted to the promotion of civil liability solutions that drew on existing conventional liability regimes. According to this new framework, the operator in command or control of the activity is seen as the strict liable party. States are obliged to implement into their domestic law standards of liability set up by the ILC principles and to provide financial remedies if necessary - like special funds or a residual liability of the State.[232] Furthermore, States would still remain responsible for failure to provide for liability in the form envisaged by the Commission. [233]The text ultimately adopted in 2006 by the ILC reflects this new framework and targeted the liability of economic operators instead of the liability of States. The *Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities* are formulated as soft

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the articles in that area had been provisionally adopted by the Commission", see UN Doc. A/CN.4/1.542, 2.

[230]ILC, 'Report of the Working Group on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' (1996), UN Doc. A/CN.4/L.553. As for the content of the draft articles presented to the Working Group, the 1996 outline provided for principles of prevention and for a liability as spelled out in art 5. Art 5 provided that "liability arises from significant transboundary harm caused by an activity referred to in art. 1 and shall give rise to compensation or other relief". The obligation to compensate other States would not cover unforeseeable risks, but would include unavoidable harm which the source State could not prevent by exercising due diligence.

[231] However, some authors have argued that a form of strict or absolute liability for environmental harm arises independently through general principles of law, equity, sovereign equality or good neighborliness, see T Scovazzi, 'State Responsibility for Environmental Harm' (2001), YB of International Environmental Law, 43; A Kiss, D L Shelton, Strict Liability in International Environmental Law, in T M Ndiaye, R Wolfrum (ed), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007), 1131-1151.

[232] P Birnie, A Boyle, C Redgwell, *International Law and the Environment* (OUP 2009) 223,224.

[233] See the ILC's 2006 *Draft Principles for Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, which are "without prejudice to the rules relating to state responsibility and any claim that may lay under those rules". It emerges once again how State responsibility and Civil liability are complementary rather than opposing regimes.

law, and their goal is to ensure compensation for transboundary damage caused by hazardous activities. The principles urge States to develop and implement within their national law civil liability remedies imposed on the private operator and to adopt other supporting financial measures. Overall, the two components elaborated by the ILC – prevention obligations and principles of allocation of loss – are what have remained of the original project on international liability, as the strict liability regime applicable to States was lost in the process.

5.2 International liability and due diligence: assessing the methodology of the ILC

The previous paragraph has drawn attention to the notion of prevention of transboundary harm as a distinct element of international liability. The principles of liability as identified by the works of the ILC allowed conceptualising a customary obligation of prevention against transboundary harm resting upon States. In this regard, due diligence shall be treated as the content of the obligation to prevent transboundary harm. The duty of care represents the amount of efforts and measures upon which measuring the appropriate steps that a State of origin should take in order to prevent significant transboundary harm or to minimise its risks.[234]
The intertwined relationship between prevention and due diligence emerged already in the first report on international liability, where the Special Rapporteur Baxter noted that

> the regime of liability in respect of acts not prohibited by international law, is envisaged to be largely – though perhaps not entirely- the product of the duty of care or due diligence, the pervasive primary rule that is approved – and explain with equal facility, by the proponents of subjective and objective theories of responsibility.[235]

During its work, the Commission found the obligation of due diligence to be the natural consequences of the principles of good neighbourliness. Overall, a State has an exclusive right to control its own territory, a principle that follows from the very notion of statehood.[236] A State may therefore allow in its territory activities that can cause harm within the territories of other States. Obviously those States, in which the harm is caused, have the same right to control their territories as the State that has caused the harm. A balance of interests is therefore required, whereby a State's freedom of action may find a limit so as not to harm one or

[234] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (2001) art 3.
[235] Quentin-Baxter, 'First Report' (note 205), 252.
[236] See *Island of Palmas (Netherlands v USA)* (1928) UN RIAA, 838.

more neighbour States.[237] The principle of good neighbourliness encompasses therefore the respect for the sovereign rights of States to use their natural resources in their territory, under their jurisdiction or control as well as the respect for the legally protected interests of third parties.[238] Its content is represented by the obligation of due diligence, this one operating as a key to determining the international liability of States.[239]

According to the works of the ILC, due diligence is to be perceived as the content of the duty of prevention, as it introduces the obligation of States to take all necessary measures to prevent significant transboundary harm.[240] Obligations of due diligence do not have the character of obligations of results, and they are unfilled only when no reasonable effort is made to discharge them.[241] Their function is to minimise the probability of an incident that would have transboundary effects, but not to prevent the occurrence of any harm, since the activities involved are not prohibited under international law.[242] The ILC devoted much of its work to putting the obligation of prevention and the following duty of care into details and it confirmed the duty of States to demonstrate due diligence in implementing their international commitments.[243] In the first report on the rules of prevention, after separating the two topics composing international liability,[244]

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[237] Most authors note that this principle found its source in the ancient Roman dictum *sic utere tuo ut alienum non laedas*, see Birne, Redgwell, Boyle, (note 232), 223.

[238] The limits of sovereign States to exploit natural resources within its jurisdiction or control as provided by the principle of good neighbourliness have been spelled out in the Stockhold Declaration, whose art 21 provides that States are under the obligation to ensure that activities carried out within their jurisdiction or under their control do not cause damage to the environment of other States or to areas beyond State jurisdiction, see Declaration of the United Nations Conference on the Human Environment, (6 June 1972); This principle was confirmed in art 2 of the Rio Declaration that confirmed that States shall exercise their sovereign rights of exploitation of natural resources with due respect for the interests of others, expanding the scope of art. 21 of the Stockholm Declaration by including also the need to take into account sustainable development, see Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development (1992) UN. Doc. A/CONF.151/26, vol. 1 art 1.

[239] See Barboza, 'Ninth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' (1993) ILC YB/II 189; PS Rao, 'First Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' (1998) ILC YB/II, 28.

[240] As for the meaning of significant transboundary harm, the term was left relatively flexible by the ILC and described as "low probability of catastrophic harm and high probability of other significant harm" see Barboza, 'Twelve Report International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' (1996) ILC YB/II, art 2.

[241] Ibid.

[242] Ibid.

[243] Barboza, 'Ninth Report' (note 239), 22-24; Barboza, 'Twelve Report' (note 240), 110,120; Rao, 'First Report' (note 239), 8-23; Rao, 'Second Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' (1999) ILC YB/II 22-23.

[244] After the separation, some Governments kept on stressing however the need to treat the issue of prevention and liability as strictly linked to each other. It was in fact suggested that 'without a fuller development of the topic of liability, treatment of the principle of prevention would remain inadequate as the consequence of harm would remain outside of prevention. (…) a close link was

the new appointed Special Rapporteur Rao confirmed that prevention is a fundamental principle established under international law to which the concept of due diligence is attached. In particular, the standard of due diligence against which the conduct of the State shall be assessed is that which is considered to be appropriate and proportional to the degree of risk of transboundary harm in a particular circumstance.[245] Only when this standard is met, a State can be considered free from liability, unless there is an international rule that provides for absolute liability in a given circumstance.[246] The report identified also the scope and meaning of 'dangerous activities' that needs to be set against the obligation of prevention; the list was intentionally left open, taking also into account the fact that some projects may turn to be risky only when performed jointly with others.[247] As for the content of due diligence, Special Rapporteur Rao noted that this obligation covered the degree of care that is expected of a good Government, a degree of care proportional to the degree of hazardousness of the activity involved, the various principles developed during the works of the previous Special Rapporteurs such as prior authorisation of the activity, environmental impact assessment, precautionary measures, and finally a degree of diligence proportional to the level of significant transboundary harm.[248] Furthermore, during the ILC works on prevention, the strict relationship between the duty of prevention and the equitable balance of interests among States also emerged. In this regard, it was advisable to place emphasis on the notion of sustainable development and to stress that the principles of prevention and due diligence shall be understood in the broader context of sustainable development, capacity-building and financial capacity on the part of the country required to implement preventive measures.[249] Some developing countries signalled the need to avoid situations where standards applied to developed countries would be impossible to implement by the developing ones due to economic and social factors.[250] For these reasons, the Commission stressed the consistency and the compatible relationship between sustainable development and due diligence, noting that the implementation of sustainable development principle in the context of the obligation of due diligence in preventing significant transboundary harm would enable the identification of common but differentiated responsibility for each State.[251]

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also to be observed between the obligation of due diligence and liability in the event of damage", see Rao, 'Third Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' (2000) ILC YB/II, 119.

[245] Rao, 'First Report' (note 239), 28.

[246] Ibid 23.

[247] Ibid 16; Rao, 'Third Report' (note 244), 118.

[248] Ibid 119.

[249] Ibid 120.

[250] Ibid.

[251] Ibid 116.

All these findings were incorporated in the 2001 *Draft Articles on Prevention of Transboundary Harm*. The Articles apply to 'activities not prohibited by international law which involve the risk of causing significant transboundary harm'[252] and codify all the existing obligations of environmental impact assessment, notification, monitoring, consultation, prevention, and diligent control likely to cause transboundary harm. In the Commentary, they are presented as a set of rules that regulate the management of risk and emphasise the duty of cooperation and consultation among all States concerned.[253] Due diligence appears as the core of the obligation of prevention and as a well established principle crystallised in international conventions and deduced from resolutions and reports of international conferences and organisations.[254]

Overall, from the analysis of the works of the ILC it emerges that due diligence is to be perceived as an immanent part of international liability. The ILC tackled the concept as part of the obligation to prevent and treated it as a primary rule of international law. Yet, due diligence operates also as the necessary link between the two accountability regimes of State responsibility and international liability. Rules of international liability cannot in fact be effectively enforced without reference to State responsibility and in particular without reference to attribution of State unlawful omissions. Failure to regulate and control potentially harmful activities to the standard of due diligence required by international law or failure to cooperate after the occurrence of damage follow inevitably rules of general law of State responsibility codified by the ILC. This proves why, after initial confusion on this issues, the ILC explicitly acknowledged that a failure to exercise due diligence as required by obligations of prevention may results in State responsibility.

Admittedly, the difficulties in recognising the violation of the duty of due diligence as source of international responsibility for wrongful acts lied in the initial assumption outlined by the ILC that the topic of international liability and therefore of prevention as a necessary component of the former, attaches to activities not prohibited under international law. How could responsibility be engaged for failure to exercise due diligence and prevent significant transboundary harm when that harm originated from an activity that is not *per se* prohibited? Yet, as the Commission later noted, non-fulfilment of the obligation of due diligence would not give rise to the implication that the activity is in itself prohibited on unlawful.[255] Prohibition of a certain activity is not in fact the necessary and inevitable results of responsibility of wrongful acts. State responsibility in these cases would arise only by the non-performance by the State of international obligations whose content involve the implementation of

[252] *Draft Articles on Prevention*, art. 1.
[253] Commentary to the *Draft Articles on Prevention*, 150 (6)
[254] Ibid 154.
[255] Rao, 'Third Report' (note 244), 122.

preventive safety measures prior to the occurrence of any harm or damage. Alternatively, responsibility could also be engaged as a result of the failure of the State to implement obligations that impose civil responsibility or duties on the operator.[256] In other words, classical general rules of international responsibility, i.e. breach of an international obligations and attribution of that obligations to the State would apply.[257]

As for the question of attribution, to be able to apply principles of international responsibility for failure to exercise due diligence in preventing transboundary harm the notion of attribution needs to be set against the scope of State territory, jurisdiction and control as defined by the works on international liability. Initially, the ILC employed the term attribution to indicate that liability could be attributed to the State provided that the latter knew or had means of knowing that an activity involving risks was or was abound to be carried on in its territory or in areas under its jurisdiction or control. Special Rapporteur Barboza noted that

> 'when the activity is carried out in a State's own jurisdiction, there is no difference regarding the basis of attribution of liability between an activity carried on by the State itself and one carried on by private persons. In both cases, liability is attributed by virtue of the mere fact that the activities are carried on in areas under State's jurisdiction. It is important therefore to resist the suggestion that attribution of a certain act to a State when it is the State that carries on the activity in question must have the characteristics of an "act of the State" within the meaning of chapter II of part 1 of the draft articles on responsibility for wrongful act. The attribution of an activity to the State is, as noted above, primary on a territorial basis'.[258]

Drawing on the first approach adopted by the ILC, attribution in international liability should attach to *activities* rather than *acts* and should be limited to those cases where the State knew or had means to know that the activity in question was performed in its territory, under its jurisdiction or control. Attribution of activity to the State would automatically imply attribution of corresponding liability.[259] This approach would further stress the difference between a regime of

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[256] This aspect of the duty of care was already recognised by the Special Rapporteur Baxter who indicates that "the measure of a State's obligation to ensure that other States rights are not infringed by the harmful effects of things done or omitted within its territory or jurisdiction is still the duty of care, but that duty extends to making good any harm that is fairly attributable to the lawful conduct of a lawful activity. Prevention and reparation are part of a single scale, in which the priority accorded to prevention is tempered by the need to maintain safeguards at levels which a beneficial activity can sustain', see Rao,'Second Report' (note 243) 112. See also *Draft Principles on Allocation of Loss*, p. 118-119(6)

[257] The realisation that rules of prevention were inextricably linked to the question of State responsibility prompted some to suggest that references to activities not-prohibited by international law should have been dropped after the separation of the two topics, Rao, 'Third Report' (note 244), 121.

[258] Quentin-Baxter, 'First Report' (note 205), 260.

[259] Ibid.

accountability based on a clear distinction between public activities as potential sources of State responsibility and private conducts outside the scope of responsibility, and a regime that attached liability to the State regardless the nature of the activity performed (whether public or private). The ILC however, soon decided to drop the notion of attribution of international liability, to avoid confusion between the two legal systems in question. The Commission opted instead for the notion of State territory, jurisdiction and control as essential parameters to the definition of 'country of origin'. In both the 2001 *Draft Articles on Prevention* and the 2006 *Draft Principles on the Allocation of Loss*, the ILC define in fact a 'country of origin' as a State within whose territory, jurisdiction or under whose control hazardous activities are carried out.[260] Accordingly, international liability can arise not only from activities performed within State jurisdiction, but also under its control or solely within its territory.

Yet, the reference to State territory, jurisdiction and control as defined for rule of international liability serves also to assess State responsibility for failure to exercise due diligence. State responsibility for failure to exercised to diligence relies in fact on the notion of State omissions; omissions resulting from a failure to discharge due diligence, or supervise private bodies or exercise jurisdiction over primary operators won't be however attributed to the State unless the latter can effectively supervise them as operating within its territory, under its jurisdiction or control. Obviously, as per general rules of international responsibility for wrongful acts, State responsibility for failure to exercise due diligence in breaching the obligations of preventions is a form of direct responsibility. The State is a guarantor of the private conduct exercised by the operators, but responsibility is direct, not vicarious. After all, the measure of prevention required by rules of liability has to be adopted by State and not by private operators.[261]

These observations confirm the strict interdependence between the two accountability regimes and the impossibility to treat them as separate topics. In this regard, if it is true that the ILC failed to recognise this interdependence in the 2001 *Draft Articles on Prevention*, in 2006 however the Commission stressed the complementarity of the regime of liability and the one of responsibility.[262] Due diligence is a shared elements of the two systems that helps stressing their complementarity.

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[260] *Draft Articles on Prevention*, art 2(d) and *Draft Principles on Allocation of Loss*, art 2(d).

[261] See Rao, 'Ninth Report' (note 239) and *Principles on Allocation of Loss*, preamble, 113(9).

[262] The preamble of the 2006 Draft Principles of Allocation of Loss recognises that "State are responsible under international law for infringement of their prevention obligations. The draft principles are therefore without prejudice to the rules relating to State responsibility and any claim that may lay under those rules in the event of a breach of the obligation of prevention", see *Principles on Allocation of Loss*, 111(6).

Finally, due diligence operates also to separate cases of transboundary harm resulting in sole liability, and cases triggering both liability and responsibility. Transboundary harm may in fact be the consequence of omissions attributable to a State failing to discharge its obligations of prevention; in this case, the State may be found responsible under rules of responsibility for wrongful acts. Transboundary harm may however be also the consequence of acts not contrary to international law that originates despite having the State adopted all its due diligence obligations. In this case, responsibility will not be engaged and rules described in the 2001 *Draft Articles on Prevention* – that include a State obligation to engage in negotiations or compensation of the damage – are to be applied should treaty regimes on consequences of such harm not be in force.

6. Concluding remarks

Due diligence is an immanent element of the regime of responsibility under international law. Its origins can be traced back to the very early developments of rules international responsibility of States and are strongly linked to the assumption that preserving State's free shall not result in lack of responsibility when private conducts, although independent from the State but under its jurisdiction, cause harm towards other members of the international community.
Within the law of international responsibility, due diligence complement the notion of attribution and allows the State to be found responsible whenever the wrongful conduct of a private agents that is not directed or controlled by State's bodies, nor attributable through the concept of apparent authority, origins from the State's failure to exercise preventive vigilance over that conduct. In this regard, the intertwined relationship between attribution and due diligence emerges from the legal reasoning adopted by Courts when private conducts causing international wrongs are involved; when such wrong is not directly linked to State bodies, the assessment of responsibility consists of the identification of normative links such as attribution or failure to exercise due diligence which are normally considered in turn.
If due diligence offers an alternative way of engagement with State responsibility when the link between the State's machinery and the private conduct does not suffice to the purpose of attribution, it may be argued that responsibility for failure to exercise due diligence constitutes a possible strategy to cross the negative consequences of leaving the private unregulated. Attribution serves in fact primary to mark the reserved domain of international law of responsibility, as it clearly separates the public realm (to which responsibility is attached) to a private sphere of non-intrusion. Should rules of attribution not apply, due diligence may still allows the State to be held responsible for the failure to take preventive measures to reduce or eliminate violations by private conducts.

Essentially, the standard of due diligence is coupled with state omission to penetrate the private sphere of "non-responsibility" under international law.

The ILC works on responsibility of States for wrongful acts did not dwell on due diligence as a complementary way of attributing responsibility. This happened because the legal operationalization of due diligence can be perfectly squared within normative construct that sees breach of an international obligation and attribution as the sole elements underpinning responsibility. Responsibility for failure to exercise due diligence does not constitute an exception to rules of attribution; at its core lays in fact an omission that is directly attributable to the State as it originates from a failure of its bodies. Hence, from the ILC's perspective, due diligence is nothing but a primary obligation of international law that, as such, shall not be the concerned of a theoretical model that deals exclusively with secondary rules.

The nature of due diligence as a primary obligation of States emerged especially during the ILC works on international liability. Here the Commission treated due diligence as part of the preventive obligations of States of transboundary harm. Yet the analysis of the methodology adopted by the ILC in dealing with international liability was essential to display the function that due diligence serves within the two accountability regimes. What emerged is that due diligence is a shared element of responsibility and international liability and its function allows to pinpoint that the two systems shall be conceived as complementary rather than opposed to one another.

CHAPTER TWO

Due diligence under international law: taking up with the concept from the perspective of primary rules

SUMMARY: 1. Introduction. – 2. Due diligence and its sources: sovereignty as the foundation and the limit to State's freedom. – 3. Assessing the status of due diligence in international law: a principle, a category of international obligations, a standard of responsibility – 3.1 Due diligence as a general principle of international law – 3.2 Obligations of due diligence – 3.3 Due diligence as a standard to assess international responsibility – 4. Contouring the nature of obligations of due diligence: a purely doctrinal quarrel? – 4.1 Obligations of conduct and obligations of result. – 4.2 Obligations to prevent. – 4.3 The nature of the obligation of due diligence. – 4.4 Issues arising from the "objectification" of due diligence obligations: the example followed by the ICJ in the context of prevention of transboundary harm. – 5. Operationalising the nexus between the State and the risk to be prevented: a tentative reconstruction of the sources of a State's duty to exercise due diligence. – 5.1 The ICJ's position on the situations prompting a State to act with due diligence: the *Corfu Channel*, the *Nicaragua*, the *Armed Activities in the territory of Congo* and the *Genocide* cases – 5.2 Sources of due diligence in the international human rights context: the case of the ECtHR – 5.3 Environmental law and the duty to prevent transboundary harm – 6. Assessing the content of due diligence obligations: elements that affect the standard – 6.1 Reasonableness and good government as golden thread to inform due diligence. – 6.2 Degree of risk. – 6.3 Control over the activity. – 6.4 State capability. – 7. Concluding remarks.

1. Introduction

With its monograph on due diligence and international responsibility of States, Riccardo Pisillo-Mazzeschi has been one of the first international scholars to engaged comprehensively with due diligence from the perspective of primary rules.[1] Before him, due diligence had been studied mainly in the context of international responsibility; first as a standard by which to measure State's fault and then as a criterion to hold States responsible for acts of private individuals. By offering a detailed analysis of international practice in areas where due diligence had traditionally played a greater role – mainly security of aliens and

[1] R Pisillo-Mazzeschi, *Due Diligence e Responsabilità Internazionale degli Stati* (Giuffré 1989).

representatives of States, security of States and the conservation of the environment – Pisillo-Mazzeschi argued in favour of a reappraisal of this concept as an objective standard of behaviour to be fulfilled by States in the performance of their obligations. In particular, duties of due diligence are to be considered as part of a particular category of primary obligations that, far from obliging a State to guarantee a certain outcome, as with 'obligations of result', only require the obligated part to make diligent efforts toward the achievement of a desired goal.

Today, the understanding of due diligence as an objective standard of conduct is hardly contested.[2] However, the increasing scholarship's engagement with due diligence in various areas of international law along with interpretations on its scope and meaning offered by Courts and adjudicators in recent years, add new perspectives and dimensions to a relatively-well established notion of the international legal system. This chapter offers therefore a reappraisal of due diligence from the perspective of primary rules in light of recent developments. Such a task seems due firstly because a certain degree of confusion still hangs over the contours of due diligence; this emerges already from the language used by international scholars to address this notion, since academics and adjudicators have been referring to it as a standard, a general principle of international law, or a primary obligation of State, often using these terms interchangeably. Furthermore, the categorisation of due diligence as a typical group of obligations of conduct continues to pose problems with the classification of obligations initially proposed by the ILC during the works on international responsibility of States. In this regard, although the attempt by the Commission to provide a framework on content and structure of international obligations eventually aborted, remainders of this initial categorization can still be detected in the final version of the ARSIWA, such as in art 14 - dealing with the extension in time of the breach of an international obligation. This complicates the analysis of due diligence as a self-standing category of international obligations, in particular in relation to obligations of prevention. An updated analysis of due diligence must also take note of the fact that in some area of international law, the standard has undergone a process of objectification whereby due diligence duties are often spelled out into specifics obligations of conduct whose breach can be assessed autonomously and regardless the occurrence of the harmful event. This trend raises further questions on the nature of the obligation of due diligence as a whole as well as in relation to these specific obligations.

Finally, the present chapter will shed some lights on the elements that constitute the normative sources of obligations of due diligence, by attempting to operationalize the links that are normally required between the State and the risk

[2] See in this regard, for a recent argument on the opportunity to reconsider due diligence as the measurement of fault in State responsibility, M Seršić, 'Due Diligence: Fault-Based Responsibility or Autonomous Standard?' in R Wolfrum, M Seršić and T Šošić (eds) *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill Nijhoff 2015).

to be prevented for a duty of diligence to arise. This will offer the opportunity to engage with collateral issues pertaining to the application of due diligence – for example in extraterritorial contexts – from a new and original perspective. The chapter will then be concluded with some reflections over the content of obligations of due diligence, providing a list of elements that are common to these obligations and that generally affect the scope of the standard.

2. Due diligence and its sources: sovereignty as the foundation and the limit to State's freedom

The concept of due diligence holds a strong connection with the notion of sovereignty. Sovereignty in international law is a concept that has evolved over time acquiring a variety of different nuances. It can refers the power of the State to performs acts, make treaties and operate as a subject on the international plane; at the same time, sovereignty implies also the right of a State to be exclusively competent with respect of its internal affairs, a principle reflected by art 2(7) of the United Nations Charter.[3] In contemporary international law, the main corollaries of sovereignty are embodied in the principle of exclusive jurisdiction of the State over a territory and permanent population living there, and the duty not to interfere in the area of exclusive jurisdiction of other States.[4] State sovereignty is in fact usually not exercised in isolation, for the activities of a sovereign State might affect the other members of the international community, and hence their sovereign rights. Independence as a fundamental feature of statehood encompasses therefore both the power to exercise jurisdiction but also the prohibition from interfering in the affairs of another State.[5]

Prohibition from interfering in others' affairs may require taking active steps aimed at preventing the use of force towards another State, preventing transboundary environmental harm or granting foreigners a minimal standard of protection. In this context, due diligence operates simultaneously as an intrinsic element and a limit to State sovereignty. Exercise of sovereignty requires steps to protect the legitimate interests of other States, efforts that are going to be evaluated based on due diligence criteria and the model of "good government" against which a State's standard of behavior shall be assessed. At the same time,

[3] J Crawford, *The Creation of States in International Law* (OUP 2006) 40-41.
[4] Ian Brownlie, *Principles of Public International Law* (OUP 2008) 289.
[5] See the *Island of Palmas* case, where the Permanent Court of Arbitration held that "territorial sovereignty involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation within the territory the rights of other States', *Island of Palmas case (Netherlands v USA)* (1928) II RIAA 839. See also L Oppenheim, *International Law: A Treatise* (2nd edn Longmans, Greens and Co. 1912) vol. I 243-244, according to which "(…) it is a rule of International Law that no State is allowed to alter the natural condition of its own territory to the disadvantage of the natural condition of the territory of a neighbouring State".

due diligence can be perceived as a limit to sovereignty by setting the boundaries of State's freedom to engage in any activity without limitations.

That the exercise of sovereignty entails the exercise of due diligence emerges clearly from jurisprudence on international responsibility. In this regard, it comes as no surprise that early international courts and tribunals have linked the duty to perform due diligence to the principle of neutrality and security of other States in times of peace and war. In the *Alabama Claims*, an arbitral tribunal was set up to decide whether Great Britain was liable for failing to maintain neutrality in the civil war in the United States between the Confederates and the Unionists. According to the US, Britain had provided support to the Confederates by allowing the construction, the equipment and armament of five vessels, including the Alabama ship, in its ports. The United States accused the British authorities of being aware that the vessels were intended for military expeditions and of breaching Britain's obligations of neutrality. The tribunal found that Great Britain had failed to exercise due diligence in the performance of its neutral obligations and had failed to adopt adequate measures of prevention despite the official warnings of the US diplomatic agents during the construction of the Alabama vessel.[6] Moreover, British authorities were also found responsible for freely admitting on several occasions Confederates vessels into ports of British colonies.[7] During the dispute the two parties offered different definitions of due diligence. The United States contended that due diligence exercised by a neutral State shall be proportionated to the size of the matter that may affect, the power and the dignity of the subject exercising it and the extent of the injury that may follow from State's negligence.[8] On the contrary, Great Britain rejected the argument that the degree of diligence should depend upon the power and the capacity of the subject providing it, and contended that such a standard shall be measured according to the degree of efforts that a government typically provides in relation to its own affairs.[9] The arbitrators considered Britain's definition too narrow, and affirmed that due diligence shall be 'exercised by neutral governments in the exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligation of neutrality on their part'.[10] In particular, the degree of due diligence required to fulfill a State's

[6] JB Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party, Together with Appendices Containing the Treaties Relating to Such Arbitrations, and Historical and Legal Notes on Other International Arbitrations Ancient and Modern, and on The Domestic Commissions of the United States for the Adjustment of International Claims*, vol. II (Government Printing Office 1872) 51.
[7] Ibid.
[8] Ibid. 8.
[9] Ibid. 9.
[10] Ibid. 50.

obligations would vary according to the object of the case, and would be proportional to the threat to the interests of the other conflicting party.[11]

It should be noted that in his opinion, one of the judges dismissed the argument that the referral to due diligence would create additional international obligations on the part of the neutral State and defined the standard as a measure of care that is required by the ordinary principles of international jurisprudence.[12] The judgment also described due diligence as part of the duty of governments,[13] and affirmed that the positive responsibilities of the neutral State are imposed by the laws of nations whose underpinnings are to be found in the respect for reciprocal interests.[14]

The prohibition of the use of State's territory in a way that compromises its obligations of neutrality was fully explored by the ICJ in the *Corfu Channel* case This case dealt with the alleged violations by Albania of its obligations of neutrality, and in particular the obligation to notify the existence of a minefield in its territorial waters. In 1946 the explosion of a mine heavily damaged four British warships while crossing a channel previously swept for mines in the North Corfu Strait. Since the explosion occurred in Albanian territorial waters, the United Kingdom accused the Albanian Government of being responsible for the damage and loss of human life resulting from the incident. The Court did not find enough evidence to identify the author of the minelaying with Albania. However, it found that by reason of the actions taken and the vigilance exercised by the Albanian Government over the waters of the Corfu Channel the days before the incident, Albania had to have knowledge of the presence of mines.[15] If Albania had warned the British vessels of the existence of those mines in the Corfu Channel, its

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[11] Ibid. 59

[12] Ibid. 57. See however the opinion of judge Cockburn, questioning the origin of this obligation; "that treaty [of Washington] may have admitted a liability in the respect of the equipment of ships where none existed by international law before, as I certainly think it has; but the degree of diligence required of a neutral government to prevent breaches of neutrality by its subjects must be determined by the same principles, whatever may be the nature of the particular obligation", at 233.

[13] Ibid. 235.

[14] "I willingly admit, on the other hand, that the duties of the neutral power cannot be determined by the laws which that power may have made in its own interest. This would be an easy means of eluding positive responsibilities which are recognized by equity and imposed by the laws of nations. There exists between nations a general law, or, if it is preferred, a common tie, formed by equity and sanctioned by respect of reciprocal interests; this general law receives special development in its application to acts which take place at sea, where no frontiers are marked out, and where there is a greater necessity that liberty should be secured by a common law (…)", ibid. 59. "The limits of positive responsibilities towards neutrality – i.e. the degree of diligence required of a State – must be carefully assessed; obviously, asking a neutral State to increase its military capacity and strengthen its system of defence would jeopardise its independence. On the other hand, complete disregard of foreign interests or a degree of action regulated exclusively by the internal laws that the neutral State may have enacted in its own interest would threaten other States' sovereignty. Due diligence shall therefore consist of the implementation and performance of those activities that a State normally employ in the pursuit of its own interests", at 59,60.

[15] *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep17.

responsibility would have been ruled out. In particular, the Court specified that the obligations incumbent upon the authorities of Albania consisted of notifying the existence of a minefield in its territorial waters and informing the British warships of the imminent danger.[16] According to the Court, these obligations derive from 'well-recognized principles' of international law, and in particular from 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[17] The ICJ did not employ the term due diligence in the discussion of the case, however it did clarified that the exercise of sovereignty entails positive obligations to manage a State territory in a way that does not cause damage to its peers.[18]

The understanding whereby States cannot authorize such use of their territory that would cause harm to others and beyond their border was most significantly discussed in the context of environmental damage. Scholarly writings normally qualify the principle of good neighborliness as a fundamental feature of international environmental law,[19] spelled out for the first time by a Court of Arbitration in the *Trail Smelter* case. The controversy involved environmental damage occurring in the territory of the United States and to be due allegedly to the emissions of a Canadian zinc smelter located at the border areas of Canada. In finding Canada internationally responsible for damage cause by the Trail smelter, the Tribunal held that 'under the principles of international law (…) no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein'.[20]The Tribunal reached its conclusion after recognizing previous pronouncements on international disputes concerning the duty of a State to respect the interests of others, their territory and to protect them against injurious acts by individuals within their jurisdiction.[21]

More recently, in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ held that

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[16] Ibid. 18-22.

[17] Ibid. 22.

[18] It should be noted that the Court admitted the duty to not allowing its territory to be used for acts contrary to the rights of other States be subject to the requisite of *knowledge* on the part of the State. The employment by the ICJ of the term "knowingly" underlines that the mere link between a State and its own territory cannot suffice for the purpose of attributing responsibility. The Court contended that although "a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation […] it cannot be concluded from the mere fact of the control exercised by the State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known the authors", at 18. This introduces the problem of the dependency link that shall exist between (private) subjects that operate within the State territory, the State and the risk that this one is called to prevent; see further paragraph 5.

[19] P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (OUP 2009) 137;T Koivurova, *Introduction to International Environmental Law* (Routledge 2014) 109.

[20] *Trail Smelter case (United States v Canada)* (1941) 3 UN RIAA 1965.

[21] Ibid. 1963.

'the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment'.[22]

In this case, the Court was asked to deliver its opinion on whether the threat or use of nuclear weapons is under any circumstance permitted under international law. The ICJ argued that States have an obligation to protect the natural environment against severe environmental damage in times of armed conflicts and to refrain from methods of warfare that could cause environmental damage. It should also be noted that the principle of good neighborliness has also been reflected in the 1972 Stockholm Declaration Principle 21 and the 1992 Rio Declaration on Environment and Development Principle 2, according to which

'States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental) policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to their environment or other States or of areas beyond the limits of national jurisdiction'.[23]

Both principles are expressed in a way that requires internal positive actions by the State so that no significant transboundary harm can occur and are now considered part of customary international law.[24] Furthermore, international practice suggests the continuing support for the idea that States must control sources of harm that originate from their territory or are subject to their jurisdiction and control and constitute a threat to other States or to the global environment.[25] Neither the Stockholm and Rio Declarations nor the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* mentioned explicitly due diligence as part of the duty to balance sovereignty with protection from transboundary environmental harm. However, the underpinnings of a State's duty to exercise diligence can be detected by arguing that the obligation to regulate and

[22] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para. 29. The Court also quoted this principle in the judgement of the *Gabcìkovo-Nagymaros Project* case, see *Case Concerning the Gabcìkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] Rep 41 para. 53.

[23] United Nations Conference on Environment and Development, (Rio de Janeiro, June 1992) UNGA A/CONF.151/26, Principle 2

[24] See *Legality of the Threat or Use of Nuclear Weapons* (note 22) 226 para 29; *Gabčikovo-Nagymaros Project* (note 22) 41; Birnie, Boyle and Redgwell (note 19) 143.

[25] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) UNTS 1833 (UNCLOS) art 192, 212; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) UNTS 1673, art 2; Vienna Convention for the Protection of the Ozone Layer (adopted 22 march 1985, entered into force 22 September 1988) 1513 UNTS 293, art 2.

control activities within the State's territory or areas under a State's control necessary entails the adoption of appropriate measures to prevent or minimize as far as possible the risk of significant harm.[26]

3. Assessing the status of due diligence in international law: a principle, a category of international obligations, a standard of responsibility

International law does not provide a legal definition of due diligence and academic writing employs various terms to describe it. Scholars have referred to due diligence as a basic principle of international law, a general principle of law, as a standard of conduct to be applied to certain international obligations, but also as a duty or a general obligation incumbent upon States. In the ARISWA for instance, the ILC defines due diligence as a standard of conduct that applies to specific treaty provisions or as part of specific primary rules of international law.[27] Yet in dealing with international liability for injurious consequences arising out of acts not prohibited under international law, the Commission made extensive reference to due diligence as an obligation of continuous character applicable to States in the context of prevention of environmental harm.[28] Recently, the International Law Association Study Group set up to explore the scope of due diligence under international law has approached this concept as an open-ended standard of care cross-cutting various fields of international law, but later it envisaged the existence of specific due diligence obligations alongside obligations of results.[29]

The array of terms used to describe due diligence raises questions on its exact significance under international law. Language has special importance in the legal context as the employment of one single word *in lieu of* another with similar value can overturn the whole interpretation of a given matter. Hence, one may query whether references to due diligence as a general principle of law or as the content of specific international obligations are reflections of different functions and meaning of the notion in international law, or if they all fall under the very same concept.

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[26] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Report, para 101.

[27] ILC, 'Report of the International Law Commission on its fifty-third session' (2001) UN Doc. A/56/10 Commentary to art 2, 34(3). See also the Special Rapporteur García Amador, who referred to due diligence as a standard, expression *par excellence* of the theory of fault and "linked (…) to the "international standards of justice"", 'Second Report on State Responsibility' (1957) ILC YB/II UN Doc. A/CN.4/106, 122 para (8).

[28] ILC, 'Report of the International Law Commission on the Work of its forty-eight session' (6 May to 26 July 1996) UN Doc. A/51/10 Commentary to art 4, 110.

[29] Committee on Due Diligence in International Law, 'ILA Study Group on Due Diligence in International Law – Second Report' in International Law Association Report of the Seventy-Seventh Conference (Johannesburg 2016) 2-3 available at www.ila-hq.org/download.cfm/docid/574BBB1E-33EA-48C6-94ACDF79A22B8477.

3.1 Due diligence as a general principle of international law

In his essay on model of rules, Dworkin posits that law is not made exclusively of rules, but also of principles that differ from the former because of their dimension of weight and importance in pursuing justice and fairness.[30] Fitzmaurice captures the distinction between rules and principles by stating that a principle is 'chiefly something which is not in itself a rule, but which underlies a rule, and explains or provides the reason for it'.[31] In international law, the term principle is employed by art 38(1)(c) of the ICJ Statute, which provides that sources of law of the Court shall include 'the general principles of law recognized by civilized nations'.

The issue over the determination of general principles as sources of international law has been one of the most debated by scholars. [32] Without entering into the details of a discussion that is clearly outside the scope of this Chapter, few considerations are nevertheless in order before tackling the question of due diligence as a principle of international law. First of all, the inherent validity and nature of principles may vary depending on the legal approach adopted,[33] however what distinguishes principles from rule is their high level of generality that ensues from a process of abstraction based on existing legal rules.[34] Furthermore, principles must be *generally* accepted by States, in the sense that their ample recognition in existing legal rules or their generalised presence in domestic legal orders testifies the acceptance of States over their existence. In this regard, it is normally acknowledged[35] that the notion of general principles include principles

[30] R Dworkin, 'The Models of Rules', (1967) Univ Chicago Law R, 14, 23,27.

[31] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rules of Law', 92 *Recueil des cours de l'Académie de droit international de la Haye* (1957), 7. Yet for a use of the term "general rule" as synonym to principles see the *Gulf of Maine* case, where the ICJ noted: "the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character", *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Merits) [1984] ICJ Rep. 288-290 para. 79.

[32] For a detailed analysis of general principles of international law see B Cheng, *General Principles of Law as Applied by International Court and Tribunals* (CUP 1953); For recent analysis of the issue see Alain Pellet, 'Article 38' in A Zimmermann, C Tomushat, K Oellers-Frahm, C J Tams (eds), *The Statute of the International Court of Justice* (OUP 2012); L Pineschi (ed) *General Principles of Law – The Role of the Judiciary* (Springer 2015).

[33] Validity, nature and legal foundations of principles differ among those who believe that the source of principles should be found in natural law conceptions, and those who opt for a positivist approach and argue that at the source of principles lays State consent, see for a general overview See J Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL 949.

[34] B I Bonafé, P Palchetti, 'Relying on general principles in international law', in C Brölmann, Y Radi (ed) *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016), 163.

[35] Ibid; see also Zimmermann, Tomushat, Oellers-Frahm, Tams (note 32); J Crawford, Browlie's Principles of Public International Law (OUP 2012) 34.

recognised by States in their domestic legal order, and principles derived directly from the international legal order. The latter are to be deduced from existing international legal rules, whether customary or conventional. However, some scholars believe that the definition set forth by art 38(1)(c) of the ICJ Statute refers exclusively to general principles identified in national legal systems and does not include principles that can be extrapolated from existing international rules.[36]

With respect to due diligence, its origins shall no doubt be found in notions derived from national legal systems and developed through the theory of fault. In civil law regimes, due diligence refers to the object of a duty intended as the degree of care that a subject shall employ to carry out the obligation, but also to the measure of fault and deviation from the standard of conduct required by that duty. The concept finds origin in Roman Law. In this sense, it has already been noted that in the *Alabama* case the arbitrators, in order to define the scope of the obligations of a neutral State, attached to due diligence the significance 'required by the ordinary principles of international jurisprudence' and employed in Roman Law.[37] Similarly, in the *Spanish Zone of Morocco* it was stressed that 'the vigilance which, from a point of view of international law a State is obliged to exercised, may be characterised as *diligentia quam in suis* applying by analogy a term of Roman law'.[38]

Yet, the contemporary understanding of due diligence as a principle of international law shall be extrapolated by international rules and in particularly from the customary law of neutrality. We previously analysed the *Alabama* case as a fundamental source of evidence of the inextricable link between due diligence and the concept of State sovereignty. However, notion and content of due diligence as developed by the arbitrators in *Alabama* became also a point of reference for the identification of rights and duties to be exercised and expected from a neutral State. The idea that in the field of neutrality a State is obliged to exercise only the degree of vigilance at its disposal was crystallised during the Hague Conventions[39] and then applied with respect to the degree of security that a

[36] In this sense, H Thirlway, *The Sources of International Law* (OUP 2014), 94; Zimmermann, Tomushat, Oellers-Frahm, Tams (note 32), 835.

[37] Moore, *History and Digest of the International Arbitrations* (note 6) 58. See also the opinion of Judge Cockburn, looking for the meaning of due diligence in the domain of general principles of jurisprudence and drawing on Roman Law and scholarly opinions on *diligentia* in municipal law to capture its significance, Moore, *History and Digest of the International Arbitrations* (note 6) 264.

[38] *Spanish Zone of Morocco Claims (Great Britain v Spain)* (1924) 2 UN RIAA, 644.

[39] Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (The Hague 18 October 1907, entered into force 26 January 1910), art 5; Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval war (The Hague 18 October 1907), art 8.

State shall reasonably expect for their nationals abroad.[40] In this context, due diligence became the *international standard of justice* required of States to discharge their obligation to protect foreign nationals and their property.[41] But the final recognition of due diligence as a principle derived by customary international law occurred with the *Corfu Channel* case. When the Court spelled out Albania's obligation to notify the existence of minefield in its territorial waters it drew it on the customary State's duty 'not to allow knowingly its territory to be used for acts contrary to the rights of other States',[42] which was defined as a 'general and well-recognized' principle.[43] It has been already noted that in this instance the ICJ made no explicit reference to due diligence, yet the obligation to not allow a State's territory to be used for acts contrary to other States is widely and generally accepted as a principle embodying the due diligence rule.[44] Today, due diligence is regarded as the fundamental feature of the no-harm rule and a general principle inherent of the obligation to prevent harm in international environmental law.[45]

Much of contemporary legal scholarship remains bound by the definition of due diligence as a general principle of international law.[46] Joanna Kulesza for example, whose recent work thoroughly discusses the notion of due diligence under international law, describes due diligence as a fundamental auxiliary principle of the international legal system applicable in the context of principles

[40] See for example *FLH Neer and P Need (USA v United Mexican States)* (1926) UN RIAA IV; For a general overview see Pisillo-Mazzeschi (note 1).

[41] F S Dunn, *The Protection of Nationals: A Study in the Application of International Law* (The John Hopkins Press 1932) 139.

[42] *Corfu Channel* (note 15) 22.

[43] Ibid.

[44] T Koivurova, Due Diligence (Max Planck Encyclopedia of Public International Law 2013); 15,19; J Kulesza, *Due Diligence in International Law* (Brill Nijhoff 2016), 262; S Heathcote, State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to the Injury in the Law of State Responsibility, in K Bannelier, T Christakis, S Heathcote (ed), *The ICJ and the Evolution of International Law: the enduring impact of the Corfu Channel Case* (Routledge 2012); Committee on Due Diligence in International Law, 'ILA Study Group on Due Diligence in International Law – First Report' in International Law Association Report of the Seventy-Sixth Conference (Washington D.C. 2014) available at http://www.ila-hq.org/download.cfm/docid/8AC4DFA1-4AB6-4687-A265FF9C0137A699, at 4.

[45] Birnie, Boyle, Redgwell (note 19), 147; Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001) ILC YB/II, art 3 para 9; S Murase, 'Third Report on the protection of the athmosphere' (2016) ILC Sixty-Eight session, UN Doc, A/CN.4/692, para 17-19.

[46] As for works specifically related to the subject of due diligence: J Kulesza, (note 44); M Seršić (note 2); 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* (Martinus Nijhoff Publishers 2003); R Barnidge, The Due Diligence Principle under International Law (2006) 8 Int Community Law Review 81. As for works that by focusing on different topics make reference to the notion of due diligence as a principle of international law see: L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1990) 19 Israel Yearbook on Human Rights 233, 240-241; T Koivurova, Environmental Law (note 19) 80-81. M N Shaw, *International Law;* (CUP 2008) 1318; E Valencia-Spina, 'Sixth report on the protection of persons in the event of disasters' (2013) ILC Sixty-fifth session, UN Doc. A/CN.4/662, 21-22.

of State responsibility.[47] In her view, due diligence shall be regarded as a general principle derived from national legal systems and a objective flexible standard varying according to the character of the international obligation to which it applies.[48] Other scholars have supported the general character of due diligence, drawing attention to the sources of this "essential element" of the international legal system,[49] namely the notion of sovereignty and the exercise of jurisdiction. Timo Koivurova has asserted that the principle of due diligence is so general in character that it should not be deemed as a regular primary rule of international law allocating clearly definable rights and obligations. On the contrary, international lawyers should conceived due diligence as a principle of equity applicable to international disputes that require Courts to opt for a careful balancing of the situation rather than for the adoption of the classical standard juristic approach.[50] Furthermore, it has been recently also argued that the understanding of due diligence in international law should not depart from classic civil law categories, hence due diligence shall be viewed as a standard that measures the degree of a State's fault in assessing international responsibility.[51] Finally, the recent work on due diligence overtaken by the International Law Association on due diligence has attempted to show how the concept applies in a vast array of international legal fields, including human rights, humanitarian law, environmental law, transnational criminal law, the law of the sea, and international investment law.[52] The standard varies and differs significantly across

[47] Kulesza (note 44) 268.
[48] Ibid. 2, 19.
[49] Condorelli, (note 46) 240. In the author's view, the origins of a general obligation upon States of due diligence shall be found in the exercise of sovereignty over a certain territory or space, which implies the positive duty to use the sovereign territory in a manner prejudicial to others' interests; the exercise of jurisdiction over a territory also on a temporary basis; finally, in the duty of a State to exercise control over certain private activities, for example with private ships in the context of the laws of the sea.
[50] Koivurova, What is The Principle of Due Diligence (note 46) 346. The author argues that due diligence is a general principle of law as provided by art 38 of the UN Charter. His generality in character shall be derived by the formulation given by the ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Armed Forces*, where the Court refrained from giving a detailed description of the principle and phrased it in the most general manner possible. More recently, the author seems to have confirmed this notion of due diligence as principle of general character that cannot be reduced to a classical primary rule. In his overview on due diligence, Koivurova provides that although State practice has developed more precise rules and standard as to what due diligence entails, due diligence remains a general principle of law, see Due Diligence (note 44) para 2. See also M Koskenniemi, *From Apology to Utopia* (CUP 2005) 391.
[51] Seršić (note 46) 168-169. The author argues against the classification of due diligence as the objective content of an international obligation requiring the adoption of a give conduct and sees no convenience in deviating from the traditional notion of fault. She contends that although the specifics of international law draw on the objectification of State responsibility, fault may yet become a condition of the latter if provided by a given primary rule. Due diligence shall therefore serve as a standard whose deviation constitutes a form of fault. This approach clearly recalls the position of prominent scholars, such as Dioniso Anzillotti, at the beginning of the 20th century. See Introduction and Chapter 1.
[52] ILA, Study Group on Due Diligence, First Report (note 44).

different areas of law, yet a commonality of understanding exists on what the duty of due diligence entails and under which circumstances it is triggered.[53] In this sense, due diligence represents in the view of the ILA study group, an 'evolving principle of international law' encompassing many standards of conduct, all premised on the idea that States 'have to strive to achieve certain common goals and, in the spirit of good neighborliness, to prevent problems especially of transboundary and global harm'.[54]

3.2. Obligations of due diligence

The wide recognition of due diligence as a standard of conduct that applies across different areas of international law certainly supports the argument that due diligence is a general principle whose contemporary understanding finds sources in international customary rules. Yet, approaching due diligence as general principle carries the risk of failing to capture its limited scope of application in the domain of primary rules. Due diligence is not an element typical of all international obligations as it applies only to a limited group of them. Kulesza for example, after labeling due diligence as a principle of general character and a criteria for attributing State responsibility, is forced to draw a distinction between the category of international obligations to which due diligence attaches, and the category of international commitment where the principle is abundant.[55]
Riccardo Pisillo-Mazzeschi has been one of the first scholars to have attempted to systematize due diligence as the object of a particular category of international obligations. His work starts from the premise that a study on the contours of due diligence should depart from the traditional ways of approaching the question mainly from the perspective of secondary rules and in relation to the issue of fault. On the contrary, the analysis should be conducted by looking at primary rules, since adopting a viewpoint that inquires into the various obligations of States is the only effective way to examine the role of due diligence in international practice.[56] By focusing on State practice over the security of foreign nationals in a State territory, the security of foreign States and the conservation of the environment, the author is able to reach a number of conclusions. First, that the concept of due diligence does not play any role with regard to international obligations of negative character, i.e. those obligations that usually require the State to refrain or abstain from doing something. Second, that due diligence attaches only to a particular category of obligations, which the authors identify as obligations to protect (foreign nationals residing in the territory of the State or the

[53] ILA Study Group on Due Diligence, Second Report (note 29) 6-7.
[54] Ibid. 47.
[55] Kulesza (note 44) 265.
[56] Pisillo-Mazzeschi, The Due Diligence Rule and the Nature of the International Responsibility of States (1992) German YB Int'L, 1, 21-22.

security of other States) obligations to prevent (such as the obligation to prevent transboundary damage) and obligations to apprehend and punish the culprit (in the context of the security of States and foreign nationals when the harmful act is carried out by a private subject). Third, what all these obligations requiring the exercise of diligence have in common is an inherent element of risk that prevents a State from guaranteeing the attainment of a particular result. For example, in the context of the security of foreign nationals, the State is not bound to guarantee the protection of the individual from any harm but only to adopt the necessary measures to avert the risk of that harm. Similarly, in the context of environmental transboundary damage, a State's duty to prevent transboundary harm would not require the State to ensure that environmental damage will never occur, but it would rather require the exercise of diligence in carrying out its activities so as to minimise the risk of harm. Yet, the element of risk could be envisaged also in obligations that require the punishment of the culprit. In these cases, the State is not asked to guarantee a result in the investigations of the crime and in the apprehension of the culprit, as what is expected by international law is only the exercise of efforts from the State apparatus in striving to investigate, pursuing and apprehending the responsible of the crime.[57]

Aside from the work of Pisillo-Mazzeschi, the understanding of due diligence as a particular category of international obligation has been supported by other prominent scholars.[58] Dupuy for example argues that the classification of certain international obligations as obligations of due diligence serves to single out all the 'circumstances in which a State must do its best to avoid certain situations coming into being', such as environmental pollution coming from a State territory or damage caused to another State by NSA.[59] Furthermore, the recent advisory opinions delivered by the Seabed Dispute Chamber in the *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area* and by the International Tribunal of the Law of the Sea (ITLOS) in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* support the conception of due diligence as a category of international commitments. Both the Chamber and the Tribunal stated clearly that the obligation to ensure that activities in the Area, whether carried out by State parties, State enterprises or natural or juridical persons, are in conformity with the

[57] The obligation to apprehend and punish the culprit should be kept distinguished from a State's obligation to possess a law enforcement apparatus to punish the wrongs. Although Pisillo-Mazzeschi recognises reference to a generic obligation to punish the culprit may fail to capture this distinction, he demonstrates how the obligation to possess an minimum legal apparatus to punish the wrong is differs from the obligation to exercise due diligence and shall be better qualified as an obligation of result, ibid. 29.

[58] J Combacau, La Responsabilité Internationale, in H Thierry, J Combacau, S Sur, C Vallée (ed) *Droit International Public* (Paris 1981), 684-685; P Reuter, Principes de droit international public, (1961) Riv Droit Comparé, 472-475, 598-599.

[59] 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) EJIL, 371,375

regulations provided by UNCLOS for the Seabed Area, and the obligation of a State to ensure that nationals flying its flag are not engaged in irregular, unreported and unregulated fishing are obligations of due diligence.[60]

The qualification of obligations of due diligence as obligations that carry an intrinsic element of risk finds its source in civil law categories and in particular in the French system.[61] In civil law, when parties enter into a contract, the obligations created may differ with respect to their object and goal. We may distinguish between contracts whose goal is to impose to the obliged party the performance of a particular act or the achievement of a particular result, and contracts that may only require the party to strive to attain the goal fixed by the content of the agreement. Obligations of this second kind are typically the obligations that a doctor assumes in relation to a patient. While there is a duty incumbent upon the former to exercise his medical activity in conformance with the best standard of practice and with maximum effort, there is on the other hand no strict expectation that the doctor will succeed in healing or curing the patient. The criterion that enables a distinction between these two categories lays essentially in the different degree of risk inherent in the object of the agreement. Contracts that impose the performance of a particular act or the achievement of a given result are premised on the assumption that the attainment of the goal sealed in the agreement does not entail a particular risk of failure on the part of the obliged party. In contracts that belong to the secondary category instead, the object of the obligation depends to some extent on conditions outside of the sphere of control of the party. Hence, since the goal envisaged by the agreement carries a certain degree of *alea*, the party is only required to make the best efforts in trying to attain the goal.

The distinction can be applied also at the international level. Certain international obligations presuppose in fact that the State is in the position of undertaking through its organs a certain active or passive conduct or guaranteeing from the occurrence of wrongs that affects other States (or the individual in the field of international human rights law). This is certainly true when international law imposes obligations of negative conduct on the part of the State - for example obligations to abstain from doing something or obligations that prohibit a certain conduct - but also when the obligation is of positive character and its fulfilment depends exclusively on the conduct of State organs. In these instances, the mere action/non-action on the part of the State provides for the fulfilment of the

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[60] *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area (*Request for an Advisory Opinion submitted to the Seabed Dispute Chamber) ITLOS Reports 2011, 35 para. 111; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Case No. 21) ITLOS Reports 2015, 129 para 127

[61] The distinction between "les obligations de moyens" and "les obligations de résultat" was firstly elaborated by R Demogue, *Traité des Obligations en General* (Libraire Arthur Rousseau 1925) 536.

international commitment. On the other hand, certain international obligations may impose only the exercise of best efforts on the part of the State, on the premise that the existence of a certain degree of *alea* may affect the attainment or the non-attainment of the object envisaged by the obligation. For example, in the context of the protection of diplomats and foreign nationals, a State may be required to abstain from entering the premises of a diplomatic mission, but it could not be required through its organs to protect in an absolute manner the premises of the mission from any intrusion or damage or to provide an absolute guarantee from any disturbance of the peace of the mission.[62] Likewise, international law may require the State to immediately notify other States of an imminent danger of damage to the marine environment,[63] but it could not impose an absolute obligation of protection and prevention from pollution.[64]

Overall, what the situations described have in common is the fact that the achievement of the object provided by the obligation (to protect the premise of the mission and the prevent pollution of the marine environment) depends also on conditions that are outside the sphere of strict control of the State. In the first case, the State may have adopted all the necessary measures, legislative and of vigilance, to protect the premise of a diplomatic mission, yet intrusions and disturbances may still occur as a result of actions carried out by private actors. In the second case, there may be an intrinsic element of risk in the type of activity carried out by the State at sea so that the latter can only be expected to adopt measures necessary to minimise it, without completely erasing the possibility that the risk will eventually materialise.[65] The rationale of this kind of obligations finds therefore reason in the circumstance that, unless we completely erase the public/private distinction or accept absolute liability of the State for the occurrence of wrongs that fall outside its sphere of control, a State may only be asked to exercise its best efforts to avoid certain situations from coming into being.

Obviously, attempting to provide a full list of obligations of due diligence would not only be outside the purpose of the present analysis,[66] but it would also carry

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[62] See art 22 of the Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 Apri 1964) 500 UNTS 95.

[63] UNCLOS art 198.

[64] Ibid art 194.

[65] For a comprehensive study on the notion of risk in international law and in particular with reference to the environmental risk see M M Mbengue, *Essai sur une theorie du risque en droit international public: l'anticipation du risque environnemental et sanitaire* (Pedone 2009), see in particular 81-86 where the author links deals with due diligence as a category of obligations whose function is to avoid the risk.

[66] Scholarly work that has focused on the identification of due diligence obligations in specific areas of international law already exists, see for example R Pisillo-Mazzeschi, Responsabilité de l'état pour violations des obligations positives relatives aux droits de l'homme, *Collected Courses of the Hague Academy of International Law*, (Brill 2008) vol 333, 390-428; R Barnidge, *Non-State Actors and Terrorism, Applying the Law of State Responsibility and the Due Diligence Principle*

the risk of being non-exhaustive. However, the fact that a State is required to exercise its best efforts, suggests first of all that obligations of due diligence are positive in character. This does not mean however that all State's omissions constitute a violation of due diligence obligations, since if a State does not adopt a legislation required by a treaty to which is bound, its omission will not qualify as a violation of due diligence. At the same time, the fact the omission of the State is related to the wrongful event carried out by private individuals does not suffice to single out the category: in cases of violations of obligations to prevent transboundary environmental harm for example, the wrongful event may have been caused entirely by the action of State organs. This can be explained by the fact that, as shown in the examples above, the element of *alea* that underpins obligations of due diligence may be related also to the nature of the activity carried out by the State. Overall, the criterion of risk along with the idea that a State needs only to exercise its best efforts suggest that an obligation of due diligence can be detected pursuant a treaty or a customary provision requiring the State 'to take the necessary measures *to ensure'*[67] the respect of a particular goal set in the obligation or legislative, administrative or other national measures enforced in application of a treaty;[68]; 'to take the appropriate measures *to protect'* for example the respect of human rights,[69] or the environment,[70] or other goals;[71]'*to prevent*' or *'preserve'* from the come into being of wrongful acts.[72] Yet, the wording 'all the necessary measures' is not a conclusive indicative, since due diligence obligations may also be embodied by obligations that do not *prima facie* appears positive in character and based on the exercise of best efforts.[73]

(Springer 2008); C Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women From Violence* (Brill 2008).

[67] UNCLOS art 61(2); art 63(1); art 66(2); art 73(1), art 94(3); art 115; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS 1249, art 2(d) second part (to ensure that public authorities and institutions shall act in conformity with this obligation); art 3, art 5; art 6, art 10; art 11; art 12; art 13; art 14(2); Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art a(3).

[68] Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) UNTS ILM 985, art 8; art 9; art 10;

[69] CEDAW art 2(e)(f) (although the wording of the Convention is 'to take all appropriate measures to eliminate, modify, of abolish); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS 999, art 2; art 3; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(2); art 6; art 11.

[70] UNCLOS art 145(b); art 146; Convention on Biological Diversity, art 8(i)(j); art 9(c); art 10(b)

[71] Vienna Convention on Diplomatic Relations, art 22.

[72] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations and the Execution of the Convention (adopted 15 May 1954, entered into force 7 August 1956) UNTS 3511, art 4(3): art 5(2); UNCLOS art 142(3); art 145(a); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965; entered into force 4 January 1969) UNTS 660 art 3;

[73] A clear example is the customary obligation of a State not to knowingly allow is territory to be used to acts contrary to the rights of other States.

3.3. Due diligence as a standard to assess international responsibility

Finally, some clarification should be brought about the meaning of due diligence as a regular standard of care of the international legal system. Admittedly, when talking about the standard of due diligence, one is clearly referring to the quantitative and the qualitative *degree* of efforts against which State's conduct can be assessed. When a harmful event has occurred as a result of a breach of a due diligence obligation, the specifics of the conduct adopted by the State are evaluated against the standard of reasonable care expected in that particular situation. This means that the notion of due diligence as a standard is normally employed *ex post facto* in the context of international responsibility, when proving the deviation of the conduct adopted by the State from the particular content of the primary rule. Furthermore, while each obligation of due diligence will differ as for its source, content and scope of application, a number of elements may be considered core to due diligence as a standard of care. Part of the remainders of this chapter will be devoted to the study of the criteria that have traditionally been deemed as shared elements of the standard of due diligence, such as reasonableness, good government, degree of risk, State capability and degree of control over the activity.

4. Contouring the nature of obligations of due diligence: a purely doctrinal quarrel?

If one moves from the premises that in international law the term due diligence refers to a particular category of obligations, consideration must be given to the structure and the characteristic features of this type of international duties. First, grasping at the formulation and meaning of due diligence obligations helps enrich the academic debate over the classification of international obligations, which does not appear to have wound down despite the final attempts of the ILC works on State responsibility to dispose of any theoretical categorization of obligations. Secondly, any doctrinal effort to grapple with the foundations of obligations of due diligence must be read in light of the function that such classification carries out in the context of international responsibility. The structure of each international obligation will in fact provide the answer to specific issues of international responsibility, for instance whether or not damage is required as an element of the breach, at which moment the international obligation should be considered breached, and so on. Classification, in this case, serves the purpose of State responsibility.

As for due diligence, international scholars have at times struggled with furnishing a clear systematisation of international obligations that would

adequately include and describe the nature of due diligence obligations. Partly, this is due to the unfamiliarity of certain legal systems with the notion of obligations of means, or obligations to endeavor, which are originally drawn on the French civil law system.[74] In addition, the classification originally proposed to the ILC by the Special Rapporteur Robert Ago between obligations of conduct and obligations of result generated confusion over the exact meaning of obligations of conduct, eventually prompting scholars to doubt on its effective utility. But the difficulty with drawing the exact contours of obligations of due diligence ensues mostly from its problematic relationship with obligations of prevention. While a coherent application of the French categorization of obligations would result in equating obligations of prevention with obligations of due diligence, the approach taken by the ARSIWA points to a different direction, treating preventive obligations mainly as obligations of result. This paradox motivates the quest over the place occupied by due diligence in the context of obligations of prevention, and more broadly as a self-standing obligation whose breach may trigger accountability pursuant to general rules of international responsibility. Furthermore, if one adopts the view that obligations of prevention are in fact to be separated from pure obligations of due diligence, it may be queried what for example distinguishes obligations to prevent from obligations to ensure, and whether and to what extent we can group different types obligations under the label of due diligence.

All these issues give further consideration to the opportunity of attempting a general analysis of the inherent features of obligations of due diligence, starting from the distinction operated by Ago between obligations of conduct and obligations of result. Clearly, given that due diligence developed autonomously across different areas of international law, the risk of conducting a general investigation over the nature of this type of obligations is to over-simplify the complexity of the debate. This is why the aim of the present analysis is not to provide a comprehensive study on the identification of principles and general rules that apply indistinctly to all obligations of due diligence. Rather, the objective is to offer some remarks through a theoretical reconstruction over the nature of due diligence obligations and to pave the way for further debate on the place taken up by due diligence in the context of primary rules.

4.1 Obligations of conduct and obligations of result

Generally, obligations can be classified according to different criteria. Sources of classification can be catalogued by reference to the origin of the obligation, for

[74] For a broader discussion, see J Combacau, 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse', in D Bardonnet (ed) *Mélanges offerts à Paul Reuter, Le droit international: Unité et diversité* (1981 Pedone), 181.

example in the distinction between conventional obligations and customary obligations; by taking into account the type of conduct required by the obligation, which may consists of actions or omissions (positive obligations vs. negative obligations); by reference to the function that the obligation serves, whether preventive or coercive; by reference to the realization of the obligation, whether the latter requires a progressive attainment of the result, or an immediate realization of it; by distinguishing cost-free obligations from progressive obligations and so on.

A distinction that touches mainly upon the scope of the obligation and is commonly referred to by the legal doctrine is between obligations of conduct and obligations of result. The debate over the meaning of obligations of conduct and result turned particularly vivid during the works of the ILC on ARSIWA; the categorisation initially proposed by Special Rapporteur Ago was in fact subject to a good amount of criticism, which eventually led the Commission and the last Special Rapporteur James Crawford to drop it and to disregard any further attempt of classification of obligations.

For Ago, obligations of conduct are obligations whose fulfilment requires the adoption by the State of a particular course of action. They call for the use of specific means, normally consisting of the approval or the repeal by legislative or regulatory bodies of certain laws or regulations.[75] A typical obligation of conduct would therefore require the State to employ a specific mean or adopt a definite conduct spelled out by the content of the obligation itself.[76] Obligations of results instead are described by Ago as obligations that require the achievement of a particular result, by leaving to the State freedom of choice as to the means available to attain the purpose of the obligation. This category comprises not only

[75] An example of an obligation of conduct is found by Ago in the Convention relating to a Uniform Law on the International Sale of Goods, adopted in 1964, whose art 1 provides that "Each Contracting State undertakes to incorporate into its own legislation (…) the Uniform Law on the International Sale of Goods". Obviously, the conduct required of a State may also consist of an omission, for example by imposing on the State the duty not to repeal a specific law or regulation. See R Ago, 'Sixth Report on State Responsibility' (1977) ILC YB/II UN Doc. A/CN.4/302 and ADD 1-3, 5-6 para 6.

[76] In Ago's view, obligations of conduct are generally formulated in a way that requires the State to adopt or refrain from adopting legislative or administrative acts; however, it is also possible that an international obligation of conduct would require the State to undertake specific actions. For instance, the content of the obligation of conduct frequently found in peace treaties may require the State to deliver arms of other objects, or to provide the destruction of a military complex. Similarly, an obligation of conduct framed in negative terms and requiring a particular course of action may address the administrative authorities to refrain from entering diplomatic premises or the territory of another country without the latter's consent,. An example of obligations of conduct that requires the adoption of legislative acts and a particular course of action can be found in the Arms Trade Treaty. Art. 5(2) provides that "Each State party shall establish and maintain a national control system, including a national control list, in order to implement he provision of this Treaty": art 5(4) requires instead that "each State Party, pursuant to its national law, shall provide its national control list to the Secretariat, which shall make it available to other State Parties." Arms Trade Treaty, (adopted on the 2 April 2013, entered into force on 24 December 2014), A/RES/69/49.

obligations that provide exclusively for a particular goal to be achieved,[77] but also obligations that call upon the State to 'take all the necessary measures' to achieve a given result, without specifying what these measures shall consist of.[78]

The core of Ago's distinction between obligations of conduct and obligations of result concerns basically the extent and the scope of freedom granted to the State in performing its international duties. While obligations of conduct leave little or no room for the State to decide how to comply with their content, obligations of result provide for a greater level of State's freedom as to the range of means suitable for the achievement of their goal. Admittedly, in Ago's mind all international obligations are in some ways obligations of results, as all international obligations are directed towards the achievement of a given purpose. Yet, a distinction shall be drawn between cases where the means to attain that result are specifically determined at the international level, and cases where it is up to the State to decide at the national level how to achieve the goal.[79]

Two main corollaries attach to this classification. First of all, since they leave to the State freedom of choice among various means, obligations of result are usually the common standard in the international legal order, as the latter is primarily build on the premises of respect of State's internal freedom. On the contrary, obligations of conduct are relatively rare, as they invade the State's sphere of freedom by requiring the adoption of a particular course of action. Clearly, less freedom to decide by which measures to implement the objective envisaged means also greater stringency in terms of character of the international obligation. Obligations of conduct appear in fact far more stringent than obligations of result, since the mere State's failure to conform to the course of action required by the content of the duty triggers international responsibility. Oppositely, obligations of result are characterised by more flexibility, and their breach takes place only had it been proved that the State did not achieve the required result. Draft art 20 and 21, adopted by the ILC on first reading, reflected this distinction. Art 20 provided that 'there is a breach by the State of an international obligation requiring to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that

[77] Obligations of this kind are typical of the field of international protection of human rights. See for example the ICCPR whose art. 22(1) provides that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". In these cases, what is demanded of the State is to guarantee freedom and rights of the individuals through the adoption of whichever measures the State deems most appropriate.

[78] For example, art 22(2) of the Vienna Convention of Diplomatic Relations provides that "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbances of the peace of the mission or impairment of its dignity". According to Ago, art. 22(2) is not an obligation of means as it defines the protection of the premises of the mission as the goal to be attained but it leaves the State free to decide which measures shall be implemented in order to ensure protection and prevent disturbances.

[79] See Ago, 'Sixth Report on State Responsibility' (note 75) 4 para 5.

obligation'; art 21 provided instead that a breach of an international obligation directed to the achievement of a given result occurs 'if, by the conduct adopted, the State does not achieve the result required of it by that obligation'.[80]

Obviously, marking out the contours of obligations of conduct and result is functional to international responsibility as these obligations differ not only in *the way in which* they are breached,[81] but also with reference to *the moment in which* the breach occurs. The breach of an obligation of conduct will arise the minute the State has adopted a conduct that departs from the one described by the content of the international duty; for the purpose of responsibility it will suffice to demonstrate that the State did not use the means imposed by the international norm. With obligations of result instead, it is only the non-achievement of the result that generates the breach. Furthermore, responsibility will not arise unless it is proved that a relationship of causality exists between the non-achievement of that result and the measures adopted by the State.

Despite being initially credited as instrumental to the purpose of secondary rules,[82] the classification made by Ago suffered significant criticism as to its complexity[83] and especially its theoretical foundations. During the second reading of the articles, the Special Rapporteur Crawford labelled the distinction as of no consequences in terms of the rest of the draft articles,[84] and contended that Ago had "reversed" the traditional meaning attached to the categories of obligations of conduct and results, which should have instead been drawn on the civil law

[80] As a matter of fact, art 21 paragraph 2 of the draft articles established also ad additional category of obligations of result, based on the circumstance that "where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the original required result through new conduct or by achieving an equivalent result in place of it, a breach of an obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct" see Ago, 'Sixth Report on State Responsibility' (note 75) para 18-30.

[81] The distinction was seen by Ago as being "of fundamental importance in determining how the breach of an international obligation is committed in any particular instance", ILC, 'Report of the International Law Commission on the works of its fifty-third session' (23 April-10 August 2001) UN Doc. A/56/10, Commentary to art 20, para. 4.

[82] It should be noted that Crawford, at least initially, did not dismissed the importance of classification of obligation in light of codifying rules of international responsibility. In his first Report, Crawford noted that "by deciding to leaving aside the specific content of the "primary" rule violated by the wrongful act, the Commission had not intended to disregard the distinction between the various categories of primary rules nor the various consequences which their breach could entail", J Crawford 'First Report on State Responsibility' (1998) ILC YB/II UN Doc. A/53/10 63, para 226.

[83] Governments were particularly skeptical about the benefit of retaining such a distinction. The United States for example questioned "whether these provisions should be deleted because they add an unnecessary layer of complexity to the draft and risk fostering substantial abuse". See in particular ILC, Comments and Observation by Governments, UN Doc. A/CN4/488 and UN Doc. A/CN4/492.

[84] J Crawford, 'Second Report on State Responsibility' (1999) ILC YB/II UN Doc. A/CN.4/498 and Add. 1, 57 para.134. Crawford noted also that the categorisation of obligations "did not fall neatly into the domain of State responsibility, which was essentially the domain of consequences, effects and results" and that retaining it "would be tantamount to over codification", para 163.

system and in particular from French law.[85] In civil law, obligations of means are obligations to endeavour, to strive to realise a certain result without the guarantee of its attainment, whereas obligations of result require the achievement of a certain goal. Obligations of means are mainly obligations of attempt, whereas obligations of result provide for a duty to succeed. While Ago's classification looked at the manner in which the content of the international obligation imposes its requirements upon the State, the source of the French distinction lays on the degree of effort required by the latter to fulfil its duties. The effects attached to the French definition are very much "reversed" as stressed by Crawford: if a breach of an obligation of result can be assessed by simply ascertain that the goal required by the obligation has not been achieved, the breach of an obligation of means inevitably brings about the question of causality. To put it simply, in order to trigger responsibility, the injured State will have to establish and prove to what extent the efforts imposed on the State by the content of the obligation, if adopted, would have been suitable to avoid the harmful event. This obviously turns obligations of means into more flexible and relative obligations, whose breach is much more difficult to establish.

The confusion over the meaning of obligations of conduct and obligations of result extends to international practice. Despite being dismissed and labelled as "reversed" by the last Special Rapporteur, the distinction proposed by Ago has in fact been applied and used as term of reference by international jurisprudence. Not only have Courts drawn on both Ago's classification and the civil law understanding of obligations of conduct and result,[86] but at times the theoretical

[85] Crawford, 'Second Report' (note 84) 57 para 133. With regard to the classification operated by Ago, Crawford noted that " (…) the distinction is drawn on the basis of determinacy, not risk" and that this way "obligations of result are treated in the commentary as in some way less onerous than obligations of conduct, where the State has little or no choice as to what it will do".

[86] In the *La-Grand* case for example, the ICJ adopted the French distinction in defining the content of the obligation resting upon the United States to "take all the necessary measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings". The Court noted that this obligation could not be interpreted as an "obligation of result" but stressed that "the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a pleas for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available", *LaGrand (Germany v. United States of America)* (Merits) [2001] ICJ Rep, para. 111-112. It appears here that the Court referred to obligations of means as obligations of "best efforts", as opposed to obligations to guarantee the achievement of a result. As for the use of Ago's definition of obligations of means and result, in the *Blaskic* case, the ICTY noted that the obligation "to adopt any measure necessary under their domestic law" (as provided at para. 4 of resolution 827/1993) " is not a generic obligation, but a very specific one. More precisely, this is an "obligation of conduct" (…) or "obligation of means" (…) namely, an obligation requiring States to perform a specifically determined action, unlike "obligations of result" (…) which require States to bring about a certain situation of result, leaving them free to do so by whatever means they chose", *Blaskic* (Decision on the Motion of the Defence filed pursuant to Rule 64 of the Rules of Procedure and Evidence) ICTY-95-14-I (3 April

concepts underpinning each classification have also overlapped.[87] Rather than interpreting such inconsistencies as proof of greater heterogeneity in the range of international obligations,[88] one may query whether the opportunity to resort to one distinction or another should be read in relation to the function that in each case the classification serves in establishing responsibility. Sometimes Courts find it more useful to read international duties in terms of risks, framing obligations of conduct as duties to endeavour and thus linking responsibility to the inadequate efforts exercised in a given circumstance. In other cases, the emphasis is placed on the determinacy of the content of the obligation. This helps distinguishing between obligations that grant freedom of choice in terms of measures necessary to pursue a certain goal, and obligations that require the adherence to a specific course of action. To some extent though, it is true that both definitions carry the risk of failing to adequately describe the full range of obligations typically employed within the international legal regime.[89] For example, obligations of due diligence do not really find place in Ago's definition, as they basically operate as

199) para. 8. The Court adds that " "obligations of conduct" specifically determine the kind of action required, although the may leave States some latitude".

[87] See for example, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, (note 22) where the ICJ provided an interpretation of the meaning of art 4 of the Treaty of the Non-Proliferation of Nuclear Weapons, which requires State Parties "to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament". The Court contended that the obligation provided by art 4 "goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursue of negotiations on the matter in good faith. Here the Court seems to refers to both special obligations of conduct that require the adoption of a particular course of action – according to the meaning specified by Ago and the ILC during its first reading of ARSIWA – and obligations of result as obligations requiring the State to succeed in achieving the goal.

[88] See for example R Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations', in M Arsanjani, J Cogan and R Sloane (eds) *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (Brill 2010), arguing that the categories of international obligations should be considered as five: (a) obligations of result (b) obligations of conduct, in the sense provided by Ago; (c) obligations goal oriented, which do not envisage a concrete result or a concrete conduct, such as art. 55(a) of the UN Charter; (d) obligations that are addressed to private entities and (e) obligations that combine obligations of result and conduct, which are for example obligations of due diligence as they allude to the achievement of a given goal through the adoption of a particular course of conduct; As for the critique on the distinction from an international human rights perspective, see C Tomuschat, 'What is a 'breach' of the European Convention on Human Rights?', in R Lawson and M Blois (eds) *The dynamics of the protection of human rights in Europe: essays in honour of Henry G Schermers* (Martinus Nijhoff Publishers 1994), 324; M Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersetia 2003) 184-196.

[89] It is for this reason that probably the ICJ, in the *Gabcikovo-Nagymaros* (note 22) para. 112 and 135, departed from the classical dichotomy between obligations of means and result and offered a classification based on three types of obligations: obligation of conduct, obligations of performance and obligations of result. From the wording of the Court it appears that while obligations of conduct shall be deemed as "obligations of best efforts", obligations of performance should indicate obligations that require the adoption of a particular course of conduct.

part of a typical sub-group of obligations of result, namely obligations to prevent.[90] Similarly, the French definition fails to address those obligations that can be defined as really "of conduct" in the sense that they do not leave much latitude of freedom to the State and they specifically determine the kind of action required.

4.2 Obligations to prevent

The classification of obligations as adopted by the ILC during the first reading of ARSIWA contained a further type of obligations aside from the distinction between duties of conduct and result. Draft art 23 described the content of obligations of prevention, pointing out that

'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'.

Ago's choice to devote a separate article to obligations to prevent – aside from obligations of conduct and result – should be read as an attempt 'to complete the study of the possible effect of the distinctive characteristics of the various kinds of international obligations on the determination of the conditions of their breach'.[91] In both Ago's analysis and the draft articles as adopted during the first reading, obligations of prevention are framed as "negative" obligations of result.[92] In dwelling on their nature, the Commentary notes that

'if the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of

[90] According to his classification, due diligence ends up being part of obligations to prevent (which can be classified as negative obligation of result). See also the *Blaskic* case, where the Court notes that the category of obligations of result "comprises such obligations as protecting foreigners with due diligence, or the obligation to take appropriate steps to protect the premises of diplomatic missions against intrusion or damage, see *Blaskic* (note 86) para. 8.

[91] ILC, 'Report of the International Law Commission on the works of its thirtieth session' (8 May-28 July 1978) UN Doc. A/33/10, 33 para 8.

[92] See also J Crawford, *State Responsibility: The General Part* (2013 CUP) 228. See also 'Commentary to the Draft Articles on Responsibility of States for International Wrongful Acts' (note 81) Art 23 para 1. Admittedly, in his report Ago does not overly qualify preventive obligations as obligations of result, leaving open the question whether the provision of a separate article should indicate a further distinctive category. Yet, the qualification of draft art 23 as sub-category of obligations of result could be drawn by the way Ago treats the structure of preventive obligations and mostly by reference to their *tempus commissi delicti*. See also the passage where the Special Rapporteur argues that "The prevention of a certain event is, in the hypothetical cases referred to in this section, the "direct" object of the international obligation. The aim of the obligation is to ensure that, to the extent possible, the State under the obligation prevents the occurrence of the event in question", R Ago 'Seventh Report on State Responsibility' (1978) ILC YB/II UN Doc. A/CN.4/307 and Add. 1 and 2, 35 para. 15.

the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation'.[93]

As described, obligations of prevention require the occurrence of the event to be prevented as necessary condition for establishing the breach. A State could not be alleged to have breached its obligations to prevent a given event so long as the event has not occurred. Yet, the occurrence of the event is not the only requisite for the existence of a breach, as the latter will depend also on the possibility to ascribe the feared event to a lack of vigilance on the part of State organs. Only when the event occurs *because* of a State's failure to prevent it by its own conduct, the breach of the international obligation will occur. This means that a relationship of causality will have to exist between the occurrence of the event and the conduct adopted by the organs of the State.[94] The Commentary also makes it clear that if the occurrence of the event with no negligence on the part of the State cannot amount to a breach of an obligation to prevent, the same can be said about the absence of a wrongful event in cases of a State's failure to adopt measures of prevention. For the mere negligent conduct of the State does not become an actual breach unless that conduct is coupled with a further element, the external event.

From the perspective of international responsibility, the major consequence of framing the duty to prevent as an obligation of result concerns the identification of the time of its breach. If the breach does not come to existence unless occasioned by an injurious event, the *tempus commissi delicti* of obligations of prevention inevitably corresponds to the occurrence of such event. This is coherent with the structure of obligations of result as proposed by Ago, whereby the State is asked to ensure a result (in this case the non-occurrence of a given event) by adopting a conduct of its choice deemed most appropriate. However, in the classical civil law conception of the distinction between obligations of conduct and result, obligations of prevention would qualify as a sub-category of obligations of conduct. If one opposes obligations to ensure a certain result to obligations to endeavour, obligations of prevention should inevitably be read as best efforts obligations. What is required of the State is not the non-occurrence of the event

[93] 'Commentary to the Draft Articles on Responsibility of States for International Wrongful Acts' (note 81), art 23(4), 173.

[94] See also Ago, noting: "it does seems clear that, in order to be able to establish the breach of an obligation in this category, two conditions are required; the event to be prevented must have occurrence, and it must have been made possible by a lack of vigilance on the part of State organs. Clearly, a State cannot be alleged to have breached its obligation to prevent a given event so long as the event as not actually occurred, and the same is true where the feared event has occurred but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach", Ago, 'Seventh Report' (note 92) 32 para. 3.

sic and simpliciter, but rather the adoption of all possible measures to prevent it. After all, that responsibility requires, other than the event, proof of a State's failure to prevent it by its own conduct, had already been recognised by Ago and the ILC during its first reading of ARSIWA. If an injurious event occurs but the State proves that there is not relationship of causality between the conduct of its organs and that event, responsibility cannot be engaged. Attention is diverted toward the conduct that should have been adopted by the State, and not on the consequences of its breach.

Placing the stress on the conduct adopted by the State rather than on the event entails also a series of consequences as to the very meaning in preventive obligations of the notion of "event" and to the moment when the breach was performed. First of all, it is the violation of the best effort obligation, and not the result actually achieved, that really counts. This means that the event to be prevented qualifies as damage, and it represents only the legal reason that leads a judge to look back to the conduct adopted by the State before the incident took place. The event in other words does not embody a constituent element of the obligation whose ascertainment is essential for the purpose of the breach, but it serves merely as an indicator of the violation on the part of the State of a set of "best efforts" obligations. Furthermore, one must take into account that with obligations of conduct, a breach will ensue from the moment the conduct of the State has been proved not to be in conformity with the behaviour required by the content of the international obligation. Hence, in the case of obligations of prevention, the time of breach shall not be identified with the occurrence of the event but with the moment the State failed to adopt the conduct prescribed or recommended by the obligation.

It is therefore quite surprising that after rejecting the classification suggested by Ago between obligations of conducts and results, the ILC maintained nevertheless Ago's original opinion on obligations of prevention. In the final text of ARSIWA - after the last Special Rapporteur Crawford opted for deleting draft art 20, 21 and 23 to respond to critics of over-codification - there is no room for the classification of different types of obligations. Yet, the articles hints at the normative structure of preventive obligations when dealing with the temporal dimension of a breach of an international obligation. Art 14(3) affirms that 'the breach of an international obligation requiring the State to prevent a given event occurs when the event occurs', clearly conforming to Ago's classification.[95]

[95] That the question over the structure of obligations to prevent did not wind down with the adoption of ARSIWA emerges also from the Commentary to art 14(3). After constructing preventive obligations as negative obligations of result for the purpose of international responsibility (namely for the identification of the moment of the breach), the Commission notes that "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given even from occurring, but without warranting that the event will not occur", Commentary to the Draft Articles on Responsibility of States for International Wrongful Acts' (note 81) art 14(3), para 14.

Although the ILC's purpose with art 14 was to focus on breaches of continuing character, and not to dwell on the normative structure of international obligations, the Commission found itself compelled to clarify the exact moment of the breach of preventive obligations in order to determine the extent of a continuing wrongful act originating from lack of prevention. The unmistakable statement of art 14(3) though raises questions when one considers that as long as preventive obligations imply positive obligations, their violation should be assessed independently from the occurrence of the event. That is why the provision of art 14(3) has been labelled as a "paradox",[96] for the decisive element for attributing responsibility is found in the event but the preventive obligation is described as one that requires doing all in one's power to achieve a result without ultimate commitment.

The hurdles of defining the boundaries of preventive obligations did not escape the attention ICJ, which touched upon the topic in 2007 in the *Genocide* case. The remarks made by the Court on the nature of the obligation to prevent genocide drawn on both Ago's works and the civil law distinction. In dealing with a State's obligation to prevent genocide, the ICJ affirmed that

> 'the obligation in question is one of conduct and not of result, in the sense that the State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which may have contributed to preventing the genocide'.[97]

Yet, the Court continued noting that 'a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed'.[98] The Court referred to art 14(3) of ARSIWA and argued that 'it is at the time when commission of the prohibited act (…) begins that the breach of an obligation of prevention occurs'.[99] Admittedly, one could read these statements as limited in scope and applicable exclusively to the circumstances of that particular case. After all, the Court did not wish to create jurisprudence for all cases involving preventive obligations, but rather to clarify the scope of the duty to prevent genocide.[100] Certainly however, as it emerges from the Genocide case, to break down the content and structure of obligations to prevent is a not a purely doctrinal

[96] See in this regard, Dupuy, Reviewing the Difficulties of Codification (note 59) 371, 381.
[97] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*) (Merits) [2007] ICJ Rep, 221 para. 430.
[98] Ibid. 221 para 431.
[99] Ibid.
[100] Ibid. 220 para. 429.

matter, as one theoretical approach or the other will bear consequences as to the moment *a quo* of the breach and, as it will be shortly argued, on the nature and scope of positive due diligence obligations.

4.3 Nature of obligations of due diligence

In light of the attempted systematization of international obligations made by the ILC and its critiques, one may query which role due diligence plays in each classification and whether obligations of due diligence should be really treated as a distinct and autonomous group of obligations. It has already been noted that obligations of due diligence are normally embodied in norms that require a State to "prevent" the occurrence of a certain event or to "ensure" the attainment of a given result. In such circumstances, the State is called for the employment of all the means at its disposal either to avoid activities taking place under its jurisdiction and possibly causing harm or damage, or to ensure the achievement of an ultimate goal. In *Pulp Mills*, the ICJ argued that 'the principle of prevention, as a customary rule, has its origin in the due diligence that is required of a State in its territory'.[101] Yet, the relationship between due diligence and obligations of prevention (as well as obligations "to ensure") is not so clear-cut and requires in-depth analysis.

In Ago's distinction, obligations of due diligence are not discussed nor treated as a distinct group of international obligations. What counts in Ago's framework is only the distinction between obligations requiring the attainment of a result through the adoption of a particular course of conduct, and obligations leaving freedom of choice in terms of means employable by the State for the achievement of that result. In this context, obligations of due diligence operate as one of the two components of preventive obligations and as a parameter against which the non-achievement of a given result shall be assessed. That a, has already been argued in the previous paragraph; focusing on due diligence alone, one may infer that positive obligations of due diligence cannot be separated from preventive obligations. Ago argues:

'A tribunal has never been requested to recognize as a breach of an international obligation the mere fact of the non-adoption by the State of measures to prevent a theoretically possible event which did not actually occur. (…) To our knowledge, decisions of international tribunals have never affirmed even indirectly or incidentally that failure to adopt measures to prevent the occurrence of a possible event sufficed in itself (…)'.[102]

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[101] *Pulp Mills* (note 22) para. 101.

[102] R Ago,'Second Report on State Responsibility' (1970) ILC YB/II UN Doc. A/CN.4/223, 34 para 11. See also the position of the Government of Austria during the works on the 1930 Hague Conference for the Codification of International Law, as reported by Ago in arguing on the

Failure to show due diligence may indicate a breach of the international obligation of prevention, but responsibility could only be engaged should the event have manifested. This happens because for Ago every international obligation is an obligation of result (in the classical civil law use of the term), therefore the occurrence or non-occurrence of the event becomes inevitably a necessary component of the breach. From this angle, due diligence duties are not proper autonomous international obligations,[103] as they are called upon only once the result is not attained and as standards against which State conduct must *causally* be evaluated.

An obligation of due diligence finds autonomous role if one adopts the perspective provided by the civil law classification of obligations. The fitting category here is one of obligations of conduct: whenever a customary or a treaty obligation calls upon the State to "ensure" the attainment of a given result or to "prevent" its occurrence, what is required is only the exercise of every effort toward the accomplishment of that result. In the *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area,* the Seabed Disputes Chamber of the ITLOS confirmed that and argued that 'this obligation [of due diligence] may be characterized as an obligation "of conduct" and not "of result"'. In referring to art 139 paragraph 1 and Annex III, art 4, paragraph 4 of UNCLOS,[104] the Chamber noted that

'110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence". 111. The notions of obligations "of due diligence" and obligations "of conduct" are connected (…)'.[105]

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normative structure of preventive obligations: "It is obvious that mere failure to exercise due diligence in protecting the person of foreigners does not in itself involve the responsibility of the State: such responsibility would arise only if a foreigner suffered injury through the act of a private person", League of Nations, Bases of Discussion,108 reported by Ago 'Second Report', 34.

[103] In elaborating on the normative structure of preventive obligations, the previous paragraph has already points to the shortcomings that this kind of categorization brings about in terms of applications of general rules of international responsibility.

[104] Art 139 para. 1 of UNCLOS provides: "States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part."

[105] *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area* (note 60) 35 para. 111.

In 2015, following a request for an advisory opinion submitted by the Sub-Regional Fisheries Commission, the ITLOS had once again the opportunity to dwell on the meaning of obligations of due diligence. Questioned on the scope of the obligations of flag States in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone (EEZ) of a third party,[106] the Tribunal held that

'the flag State has the "responsibility to ensure" (…) compliance by vessels flying its flags with the laws and regulation concerning conservation measures adopted by the coastal State. (…) [T]his is an obligation [of the flag State] "to deploy adequate means, to exercise best possible efforts, to do the utmost" to prevent IUU fishing by ships flying its flag. However, as an obligation "of conduct" this is a "due diligence obligation", not an obligation "of result". This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the exclusive economic zones of the SRFC Member States. The flag State is under the "due diligence obligation" to take all necessary measures to ensure compliance and *to prevent* IUU fishing by fishing vessels flying its flags'.[107]

Similar indications were given by the ILC in the 2001 Draft Articles on Prevention of Transboundary Harm for Hazardous Activities. Elaborating on art 3, the Commentary states that

'[t]he obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present article. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so (…). In this sense, it does not guarantee that the harm would not occur'.[108]

Stating that obligations "to prevent" or "to ensure" are obligations of due diligence, i.e. obligations of conduct, brings back all the critiques discussed in the previous paragraph in the context of prevention. Strict adherence to the civil law notion of obligations of conduct requires in fact the breach of an international obligation to prevent or ensure be identified with the moment in which negligence

[106] The advisory opinion, which is the first one issued by the full Tribunal, was requested in 2013 by the Sub-Regional Fisheries Commission (SFRC) established by seven West African States, and consisted of four questions regarding the obligations and liability of flag States for IUU fishing by their vessels in the EEZ of another State. The request was made by the SFRC under the Convention on the Definition the Minimum Access Conditions and Exploitation of Fisheries Resources Within the Maritime Zones under the Jurisdiction of SRFC Member States (MAC Convention). The ITLOS clarified therefore that questions on obligations of States in case of IUU fishing regarded only States that are not members of the SRFC when their fishing vessels operate within the EEZs of SRFC members, and not the question of IUU fishing generally.
[107] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (note 60) 129 para 127 (emphasis added).
[108] Commentary to the ARSIWA art 3.

took place, and not the moment in which the event occurred; furthermore, the occurrence of the event qualifies simply as damage and does not constitute an essential element of these obligations. Nevertheless, it has already been illustrated that art 14(3) of ARISIWA sets the breach of preventive obligations according to the moment in which the event occurred and not with reference to the time when a State's omission took place. This has been confirmed by the ICJ not only in the *Genocide* case, but also in circumstances concerning prevention of environmental harm.

When questioned on the duty to prevent environmental harm, the ICJ has always distinguished between procedural and substantial obligations, linking the breach of an obligation to prevent environmental harm to the actual occurrence of environmental damage.[109] That being the case, one is left wondering about the normative understanding of obligations of due diligence and in particular about the consequences of their breach. Are due diligence good standing international obligations of conduct or are they simply relative obligations whose breach does not trigger responsibility unless followed by further conditions?

Grasping at the difficulty of reconciling due diligence with the normative structure of preventive obligations as provided in ARSIWA, some scholars have suggested that obligations of prevention are not in fact obligations of due diligence in the ordinary sense and that a distinction between the two categories shall be made. Crawford for example argues that while a true obligation of prevention is not breached unless the event occurs, an obligation of due diligence can be breached by failure to exercise due diligence alone, regardless the occurrence of the event.[110] Crawford admits that the drafting of art 23 of ARSIWA was problematic for its treatment of preventive obligations. However, he asserts that although there might be cases where the situation to be prevented is defined in terms of occurrence of damage – making the materialisation of the latter necessary for triggering responsibility – when responsibility is engaged by the failure to act *in and of itself*, then the obligation shall be better qualified as an obligation of due diligence.[111] Such a categorization is thoroughly explained,

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[109] *Pulp Mills* (note 22); *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) (Merits) [2015] ICJ Rep; *Construction of a road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica) (Merits) [2015] ICJ Rep. For an in depth discussion on these decisions, see the next paragraph.

[110] Crawford, State Responsibility (note 92) 227. See also OHCHR, 'Report of the UN High Commissioner for Human Rights on The Role of Prevention in the Promotion and Protection of Human Rights' 6 July 2015, A/HRC/30/20, para. 7, that distinguishes between human rights treaty provisions that point to a negative obligation of result, and preventive provisions that require the adoption of positive conduct and all necessary steps to prevent effectively human rights violation. According to the scheme, prevention of genocide, slavery or racial discrimination would fall into the first category, whereas obligations to prevent violations of the rights of the child would belong to the second category.

[111] Ibid 230.

'although (…) due diligence is an important factor in discharging the obligation of prevention, the latter cannot be categorized as an obligation of due diligence per se, because such an obligation would be breached by a state party's failure to take action, regardless of whether the prohibited event in fact took place. The obligation to prevent (…) requires both a failure to take steps *and* the occurrence of (…) [the event] before responsibility is triggered'.[112]

A pure obligation of prevention would therefore be composed by positive obligations of due diligence *plus* the event as a necessary condition for its breach.[113] An obligation of due diligence would instead simply require the exercise of every effort and the adoption of all the necessary required measures towards the attainment of a given goal. Separating obligations of due diligence from preventive obligations facilitates coherence with the legal framework provided by ARSIWA. On the one hand, it ensures adherence to the rule that requires the occurrence of the apprehended event as indispensable for triggering responsibility arising out of breaches of preventive obligations. On the other hand, the separation enables to fully comply with general rules of international responsibility by treating violations of due diligence obligations as proper breaches of international obligations of conduct.[114] In this context, the obligation to prevent genocide would thus belong to the category of pure obligations to prevent, provided that art 1 of the Convention on the Prevention and Punishment of the Crime of Genocide cannot be breached unless genocide occurred. On the contrary, Crawford argues that art 22(2) of the Vienna Convention on Diplomatic Relations, requiring the receiving State to take all appropriate steps to protect the premises of the mission against intrusion or damage and prevent disturbances of its peace, is an obligation of due diligence. For it is 'a *continuing obligation* on the host state to take all appropriate steps to protect the mission, which becomes more demanding if for any reason the mission is invaded or disturbed'.[115]

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[112] Ibid 231-232. Crawford builds up his argument be referring to the very notion of obligation to prevent as defined by the ICJ in the Genocide case. In this instance and after qualifying the obligation to prevent genocide as an obligation of conduct and not of result, the Court had affirmed that "in this area, the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance". See *Genocide* case (note 97) 43, para. 221. Crawford suggests that in requiring the occurrence of genocide as an essential element of the breach of the obligation to prevent it, it is the very International Court of Justice to draw a clear distinction between an obligation of due diligence and obligations to prevent.

[113] This would basically mean to return to the description made by Ago of obligations of prevention, whereby failure to carry out obligations of due diligence in a necessary but not sufficient condition for the establishment of the breach.

[114] The previous paragraphs have already hinted at the conundrum raised by treating obligation to prevent partly as "negative" obligations of result; if the two essential elements of an international wrongful act are (a) conduct attributable to the State under international law, and (b) the breach by that conduct of an international obligation incumbent upon the State, one may query why the mere failure by State organs to comply with positive obligations of due diligence shall not give rise *per se* to responsibility.

[115] Crawford, State Responsibility, (note 92) 229 (emphasis added).

On the whole, the major problem with distinguishing due diligence obligations from obligations to prevent concerns the identification of the conditions according to which an obligation should be labelled as of due diligence rather than a purely preventive one. Crawford does not fully broach the problem and by referring to art 22(2), he simply provides that 'states should not be able to neglect that "special duty" on the basis that intrusion, damage or disturbances has not yet occurred and may never occurred'.[116] Yet it is unclear when inaction *by itself* should amount to clear violations of a State's obligations and when such inaction should instead be accompanied by other elements. For example, although obligations to prevent environmental harm have normally been treated as pure obligations of prevention, some recent instances seem to push towards a different direction.[117] Moreover, one may query which interest should a State have in pursuing international responsibility of another State that is failing to comply with its due diligence obligations, but whose actions have not (yet) resulted in harmful consequences. It may of course be objected that a State's lack of interest in having recourse to a judicial organ for establishing the existence of a breach in itself does not constitute a sufficient probative ground to dismiss the theory of separation. States are in fact bound to comply with their international obligations regardless the likelihood of being reprehended for a breach of them. However, it is the very possibility to engage with State responsibility beyond the occurrence of the event that, according to Crawford, serves as a distinctive criterion to distinguish between pure preventive obligations and obligations of due diligence. It would therefore seem more logical to conclude that obligations to prevent and to ensure are in fact plain due diligence obligations since – with the exception of art 14(3) of ARSIWA – no clear structural distinction can be found between the two.

It should also be noted that the very problem raised by the wording of art 14(3) can be scaled down if one looks back at the *function* that due diligence plays in the context of responsibility. The previous chapter grasped at the role of due diligence as complementary to the notion of attribution, arguing that the opportunity to hold a State responsibility for failure to exercise due diligence should be explored whenever the conduct of private persons or entities could not be attributable to the State pursuant the ARSIWA. In this regard, the Seabed Chamber noted that

'the expression "to ensure" [and arguably the expression "to prevent"] is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by

[116] Ibidem. See also the Tehran Hostages case, where the Court said *the inaction by itself* of the Iranian authorities toward the protection of the US embassy constitutes clear and serious violation of Iran's obligations, see *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran)* [1980] IC Rep, para. 67.

[117] See *Nicaragua v. Costa Rica* (note 109) Separate Opinion of Judge Donoghue, para 9, discussed thoroughly in the next paragraph.

persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law'.[118]

Exercise of due diligence and enactment of administrative, legislative or other necessary measures is functional to preventing private individuals or entities from carrying out activities that may be harmful under international law. This means that due diligence does not only entail the adoption of appropriate measures "to ensure" or "to prevent" a given event, but it must also encompass the exercise of *vigilance* in the enforcement of these measures. In this regard, the type of control that State bodies should exercise in order to prevent harmful activities by private subjects shall go beyond normative control, and it should involve also a certain degree of effectiveness.[119] Hence, it is normally the occurrence of the event that will substantiate lack of vigilance on the part of State bodies.[120] The event will in fact often be the only indicator at disposal of a breach by private individuals of interests protected under international law. In the absence of any event, it would be difficult to prove the lack of vigilance by State organs over the conduct of private subjects. Clearly, the ultimate event should not be regarded as a constituent element of prevention, since this one will operate simply as a catalyst that debunks the breach of due diligence and triggers responsibility.[121] Yet, the

[118] *Responsibilities for Activities in the Area* (note 60) para. 112.
[119] See *Pulp Mills* (note 26), para. 197 and *Responsibilities for Activities in the Area* (note 60) para. 36 with the notion of *veiller*. Obviously effective control does not amount to art 8 of ARSIWA, otherwise we would fall back into the framework of attribution.
[120] It should be noted that Ago had already grasped at this very issue. Although in his formulation of preventive obligations the occurrence of the event is a necessary constituent element of the obligation, from the writing of Ago's Second Report, the author seems to acknowledge the difficulty of reconciling the structure of obligations of prevention with rules on the constituent elements of an international wrongful act. Ago notes: "it might, of course, be objected that the fact that international judicial or arbitral tribunals have never had occasion to recognize that a State has breached the international obligation to prevent a given event in cases where the event to prevent did not take place might due to reasons which in part at least deprive it of probative value for our purposes". The Special Rapporteur goes on labelling the external event as the *occasion* for the breach of a preventive obligation to be established. He contends that the event – usually caused by the conduct of private persons – should be regarded as "the occasion, or even the condition, on the basis of which the State is deemed to have breached its obligations of prevention and incurred the resultant responsibility", ILC, 'Ago Second Report' (note 102) 35-36. Here Ago seems in fact to suggest that failure of the State to adopt measures to prevent acquires concreteness by the actual occurrence of an event made possible by the lack of vigilance by State organs. See however also the Commentary, confirming on the first reading of ARSIWA that ""the "event" (…) must not be understood as being "damage" in the sense in which this term is used in the theory of State responsibility. (…) [D]amage is not necessarily caused in every specific case when an event occurs which the State was under the obligation to prevent. (…) The requirement that the event must have occurred (…) is no way a sort of exception to the general position taken by the Commission during the formulation of article 3 and the commentary thereto", Commentary to the ARSIWA art 23(5) p. 173.
[121] See for example *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commiss*ion (note 60), where in regard to IUU illegal fishing of third parties in the exclusive

fact that in most cases State's failure to adopt measures to prevent or ensure will acquire concreteness by the actual occurrence of an event renders the structural inconsistencies between art 14(3) and the nature of obligations to prevent more nuanced. Responsibility for failure to exercise due diligence will normally be established after the occurrence of the event, making the application of art 14(3) less problematic.

4.4 Issues arising from the "objectification" of due diligence obligations: the example followed by the ICJ in the context of prevention of transboundary harm

In light of what has been discussed in the previous paragraphs, it is worth querying whether the current trend of "objectification" of due diligence obligations detectable in certain areas of international law affects the nature of such obligations and what consequences ensue in terms of international responsibility. In some areas of international law, recent developments point toward the "objectification" of due diligence duties. In these cases, the obligation of due diligence – which initially provided for a flexible standard requiring the State to 'take all the necessary measures' – is spelled out usually by Courts into more detailed obligations that specify the measures States have to undertake in order to fulfil the duty. This is what happens for example in the context of the international protection of the environment, where rules have been developed in a way as to include detailed elaborations of due diligence obligations, ranging from the duty to undertake environmental impact assessments, to the duty to adopt the best available techniques, and so on.[122] Other examples of "objectified" due diligence obligations can be found in the measures spelled out by the Seabed Dispute Chamber with regard to the obligations of sponsoring States for activities in the Area[123], or in the specific obligations set up by ITLOS in the IUU fishing Advisory Opinion.[124]

Bearing in mind the analysis conducted above over the moment in which the breach of due diligence obligations occurs and its relation with the issue of responsibility, it is submitted that as long as the only indicator embodied in a due

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economic zone of SRFC States, the ITLOS affirms that responsibility of States flows from a violations of their due diligence obligations as specified by the Tribunal, para. 146-148.

[122] See *Pulp Mills* (note 26), para. 204 and *Responsibilities for Activities in the Area* (note 60) para 141-142.

[123] Although the Chamber in one passage admits not to be called upon "to render specific advice as to the necessary and appropriate measures that the sponsoring State must take (…) [as] [j]udicial bodies may not perform functions that are not in keeping with their judicial character", it did list some of the necessary legislative, administrative measures and procedures that a State shall take in order to fulfil its obligation of due diligence, see *Responsibilities for Activities in the Area* (note 60) para 212-240.

[124] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commiss*ion (note 60), para. 114-119 and 131-139.

diligence duty will be 'to adopt all the necessary measures', the event will operate not just as a possible but also as a *de facto* necessary element in evaluating the breach of the obligation. The latter will only be assessed through the relationship of causality between that wrongful event and the conduct of the State. The conduct will be appraised against the event in order to establish whether in that particular circumstance the State has in fact adopted the measures deemed necessary to prevent the harmful outcome.

When the content of the obligation is instead broken down into specific duties, lack of diligence will necessarily coincide with the breach of one of those particular duties. Furthermore, each detailed obligation – which is part of a bigger due diligence duty – could arguably be regarded as an obligation to adopt a particular course of conduct, in the sense intended by Ago.

To provide an example of the issues under examination, one should focus on international environmental law and the customary obligation to prevent significant transboundary harm. It is generally established that obligations to prevent significant transboundary harm include certain specific duties on the part of the State, such as the obligation to conduct environmental impact assessments (EIA), the obligation to notify, to cooperate with the potentially affected party and to adopt the best environmental techniques or [best environmental] practices at State's disposal.[125] All these obligations objectify the content of the due diligence duty to prevent significant transboundary harm and specify the measures to be taken by the State(s) to be compliant with its preventive obligations. At the same time, these specific obligations – the duty to undertake EIA, to warn, to consult, to notify and inform the potentially affected – are also part of the so-called procedural obligations that States shall respect when authorizing new activities that may cause transboundary harm. Procedural obligations flow from the principle of prevention, and although some of them are considered to be already part of customary law, they are almost always specifically provided in treaties concluded between the parties.[126]

In *Pulp Mills*, the ICJ drew a clear distinction between procedural and substantive obligations in the field of environmental protection. Asked to determine the international responsibility of Uruguay for the authorization, construction and commissioning of two pulp mills on the River of Uruguay, the Court initially found that Uruguay had breached its procedural obligations under the Statute of

[125] See *Pulp Mills* (note 26), para. 204 and *Responsibilities for Activities in the Area* (note 60) para 141-142; Birnie, Boyle, and Redwell (note 19) 148-150; BS Alam, M J Hossain Bhuiyan, T Mr Chowdhury and E Techera, *Routledge Handbook of International Environmental Law* (Routledge 2013) 638. Contrary to this view, as for the obligation to conduct an EIA as part of due diligence, see Certain Activities (note 109) Separate Opinion Judge Dugard, discussed also at note 199.

[126] For an overview on procedural obligations and their customary nature see U Beyerlin and T Marauhn, *International Environmental Law* (Hart & Beck 2011) 39-46; P M Dupuy & J Viñuales, *International Environmental Law* (CUP 2015), 54. On the customary nature of the EIA, see also *Pulp Mills* (note 26), 204.

the River Uruguay, and in particular the duties to inform and notify Argentina of the construction of the two planned mills.[127] However, the ICJ did not find any violation of the substantive obligation to prevent pollution of the river. It recognised the importance of the practice of environmental impact assessments where there is a risk that the activity may have significant adverse impact in a transboundary context, yet it eventually held that inconclusive evidence on the pollution of the waters of the River Uruguay prevented finding Uruguay responsible for a breach of its substantive obligations.[128] Essentially, two were the major findings of the ICJ: (a) that procedural obligations have a separate existence from the obligation to prevent significant transboundary harm and therefore their breach can occur even when pollution did not materialise; and (b) that Uruguay had not breached its obligation to exercise due diligence to prevent the pollution of the River Uruguay, since there were not enough evidence to prove harmful effects on the quality of the waters of the river.

By distinguishing between direct obligations of conduct (i.e. procedural obligations) and the obligation to prevent pollution, the Court suggested that a mere failure to exercise diligence is not sufficient to establish a State's breach of its preventive obligations in the environmental context, as the assessment of that breach necessary involves the evaluation of further elements, including the occurrence of damage.[129] It should be noted though that already in *Pulp Mills* a certain ambiguity emerged over the nature of procedural obligations, since the Court in some passages drew a clear link between them and the obligation to exercise due diligence.[130] This nexus between procedural obligations and due

[127] *Pulp Mills* (note 26), para 111, 149.

[128] Ibid. para. 180, 214,

[129] From this perspective, violations of procedural obligations could be classified as a violation of obligations in the sense intended by Ago, i.e. violations of obligations that require the adoption of a particular course of conduct.

[130] While Argentina argued that a breach of procedural obligations automatically entails a breach of substantive ones, *Pulp Mills* (note 26), para. 72, the ICJ chose a different path, arguing that "nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entail the breach of substantive ones. Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so", at para. 78. Yet, in the same paragraph the Court went on admitting that "there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute"; similarly, in fleshing out the scope and content of the obligation to inform Argentina of the planned activities that was provided by the 1975 Statute, the ICJ drew a link with due diligence noting: "101. The Court points out that the principle of prevention, as a customary rule, has its origin in the due diligence that is required of a State in its territory (…). A State is thus obliged to use all the means at his disposal in order to avoid activities which take place in its territory, or in any other area under its jurisdiction, causing significant damage to the environment of another State (…). 102. In the view of the Court, the obligation to inform CARU allows for the initiation of cooperation between the Parties which is necessary in order to fulfil the obligation of prevention", ibidem, para 101-102. If the obligation to inform is part of the obligation to exercise due diligence, one may question why its violation should not entail *per se* a breach of the obligations to prevent, especially

diligence appeared even more evidently in the recent ICJ decision on *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and the *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*. First, it should be noted that in *Costa Rica v. Nicaragua*, the Court confirmed that the duty to undertake an EIA is part of the due diligence obligations to prevent significant transboundary harm.[131] In this case, the ICJ eventually held that, given the absence of the requisite risk, 'Nicaragua was not under an international obligation to carry out an environmental impact assessment'.[132] In *Nicaragua v Costa Rica*, the Court found a violation of procedural obligations on the part of Costa Rica as the plans for the construction of the road over the San Juan River had triggered the obligation to undertake an EIA, an obligation that Costa Rica failed to fulfil.[133] As in *Pulp Mills*, the Court however distinguished between procedure and substance and concluded that, in absence of significant transboundary harm, there was no violation of the obligation *not to cause* significant transboundary harm.[134]

The decision confirms what already emerged in *Pulp Mills*, namely that a mere failure to exercise due diligence in the prevention of transboundary harm cannot amount to a breach of substantive obligations. The event – considerations of the environmental damage affecting the area in question – must be taken into account when assessing a State's failure to comply with its obligations. Furthermore, by proceeding with their separate assessment, the Court also upheld the view that procedural obligations, despite being part of the duty of exercise due diligence, should be considered separate self-standing obligations, whose breach is assessed independently from the obligation to exercise diligence in preventing transboundary harm. Yet, a couple of considerations point to the ambiguity of the Court toward the relationship between due diligence, procedural obligations, and the obligation to prevent transboundary harm.

First of all, it should be noted that in *Nicaragua v Costa Rica,* Nicaragua accused Costa Rica not only to have violated the obligation to conduct and EIA, but also to have breached the obligations to notify and consult with Nicaragua in relation

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in light of the fact that the Court explicitly recognised the nature of this last one as an obligations of means, see para. 187, whose breach should therefore be established regardless the occurrence of the event.

[131] *Costa Rica v Nicaragua* (note 109) para 104, "to fulfil its obligation to exercise due diligence in preventing significant environmental transboundary harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment".

[132] Ibid. para. 108, This passage is relevant because the Court suggests here that the absence of significant environmental risk prevents the very obligation to exercise due diligence to arise, see *infra*, paragraph 5. Obviously, in absence of any risk of transboundary environmental impact, the Court did not find any breach of the substantive obligation to prevent transboundary harm.

[133] *Nicaragua v. Costa Rica* (note 109) 160-162.

[134] Ibid. para 192, 196, 207, 213, 216-217.

to the construction works. According to Nicaragua, such obligations found existence on three grounds, customary international law, the 1898 Treaty concluded between Nicaragua and Costa Rica and the Ramsar Convention. The Court decided to examine each of these three grounds separately and adopted an interesting approach with regard to the nature of the obligations of notify and consult. In assessing whether Costa Rica was bound by customary international law to notify and consult with Nicaragua, the ICJ found no need to examine whether such obligations had been actually breached by Costa Rica, 'since the Court has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road'.[135] By deeming the examination of the obligations to notify and consult superfluous in light of the already established breach of the duty to conduct an EIA, the ICJ clearly refers back to the due diligence matrix. This passage can in fact easily be read as the assertion by the Court that *because of* the violation of the duty to conduct an EIA, a failure to exercise due diligence on the part of Costa Rica had already occurred, making it unnecessary for the Court to evaluate the breach of the obligations to inform and to notify. Arguably, this would also mean that by failing to undertake an EIA, Costa Rica had already breached its obligation to prevent transboundary harm – which, in the words of the ICJ, finds its source in the obligation of due diligence.[136]

In this regard, Separate Opinion of Judge Donoghue strongly criticised the approach of taken by the ICJ, and noted

'The requirement to exercise due diligence, as the governing primary norm, is an obligation of conduct that applies to all phases of a project (…). In the planning phase, a failure to exercise due diligence to prevent significant transboundary environmental harm can engage the responsibility of the State of origin even in the absence of material damage to potentially affected States. This is why (as in Nicaragua v. Costa Rica) a failure to conduct an environmental impact assessment can give rise to a finding that a State has breached its obligations under customary international law without any showing of material harm to the territory of the affected States. If, at a subsequent phase, the

[135] Ibid. para 217.

[136] It should be noted however that, in assessing the breach of substantive obligations, the ICJ did not speak of a violation of Costa Rica of the obligation to prevent transboundary harm, but rather of a violation *not to cause* significant transboundary harm: "In light of the above, the Court concludes that Nicaragua has not proved that the construction of the road *caused* it significant transboundary harm. Therefore, Nicaragua's claim that Costa Rica breached its substantive obligations under customary international law concerning transboundary harm must be dismissed", see para. 217 (emphasis added). According to this reading, one may argue that the ICJ by establishing the failure of Costa Rica to exercise due diligence in performing the EIA, did in fact find a violation of the *obligation to prevent* transboundary harm, which the Court deemed separated from the substantive obligations *not to cause* transboundary harm. In support of this perspective, see J Brunnée, International Environmental Law and Community Interests: Procedural Aspects (2016) SSRN papers, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784701, 10-12.

failure of the State of origin to exercise due diligence in the implementation of the project causes significant transboundary harm, the primary norm that is breached remains one of due diligence, but the reparation due to the affected State must also address the material damage caused to the affected State'.[137]

Donoghue adopts a perspective that is arguably more coherent with the nature of due diligence and the obligation to prevent transboundary harm. As an obligation to endevour, the duty to prevent significant transboundary harm can be breached whenever it is established that a State has failed to undertake the efforts required by the obligation of diligence, regardless the occurrence of material damage. This means that whenever measures and efforts required of the State are spelled out in detailed obligations, their breach can engage the responsibility of the latter for failure to exercise diligence. The occurrence of environmental damage will only serve to the purpose of reparation, not as constituent element for the evaluation of the breach. Obviously, this approach implies the repeal of any distinction between procedural and substantive obligations,[138] since there would be no need to maintain the separation once the mere failure to comply with the objectified standard of due diligence entails responsibility for failing to prevent significant harm.

The debate that arose on due diligence and prevention in *Nicaragua v. Costa Rica* is certainly narrow in scope since it is limited to the context of environmental transboundary harm. Nevertheless, the difficulty of the ICJ in grappling with the relationship between procedural obligations, due diligence and the obligation to prevent transboundary harm is telling of a certain degree of uneasiness over the exact contours of obligations of due diligence. This is particularly so when the wording 'all the necessary measures' are broaden in scope through the provision of detailed sub-obligations whose fulfilment is proof of State's compliance with the duty to exercise diligence. In these cases, it is difficult to argue against the claim that a violation of even one of these sub-obligations qualifies already as a breach of the duty to exercise diligence. At the same time, giving in to these arguments implies to some extent a re-conceptualisation of the entire notion of due diligence. First because, from a structural perspective, to break up due diligence into a series of sub-obligations of conduct carries the risk of diluting the very meaning of this concept and to transform it into a mere list of procedural checks. Secondly, because by replacing an open-ended standard with detailed procedural obligations, the objectification of due diligence risks reversing the traditional conception of this notion from a flexible and diluted form of obligation to a rather stringent and rigid State's duty.

[137] *Nicaragua v. Costa Rica* (note 109), Separate Opinion of Judge Donoghue, para 9.
[138] This is in fact the position of Judge Donoghue, ibidem, para. 9.

5. Operationalising the nexus between the State and the risk to be prevented: a tentative reconstruction of the sources of a State's duty to exercise diligence

The first part of the present Chapter has illustrated how the underpinnings of obligations to exercise due diligence lay in the element of risk. The connection between the duty to exercise diligence and the risk to be averted applies to due diligence obligations that find their sources in treaty law – where the obligation is framed as such because the State cannot absolutely guarantee the attainment of the object provided by the norm – but also to obligations that find their sources in customary law. For example, a State's duty 'not to knowingly allow the use of its territory for acts contrary to acts of other States' or the obligation to prevent transboundary environmental harm are best efforts obligations because the State cannot be required to guarantee from any use of its territory contrary to the rights of its peers nor to prevent from the occurrence of any environmental damage.

With regard to customary obligations to exercise diligence, one may query *when* the State's duty to exercise diligence exactly arises, namely when the State is effectively required to activate its apparatus and adopt the measures necessary to avert the risk of harm. It has been already shown that the origins of the customary duty to exercise due diligence in international law are closely connected to the exercise of sovereignty. Yet, territorial sovereignty alone is not the distinctive criteria for a State's duty of due diligence to arise. After all, in the *Corfu Channel* case, the ICJ broached the argument of Albania's international responsibility by pointing out that the mere fact of exercising territorial control over land or waters could not amount to sufficient ground for finding a State responsible of every wrongful acts contrary to the rights of other States.[139] Furthermore, there might also be cases in which a State's obligation to exercise due diligence may be triggered outside of its territory and on the basis of factual criteria, such as the nexus between the State on the one hand and the territory or the persons under its control on the other.

The question over the sources that "activate" a State's duty to exercise diligence does not only involve customary obligations but also obligations that arise from treaty law. While the wording 'to adopt the appropriate measures', 'to protect', 'to prevent' may certainly entail the adoption of preventive legislative or administrative or executive reforms, the duty to exercise diligence implies also a certain degree of vigilance vis-à-vis the risk to be averted.[140] Logically, a State will be expected to exercise this vigilance and to perform diligence whenever the risk will materialise. Therefore, grasping at the sources that activate the duty to exercise vigilance means to appraise the link between the State and the risk to be averted. Establishing the factual or the legal sources that account for a connection

[139] *The Corfu Channel Case* (note 15) 18.
[140] See *Pulp Mills* (note 26), para. 197.

between the State apparatus and the risk to be prevented is in fact crucial to single out the conditions upon which a State's obligation to perform due diligence will be activated. These sources represent the reason by which a State shall be tasked with the duty to adopt adequate measures and shall be held accountable had the wrongful even been occurred as a result of its inaction.

Some clarifications are needed before embarking on the analysis of the array and the nature of links that lie at the core of a State's obligation to act and exercise vigilance over certain activities. Primarily, it should be noted that the evaluation of the link between the State and the risk to be prevented shall be kept distinguished from the appreciation of the content of an obligation to exercise due diligence. The first task has to do with the criteria that determine *why* the State is under the duty to take all the necessary measures, whereas the second deals with the identification of *which* measures a State shall adopt to fulfil its due diligence duties. That does not mean however that the appraisal of the nexus that ties up the State with the risk to be prevented could not influence also the degree of diligence required in a given case; the standard may vary depending on the level of risk but also on the circumstances that makes the State apt to intervene in order to prevent it. Moreover, one should keep in mind that the operationalization of the nexus State-risk is an activity that belongs to the realm of primary rules of international law and is completely unrelated to attribution as per secondary norms. The goal here is to map out the conditions that justify the fact that the State is charged with a duty to act and not to identify the situations where a single conduct can be attributed and deemed as an act of the State. Such distinction is crucial as it will be shown that in some cases Courts seem to have merged the two tests – attribution for the purpose of secondary rules and ascription to a State of an obligation to exercise due diligence – into one single standard.[141]

The first evidence emerging from the analysis of the circumstances giving rise to a State's obligation of due diligence is the absence of a coherent set of principles spelling out when a State is effectively linked to a situation of risk that requires its proactive and protective action. Normally the appraisal of the link between the State and the risk occurs *ex-post facto*, when Courts proceed to weight the degree of risk faced in the particular circumstances of the case against the means at State's disposal that could have neutralised or reduced that risk. A look at the most relevant case law can however help identify some common trends within different areas of international law and drawn some general conclusions about the issue. In this regard, an in-depth study of the circumstances giving rise of obligations of due diligence in the context of the protection of foreigners and security of other States had already been conducted by Pisillo-Mazzeschi in his detailed work on due diligence.[142] Therefore, the following analysis is an attempt

[141] *Loizidou v. Turkey* (judgement), 23 March 1995, series A, Vol. 310 para. 62, see also *infra*.
[142] R Pisillo Mazzeschi, Due Diligence e Responsabilità (note 1).

to focus on the most relevant pronouncements of the ICJ and on the protection of the environment and human rights law, in light of recent developments in case law and practice.

5.1 The ICJ's position on the situations prompting a State to act with due diligence: the *Corfu Channel*, the *Nicaragua*, the *Armed Activities in the territory of Congo* and the *Genocide* cases

The first element that triggers the nexus between a State's obligation to exercise due diligence and the risk to be averted is knowledge of the latter on the part of the State. This emerged clearly in the *dictum* of the ICJ in the *Corfu Channel* case, where the obligation incumbent upon Albania to notify the existence of the minelaying was drew from every State's obligation 'not to allow *knowingly* its territory to be used for acts contrary to the rights of other States' and was explicitly framed by the Court as an obligation dependent on Albania's knowledge of the fact.[143] The Court treated knowledge of the risk not just as a necessary, but also as a self-standing condition to be assessed independently from the control exercised by the State over its territory. In this regard, it was noted that

'it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known the authors'.[144]

The Court did acknowledged that exclusive territorial control is a factor with special weight when proving State's knowledge of the risk and argued that 'this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such event'.[145] Accordingly, evidence of Albania's knowledge were inferred mainly by the close vigilance that Albania exercised over the waters of the North Corfu Channel rightly before the explosion, and by the fact the Experts' report requested by the Court had concluded that the minelaying could not have escaped the attention of Albanian coastguards.[146]

The same rationale was adopted in the *Nicaragua* case. Faced with the question on whether Nicaragua was responsible for the flow of arms to the armed opposition in El Salvador, the Court had to determine whether such flow did as a matter of fact take place and whether it could be imputable to the State.

[143] *Corfu Channel* case (note 15), 22.
[143] Ibid 16-17.
[144] Ibid 18.
[145] Ibid.
[146] Ibid, 21.

Admittedly, the ICJ found that evidence of military aid from and through Nicaragua after 1981 were very weak and not sufficient for the purpose of establishing the occurrence of a continuing arms flow.[147] Yet, it was noted that even if the arms supply had taken place and reached the territory of El Salvador, it remained to be proved that Nicaragua was aware of its occurrence. By referring to the *Corfu Channel* case, the Court submitted that Nicaragua's responsibility for allowing the transit of weapons through its territory could only be established if evidence pointed to knowledge of that traffic on the part of the State, a possibility that the Court eventually dismissed.[148] The Court reiterated that the mere fact that a State exercises control over its territory cannot lead to conclude that the latter had knowledge of the illicit acts taking place within its territory.[149]
Both in the *Corfu Channel* and *Nicaragua*, the Court grappled with the issue of knowledge as a source of the State's duty to exercise diligence, but it did not have to dwell upon the question of State's control over the territory, since both illicit acts – the minelaying and the military aid to a paramilitary group operating in another State – occurred within the territorial boundaries of Albania and Nicaragua. Yet, the very possibility of drawing a link between the State and the risk through the element of knowledge presupposes the exercise by the State of a certain degree of control on its territory. After all, it is the exercise of this control that provides power and places the State in the position to take measures to avert the risk or put an end to the wrongful act once the latter has materialised. In *Nicaragua* and the *Corfu Channel*, the exercise of control was implied in the very notion of State's sovereignty over its territory. Yet, one may query in situations of extra-territorial application of due diligence obligations, what is the threshold above which it can be assumed that the State had power to act with diligence vis-à-vis the risk in question. In the *Armed Activities on the Territory of the Congo* the Court argued that the Uganda's exercise of authority as an occupying power in the Democratic Republic of Congo (DRC) district of Ituri conferred it the responsibility for

'any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account' .[150]

On these premises, Uganda was found responsible for violations of human rights and humanitarian law performed by its military forces – which were attributed

[147] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States)* (Merits) [1986] ICJ Rep. 153.
[148] Ibid. 154.
[149] Ibid. 155.
[150] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda) (Merits) [2005] ICJ Rep. 252 para. 179.

directly to the State – and for failing to take measures to ensure the respect of IHRL and IHL in the occupied territory.[151] The exercise of *de facto* control over the Ituri district served the Court to establish Uganda's responsibility also for failing to prevent the illegal exploitation of natural resources in the occupied area. In particular, this part of the claim originated from the DRC's accusation against Uganda of having failed to prevent and prosecute the UDPF forces, the Ugandan companies and the rebel groups supported by Uganda who had engaged in the exploitation of natural resources in the Congolese territory. As for the acts of exploitation of the UPDF forces, the ICJ argued in favour of Uganda's responsibility since the unlawful acts had been carried out by members of the armed forces, hence attributable to the State even if committed contrary to the instructions given (art 7 ARSIWA) and regardless of Uganda being an occupying power in that particular region.[152] With regard to Uganda's responsibility for the illegal exploitation by NSA instead, the Court ruled out any responsibility of the State for the acts of rebels groups operating outside the province of Ituri, since the absence of *de facto* control over these groups released Uganda's from any duty to exercise due diligence over the illegal activities.[153] As for the illegal operations carried out by private persons and Ugandan companies in the Ituri distric, the exercise of territorial control[154] extended Uganda's obligations to take appropriate measures to prevent and prosecute the exploitation of natural resources in this occupied territory.[155]

Shortly after its decision in the *Armed Activities on the Territory of the Congo*, the ICJ revisited the paradigm of control by offering a rather blurred definition of the link that shall exist between the State and risk of genocide prompting the latter to act with due diligence. In the *Genocide case*, the Court argued that the obligation to prevent genocide arises 'at the instant that the State learn of, or should normally have learned of, the existence of a serious risk that genocide will be committed',[156] confirming that risk-awareness is a determinant factor in assessing the nexus State-risk.[157] However, as in the *Armed Activities*, the Court here was faced with the challenge of the extraterritorial application of due diligence obligations, and in particular the extraterritorial application of the duty to prevent

[151] Ibid. para 211.
[152] Ibid. para. 245.
[153] Ibid. para. 247.
[154] Territorial control must be conceived as the exercise of authority over the territory occupied by the occupying power, as provided by art 42 of the Convention Respecting the Laws and Customs of War on Land.
[155] *Armed Activities* (note 150), 222-231 para.172-178 and 253 para 248.
[156] *Genocide case* (note 97) 222 para. 431
[157] Serbia's knowledge of the risk of genocide was not in doubt, since the ICJ had already affirmed its existence in the order of provisional measures of 1993 that asked Serbia to take all the necessary measures to prevent genocide from occurring, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia v Serbia) (Provisional Measures) [1993] ICJ Rep, 24 para. 52.

genocide. After all, in a situation of multi-state intervention, even in a case where multiple State actors are aware of the risk of genocide in a particular area, it cannot be expected that all States will have the same positive obligations with regard to the duty to prevent genocide. Furthermore the need to find a link *ratione loci* between the State and its duty to prevent arises not just with reference to third States, but also with regard to the territorial State that might not be in the position to adopt certain positive obligations depending on the circumstances of the case. The Court affirmed that the obligation of Serbia to prevent genocide in Bosnia was dependent on 'the capacity to influence effectively the actions of persons likely to commit (…) genocide',[158] 'the geographical distance of the State concerned from the scene of the events, and of the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the event'.[159] It was specified that these factual links – that call for as assessment *in concreto* – are not the only conditions to be taken into account, since the capacity of the State to prevent genocide will also depend on legal criteria.[160] The Court did not offer a clear understanding of what these legal criteria might be, for it only contended that the capacity to influence may vary depending on the State's 'particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of the genocide'.[161] It is unclear how this particular legal position should be qualified, and what is the threshold above which a State might be said to influence the actions of persons that do not qualify as its organs.[162] Arguably, the decision of the Court to ditch the criteria of effective control for triggering the extraterritorial obligation to exercise due diligence can be explained by the fact that the ICJ had already dismissed the standard of effective control for the purpose of attribution to Serbia of the genocide acts committed by persons without the status of organs (under art 8 of ARSIWA).[163] The Court was therefore bound to take a different path as basis for Serbia's obligation to prevent genocide, which was found in the vague concept of

[158] *Genocide case* (note 97) 221 para. 430.
[159] Ibidem.
[160] The criteria offered by the ICJ do not serve exclusively to establish the conditions upon which a State shall be tasked to prevent genocide and exercise vigilance over the persons who may commit it, but also as parameters to determine the level of due diligence required in a particular situation, see *Genocide case* (note 97) 221 para 430. This is coherent with what argued at the beginning of this paragraph, whereby the appraisal of the link between the State and the risk to be prevented has also a bearing on the degree of diligence that that State shall exercise in a given case.
[161] Ibid..
[162] See A Gattini, 'Breach of International Obligations', in A Nollkaemper, I Plakokefalos (eds) *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (2014 CUP) 41. With reference to the problems related to the extraterritorial application of the duty to prevent genocide and the content of the duty, see in general A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695; S Forlati, 'The Legal Obligation to Prevent Genocide: Bosnia v Serbia and Beyond' (2011) XXXI Polish YB Int'l 189.
[163] *Genocide case* (note 97) 207 para. 398 – 214 para. 412.

a State's capacity to influence the actions of persons likely to commit genocide.[164] Some remarks are due in light of the approach of the ICJ. First of all, a certain degree of territorial control is the first condition to be taken into account for triggering a State's duty to exercise due diligence. Such territorial control must be accompanied by knowledge of the risk, which must be proved and assessed separately and according to the circumstances of the case. This raises the question over the standard of proof required to establish knowledge, which in certain cases may be much more burdensome than in others. In the *Corfu Channel* the ICJ seemed to opt for a lessen, loosen standard of proof, acknowledging that 'the exclusive territorial control exercised by the State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State' and that 'by reason of this exclusive control, the other State (…) is often unable to furnish direct proof of facts';[165] in the *Genocide* case the Court took instead an opposite route and contended that knowledge of the risk required 'proof at a high level of certainty appropriate to the seriousness of the allegation'.[166] Yet, the higher standard of proof required in this latter case may be explained not only in light of the seriousness of the crime, but also because of the nature and the degree of control exercised by the State over the territory. Arguably, the level of territorial control is likely to influence the standard of proof required for the injured party to evidence knowledge of the risk. The stronger will be the bond that ties the State with the territorial area in question, the easier will be for the injured party to infer knowledge of the risk. Finally, a further element appears to be at least implicitly considered by the Court in the *Genocide* case, when assessing the relationship between the Serbia and the risk of genocide to be averted through the fulfilment of Serbia's preventive obligations. The Court noted that the obligation to prevent genocide arises the moment the State learns of 'the existence of a *serious* risk that genocide will be committed'.[167] The ICJ reiterated the need for this condition in more than one passage,[168] although it gave no general indication of what qualifies as seriousness of the risk, for the Court only assessed it with regard to the circumstances of the case.[169] However, what these passages suggest

[164] Gattini suggests that the Court would have probably done better by replacing the concept of "capacity to effectively influence" with the test of overall control, that while not sufficient for the purpose of attribution as for secondary rules, may be relevant for the purpose of attribution of due diligence obligations as for primary rules, see Gattini, Breach of International Obligations (note 162) 41.
[165] *The Corfu Channel Case* (note 15) 18.
[166] *Genocide case* (note 97) 221 para. 430.
[167] Ibid 431.
[168] The Court notes: "for it [the State] to incur responsibility on this basis, it is enough that the State was aware, or should normally have been aware, of the *serious danger* that acts of genocide would be committed" at 432 (emphasis added); "The Court recalls that (…) the Belgrade authorities (…) could hardly have been unaware of the *serious risk* of it [genocide] once the VRS forces had decided to occupy Srebrenica enclave", at 436 (emphasis added).
[169] Ibid. 436.

is that is not the existence of *any* risk that requires the State to react promptly in the exercise of diligence, but only the presence of a qualified risk significant in scale.[170]

5.2. Sources of due diligence in the international human rights context: the case of the ECtHR

The identification of the elements triggering the nexus between the State and the risk to be averted – control over the territory, knowledge and seriousness of the risk or the manifestation thereof – call for an assessment in other areas of international law. In this regard, a focus on the European Court of Human Rights (ECtHR) and its relevant jurisprudence may help broaden up the scope of the analysis and offer further insights on the conditions triggering a State's duty to act with diligence.

First of all, difficulties in grappling with the question of the degree of control necessary for identifying the State that owes a duty of due diligence arise also in the context of international human rights law. In international human rights law, the extent of the applicability of (positive) States' obligations to fulfil their human rights duties depends largely on the notion of jurisdiction. Art 1 of the European Convention on Human Rights (ECHR) provides that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[171] Similarly, The International Covenant on Civil and Political Rights (ICCPR) provides that a State party to the Convention undertakes 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized'.[172] Other international human rights treaties refer to jurisdiction as the criterion to determine the extension of a State's human rights obligations.[173]

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[170] Somehow this could also be inferred in the Nicaragua case. In assessing Nicaragua's responsibility for the flows of arms to El-Salvador, the Court did admitted that a certain amount of arms aid might have reached El-Salvador after 1981 and onwards, but it did admit that there was lack of evidence on 'any continuing flow on a *significant scale'* see *Nicaragua* case (note 147) 153.[170]

[171] Council of Europe, The European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Art. 1.

[172] See for example art 2(1) of the ICCPR; the wording of the article may suggest the for human rights obligations to arise, both jurisdiction and presence on a State's party territory is necessary; however, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* [2004] ICJ Rep. para 109-111; UN HRC, 'Concluding Observations of the HRC, Israel' (18 August 1988) UN Doc CCPR/C/79/Add.93 para 10; UN HRC, General Comment no. 31,' The Nature of the General Legal Obligations Imposed on State Parties to the Covenant' (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 para 10.

[173] See 1969 Convention on the Elimination of All Forms of Racial Discrimination art 3 and art 6; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Jurisdiction is primary territorial,[174] as it alludes to the sphere of power exercised by a sovereign State over the persons, property and events occurring within its territory. Yet, a State may have jurisdiction beyond its national territory, and it may therefore be held accountable for violations of international human rights law that occurred outside the State's territory but under its jurisdiction. It is in this context that the question of the extraterritorial application of human rights treaties arises.[175]

Setting aside the early case law concerning State responsibility for extraterritorial conduct,[176] the first opportunity for the ECtHR to give meaningful content to the notion of jurisdiction ensued from the well-known *Loizidou* case. Here the Commission spoke of 'effective overall control' over an area as threshold for finding Turkey responsible for the breaches of human rights committed by the Turkish Republic of Northern Cyprus (TRNC). In a subsequent case, the Court also stressed that Turkey's effective overall control over Northern Cyprus entailed the State's obligation to secure in the relevant territory the entire range of rights set out in the Convention.[177] Similarly, in *Ilaşcu v. Moldova and Russia*, the ECtHR stated that State's responsibility may be engaged 'where, as a consequence of military action – whether lawful or unlawful – it exercises in practice *effective control of an area* situated outside its national territory'.[178] In this regard, the Court reiterated in more than one occasion that the assessment of the exercise of effective control over an area is a question of facts, which may depend on several different factors. Accordingly, although primary weight has been given by the Court to the strength of the military presence in the area, at times the ECtHR has gone beyond the mere physical presence of military personnel and established jurisdiction on the basis of other relevant

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(adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2(1), art 5, art 7(1), art 11, 12, 13, 16 and 22(1).

[174] *Bankovic and Others v Belgium and Others* [GC] (dec.) App. No. 52207/99, 12 December 2001 para 57; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (note 172) para. 109.

[175] For a complete overview of the problem see M Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011 OUP), in particular Chapter II.

[176] See for example *Cyprus v. Turkey*, (decision) App. No. 6780/74 and 6950/75,26 May 1975, 136, where the Commission stated that 'within the jurisdiction' as provided at art. 1 of the ECHR refers to the duty of the Contracting Parties to secure rights and freedom of all persons 'under their *actual authority* and *responsibility*, whether that authority is exercised on its own territory or abroad' (emphasis added); *Stocké v. Germany*, App. No. 1755/85, Report of 12 October 1989, series A Vol. 199, 24 para. 166.

[177] *Cyprus v. Turkey*, App. NO. 25781/94, 10 May 2001, para. 77.

[178] *Ilaşcu v. Moldova and Russia*, App. No. 48787/99, (8 July 2004) para. 314 (emphasis added). It should be noted that in this case the Court held not only Russia - which was the entity exercising effective control over the Transdniestrian area - but also Moldova had jurisdiction in the Transdniestrian region where the alleged human rights violations occurred, since the latter was the territorial State, even though it did not have effective control over the area, at 331; See more recently, confirming the findings of *Ilaşcu*, *Catan and others v Moldova and Russia*, App No 43370/04, 82 52/05 and 18454/08 (19 October 2012) para 109.

circumstances. In the *Catan and others v Moldova and Russia* for instance, the Court was faced with the question on Russia's responsibility for violations of ECHR in the Transdniestrian region, an area formally in the territory of Moldova but actually occupied by a separatist regime with strong Russian ties. The Court found a violation of the right of education of the applicants and found Russia responsible basing on the exercise of jurisdiction over the Transdniestrian region at the time of the events. Evidence of Russia's effective control over the area weren't however inferred from the military presence of Russian officers over the area – since such presence was insignificant at the time of the events – but rather from the strong political and economic ties between Russia and the separatist regime.[179] Likewise, in the *Chiragov* case, the ECtHR established Armenia's jurisdiction over the separatist Azerbaijani area of Nagorno- Karabakh on the ground of the 'significant and decisive influence' in terms of 'military, political, financial and other support' that Armenia provided to the separatist regime.[180] Finally, it should also be noted that ECtHR extended the notion of jurisdiction beyond the definition of effective control exercised over a territorial area, and argued that human rights obligations of States Parties may arise also owing to the particular relationship between the State and the victims, irrespective of any effective overall control over a territory. In the *Issa v. Turkey* case, the Court found that 'a State may also be accountable for violations of the Convention rights and freedom of persons who are in the territory of another State but who are found to be *under the former State's authority through its agents* (…) operating in the latter State'.[181]

In light of the present analysis, this means that human rights due diligence obligations arise whenever a State Party either exercises effective overall control over a territory of another State or as a result of authority and control exercised toward the victims. Effective overall control over a territory or authority and control over individuals qualify as the relevant factors that link a State with the risk of human rights breaches to be averted. That said, practice shows that the concept of jurisdiction as source of obligations of due diligence is far from being that crystal-clear. Firstly, because at least in the *Loizidou* case, the ECtHR seems to have struggled to disentangle attribution for the purpose of secondary rules with the conditions triggering a State's positive obligation to exercise due diligence. At the merit state, the Court affirmed that

> [it] is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercised detailed control over the policies and actions

[179] *Catan and others* (note 178), 102-123.
[180] *Chiragov and Others v Armenia*, App NO 13216/05 (16 June 2015) 167-187.
[181] *Issa v. Turkey*, App. N0. 31821/96, 16 November 2004, para. 71 (emphasis added). See also *Öcalan v. Turkey*, App. No. 46221/99, (12 May 2005) para. 91; *Al Saadoon and Mufdhi v. UK*, App. No. 61498/08, (Admissibility) 30 June 2009, para 88.

of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus (…) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and action of the 'TRNC'(…). Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purpose of Article 1 of the Convention (art. 1).[182]

It is well-known that this passage of the Court sparked vivid doctrinal debate, with scholars grappling with the question on whether the ECtHR was indeed stating that by virtue of its effective overall control over northern Cyprus, Turkey was under the positive obligation to secure human rights, or whether it overlapped the issue of jurisdiction with the one of attribution by finding all actions of the TRNC attributable to Turkey due to the exercise of effective overall over them.[183] Should this latter be the correct reading, the Court would have implicitly stated that the test of jurisdiction is dependent and ancillary to the test of attribution as per secondary rules.

Furthermore, the approach toward the issue of jurisdiction might show inconsistencies depending on the circumstances of the case. In *Bankovic* for example, the Court argued in favour of a rather restrictive definition of jurisdiction and tied effective control of a relevant territory and its inhabitants with the need for this control to be consequent to military occupation or exercise of public powers as a result of consent, invitation or acquiescence of the Government of that territory.[184] The specifics of a case may also suggest going beyond the strict notion of jurisdiction. The link between a State and its duty to prevent human rights violations may lay in the existence of a risk of human rights violations and the capacity of the State to neutralise it through its influence on targeted persons; this may occur for example when a flag State learns through masters of private vessels flying its flag of the existence of a serious risk that persons in distress at sea will drown and does nothing to prevent the loss at sea.[185]

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[182] *Loizidou*, (note 141) para. 56.

[183] See in this latter sense, V P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence and Concurrence Responsibility' (2015) 36 Mich J Int'l L 129, arguing that the ECtHR in Loizidou did tackle the issue of Turkey's responsibility as a matter of attribution rather than jurisdiction, linking effective control to the attribution of conduct of the TRNC to Turkey. See also *Prosecutor v. Tadic, IT-94-1, Appeal Chamber*, Judgement, 15 July 1999, para 128. Contrary to this view, M Milanovic (note 175) arguing that the Court's test here is one of control over an area or territory, and not over a non-state actor.

[184] *Bankovic v. Belgium*, App. No. 52207/99, Inadmissibility Decision, 12 December 2001, para 71. The Court seems however to have moved away from the *Bankovic* approach, as in *Issa v. Turkey* it recognised that the respondent State (Turkey) could be considered to have exercise jurisdiction due to *temporary, effective overall control of a particular portion of the territory* of northern Iraq, see *Issa v. Turkey* (note 181) para 74.

[185] See E D Papastavridis, Is there a right to be rescued at sea? A skeptical view (2014) 4 QIL 17, 29-31 available at http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-skeptical-view/ (accessed 29 March 2017) arguing that in this case, if the master of the vessels is in the vicinity of

The extent to which States must secure rights and freedom of individuals and enforce their due diligence obligation is not however commensurate exclusively with the extent of their jurisdiction, i.e. with the extension of their control over the territory. Others factors that echo the findings of ICJ in the relevant cases analysed above shall be also taken into account.
Questioned on the scope of the right to life, the ECtHR in *Osman* noted that

'[T]he scope of the positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life can therefore entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities *knew or ought to have known* at the time of the existence of a *real* and *immediate* risk to the life of an identified individual from the criminal acts of a third part and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[186]

With reference to the right to life, the ECtHR has applied the criteria originally set in *Osman* consistently. In the *Öneryldiz* case for example, the Court held that Turkish authorities had a positive obligation to prevent breaches of the right to life and to exercise due diligence when they '*knew* or *ought to have known* that there was a *real and immediate risk* to a number of persons'.[187] Recently, in *Kemaloğlu v. Tukey*, the Court found Turkey responsible for the death of a seven-year old boy who froze to death while returning home after early dismissal of the class. The Court initially reaffirmed what elaborated in *Osman*, namely that positive obligations are not be interpreted in a way 'to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources'.[188] Yet it eventually argued that given the weather conditions at that time, the school authorities should have taken basic precautions to minimize the risk and give notice to the municipality shuttle's service of the early closure of the school.[189] But the ECtHR has applied the *Osman* test also beyond the protection

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the persons in distress, the flag State learning of the risk would have the capacity to influence the conduct of this master and could therefore incur in the violation of its due diligence obligations under the right to life.

[186] *Osman v UK*, Judgement, 28 October 1998, Reports 1998, para. 116 (emphasis added). See also *Özgür Gündem v. Turkey*, ECtHR, App. 23144/93 para 42-43 dealing with positive obligations under art. 10 of the ECHR.

[187] *Öneryldiz v Turkey*, para. 101

[188] *Kemaloğlu v. Tukey*, Appl. No. 19986/06 (10 April 2012) 36.

[189] Ibid. 41. See also, as for the protection for the right to life, *Mastromatteo v. Italy*, (24 October 2002) ECHR App. 37703/97, para 74, stressing that domestic authorities must "do all that could reasonably be expected of them to avoid a *real* and *immediate* risk to life of which they had or ought to have had knowledge" (emphasis added). See also, *Denizci v. Cyprus*, (23 July 2001) ECtHR, App. No. 25316-25321/94, where responsibility of the authorities could not be engaged since the police had not been informed and therefore could not have been deemed to know.

of the right to life; in *El-Masri v Macedonia* for example, the Court affirmed that Macedonian authorities violated art 5 of the Convention (right to liberty and security) since 'it should have been clear to the Macedonian authorities, that having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights'. Furthermore the Court reiterated the Macedonian authorities acted 'despite the fact that they were aware or ought to have been aware of the risk of that transfer [from the CIA to a subsequent detention in Afghanistan]'.[190]

The reasoning takes us back to what already argued by the ICJ in different contexts. What triggers a State duty to act diligently and adopt the necessary measures in protecting human rights and preventing violations is not just jurisdiction, or control over a territory, but also knowledge (or constructive knowledge) or the risk and foreseeability of the violation, which shall be deemed *real* and *immediate* with respect to the possible breach.[191] Arguably, this *quid pluris* is what enables the Court to find a causal connection between the State omission and the occurrence of the wrongful event (the infringement of the right protected by the Convention). If the risk was real and immediate and the authorities had knowledge of should have knowledge of a risk of the breach it is safe to assume that had the State acted promptly, the violation would have been averted. Yet, the existence of additional conditions that triggers a State's duty to protect is also a policy urgency, as it allows to set limits to States' restraints.[192] By linking State's responsibility with the failure to act in circumstances where the risk was known, serious and imminent – and not for a failure to act in relation to *any* risk – international law enables the State to limit its governmental authority over private parties.

5.3 Environmental law and the duty to prevent transboundary harm

Lastly, the appraisal of the nexus between a State and the risk to be prevented shall be analysed with reference to environmental law. In the field environmental protection, control of the territory, qualified risk and knowledge of the latter have been consistently regarded as the necessary elements that trigger a State's obligations to exercise due diligence in preventing transboundary harm. Both the 1972 Stockholm Declaration Principle 21 and the 1992 Rio Declaration on Environment and Development Principle 2 provide that the responsibility of a

[190] *El-Masri v The Former Yugoslav Republic of Macedonia*, App No 39630/09 (13 December 2012), 239.

[191] See also on foreseeability of the event as source of positive obligations 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* (Hart Publishing 2004), 132

[192] See in this regard M Hakimi, 'State Bystander Responsibility' (2010) EJIL, 341, 355-357.

State not to cause damage to the environment of other States extends only to the activities carried out within the State's jurisdiction or under its control, a condition that was reiterated by the ICJ also in the *Legality of the Threat or Use of Nuclear Weapons*[193] and in *Pulp Mills*.[194] Also in the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted by the ILC in 2001, the Commission clarified that the articles would apply exclusively in the circumstances set above. Yet, the articles point to the other elements that should subsist, namely, knowledge of the risk and seriousness thereof. None of the draft articles make explicit reference to knowledge of the risk, however the Commentary to art 1 specifies that 'the mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no proper informed observer *was* or *could have been aware* of that risk at the time the activity was carried out'.[195]Hence, responsibility for failure to prevent transboundary harm will arise only if environmental harm materialises a risk that was foreseeable by a proper and informed observer. In this context, the Commentary also notes that knowledge of the risk may appear as a result of some event or development. This means that an activity originally branded by the State as void of any inherent risk may reveal itself as risky following new developments in scientific or technical knowledge.

As for seriousness of the risk, art 3 explicitly provides that the State of origin shall take all appropriate measures to prevent *significant* transboundary harm. Two types of activities are covered by the umbrella of "significant risk": activities that have a low probability of causing disastrous consequences, and activities where there is a high probability of causing harm of a significant scale. The ILC acknowledged the difficulty of setting the threshold above which a certain activity may cause significant harm. In attempting to provide guidance on the issue, the Commentary affirms

'The term significant involves more factual considerations than legal determination. It is to be understood that "significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect of matters (…) [that] must be susceptible of being measured by factual and objective standards'.[196]

The limit of 'significant risk' for a State's obligation to prevent transboundary harm was agreed by drawing originally on the *Trail Smelter* case, where the Tribunal reached its conclusions on a State's obligation not to causes transboundary environmental injury to the others by referring to previous

[193] *Legality of the Threat or Use of Nuclear Weapons* (note 22) para 29.
[194] *Pulp Mills* (note 26) 45-46.
[195] Commentary to art 1 of the *Draft Articles* on *Prevention of Transboundary Harm from Hazardous Activities* (2001) ILC YB/II UN Doc. A/56/10.
[196] Ibid Commentary to art 2, at 152.

jurisprudence of the United States. In the list of US cases quoted by the Tribunal, the US Courts had found a breach of a State's interest whenever pollution or the risk thereof caused by the other State was "of serious magnitude",[197] or "of a great scale".[198] Recently, in the *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* cases, the ICJ reiterated that an obligation to exercise due diligence arises only when the planned activity may have a significant adverse impact in the transboundary context. In particular, the Court found that Nicaragua did not breach its duty to conduct an environmental impact assessment, which is part of the due diligence obligation to prevent environmental harm, as the activity that Nicaragua had planned did not carry a risk of significant transboundary harm.[199] On the contrary, the ICJ held that because the construction of the road planned by Costa Rica carried a risk of significant transboundary harm, the State was under the obligation to pursue an environmental impact assessment that Costa Rica had failed to undertake.[200]

In this regard, a final remark is due with regard to the recent ICJ's pronouncement. Building on the *Commentary of the Draft Articles on Prevention* and on the analysis conducted in the course of the present paragraph, it has been submitted that seriousness or significance level of the risk are some of the conditions that underpin a State's duty to exercise due diligence. This means that in the context of transboundary environmental harm, any evaluation of the degree of risk embedded in the activity should precede the assessment of the content of the obligation of due diligence, since the very existence of the latter depends on a positive evaluation of the 'significant risk' test.[201] Yet, in the *Costa Rica v. Nicaragua* the Court has somehow overlapped the issue over the very existence of Nicaragua's obligation of due diligence with the test on its content. Asked to

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[197] See the case quoted by the Tribunal between the State of Missouri and the State of Illinois, *Trail Smelter* (note 20) 1964.

[198] Ibidem, 1965, with reference to a case brought before the Supreme Court between the State of Georgia and the State of Tennessee.

[199] *Costa Rica v Nicaragua* (note 109) para 104-105. But see in this regard, Separate Opinion of Judge Dugard. Aware of the risk of linking the source of an obligation to exercise due diligence with the existence of a significant risk of harm, Dugard affirms: "A State's obligation to conduct an environmental impact assessment is an independent obligation designed to prevent significant transboundary harm that arises when there is a risk of such harm. It is not an obligation dependent on the obligation of a State to exercise due diligence in preventing significant transboundary harm. Due diligence is the standard of conduct that the State must show *at all times* to prevent significant transboundary harm, including in the decision to conduct an environmental impact assessment (…). 10. The danger of viewing the due diligence obligation as the source of the obligation to perform an environmental impact assessment is that it allows a State to argue, retrospectively, that because no harm has been proved at the times of the legal proceedings, no duty of due diligence arose at the time the project was planned." at para 9-10. This is why Judge Dugard defined the approach adopted by the ICJ in this particular case as a "backward looking approach", because it makes the obligation to conduct an EIA dependent on the risk of significant transboundary harm.

[200] *Nicaragua v Costa Rica* (note 109) para. 146-152.

[201] See Commentary to art 2 of the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,* at 152.

assess whether Nicaragua's has breached its obligation to conduct an EIA, the Court did not determine, first and foremost, whether the State was under the obligation to exercise due diligence to prevent transboundary harm, but it went straight to the question on whether Nicaragua had breached its obligation of due diligence to conduct an environmental impact assessment.[202] It was in fact throughout the verification of the environmental impact assessment carried out by Nicaragua in 2006, that the Court was able to provide an answer to the premises of the claim. The Court confirmed the conclusions contained in the EIA performed by Nicaragua and eventually held that the obligation to conduct an EIA was actually inexistent for the risk embedded in the activity was not significant.[203]

6. Assessing the content of due diligence obligations: elements that affect the standard

Clearly, the content of an obligation of due diligence cannot be determined abstractly and *a priori*, as it depends largely on the content of the particular primary rule in question.[204] Scholars and international courts have highlighted the 'elastic and relative nature' of due diligence duties,[205] and recently the Seabed Dispute Chamber has argued that the content of due diligence cannot be described in precise terms as it is a 'variable concept (…) [that] may change over time' according to several factors.[206] Traditionally, in order to fulfil obligations to prevent or to ensure, and obligations to punish, States will need to enact national legislation and regulation aimed at preventing or ensuring a given result, and equip themselves with an effective administrative or judicial apparatus. The latter should be used by States diligently to prevent the commission of prohibited activities, and to investigate or punish such activities should they nevertheless occur. These are to be considered the minimal requirements for States to discharge their obligations to take 'all the necessary measures' and discharge their duty to act diligently. However, depending on the circumstances of the case and the particular primary rule envisaged, these measures may also consist of the adoption of other rules or steps that a State shall undertake to prove that everything was done in order to avoid a harmful event. Two corollaries attached to this matrix. First that the assessment of due diligence can only be done *in concreto*, by taking into account the particular situation in which States are called upon to exercised diligence.[207] Second, that unless the basic elements/constitutive

[202] *Costa Rica v Nicaragua* (note 109) para 104-105 where the Court refers back to Pulp Mills to appreciate the content of an EIA and then refers to the 2006 EIA conducted by Nicaragua
[203] Ibid, 105.
[204] Already, *Alabama Claims* (note 6) 58.
[205] Pisillo-Mazzeschi, Due Diligence and International Responsibility (note 56) 44.
[206] *Responsibilities of the Sponsoring States* (note 60) para 117.
[207] See *Genocide* case, (note 97) 221 para 430.

elements of a due diligence obligation will have been already "objectified" (for example by means of specific treaty provisions setting forth the standards of the 'best available practices' applicable in a certain field of State activities), the content of due diligence will often be spelled out by Courts during the adjudication process. This is a direct consequence of the inherent characteristic of due diligence obligations and the result of their nature as duties whose fulfilment must be evaluated *in concreto*. Since an obligation of due diligence will often only require the adoption of 'all the necessary measures or steps' to reach a particular goal, it will be up to Courts to provide concreteness to this proposition and to specify which particular measures a State should take in a given case.

Notwithstanding these premises, it is possible to identify a number of elements that are normally used by international tribunals to determine the level of diligence required in a case and according to the circumstances. Taking into account what has been previously argued, we are dealing here with the elements that inform the *standard* of due diligence, namely the degree of care referred *ex-post* by Courts when assessing the fulfilment of obligations of due diligence in a particular context. In this regard, the interest to be protected, the degree of danger involved, the level of control exercised by the State over the activity and its capability, are all factors that will help measure the degree of diligence that should have been employed by that State in light of the circumstances.

6.1 Reasonableness and good governance as golden thread to inform due diligence

Traditionally, the standard of due diligence has been conceived as the degree of care that a well organised State would be expected to take in circumstances similar to the case in question. Early scholarship dwelt upon the meaning of due diligence in the context of the protection of aliens and referred to it as a standard embodying the level of measures that States normally take to prevent or punish the injurious act.[208] During the discussion of the Preparatory Committee of the Hague Conference of 1929, the Committee argued that in the protection of aliens States shall perform 'such due diligence (…) as, having regard of the circumstances and the status of the person concerned, could be expected from a *civilized* State'.[209] The concept that underpins the standard of due diligence is that of good government, taken as the set of legal, administrative and judicial measures that a well-governed State apparatus should be able to guarantee.[210] The

[208] García Amador, 'Second Report on State Responsibility' (1957) ILC YB/II, UN Doc. A/CN4/106, 122 para. 9.
[209] Ibidem, para. 5.
[210] See *Velàsquez Rodriguez Case* (Judgement) (29 July 1988) IACtHR para 166, whereby the Court establishes that there is a duty of the Parties to the Convention "to organize the

notion of good government sends back to the concept of reasonableness, and in particular to the idea that while States shall do all in their power to prevent the occurrence of a harmful event or to punish the culprit, they should not be expected to exercise a level of efforts disproportional to what would it be seen as *just* in a given circumstance.[211]

As a matter of fact, "reasonable" is a notion that has been largely employed by Courts grappled with the problem of defining the content of a due diligence standard. To provide some examples, in the *De Brissot and others* case, the United States – Venezuelan Claim Commission established that Venezuela's responsibility had to be assessed depending on the measures employed in bringing to justice the guilty parties, and in particular by evaluating whether 'she did all it could *reasonably* be required in that behalf'.[212] In the *Wipperman* case, it was argued that States are not responsible for acts of private individuals 'as long as *reasonable* diligence is used in attempting to prevent'[213] the occurrence of the wrong. More recently, the trend toward the objectification of the content of obligations of due diligence is limiting the recourse to reasonableness as the main factor to assess whether a State has acted diligently in a particular case. The more necessary measures and steps to be taken by States are crystallised and spelled out, the less reasonableness operates as formal threshold to inform the standard. Yet, the idea that the measure of due diligence is closely linked to a degree of care that cannot be disproportionate with respect to the circumstances of the case is still strongly ingrained in contemporary jurisprudence. In the *Seabed Mining Advisory Opinion*, the Tribunal spelled out the particular obligations that States should take in order to fulfil their due diligence duties, but then stressed that these due diligence obligations incumbent upon Sponsoring States should be 'reasonably appropriate'.[214] Similarly, when queried on the breach of Serbia of the obligation to prevent genocide from occurring, the ICJ argued in favour of Serbia's responsibility as the State had manifestly 'failed to take all measures to prevent genocide which were *within its power*'.[215] The short passage alludes to the fact that not only have State the duty to exercise the best efforts to prevent the occurrence of genocide, but also that it would be unreasonable to expect them to

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governmental apparatus and, in general, all the structures through which public power is exercised".

[211] *Genocide* case (note 97) 221, para 440.

[212] Moore, *History and Digest* (note 6) vol. III, 2968 (emphasis added).

[213] Ibidem, 3041 (emphasis added). A further example can be found in the *L.F.H. Neer and Pauline Neer* (USA v. United Mexican States) (Decision) General Claim Commission (Mexico and United States) (15 October 1926), IV UN RIAA, 61-62. A detailed analysis of the standard of due diligence and of reasonableness as threshold for a State to act diligently in the context of the protection of aliens can be found in Pisillo-Mazzeschi, Due Diligence and International Responsibility (note 56) 25-31.

[214] *Responsibilities of the Sponsoring States* (note 60) para. 120

[215] *Genocide* case (note 97) 221 para 440 (emphasis added).

go beyond their capability.[216] In *Osman*, the ECtHR stressed that the positive obligations incumbent upon States to protect the right to life must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[217]

6.2 Degree of risk

The degree of risk is possibly the most acknowledged variable that affects the evaluation of the standard of due diligence. A State will generally need to take greater measures of prevention or punishment where there is a higher risk of violation, provided of course that the State had knowledge or ought to have knowledge of this particular risk. That the level of due diligence shall be subject to the degree of risk of the activity envisaged in a particular circumstance emerged already in the well-known *Alabama* case. While in this case the UK defined due diligence as the measure of care which governments usually employ with respect to their own affairs, the United States argued that the level of due diligence should have been proportional to the size of the object in question and the power of the State. The Tribunal subscribed to the definition of due diligence provided by the US and held that due diligence referred to the level of care that 'ought to be exercised by neutral governments in exact proportion to the risk to which either of the belligerent may be exposed'.[218] In the context of international environmental law the level of the risk involved in the activity operates as the main element that influences the standard of diligence. The Commentary to art 3 of the Draft Articles on Prevention of Transboundary Harm provides that the standard of due diligence against which the conduct of the State shall be assessed is that which is 'considered appropriate and proportional to the degree of risk of transboundary harm in the particular instance'.[219] In the *Seabed Minining Advisory Opinion*, the Tribunal contended that the level of diligence changes in relation to the risks involved in the activity; hence, activities in the Area concerning different kinds of minerals may require different standards of due diligence.[220] The degree of risk played also a relevant part in the *Genocide* case, when the ICJ was asked to evaluate Serbia's responsibility for failure to prevent genocide according to in Srebrenica. Drawing on the amount of international documents containing information clearly suggesting a serious risk of genocide in

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[216] See *infra*.
[217] *Osman* (note 186) para. 116.
[218] *Alabama Claims* (note 6), 50.
[219] ILC, 'Report of the International Law Commission on its fifty-third session' (2001) UN Doc. A/56/10 Commentary to art. 3, 154 para. 11.
[220] *Responsibilities of the Sponsoring States* (note 60) para. 117. See also implicitly, *Pulp Mills* (note 26) 88-89 para. 223, where the Court states that the exercise of due diligence entails consideration of the technology used, in light of risk of the activity and its impact on the environment.

Srebrenica – including the two orders of Provisional Measures delivered by the Courts in 1993 and resolutions of the UN General Assembly – and by virtue of evidence collected before the ICTY, the ICJ established that Serbia had to be aware of the serious risk and the imminence of genocide.[221] The Court argued then that in light of the information at their disposal, the Yugoslav Federal Authorities should have made the best efforts within their power to prevent the event from taking shape.[222]

It should be noted that the degree of risk embedded in the activity is not just a relevant factor that affects the content of the due diligence standard, as this one also operates as possible necessary nexus for charging a State with an obligation to act with due diligence. We have previously argued that a qualified risk may be the source of a positive duty for the State to adopt measures to prevent it. While in this latter case the qualified risk operates as a necessary feature to establish *whether* an obligation to exercise due diligence actually exists, the degree of risk affecting the standard concerns *the extent* to which the obligation of due diligence falls on the State.

6.3 Degree of control over the activity

As for qualified risk, degree of control over the activity or the territory is one of the elements that operates as source of a State's obligation to exercise due diligence. It has been previously argued that for a State to have a duty to exercise vigilance over activities that may cause harm to the environment, may cause harm to the interests of other States or be in violations of international human rights norms, a State must exercise control over the territory or the activity in question. This control may be qualified as well, following the example provided by the case law of the ECtHR, where the exercise of effective overall control over a territory has been deemed as the threshold for States' positive obligations to arise.

Although a certain degree of control is primary a source of due diligence obligations, its intensity may also influence the degree of diligence required in a particular case. Depending on the connection or influence that States have over certain activities or on private actors, they may be required to exercise higher vigilance with respect to these activities than their peers. For example, with regard to the relationship between States and private military security companies (PMSCs) in situations of conflicts, States' obligation to exercise due diligence would arise from art 1 common to the four Geneva Conventions, whereby 'The High Contracting Parties undertake to respect and to ensure respect for the present

[221] *Genocide case* (note 97), 224-225 para. 436-438.
[222] Ibidem.

Convention in all circumstances'.[223] However, States' obligation to exercise due diligence over these private actors may vary among the home State (where the PMSCs in based), the host State (where the PMSCs operates) and the contracting States (that has purchased the PMSCs service) according to the level of influence and connection toward these actors.[224] In the *Genocide* case, the ICJ held that Serbia was under the obligation to exercise diligence in preventing the occurrence of genocide *because* the FRY was in a position of influence over the Bosnian Serbs that implemented the genocide and owing to the strength of the political, military and financial links between the FRY and the Republika Srpska and the VRS.[225] At the same time, the Court noted that 'various parameters operate when assessing whether a State has duly discharged the obligation concerned'.[226] Among these parameters, the ICJ mentioned 'the capacity to influence effectively the actions of persons likely to commit, or already committing genocide',[227] capacity that may depend on the geographical distance of the State from the event, the strength of the political link, and other factors. This suggests that in the ICJ's opinion, the capacity to influence effectively the actions or persons likely to commit genocide operates both as the threshold that triggers the obligation of the State to act with due diligence, but also as a factor likely to influence the degree of vigilance that such State should implement.

In this regard, a clearer example may be offered by the recent *South China Sea Arbitration* case, between Philippines and China. Among the various claims brought before the Permanent Court of Arbitration (PCA), the Tribunal had to establish (1) whether China had engaged in fishing activities in the Philippines' exclusive economic zone in violation of art 58(3) of UNCLOS, and (2) whether China had breached its obligations under art 192 and 194(5) of UNCLOS to take the necessary measures to protect and preserve the marine environment, with respect to the harvesting of endangered species from the ecosystem of the Scarborough Shoal and the Second Thomas Shoal. Before delivering its decision, the Tribunal noted that

> In many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine. Often, unlawful fishing will be carried out covertly, far from any official presence, and it will be far from obvious

[223] L Cameron and V Chetail, Privatizing War: *Private Military and Security Companies Under Public International Law* (2013 CUP) 244-249, where the authors argue that common Article 1 provides for a global duty to exercise due diligence.
[224] See N D White, 'Due Diligence Obligation of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 Criminal Justice Ethics, 233, 243-245; Cameron and Chetail (note 223) 249.
[225] *Genocide* case (note 97) 223 para. 434.
[226] Ibid, 221 para 430.
[227] Ibid. See also paragraph 5 of this chapter above.

what the flag State could realistically have done to prevent it.[228]

However, the Tribunal held that with regard to China's fishing activities, Chinese fishing vessels had been closely escorted and protected by Chinese vessels belonging to the Chinese Government, whose actions constituted official acts of China.[229] Likewise, the PCA established that not only was China aware of the harvesting of giant clams in the Scarborough and Second Thomas Shoal, but that also in this case the Chinese Government provided armed governmental vessels to the Chinese fishing boats, in order to escort them in gathering clams.[230] The Tribunal argued that 'in any event, there can be no question that the officers aboard the Chinese Government vessels in question were fully aware of the action being taken by Chinese fisherman and were able to halt them had they chosed to do so'.[231] The wording of the PCA confirms that risk-awareness is a necessary element to establish the obligation of the flag State to exercise due diligence. At the same time, what the Court seems to suggest here is also that the level of due diligence expected by the Government of China was greater than it would have been in other circumstances, as by escorting the Chinese vessels China the former was not just fully aware but also in a greater control of the activity carried out by the Chinese fishing boats.

6.4 State capability

The last element that may affect the degree of diligence required of a State in performing its obligations relates to the extent of the resources that are available to it.

In the Nicaragua case, Nicaragua's responsibility for failing to prevent and put a stop to the alleged arms flow to El-Salvador was ruled out not only because of insufficient proof of knowledge of that flow on the part of Nicaragua, but also because it would have been unreasonable to demand the government of Nicaragua a degree of diligence higher than its capability.[232] The Court contended in fact that if neither the neighbouring countries of El-Salvador and Honduras nor the United States with their level of capability and resources, managed to successfully prevent the arms traffic, then it was scarcely possible for Nicaragua to be in the position to undue the illicit flow with the resources at its disposal.[233] The degree of resources at the State's disposal was taken into account also in the *Hostage* case, where Iran was found responsible for failing to protect American diplomats,

[228] *In the Matter of the South China Sea Arbitration* (The Republic of the Philippines v The People's Republic of China) (Award) [12 July 2016] PCA case 2013-19, para 750-754.
[229] Ibidem, para 754.
[230] Ibidem, para. 964.
[231] Ibidem, para 775.
[232] *Nicaragua* case (note 147) para 157.
[233] Ibid.

because the authorities 'were fully aware of their obligation (…) [and] *had the means at their disposal* to perform their obligation'.[234] Similarly, in the *Genocide* case, the ICJ referred to the means 'reasonably available' to Serbia and 'within its power' in order to outline the scope of Serbia's obligation to prevent genocide.[235] Availability of means indicates that a State should not be required to go beyond its capability in order to comply with the duty to prevent genocide or another harmful event; at the same time, this capability should be assessed on the basis of evidence that suggest it would *reasonable* to expect any State with those level of resources to act effectively to prevent the wrongful event and fulfil its obligations of prevention. The capability check should not in other words transform into a causality test that requires the injured part to prove that the State concerned had definitely the power to prevent the occurrence of the harmful event.[236]

The idea of the degree of efforts required by obligations of due diligence being subject to the availability of resources of the State is very familiar in the context of international environmental law. In international environmental law, the principle of common but differentiated responsibilities maintains that the measures expected of States with better structures of governance and higher capabilities may differ from those expected of developing States or States with less resources at their disposal. This is clearly reflected in Principle 23 of the Stockholm Declaration, as well as in the Rio Declaration, in art 194(1) of UNCLOS and in other conventions focused on the environment and the risk of pollution thereof.[237] Similarly to the principle of common but differentiated responsibility, due diligence in international law allows for different standards of conduct for States with different level of resources.[238] In the Commentary to art 3 of the Draft Articles on the Prevention of Transboundary Harm, the ILC, with regard to the obligation to prevent significant transboundary harm, stressed that

'it is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed'.[239]

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[234] *US Diplomatic and Consular Staff in Iran* (US v. Iran) (Merits) [1980] ICJ Rep para 68 (emphasis added).

[235] *Genocide* case (note 97) para. 430.

[236] Ibidem, 225 para. 438 where the ICJ assessed Serbia's responsibility over the prevention of genocide and stressed that "for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them".

[237] United Nations Framework Convention on Climate Change (adopted 14 June 1992, entered into force 21 March 1994) 1771 UNTS 107, art 3(1); United Nations Convention on Combat Desertification (adopted 17 June 1994, entered into force December 1996) 1954 UNTS 3, art 6; Convention on Biological Diversity (adopted 14 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

[238] Birnie, Boyle and Redgwell (note 19) 149.

[239] ILC, Draft Articles on Prevention of Transboundary Harm (note 27), 155 para. 17.

Obviously, the variability in the degree of diligence will not exempt a State from fulfilling its obligations by employing 'the best available technology', the 'best environmental practice' as well as by taking into account the precautionary principle.[240] Yet, in the *Seabed Mining Advisory Opinion,* the Seabed Dispute Chamber offered a restrictive reading of the notion of due diligence in environmental protection as primarily dependent on the capability of States. The Tribunal decided in fact to provide some clarification on whether sponsoring developing States enjoy some degree of preferential treatment as compared to their developed counterpart with regard to their obligations over activities in the Area. Initially, the Chamber argued that rules setting out direct obligations of the sponsoring State 'could provide for different treatment for developed and developing sponsoring States',[241] and remarked that in accordance to Principle 15 of the Rio Declaration, 'the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States'.[242] However, the Tribunal went on denying the possibility to distinguish responsibilities and liabilities of sponsoring States according to their capability, as this would prevent the implementation of 'the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind'.[243] Similarly, the ITLOS did not hint at any differentiated treatment between developing and developed countries when questioned on the due diligence obligations of flag States in preventing illegal, unreported and unregulated fishing in the exclusive economic zone of other States.[244]

[240] See in this regard, the *Gabčikovo-Nagymaros Project* (note 22), 78 para 140, where the ICJ argued that "in the field of environmental protection (…) new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have been taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also with continuing with activities begun in the past". See also *Pulp Mills*, (note 26) 79-80 para 197 and *Responsibilities of the Sponsoring States* (note 60), 48-49, para 160-161

[241] *Responsibilities of the Sponsoring States* (note 60), 48-49, para 160-161

[242] Ibidem. The Chamber also stressed that the term capability in this case should be intended as referring to "the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical field".

[243] Ibidem. The Tribunal noted also that after all. the general provisions of UNCLOS concerning the responsibilities of Sponsoring States did not provide for any difference as such between developing and developed countries.

[244] See *Request for an Advisory Opinion* (note 60), 38-40 para. 130-140. See also *In the Matter of the South China Sea Arbitration* (note 228) para 744, where the PCA noted that "anything less than due diligence by a State in preventing its nationals form unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to art 58(3) of the Convention".

7.1 Concluding Remarks

The notion of due diligence has been widely discussed in the context of primary rules by contemporary scholarship. International scholars have taken up with the concept as a fundamental principle of international law, a particular category of obligation and as a standard against which measuring the conduct of the State. When dealing with due diligence as the object of a particular type of obligations, issues still arise as for its exact contours and nature. This is mostly due to the confusion over the classification of international obligations that started with the categorization proposed by Ago and adopted by the ILC on the first reading of ARSIWA, continued with ILC dropping the distinction in light of the critics over Ago's formulation, and ended up with a remainder of it in art 14(3) of the ARSIWA. Yet, international courts and tribunals have recently been given the opportunity to dwell upon the structure of obligations of due diligence, and they have provided useful hindsight that enrich the meaning of this concept. Furthermore such recent pronouncements attest also the need for further academic debate, in particular with reference to the issue of objectification of due diligence duties.

As for the sources of due diligence obligations, control over the territory and knowledge of the risk are the shared necessary elements that tie the State with its duty to prevent the risk, as it appeared from the analysis of jurisprudence across different areas of international law. That does not mean however that other factors may determine whether a State is bound by an obligation to exercise diligence, as it happens for example with reference to the obligation to prevent breaches of the right to life, whereby the presence of a serious and imminent risk is crucial to assess the State's responsibility.

Finally, although the due diligence duties vary necessarily on the basis of the content of the obligation in question, a number of shared elements which affect the extent to which a State is required to perform diligence are common to these types of obligations. Reasonableness, degree of control over the activity or the territory, degree of risks, and a State's capability can be deemed as variables that influence the standard against which Courts and adjudicators will measures States' efforts by at the same time conferring flexibility to the content of each obligation.

CHAPTER THREE

Due diligence in context: international law, the cyberspace and the quest for State responsibility

SUMMARY: 1. Introduction – 2. International Law and cyberspace – 3. State Responsibility for cyber attacks – 3.1 Applying rules of attribution in the context of cyber harmful activities – 3.2 Strategizing State responsibility for cyber threats through the application of the due diligence rule – 4. Taking up with the obligation to exercise due diligence in the cyberspace from the perspective of primary rules: assessing scope and content of the obligation to prevent transboundary cyber harm – 4.1 The meaning of the principle requiring a State 'not to allow knowingly its territory to be used for acts contrary to the rights of other States' – 4.2 Exploring the content of the obligation to exercise due diligence in the cyberspace – 5. Concluding remarks

1.Introduction

In 2007, a massive cyber attack hit the country of Estonia, disabling the websites of government ministries, newspapers, banks and broadcasters. Notably, the incident took place while Russia and Estonia were embroiled in a dispute over the Estonia's removal of the "Bronze Soldier Soviet" war memorial in Tallinn. Estonian officials accused Russia of being behind the attack, a charge Moscow denied arguing that there was no concrete evidence of Russia's involvement. Yet, the attacks came from Russian IP addresses, instructions were given in Russian language and the appeals for help from Estonia to the Russian government were ignored.[1] Similarly, in 2008, Georgia was subject to a cyber attack that involved news agency, banks, and governmental web resources, resulting in significant disruption in communications. The attacks occurred while the country was in conflict with Russia, but once again Russia denied any participation to the attack. In 2010, news emerged that multiple Iranian nuclear facilities were attacked and infiltrated by Stuxnet, a malware designated to infiltrate Window-based Siemens softwares, prevalent in industrial computing networks. Anonymous sources disclosure that the US Government, with the help of Israel, was behind the Stuxnet virus, which disabled some Iran's centrifuge machines. When the incident

[1] D McGuinness, 'How a cyber attack transformed Estonia' *BBC* (London, 27 April 2017) < http://www.bbc.com/news/39655415> accessed 23 June 2017.

unfolded, the US deputy defence secretary declined to admit whether the US was involved in the usage of Stuxnet.[2]

Communication and information technology offers a unique array of opportunities and benefits, yet its usage has also become a source of threats for the international community. States and non-state actors often take advantage of the anonymity offered by the cyberspace, its accessibility and its "virtual" borderless domain, to conduct operations that can affect the rights of other States. In this context, the question arises over the effectiveness of international law in addressing and ensuring responsibility for cyber activities with a transboundary effect. The problem of accountability is particularly relevant in the cyberspace as one is faced with the issue of accommodating rules of international responsibility – that concern exclusively States and international organisations – with a system in which transboundary cyber operations are often carried out by NSA.

Hence, one of the biggest challenges of international responsibility in the cyberspace clearly concerns the problem of attribution and the examination of the circumstances under which an international wrongful act committed by non-state actors – often with a certain level of support of the State – can be attributed to the State. A solid amount of scholarship has focused on the issue of attribution of conduct in the cyber domain, often cautioning against the risk of a responsibility deficit that would likely flow from the stringency of rules of attribution. This is why an alternative strategy that looks at responsibility for failure to exercise due diligence and focuses on the obligation of States to not allow the use of their territory in a manner contrary to the rights of other States is worth exploring. Responsibility for failure to exercise due diligence in the cyber space can bridge the attribution gap and fill the responsibility deficit when the link between the State and the conduct of NSA does not reach the threshold of effective control. At the same time, the principle that obliges States not to allow knowingly their territory to be used for acts contrary to the rights of other States opens up to the prospects of responsibility when for example governmental cyber infrastructures located in the State's territory are used to conduct or route cyber operations against a victim States. Yet, from the perspective of primary rules, doubts emerge as to the precise scope and content of the obligation to exercise due diligence in the cyberspace: does due diligence require the State to put in place all the necessary measures to prevent risk of future cyber threats, or should the State be required to act only to put an end to operations that are already underway? What are the elements that influence the assessment of due diligence in the cyber context?

[2] P Baumont and N Hopkins, 'US was 'key player in cyber-attacks on Iran's nuclear programme', *The Guardian*, (London, 1 June 2012) < https://www.theguardian.com/world/2012/jun/01/obama-sped-up-cyberattack-iran> accessed 23 June 2017.

In light of these questions, the present chapter focuses on international responsibility in the cyber domain and in particular on the function, nature and scope of the due diligence rule. The goal is primary to show how, from the perspective of secondary rules, due diligence can be effectively employed to bridge the attribution gap. Furthermore, drawing on the analysis of the previous chapter on the content of due diligence as a primary obligation of States, scope and limits of due diligence and the obligation to prevent cyber transboundary harm will be thoroughly discussed.

2. International law and cyberspace

International law is constantly faced with new technological developments that challenge the suitability of established principles and legal norms. The cyberspace is in this respect a unique environment that tests physical assumptions on which international law rests upon and questions the applicability of general rules.
Being regarded as a "virtual space" where computer mediated communication take place, the cyber context has been described as a space that requires a system of rules of its own,[3] as international law's reliance on geographical and territorial borders would not be apt to regulate it and accommodate its features. However, to carry out their cyber operations, actors need to avail themselves of cyber infrastructures physically located in the territory of a State. The operation may be routed through cyber infrastructures located in different States before reaching the addresses – i.e. the computer physically located in another different State - but this does not exclude the existence of a territorial link between the activity and the State from which the latter originated. The majority of current legal scholarship therefore agrees on international law being applicable to the cyber context.[4] The concept of sovereignty over cyber infrastructures located in a State territory can fit into the cyber domain and allow for the application of customary international law that flows directly from these principles. Accordingly, when operating in the cyberspace States will have to abide by rules of jurisdiction, obligations pertaining to immunities of other States, rules of attribution and principles of international responsibility, and the prohibition of the use of force. Yet, in the absence of treaties and particular instruments governing some of the specific

[3] D R Johnson, D Post,'Law and Borders – the Rise of Law in Cyberspace' (1996) Standford Law Review, 1367.
[4] M N Schmitt (ed), Tallinn Manual on the International Law Applicable to Cyber Warfare (CUP 2013) (hereafter Tallinn Manual); M N Schmitt (ed), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (CUP 2017) (hereafter Tallinn Manual 2.0); M N Schmitt and S Watts, 'Beyond State-Centrism: International Law and Non-State Actors in Cyberspace' (2016) Journal of Conflict & Sec L, 595, 597-603; M Ney and A Zimmermann, 'Cyber Security Beyond the Military Perspective: International Law, 'Cyberspace' and the Concept of Due Diligence' (2015) German YB Int'L, 51; J Brunée and T Meshel, 'Teaching an Old Law New Tricks: International Environmental Law Lessons for Cyberspace Governance' (2015) German YB Int'L. 129.

features of the cyberspace, challenges will still arise as to the precise scope of application of general rules and principles that may suffer a certain degree of vagueness.[5] For example, the application of the principle that prohibits the use of force have prompted scholars to debate over the exact threshold that qualifies a cyber attack as in violation of art 2(4) of the Charter of the United Nations.[6] By the same token, the qualification of a cyber operation as an armed attack or the fact that this attack may be undertaken as part of on-going hostilities may raise further issues pertaining to the applicability of international humanitarian law – such as for example the qualification of cyber installations as military objects.[7]

A further fundamental inherent characteristic of cyberspace may lead to question whether international law fits squarely into the cyber context. In traditional international law, private individuals and non-state actors are usually taken into account when they operate as agents of the State or as their proxies. Without any form of State's support, private individuals have usually limited capacity that prevents them from being able to perform operations on their own which may constitute a threat to the sovereignty of other States. In the cyber realm however, not only are private individuals – for example hacker groups – among the main actors that carry through cyber attacks, but they can also often avail themselves of cyber equipment capable of mounting operations that significantly affect a State's security. The presence of powerful NSA that can operate at the same level of the State challenges some of the essential features of the laws of international responsibility. The regime of international responsibility limits the array of actors that can meet with responsibility to States and international organisations. Individuals can be responsible under international law only when culpable of having committed international crimes. Yet, when significant gaps between States' and non-state actors' capability are closed as in cyberspace, one may query whether international law is not ill-suited to address cyber international wrongful acts or whether a special regime of responsibility for the cyber context should be envisaged.

3. State Responsibility for cyber attacks

The absence of any treaty law or State practice setting out particular rules of responsibility for cyber attacks that breaches the rights of other States raises the

[5] A Zimmermann, 'International Law and 'Cyber Space'' (ESIL Reflection, 10 January 2014), <http://www.esil-sedi.eu/node/481 >;

[6] See in this regard the International Group of Experts working on the first edition of the Tallinn Manual focused exclusively on cyber operations involving the use of force and those that occurred in armed conflicts.

[7] See for example K Kittichaisaree, 'Application of the Law of Armed Conflict, Including International Humanitarian Law, in Cyberspace', *Public International Law of Cyberspace* (Springer 2017).

question on the extent to which traditional rules can accommodate the peculiarities of the cyber domain.

Notably, the principal sources of reference for the contemporary law of State responsibility are the ARSIWA. The ARSIWA establish that responsibility as a matter of international law arises out when an act (1) is attributable to the State and (2) constitutes a breach of an international obligation. In the cyber context, both requirements seem to raise some issues. As for the question of attribution, difficulties in back-tracing the very author of a cyber attack could make the legal process of attributing a conduct to a State particularly problematic. Furthermore, the fact that NSA could easily take control of governmental cyber infrastructures and carry out their harmful operations through them makes it even complicate to label as conduct of a State that one that apparently originates from the governmental apparatus.

As for the objective element of international responsibility, cyber operations can qualify as international wrongful acts if they breach rules governing peacetime or applicable in armed conflicts. There are cases in which the circumstance that the operation has been carried out with the use of cyber equipment does not pose any problem as to the qualification of that conduct as internationally wrongful. For example, if a State will launch a cyber attack against civilian objects during an armed conflict, that conduct will constitute an international wrongful act because in violation of international humanitarian law. On the other hand, it might be more problematic to assess when a cyber operation that is conducted by States is in violation of the sovereignty of another State. This might be the case of cyber-espionage, which does constitute a form of interference with governmental functions but it is considered by some as an exception to the general rule that non-consensual activities by a State within the territory of another State and without the consent of the territorial State violate sovereignty.[8]

3.1 Applying rules of attribution in the context of harmful cyber activities

In the cyber context a multiplicity of agents carry out operations that can be classified as internationally wrongful. States are obviously among the main actors that perform cyber activities, whether by means of their organs or through the use of proxies. Yet, States may at times wish to operate covertly in the cyberspace by outsourcing their activities to NSA,[9] such as individual hackers or other private or

[8] See Tallinn Manual 2.0 (note 4), 19 para 8-9. The International Group of Experts agreed that lawfulness of cyber operations with the obligation to respect other State's sovereignty shall be assessed based on (1) the degree of infringement upon the target State's territorial integrity; and (2) whether there has been an interference with or usurpation of inherently governmental functions, see para 10.

[9] The array of non-state actors and the size and organizational structure of groups operating in the cyberspace vary considerably. Individual hackers may be sufficiently equipped to independently launch cyber attacks, but they may also be formally or informally employed by States to conduct

criminal groups that will help a State preserve its anonymity when attempting to trace back the author of a cyber attack. At the same time, individuals or hacker groups acting in their own private capacity could also easily perform cyber operations that violate a State's sovereignty. In order to carry out their operations, these subjects may decide not to resort to private cyber services but to avail themselves of governmental cyber infrastructures or to route their operations via cyber infrastructures located in another State. For example, in 2013, a hacker group called Anonymous Ukraine conducted a serious of cyber operations against the Estonian Defence Forces and the Ukrainian Government, and made it appear as the NATO Cooperative Cyber Defence Centre of Excellence was behind the defacement of webpages in Ukraine.[10]

The vast array of actors capable of mounting harmful cyber operations that can affect a State's sovereignty and difficulties in back-tracing the sources of a cyber attack adds a further layer of complexity to the operation that leads to the attribution of conduct. As mentioned, in the cyber context it is not only the State the subject that can resort to the actions of private hacker groups, but also individuals acting in their own private capacity may hack and avail themselves of governmental cyber infrastructures. Therefore, the classification of a certain conduct as "public" or "private" may become especially ardours, since an activity that appears as conducted by private hacker groups may in reality have been controlled or instructed by the State. On the other hand, private individuals with "private" intents may also carry through operations that appear as an 'act of the State'.

Within the cyber realm, the identification of the person or the group responsible for the operation is possible solely through the identification of the Internet protocol address (IP) locating the computer through which the operation has taken place. Yet, actors will often try to remain anonymous in cyberspace by using tools that avoid detection and association with their true identity. Anonymity may be sought in different ways. One method would be for example to make use of proxy servers enabling the users to hide their IP address by directing all the traffic to another server; another option would consist of tunnelling the network traffic to a server in another location before data is transmitted to the resource that the user is attempting to access (VPN tunnels); users may also take advantage of the so

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operations; Cyber mercenaries groups may put their skills and know-how at the disposal of private or public agents that whish to conduct precise attacks. Criminal organizations may decide to perform their illegal activities wholly or simply in part in the cyber scenario; Cyber mercenaries hackers groups may put their skills and know-how at the disposal of private or public agents that whish to conduct precise attacks. For an analysis of non-state actors carry out cyber attacks with a transboundary effect see N Bussolati, 'The Rise of Non-State Actors in Cyber warfare' in J D Ohlin, K Govern and C Finkelstein' (ed), *Cyberwar: Law and Ethics for Virtual Conflicts* (OUP 2015), 104-111.

[10] P Pernik, 'Baltic States Targets of Cyber Incidents During NATO Exercise Steadfast Jazz' Atlantic Council (12 November 2013), < http://www.atlanticcouncil.org/blogs/natosource/baltic-states-targets-of-cyber-incidents-during-nato-exercise-steadfast-jazz > accessed 13 July 2017.

called "onion routers" technique, where multiple layers of encryption are applied to the transmitted data, until each relay node decrypts the following layer and the original data is revealed. Finally, one could also proceed by assuming the identity of someone else and infecting the computer of this person planting a malware that takes control and performs the malicious activity.[11]

Basing on the obstacles of locating the origin and the author of a cyber attack, many scholars argue that the "attribution problem" in the cyber context is a particular challenging task. The difficulty lays in the circumstance that the international wrongful act could only be imputed to the particular IP address from which the attack originated, whereas the identity of the person *actually* operating could only be established by ways of presumption.[12] Obstacles in detecting cyber attacks from the outside coupled with the narrow test of attribution provided by international law would thus encourage impunity for States that interfere with other States' rights.[13] That is why traditional rules of attribution have been labelled as inadequate to address State responsibility for cyber attacks, as they do not capture the multifaceted feature of an internationally wrongful cyber operation.[14]

Yet in the law of State responsibility, attribution refers to that operation aimed at assessing the factual link between a wrongful conduct and the State apparatus. The test of attribution serves exclusively to single out the conditions under which a specific act will be regarded as an act of a State, and not to detect the subject that physically acted. What matters is only the degree of connection between the

[11] For a detailed description of sources of anonymity in the cyberspace and back-tracing strategies see M Pihelgas, 'Back-Tracing and Anonymity in the Cyberspace', in K Ziolkowski (ed), *Peacetime Regime for State Activities in Cyberspace* (NATO Cooperative Cyber Defence Centre of Excellence Publication, 2013), 41-58.

[12] See C Antonopoulos, 'State Responsibility in the cyberspace" in N Tsagourias and R Buchan (ed), *Research Handbook on International Law and Cyberspace* (Edward Elgar, 2015), 62; D Clark and S Landau, 'Untangling Attribution' (2011) Harvard National Security Journal, 323, 234; P Marguilies, 'Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14 Melbourne Journal of International Law, 1, 7.

[13] P Marguilies (note 12), 2-6, 19-23. The author argues that the cyberspace is characterised by what he calls "attribution asymmetry", whereby cyber operations can be easily control and directed even from remote locations but unlike kinetic actions they are particularly difficult to detect. Combined with narrow rules of attribution, "attribution asymmetry" makes the system of international responsibility for cyber attacks profoundly destabilised and encourages impunity. An alternative "attribution test" is therefore provided, one premised on virtual control: under this test, whenever an attack was launched from State' infrastructures or it was funded or equipped by State organs, the burden of proof would shift to the territorial State to demonstrate that it was not responsible for the attack.

[14] Ibid. On the need to expand or adopt different attribution standards to accommodate the peculiarities of the cyber domain see also N Tsagourias, 'Cyber Attacks, Self-Defence and the Problem of Attribution' (2012) J of Conflict & Sec Law, 229, 223; W Banks, 'State Responsibility and Attribution of Cyber Intrusions After *Tallinn 2.0'* (2017) Texas Law Review, 1488; for an analysis of authors that propose different standard of attribution see also Z Huang, 'The Attribution Rules in ILC's Articles on State Responsibility: A Preliminary Assessment on Their Application to Cyber Operations' (2014) Baltic YB Int'L, 41.

entity to which the cyber attack can be ascribed and the State apparatus; every technical operation preceding the assessment of that link and directed to identifying the actual source of the attack is outside of the scope of attribution as per secondary rules. This does not mean that *technical attribution* – taken as the process of back-tracing the real author behind the wrongful act – is without relevance in the context of State responsibility. Detecting the origins of the attack is the necessary step that allows for the identification of the entity responsible and the precondition for performing the test of attribution. However, ascertaining the real author of a given activity is a hurdle encountered not only in the context of cyberspace, but whenever one is faced with the question of availability of evidence upon which the connection between the subject and the conduct is established. After all, already in the *Nicaragua* case the ICJ acknowledged that 'the problem is not (…) the legal process of imputing the act to a particular State (…) but the prior process of tracing material proof of the identity of the perpetrator'.[15]

With that in mind, it is submitted that there is nothing preventing the application of traditional rules of attribution in the context of international wrongful acts committed in the cyberspace. This is also the approach adopted by the Tallinn Manual 2.0, which largely reflects the ILC articles on State responsibility.[16] In this regard, the International Group of Experts who contributed to the Manual acknowledged the view expressed by some scholars whereby the international law of cyberspace is a self-contained regime with specialised rules of responsibility falling outside the provisions of the ARSIWA.[17] However, the majority of the Experts took the position that although international customary law and treaty provisions may offer special rules of State responsibility for particular situations arising in the cyber context, these rules would qualify as *lex specialis*, and therefore they would be applicable only when in conflict with general rules of international responsibility.[18]

Following the provisions on attribution of the ARSIWA, to the extent that a cyber operation has been launched by an organ of the State, the operation will be attributed to the latter ex art 4 of the articles on State responsibility. Thus, any

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[15] *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Report, para. 57.

[16] Tallinn Manual 2.0 (note 4). Rule 14 provides: "A State bears international responsibility for a cyber related act that is attributable to the State and that constitute a breach of an international legal obligation".

[17] Tallinn Manual 2.0 (note 4), 80-81, para 4-7.

[18] See in this regard art 55 of the ARSIWA, which provides that general rules of State responsibility do not apply to those situations that are governed by special rules of international law. Whenever a case of *lex special* arises, the interpreter would be bound to apply the special rule *in lieu* of the provisions envisaged in the articles. The ARSIWA however would continue to have the same legal rank of the special rule and would apply in a residual way. The Commentary to the ARSIWA also stresses that self-contained regimes may be qualified as "strong forms" of *lex specialis*, and would follow therefore the same rule of art 55.

cyber operation that violates an international legal obligation binding on a State and carried out by the military, intelligence, security or other agencies of that State will be attributable to it. Similarly, attribution to the State will take place also whenever the conduct is undertaken by a person or entity that is not an organ of the State but it is empowered by the latter to exercise elements of governmental authority (art 5 of ARSIWA); finally attribution follows also whenever the conduct is performed by an organ of another State which is placed at the disposal of the first one (art 6 of ARSIWA). For example, whenever a State contracts a private company to carry out specific cyber operations, every conduct of the private company performed 'under the colour of authority' of the State will be attributable to it.[19]

It is beyond doubt that what makes the application of the rules in question especially problematic in the cyber context is the uncertainty of the real identity behind a cyber attack apparently carried out by cyber governmental infrastructures. Normally, the use of governmental assets or equipment is a decisive indicator that the State is the entity responsible for the attack. In the cyber domain however, private hacker groups and other NSA can easily take control over cyber governmental infrastructures and perform their activities through them. The Tallinn Manual 2.0 brings about the example of "spoofing", the practice of an agent of a State who, by impersonating the IP address of another State, dissimulates its identity or its location. Hence, the mere use of State cyber assets may not qualify as a sufficient element indicating imputability of the wrongful conduct to the State, which is the assumption on which art 4 of ARSIWA is premised. This is why in the Report of the UN General Assembly on developments in the field of information and telecommunication in the context of international security, the Group of Governmental Experts admitted that the fact that a cyber operation was launched by the cyber infrastructure of a State 'may be insufficient in itself to attribute the activity to the State'.[20] The Tallinn Manual takes also a cautious approach toward the linkage between a State and a cyber conduct performed through its own cyber services; such usage may in fact serve exclusively as an indication of the involvement of the State.[21] Yet, as argued above, all the questions over the imputability to the State of cyber conduct apparently performed by one of its organs are issues that relate to the *quantum* of evidence, and not to the suitability of rules of attribution in the cyberspace. The problem that the injured State faces is to gather sufficient proof that the cyber activity originating from a governmental cyber infrastructure was actually

[19] Rules 15 and 16 of the Tallinn Manual 2.0 follow the same approach and reflect rules of attribution provided in ARSIWA.

[20] UNGA, 'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security', UNGAOR 70th session UN Doc. A/70/174 (2015), para. 28(f).

[21] Tallinn Manual 2.0 (note 4), 91 para 13.

controlled by the very same government. This is essentially an evidentiary issue, as confirmed also by the Tallinn Manual 2.0. The Manual concludes that although the law of State responsibility (and therefore rules of attribution) 'applies objectively to facts as they do exist or do not exist',[22] with respect to the problem of attribution a victim State willing to respond with self-help measures may be bound to make unilateral *ex ante* determinations which might be subject to *post factum* review of the applicable standard of proof.[23]

Coming back to the problem of attribution, it should be born in mind that in cyberspace most attacks come from individuals or private groups with some level of involvement of the State. Due to its anonymity and its easily accessible space, the cyber context offers a unique environment for NSA to operate. For example, when Estonia was hit in 2007 by the major cyber attack that took down several governmental cyber infrastructures, it was later claimed that although the attack was performed by patriotic Russian hackers, it benefited of the passive encouragement of the Russian government. Similarly, the fact that the cyber attack conducted in Georgia in 2008 at the hands of a Russian criminal hacker group targeted Georgian military equipment and occurred one day before the invasion of Georgia by Russia prompted some experts to query whether the Russian government had controlled the attack, coordinated it, or had simply passively consented to it. Since the degree of connection between the non-state entity responsible for the operation and the State apparatus may vary considerably, it is necessary to establish the threshold above which wrongful conduct may be ascribed to the State for the purpose of attribution.

Drawing on article 8 and article 11 of the ARSIWA, the Tallinn Manual acknowledges that as a general rule, cyber operations conducted by private individuals are not in principle attributable to the State. Yet, cyber conducts reaching the threshold of international wrongful act can trigger State responsibility when performed under the instruction, the direction or the control of the State, or when the State acknowledges and adopts the operation as its own.[24] As for the meaning of instruction, direction and control, the Manual

[22] Ibidem,

[23] Ibidem,

[24] Tallinn Manual 2.0 (note 4), Rule 17. The Manual overlooks at the other two circumstances where conduct performed by non-state actors and private individuals could be attributed to the State, namely the case of conduct of persons or group of persons exercising elements of the governmental authority in the absence or default of the official authorities (art 9) and conduct of insurrectional movements succeeding in becoming a new government or establishing a new State (art 10). Within the scope of art 9, one could think for example of a situation in which governmental services migrated to cyber, the governmental apparatus is partially collapsed with the State being unable to provide some of its cyber services, and non-state actors take over by fulfilling some of the government functions. A situation in which art 10 would apply could for example be envisaged should an entity like ISIS succeed in establishing a new State in the area between Syria and Iraq. In this case, previous ISIS's cyber activities amounting to international wrongful acts would be attributed to the new State, engaging its own responsibility. For a more detailed analysis of application of art 9 and art 10 for cyber acts conducted by NSA in situations of

follows the interpretation provided by the ARSIWA. Acts pursuant to the instruction of the State generally comprise situations in which non-state actors act as State's auxiliaries, for instance when a State asks a private cyber company to perform a given operation or when private hacker groups are instructed to conduct specific tasks. A cyber attack carried out by NSA under the control of a State could instead be attributed to the latter should the State had exercised 'effective control' over the conduct in question, as provided by the ICJ in the *Nicaragua* and the *Genocide* cases. Clearly, the requirement of 'effective control' operates as a high standard for the application of art 8 of the ARSIWA, since the mere financing, organizing or equipping of a State of a hacker group will be insufficient for the purpose of attribution. Hence, providing a malware to a non-state actor for conducting a cyber attack against another State will not determine attribution of that attack to the provider State. Likewise, State's tacit approval or mere endorsement of the non-state actor's cyber operation cannot qualify as conduct that the State acknowledged and adopted as its own as per art 11 of ARSIWA[25]; for attribution to apply, the State will have to actively take means, for example by facilitating the continuation of the operation or by protecting non-state actors against counter cyber-operations.

3.2 Strategizing State responsibility for cyber threats through the application of the due diligence rule

The standard or 'effective control' and generally the high threshold required by the ARSIWA to impute a cyber conduct to a State limit significantly the scope of application of rules of attribution. Scholars have proposed an array of alternative solutions to close the gap of (ir)responsibility that strict rules of attribution generate in the cyber context. Some advocate for a loosen standard of control, arguing that since it would be easy for governments to hide their cyber operations by benefitting from the 'effective control' standard, 'it should be sufficient as a matter of international law to prove overall control by a government in a cyber attack'.[26] Others suggest to completely disregard rules of attribution; responsibility for cyber attacks should be imputed directly to the State from which territory the operation was conducted, and the issue of attribution should be

ungoverned spaces see N Tsagourias, 'Non-State Actors, Ungoverned Spaces and International Responsibility for Cyber Acts' (2016) 21 Journal of Conflict & Sec Law, 455.

[25] See the Commentary to art 11 of the ARSIWA, para. 6-8, where *acknowledgement* and *adoption* are interpreted mainly as the identification of a particular situation that the State makes as its own.

[26] S Shackelford, 'State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem', in C Czosseck and K Podins (ed), *Conference on Cyber Conflict Proceedings 2010* (CCDCOE 2010), 202-203.

solved by shifting the burden of proof to the territorial State to demonstrate that it failed to take all the necessary measures to prevent or put an end to the attack.[27]

Yet, the challenges of attributing wrongful cyber conduct of NSA to the State do not necessarily create a void of international responsibility. In order to "mitigate" the attribution dilemma, one could think of attaching responsibility to the State on the premise of breach of its obligation to not knowingly allow its territory to be used for acts injurious to other States. State's failure to exercise due diligence in preventing NSA from carrying out cyber operations again other States is a further ground for engaging with responsibility, that dispenses with the hardship of attributing acts of individuals to the State. As discussed in the previous chapters, responsibility for failure to exercise due diligence concerns the omission of the State to act in accordance with its primary obligations: it is in fact the omission of the State that allows other States or NSA to mount wrongful operations. Conduct giving rise to these wrongful acts is not attributed directly to the State, since responsibility flows from the inaction of the governmental apparatus to adopt all the necessary measures, and not from the actual realization of it. The perpetrator is still the sole responsible for the act, whereas the State is responsible for not taking reasonable measures to prevent or put an end to it.

In cyberspace, responsibility for failure to exercise due diligence may be triggered whenever cyber infrastructures are located in one State and other States or private groups – hacker groups, terrorists, individual hacktivits – use them to carry out injurious acts. For example, a State aware that a non-state actor group is launching a cyber attack from within its territory would be in breach of its obligation to exercise due diligence should it fails to adopt the necessary measures at its disposal to put an end to the attack. Similarly, international responsibility could be envisaged whenever wrongful cyber operations are conducted by State A and routed via the cyber infrastructures located in State B; if State B has knowledge of such usage and again fails to adopt the measures at its disposal to stop the attack, State B may be found responsible for failure to carry out its obligation to exercise due diligence.

Some scholars have been skeptical about the application of due diligence in the cyber context, casting doubts over the suitability of this rule in the cyberspace and the excessive burden that the application of the principle would impose on States. First, being the cyberspace a "new realm" that challenges notions of territoriality, it is argued that traditional rules of international law building on the concept of territorial jurisdiction cannot apply. According to this view, an obligation that is attached to the ability of a State to exercise jurisdiction within its territory – such as the duty to exercise due diligence in not knowingly allow others to use State's territory for acts contrary to other States – could not find any application in a

[27] R Clarke and R K Knake, Cyber War: The Next Threat to National Security and What to Do About It (Harper Collins 2012), 249.

space that is de-territorialised and has no clear parallel in the non-virtual world.[28] Furthermore, even if States could claim jurisdiction over cyber activities originating from their territory, that does not mean that general principles belonging to other areas of international law – such as the duty to exercise due diligence which belongs mostly to international law of the environment – would also find application in the cyber context.[29] That States have yet to accept the application of the rule of due diligence in the cyberspace could also be inferred by the wording used in 2013 by the UN General Assembly "Group of Governmental Experts" created to consider the application of international law in the cyber context, with the group concluding that 'States *should* seek to ensure that their territories are not used by non-State actors for unlawful use of ICTs'.[30] The use of should *in lieu* of a more prescriptive terminology could be interpreted as evidence of States' apprehension over considering due diligence as a legal duty whose breach triggers the application of secondary rules. Finally, some authors have raised doubts over the utility of applying due diligence to expand the scope of international responsibility. Basically, opting for the recognition of due diligence should be a question of policy rather than a pure legal matter: while due diligence may in fact mitigate the problem of attribution, its application may eventually be counterproductive. Responsibility for failure to exercise due diligence could expand the recourse to countermeasures and lead in the long run to greater instability within the international legal system, and possibly jeopardising States' compliance with international norms.[31]

As for the compatibility of international law with the cyberspace, it should be noted that although States may not claim sovereignty over the cyberspace, they hold sovereignty rights and exercise jurisdiction over cyber infrastructures, persons, and cyber activities located in their territory.[32] Sovereignty over cyber infrastructures in a State's territory and jurisdiction over persons conducting cyber operations from or within it, grants the State the power to control and these activities and to take measures to prevent the wrongful use of cyber infrastructures. This is why there is no compelling legal ground to rule out the

[28] D R Johnson, D Post,'Law and Borders – the Rise of Law in Cyberspace' (1996) Standford Law Review, 1367.

[29] See in this regard Schmitt, 'In Defence of Due Diligence in Cyberspace' (2015) Yale Law Journal Forum, 68, 73, who acknowledges this position but does not share it.

[30] UNGA,'Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security', UNGAOR 68th session UN Doc. A/68/98 (2013), para. 23.

[31] E T Jensen, S Watts, 'A Cyber Duty of Due Diligence: Gentle Civilizer or Crude Destabilizer?' (2017) 95 Texas Law Review, 1555, arguing that the application of due diligence and therefore the possibility of expanding the scope of State responsibility would possibly lead States to make greater use of countermeasures at the expenses of general compliance with international legal rules.

[32] Tallinn Manual 2.0 (note 4), Rule 2. See also K Kittichaisaree, *Public International Law of Cyberspace* (note 7), 23-32.

application of due diligence in the cyber context. The obligation to exercise due diligence within a State's territory is a customary obligation that attaches to sovereignty, whose exercise implies the duty of the State to safeguard within its territory the rights of other States, including their integrity and inviolability in peace and war.[33] Its application is premised on the idea that the State has jurisdiction to act, thus capability of taking measures of prevention and opportunity to repress injurious conducts.[34]

From the perspective of responsibility, due diligence operates therefore as the standard against which the actions of the State in taking measures of prevention or repression should be assessed. Resorting to due diligence as a mean to engage with international responsibility is an opportunity that has been exploited across different areas of international law, and not exclusively in the environmental realm.[35] In the cyber domain, the State that exercises sovereignty over cyber infrastructures holds the obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States':[36] should these acts be committed and the integrity of the targeted State violated, the territorial State may be found responsible for the breach of its own omissions over its territory or activities under its control. While discussing the possibility to turn to due diligence in the context of State responsibility for cyber attacks, Schmitt notes that in international law 'it is unnecessary to identify a distinct reason to apply a general principle in particular context. On the contrary since [due diligence] is a general principle, the presumption is that the principle applies unless state practice or *opinio juris* excludes'.[37] Despite the cautious reference of the Group of Governmental Experts to due diligence as a principle that *should* be applied in international law of cyberspace, no State has overtly opposed to its application.[38] Furthermore, the Tallinn Manual 2.0. also recognises due diligence as a general principle applicable to international law governing cyberspace concluding that violation of the due

[33] *Island of Palmas* (*Netherlands v. USA*) (1928) 2 RIAA, 829,839; *Corfu Channel Case* (*UK v. Albania*) (Merits) [1949] ICJ Rep 4, 22.

[34] ILC, "Second Report by the Special Rapporteur F.V. Garcìa Amador on State Responsibility" (15 Feb 1957) UN Doc. A/CN.4/106, 122.

[35] As for the application of the principle in the context of neutrality of States – which is particularly relevant when discussion international wrongful conduct in the cyberspace – see already the *Alabama* case, where due diligence was defined as the standard of care that is required of a neutral State by ordinary principles of international jurisprudence, see J Basset Moore, History and Digest of the International Arbitration to which the United States Has Been A Party, Together with Appendices Containing the Treaties Relating to Such Arbitrations, and Historical and Legal Notes on Other International Arbitrations Ancients and Modern, and on the Domestic Commission of the United States for the Adjustment of International Claims , vol. II (Government Printing Office, 1872), 53, 223.

[36] *Corfu Channel Case* (note 33), 22.

[37] Schmitt (note 29), 73.

[38] Ibid.

diligence principle by omission triggers the international responsibility of the State.[39]

As for the standard of proof, the threshold imposed by the due diligence rule is significantly lower that the one required by rules of attribution. The victim State will not have to prove that the cyber operation is attributable to the territorial State, but only that the operation was launched by an actor using cyber infrastructures under the jurisdiction of the culpable State. Yet, responsibility for failure to exercise due diligence does not amount to a form of State liability. First of all, the State is not responsible for every cyber incident occurring within its territory that affects the rights of other States, but only for incidents and wrongful events that result from the State's own omission. Secondly, not every cyber operation that negatively affects the rights of a State will necessarily occasion responsibility for breach of due diligence, but only those activities that breach a right of the State according to international law. Therefore, a cyber attack that merely causes minor disruptions or some inconveniences to a State will not suffice to unveil failure to exercise due diligence on the part of territorial State. On the other hand, cyber operations that amounts to an armed attack, render inoperable or cause interferences with critical governmental infrastructures may be indication of a State's omission that triggers international responsibility.[40]

Finally, in order to hold the State responsible, the injured State has to prove that the first State had knowledge of the fact that its territory has been used for hostile cyber operations against another State. As discussed in the previous chapter, knowledge is a decisive element of due diligence.[41] Obviously, a State cannot have absolute knowledge of everything that is happening in its own territory. In this regard, knowledge for the purpose of establishing due diligence cannot be

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[39] The first edition of the volume, the Tallinn Manual on the International Law Applicable to Cyber Warfare published in 2013 already recognised, albeit briefly, the application of the duty to exercise due diligence in the cyberspace. The second edition of the Manual however, which focus on the international law applicable to cyber operations in general, not only reiterates in Rule 6 and Rule 7 the existence of a general duty of States to exercise due diligence in the cyberspace, but it also analyses the principle and its application in a more in-depth way. Rule 6 reads: "A State must exercise due diligence in not allowing its territory, or territory or cyber infrastructure under its governmental control, to be used for cyber operations that affect the rights of, and produce serious adverse consequences for other States".

[4040] The Tallinn Manual 2.0. correctly notes that if any cyber activities causing adverse consequences to the rights of another State could potentially determine the responsibility of the State for failure of due diligence, an incongruent situation would be created whereby a State would be in breach of due diligence when non-State actors engage in cyber operations from its territory, but not if the State had engaged in the same conduct itself; see Tallinn Manual 2.0 (note 4), 36 para 24. After all, from the perspective of primary rules, the obligation to exercise due diligence arises not at any level of harm, but when the threshold of actual or potential harm is "significant", "substantial" or "serious"; see in this regard the discussion in the next paragraph.

[41] See *Corfu Channel* case (note 33), 22; *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* (24 May 1980) [Merits] ICJ Reports, para 68, where the Court concluded that "the Iranian authorities (b) were *fully aware* (…) of the urgent need for action on their part; (c) had the means at their disposal to perform their obligations; (d) completely failed to comply with these obligations" (emphasis added).

inferred simply by the fact that the State exercises jurisdiction and control over its territory.[42] On the contrary, the injured State has to provide evidence that there was *actual* knowledge on the part of the territorial State that wrongful conduct was or was about of being carried through. It should also be noted that when dealing with the issue of responsibility for failure to exercise due diligence, adjudicators tend to equate actual knowledge with constructive knowledge. Constructive knowledge regards those situations in which the State was not aware, yet it should have known of the existence or the risk of hostile operations.[43] In the context of cyber operations, this means that responsibility could be engaged not only when State intelligence agencies receive credible information that a hostile cyber operation is going to be conducted or it is underway in the State territory, but also when the operation is carried out without State's knowledge, but the latter should have known of its existence. In the *Corfu Channel* case, Judge Alvarez in his Separate Opinion argued that 'every State is considered (…) as having a duty to have known (…) of prejudicial acts committed in parts of its territory where local authorities are installed'.[44] Hence, if NSA or State A use governmental infrastructures of State B to perform wrongful cyber activities, State B will be more in the position 'to have known' of the operation than in a situation where perpetrators decide to operate by using private cyber assets.[45] Obviously, proving knowledge – especially if constructed – on the part of the State can be particularly challenging. If having exclusive territorial control of the cyber infrastructures from which the cyber operation originated does not *per se* amount to proof of knowledge, the victim State will have to resort to circumstantial evidence in order to prove its claim.[46] Yet, one might read the difficulty of establishing cases of State's responsibility for failure to exercise cyber due diligence as further evidence of the unlikelihood that due diligence would excessively broaden up the scope of international responsibility in the cyber domain.

Finally, the requirement of knowledge raises a further question, namely the extent to which a State shall adopt preventive measures in order be in the position 'to know' whether or not illegal cyber activities are conducted within its territory. This is an issue that essentially relates to the content of the obligation to exercise due diligence, and in particular to the measures that States are obliged to adopt in

[42] *Corfu Channel case* (note 33), 18.

[43] *Corfu Channel* case (note 33), Separate Opinion of Judge Alvarez, 44; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)* (27 February 2007) [Merits] ICJ Reports, para 432; Osman v United Kingdom, ECHR 1998-VIII, para 116.

[44] *Corfu Channel case* (note 33), Separate Opinion of Judge Alvarez, 44

[45] See also Tallinn Manual 2.0, 41. Taking a different stand from its previous edition, the International Group of Experts working on the second version accepted that the obligation to exercise due diligence arises both in cases of actual and constructive knowledge.

[46] See *Corfu Channel* case (note 33), 18.

order to not allow their territory to be used for cyber activities contrary to the rights of other States. In this regard, if preventive measures – such as for instance the monitoring of cyber operations taking place in the State's territory – are to be considered part of the duty to exercise due diligence, then the knowledge criterion will only be discharged should the respondent State prove to have put in place all those steps necessary to be aware of the risk (or the occurrence) of wrongful activities.[47]

4. Taking up with the obligation to exercise due diligence in the cyberspace from the perspective of primary rules: assessing scope and content of the obligation to prevent transboundary cyber harm

From the perspective of international responsibility, resorting to the principle of due diligence helps circumvent rules of attribution and facilitates the normative operation required to establish State responsibility for cyber attacks. Yet, if one moves away from the plane of secondary rules, issues arise as to the precise scope and content of the due diligence rule. In cyberspace, the question attached to the obligation to exercise due diligence regards primary the extent to which this rule imposes specific duties upon States to take preventive measures to reduce the risk of harmful cyber attacks. Some scholars argue that the exercise of due diligence implies the obligation of the State to put in place an effective apparatus capable of detecting and contrast hypothetical future harmful cyber operations. Should this be the case, the State would face a double burden not just as to the array of measures and intelligence activities that would be required to implement, but also as to the careful balance that it should strive to maintain between the duty to ensure security of foreign States and the obligation to respect human rights.[48] Others consider instead that *lex lata* in cyberspace does not stretch further than requiring the State to adopt all the necessary measures at its disposal to put an end to cyber operations that are already underway.[49] To envisage other preventive

[47] With regard to this issue and the question regarding the content of the obligation to exercise due diligence in the cyber context, see the discussion of the next paragraph.

[48] If the obligation "not to allow knowingly the State's territory to be used for acts contrary to the rights of other States" in the cyber context includes also the obligation to monitor cyber activities in search for possible threats, this would certainly pose some issues with regard to a State's obligation to safeguard the right to privacy. States shall respect the right to privacy when operating in the cyber domain, as affirmed by the UNGA and the Special Rapporteur on the Right to Privacy. In this regard, a limit to the scope of cyber due diligence may be found in the what the ICJ affirmed in the *Genocide case*, according to which when discharging their due diligence obligation to prevent States "may only act within the limits permitted by international law", *Genocide case* (note 43), para 430; UNGA Res 68/167, 'The Right to Privacy in the Digital Age' (18 December 2013) UN Doc A/Res/68/167; UN Human Rights Council 'The Right to Privacy in the Digital Age' (24 March 2015) UN Doc A/HRC/28.L.27.

[49] See the minority of the group of experts of the Tallinn Manual 2.0, (note 4), 44 para. 4.

duties would amount to a form of scholarly interventionism seeking to circumvent the international law-making process.[50]
Despite the absence of jurisprudence challenging the responsibility of State for failure to exercise cyber due diligence, one may still attempt to build on the common understanding of due diligence as interpreted by international jurisprudence in different areas of international law and attempt to provide a tentative analysis of the scope of such obligation.

4.1. The meaning of the principle requiring a State 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'

As discussed in the previous chapters, the obligation to exercise due diligence originates from every State's obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other State',[51] a principle spelt out for the first time by the ICJ in the *Corfu Channel* case. Such rule traces back to the 17th century[52] and finds its origins in the law of neutrality, and in particular in the duty of the neutral State to not tolerate the use of its territory to conduct hostile operations against another State. Established international jurisprudence provides that the nature of obligations arising out of this fundamental principle of international law is twofold. On the one hand, the State is required to possess a minimum legal and administrative apparatus apt to guarantee the respect of the 'no-harm rule' and consistent with international legal standards. On the other hand, the obligation to prevent acts contrary to the rights of other States encompasses also the duty of the State to act and use its governmental apparatus with the diligence that is required according to the circumstances of the case.[53]
The question that arises in the context of cyberspace regards therefore the array of legislative and administrative measures that a State shall implement in order to discharge the duties required by the no-harm principle. International law and early jurisprudence on protection of foreigners and their property do not spell out the specific types of legislation or administrative measures that should be included in this rule. Generally speaking, it is up to the State to decide which measures to adopt to fulfil its duty. The only limit that international law seems to impose is

[50] In this regard J d'Aspremont, 'Cyber Operations And International Law: An Interventionist Legal Thought' (2016) Journal of Conflict & Sec Law, 575, arguing that legal scholarship surrounding the application of international law in cyberspace shall be read as a form of scholarly interventionism.
[51] *Corfu Channel* case (note 33), 22.
[52] See the *Alabama* case (note 35) 223.
[53] R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German YB Int'L. 9, 34; In the context of the security of aliens, the Tribunal in the *Walter A Noyes* (*United States v Panama*) (1993) VI RIAA 308, 311 held that "There must be shown special circumstances from which the responsibility of authorities arises: either the behaviour in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals".

that such measures should correspond to what any other *reasonable* State would implement in the same circumstances in order to prevent the occurrence of wrongful acts.[54] Drawing on the works of the ILC Commission on the Draft Articles on Prevention of Transboundary Harm From Hazardous Activities, States 'should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to *control* and *monitor* their activities'.[55] This certainly includes the adoption and enforcement of a functional legislative, administrative and judicial apparatus capable of adequately address possible cases of harmful activities undertaken in the State's territory. In the case of security of aliens and their property, the territorial State would be for example asked to adopt legislation that protect foreigners from hostile acts at the hands of private individuals and to put an effective system of redress and punishment in place.[56] Yet, calling on States to adopt an adequate legislative and administrative apparatus to control their activities does not say much nor clarify the types of measures that a State should implement in the cyberspace in order to be "in control" of cyber activities.
Dwelling upon the content of the obligation of neutrality that a non-belligerent State owes to other States, Lauterpacht argues that legislative measures of protection of other States would often consist of enacting criminal laws that punish conspiracies, incitement to assassination, or revolutionary activities against other States.[57] Yet,

> No unreasonable burden of specially protecting the life of foreigners abroad is thereby imposed upon a State. (…) [S]o long as these laws are reasonably sufficient to prevent hostile acts or to punish them after they have occurred, the state has performed its duties.[58]

Lauterpacht continues noting that the enactment of legislation and administrative measures shall not be regarded as a burdensome duty that puts the State in the position of a guardian of other States' constitution and tranquillity. The obligation to not knowingly allow the territory to be used for acts contrary to the rights of other States shall not be read as the duty to actively intervene and protect 'in excess of the irreducible minimum, a constitution or a regime which may be either distasteful to the overwhelmingly majority of its own citizens, or a matter of complete indifference to them'.[59]

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[54] *HG Venable (USA v United Mexican States)* (1927) IV RIAA, 219,229.
[55] ILC, 'Commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' (2001) UN Doc A/56/10, 155 (emphasis added).
[56] *Noyes* case (note 53), 311; *Venable* case (note 54),229.
[57] H Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States' (1928) AJIL, 105, 111-113, 127.
[58] Ibid, 129.
[59] Ibid.

Coming back to the context of cyberspace, it is difficult to argue that States hold obligations in accordance to customary international law that require them to provide for specific forms of punishment of malicious cyber conducts, to demand providers of communication and information technologies to suppress targeted cyber operations, to implement policies that facilitate the sharing of information, or to approve laws that consent the monitoring and detecting of malicious cyber activities. After all, to enact measures of this kind international law normally requires the adoption of a treaty.[60] In absence of the latter, a State will arguably only be bound to equip itself with a minimum apparatus that enables it to promptly react – with its police, military or intelligence forces for instance - to a harmful cyber attacks already underway or at a serious risk of being carried out.
Obviously, any legislative or administrative steps taken by the State in pursuit of the no-harm principle will be evaluated against the concept of "reasonableness". This means that if a State has a highly-evolved system of cyber infrastructures and its governmental apparatus depends largely on it, such State will be reasonably expected to put in place a more severe legislative and administrative system capable of reducing at the minimum the risk of interferences with the rights of other States.[61] In other words, the level of State's legislative and administrative intervention is to be assessed according to the cyber capability of the State and the level of development of its cyber infrastructures.

4.2 Exploring the content of the obligation to exercise due diligence in the cyberspace

In order to fulfil the obligation not to tolerate the use of its territory by individuals to perform acts contrary to the rights of other States, a State is not only required to put a adequate legislative and administrative apparatus in place, but also *to use* this apparatus to address wrongful acts. This is the core of the due diligence rule: not every injury done to the interests of a foreign country will trigger the responsibility of the State, but only injuries that are the result of a failure of the State to promptly react to harmful conducts already underway or at serious risk of being undertaken.

[60] For example, see the Council of Europe's Convention on Cybercrime that requires States to adopt "legislative and other measures" to ensure that the conducts listed in the Convention are "punishable by effective, proportionate and dissuasive sanctions", Convention on Cybercrime (adopted on 23 November 2001, entered into force July 2004) ETS NO. 185, art. 13 (it is worth noting that the Convention has been so far ratified by only five States).
[61] See the ILC Commission on the Draft Articles of Prevention of Transboundary Harm, when noting that States "should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor their activities. It is however understood that the degree of care expected of a State with a well-developed economy and material resources and with highly evolved systems and structures of government is different from States, which are not so well placed". ILC, 'Commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' (2001) UN Doc. A/56/10, 155.

As for the sources of the obligation to exercise due diligence, it has been argued that international law generally recognises that a State's duty to act arises the moment the State learns of (or should have learn) or the existence of a risk (which may be serious or significant depending on the circumstances of the case) of an harmful activity that may cause significant harm to another State. While knowledge (or constructive knowledge) has already been discussed, further analysis should be devoted to the element of risk and its interpretation in the context of cyberspace. In this regard, in the *Genocide* judgement, the ICJ noted that a State's obligation to prevent genocide and the corresponding duty to act 'arise[s] at the instance the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'.[62] In the view of the Court, the obligation to prevent genocide does not imply a positive duty on the part of the State that extends to the obligation to actively take all the measures necessary to avoid any risk of genocide, but rather a duty to take positive steps should the State learn of a *serious* risk that genocide will be committed. If one transposes this principle to the context of cyberspace, States will be bound to the duty of due diligence only when they are aware (or should have been aware) of a serious risk that a malicious cyber operation will be taking place. The exercise of due diligence cannot in fact require the State to adopt preventive measures to ditch any other risk of cyber attacks. Hence it is highly doubtful that due diligence encompasses the obligation to monitor cyber activities in the State's territory or to strengthen cyber governmental infrastructures as to reduce at minimum the risk of wrongful acts.[63] Dubious consequences would arise if we were to hold otherwise. First of all, departing from the assumption that links the exercise of due diligence with an *actual* risk of significant harm leads to the creation of a general obligation of prevention of cyber transboundary harm which does not found any support in current State practice. States have never condemned the failure of other States to adopt the necessary measures to generally prevent harmful cyber attacks, nor they have expressed in favour of the existence of such an obligation.

To support the argument in favour of a general obligation to prevent transboundary harm in the cyber context, scholars have normally referred to the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Art 3 of the ILC project imposes in fact a general duty upon the State

[62] *Genocide case* (note 43), 222 para 431. For an in-depth analysis of the requirement of risk as a feature of the obligation to exercise due diligence see Chapter 2.

[63] Some scholars argue in fact that the obligation to prevent harmful cyber attacks certainly includes the duty of the State to monitor its cyber activities and to adopt all the necessary preventive measures at its disposal that could preclude malicious cyber operations, see K Bannelier – Christakis, 'Cyber Diligence: A Low-Intensity Due Diligence Principle for Low-Intensity Cyber Operations?' (2014) 14 Baltic YB of Int'L. 23, 30; E Talbot Jensen, 'State Obligations in Cyber Operations' (2014) 14 Baltic YB Int'L., 71, 79; R Buchan, 'Cyberspace, Non-State Actors and the Obligations to Prevent Transboundary Harm' (2016) Journal of Conflict & Sec Law, 429.

to prevent significant transboundary harm or to minimise the risk thereof.[64] Yet, it might be argued that cyber activities do not necessarily fall into the scope of the Draft Articles on Transboundary Harm. Art 1 of the project provides that the Articles apply 'to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences'.[65] The Commentary abstains from listing the type of activities to which the articles would attach,[66] however it clarifies that these activities should not be prohibited by international law and should carry an *inherent* risk of transboundary harm which is strictly connected to the nature of the activity or to the situation in question.[67] This means that the articles cover only activities that *by nature* may cause harm in the normal course of their operations,[68] or activities that despite not being hazardous or dangerous *per se*, carry a significant risk of transboundary harm due to the circumstances of the particular case. In this regard, cyber activities do not qualify as activities that carry an inherent risk of transboundary harm. They can be performed and conducted in a manner that breaches international obligations (breach of the prohibition of the use of force for example), but their harmful effect is not a proper physical feature of the activity, but rather a possible consequences deriving from the use that one can do of them.[69] It may be that *specific* cyber operations may carry an inherent risk of transboundary harm – which could in this case trigger the application of the ILC Draft Articles – but this would happen in particular selected circumstances where the State would be bound to adopt the necessary preventive measures. Furthermore, it should be noted that recent ICJ jurisprudence in the context of transboundary environmental harm appears to make the performance of preventive due diligence obligation dependent on the risk of significant harm in

[64] ILC Draft Articles on Transboundary Harm (note 61), see especially the commentary to art 3, para. 5. See also *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Merits) [2010] ICJ Reports, with the ICJ holding that due diligence implies " the exercise of administrative control applicable to private and public operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party", para 197.
[65] Ibid, art 1.
[66] Ibid, Commentary to art 1, 149-150, para. 3-4.
[67] ILC, 'First report on prevention of transboundary damage from hazardous activities by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur' (1998) UN Doc. A/CN.4/487 and Add.1, 193 para. 73-77.
[68] Ibid, para 78.
[69] "The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type – a consequence which does or may arise out of the very nature of the activity or situation in question. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality. Thus the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet, this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an *inherent risk* of disastrous misadventure", ILC Draft Articles on Transboundary Harm (note 61), 151 para 17 (emphasis added).

the situation in question,[70] bringing further support to the argument that due diligence and actual risk of transboundary harm are inextricable linked.[71]

A further ground that should rule out the existence of a general obligation to prevent transboundary harm in the cyber context inheres with the issue of knowledge. Had a State bound to adopt all the necessary measures to prevent future and hypothetical harmful cyber operations with a transboundary effect, the requirement of knowledge would lose its grip: due diligence would in fact be breached the moment the State had not discharged its duty adopt preventive measures, regardless of knowledge of a particular situation of risk. On the other hand, constructive knowledge is not premised on the assumption that a State shall take all the necessary measures in order to be in the position "to know" if malicious cyber attacks will take place. Knowledge is a pre-requisite of due diligence – and an element to be proven by the claimant in the context of secondary rules - that serves to narrow down the scope of State responsibility and to escape from the realm of absolute liability. Holding a State responsible because it should have known that harmful cyber activities were underway does not mean to require that State to strive to be in the position "to know". Rather, constructive knowledge serves to prove that in the very same circumstances, any other State with the same capabilities of the first one would have reasonably presumed that a harmful operation was taking place.

The fact that preventive measures to safeguard from potential and future harmful operations are not part of the due diligence rule does not lead to conclude that due diligence arises only for cyber harmful operations already underway.[72] Whenever a State learns of a specific cyber operation that has yet to be launched but toward which material steps have already been taken, and the State reasonably concludes that the operation will be carried out, the obligation to take measures to prevent the attack sets in. Therefore, if the State acquires for example information through its intelligence that a hacker group based on its territory is going to launch a cyber attacks likely to disrupt governmental cyber infrastructures of another State, the territorial State must act to prevent the occurrence of the operation.

Finally, the criteria that determine the precise content and demands of due diligence in other areas of international law will apply also to the cyberspace. Assessing whether a State acted reasonably in addressing a cyber threat with

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[70] *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*), (Merits) [2016], ICJ Report, 45 para. 105; see the discussion in Chapter II on the sources of the obligation to exercise due diligence in the environmental context.

[71] To rule out any possible misinterpretation of the meaning of preventive measures in the context of cyberspace, the Tallinn Manual at Rule 7 – which deals with compliance with the principle of due diligence – provides that "The principle of due diligence requires a State to take all measures that are feasible in the circumstances to put an end to cyber operations that affect a right of, and produce serious adverse consequences for, other State", at 43 (emphasis added).

[72] This was a minority view shared by part of the International Group of Experts that contributed to the Tallinn Manual 2.0; see Tallinn Manual 2.0 (note 4), 44 para. 4.

transboundary effect will primary depends on the *capacity* of that State and the *risk* inherent of the activity.[73] In the cyber context, capabilities of State vary dramatically. Technologically advanced States will be more equipped to trace back the origin of a cyber operation, to identify the responsible entity and to adopt enforcement actions against them, therefore they will hold strengthened due diligence obligations. On the other hand, States with a poor system of information and communication technology or weaker governmental cyber infrastructures will likely lack the technical means to suppress a cyber threat. The content of their due diligence obligations will then be diluted, possibly encompassing at the very minimum the obligation to notify and warn the State that is likely to be the victim of the attack.[74] In any case, the standard of due diligence will not just be dependent on the resources at the disposal of the State, but also on the level of scientific and technological knowledge acquired at a given time.[75] As for the element of risk, the ILC stated that the standard of due diligence shall be 'appropriate and proportional to the degree of risk of transboundary harm in the particular instance'.[76] In the context of cyberspace it will be a particularly burdensome task to evaluate the degree of risk of a cyber attack and level the degree of due diligence accordingly. A lot of cyber threats develop rapidly and it might be extremely difficult for a State to assess their potential harmful effect and to react promptly and proportionally.

5. Concluding remarks

The analysis conducted has shown that cyberspace is not immune from the application of public international law. In the absence of treaty laws, general principle such as sovereignty, jurisdiction and secondary rules apply to operations conducted in the cyber domain. This means that also the principle of due diligence finds application as an interstitial obligation that allows States to be found responsible for cyber attacks that are not attributable pursuing rules of attribution. Due diligence does not impose an excessive burden on States and does not dangerously broaden the scope of State responsibility in the cyberspace, as its source shall be found in the principle of sovereignty and in particular in every States obligation not to allow knowingly their territories to be used for acts contrary to other States. Furthermore, the requisite of knowledge of risk adds a further layer of complexity in the cyber domain – as it will be relatively difficult

[73] *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area*, (Advisory Opinion) [2011] Seabed Dispute Chamber of the ITLOS, para 117.
[74] *Corfu Channel* case (note 27), 22.
[75] *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the* (note 73), para. 117.
[76] ILC Draft Articles on Transboundary Harm (note 61), 154.

for victim States to gather evidence of knowledge of the attack – that shall limit the effectiveness of the rule and the possibility to trigger international responsibility. Yet, the fact that responsibility will be difficult to engage does not diminish the value of the primary obligation of States to exercise due diligence in the cyber context. Scope and content of the obligation of cyber due diligence should be carefully assessed, so as to avoid creating further obligations upon States that do not find support in customary law. In this regard, the obligation to exercise due diligence in the cyber context arguably includes the obligation of the State to effectively avail itself of its legislative and administrative apparatus in order to stop cyber operations that are already underway or at risk of being performed. It is doubtful the cyber due diligence encompasses also a general obligation to prevent possible future cyber operations, as this would create a norm inconsistent with customary law and State practice.

CHAPTER FOUR

The role of due diligence in shared responsibility settings

SUMMARY: 1. Introduction – 2. The concept of shared responsibility in international law – 3. Due diligence in shared responsibility settings – 3.1 Cases of shared responsibility arising out of the same failure to exercise due diligence: the case of cooperative negligence – 3.2 Shared responsibility arising out of several conducts: breached of due diligence obligations in cases of cumulative responsibility – 3.2.1 Aid or assistance – 3.2.2 Circumvention – 4. Concluding remarks.

1. Introduction

This chapter focuses on the scope of due diligence in shared responsibility settings. The term shared responsibility refers to situations in which two or more subjects of international law contribute to the same injury or harm and international responsibility is distributed among them.

The question underpinning the analysis is whether and to what extent cases of shared responsibility can arise out of one or more breaches of due diligence obligations. Appraising the scope of application of due diligence obligations in shared responsibility settings serves first of all to test the cogency of fundamental features of the international responsibility regime, such as the distinction between primary and secondary rules. The separation between the rules dictating the conduct of States and rules aimed at determining the legal consequences of failure to fulfil obligations set by primary rules has been one of the key contributions of Ago's work as a Special Rapporteur on State responsibility. The Commentary to the ARSIWA provides that 'it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation'.[1] The purpose of the articles should in fact be limited to 'provide the framework for determining whether the consequent obligations of each State

[1] Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA), 31.

have been breached, and with what legal consequences for other States'.[2] Yet, the distinction between primary and secondary rules has been critically assessed by the doctrine, with scholars pointing to the sections of the ARSIWA where such division is particularly blurred[3] or to the articles that seem to impose primary rules.[4]

Gaja notes that the distinction between primary and secondary rules is hard to trace, since 'all the elements that are useful in order to determine the content of an international obligation are also relevant with regard to define whether there is a breach'.[5] In this sense, referring to art 12, 13 and 14 of the ARSIWA[6] Gaja argues that the assessment of the moment of the breach of an international obligation not only has a bear on the breach itself, but it influences also the content and scope of application of primary rules. If secondary rules contribute to the definition of the scope of relevant primary rules, then it may be worth querying whether provisions of the ARSIWA that refer to situations of shared responsibility affect also the scope of application of due diligence obligations. For example, in situations of responsibility of a State in connection with the international wrongful act of another State or an international organisation, the content of provisions such as art 16 (aid or assistance) of the ARSIWA or art 61 of the ARIO and their interpretation – namely with reference to the notion of "intention" – determines whether or not a breach of an obligation of due diligence can amount to an act of 'aid or assistance' or 'circumvention'.

Yet, squaring due diligence in the framework of shared responsibility may also bring about further insights on the nature of these obligations in light of what discussed in the previous chapters. Through the analysis that will be conducted here, more lights will be shed over the additional hurdles that interpreters face when assessing a breach through the non-performance of a conduct whose content is not spelled out by the primary norm. For example, cases of multiple breaches of obligations to exercise due diligence that contribute to the occurrence of one harmful outcome may raise complex issues of causality as to the existence of separate international wrongful acts and the identification of the *quantum* of reparation. But practice (although limited) shows also some difficulties in

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[2] Ibid.

[3] David,'Primary and Secondary Rules', in J Crawford, A Pellet, S Olleson (ed), *The Law of International Responsibility* (OUP 2010), 27.

[4] For example with reference to art 16 of ARSIWA, which prohibit aid or assistance to another State. By attributing responsibility to the State that aid or assistance another State in the commission of an international wrongful act, art 16 also imposes the primary obligation not to assist or aid another state in the commission of that act, see Dominice, Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State, in Crawford, Pellet, Olleson (note 3), 289.

[5] G Gaja, Primary and Secondary Rules in the International Law on State Responsibility (2014) Riv Dir Int, 981, 984.

[6] B Gaefrath, 'Complicity in the Law of International Responsibility' (1996) Revue Belge de Droit International, 370, 372.

grappling with the nature of due diligence obligations in the context of cooperative responsibility, i.e. when the very same breach of a failure to exercise due diligence is to be attributed to more than one State or to a State and an international organisation.[7] The fact that obligations of due diligence are positive obligations whose breach often depends on inaction and absence of specific orders or instruction on the part of the State may in fact have an impact on the meaning of 'effective control' and on the possibility of attributing a conduct consisting of a failure to act to multiple subjects.

The chapter is structured as follow. The first paragraph will clarify the meaning of 'shared responsibility', set the differences with notions like 'multiple' or 'joint' responsibility and delimit its scope of application in the present analysis. Afterwards, a distinction will be drawn between cases of shared responsibility arising out of the same wrongful act, and cases of cumulative responsibility, where each subject undertakes its own conduct which contributes with the others to the occurrence of the same harmful outcome. The analysis of the scope of application of due diligence will be conducted for each of these separate contexts, in order to provide a comprehensive overview of cases of shared responsibility involving breaches of due diligence duty and to single out the specificities of these kind of obligations.

2. The concept of shared responsibility in international law

In the international setting, States often do not operate alone but make use of other States' or international organisations' participation to achieve a specific outcome. In some cases, this participation may result in the commission of an international wrongful act, raising questions about the responsibility of each entity for the injury caused collectively to the third party. At the same time, there may be cases in which States' or international organisations' action is not necessarily concerted, yet each conduct contributes to cause the same harmful outcome. When the combined conduct of more than one actor results in the same injury or harm, one should query how international responsibility is allocated among these actors. The notion of shared responsibility covers therefore situations in which responsibility for a single harmful outcome is distributed among different actors.

In light of the present analysis, the term shared responsibility[8] is preferred over the notion of 'joint' responsibility because of its broader scope.[9] 'Joint'

[7] The present Chapter does not broach the problem of the sources of due diligence obligations for international organisation. For an overview of the issue see Committee on Due Diligence in International Law, 'ILA Study Group on Due Diligence in International Law – Second Report' in International Law Association Report of the Seventy-Seventh Conference (Johannesburg 2016) available at www.ila-hq.org/download.cfm/docid/574BBB1E-33EA-48C6-94ACDF79A22B8477.

[8] The use of this term is borrowed by Nollkaemper and Jacobs from their project on shared responsibility in international law, see A Nollkaelper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law,

responsibility usually evokes situations in which one international wrongful act is attributed to a plurality of States. This would be the hypothesis covered by art 47 of the ARSIWA, according to which if several States are responsible for the same international wrongful act, the responsibility of each State may be invoked in relation to that act. On the contrary, the expression 'one single harmful outcome', as employed in the context of shared responsibility, is not limited to situations of a plurality of States or organisations responsible for the same international wrongful act. Rather, shared responsibility includes also cases where separate conducts, that may each one constitute a separate wrongful act, are causally connected to each other in the realisation of one harmful event, or situations of attribution of responsibility – i.e. when responsibility of a State or an organisation is established in connection with the international wrongful act of another State or another international organisation. In this regard, a synonym of shared responsibility may be the notion of 'multiple responsibility'; yet, the term 'shared' better expresses the idea of inter- and co- dependency that exists between conducts giving rise to a single harmful outcome.

Both the ARSIWA and Draft Articles on Responsibility of International Organisations (ARIO) foresee the possibility of international responsibility being shared among different actors. For example, the Commentary to the ARISWA recognises that the allocation of international responsibility to one State does not precludes finding another State responsible for the conduct in question or the injury caused as a result.[10] We have already mentioned art 47 of the ARSIWA, which provides for multiple attribution of conduct when several States are

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359, 366-368; A Nollkaemper, 'Introduction' in A Nollkaemper and I Plakokefalos (ed), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014), 6-9. Obviously, the concept of shared responsibility is distinct from the idea of *collective responsibility*, which rests on the premise of unity and allocation of responsibility to a group and the collective as such (see in this regard Chapter I on the discussion of early forms of international responsibility). It should also be noted that the concept of shared responsibility in international law is not necessarily limited to situations in which responsibility is distributed among States and international organizations. A single harmful outcome may in fact result also from the concerted actions of States and individuals or multinational corporations, see for an overview J d'Aspremont, A Nollkaemper, I Plakokefalos, C Ryngaert, Sharing Responsibility Between Non-State Actors and States in International Law: Introduction (2015) Neth Int Law Rev, 49; W Vandenhole, Responsibilities of the Non-State Actors in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings (Brill 2015) 55-78; T Gammeltoft-Hansen, Private Actor Involvement in Migration Management, A Nollkaemper and I Plakokefalos (ed) *The Practice of Shared Responsibility in International Law* (CUP 2017); see also *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (advisory opinion, 1 February 2011) ITLOS Reports 2011, para 200 on the distribution of responsibilities between the contractor, the Authority and the sponsoring State. The present chapter however will focus solely on the notion of shared responsibility as referring to cases in which responsibility may be shared among subjects of international law, whether States or international organisations.

[9] Contrary however, J Crawford, State Responsibility: The General Part (CUP 2013) at Chapter 10, employing the term *joint responsibility* as synonym to the notion of shared responsibility.

[10] Commentary to the ARSIWA, art 1 para 6.

responsible for the same wrongful act. Chapter IV is also devoted to situations of shared responsibility, when international responsibility is attributed to one State based on the connection between the conduct of that State and the international wrongful act of another State, as in the cases of aid or assistance,[11] exercise of direction and control,[12] and coercion.[13] Likewise, the ARIO are also premised on the idea that responsibility of an international organisation for a wrongful act does not exclude the existence of parallel responsibilities of other subjects for the same set of circumstances.[14] In this regard, the ARIO cover both situations in which responsibility may be distributed between two international organisations,[15] and situations where responsibility could be shared between a State and an international organisation.[16]

International practice has dealt with cases of shared international responsibility. As for cases of multiple attribution of conduct, in the *Nauru* case, the ICJ did not rule out the possibility of joint responsibility between Australia, New Zealand and the United Kingdom over the conduct in breach of the Trusteeship Agreement over Nauru.[17] In the *Nuhanović* case, the Supreme Court of The Netherlands confirmed the approach of dual attribution taken by the Court of Appeal and found that both The Netherlands and UN exercised effective control over the same wrongful conduct carried out by the Dutchbat troops during the massacre in Srebrenica.[18] As for cases of shared responsibility arising out of separate wrongful acts, in the *Ilascu v Moldova and Russia* for example, the European Court of Human Rights (ECtHR) found that responsibility for the violation of art 3 of the European Convention on Human Rights against two of the applicants was allocated between Moldavia and Russia.[19]

Overall, international law is plentiful of examples of responsibility that may involve multiple States or international organizations. Two or more States could undertake a cooperative military invasion of a third States both in breach of the prohibition of the use of force. Harmful outcomes may arise as a result of States placing their organs at the disposal of another State or international organisation,

[11] Art 16 of ARSIWA.
[12] Art 17 of ARSIWA.
[13] Art 18 of ARSIWA
[14] Commentary to the Articles on Responsibility of International Organizations, ILC Yearbook 2011/II(2) (ARIO), art 3 para 6.
[15] Art 14, 15, 16 and 18 of ARIO.
[16] Art 14, 15, 16 of ARIO, which run parallel to articles 16, 17, and 18 of ARSIWA, and art 17 and 61 which cover the cases of circumvention.
[17] *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections, Judgement) [1992] ICJ Report, para 55. The case brought before the ICJ concerned exclusively the responsibility of Australia as the only party in the dispute with Nauru. However, the Court recognised that "responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned".
[18] *The State of The Netherlands v Hasan Nuhanović,* case no 12/03324 (Judgement) (The Supreme Court of the Netherlands, 16 September 2013), 22-23.
[19] *Ilascu and Others v. Moldova and Russia*, App no 48787 (ECtHR 8 July 2004), para 449,454.

such as in multinational military forces or peacekeeping missions. In this case, the main issue regards the identification of grounds allowing for multiple attribution of conduct to all the entities involved – whether a plurality of States, or States and international organisations. States may also collaborate to create a trusteeship with no separate legal personality, and therefore engage in wrongful conducts that would be classified as joined among all the participants.[20]

Shared responsibility may also include cases of attribution of responsibility (or *derivative* responsibility), namely situations in which international responsibility is attached to the entity due to the content of a particular primary obligation, even when the *conduct* giving rise to the international wrongful act may be attributable to another subject, whether a State or an international organisation. This may occur for example when a State or an international organisation renders aid or assistance to another State in the commission of an international wrongful act; in this case, the State or international organisation would be attributed responsibility for the international wrongful act committed by the aided or assisted State, without conduct of the latter being attributed[21] to the aiding or assisting entity. Cases of shared responsibility may also interest situations of transboundary environmental damage, when a plurality of States causes injury by breaching their primary obligation to prevent transboundary harm. This may happen for example in the case of shared responsibility of upstream States for the pollution of international watercourses generated by States' discharges and activities in the area. Here, the conduct of each State amounts to a separate international wrongful act, yet each separate conduct constitutes an aspect of the same harm or injury.

Situations of shared responsibility in international law are often complex to "debunk" for two main reasons. Firstly, because the system of international responsibility set by the ARSIWA and ARIO functions as a reference point, but it is mainly constructed around the concept of independent responsibility.[22] Both the ARSIWA and ARIO do not rule out hypothesis of responsibility shared by multiple actors, however they provide a conceptual legal framework that is mostly focused on the individual responsibility of a State or international organisation. The underlying idea that informs principles and norms as established by the ILC is in fact that each State and international organisation can be held responsible only for their own international wrongful conduct. Attribution of responsibility outside of this rule is treated as exceptional and confined to a rigid set of conditions. If one considers also that multiple responsibility can arise in a variety of situations that can be profoundly heterogeneous with each other, it seems clear that the lack of a coherent framework addressing the problem of allocation and distribution may render the issue of shared responsibility particularly problematic.

[20] See *Nauru* case (note 17), 240.

[21] Attribution here is to be intended as attribution of conduct pursuant to art 4 to 11 of the ARSIWA and art 6 to 9 of ARIO.

[22] See also Nollkaemper and Jacobs (note 8), 364.

A further layer of complexity is added by the many problems and queries that underpin the process of allocating responsibility among multiple actors. In this regard, a legal analysis of a shared responsibility setting requires drawing on different sets of legal rules in order to address core issues such as (a) the identification of the actors which can be held accountable under the regime of international responsibility; (b) rules and principles governing distribution of responsibility among these actors; (c) questions of reparations, and in particular on the extent to which each responsible entity should be expected to repair and compensate for the injury caused. As for the identification of the subjects responsible, singling out the entities that bear responsibility for a single harmful outcome may be a particularly challenging task when discussions related to attribution of conduct as per secondary rules are involved. For example, in the case of a multilateral peacekeeping mission that failed to ensure international human rights of the affected population, the question of attribution of conduct to more than one entity – whether to two or more States or States and international organisations – constitutes the premise upon which responsibility may be qualified as shared. Sometimes, the hurdle may rest on how responsibility is allocated *ex post* among different actors. This may be a difficult process in cases where responsibility is to be apportioned following the conduct of States or international organisations that acted separately but together contributed to the realisation of the harmful outcome. Consider the case of climate change litigation or transboundary environmental harm resulting from the omissions of a plurality of States; in this instances, the allocation of responsibility is premised on the determination of the content and scope of the primary obligation of each State to prevent environmental harm and on the *test of causality* that links the failure to prevent with the occurrence of damage.[23] Finally, a scenario of shared responsibility complicates discourses related to reparation of the harm caused. When multiple actors are held responsible for their contribution to the harmful

[23] See for the issue of climate change C Voigt, State Responsibility for Climate Change Damages, (2008) 77 Nordic Journal of International Law, 1; D Bodansky, J Brunnée and L Rajamani, International Climate Change Law (OUP 2017), Chapter II; Paris Agreement (adopted 12 December 2016, entered into force 4 November 2016) ILM 743. As for the causal enquiry between the conduct of a State and the harmful outcome, *causality* is not per se a necessary feature of international responsibility. Yet, the legal analysis of factual causation is a process to which it might be necessary to resort at different stages of the responsibility discourse. In the context of responsibility arising out of an harmful outcome occasioned by the omissions of several actors, a causal analysis needs to be undertaken in order to assess the determination of the breach of the primary obligation in question, i.e. whether the omission of the State caused the event to be prevented by the primary rule. But causation may be relevant also as a requirement upon which the obligation to provide reparation is premised, since a State or international organisation will be ask to provide reparation should the injury caused be the result of the State's or organisation's wrongful act. See for an overview on causation in the law of State responsibility, I Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: in Search of Clarity', (2015) 26 EJIL, 471; As for causation as an inherent feature of certain international obligations see A Gattini, 'Breach of International Obligations', in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility* (note 8) 28.

event, questions arises as to the extent to which each responsible entity shall be require to provide reparation, in particular whether it should be full reparation or reparation standardised on each particular contribution. In this regard, the ICJ when considering the obligation of Serbia to prevent genocide in 2007 labelled as irrelevant the fact that even if Serbia had employed all the means reasonably at its disposal, genocide would nevertheless have been committed. Essentially the Court ruled that responsibility for wrongful harm is not diminished by the participation of other actors to the commission of the very same harm.[24] Yet, in turning to the question of reparation, the ICJ argued that the issue on whether genocide at Srebrenica would have taken place even if Serbia had attempted to prevent it by all possible means, 'becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent'.[25] Eventually, the Court concluded that since it could not be proved that in the circumstances of the case the means of influence of Serbia would have been sufficient to prevent genocide – and therefore the *causal nexus* between the breach of the obligation to prevent and damage could not be proved – Serbia could not be ordered to pay compensation.[26] The issues outlined above are just some of the points that may be raised in cases where responsibility for a harmful outcome involves a plurality of actors. However, they prove that when embarking in a discussion on shared responsibility settings, the discourse inevitably touches upon questions that do not exclusively belong to the realm of secondary rules. In some cases, the legal process that leads to the allocation of international responsibility to more than one State or international organisation entails considerations on the content and scope of primary rules. This emerges clearly in the context of complicity for example, where the opportunity to codify responsibility as shared depends on the possibility to classify the action of the complicit State as a conduct of aid or assistance. But discussions on the content of primary rules may also arise in other circumstances, for example when trying to assess the contribution of each actor to the commission of a single harmful act arising out of several States' or international

[24] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Merits) [2007] ICJ Report, para 430.

[25] Ibidem, para 462.

[26] Ibidem. But see the *Corfu Channel* case, where despite the fact that mines had been laid by a third State, the Court ruled that Albania had to compensate the full amount of the injury, see *Corfu Channel* (*Albania v United Kingdom*) (Merits) [1949] ICJ Rep, 4, 23. See also art 31 of the ARSIWA, which provides for "full reparation of the injury caused by the international wrongful act" on the part of the State. For an overview on issues of compensation and reparation in the context of shared responsibility see P D'Argent, Reparation, Cessation, Assurance and Guarantees of Non-Repetition, in Nollkaemper and Plakokefalos, *Principles of Shared Responsibility* (note 8). A separate but related question which arises again in the context of shared responsibility is whether in cases of multiple States responsible for the same international wrongful act, reparation should be governed by the principle of joint liability, or joint and several liability. A discussion on the principle of joint and several liability can be found in J Noyes, B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale Journal Int'l, 242-249.

organisations' failure to exercise due diligence; in such case, it is the evaluation of the causal link between the wrongful event and the scope of each State's obligation to exercise due diligence that allows for responsibility to be shared.

3. Due diligence in shared responsibility settings

Failure to exercise due diligence can be a constitutive feature of shared responsibility. There may be cases where the single harmful outcome appears as the result of one single negligent conduct that is attributable to a plurality of States and/or international organisations. But breached of due diligence obligations could also play a role in contexts of cumulative responsibility – i.e. when separate conducts each one attributable to a State and/or an organisation contribute together to the occurrence of the same harmful outcome. In this latter case, we may distinguish between cases of shared responsibility arising out of separate wrongful acts, and cases where responsibility is allocated on multiple subjects due to the connection of a State's conduct with the international wrongful act of another State or organisation. In the first group of cases, the single harmful outcome is the result of several conducts each one constituting an international wrongful act and contributing to the occurrence of the wrongful result. In this contexts one or more wrongful conduct(s) may consist of a breach of an obligation to exercise due diligence. In the second group of cases instead, the negligent conduct of one State is assessed in connection with the international wrongful act of another entity (a State or an organisation) and responsibility is attributed to the former for the wrongful act committed by the latter.
The following analysis is devoted to the assessment of the scope of application of due diligence in each of these cases and of the extent to which a breach of one or more obligations of due diligence triggers the question of shared responsibility.

3.1 Cases of shared responsibility arising out of the same failure to exercise due diligence: the case of cooperative negligence

Shared responsibility includes situations in which several subjects are responsible for the same wrongful act that generates a single injury. This is the hypothesis labelled as 'joint responsibility'[27] and covered by art 47 of the ARSIWA and art 48 of ARIO, according to which responsibility of more States or international organisations for the same international wrongful act does not preclude responsibility to be invoked in relation to that act for each State or international organisation. We may resort to the expression *cooperative negligence* whenever such wrongful act that is attributable to more subjects consists of a failure to

[27] See the Commentary to ARIO, art 48(1).

exercise due diligence or adopt all the measures proscribed by the primary obligation.

As specified in the Commentary to the ARSIWA and ARIO, situations of joint or cooperative responsibility may arise when a common organ of several States carries out a wrongful act. In the *Eurotunnel case* for instance, the Arbitral Tribunal found that the Intergovernmental Commission (IGC) came into view as a joint organ of France and the UK.[28] Joint responsibility may also arise whenever wrongful conduct is carried out by an entity that lacks personality but is administered by a plurality of States, such as in the *Nauru* case.[29] Finally, the Commentary to the ARSIWA mentions also cases where two or more States 'combine in carrying out together an international wrongful act in circumstances where they might be regarded as acting jointly in respect of the entire operation'.[30] This would include multinational military operations or peacekeeping missions, for example in situations where the UN and a sending troop State breach a set of shared obligations through cooperative action.

The expression 'responsibility for the same international wrongful act' employed in art 47 of the ARSIWA appears to suggest that States and/or international organisations are to be held together responsible for a single course of conduct in breach of a primary obligation, rather than for separate breaches of the same primary rule.[31] Hence, shared responsibility arising out of the same wrongful act is a form of responsibility whose ascertainment revolves around the question of attribution of conduct. The interpret is not faced with difficulties in singling out the primary obligation bearing on each State or organisation, nor in determining whether the conduct constitutes a breach of an international obligation; rather, when the international wrongful act ensued from the cooperative action of a plurality of States or a State and an organisation, the key challenge is to establish whether the conduct can be attributed to all the entities involved.

Questions of attribution of conduct to a plurality of States or to States and an international organisation should be tackled by reference to rules of attribution provided in the ARSIWA and ARIO respectively. To be more precise, whenever wrongful conduct involves the action of multiple States, attribution of conduct will exclusively follow rules set out by the ARSIWA. For example, the conduct of a joint organ exercising elements of governmental authority and acting on behalf

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[28] *The Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.a v. Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and el minister de l'èquipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*), PCA Repository (2007) (Partial award), 103 para 317.

[29] *Nauru* case (note 17).

[30] Commentary to ARIO, art 48(1).

[31] After all, art 47 of ARSIWA and art 48 of ARIO employ the singular noun *act*, which according to the articles is internationally wrongful whenever an action or omission is attributable to a State or a international organisation, and constitutes a breach of an international obligation. See in this regard also D'Argent (note 26) 234.

of the States that created it will be attributable to the latter as per art 5.[32] A similar scenario may arise whenever the conduct of an organ of a State acts upon the instructions of that State jointly will another State, triggering the international responsibility of each party. However, concerted conducts in breach of an international obligation may also arise as a result of the cooperative actions of States and international organisations. In this case, the process of identifying the entities bearing responsibility may demand resorting to both rules of attribution of ARSIWA and ARIO. Consider for example peacekeeping operations, where the UN is formally the organisation in charge of the operation and troop contributing States place their organs at the disposal of the organisation. Attribution of conduct in this case will primarily be premised on rules set out in ARIO, under the assumption that the operation is conducted under the command and control of the UN and thus troops contributing State hold the status of subsidiary organs.[33] Since the reality of these missions though shows that troop contributing States hardly give up full operational control to the organisation and continue to retain some level of power over their troops, international responsibility will mostly lie where effective control is practically exercised.[34] This means that in order to disentangle the problem of attribution, rules of ARIO and ARSIWA will often have to be considered in turn, vis-à-vis the conduct in question.[35]

Thus far, one may argue that there should be no reason to devote a separate analysis to cases of cooperative negligence, as their assessment would not differ from any other case of cooperative conduct in breach of any primary obligation. If the question of shared responsibility is primary one of attribution, whether the wrongful conduct consists of an action or an omission is not going to have a bear on the process of establishing responsibility. Yet, it is worth to dwell upon the specificities of cooperative negligence, since attribution to more than one entity of the very same conduct consisting of a failure to act may for example have an impact on the meaning of effective control. This is particularly true whenever

[32] This is the situation that occurred in *Nauru* (note 17) and in the *Eurotunnel case* (note 28). In *Nauru*, the ICJ noted that "the three Governments mentioned in the Trusteeship Agreement constituted, n the very terms of that Agreement " the Administering Authority" of Nauru; that this Authority did not have international legal personality distinct from those of the States thus designated" and that "Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority", see para 47 and para 48 at 258-259. In the Eurotunnel, the PCA labeled the IGC as a common organ of France and the UK, "whose decisions required the assent of both Principals" at 61.

[33] Art 6 of ARIO, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, ECtHR, Apps. No. 71412/01 and 78166/01, 2 May 2007, para. 133-141.

[34] Art 7 of ARIO and art 8 of ARSIWA.

[35] See for instance *State of the Netherlands v Mustafić et al.* ECLI: HR:2013:BZ9228 (advisory opinion of the Advocate General Vlas), where the General Vlas, in relation to attribution of conduct of Dutchbat to the UN or The Netherlands for the killings of the relatives of Mustafić and Nuhanović during the massacre at Srebrenica, observed that if the UN did not exercise effective control (pursuant art 7 of ARIO), the troop contributing State is responsible for its own conduct (as per art 4 of ARSIWA, whereby national contingents do not cease to act as organs of their respective States).

failure to act of the agent in a specific circumstance ensues from the absence *in concreto* of any specific order or given instruction by the entities involved.[36]

That failure to act in the context of dual attribution of conduct may appear as slightly more problematic that attribution of a breach resulting from action, is something that was already noted by the Permanent Court of Arbitration in the *Eurotunnel* case. The dispute concerned the alleged violation by France and the UK of part of the Concession Agreement signed with two companies entrusted with the development, the construction and the operation of a fixed link across the Channel between France and the United Kingdom. The claimants argued, *inter alia*, that both States breached the Concession Agreement by failing to protect one of the sites of the Fixed Link against incursions of clandestine migrants, impeding this way the normal course of commercial operations to be carried out by the claimants. In dealing with the problem of attribution of wrongful conduct to France and the UK, the Court affirmed that while it is relatively straightforward to affirm that breaches resulting from *action* taken by the IGC can be attributed to both States - since the IGC 'is a joint organ of the two States whose decisions require the *assent* of both parties'[37] – more difficult is to assess 'whether the failure of the IGC to take action (whether or not because the Principals were not agreed on the action to be taken) results in the joint liability of both Principals or the individual liability of each'.[38] Basically, the Court queried whether the breach of an obligation stemming from the absence of any concerted or cooperative decision between two States should have been considered as cooperative conduct of negligence attributable to both, or as the violation of two separate primary obligations identical in their content. No issue arises in fact for dual attribution when wrongful conduct amounts to an action implemented upon instructions ensued by means of cooperative decision of two States. On the contrary, passive conduct such as mere abstention and failure to act on both parts is more difficult to classify as the result of a concerted decision of both entities.

Eventually, the PCA found that the IGC bore the duty to take the necessary steps to ensure the normal operations of the Fixed Link, and that France and the UK held therefore the duty to ensure that the IGC took measure to facilitate the implementation of the Agreement. For these reasons, the Court affirmed that 'what the IGC as a joint organ failed to do, the Principals in whose name and whose behalf the IGC acted equally failed to do'.[39] This is in conformity with the Commentary to art 5 of the ARSIWA, whereby 'there may be an entity which is a

[36] When attribution of conduct depends on the entities that exercised effective control, and the course of conduct emerges as the actualization of a given instruction or order, the factual identification of the organ which gave that precise instruction, along with the evaluation of the legal status of that organ in the particular circumstances of the case, makes it easier to determine to whom conduct should be attributed.

[37] *Eurotunnel* case (note 28) para 179-180 (emphasis added).

[38] Ibidem.

[39] Ibidem, para 317 at 103.

joint organ of several States (…) [and] [i]n these cases, the conduct in question is attributable to both States'.[40] It may also be argued that the Court, aware that wrongful conduct by the IGC had not occur by reason of a concerted decision between UK and France to act in a certain manner, felt also the need to specify that mere inaction of a joint organ can as well be regarded as the product of tacit consent. In acknowledging that the obligation to take steps to secure the area from the immigration flow fell mostly on France, the Court affirmed in fact that attribution of conduct to the UK was not to be deemed inequitable, as

'the record of the IGC, though it sometimes shows disagreement between the Principals, does not show a consistent and conscientious opposition by the United Kingdom to a unilateral French policy, such that the United Kingdom could argue that it did everything within its power to bring a clearly unsatisfactory situation promptly to an end'.[41]

The *Eurotunnel* case is one of the few examples of practice concerning an omission jointly carried out by two States.[42] Yet, multiple attribution could also be established when there is no joint organ between two entities. For instance, a person may be at the same time under the instruction, the direction or control of two of more States or a State and an international organisation.[43] Furthermore, there might be circumstances where attribution rules of States and international organisations interact with each other due to cooperative conducts between the State and the organisation. It may happen that the organ of a State or an organisation is transferred to an international organisation. In this case, art 7 of ARIO provides that the conduct of the organ lent by the State or the organisation to another international organisation shall be considered an act of the latter if the organisation exercised effective control over that conduct. Practice shows however that whenever the lent organ is controlled by the organisation but it is not fully integrated within it, there could be room for multiple attribution to apply.
Situations of this kind arise especially in the context of multinational or peacekeeping operations ordered and carried out under the authority of the UN. Despite being formally under the secondment of the organisation, troops deployed on the field often continue to act as organs of the contributing State, giving rise to questions of shared responsibility. A detailed analysis of the distribution of responsibility between contributing States and international organisations involved in joint military operations is obviously outside the scope of the present

[40] Commentary to ARSIWA, art 5 at 44.
[41] *Eurotunnel* case (note 28) para 318 at 103-104.
[42] The other case where it was at least implicitly established that wrongful conduct of a joint organ can be attributed to more than one State was the Nauru case, before the ICJ.
[43] A detailed analys of all possible cases of multiple cases of attribution is obviously outside the scope of this chapter. For a more in-depth study on how rules of attribution could interact with each other for the purpose of dual attribution see F Messineo, Attribution of Conduct, in Nollkaemper and Plakokefalos, Principles of Shared Responsibility (note 8).

chapter. Suffice is to say that international and national Courts have grappled with the interaction and meaning of rules of ARISWA and ARIO when troop contributing States conserve some degree of control over their troops formally under the authority of the UN.[44]

For the purpose of multiple attribution in the context of cooperative negligence, some considerations should be given to the decisions of the national Courts of The Netherlands over the attribution of conduct of UN peacekeepers during the Srebrenica genocide. In particular, in the *Nuhanović* and *Mustafić* cases, the Courts of The Netherlands had to established whether the State was liable for having evicted the families of Hasan Nuhanović and Rizo Mustafić from the compound of Dutchbat, the peacekeeping force deployed in Srebrenica under the command of the UN on the 12 of July 1995. While initially the District Court of The Hague denied the claim on the basis that Dutchbat was operating under the mandate of the UN, in 2011 the Court of Appeal quashed the decision and found responsibility *also* on the part of the Netherlands. The Court affirmed that questions of attribution of conduct of Dutchbat should be solved applying the test of "effective control" in relation to art 7 of ARIO. In this context, it noted the possibility that the application of this criterion would lead to attribution of conduct to more than one party. One should pay attention to the meaning of effective control adopted by the Court in order to establish that during the removal of the four Bosnian nationals, Dutchbat was effectively under the control of The Netherlands. The Appeal Court premised effective control on the existence of a factual and normative link between the negligence conduct adopted by Dutchbat troops and the State of The Netherlands. As for the factual link, it was argued that the actual removal of relatives of Nuhanović and Mustafić could be attributed to the Dutch Government's decision and instructions on how the evacuation of

[44] Generally, a first distinction should be drawn between operations fully seconded by the UN, and operations that having been merely authorised by the Security Council, are conducted by national contingents. The latter are not given the status of organs under the rules of the organisation, thus attribution of conduct does not fall under ARIO, but follows rules of ARSIWA. As for the first category, although troops should formally act as organs of the organisation – leading to the application of art 6 of ARIO – the conservation of some degree of control by the troop contributing State makes art 7 of ARIO more suitable to solve questions of attribution of conduct. With regard to the most relevant case law before the ECtHR that deals with questions of attribution of conduct see *Berhami and Berhami v France and Saramati v France,* ECtHR, App 71412/07 and no 78166/01, 31 May 2007; *Al-Jedda v. United Kingdom*, ECtHR, Application NO. 27021/08, 7 July 2011; *Stichting Mothers of Srebrenica and Others v The Netherlands*, ECtHR, Application no 65542/12, 11 June 2013; As for relevant doctrine tackling the issue of attribution of conduct in the context of peacekeeping operations see [44] P Palchetti, 'The allocation of responsibility for internationally wrongful acts committed in the course of multinational operations', (2013) 95 International Review of the Red Cross, 727; T. Dannenbaum, Translating the standard of Effective Control into a System of Effective Accountability: How liability should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers, (2010) 51/1 Harvard Journal of International Law, 113; L Condorelli, 'Le statut de forces de l'ONU et le droit international humanitaire' 78 Rivista di Diritto Internazionale, 85.

refugees within the compound should have been carried out.[45] However, the Court held that the effective control test

'does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction (…) but also to the question whether, if there was no such specific instruction, the UN or the State *had the power to prevent* the conduct concerned'.[46]

It was then argued that since the Dutch Government was closely involved in the preparation and evacuation of the refugees, 'it would have had the power to prevent the alleged conduct if it had been aware of this conduct at the time'.[47] Yet, the notion of *power to prevent the wrongful conduct* as a basis of attribution is not without ambiguities. One possible reading is that by grounding effective control on the power to prevent the breaches of an international obligation, the Court somehow mixed the level of attribution of conduct with the base for wrongfulness. After all, to say that the State had the power to prevent wrongful conduct and that, had proper instructions been given to Dutchbat, such instructions would have been executed,[48] means also to say that the State had the legal obligation to intervene to prevent the wrongdoing.[49] However, power to prevent as the basis for the obligation to exercise due diligence and prevent wrongful outcome (including wrongful conduct) is an inference that belongs to the assessment of the *objective* element of responsibility, not the attribution part. D'Argent rightly notes that a failure to act never raises any question on attribution but points to 'a possible wrongful conduct of the legal subject bound by an obligation to act, eventually in the form of the duty to prevent certain events that occurred. It is not conclusive of the attribution to that subject of the actual disputed conduct which should not have occurred'.[50] In this sense, it is worth noting that in judgment of the Court of Appeal there was no reference to the specific international wrongful act to which the Netherlands was bound, as the discourse of the Court revolved around the issue of attribution. In order to determine whether The Netherlands bore an obligation to prevent genocide and

[45] Court of Appeal of The Hague, *Nuhanović v Netherlands*, Judgement of 5 July 2011, ECLI:NL:GHSGR:2011:BR0133, para 5.19.
[46] Ibidem, 5.19 (emphasis added).
[47] Ibidem, 5.18.
[48] Ibidem.
[49] See also in this regard, although not being critical on this point over the specifics of this formulation, A Nollkaemper,'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' 9 Journal of International Criminal Justice (2011), 1143, 1150.
[50] P D'Argent, State organs placed at the disposal of the UN, effective control, wrongful abstention and dual attribution of conduct' (2014), QIL, 17,28 at http://www.qil-qdi.org/state-organs-placed-at-the-disposal-of-the-un-effective-control-wrongful-abstention-and-dual-attribution-of-conduct-2/.

grave breaches of IHRL the Court would have had to assess whether the Netherlands had jurisdiction over that area or exercised effective control over it.
On the other hand, it has been argued that the definition given by the Court of Appeal is the most appropriate to capture the essence of effective control. According to Dannenbaum, effective control should be 'held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question'.[51] He argues that the test of preventive power would be suitable to tackle cases of wrongdoings resulting from the cooperative action or omission of multiple entities.[52] In particular, the inherent reciprocity that exists between the exercise of public power and the responsibility to prevent would justify attribution in context of cooperative conduct to the entity that effectively instructed the agent, and to any other State or international organization that held a sufficient level of control apt to prevent the wrongful conduct in question.[53]
In 2013 the Supreme Court of the Netherlands upheld the test of effective control based on the capacity to prevent wrongful conduct. So far, *Nuhanović* remains the only case where a Court has envisaged dual attribution on the ground of effective control exercised by more than one entity. Certainly, this construction of effective control opens up the possibility of ensuring redress from States in cases of violations of human rights of peacekeeping operations where the UN is formally the entity in control. Yet, constructing attribution on the basis of capacity to prevent the wrongdoing may generate confusion between the level of the breach of the primary obligation to prevent and exercise diligence, and the test of attribution of conduct.

3.2 Shared responsibility arising out of several conducts: breaches of due diligence obligations in cases of cumulative responsibility

Shared responsibility may also arise in situations where a single harmful outcome is the result of several actions and/or omissions each one of which is insufficient to cause the eventual harm, yet sufficient for the purpose of attributing responsibility to the author. We may resort in these cases to the term *cumulative responsibility* to describes circumstances where each State's or international organisation's contribution is necessary to determine the occurrence of the eventual harmful outcome. Cases of cumulative responsibility can be divided in two main sub-groups. On the one hand, cumulative responsibility includes cases where each contribution constitutes an international wrongful act. This can happen when a plurality of States or international organisations breach primary

[51] T Dannenbaum (note 44), 157.
[52] T Dannenbaum, Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Venture, in A Nollkaemper and D Jacobs (eds), Distribution of Responsibilities in International Law (CUP 2015), 215, 223.
[53] Ibidem, 217.

obligations that may hold the same or different content. For example, agents of the State A abduct from the territory of State B a national of State C and transfer him to State D where he is subject to arbitrary detention, ill-treatment and torture by the agents of State A. In this case, State A may face responsibility for directly engaging in breaches of the prohibition of arbitrary detention and prohibition of torture, State B may face responsibility for the violation of the principle of *non-refoulement* - should the State had knowledge of the risk that the person abducted would have faced - and State D may as well be found responsible for breaches of positive human rights duties and for failing to protect from arbitrary detention and torture. Another example may concern a scenario where multiple actors contribute to the depletion of marine living resources by breaching the same or different sets of primary obligations. Cumulative responsibility arises for instance when the depletion of fish stock results from breaches of flag States' obligations to take the necessary measures for their nationals engaged in EEZ zone fishing, and from the coastal State's failure to discharge its obligation.[54] Essentially, all these examples involve separate breaches of the same or different primary obligations which all contribute to the occurrence of the same harmful outcome.[55]

On the other hand, cases of cumulative responsibility may also include situations in which the contribution of each State or international organisation is sufficient for the purpose of *attribution of responsibility*, but does not necessarily amount to an international wrongful act. This occurs for example in situations of direction or control pursuant to art 17 of the ARSIWA and 15 of ARIO or circumvention pursuant to art 61 of ARIO; here the conduct of the entity which consists of direction, control or circumvention, does not amount to an international wrongful act, yet it contributes to the realisation of the harmful outcome to which is *causally* linked. Furthermore, attribution of responsibility may also occur in cases of aid or assistance pursuant to art 16 of the ARSIWA and art 14 of ARIO,[56] where the responsibility of each entity involved is based on a separate wrongful act, yet knowledge of the circumstances of the case on the part of the aiding or assisting State is what connects the distinct breaches.

In general, a failure to exercise due diligence can clearly be a constituent feature of cumulative responsibility. In the examples provided above, responsibility of State D for allowing agents of State A to carry out acts of torture in its territory

[54] See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Case No. 21) ITLOS Reports 2015.

[55] To steer clear from any source of confusion, it is worth mentioning once again that the expression "the same wrongful outcome" does not mean "the same wrongful act". Each State may in fact be found responsible on different ground and on the basis of the breach of completely different obligations. What counts for the purpose of cumulative responsibility is that each of these breaches contributes to the same harmful result.

[56] For example in the case of a State that aids or assists a torturing State. The act of aid or assistance is causally linked to the eventual harmful outcome - the act of torture perpetrated by the aided and assisted State- and it constitutes and international wrongful act in itself.

may originate from State D's failure to exercise due diligence in discharging its positive human rights obligations; similarly, the depletion of fish stock in a certain EEZ zone may result from cumulative flag States' failures to exercise due diligence in preventing IUU fishing. These scenarios do not pose particular problems as cumulative responsibility rests on the violation of separate primary obligations, some of which may comprise negligent conduct(s).

Slightly more problematic may be instead cases of shared responsibility consisting of one indivisible harmful outcome arising out of cumulative States' failures to exercise due diligence. This may occur for instance when a number of watercourse States may simultaneously yet independently cause pollution of water resources of a downstream State by failing to adopt the adequate measures for the protection of waters or the ecosystems of a watercourse; in these cases transboundary environmental damage is the product of separate negligent conducts on the part of several States, but it is also the indivisible result of the cumulative contributions of each one of them.[57] Cases of *cumulative negligence* may trigger complex questions of causality as to the ascertainment of the breach of each due diligence duty. In order to determine the responsibility of each actor for its failure to exercise due diligence, the interpreter will necessarily have to consider each State's conduct – each alleged failure to exercise due diligence – in connection with the wrongful event. However, such logical operation may turn to be particular problematic when the harmful outcome is indivisible and manifests itself as the sum of separate harmful contributions. In this case in fact, the harm may be significant as a result of the combined omissions of several States, but not significant for the purpose of the breach when isolated in relation to a single State's contribution. It might therefore become especially difficult to assert that the actions of any particular State are the proximate causes of a meaningful degree of harm, both in terms of evidence and in terms of choice of the best standard of causality to be adopted.

Yet, the role of due diligence in cases of cumulative responsibility deserves a thorough analysis in those situations labelled by Chapter IV of the ARSIWA as responsibility of a State in connection with the act of another State, and by part V of the ARIO as responsibility of a responsibility of a State in connection with the

[57] Cases of *cumulative negligence* should be kept distinguished from cases of *concurrent negligence*, which occurs whenever the harmful event originates from several contributions, each one consisting of a conduct of negligence and each one capable by itself of causing the eventual harmful outcome. An example of concurrent negligence is the situation that the ECtHR envisaged in *Ilascu v Moldova and Russia*, where responsibility for failing to prevent the ill-treatment by the Moldavian Republic of Transdniestria (MRT) forces of the of applicant was found on both Russia – for the first period of detention of the applicant till 1998 - and Moldova – from 1998 onward.[57] Here each State's omission caused the significant harm, which in its entirety can be causally linked to separate negligent contributions, alternatively; see *Ilascu,* (note 19), para 449,454. In cases of cumulative negligence instead, the eventual harm flows from the sum of all contributions, each one of which constitute an international wrongful act but it is insufficient to cause the eventual harmful result.

conduct of an international organisation. As explained in the introduction to the present Chapter, it is worth querying to what extent provisions of the ARSIWA that refer to situations of cumulative responsibility affect the scope of application of due diligence obligations. In this regard, two situations are taken into account: aid or assistance and circumvention. This can be explained by the fact that aid or assistance and circumvention are the only two situations where negligence can (at least on a theoretical basis) structurally fit into the paradigm of aid or assistance, and whether the act of circumvention of a State or an international organisation can consists into failure to exercise due diligence. All the other cases of attribution of responsibility – direction and control over the commission of an international wrongful act and coercion of another State or organisation – are premised on the active conduct of direction or control[58] or the intention to exercise coercion.[59] Hence, in all these cases conduct 'in connection' with the act of another entity necessarily excludes negligent action.

3.2.1 Aid or assistance

This paragraph explores the boundaries between due diligence and responsibility for complicity. It questions first of all whether complicity can be attained through State's omission and, should this be the case, whether and to what extent international law draws a distinction between complicity through omission and responsibility for failing to exercise due diligence.

The concept of complicity has a long history in international law and finds its theoretical foundations already in the writings of early legal scholars.[60] Special Rapporteur Roberto Ago introduced the notion of complicity in the work of the ILC on the ARSIWA, urging the Commission to undertake an operation of progressive development of international law by dealing with a concept not yet

[58] Commentary to ARSIWA, art 17, 68.

[59] Ibidem, art 18, 69.

[60] It may be argued that initially the notion of complicity merged with the concept of due diligence, as conceptually both can be traced back to the concept of fault in international responsibility. In this regard, Anzillotti already defined the notion of *patientia* and *receptus* as elaborated by Grotius as a form of complicity of the State (commenting on the theory of Grotius: "Lo stato, il quale sa che un private ordisce un delitto contro uno stato o un sovrano straniero, e non l'impedisce mentre dovrebbe impedirlo, come lo stato che da ricetto ad un delinquente nel suo territorio e, rifiutandosi di consegnarlo o di punirlo, lo sottrae alla pena meritata, divengono in un certo modo complici nel delitto"), D Anzillotti, *Teoria Generale della Responsabilità dello Stato* (Lumachi Librario editore 1902) 15. Also De Vattel and Borchard whenever a State failed to prevent injury from private persons toward another State or failed to punish the culprit, see E. De Vattel, *The Law of Nations or, the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Legal Classic Library, 1916), 72; E M Borchard, *The Diplomatic Protection of Citizens Abroad; or The Law of International Claims* (The Banks Law Publishing, 1915) 217. See also the discussion at Chapter I, para 2.2. Lavonoy argued that the notion of complicity finds origin mostly in the law of neutrality, V Lavonoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016) 23-33.

ripe for codification.[61] Eventually the ILC replaced the term complicity with the more neutral notion of 'aid of assistance' in the commission of an international wrongful act.[62] Today, both ARSIWA and ARIO contains provisions on 'aid or assistance', which are almost identical in their content.[63] The present analysis will make reference mostly to art 16 or ARSIWA, hence to the act of aid or assistance by a State in the commission of an international wrongful act of another State; yet, discourses on the limits of complicity vis-à-vis due diligence can be easily transposed to the realm of responsibility of international organisations and in particular on art 14 and 58 of ARIO.

It should preliminary be noted that art 16 of the ARSIWA, art 14 and 58 of the ARIO contain few limitations as to what can integrate an act of aid or assistance. In this regard, the ARSIWA provide that a State that aids or assists another State in the commission of an international wrongful act by the latter 'is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State'.[64] The Commentary specifies that the scope of responsibility for aid or assistance be grounded on three conditions. The first one is that the State providing assistance or aid 'must be aware of the circumstances making the conduct of the assisted State internationally wrongful'.[65] Secondly, aid or assistance must be provided 'with the view to facilitating the commission of the international wrongful act, and must actually do so'.[66] Lastly, a State can be held responsible for aiding or assisting another State in the commission of an international wrongful act, only if the assisting State is bound by the same obligation breached by the assisted State.[67]

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[61] ILC Yearbook 1978/I, 240 para 21. In his seventh Report, Ago proposed for complicity the following provision: "art. 25: Complicity of a State in the internationally wrongful act of another State. The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful", R Ago, 'Seventh Report on State Responsibility' (1978) ILC YB/II, 60.

[62] ILC Yearbook 1978/I, 269. Several members of the ILC argued that it was not advisable to employ a term borrowed form international criminal law.

[63] Art 16 of ARSIWA, art 14 (aid or assistance [by an international organisation] in the commission of an international wrongful act) and art 58 (aid or assistance by a State in the commission of an international wrongful act by an international organization) of ARIO.

[64] Art 16 of ARSIWA.

[65] Commentary to ARSIWA, 66.

[66] Ibidem.

[67] A thorough study of the requisite of an act of aid or assistance pursuant art 16 of ARSIWA and art 14 and 58 of ARIO is obviously outside the scope of this paragraph, which is rather focused on the scope of responsibility for complicity vis-à-vis responsibility for failing to exercise due diligence. The current analysis will focus more on the requirements of knowledge and intention to facilitate the commission of the wrongful act – since their meaning is functional to the understanding of the relationship between complicity and due diligence – while leaving aside the problem of opposability of the obligation breached. In this regard, in the initial version of the norm

Except for these requirements, there are no further limitations in terms of content of an act of aid or assistance. Hence, this suggests that omissions could also theoretically qualify as acts of aid or assistance, provided that they comply with the other conditions set by art 16.

However, in the *Genocide* case of 2007, the ICJ seemed to be of a different advice. In building on art 16 of ARSIWA in order to clarify the content of art III(e) of the Genocide Convention,[68] the Court observed that 'complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide'.[69] Read in connection with art 16 of ARSIWA, this statement may be subjected to three different interpretations. According to the first one, the argument of the ICJ on the scope of complicity in genocide should be given general character, leading therefore to the conclusion that in the international law of responsibility, aid or assistance by a State to the international wrongful act of another State could only be carried out through positive actions, and not through omission.[70] In this regard, the ICJ appeared to suggest a conceptual incompatibility between complicity and omission. In the view of the Court, omission is the manner in which a State breaches its obligation to prevent, that structurally requires a State to act and to adopt all the necessary measures to ensure that the acts to be prevented do not occur. On the contrary, complicity could be envisaged whenever a State is placed under a negative obligation not to commit a prohibited act and yet decides to acts in violation of that prohibition.[71] This reading would certainly give large scope of application to preventive obligations and limit substantially the opportunity to resort to the notion of aid or assistance or complicity. For example, supposing that a State deliberately allows its territory to be used by another State for committing a wrongful act against a third State, the conduct of the first State could not be characterised as aid or assistance under art 16, but only as form of responsibility for failure to exercise due diligence.[72] If qualifying a State's conduct as of failure to exercise due

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as provided by Ago and approved in the first reading by the ILC, there was no requirement that the act of the aided or assisted State should be internationally wrongful also if committed by the aiding or assisting State. However Special Rapporteur Crawford prompted the ICL to narrow further the scope of applicability of complicity arguing that if art 16 of ARSIWA would apply regardless of reciprocity in terms of international obligations, such provision could have become a vehicle for the universal extension of bilateral obligations. See J Crawford, Second Report on State Responsibility, ILC Yearbook 1999,/II(1)51; J Crawford, State Responsibility (note 8) 410.

[68] Art III reads: "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and Public incitement to commit genocide; (d) Attempt to commit genocide; (e) complicity in genocide", Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

[69] *Genocide* case (note 24) para 432.

[70] This seems to be the position of Crawford, who notes that "Omissions may also be excluded as a form of aid or assistance", see Crawford, State Responsibility (note 8), 403.

[71] *Genocide* case (note 24) para 432.

[72] Unless the conduct itself constitutes a violation of a primary norm. See for example art 3(f) of the Declaration of Aggression of 1974, according to which States shall not allow their territory,

diligence *in lieu* of a conduct of complicity should not pose particular problems – so long as responsibility can in fact be established – some however contend that there may be cases where particular forms of State's participation in the wrongful action of another State will not be cover under the umbrella of due diligence. One author takes for example the case of State A that, with full knowledge of the circumstances, provides a credit guarantee for one of its companies participating in a project carried out by State B within its territory. If the project violates State's B obligations to protect cultural property (and assuming that State A would be bound by the same obligation), it is doubtful that responsibility of State A could be engaged under the due diligence rule.[73]

A second possible reading of the ICJ's narrow interpretation of the meaning of complicity would limit the Court's argument to the case of genocide. Some authors have in fact contended that since there is nothing in the ARSIWA and in the commentary of the ILC to suggest an interpretation of aid and assistance as limited to positive actions, one should conclude that in the *Genocide* case the Court was exclusively focused on the meaning of complicity as provided by art III(e) of the Convention.[74] Lastly, there is also room to argue that the Court did want to make a clear demarcation between the scope of complicity and obligations to prevent genocide, in order to avoid complex discourses on the very thin line that separates complicity through omission and failure to exercise due diligence. However, one may not only conceive aid or assistance as resulting from omission and distinguished from failure to exercise due diligence, but also imagine acts of complicity in genocide that originate from omissive conduct.[75]

Before taking a look at relevant practice, one should strive to build a conceptual distinction between aid or assistance through omission and breaches of due diligence obligations. For the majority of scholars, the most relevant difference lays in the subjective requirement for aid or assistance to accrue. While responsibility for failure to exercise due diligence arises already upon constructive knowledge of the risk that the breach will occur, aid or assistance requires

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which they have placed at the disposal of another State, to be used by that State for the perpetration of an act of aggression against a third State, UNGA, Res 3314 (XXXIX) (14 December 1974) UN Doc. A/RES/3314.

[73] See M Jackson, *Complicity in International Law* (OUP 2015) 132-133.

[74] See V Lavonoy, 'Complicity in an Internationally Wrongful Act', in Nollkaemper, Plakokefalos, Principles of Shared Responsibility (note 8), 146; H P Aust, *Complicity and The Law of State Responsibility* (CUP 2011), 225-230. This interpretation could be also inferred by reasons that led the Court to construct complicity as an act of a positive character. The ICJ contended: "(…) while complicity results from commission, violation of the obligation to prevent results from omission; this is merely *reflection of the notion that the ban on genocide and other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts* (…)", *Genocide* case (note 24) para 432 (emphasis added).

[75] In this sense, P Palchetti, 'State Responsibility for Complicity in Genocide', in P Gaeta (ed) *The UN Genocide Convention: A Commentary* (OUP 2009), 385-386; A Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 Journal of International Criminal Justice 875, 887.

'knowledge of the circumstances' on the part of the aiding or assisting State, which is responsible only if 'intended (…) to facilitate the occurrence of the wrongful conduct'.[76] In the *Genocide* case, the ICJ contended that while complicity requires 'full knowledge of the facts', responsibility for breaches of an obligation to prevent genocide ensues the moment 'the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed'.[77] Hence, for complicity to arise it is not sufficient that the accomplice knew or must have known that assistance might have been used for the commission of genocide. Yet, the separation between awareness of the risk and full knowledge of the facts is not without ambiguities. After all, it has rightly been noted that the ICJ itself fell into some degree of contradiction by firstly affirming that Serbia's authorities could not be held complicit since 'they were not clearly aware that genocide was about to take place or was under way';[78] then noting, with regard to the breach of the obligation to prevent genocide, that 'it was clear that dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide'.[79] Furthermore, from an evidentiary standpoint, it might be already very burdensome for the claimant to provide convincing evidence of (constructive) knowledge on the part of the respondent in order to establish a failure to exercise due diligence.[80] It would require much more speculation to substantiate a claim that needs to be based on 'full awareness' or intent 'to facilitate the occurrence of the international wrongful act'.

Building on a further distinction, Lavonoy contends that the obligation not to be complicit[81] holds a negative character, whereas due diligence obligations are positive obligations, and they require the State to act and adopt all the measures prescribed by the primary norm. Furthermore, while due diligence is an obligation

[76] Commentary to ARSIWA, 66.
[77] *Genocide* case, (note 24), 432.
[78] Ibidem, 422
[79] Ibidem, 428. See in this regard the dissenting opinion of Judge Mahiou, para. 128, and the critique advanced by Cassese (note 75) 887. Palchetti argues that, with regard to the subjective element of aid or assistance, the notion "intended (…) to facilitate the occurrence of the wrongful conduct" should be interpreted in a way that makes the act of aiding or assisting deliberate in character. Essentially, it suffice for the aiding or assisting State to have the general intention to aid or assist, "even if the State knows that with its aid, it will facilitate the commission of the wrongful act", see Palchetti (note 75) 389.
[80] Which is the reason why a Court would often resort to constructive knowledge, so as to infer by factual evidence that the respondent should have at least been aware of the risk that an international wrongful act was about to be committed. See in this regard, Corfu Channel case (note 75), 16-17. On the evidentiary barriers that one would face in establishing aid or assistance see O Corten, P Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case', in K Bannelier, T Christakis, S Heathcote (eds), *The ICJ and the Evolution of International Law: the Enduring Impact of the Corfu Channel Case* (Routledge 2012), 322-324.
[81] It is largely debated whether art. 16 of ARSIWA rapresents a sort of meta-rule that defies the distinction between primary and secondary rules since establishing ancillary responsibility on the basis of a conduct of aid or assistance entails the existence of a primary obligation that prohibits that conduct; See Crawford, State Responsibility (note 8), 399, 400: Aust (note 74), 6.

of conduct, 'prohibition of complicity resembles an obligation of result'.[82] This argument is however not fully convincing. While it is certainly true that due diligence obligations are positive obligations of conduct, the obligation not to be complicit is not necessarily negative in character. If one accepts the proposition that complicity can be attained also through omission – which is what the author suggests – then it is clear that omission cannot accrue unless the aiding or assisting State was originally bound by an international obligation of a positive character.[83] It holds some true instead that fact that obligations to exercise due diligence have somehow a territorial character, or require in order to arise at least some form of control to be exercised by the State over a territory. This can be explained by the fact one of the primary goals of due diligence obligations and obligations of prevention is to ensure a minimum degree of monitoring and control by the State over the conduct of private individuals who may engage in activities contrary to the rights of other States. On the contrary, the obligation not to be complicit is entirely independent of any territorial link, and simply arises the moment a State is fully aware that another State is committing or is about to commit and international wrongful act and that, by not acting upon it, the State will facilitate the commission of such wrongful act. One may query however if it is possible to envisage situations of complicity through omission which would not also qualify as responsibility for failing to exercise due diligence.

More conclusive is arguably to construe the difference between due diligence obligations and aid or assistance by reference to the requirement of 'significant contribution to the act' as addressed by the ILC in the Commentary to art 16. In this regard, the Commentary specifies that for the purpose of attributing responsibility under art 16 of ARSIWA, it is not necessary to prove that the act of aid or assistance was "essential" to the performance of the international wrongful act, but rather that 'it contributed significantly to that act'.[84] Aust suggests that such a requirement entails a relationship of causality between the act of aid or assistance and the international wrongful act, whereby it should be demonstrated that aid or assistance was provided *for the purpose* of the commission of the international wrongful act.[85] Hence, if one adopts this lens and thinks from the perspective of shared responsibility, the difference between complicity through omission and due diligence becomes apparent. In a context of shared

[82] Lavonoy, Complicity and Its Limits (note 60), 214-216.

[83] Arguably, in these cases the primary obligation upon which the obligation not to be complicit rests on the very obligation with a due diligence content. For example, when State A is using the airspace of State B to overfly in order to attack State C, it is conceivable to deem State B's conduct as an act of aggression only should it be established that State B was bound by the obligation not to be complicit in the commission of the wrongful act. And such obligation would be the duty not to allow its territory to be used in a manner that affects the rights of other States, which indeed is a due diligence obligation.

[84] Commentary of ARSIWA, art 16(5), 66.

[85] Aust (note 74), 210-219, 225.

responsibility, failure to exercise due diligence may constitute the premise or even the *condition sine qua non* for the commission of another international wrongful act. However, such conduct will not be carried out for the purpose of the commission of the second act, being linked to the latter by a relationship of *factual* rather than normative causality. On the other hand, complicity through omission cannot accrue unless the act of aid or assistance is really *in connection* – as the title of Chapter IV suggests – with the principal international wrongful act and is associated with the latter by a relationship of normative causality.[86]

Once a tentative conceptual reconstruction of the difference between due diligence and aid or assistance through omission has been endeavoured, one should take a look at some of the practice to discover that not only is the red line of demarcation blurred, but that the notions of due diligence and complicity through omission often merged. Relevant for the present purpose is the jurisprudence of the European Court of Human Rights (ECtHR) on the extraordinary rendition programme. Some of the decisions of the ECtHR over the extraordinary rendition programme refer to the notion of complicity, though the exact meaning and scope of the term is not entirely clear. In *El-Masri* case, concerning the alleged secret rendition operation of El-Masri by the former Yugoslav Republic of Macedonia and his subsequent transfer by Macedonian authorities to the CIA agents, the Court noted that

'The Macedonian authorities not only failed to comply with their positive obligations to protect the applicant from being detained in violation of Article 5 of the ECHR, but they also *actively facilitated his subsequent detention* in Afghanistan by handing him over to the CIA, despite the fact that *they were aware or ought to be aware of the risk of that transfer'*.[87]

The Court cited art 16 of ARSIWA[88] which, along with the finding that Macedonia *actively facilitated* the subsequent detention, appears to suggest that the conduct of Macedonian authorities could be regarded as an act of aid or assistance. Yet, the subjective element of the conduct of aid or assistance fits squarely into the paradigm of responsibility for failure to exercise due diligence. For the Court seems to contend that even constructive knowledge can form the basis of complicity. Similarly, the *Al-Nashiri v Poland* and *Husan v Poland* cases make several references to the notion of complicity as for the conduct carried out

[86] For example, if State A renders an individual to State B where he/she will face the risk of being torture of mistreated, one may argue that the conduct of State A was the *conditio sine qua non* for the subsequent act of torture by State B. In this case however, complicity may be arguably ruled out as the individual is not rendered for the purpose of mistreatment, but it is merely exposed to it, see Aust (note 74), 225.

[87] *El-Masri v The Former Yugoslav Republic of Macedonia* (Judgement) (GC) [2012] ECtHR App No 39630/09 (2013) 57 EHRR 25 (emphasis added).

[88] Ibidem, para 239.

by Poland in enabling the CIA to hold Mr Al-Nashiri and Mr Husan in secret detention within its territory. The ECtHR in these cases found that

'Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and that, by *enabling* the CIA to use its airspace and the airport, *by its complicity* in disguising the movements of the rendition aircraft and by its provision of logistics and services (…) Poland cooperated in the preparation and execution of the CIA rendition'.[89]

Yet, when ruling on Poland's responsibility for violation of art 3 of the Convention, the Court framed it as a direct violation of primary rules and failure to prevent the occurring of torture on the part of Poland.[90] The same can be arguably sustained with regard to the Abu Omar case, where the ECtHR made reference to the possibility that Italian authorities were complicit in the rendition programme of the CIA,[91] but then found Italy directly responsible for the violation of art 3 of the Convention since 'ses agents s'étant abstenus de prendre les mesures qui auraient été nécessaires dans les circonstances de la cause pour empêcher le traitement litigieux'.[92]

What can be deduced from the ECtHR cases on extraordinary rendition is that the notion of complicity and responsibility for failure to exercise diligence often end up merging. This is possibly so because of the difficulties of proving 'full knowledge of the facts' and the causal link between the omission of the aiding or assisting State and the commission of the principal international wrongful act. In this regard, one cannot but give credit to the doubts raised by Corten and Klein over the usefulness of the concept of aiding or assisting in current international law.[93] If the substantial distinction between aid or assistance and due diligence rests on the specific intention of the aiding or assisting State and the causally significant contribution to commission of the international wrongful act, then the heavy burden of proof set for both requirements will make far more logic to resort

[89] *Al Nashiri v Poland* and *Husayn (Abu Zubaydad) v Poland* (Judgement) [2014] ECtHR App No 28761/11, para 442 (emphasis added)

[90] Ibidem, para 517-519. Poland "ought to have known that , by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention. (…) the possibility of a breach of Article 3 was particularly strong and should have been considered intrinsic in the transfer (…). Consequently (…) the Polish authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention".

[91] *Nasr et Ghali v Italy* (Judgement) [2016] ECtHR App No 44883/09, para 288.

[92] Ibidem, 289.

[93] "Either the notion of complicity is interpreted as requiring the establishment of a specific intention on the part of the accomplice, and it will therefore be far more convenient to turn to the concept of due diligence, which does not require such an element of intention. Or the notion of complicity is interpreted as not requiring the establishment of such a specific intention, but this notion then appears equivalent to- or could even merge with – the concept of due diligence." Corten and Klein (note 80) 331.

to the concept of due diligence. After all, due diligence would arguably already include all the cases with potential relevance for complicity.

3.2.2 Circumvention

The ARIO address two types of circumvention. Art 17 is concerned with the responsibility of an international organisation, and envisages two circumstances where the organisation can incur into responsibility in relation to the conduct of one of its member States or another international organisation. In this sense, art 17(1) sanctions the conduct of an international organisation that circumvents its obligations by adopting a decision binding a member State or an organisation to commit an act that would be wrongful if committed by the former organisation; art 17(2) deals instead with circumvention in the case where the organisation authorises a member State or another international organisation to commit an act internationally wrongful for the first organisation. The ARIO however cover also the international responsibility of a State that, as a member of an international organisation, takes advantage of the fact that the organisation has competence in relation to a given subject and circumvents one of its obligations by causing the organisation to commit an act that would be wrongful if committed by that State.[94] It is very much in regard to art 61 of ARIO that it is worth querying whether the act of circumvention of a State can consist in negligent conduct or whether circumvention always requires the intention to avoid compliance on the part of the State.[95] Hence, the focus is placed not on the content of the international obligation that the State aims at circumventing – which is absolutely irrelevant as for the scope and meaning of art 61 – but rather on the conduct of the State that qualifies as an act of circumvention.

Despite addressing the international responsibility of a State, art 61 was included into the ARIO in order 'to fill the gap that was deliberately left in the articles on responsibility of States for international wrongful acts'.[96] During the ILC work on responsibility of international organisation, Special Rapporteur Giorgio Gaja framed international responsibility of a State for circumvention as a form of objective responsibility. Gaja even suggested departing from the use of the term circumvention, as to avoid confusion over the need of envisaging specific intention on the part of the State of circumventing its international obligations. Yet, the final version of art 61 not only employs the notion of circumvention, but

[94] ARIO art 61.

[95] The relationship between negligence and circumvention pursuant art 17 of ARIO is left aside both because of lack of relevant judicial practice in this context and because the adoption of a binding decision or the authorisation on the part of the international organisation necessarily entails intention to circumvent an international obligation.

[96] G Gaja,'Fourth Report on Responsibility of International Organization', (2006) UN Doc. A/CN.4/564, 114.

it also specifies in the Commentary that 'the existence of an intention to avoid compliance is implied in the use of the term "circumvention"'.[97] This would automatically rule out any possibility to engage with State responsibility when the breach of the State's international obligation resulting from the transfer of power to the organisation originates from a conduct of negligence on the part of that State.

However, if one looks at the relevant practice, a State can incur in responsibility for circumvention regardless of the intention to elude its international obligations. This is especially true with reference to the international responsibility of a State that fails to ensure compliance with its obligations under the ECHR in an area where that State has attributed competence to an international organisation, in particular to the European Union. In this context, due diligence can play a role in the form of the judicial review that national Courts need undertaking in order to verify that a member State of the ECHR is not breaching its obligations under the Convention to give application to a EU Directive or a Regulation. If such judicial review is lacking – i.e. if the State fails to exercise a "diligent conduct" over the implementation of human rights obligations through its judicial organs – the State can incur in responsibility for circumventing its obligations under the European Convention.

The duty to undertake a judicial review in order to avoid responsibility for circumvention emerged clearly in *Michaud v France*. This case represents an evolution in the doctrine of the equivalent protection originally developed by the ECtHR to avoid a deadlock of normative conflict in cases involving rights under the Convention and the EU treaty regime. In *Bosphorus*, the ECtHR noted that States remain responsible under the ECHR for the measures they take to comply with their international obligations, even when such obligations stem from their membership of an organisation to which they have transferred part of their sovereignty.[98] Yet the Court clarified that 'State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights (…) in a manner which can be considered at least *equivalent* to that for which the Convention provides'.[99] Accordingly, the ECHtR acknowledged the existence of a rebuttable presumption whereby human rights protection by EU law is in principle equivalent to the system of the ECHR and found such presumption applicable to the circumstances of the case.

In *Michaud*, the Court took a step further and came to delineate the limits of the presumption of equivalent protection. The case concerned France's alleged violation of art 7 and 8 of the ECHR through the implementation of a EU Directive requiring legal professionals to report to the Financial Intelligence Unit

[97] Commentary to art 61 of ARIO, 93.
[98] *Michaud v France*, (Judgement) [2012] ECtHR App No 12323/11, 154.
[99] Ibidem 155.

any suspicion over their client of money laundering or terrorist financing. France constructed its defence claiming that the Government simply complied with its obligations under EU law and that in any case the equivalent protection clause should have applied. The Court however refuted these arguments pointing out to two fundamental differences with *Bosphorus*. First of all, the ECtHR noted that while in *Bosphorus* the State was asked to give implementation to a EU Regulation, hence with no margin of manoeuvre in the execution of its obligations, the fact that in *Michaud* France's international obligations took the form of a Directive, gave the State 'a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection'.[100] Furthermore, in *Bosphorus* the European Court of Justice had already checked the respect of fundamental rights by the EU Regulation. In *Michaud* instead, the French Conseil d'Etat prevented such control over the Directive by refusing to defer the question to the ECJ.[101] According to the Court, these two grounds sufficed for the purpose of waiving the presumption of equivalent protection. Eventually, no substantive violation of any article of the Convention was found. However, the case is telling of the review process that States – through their domestic system of judicial review – have to undertake in order to prevent any possible circumvention of the Convention obligations. The Conseil d'Etat's refusal to submit the question of legitimacy to ECJ can be interpreted as a lack of "diligence" of a national judge in ensuring that the State's implementation of obligations arising out of its membership of an international organisation do not cause the breach of other obligations falling upon that State. In this sense, had a substantive violation of art 8 been found in *Michaud*, France would have circumvented the respect of that obligation through a conduct of negligence.

The prescription on the presumption of equivalent protection being submitted to a judicial review that ascertains the conditions for its existence has been restated in *Avotins v. Latvia*. Here the Court reminded of the need of a control of foreign judgements by courts of the State required to recognise and enforce them within its territory, in order to prevent violation of rights protected by the Convention. In particular, it was submitted that for the presumption of equivalent protection to apply, the ECtHR needs to evaluate the conduct of national courts in assessing the nature of the EU obligation binding the member State, and in granting or refusing to defer the question to the ECJ.[102] Once again, had the judicial review been conducted and thus the State "exercised diligence", the presumption of equivalent protection would apply, with the possibility of being rebutted only if the protection of rights guaranteed by the Convention was manifestly deficient in the specific circumstances of the case. On the other hand, had the judicial review been

[100] Ibidem, 113.
[101] Ibidem, 114.
[102] *Avotins v Latvia* (Judgement) [2012] ECtHR App No 17502/07, 101-113.

lacking, the presumption would not apply and the State will be open to the possibility of breaching its obligation under the Convention through circumvention.

4. Concluding remarks

This chapter has strived to shed some lights on the role of due diligence in shared responsibility settings. The analysis has been carried out to assess the scope of application of due diligence obligations in situations of shared responsibility, and to deepen the study of due diligence from a different perspective. In this regard, tackling due diligence from the standpoint of shared responsibility has helped illustrate the nature of due diligence obligations, and the space that due diligence occupies in the law of state responsibility. Due diligence can constitute the primary form of shared responsibility, such in the cases of cooperative negligence or cumulative negligence, where either the wrongful conduct of failing to exercise diligence is attributed contemporary to more than one State, or multiple conducts of breaches of due diligence obligations are attributed to different entities. Once the interpreter has ascertained if the harmful outcome is the result of one negligent conduct of several breaches of due diligence obligations, different issues will arise. In the context of cooperative negligence, the main problem consists in determining whether the absence of a specific instruction or order can nevertheless count for the purpose of attributing conduct to the relevant entities. In the case of cooperative negligence instead, shared responsibility is premised on evaluations of causality that are crucial to establish the breach of the primary norm.

Finally, negligence can also play a role in the context of attribution of responsibility for acts in connection with the international wrongful conduct of a State or an international organisation. Structural limitations as to the requirements of some forms of attribution of responsibility prevent negligence from operating in all circumstances. However, negligence may be relevant in all those cases involving acts of aid or assistance carried through omission, and as a form of circumvention by a State of international obligations arising out of its memberships to an international organisation.

CONCLUSION

I. The present analysis has proved that due diligence is an ambiguous term in international law. Many scholars refer to due diligence as a principle of the international legal system inherent to State responsibility and substantiate their arguments mainly by drawing on the customary obligation not to knowingly allow the territory of a State to be used for acts contrary to the rights of another State. Yet, due diligence is not a *general principle* of international law, at least not in the sense conceived by art 38 of the ICJ Statute (i.e., a principle common to and drawn from the domestic legal systems of nations). As a matter of fact, due diligence does not apply indiscriminately to all obligations of the international legal system and it is not a concept to which interpreters resort to fill the gap in absence of an international treaty or customary international law available for application in a dispute. Due diligence is a *general concept* that refers specifically to certain primary obligations of States requiring the exercise of best efforts and finding their sources either in customary law or in treaty law. The tendency to label due diligence as a principle of international law most likely derives from the wording of the ICJ in the *Corfu Channel* case when, in spelling out the content of Albania's obligation to notify the UK of the minelaying, the Court referred to the 'well recognized principle' that requires the State not to allow its territory to be used to acts contrary to other States. But even in that case, the ICJ spoke of the '*obligation* not to allow', which leads to conclude that the principle in question is very much a customary obligation of States.[1]

However, it certainly exists a commonality of understanding of the concept of due diligence in international law, since the standard of efforts required by due diligence obligations is often evaluated according to parameters that apply across different areas. The standard of good government, the level of risk embedded in the activity, the level of control exercised by the State, the capacity of the State apparatus, are all common features that play a relevant role when verifying if a State has discharged its due diligence duties. In this sense the term due diligence is a general indication of the "presumed" standard of conduct that a State will have to exercise in the circumstances of the case; but what the expression really designates is a particular kind of international obligations characterised by a

[1] *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep, 21.

degree of risk that may prevent a State from guaranteeing the attainment of the objective provided by the norm.

II. Treating due diligence as the constituent feature of particular international obligations does not set aside the ambiguities surrounding this notion. What emerged in the analysis of Chapter II is that the distinction proposed by Ago on the classification of international obligations, despite been criticised by subsequent legal scholars and then disregarded by the ILC, did leave its trace in the final version of the ARSIWA and in particular in art 14(3). This provision inevitably affects the understanding of due diligence as it creates the illusion that obligations of prevention share to some extent common elements with the obligations of result (they are in fact depicted by art 14(3) as *negative* obligation of result) and thus they must be kept distinguished from due diligence obligations, which are by nature obligations to endeavour. However, this distinction is really an "illusion" since obligations to prevent are *par excellence* obligations of due diligence for they only require the State to strive toward the achievement of the result envisaged by the norm (the non-occurrence of the event to be prevented).
The internal coherence in Ago's classification of obligations of prevention as negative obligations of result lays in the circumstance that, for Ago, obligations of conduct only call for the adoption of a specific and particular course of conduct. All the other obligations that leave room to the State to decide how to implement the objective set forth by the norm are obligations of result. In this sense, Ago is right in qualifying obligations of prevention as negative obligations of result, since the latter do leave the State ample margin of appreciation as to the measures to be adopted to prevent the occurrence of the event. Yet, provision of art 14(3) – which certainly finds its genealogy in Ago's distinction – creates the misconception that due diligence obligations are watered down primary norms, for they only require the exercise of best efforts but cannot be breached unless the event has occurred.

III. The binding force of due diligence obligations emerged clearly in the 2011 and 2014 ITLOS advisory opinions on obligations of sponsoring State for activities in the Seabed Area and on obligations of flag States in cases of IUU fishing conducted in the exclusive economic zone of third party States. Probably facilitated by the fact that the issues in question required the Tribunal to clarify the meaning of 'obligations *to ensure'* (not obligations framed as obligations to prevent), the ITLOS stated that obligations to ensure are plain obligations of due diligence that requires the adoption of all necessary measures to ensure compliance with the object set forth by the obligation under exam. The Tribunal acknowledged the difficulties of describing obligations of due diligence; yet such difficulties were found mainly in the variable meaning that due diligence may

assume over time in light of the scientific and technological developments that may increase the level of efforts required of a State. But in the advisory opinion on IUU fishing, nowhere the ITLOS described due diligence obligations as diluted forms of duties whose breach does not ensue unless IUU fishing occurs. [2]

IV. The "illusion" generated by art 14(3) and the paradox of having to reconcile obligations of prevention as framed by the ILC with obligations of due diligence tone down the moment one adopts a more holistic approach that looks at the content of due diligence, the function that due diligence serves in the context of responsibility and the mechanisms that underpin the attribution of responsibility to a State. First, as the ICJ noted in *Pulp Mills*, due diligence obligations may include the adoption by the State of legislative, administrative and executive measures that evidence the exercise of efforts on the part of the government apparatus. But *Pulp Mills* stressed also that due diligence obligations require, in addition to these measures, the exercise of a certain degree of *vigilance* over the activities undertaken in the territory or under the jurisdiction of the State.[3] While it is relatively easy for a State to claim the breach of a due diligence norm that has been spelt out into a more detailed requirement (e.g. the adoption of certain executive measures), lack of vigilance will most of the time be substantiated by the occurrence of the wrongful event. It is the wrongful event that gives proof to the claimant that the State might have breached its due diligence obligations.

Furthermore, the occurrence of the wrongful event will often coincide with the damage suffered by the injured State. It is once the materialisation of the injury has affected the State that the latter will arguably initiate a proceeding before an adjudicative body. Before that, it is difficult to imagine that a State will initiate a proceeding against another that is failing its exercise of due diligence but whose actions have not (yet) had a concrete effect on other States. This is why, eventually, the event will often be the "necessary" element for a breach of an obligation of due diligence to arise.

An exception to this discourse may be represented by international environmental law, where the "spelling out" of the obligation to prevent transboundary harm has resulted in the identification of several obligations, each one requiring particular measures to be adopted in order to fulfil the due diligence rule. And it is in fact in this context that the greatest degree of confusion arises when one attempts to grasp the relationship between due diligence, procedural obligations and the

[2] In the *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area*, the Tribunal did argue that liability of a sponsoring State for activities in the Area does not arise unless damage occurs. However, the ITLOS defined art 139(2) as an exception to customary international law that does not require damage in order to establish a breach of an international obligation, see *Responsibility and obligations of States sponsoring persons and entities with respect to activities in the Area (*Request for an Advisory Opinion submitted to the Seabed Dispute Chamber) ITLOS Reports 2011, at para 178.

[3] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Merits) [2010], ICJ Rep, 197.

obligation to prevent transboundary harm. Arguably, the ICJ's decision in *Pulp Mills* to differentiate between procedural obligations and obligation to prevent transboundary harm allowed the Court to come out of the *impasse* created by art 14(3): either recognise that the obligation to prevent transboundary harm is a plain due diligence obligation that therefore can be breached the moment the State fails to conduct an EIA; or accept that the obligation to prevent transboundary harm is a negative obligation of result and therefore that the duties to provide an EIA, to consult and to notify need to be treated separately in the realm of "procedure".

V. The "event" treated as the substantiation of a State's failure to exercise due diligence leads us to the final remark that touches upon the very core of this research, that is the function that due diligence obligations serve in the law of State responsibility. In most cases, the risk embedded in a due diligence duty will often be represented by the activities that NSA and private individuals who are not under the strict control of the State may carry out causing internationally harmful acts. This is very much the risk that underpins the customary State's obligation not to knowingly allow its territory to be used for acts contrary to other States, as well as several obligations of prevention in the context of human rights, diplomatic protection and so on. The State is only asked to exercise its best efforts since it cannot guarantee that despite such efforts, NSA will not carry out international harmful acts.

Yet, the fact that States are required to adopt the necessary measures vis-à-vis the risk in question creates the expectation that whenever a wrongful act which results from the conduct of NSA takes place and is not attributable to the State, responsibility may still be engaged by looking at the primary obligations of that State calling for the prevention or protection from the occurrence of event. Clearly, in these cases the condition for responsibility based on due diligence is twofold: a binding customary or treaty obligation requiring prevention or protection; and a certain degree of connection between the State and the NSA. It is very much with reference to this connection that the operationalisation of the nexus between the State and the risk to be prevented becomes fundamental. The duty to 'activate vigilance' and react promptly to the risk of international harmful acts of NSA will in fact be contingent upon the existence of certain links between the State and the actions of private entities: (constructive) knowledge of the risk, a certain degree of control exercised over the territory or the activity in question, and the significant or serious possibility that this risk will materialise.

If one reads these conditions as the catalysts that link the State apparatus with the action of the NSA, it becomes apparent how the recourse to the due diligence rule allows us to conceive an "integrated" framework of international responsibility where conducts of NSA vis-à-vis the State are appreciated on a continuous scale. When the *rattachement* between the State and the conduct of NSA will reach the

threshold of effective control, the conduct (of NSA) will be "assumed" by the State as its own; when instead the link falls under this threshold yet it is still substantiated by the State's knowledge of the risk, its significance and the influence that the State could have exercised over the conduct, responsibility will flow albeit from different conceptual grounds. In this sense, (constructive) knowledge of the risk, its seriousness or significance and the control or influence that the State exercises over the action of NSA will very much be "the sources" of a State's responsibility.

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