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DUALITY OF RESPONSIBILITY IN INTERNATIONAL LAW

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DUALITY OF RESPONSIBILITY IN INTERNATIONAL LAW

ABSTRACT

Duality of responsibility in international law arises when the same conduct entails the international responsibility both of the state and of the individual through which the state acts. The thesis examines the origins of duality of responsibility and what this duality entails for the interpretation and application of the rules governing the international responsibility of states and individuals. In principle, state and individual responsibility exist in parallel and are independent from each other. This, however, does not mean that they do not overlap. First, duality of responsibility is the corollary of the duality of obligations. This means that the content of certain international obligations of the individual is materially identical to, or necessarily co-determined by, the international obligation of the state. Second, the state can only act through individuals (natural persons). When the same obligation is incumbent on both the state and the individual, both state and individual responsibility may be engaged when the individual's conduct is attributable to the state. In parallel, the law of individual responsibility has developed its own rules of attribution of conduct. The unprincipled dissociation between the state and the individual acting as its organ or agent for the purposes of engagement of their respective responsibility would amount to a legal, if not logical, contradiction. Third, individual responsibility under international law is predominantly criminal, but not exclusively so. As both states and individuals can be responsible under international law for the same conduct, they must both incur secondary obligations to make reparation for the same injury in whole or in part. In this sense, duality of responsibility also leads to duality of consequences. The thesis argues that duality of responsibility reflects not only a feature, but also the general principle governing the international responsibility of multiple internationally responsible actors: the principle of independent responsibility. More importantly, duality of responsibility occasions, at a substantive level, the gradual merging of the rules and principles of state and individual responsibility into a common law of international responsibility.

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Στους γονείς μου και

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Table of Contents

TABLE OF ABBREVIATIONS

AC(J)(-R)	Appeal Chamber (Judgment)(-on Reparations)
ACJHPR	African Court of Justice and Human and Peoples' Rights
AdV	Archiv des Völkerrechts
AFDI	Annuaire Français de Droit International
AJIL	American Journal of International Law
AP-I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
AP-II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
ARIO	Articles on the Responsibility of International Organisations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL	American Society of International Law
AW	Arrest Warrant
AYBIL	Australian Yearbook of International Law
BPRV	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
BYBIL	British Year Book of International Law
CaLR	California Law Review
CAT	Convention against Torture
CED	International Convention for the Protection of All Persons from Enforced Disappearance
Chinese JIL	Chinese Journal of International Law
CLF	Criminal Law Forum
CLP	Current Legal Problems
CPPCG	Convention on the Prevention and Punishment of Genocide
CR	Compte-rendu
DACAH	Draft Articles on Crimes against Humanity
DADP	Draft Articles on Diplomatic Protection
DCC	Decision on Confirmation of Charges
DCCAPSM	Draft Code of Crimes Against the Peace and Security of Mankind
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EECC	Eritrea-Ethiopia Claims Commission
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ELD	Electronic Legal Depository
FYIL	Finnish Yearbook of International Law

GC-I	(Geneva) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC-II	(Geneva) Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
GC-III	(Geneva) Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949
GC-IV	(Geneva) Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949
GYIL	German Yearbook of International Law
HJIL	Harvard Journal of International Law
HRC	Human Rights Council
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC-ASP	Assembly of the States Parties to the Rome Statute for the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ (Rep)	International Court of Justice (Reports of Judgments, Advisory Opinions and Orders)
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTR (Statute)	(Statute of the) International Criminal Tribunal for Rwanda
ICTY (Statute)	(Statute of the) International Tribunal for the Former Yugoslavia
IJHR	International Journal of Human Rights
ILA(RC)	International Law Association (Reports of Conferences)
ILC	International Law Commission
ILDC	Oxford Reports on International Law in Domestic Courts
ILR	International Law Reports
ILSAJICL	International Law Students Association Journal of International and Comparative Law
IMT	International Military Tribunal
IRRC	International Review of the Red Cross
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-US Claims Tribunal
IYHR	Israel Yearbook of Human Rights
IYIL	Italian Yearbook of International Law
JCE	Joint Criminal Enterprise
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
LPICT	Law and Practice of International Courts and Tribunals
LRTWC	Law Reports of Trials of War Criminals
MelJIL	Melbourne Journal of International Law
MJIL	Michigan Journal of International Law
MPEPIL	Max Planck Encyclopedia of Public International Law
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law

Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and its Judgment
NYIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law and Politics
OP	Operative Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PCNICC	Preparatory Commission for the International Criminal Court
PP	Preambular Paragraph
PTC	Pre-Trial Chamber
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours de l'Académie de Droit International de La Haye
RDI	Rivista di diritto internazionale
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
RPE	Rules of Procedure and Evidence
RSICC	Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra Leone
Stanford JIL	Stanford Journal of International Law
SZIER/RSDIE	Schweizerische Zeitschrift für internationales und europäisches Recht / Revue suisse de droit international et de droit européen
TC(J)(-R)	Trial Chamber (Judgment)(-on Reparations)
TFV	Trust Fund for Victims (under Article 79 RSICC)
TWC	Trials of War Criminals before the Nuernberg Military Tribunals
UCLR	University of Chicago Law Review
UN	United Nations
UNCC	United Nations Compensation Commission
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
VCLT	1969 Vienna Convention on the Law of Treaties
VCLT 1986	1986 Vienna Convention on the Law of Treaties
VJ	Army of Yugoslavia
VJIL	Virginia Journal of International Law
VRS	Army of Republika Srpska
YbILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

International Court of Justice ('ICJ')

Permanent Court of International Justice ('PCIJ')

International Criminal Court ('ICC')

International Criminal Tribunal for the former Yugoslavia ('ICTY')

International Criminal Tribunal for Rwanda ('ICTR')

Post- Second World War World Trials

Special Court for Sierra Leone ('SCSL')

Extraordinary Chambers in the Courts of Cambodia ('ECCC')

Special Tribunal for Lebanon ('STL')

European Court of Human Rights ('ECtHR')

Inter-American Court/Commission of Human Rights ('IACtHR'/'IACmHR')

International Tribunal for the Law of the Sea ('ITLOS')

Inter-state Arbitration Awards

Other International Courts and Arbitral Tribunals

Domestic Decisions and Legislation

TABLE OF INSTRUMENTS

Treaties

United Nations Security Council Resolutions

United Nations General Assembly Resolutions

ICC-ASP Resolutions

ILC Outcome Documents

ILC Reports

UN Reports

Other Primary Sources

Chapter 1. Introduction

Responsibility in international law is the 'necessary corollary of obligation'.[1] Any conduct of an actor which international law classifies as legally wrongful entails the international responsibility of that actor.[2] In principle, international law provides for state obligations and the conduct of individuals is addressed in domestic laws. Although it is not uncommon for the same conduct to entail the responsibility of the state and of the individual through which the state is acting, such responsibility will arise under international law for the state and under domestic law for the individual.[3] For example, a killing by the police or in police custody will qualify as an internationally wrongful act of the state.[4] The responsibility of the individual police officer that was involved in such act remains an issue of domestic law.[5] Nevertheless, certain types of conduct can lead to the international responsibility both of the state and of the individual–ie the natural person–whose conduct is attributable to the state.[6] For example, genocide constitutes a crime under international law entailing the international responsibility of the

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1 J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in M Evans (ed.), *International Law* (5th edn, OUP 2018) 415, 415; see in relation to individuals: A Pellet, 'The Definition of International Responsibility' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1, 8.

2 cf Art 1 ARSIWA; R Ago, 'Second Report on State Responsibility' (1970) II YbILC 177,179 [12]; Art 2 DARIO; Art I Nuremberg Principles; Art 1(2) DCCAPSM and Commentary [9-10]; eg C Eagleton, 'International Organization and the Law of Responsibility' (1950) 76 RdC 319, 324-325.

3 See for more detail Chapter 2.II.

4 eg *Salman v Turkey* [GC] 2000 ECHR-VII 365, 397[99].

5 eg *Selmouni v France* [GC] 1999 ECHR-V 149, 179[87].

6 eg P Guggenheim, *Lehrbuch des Völkerrechts* Bd. II (Verlag für Recht und Gesellschaft 1951) 549; similarly: C Eustathiades, 'Les sujets du droit international et la responsabilité internationale: nouvelles tendances' (1953) 84 RdC 397, 487-8; G Sperduti, 'L'individu et le droit international' (1956) 90 RdC 728, 774-775; A Nollkaemper, 'Concurrence between Individual Res-

individual perpetrator.[7] At the same time, states 'are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them.'[8]

Duality of responsibility arises because the same conduct constitutes the basis of the international responsibility of both the state and the individual. Thus, for instance, the ICTY indicted President Milošević of Serbia on charges of genocide occurring in Bosnia-Herzegovina during the Yugoslav War.[9] At the same time, Bosnia-Herzegovina brought claims before the ICJ alleging Serbia's state responsibility for the same acts of genocide.[10] More recently, a UN-mandated Independent Fact-Finding Mission concluded that 'Myanmar continues to commit crimes against humanity of inhumane acts…and of persecution'.[11] In parallel, the ICC concluded that it has jurisdiction to initiate investigations against individuals with respect to the same crimes against humanity of persecution and inhumane acts in Myanmar.[12] Furthermore, the UN Mission recommended that the UNSC authorise the ICC to exercise jurisdiction with respect to

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ponsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 618; C Dominicé, 'La question de la double responsabilité de l' Etat et de son agent' in E Yakpo and T Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (Kluwer 1999) 143, 144; Commentary on Art 58 ARSIWA [3].

7 Art I CPPCG; Art 6 RSICC.

8 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 114 [167]; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, 61[128].

9 *Milošević (Slobodan)* (Amended Indictment) IT-02-54-T (22 November 2002) [32].

10 ibid.

11 HRC, 'Detailed findings of the Independent Fact-Finding Mission on Myanmar' (16 September 2019) A/HRC/42/CRP.5 [213].

12 *Request under Regulation 46(3) of the Regulations of the Court* (Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute) ICC-RoC46(3)-01/18-37, PTC-I (6 September 2018) [77]-[78].

acts of genocide committed by individuals.[13] At the same time, several states have expressed an intention to initiate proceedings before the ICJ with respect to Myanmar's state responsibility for the same acts constituting violations of the Genocide Convention.[14] In this context, two fundamental questions arise from the perspective of responsibility. First, do the international obligations and the rules governing the international responsibility of the state and the individual differ, and if so, how? Second, does the international responsibility of the individual have any effect on the responsibility of the state and *vice versa*?

This thesis examines how duality of state and individual responsibility arises from the violation of specific international obligations and what this duality entails for the interpretation and application of the general rules governing the international responsibility of the state and of the individual, respectively. These latter rules establish the general conditions for the state or for the individual to be considered responsible under international law and the legal consequences arising therefrom.[15] According to the ICJ, state and individual responsibility 'are governed by different regimes and pursue different aims'.[16] However, this thesis shows that this disparity is only partial. In fact, state and individual responsibility share certain aims and, to this extent, those different regimes materially overlap. At the same time, this overlap does not affect the

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13 HRC, 'Report of the independent fact-finding mission on Myanmar' (8 August 2019) A/HRC/42/50 [105]

14 ibid [107]-[108].

15 cf General Commentary to ARSIWA [1]; cf, eg, G Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 236, 247-248.

16 *Croatia Genocide* (n8) 61[129].

extent of the international responsibility of the state and of the individual. So, the international responsibility of the individual does not affect the responsibility of states under international law for the same conduct.[17] At the same time, individuals cannot 'hide behind the State in respect of their own responsibility for conduct of theirs that is contrary to rules of international law which are applicable to them'.[18] Pursuant to the ICJ, this 'duality of responsibility continues to be a constant feature of international law.'[19] In this light, the duality of responsibility reflects a principle of international responsibility: the principle of independent responsibility.[20]

If international responsibility is the corollary of international obligations, then duality of responsibility is the corollary of the duality of international obligations. Chapter 2 discusses two foundational notions for the purposes of this thesis, namely, the notions of international obligations of individuals and of dual obligations. The essence of dual obligations is that they render certain conduct unlawful under international law whether committed by states or individuals. The analysis cannot be exhaustive; it focuses on four such obligations: the prohibitions of genocide, grave breaches of international humanitarian law, aggression, and crimes against humanity. The chapter shows that these obligations are dual in the sense that they are materially identical for states and individuals. It further demonstrates the mechanisms through which this

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17 Art 25(4) RSICC cited with approval by *Bosnia Genocide* (n8) 116[173] and Commentary to Art 58 ARSIWA [3].

18 Commentary to Art 58 ARSIWA [3].

19 *Bosnia Genocide* (n8) 116 [173].

20 cf, *mutatis mutandis*, R Ago, 'Eighth Report on State Responsibility' (1979) II(1) YbILC 4, 26 at fn108.

duality is maintained, notwithstanding the fact that these obligations may arise from formally different rules.

The determination of the conduct that forms the basis of international responsibility is also dependent on the general rules of state and individual responsibility. Chapter 3 analyses the processes which determine the subject of responsibility in the law of state and individual responsibility. The law of state responsibility and the law of individual responsibility are based partly on functionally equivalent considerations. First, the determination of the author of allegedly wrongful conduct takes place on the basis of rules of law which describe in the final analysis a relationship between individuals. Second, both state and individual responsibility are premised on the principle of independent responsibility. This means that the state or the individual are only responsible for conduct attributable to them and in breach of an international obligation incumbent upon them, that is, for their internationally wrongful act.

Against this background, the following two chapters assess the operation of dual obligations within the framework of the internationally wrongful act: breach of an international obligation and attribution of conduct. Since every internationally wrongful act of an actor entails the responsibility of that actor, it is the duality of the internationally wrongful act that entails the duality of responsibility. Chapter 4 addresses the duality of the breach by examining three specific structural features of the breach of dual obligations. First, dual obligations often comprise mental elements. Second, another frequent structural feature of dual obligations is their composite or complex character; they consist of a series of interrelated actions or omissions which are defined in aggregate as wrongful. Third, the duality of obligations makes possible the emergence of derivative wrongs consisting of state participation in the wrongful acts of individuals. These obligations operate in parallel with international rules prohibiting participation

of individuals in the wrongful acts of other individuals. Chapter 5 provides an analytical account of the rules of attribution of conduct in the law of state and individual responsibility. It shows how, in both cases, attribution of conduct is based in part on equivalent principles that can be characterised as dual principles of attribution of conduct.

Chapter 6 addresses the implications of the duality of responsibility for the content of state and individual responsibility, respectively. First, it evaluates the legal implications of the concurrency of state responsibility and of the criminal responsibility of the individual for the same conduct. Second, the chapter assesses whether and to what extent dual internationally wrongful acts can also entail dual consequences. Specifically, it examines whether a secondary obligation of individuals to make reparation for injury caused by their internationally wrongful act has emerged in international law. It then investigates whether this obligation of individuals can overlap with the respective obligation of states under the law of state responsibility in cases of dual internationally wrongful acts and proposes ways to deal with such overlap. Chapter 7 provides a general conclusion.

Chapter 2. Duality of Obligations in International Law

I. Introduction

International law is premised in many respects on the absence of the individual from its remit.[1] The state is a legal entity distinct from the individuals which comprise its organisation. The conduct of individuals is only relevant to international law as acts of states or as events whose injurious consequences the state might have the obligation to prevent or to address through the imposition of responsibility under domestic law on those involved.[2] The traditional view holds that international law is applicable only in interstate relations, whereas the conduct of individuals *inter se* and in their relationship with the state remains an issue of domestic law.[3] Conflicts between obligations arising for states under international law and for individuals under domestic law were traditionally considered conceptually impossible because these bodies of law have different fields of application.[4]

The emergence of rules of international law imposing obligations directly on individuals upsets this configuration. It makes conflicts between rules addressed to states and individuals a possibility. However, in principle, the international obligations of individuals can be conceptually distinguished from the international obligations of

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1 A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 616.

2 eg D Anzilotti, *Teoria Generale della Responsabilità dello Stato nel diritto internazionale—parte prima* (Lumachi 1902) 120.

3 eg H Triepel, *Völkerrecht und Landesrecht* (Hirschfeld 1899) 254.

4 GG Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 RdC 1, 70; on the notion of conflict see ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission – Finalised by Martti Koskenniemi' A/CN.4/682 (13 April 2006) [24].

states on account of their different personal scope of application, that is, on account of the actors that they address.[5] States are in principle only subject to the legal obligations to which they have consented. By contrast, individuals are subject to the prescriptive jurisdiction of states, the joint exercise of which can entail international obligations for individuals. Formally speaking, states might choose to bind whomever they please and in whatever way they please, subject, of course, to any limitations that they themselves have imposed on their freedom in that respect.[6] This means that individuals might incur obligations under international law regardless of whether their acts are considered state acts, the ensuing responsibility being completely disconnected from the responsibility of the state.[7]

Still, whilst the state and the individuals comprising its apparatus have distinct legal personality for the purposes of international responsibility,[8] complications arise because the state acts 'by and through' individuals.[9] When a state can lawfully undertake, authorise, or enforce certain conduct under international law, it would amount to a legal absurdity if other international rules rendered responsible the individual through

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5 G Arangio-Ruiz, 'International and Interindividual Law' in JE Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 15, 49.

6 G Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 CLP 263, 275; R O'Keefe, *International Criminal Law* (OUP 2015) 83.

7 *Tadić* (Judgment) IT-94-1-T (7 May 1997) [573]; A Bianchi, 'State Responsibility and Criminal Liability of Individuals' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 16, 17.

8 G Gaja, 'Dualism—a Review' in Nijman and Nollkaemper (n5) 52, 56.

9 *Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Ser B No 22, 22; H Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1948) 1 ILQ 153, 159; R Ago, 'Le délit international' (1939) 68 RdC 415, 462; D Anzilotti, *Cours de droit international* vol-I (G Gidel tr, Sirey 1929) 469.

which the state acts for effecting that conduct, or for authorising it, or for enforcing it.[10] It is hardly contestable that the consequences of a wrong should desirably befall the individual committing that wrong instead of the entire population of a state.[11] However, from a practical perspective, the complete dissociation between the state and the individual through which the state acts would create legal uncertainty, and would thus seriously compromise strategic, operational, tactical, and transactional decision-making.[12]

The tension described above between substantive standards of conduct applicable to states and to individuals acting on their behalf could be resolved if international law attached individual responsibility only to purely private acts, that is, acts not even amenable to be attributed to the state. Were this the case, the fact that the relevant conduct is attributable to the state would remove any responsibility from the individual effecting such conduct. Conversely, the state would only be conceivably responsible for its own failure to prevent or suppress such conduct, but the conduct itself would not be internationally wrongful for the state.[13] This seems indeed to be the case with respect to some international wrongs. For example, even if the prohibition of piracy were con-

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10 eg A Zimmermann, 'Die Wirksamkeit rechtlicher Hegung militärischer Gewalt—Ausgewählte Aspekte der Anwendbarkeit und Systemkohärenz des humanitären Völkerrechts' in *Moderne Konfliktformen—Humanitäres Völkerrecht und privatrechtliche Folgen—Berichte der DGV* Bd-44 (Müller 2010) 7, 17; AC Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?' (2009) 20 EJIL 1195, 1204; E Canizzaro, 'Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ' (2007) 1 EJLS 42, 45.

11 eg M Chinen, Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility (2014) 25 EJIL 703, 704; A Cassese, *International Law* (2nd edn OUP 2005) 241; Kelsen, Will… (n9) 165.

12 On the general point, see: P Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 5; ILC, Report on Fragmentation (n4) [24]-[25].

13 J Barboza, 'International Criminal Law' (1999) 278 RdC 1, 78.

strued as an international obligation of individuals, it would be unlikely that acts attributable to a state would be amenable to this legal characterisation.[14] This is because the acts proscribed by international law must be committed for 'private ends' to meet the definition of piracy.[15] The definition of piracy excludes all attacks on persons or property when they are made on behalf of states.[16] The distinction between obligations not to engage in certain conduct and to prevent or suppress that conduct is not 'a distinction without meaning, producing no difference'.[17] The conduct which comprises the internationally wrongful act of the state constitutes the measure against which all consequences flowing from state responsibility are assessed.[18]

At the same time, there is nothing precluding states from establishing an obligation with multiple addressees, that is, both states and individuals. In principle, there is nothing special about more entities having materially identical obligations under international law. Commonly, more states might assume the same obligation by, say, a multilateral treaty. In addition, materially identical obligations might arise for states and international organisations from the same source—eg a treaty—or different

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14 F Mégret, 'The Subjects of International Criminal Law' in P Kastner (ed), *International Criminal Law in Context* (Routledge 2017) 28, 34.

15 Art 101 LOSC.

16 eg D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2011) 36-37; MS McDougal and WT Burke, *The Public Order of the Oceans* (New Haven Press 1987) 822; cf JW Bingham, and ors, 'Harvard Research in International Law: Draft Convention on Piracy' (1932) 26 AJIL Supplement 739, 786.

17 H Fox, 'The ICJ's Treatment of Acts of the State in Particular the Attribution of Acts to the State' in N Ando (ed), *Liber Amicorum Judge Shigeru Oda* (Kluwer 2002) 147, 156.

18 cf M Spinedi, 'State v Individual Responsibility for Genocide: *Tertium Non Datur?*' (2002) 13 EJIL 895, 897-899; see *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 233-234[462].

sources, say, a treaty and customary international law. The determination of the addressees of each obligation is a matter of interpretation of that obligation.[19] The essence of dual obligations is that they are addressed both to states and to individuals including, at least, those through which the state acts.[20] For an international obligation to be therefore properly understood as dual, two conditions need to be met. First, the obligation needs to be addressed directly to individuals. In other words, certain conduct of an individual must be mandated or prohibited directly under international law. Second, that same conduct needs to constitute a breach of the same or a materially identical international obligation for the state.[21] As a result, the underlying acts would be 'unlawful both *qua* acts of state and *qua* acts of individuals acting as the agents and representatives of the state.'[22]

As will be demonstrated, certain international obligations of individuals under treaties and customary international law, obligations applicable in all circumstances–

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19 eg R Portmann, *Legal Personality in International Law* (CUP 2011) 272.

20 KJ Keith, 'The International Court of Justice and Criminal Justice' (2010) 59 ICLQ 895, 896.

21 cf G Arangio-Ruiz, 'Seventh Report on State Responsibility' (1995) II(1) YbILC 3, 27[124].

22 I Brownlie, *International Law and the Use of Force by States* (OUP 1963) 165.

that is, even for individuals acting as state organs–are complemented by at least equivalent state obligations, and indeed, of a peremptory character.[23] From a normative perspective, this is 'no accident'.[24] Essentially, states create these obligations with a view to proscribing certain emanations of state (or state-like) authority and control.[25] Conversely, the individual is expected to act more often than not as part of the state (or state-like) organisation and on its behalf in carrying out the specific wrongful act.[26] Thus, if an international obligation of individuals encompasses acts 'by an individual capable of engaging State responsibility',[27] this implies that the state is bound by an at least materially coextensive obligation.

This chapter starts with an introduction to the concept and sources of international obligations of individuals (Section II). The analysis that follows elaborates on the formal sources of dual obligations on the basis of four case studies (Section III): genocide (sub-section 1), grave breaches of international humanitarian law (sub-section 2), and aggression (sub-section 3). This section also addresses recent developments in

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23 *Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 32[64] ('CR') (genocide); *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) [2012] ICJ Rep 99, 141[95] (grave breaches of international humanitarian law and crimes against humanity); *Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, 456[97] and 457[99] (torture); also eg A Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (2010) 8 Santa Clara JIL 313, 332; O Quirico, International 'Criminal' Responsibility (ELD edn, Routledge 2019) para 2.2.2.1.

24 R Ago, 'Fifth Report on State Responsibility' (1976) II(1) YbILC 3, 33[101].

25 See, eg, *'Justice' Case (US v Altstoetter and ors)* (Opinion and Judgment) [1947] III TWC 954, 984.

26 R Maison, *La responsabilité individuelle pour crime d'État en droit international public* (Bruylant 2004) 325.

27 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Declaration of Judge Skotnikov) [2007] ICJ Rep 366, 372; also *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) (Separate Opinion of Judge Skotnikov) [2015] ICJ Rep 194, 200[13].

the field of crimes against humanity (sub-section 4). The chapter then turns to the principles and techniques underlying the identification and interpretation of the rules encompassing such obligations. It demonstrates that the transcription of these obligations in formally separate sources and their implementation by separate institutions is not fatal to their dual character in substantive terms (Section IV).

II. The Concept and Sources of International Obligations of Individuals

This section lays out the background of the concept and the sources of international obligations of individuals and then distinguishes these obligations from state obligations in relation to individual conduct. The idea of international obligations of individuals–let alone 'dual' obligations of both states and individuals–may seem 'extraneous to international law'.[28] From a purely 'sociological'[29] perspective, the state can only comply with its international obligations if the natural persons comprising the state apparatus individually or collectively either perform or abstain from certain material acts.[30] States as collective entities cannot act in the physical world but 'only by and through their agents and representatives' who are in the final analysis natural persons.[31] Still, the addressees (or subjects) of international obligations in the legal sense are normally not those individuals themselves but states.[32] For instance, states are obligated to

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28 AGD Levy, 'Criminal Responsibility of Individuals and International Law' (1945) 4 UCLR 313, 332.

29 On nomenclature, see eg MS Korowicz, 'The Problem of the International Personality of Individuals' (1956) 50 AJIL 533, 539-540.

30 eg JL Brierly, 'Règles générales du droit de la paix' (1936) 58 RdC 5, 47; H Kelsen, *Principles of International Law* (Rinehart and Winston 1952) 116; P Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 HJIL 1, 14.

31 *Settlers of German Origin* (n9) 22.

32 eg R O'Keefe, 'The Doctrine of Incorporation Revisited' (2009) 79 BYBIL 7, 56-57.

accord immunities from jurisdiction to other states.[33] The judge who permits a suit against a foreign state in violation of the rules of immunity does not breach any international obligation of her own, since there is none addressed to her directly.[34] Her conduct becomes relevant for the purposes of international responsibility as that of the state that is the sole addressee of the international obligation.[35] In other words, the state is, due to the typical structure of international obligations, an indivisible whole, a unity, for the purposes of the general law of state responsibility.[36]

Individuals–including those acting on behalf of the state–are normally only indirectly affected by international rules, but are usually not the addressees of international obligations.[37] States might unilaterally take domestic legislative or disciplinary measures with respect to their personnel to ensure compliance with their international obligations.[38] Under certain circumstances, states are even obligated under international law to impose through their domestic laws obligations on individuals–including those acting as their organs–and enforce them through their domestic institutions.[39] State obligations to ensure protection or to prevent an event might have such an indirect effect

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33 *Jurisdictional Immunities* (n23) 123-124[57].

34 FA Mann, 'The Consequences of an International Wrong in International and National Law' (1976) 48 BYBIL 1, 48; O'Keefe, Doctrine (n32) 56-57.

35 Art 4 ARSIWA.

36 Fitzmaurice (n4) 87; also E Kaufmann, 'Règles générales du droit de la paix' (1935) 54 RdC 311, 398.

37 eg Triepel (n3) 21; Anzilotti, Teoria (n2) 120.

38 Schwarzenberger, Problem (n6) 268; for the general point, cf *Exchange of Greek and Turkish Populations* (Advisory Opinion) [1925] PCIJ Ser B No 10, 20.

39 G Gaja, 'The Protection of General Interests in the International Community' (2011) 364 RdC 13, 153.

on individuals.[40] For instance, under Article 2(1) of the Convention against Torture ('CAT') each state party is obligated to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. Still, the CAT 'imposes obligations on States parties and not on individuals'.[41] Similarly, international obligations enjoining states to criminalise certain conduct and submit suspects to investigation and prosecution ('suppression treaties') or to impose on individuals liability for damage caused by certain hazardous activity ('civil liability treaties') are frequent in international law. Nonetheless, even those instruments do not normally impose an obligation directly on individuals nor do they directly provide for individual responsibility in case of violation of the obligation. It is left to each state, by means of domestic law, to take these steps.[42]

In all these situations, the acts of individuals are not strictly speaking contrary to international law and individuals 'remain foreign to such law'.[43] The obligation and

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40 A Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014) 60-63.

41 CAT, 'General Comment No2: Implementation of Article 2 by States Parties' (24 January 2008) CAT/C/GC/2 [15]; cf also UNHRC, 'General Comment No 31[80]' (26 May 2004) CCPR/C/21/Rev.1/Add.13 [8] with respect to Art 2(1) ICCPR.

42 Along those lines on suppression treaties see eg Schwarzenberger, Problem (n6) 226; R Cryer, 'Introduction' in R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Law and Procedure* (3rd edn CUP 2014) 1, 9-10; A Mahiou and J-C Martin, 'Les traités' in H Ascensio, E Decaux, and A Pellet (eds), *Droit international pénal* (2nd edn Pedone 2012) 51, 62; W Ferdinandusse, *Direct Application of International Criminal Law in Domestic Courts* (Asser 2006) 260; N Boister, *An Introduction to Transnational Criminal Law* (2nd edn OUP 2018) 30. On civil liability treaties see eg C Tomuschat, 'The Responsibility of Other Entities: Private Individuals' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 317, 323; I Plakokefalos, 'Liability for Transboundary Harm' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 1051, 1058; but also A Nollkaemper, 'Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives' in G Winter (ed), *Multilevel Governance of Global Environmental Change* (OUP 2006) 179, 188-189 (tentatively).

43 eg D Anzilotti, 'La responsabilité internationale des états a raison des dommages soufferts par étrangers' (1906) 13(1) RGDIP 5, 14-15.

responsibility that individuals might incur arises only from the domestic law of some state.[44] The acts of individuals become relevant for international law only as acts of the state or as a 'catalyst' for the wrongfulness of conduct attributable to the state in relation to such acts of individuals.[45] Conversely, the obligations that are imposed on states by international law remain distinct from the obligations they are required under international law to place on individuals under their domestic law.[46] As long as the conduct qualifies as an act of the state and contravenes one of the state's obligations under international law, it is immaterial whether the individual, though which the state is acting, acted within the limits of domestic law.[47] In all these cases, the legal characterisation of individual conduct under domestic law is merely a fact which cannot as such affect the characterisation of the same conduct (now attributed to the state) under international law.[48] This distinction between international–purely interstate–and domestic spheres constitutes the backdrop of the law of state responsibility as it underlies some of its basic tenets; that is, the 'unity' of the state and the irrelevance of the characterisation of certain conduct under domestic law for its characterisation under international law.[49]

That said, there is no international rule that precludes the imposition of international obligations directly on individuals, despite international law being mainly a state-

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44 eg J Basdevant, 'Règles générales du droit de la paix' (1936) 58 RdC 471, 659.

45 R Ago, 'Fourth Report on State Responsibility' (1972) II YbILC 71, 97[65].

46 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 117[174].

47 Art 7 ARSIWA; P-M Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in Crawford and ors (n42) 173, 176.

48 *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Ser A No 7, 19; Article 3 and 32 ARSIWA.

49 eg P-M Dupuy, 'Dionisio Anzilotti and the International Responsibility of States' (1992) 3 EJIL 139, 143-145.

centric system.[50] Theoretical debates aside, international personality has been treated in practice as a relative concept that operates more as shorthand rather than as a pre-condition for the imposition of obligations upon individuals.[51] In fact, this seemed rather banal even to the ICJ: '[t]hat international law imposed duties and liabilities on individuals as well as states has long been recognised'.[52] As states can undoubtedly impose obligations on individuals through their domestic laws, they might as well do 'together what any of them might have done singly'.[53] In other words, states can collectively or jointly exercise their jurisdiction so as to impose direct international obligations on individuals.[54]

As to the means through which states collectively impose obligations on individuals, they correspond to the ordinary 'law-creating processes' of international law.[55] It is widely accepted that states can impose obligations on individuals directly by means

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50 I Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 65; cf, more generally, G Balladore Pallieri, 'Le dottrine di Hans Kelsen e il problema dei rapporti fra diritto interno e diritto internazionale' (1935) 27 RDI 24, 74.

51 For the general point, see eg DP O'Connell, *International Law* (2nd edn Stevens 1970) 80-83; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178-179; Ago, Le délit… (n9) 451-452; similarly with respect to individual rights cf *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 494[77].

52 *Bosnia Genocide* (n46) 116 [172].

53 IMT, 'Judgment and Sentences – October 1, 1946' (1947) 41 AJIL 172, 216.

54 eg M Milanović, 'Is the Rome Statute Binding on Individuals? (And Why Should We Care)' (2011) 9 JICJ 25, 46.

55 On terminology see G Schwarzenberger, *International Law as Applied by International Courts and Tribunals* vol-I (3rd edn Stevens 1957) 25-27.

of customary international law[56] and 'general principles of law recognised by the community of nations'[57] or 'derived (…) from national systems of the world'.[58] In the same vein, there is nothing intrinsic in treaties as opposed to other sources of international law that renders them incapable of imposing direct obligations on individuals *qua* treaties.[59] Formally speaking, both treaties and custom are *res inter alios acta* in relation to individuals.[60] The *pacta tertiis nec nocent nec prosunt* objection has indeed been raised in literature,[61] but the application of such an argument to individuals–ie natural persons– is not easily defensible.[62] Individuals do not normally possess treaty-making capacity and cannot therefore become *parties* to treaties in the formal sense.[63] As a result,

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56 See eg *Kallon & Kamara* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-04-15-PT-060-I, AC (13 March 2004) [47]; *Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [94].

57 Art 15(2) ICCPR; Art 7(2) ECHR; see eg *Erdemović* (Judgment) IT-96-22-T (29 November 1996) [40]; *Ieng Sary* (Decision on Ieng Sary's Appeal against the Closing Order) Case No 002/19-09-2007-ECCC/OCIJ (PTC75), PTC (11 April 2011) [226].

58 Art 21(1)(c) RSICC; *Erdemović* (Joint Separate Opinion of Judge McDonald and Judge Vohrah) IT-96-22-A (7 October 1997) [57]; cf Art 38(1)(c) ICJ Statute.

59 See *Tadić* Interlocutory Appeal on Jurisdiction (n56) [89]; O'Keefe, ICL (n6) 77; D Akande, 'Sources of International Criminal Law' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 41, 48–49; for the opposing view see, eg, AG O'Shea, 'International Criminal Responsibility' (2009) MPEPIL [4]; V-Đ Degan, 'On the Sources of International Criminal Law' (2005) 4 CJIL 45 62-64.

60 eg S Rosenne, 'State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility' (1998) 30 NYJILP 145, 166; J Crawford, 'Democracy and International Law' (1993) 64 BYBIL 113, 130-131.

61 See, eg, A Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416, 429-430; L Moir, *The Law of Internal Armed Conflict* (CUP 2001) 52-56. On the principle, see Art 34 VCLT and 1986 VCLT.

62 Milanović, Is… (n54) 40-42; Peters, *Jenseits* (n40) 64-66.

63 GG Fitzmaurice, 'Fourth Report on the Law of Treaties' (1959) II YbILC 37, 79[156]. Whether and under what conditions they can conclude contracts governed exclusively by international law is not part of the present inquiry: see eg M Karavias, *Corporate Obligations in International Law* (OUP 2014) ch IV.

they are not generally accorded the protection of having to assent in writing to the imposition of burdens upon them.[64] In fact, even the PCIJ affirmed, albeit with some ambiguity,[65] the capacity of individuals to incur obligations directly from treaties:

> It may be readily admitted that, according to a well-established principle of international law…an international agreement, cannot, as such, create direct… obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual…obligations…That there is such an intention in the present case can be established by reference to the terms of the [international agreement].[66]

In other words, treaties do not generally create obligations for individuals, but they *can* do so.[67] What is dispositive is the intention of the states parties to impose international obligations directly on individuals.[68]

International obligations of individuals are distinct from international obligations addressed exclusively to states which require these states to impose obligations on individuals under domestic law for conduct defined in international law. State failure to perform its obligations to impose obligations on individuals will lead to state responsibility without, however, affecting the position of the individual. The interposition of domestic law in such cases is still necessary one way or another for the obligation to

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64 C Chinkin, *Third Parties in International Law* (OUP 1993) 122; Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2007) 322 RdC 243, 340. Note that Art 35 VCLT and Art 35 1986 VCLT refer only to states and international organisations.

65 Portmann (n) 68-73; K Parlett, *The Individual in the International Legal System* (CUP 2011) 22-26.

66 *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Ser B No 15, 17–18.

67 M Milanović, 'Aggression and Legality – Custom in Kampala' (2012) 10 JICJ 165, 171(fn24); Peters, *Jenseits* (n40) 78.

68 Schwarzenberger, Problem (n6) 275-276; also IUSCT, *Amoco International Finance Corp. v Iran* (Partial Award) No 310-56-3 (14 July 1987) [103].

have any effect with respect to the individual.[69] In practical terms, the state maintains complete control over the effective performance of these international obligations. As a result, the state retains, in a normative sense, ultimate authority and control over the conduct of individuals.[70]

By contrast, the necessary corollary of international obligations of individuals is individual responsibility under international law.[71] According to a 'general principle of international responsibility',[72] the characterisation of a given act as wrongful in international law is independent from its characterisation in domestic law.[73] Failure of the state to adopt domestic measures in the case of international obligations of individuals will be of no consequence as to the responsibility of the individual under international law.[74] Moreover, an international obligation of individuals applies even if it is in conflict with the obligations of individuals arising out of domestic law.[75]As a result, individuals cannot invoke domestic law provisions or the lack thereof as justification

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69 Boister (n42) 30; see *Obligation to Prosecute or Extradite* (n23) 456-457[97]-[98].

70 eg A Nollkaemper, 'Inside or Out: Two Types of International Legal Pluralism' in J Klabbers and T Piiparinen (eds), *Normative Pluralism and International Law – Exploring Global Governance* (CUP 2013) 94, 99-101.

71 eg A Pellet, 'The Definition of International Responsibility' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1, 8; S Rosenne, 'War Crimes and State Responsibility' (1994) 24 IYHR 61, 99.

72 R Ago, 'Third Report on State Responsibility' (1971) II(1) YbILC 199, 226[86].

73 Art 3 ARSIWA; Art II Nuremberg Principles and Commentary [102]; Art 1(2) DCCAPSM and Commentary [6]; V Abellán Honrubia, 'La responsabilité internationale de l'individu' (1999) 290 RdC 135, 274; LS Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Nijhoff 1992) 161.

74 Commentary to Art II Nuremberg Principles [100]; eg K Ambos, *Treatise on International Criminal Law* Vol-II (OUP 2014) 223.

75 eg *'High Command' Case (US v Von Leeb and ors)* (Judgment) [1948] XI TWC 462, 508; *a contrario* Arangio-Ruiz, International and Interindividual Law (n5) 16.

for their failure to perform their obligations under international law.[76] In this way, the obligation (and the ensuing responsibility) of the individual is 'insulated' from any changes that a state might unilaterally bring about in the ordinary exercise of its prescriptive jurisdiction.[77] Thus, no state alone possesses residual normative authority and control over the conduct of individuals in that respect. Any authority and control that the state exercises over the individual is relevant only as a fact for the determination of individual responsibility under international law.[78] Therefore, for example, the obligation to obey orders under domestic law, which is a corollary of the state's normative authority and control, cannot preclude the responsibility of the individual under international law.[79] Nonetheless, the threatened or actual enforcement of such an order through violent means, which is a form of factual control, could conceivably amount to duress that precludes individual responsibility under international law.[80]

To conclude, whilst the default position remains that international rules affect individuals only indirectly, the possibility of direct imposition of obligations on individuals under international law is firmly established. Such imposition takes place on the basis of the joint or collective exercise of prescriptive jurisdiction by states through the ordinary processes of international law creation. Such obligations can only be defined by the effect states intend to give them, that effect being that individuals can be

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76 eg, *'Justice'* Case (n25) 983-984; *Blaškić* (Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence) IT-95-14-T, President of the Tribunal (3 April 1996) [7].

77 See, *mutatis mutandis*, *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion) [1927] PCIJ Ser B No 14, 38.

78 See n48.

79 Art 33 RSICC; Art 7(4) ICTY Statute; Art 6(4) ICTR Statute; IMT Judgment (n53) 221.

80 Art 31(1)(d) and 33 RSICC; *Erdemović* (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A (7 October 1997) [15].

responsible under international law for an act regardless of its characterisation under domestic law. The identification of an international obligation of individuals hinges on the determination of states' intention to produce such legal effects. Thus, in the final analysis, the identification of an international obligation of individuals and its distinction from other international rules is a matter of interpretation of the rule.[81] In this light, the following sections shows how specific rules of international law lay down international obligations of individuals, whilst the same obligation, at least in substantive terms, is simultaneously addressed to states.

III. Dual Obligations under International Law

1. The Dual Character of the Prohibition of Genocide

The dual character of the prohibition of genocide is not readily apparent from the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention' or 'CPPCG').[82] On its face, the instrument defines a prohibited conduct and consists mainly of obligations that are addressed exclusively to states to cooperate in repressing the prohibited conduct by means of their domestic laws.[83] States are obligated to criminalise and punish genocide and ancillary conduct under their domestic law, to prosecute relevant acts if committed on their territory, and to grant extradition of alleged offenders under applicable treaties and laws.[84] Viewed this way, the instrument establishes a relationship between domestic and international law that is mutually

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81 eg A Kjeldgaard-Petersen, *The International Personality of the Individual* (OUP 2018) 6.

82 See eg Webb (n12) 17.

83 A Cassese, 'On the Use of Criminal Law Notions in Determining Acts of Genocide' (2007) 5 JICJ 875, 876

84 Art IV-VII CPPCG.

reinforcing,[85] but is otherwise rather commonplace in international law.[86] The state would be responsible for its own failure to prosecute or anticipate the risk of genocide at the very least by establishing a framework for its effective suppression.[87] The responsibility of individuals – even those whose conduct is attributable to the state – remains a question of domestic law.[88] It follows that, in the first place, the obligations that the Genocide Convention imposes on states are distinct from those which the Convention requires states to place on individuals.[89]

The unprecedented feature of the Genocide Convention is that it 'entails the national *and international responsibility* on the part of *individuals and states'*.[90] As far as individuals are concerned, the Convention confirms that genocide is 'a crime under international law'.[91] As a result, individuals are liable to punishment as a matter of international law and indeed so regardless of whether they are public officials.[92] In other words, the prohibition of genocide as a rule addressed to individuals exists independently from any prohibition under domestic law at the time of commission.[93] A

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85 Nollkaemper, Concurrence (n1) 617.

86 C Dominicé, 'La question de la double responsabilité de l'État et de son agent' in E Yakpo and T Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (Kluwer 1999) 143, 152.

87 Fox (n17) 161; *Bosnia Genocide* (n46) 219[425]-[426].

88 eg JL Kunz, 'The United Nations Convention on Genocide' (1949) 43 AJIL 738, 746.

89 *Bosnia Genocide* (n46) 117[174].

90 ibid 111[162] citing UNGA Res 180 (III) (21 November 1947), preamble [3] (emphasis added).

91 Art I CPPCG.

92 Art IV CPPCG; O'Keefe, ICL (n6) 80; *Kadić v Karadžić* 70 F 3d 232, 241–2 (2nd Cir 1995). However, whether the treaty or the underlying customary obligation on individuals has direct effect before domestic courts remains a matter of domestic law: see eg W Schabas, *Genocide in International Law* (2nd end CUP 2009) 405.

93 eg *Vasiliauskas v Lithuania* [GC] 2015 ECHR-VII 111, 177[168].

further implication of Article I's formulation is that 'the Convention was intended by the General Assembly and by the contracting parties to be universal in scope'.[94] Of course, customary international law also provides for individual responsibility in respect of genocide.[95]

According to the Genocide Convention, *génocidaires* are subject to the jurisdiction of an 'international penal tribunal as may have jurisdiction with respect to those Contracting Parties which have accepted its jurisdiction'.[96] Although the provision was lying dormant for decades in the absence of such an international jurisdiction, this feature of the Convention also corroborates the direct imposition of the core prohibitions relating to genocide on individuals.[97] The formulation of Article VI CPPCG has been interpreted as covering all international criminal tribunals of potentially universal scope that are competent with respect to acts under Article III CPPCG, to the extent that acceptance of their jurisdiction can be established with respect to the party or parties concerned.[98]

On its face, the requirement of state consent for the subjection of the individual to the jurisdiction of the 'international penal tribunal' under the Genocide Convention could be construed as a form of 'domestication' of the underlying obligations.[99] In other

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94 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

95 eg *Jelisić* (Judgment) IT-95-10-T (14 December 1999) [60].

96 Art VI CPPCG.

97 See eg *Trial of Pakistani Prisoners Of War (Pakistan v India)* ICJ Pleadings 17: 'A "Competent Tribunal" within the meaning of Article VI of the Genocide Convention means a Tribunal … applying international law…'

98 *Bosnia Genocide* (n46) 227-228[445]-[446].

99 KJ Heller, 'What Is An International Crime? (A Revisionist History)' (2017) 58 HJIL 353, 372.

words, to the extent that the consent of the state is necessary for the prosecution of these acts, one could argue that the source of the obligation is the state act of consent, and not international law. Nevertheless, consistent practice does not confirm this interpretation. First, practice suggests that it is immaterial for the 'international penal tribunal' whether the Convention is applicable with respect to individuals as a matter of domestic law.[100] The more notable example in this respect is the practice of the ICTR, which applied the Genocide Convention interchangeably with the customary rules envisaged in it,[101] despite the fact that Rwanda had failed to give effect to it in accordance with its domestic law.[102] Second, the core prohibitions enshrined in the Genocide Convention have been applied for events predating the acceptance of the jurisdiction of the international penal tribunal by the state party or parties concerned.[103] For example, the ICC has issued an arrest warrant for act(s) of genocide committed prior to the referral by the Security Council to the ICC of the situation in Darfur, Sudan, a non-party to the Rome Statute.[104] These notable instances confirm that the source of the obligation for the individual accused is international law, whether the Genocide Convention or customary international law. The concerned state's act of consent–either direct or 'remote' in the

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100 Art 21 RSICC; Art 1 ICTY Statute; Art 1 ICTR Statute; S Furuya, 'Legal Effects of the Rules of International Criminal Tribunals and Court upon Individuals: Emerging International Law of Direct Effect' (2000) 47 NILR 111, 111.

101 eg *Akayesu* (Judgment) ICTR-96-4-T, TC (2 September 1998) [496].

102 See *X v Public Prosecutor* No 13-87888 (26 February 2014) ILDC 2718 (FR 2014) [21] (French Court of Cassation) [21].

103 cf Art 12(3) and 13(b) RSICC.

104 *Al-Bashir* (Second Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-02/05-01/09-94, PTC-I (12 July 2010).

form of a Security Council Resolution[105]–to jurisdiction of the international penal tribunal is only relevant for the purpose of implementation of individual responsibility. The responsibility itself arises directly from international law.

As far as states are concerned, the extent of the obligations provided for them was one of the most controversial issues in the *Bosnia Genocide* case. The Genocide Convention appears in the first place to impose obligations of criminal suppression and cooperation on states. The key provision in the Convention that appears to go beyond the 'suppression treaty' model is only Article I in which states parties 'confirm that genocide … is a crime under international law which they undertake to prevent and to punish'. In this respect, the Court found that the obligation to prevent genocide under this provision does not only involve taking the suppressive measures set out in the Genocide Convention.[106] It is also breached if a state 'manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide'.[107] Such breach requires that genocide, or, arguably, at least an associated inchoate offence is committed.[108] However, this obligation is one of conduct or best efforts, in that the state needs not to succeed in averting genocide.[109] For the same reason, the state will not have discharged this obligation even if it proves that the measures that were within its powers and which it failed to take were not sufficient

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105 E Lauterpacht, *Aspects of the Administration of International Justice* (CUP 1991) 46.

106 eg A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695, 699-700.

107 *Bosnia Genocide* (n46) 221[430]; also HRC, '"They came to destroy": ISIS Crimes against the Yazidis' (15 June 2016) A/HRC/32/CRP.2 [188].

108 Art 14(3) ARSIWA; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, 128[441].

109 *Bosnia Genocide* (n46) 221[430]; Commentary to Art 14 ARSIWA [9].

to avert the commission of genocide.[110] The Court cautioned against the generalisation of such an expansive interpretation to all obligations of prevention.[111]

The Court, however, went beyond the obligations of prevention, criminalisation, prosecution, and extradition. It found that states parties are under the obligation 'not to commit genocide [or the other acts enumerated in Article III], through the actions of [their] organs or persons or groups whose acts are attributable to [them].'[112] It is uncontroversial that states can be responsible under international law for genocide, the prohibition of genocide being without doubt a peremptory rule of general international law.[113] Criticisms concern the existence of a treaty-based state obligation not to commit genocide, and the content of the prohibition of genocide with respect to states.[114] The Court reasoned its finding in two ways.

First, it found that 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.'[115] However, this part of the reasoning should not be construed as an enunciation of a point of principle. It is not axiomatic, either as a matter of law or logic, that a state obligation to prevent the occurrence of

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110 ibid 221-2[431].

111 ibid 220[429].

112 ibid 114[167].

113 *Armed Activities* (DRC-R) (n23) 32[64].

114 eg A Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' in P Gaeta (ed), *The UN Convention on Genocide: A Commentary* (OUP 2009) 349, 369.

115 *Bosnia Genocide* (n46) 113[166].

certain conduct implies an unqualified obligation to abstain from that conduct.[116] Obligations to prevent might take different shapes and forms and might be circumscribed to differing extents so that it would be far-fetched to equate them with unconditional obligations not to commit.[117] A treaty might leave some latitude to state parties to define certain aspects of the relevant conduct in their domestic law or envisage an act that is defined as a purely private act, like piracy. For example, the prohibition of terrorism or at least certain offences under the 'counter-terrorist' conventions have been characterised as obligations addressing both states and individuals.[118] Nonetheless, without a commonly agreed international definition of the relevant prohibitions, it is doubtful that they can apply autonomously from domestic law to individuals.[119] Besides, it is possible to argue that the regulated conduct is incapable of engaging state responsibility, because it can only have a private character.[120] Nonetheless, in the case of genocide, the absence of an obligation not to commit genocide or the acts prescribed under Article III CPPCG seemed paradoxical to the Court due to the wording of the provision of Article I in which the undertaking to prevent genocide is unqualified. This distinguished

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116 M Jackson, *Complicity in International Law* (OUP 2015) 205; also C Tams, 'Article I' in C Tams, L Berster, and B Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide – A Commentary* (Beck/Nomos/Hart 2014) 33, 57.

117 P Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 EJIL 631, 638; P-M Dupuy, 'Crime sans châtiment ou mission accomplie' (2007) 111 RGDIP 243, 245-246.

118 *Ayyash and ors* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/1, AC (16 February 2011) [105]; Commentary to Art 14 ARSIWA [14] and fn250; also Nollkaemper, Concurrence (n1) 619; K Trapp, *State Responsibility for International Terrorism* (OUP 2011) 138-145.

119 eg B Saul, *Defining Terrorism in International Law* (OUP 2008) 270; cf Art 28G(A) ACJHPR Statute ('a violation of the criminal laws of a State Party' as an element of terrorism).

120 *a contrario*, *Bosnia Genocide* (Skotnikov) (n27) 372; *Croatia Genocide* (Skotnikov) (n27) 200[13].

the obligation of Article I CPPCG from obligations found in other suppression treaties.[121] Therefore, the obligation to prevent constituted the textual foothold for the Court's finding of the obligation not to commit genocide and the associated acts of Article III CPPCG.

Second, in interpreting the provision of Article I CPPCG, the Court took into account 'the nature of the acts to be prevented'.[122] The Convention characterised genocide as 'a crime under international law' and, thus, 'by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described'.[123] More importantly, the Genocide Convention explicitly provides that this crime can be committed by officials of the state.[124] One criticism levelled against the Court's reasoning is that the term 'crime under international law' refers in the first place to international obligations of individuals that give rise to their criminal responsibility under international law.[125] It has also been argued that the acts characterised under the Convention as 'crimes under international law' cannot be equated with state obligations, since states cannot be subjected to criminal sanctions under current international

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121 *Bosnia Genocide* (n46) 111[162]; for an updated list see SD Murphy, 'First Report on Crimes Against Humanity' (17 February 2015) A/CN.4/680 [86].

122 *Bosnia Genocide* (n46) 111[162] and 220[429]; Dominicé (n86) 150.

123 *Bosnia Genocide* (n46) 113[166].

124 Art IV CPPCG; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, 616[32].

125 eg O'Keefe, ICL (n6) 80.

law.[126] More tentatively, it has been suggested that there is no legal reason why characterising conduct as a crime should inform the state's 'delictual' responsibility.[127]

These observations fail to encapsulate adequately the systemic implications of the characterisation of genocide as a 'crime under international law'. This term logically implies that certain conduct is wrongful under international law.[128] A logical and legal absurdity would arise if the same instrument would render wrongful an act capable of engaging state responsibility without imposing a corresponding obligation on the state.[129] In other words, it would be peculiar, in the absence of a clear indication to the contrary, if the 'paradigm person of international law, the state, were treated as immune from committing the very acts that international law characterises as crimes in all circumstances whatsoever'.[130] At the same time, there is no juridical absurdity in regarding the same act as simultaneously subject to multiple legal consequences.[131] Indeed, the individual is subject to criminal responsibility (albeit not exclusively). State respon-

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126 ibid; also *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Separate Opinion of Judge *ad hoc* Kreća) [2007] ICJ Rep 450, 558-559[132].

127 KN Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice' (2012) 2 JIDS 279, 288.

128 Tams (n116) 57; more generally, H Waldock, 'Second Report on the Law of Treaties' (1962) II YbILC 36, 53[4].

129 *Bosnia Genocide* (Skotnikov) (n27) 372; *Croatia Genocide* (Skotnikov) (n27) 200[13]; cf also L-A Sicilianos, 'La responsabilité de l'état pour absence de prévention et de répression des crimes internationaux' in H Ascensio, E Decaux, and A Pellet (eds), *Droit international pénal* (2nd edn Pedone 2012) 631, 632.

130 J Crawford, 'First Report on State Responsibility' (1998) II(1) YbILC 1, 22[83].

131 NHB Jørgensen, *The Responsibility of States for International Crimes* (OUP 2000) 153; Brownlie, Use of Force (n22) 165; more generally, Ago, Le délit… (n9) 424 and 426.

sibility on the other hand defies the 'domestic' classifications of civil or criminal responsibility;[132] it is 'purely and simply international' or '*sui generis*'.[133] Accordingly, state responsibility can also 'extend to the most serious wrongs qua breaches of obligation, *notwithstanding that those wrongs may also constitute crimes*.'[134] The Articles on State Responsibility are agnostic as to whether such characterisation entails special consequences, but they surely do not deprive the underlying international obligation of its 'ordinary' consequences.[135] It was this approach that was adopted by the ILC and confirmed by the Court in this and other subsequent cases.[136]

The Court's reasoning with respect to the identification of the state obligations arising out of the Genocide Convention is telling about the identification of dual obligations more generally. The characterisation of genocide as a 'crime under international law' and, indeed one which could be committed by state officials, was decisive for the finding of a corresponding state obligation not to commit these acts. For these international obligations of individuals not to be complemented by state obligations of the same content would amount to a paradox. What emerges from this analysis is that the Genocide Convention obligates individuals not to commit genocide or an ancillary offence and renders them liable to punishment regardless of their official capacity. Under the same Convention, states are obligated not to commit genocide through the acts of individuals whose conduct is attributable to them. In the same vein, pursuant to Article

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132 eg H Kelsen, 'Théorie du droit international public' (1953) 84 RdC 1, 87; P Reuter, 'Principes de droit international public' (1961) 103 RdC 425, 586.

133 ILC, 'Comments and Observations Received by Governments' (1998) II(1) YbILC 81, 114 (Czech Republic) and 115 (France); also A Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425, 433.

134 Crawford, First Report (n130) 23[93] (emphasis added).

135 See Art 41(3) ARSIWA and Commentary [13]-[14].

136 *Bosnia Genocide* (n46) 115[170]; *Croatia Genocide* (n108) 61[128].

III CPPCG, states cannot engage in complicity in genocide, direct and public incitement to genocide, attempt, and conspiracy to commit genocide. This means that, according to the ICJ findings, these obligations have identical content for states and individuals.

2. The Dual Character of Grave Breaches of International Humanitarian Law

As in the case of genocide, duality might not be an obvious feature of the international humanitarian law treaties. The 1949 Geneva Conventions ('GCs') lay down the fundamental obligation to 'respect' and 'ensure respect' for their provisions 'in all circumstances'.[137] Therefore, besides the specific obligations arising out of the Convention, the parties have undertaken a general best efforts obligation to ensure respect to the Conventions by third parties (in a way akin to the aforementioned obligation of Article I CPPCG).[138] With respect to individuals, the parties undertake to enact all necessary legislation to suppress all violations of the GCs.[139] In addition, the parties are obligated to criminalise and 'search' and prosecute persons found in their territory alleged to have committed, or to have ordered to be committed, so-called 'grave breaches', regardless of the nationality of the offenders.[140] Much like the Genocide Convention, the GCs

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137 Common Article 1 GC-I-IV.

138 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16, 114[220]; J-M Henckaerts, 'Article 1: Respect for the Convention' in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2016) at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> MN 166 (ICRC 2016 Commentary).

139 Arts 49(3) GC-I, 50(3) GC-II, 129(3) GC-III, 146(3) GC-IV.

140 Arts 49(2) GC-I, 50(2) GC-II, 129(2) GC-III, 146(2) GC-IV.

establish a framework for their implementation that builds around the familiar relationship between the responsibility of the state under international law and the responsibility of the individual under domestic law.[141]

The dual character of the obligations enshrined in these provisions becomes apparent through the synergy of the GCs and their first Additional Protocol ('AP-I'). Article 85(5) AP-I states that grave breaches of the GCs and the AP-I are to 'be regarded as war crimes'. The term 'war crimes' is not defined in the AP-I, but is generally understood as a 'violation of the laws and customs of war' entailing individual responsibility.[142] The *travaux préparatoires* of the AP-I attest to the international source of such responsibility. The provision of Article 85(5) AP-I was intended to draw a direct connection between the Conventions and the Protocol, on the one hand, and the Nuremberg principles, on the other.[143] Thus, the characterisation of the grave breaches as 'war crimes' was meant to indicate that the GCs and their AP-I complement the list of 'war crimes' contained in the IMT Charter.[144] It follows that such violations entail the responsibility of the individual as a matter of international law independently from their applicability according to domestic law.[145] Of course, customary international law also

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141 eg G Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2006) 9; Parlett (n65) 188.

142 Article 6(b) IMT Charter; R Kolb, 'International Humanitarian Law and its Implementation by the Court' in J Doria, H-P Gasser and MC Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Igor Blishchenko* (Brill 2009) 1015, 1016.

143 eg *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* vol-VI (FDR 1978) 293[80] (Poland).

144 ibid 306 (Yugoslavia); also Y Sandoz, C Swinarski, and B Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949* (ICRC 1987) 1003[3522].

145 Rosenne, State Responsibility and International Crimes (n60) 161.

provides for individual responsibility for the grave breaches of the GCs and, to a certain extent, of AP-I.[146]

As to state responsibility, Article 3 Hague Convention IV and Article 91 AP-I codify the customary rule that the state is 'responsible' and 'liable to pay compensation' for all breaches of the law of armed conflict committed by its armed forces.[147] The responsibility of the state specifically for grave breaches becomes apparent from the letter of common Articles 51, 52, 131, and 148 GCs I to IV which prohibits the parties from absolving each other from any 'liability' arising out of the grave breaches regime.[148] Article 85(1) AP-I extends the application of this 'non-exculpation' clause to grave breaches of the Additional Protocol.[149] This 'non-exculpation' clause serves a dual purpose. First, a state party may not enter into an agreement dispensing with 'any responsibility incurred by itself or any other party (…) to punish persons'.[150] Second, the provision was intended to preclude any agreements by which the vanquished belligerent waives any claims to state responsibility of its opponents arising from grave breaches.[151] The interdependence between the responsibility of the state and that of the

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146 eg J-M Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7 JICJ 683, 691.

147 Art 3 Hague Convention; Art 91 AP-I; as to customary character: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 242[214] ('CO').

148 As to its status under customary international law see J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* vol-I (CUP 2009) 537 (only cursory reference).

149 F Kalshoven, 'State Responsibility for Warlike Acts of the Armed Force' (1991) 40 ICLQ 827, 845-846.

150 *Final Record of the Diplomatic Conference of Geneva of 1949* Vol. II-B (Federal Political Department, 1950-51) 35 (Australia); see also Y Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 JICJ 657, 674.

151 JS Pictet, *The Geneva Conventions of 12 August 1949 - Commentary* vol-I (ICRC 1952) 373; K Dörmann, 'State and Individual Responsibility in the Field of International Humanitarian Law'

individual through which the state acts forms the very *ratio* of the provision.[152] As the Joint Committee opined, 'where a State has obtained a promise that it shall not be held responsible, it would be extremely difficult to condemn an individual agent acting under its orders.'[153] This shows that, as in the case of genocide, there is an inextricable link between the wrongfulness of the act of the individual through which the state acts and the wrongfulness of the act for the state.

The ICJ has made a finding of 'grave breaches of international humanitarian law' on the part of a state in the *Armed Activities* case.[154] In reasoning this finding, the Court did not refer explicitly to the provisions relating to the grave breaches regime of the GCs or AP-I or to state obligations relating to prosecution of individuals for violations of international humanitarian law.[155] Based on this, one could argue that the grave breaches regime is inapplicable to states, mirroring the criticisms voiced against the *Bosnia Genocide* judgment.[156] Nonetheless, such an argument would be misguided for two reasons. First, the prohibitions underlying the grave breaches regime are materially reflected in other provisions of the GCs or the AP-I upon which the Court explicitly relied.[157] Thus, for example, 'wilful killings', which qualify as grave breaches under Article 147 GC-IV, are encompassed in the prohibition of 'murder' under Article 32

(1999) 18 Refugee Survey Quarterly 78, 82; also *Kupreškić and ors* (Judgment) IT-95-16-T (14 January 2000) [517].

152 See ICRC 2016 Commentary on Article 51 GC-I (n138) MN 3018.

153 *Final Record* II-B (n150) 133 (Joint Committee), also 91 (Italy).

154 *Armed Activities* (CO) (n147) 239[207].

155 ibid 243[217].

156 Along the line suggested by Gaeta, On… (n117) 641.

157 *Armed Activities* (CO) (n147) 244[219].

GC-IV.[158] More notably, grave breaches under AP-I can only be committed if the act is in violation of other provisions of the Protocol.[159] This rather reinforces the argument put forward in this thesis that certain rules of the law of armed conflict establish obligations of identical content for states and individuals. Second, in the merits proceedings, the DRC did not make any arguments regarding the obligations arising from the qualification of the acts as grave breaches under the GCs and the AP-I, including the obligation to prosecute individual perpetrators. In this respect, the Court presumably abstained from pronouncing on them because of the procedural principle requiring it to abstain from deciding points not included in the submissions of the parties before it.[160] Indeed, it would have been rather odd for the Court to pronounce on these points without a claim, still less proof, of a violation of the obligation to search and prosecute persons responsible for grave breaches of international humanitarian law.[161] But, as Judge Tomka suggested in his separate opinion, these obligations were clearly applicable in the circumstances of the case.[162] Thus, the Court's findings in the *Armed Activities* case are clearly supportive of the argument put forward in this part that the core

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158 See, eg, Nollkaemper, Concurrence (n1) 663.

159 See Art 85(3) and (4) AP-I.

160 T Ingadottir, 'The ICJ *Armed Activity Case*—Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human rights Violations and Grave Breaches of the Geneva Conventions' (2010) 78 NJIL 581, 594-595; on the *ultra petita* rule see, eg, *Request for Interpretation of the Judgment of November 20th, 1950 in the* Asylum case (Colombia/Peru) (*Colombia v Peru*) (Judgment) [1950] ICJ Rep 395, 402.

161 P Gaeta, 'Grave Breaches of the Geneva Conventions' in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 615, 644. See, similarly, *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 196[146] (where the Court only took note of the contention of the participants that such an obligation existed but did not pronounce on the issue presumably because there was no claim or proof that the obligation was breached).

162 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (Separate Opinion of Judge Tomka) [2005] ICJ Rep 351, 353[9].

prohibitions constituting grave breaches of international humanitarian law are dual obligations.

Beyond the text of the GCs and AP-I, the ICTY Appeals Chamber has set out the criteria for the engagement of individual responsibility with respect to other violations of the law of armed conflict. According to the Appeals Chamber: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, that treaty must be binding on the parties involved;[163] (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[164] The application of this approach and, especially, the legal criteria for establishing whether a specific violation entails individual criminal responsibility are 'far from clear'.[165] But this is unimportant for the purposes of the current argument. What is important is that duality of obligations is embedded in the logic of war crimes. The starting point of the definition of a war crime is to determine 'whether certain acts infringe international law' and then to establish 'whether criminal responsibility attaches to an individual for such an infringement.'[166] In other words, individual responsibility is attached by customary or conventional law to the violation of a rule that is

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163 *Tadić* Interlocutory Appeal on Jurisdiction (n56) [143].

164 ibid [94].

165 T Meron, 'Is International Law Moving towards Criminalization?' (1998) 9 EJIL 18, 24.

166 *'High Command' Case* (n75) 510.

binding in the first place also on states.[167] This means that all violations of international humanitarian law that will engage the responsibility of the individual state organ will at the same time be internationally wrongful acts if attributable to states.[168]

What emerges from this exposition is that the GCs and AP-I, alongside customary international law, establish international obligations of individuals. At the same time, the same conduct invariably constitutes a breach of an international obligation of states. In fact, this duality of obligations is embedded in the development of the corpus of war crimes,[169] and was confirmed by the ICJ.[170] Therefore, certain rules of international humanitarian law envisage dual international obligations of both the state and of the individual through which the state acts.

3. The Dual Character of the Prohibition of Aggression

The prohibition of aggression is another customary obligation of peremptory status[171] whose violation may bring about the concurrent engagement of both state and individual responsibility.[172] This is because a violation of the law on the use of force by a state is a *conditio sine qua non* for the engagement of individual responsibility for the crime of aggression.[173] Yet, the exact contours of such concurrent engagement are not easily

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167 Mettraux (n141) 49.

168 Zimmermann (n10) 17.

169 G Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the *Darfur* Case' (2005) 3 JICJ 539, 541.

170 *Armed Activities* (CO) (n147) 239[207]; *Jurisdictional Immunities* (n23) 141[95].

171 Commentary to Art 40 ARSIWA [4].

172 BI Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Nijhoff 2009) 27; also Nollkaemper, Concurrence (n1) 618.

173 Commentary to Art 58 ARSIWA [3]; Commentary to Art 16 DCCAPSM [4].

discernible. This section argues that the prohibition of aggression is a dual obligation addressing states and individuals in the same way.

From a formal perspective, the source of individual responsibility for aggression has always been a contested issue,[174] although the entry into force of relevant provisions of the Rome Statute renders this perhaps of lesser importance.[175] As an obligation of states, the prohibition of aggression is deeply rooted in the 'fundamental or cardinal principle'[176] of the prohibition of the use of force under the UN Charter and customary international law.[177] The first and practically only instrument that deals with both state and individual responsibility for aggression is UNGA Resolution 3314 on the definition of aggression.[178] This resolution defines the notions of 'aggression' and 'act of aggression'.[179] Additionally, it distinguishes for the purposes of enforcement between 'aggression', that gives rise to state responsibility, and a 'war of aggression' that is a 'crime against international peace'.[180]

The only binding instrument that contains an authoritative definition of the crime of aggression is the Rome Statute. The crime has two main structural features.

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174 IMT Judgment (n53) 216-221; see Kelsen, Will… (n9).

175 But see Milanović, Aggression… (n67); Heller, What… (n99) 50.

176 *Nicaragua* (n138) 100[190].

177 Arts 2(4) and 39 UN Charter; also *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (Separate Opinion of Judge Elaraby) [2005] ICJ Rep 327, 329[10].

178 UNGA Res 3314 (XXIX) (14 December 1974).

179 Art 1 UNGA and Article 2 UNGA Res 3314 (XXIX).

180 Article 5(2) UNGA Res 3314 (XXIX); Y Dinstein, 'Aggression' (2015) MPEPIL [13].

It is defined as a form of intentional participation by an individual (individual act element) in an act of a state against another state (state act element).[181] In Article 8*bis*(1) of the Rome Statute, the individual act element consists of the 'planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of the State, of an act of aggression'. The act of the state must be 'an act of aggression' defined by reference to the UN Charter and the UNGA 3314 Resolution 'which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[182] Upon closer inspection, the individual act element largely corresponds to the form of commission under international criminal law known as indirect perpetration or co-perpetration 'by means of an organisation'—in this context, the state.[183] In a way, the logic of the definition of aggression is that the act of state is attributed to the individual, the state being merely its instrument.[184] In this sense, the wrongfulness of the act of the individual hinges on the application of the prohibition of aggression under the UN Charter, an instrument that is binding only on states.

As far as the interplay between state and individual responsibility is concerned the text of the Rome Statute is open to two interpretations. One reading would be to construe the requirement that the act of aggression which 'by its character, gravity and

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181 Art 6(a) IMT Charter; Art 16 DCCAPSM; Art 8*bis*(1) RSICC; Ambos, Treatise II (n74) 198.

182 Article 8*bis*(1) RSICC.

183 Ambos, Treatise II (n74) 205; cf *Katanga* (Judgment) ICC-01/04-01/07-3436, TC-II (7 March 2014) [1412]; see Chapter 5.III.2.

184 cf K Ambos, 'Article 25' in K Ambos and O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (3nd edn Hart 2016) 979, 994-996; S Sayapin, *The Crime of Aggression under International Criminal Law* (Springer 2014) 258 ('[N]atural persons are…the primary subjects of an act of aggression' (emphasis omitted)).

scale, constitutes a manifest violation of the Charter of the United Nations' as an additional element that qualifies the term 'act of aggression'. The 'manifest' qualification is an element of the individual—not the state—act.[185] Such an approach finds some textual support in the ICC Elements of Crime.[186] Another reading would be to construe it as an element of the definition of the term 'act of aggression'. The state act of aggression constitutes by definition a violation that is manifest in terms of character, gravity, and scale.[187] This means that the extent of the state and the individual obligation would be identical. The ambiguity was undoubtedly intentional, since the definition essentially cloaks the completely antithetical views expressed during the negotiations of the text.[188] Such views boiled down to those arguing that reference should be made to the definition of aggression under UNGA Resolution 3314 without any threshold, and those arguing for a higher threshold for criminalisation of the conduct.[189] The final text, while using the term act of aggression and explicitly referring to Article 2(4) UN Charter and Article 3 of Resolution 3314 in Article 8*bis*(2) RSICC, uses the term 'manifest' violation in Article 8*bis*(1) RSICC that does not appear in the Resolution.[190] As a result,

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185 HH Koh & TH Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 AJIL 257, 269.

186 Art 8*bis*(5), (6) ICC-ASP, 'Elements of Crimes' (3-10 September 2002) *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court – First Session* (ICC-ASP/1/3 and Corr.1) 112*ff.* ('ICC Elements of Crimes').

187 A Pellet, 'Response to Koh's and Buchwald's Article: Don Quixote and Sancho Panza Tilt at Windmills' (2015) 109 AJIL 557, 559.

188 ICC-ASP, 'Report of the Working Group on the Crime of Aggression' ICC-ASP/6/20/Add.1/Annex II (14-22 November 2008) [23]-[29].

189 C Kreß and L von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 JICJ 1179, 1190-1191.

190 ICC-ASP/6/20/Add.1/Annex II (n188) [27].

it is possible to argue that the relevant international obligations of states and individuals differ in material terms.

From the outset, the argument of different thresholds under the respective international obligations of states and individuals seems to be premised on the existence of materially different rules. The prohibition of aggression, the argument goes, is an obligation addressed to states under customary international law and the UN Charter, whereas individuals may be responsible under customary international law for the crime of a 'war of aggression'.[191] Yet, 'war of aggression' as a term of art has a specific meaning. The essential characteristic of 'war', according to the Nuremberg Tribunals, was the 'implementation of a political policy by means of violence'.[192] What made a war unlawful and thus criminal was the 'intent and purpose for which it is planned, prepared, initiated, and waged'.[193] Viewed this way, the crime of aggression as premised on the notion of 'war of aggression' requires a specific aggressive intent expressed in the form of an aggressive policy.[194] The centrality of the aggressive purpose was so pronounced that the Charters of the IMT and IMTFE criminalised even an agreement to commit the crime of a 'war of aggression' as an inchoate offence, that is, essentially

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191 A Cassese, 'On Some Problematical Aspects of the Crime of Aggression' (2007) 20 LJIL 841, 845; Koh & Buchwald (n185) 269-270; C Kreß, 'The State Act Element' in C Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017) 412, 514-517.

192 *'High Command' Case* (n75) 485.

193 ibid 486.

194 Cassese, LJIL (n191) 849; G Werle and F Jessberger, *Principles of International Criminal Law* (3rd edn OUP 2014) 539-540.

the participation in the formulation of an aggressive policy as such.[195] This understanding of the crime of aggression was emphatically rejected early in the negotiations of the aggression amendment, and there is no reference whatsoever to war of aggression or a specific intent requirement in the Statute, Elements, or Understandings.[196] The reason for such inimical stance was presumably the unqualified prohibition of the use of force in the UN Charter, save for the exceptions provided expressly therein.[197] It is commonly understood that the 'manifest' requirement is an objective qualification,[198] unrelated to any specific intent.

A more nuanced argument suggests that the 'manifest' requirement is applicable as an objective qualification of the term 'act of aggression' only in the context of the Rome Statute and as such is only applicable with respect to individuals.[199] Hence, the term 'act of aggression' should not be interpreted by reference to Article 39 of the UN Charter and UNGA Resolution 3314. The definition of an 'act of aggression' under UNGA Resolution 3314 has been used in the practice of the ICJ as coterminous with an 'armed attack' for the purposes of the right of self-defence under Article 51 UN Charter.[200] Such a connection has also a textual basis in the UN Charter, since its French

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195 Art 5(a) IMTFE Charter and Art 6(a) IMT Charter ('participation in a common plan or conspiracy'); see IMTFE, 'Judgment: International Military Tribunal for the Far East' (1 November 1948) <https://www.legal-tools.org/uploads/tx_ltpdb/169.630-717.pdf> 32.

196 S Barriga, 'Negotiating the Amendments on the Crime of Aggression' in S Barriga and C Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (CUP 2011) 5, 28-30.

197 Pellet, Response (n187) 558.

198 Art 8*bis* ICC Elements of Crimes, Introduction [3].

199 Use of Force Committee, 'Final Report on Aggression and Use of Force' (International Law Association, Sydney 2018) <http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf> 28.

200 eg G Nolte and A Randelzhofer, 'Article 51' in B Simma and ors (eds), The UN Charter: A Commentary Vol-II (2nd edn OUP 2012) 1397, 1410-1420.

equally authoritative version uses similar terminology in Article 39 ('*acte d'agression*') and Article 51 ('*agression armée*').[201] The Court inevitably has drawn upon that similarity without ever characterising explicitly an act as an act of aggression.[202] In this light, although aggression is by definition a use of force by a state that requires the fulfilment of a threshold of gravity, such threshold could potentially differ for the purposes of state and individual responsibility. In fact, it might also differ for the purposes of state responsibility too. The threshold for an 'armed attack' or 'act of aggression' for the purposes of the UN Charter and the threshold for a 'serious breach of a peremptory norm' for the purposes of the 'aggravated' regime of state responsibility might differ.[203] In the same vein, the threshold for these state obligations and that of the individual criminal obligation might not necessarily correspond.[204]

Yet, several factors favour the duality of the prohibition of aggression. The Statute explicitly refers to the UN Charter for the definition of the state act element of the crime of aggression. The term 'act of aggression' appears in Article 39 UN Charter and there is no convincing reason to exclude this provision as the starting point for the interpretation of the term.[205] To the extent that the UN Charter entrusts primarily to the UN Security Council the judgment on this matter, it is also apposite to use its practice

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201 Pellet, Response (n187) 560.

202 See for criticism *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (Separate Opinion of Judge Simma) [2005] ICJ Rep 334, 334[2].

203 D Akande and A Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression' in Kreß/Barriga Commentary (n191) 214, 225-226.

204 ibid 229.

205 cf, similarly, T Meron, 'Defining Aggression for the International Criminal Court' (2001) 25 Suffolk Transnational Law Review 1, 11.

as a means for interpretation of Article 39 of the UN Charter.[206] In the relatively few occasions that the Security Council has characterised an incident as an act of aggression, it has also found that such aggressive act constitutes a 'gross'[207] or 'flagrant violation of [the] sovereignty and territorial integrity'[208] of the victim state or a 'flagrant violation of the Charter of the United Nations'.[209] The initial proposal of the threshold element in the Rome Statute used the qualifier 'flagrant'.[210] The use of term 'manifest' in the final text was more likely intended to dispel any subjective connotations of the term 'flagrant' alluding to the notion of 'war' which is totally in dissonance with the virtually unanimously accepted meaning of the UN Charter.[211] Thus, there is no evidence whatsoever to suggest that the drafters of the Rome Statute intended to depart from Article 39 of the UN Charter as far as the objective requirements of an act of aggression are concerned. Rather, the use of the term 'act of aggression' suggests that the drafters of the Statute anchored the definition of Article 8*bis*(1) of the Rome Statute to Article 39 of the UN Charter as interpreted and applied by the Security Council and the General Assembly in Resolution 3314. Whether the notion of an 'act of aggression' so construed is coextensive or more narrow compared to the notion of 'armed attack'

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206 cf, *mutatis mutandis*, *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 9.

207 eg UNSC Res 568 (21 June 1985) UN Doc S/RES/568 OP[1].

208 eg UNSC Res 455 (23 November 1979) UN Doc S/RES/455, PP[7], OP[1]; UNSC Res 527 (15 December 1982) S/RES/527, OP[1]; UNSC Res 546 (6 January 1984) S/RES/546, OP[1]; UNSC Res 567 (20 June 1985) S/RES/567, OP[1]; UNSC Res 571 (20 September 1985) S/RES/571, OP[1]; UNSC Res 574 (7 October 1985) S/RES/574, OP[1]; UNSC Res 577 (6 December 1985) S/RES/577, OP[2]; UNSC Res 602 (25 November 1987) S/RES/602, OP[1].

209 eg UNSC Res 573 (4 October 1985) S/RES/573, OP[1]; UNSC Res 611 (25 April 1988) S/RES/611, OP[1].

210 PCNICC, 'Discussion Paper Proposed by the Coordinator' PCNICC/2002/WGCA/RT.1/Rev.1 (10 July 2002)

211 Barriga (n196) 29(fn146); see the criticisms in that respect: Koh & Buchwald (n185) 270.

in Article 51 UN Charter has no bearing on the duality of the underlying prohibition. After all, Articles 39 and 51 of the UN Charter have a different function.[212] Likewise, it is irrelevant whether an act of aggression thus defined would also constitute a 'serious breach of a peremptory norm of general international law'. It is true that, according to the ILC Commentary to ARSIWA, an act of aggression 'by its very nature require[s] an intentional breach on a large scale'.[213] Nonetheless, the characterisation as a 'serious breach' depends on the circumstances of the breach and relates only to the consequences of that breach for the purposes of state responsibility.[214]

To sum up, in structural terms, the crime of aggression is by definition a wrongful act of a state and a wrongful act of an individual. From a normative perspective, it would be rather odd for public international law to allow 'the rise of two competing definitions of aggression…eclipsing the *jus ad bellum* definition'.[215] Indeed, the logic of aggression essentially hinges on the attribution of a state act of particular character, gravity, and scale to the individual for the purposes of imposing responsibility for this act. Whilst the notions of character, gravity, and scale could conceivably differ for the purposes of individual responsibility and state responsibility (even in its aggravated form), such disparity is controverted by convincing evidence. In the final analysis, the Rome Statute criminalises an 'act of aggression' as defined in the UN Charter. Thus, it

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212 C McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (CUP 2013) 68-69

213 Commentary to Art 40 ARSIWA [8].

214 Commentary to Art 40 ARSIWA [8] and fn651.

215 ME O'Connell and M Niyazmatov, 'What is Aggression? Comparing the *Jus ad Bellum* and the ICC Statute' (2012) 10 JICJ 189, 200; similarly, McDougall (n212) 96-97.

is the same conduct—ie an 'act of aggression' under the UN Charter—that is prohibited for both states and individuals under international law.

4. The Dual Character of the Prohibition of Crimes against Humanity

At the time of writing, there is no binding instrument encompassing state obligations that prohibit crimes against humanity as such. Duality of obligations is a key difference between two different initiatives for the development of a binding instrument on crimes against humanity. On the one hand, the International Law Commission is currently finalising its Draft Articles on Crimes against Humanity ('DACAH'). As will be shown, the core prohibitions of crimes against humanity in such articles appear as binding on both states and individuals. On the other hand, another initiative relating to crimes against humanity aims solely to enhance cooperation for the domestic prosecution of these acts without any regard for the responsibility of states or individuals under international law for the commission of these acts.[216] It is arguable that the relevant obligations are dual under customary international law,[217] the prohibition of crimes against humanity being widely recognized as *ius cogens*.[218] Nonetheless, it is important for the purposes of legal certainty and effectiveness that this duality is clearly spelt out and operationalised. In any case, whatever views one holds on the desirability of such an instrument or its fate, it is still important to examine how the DACAH envisage the duality of the prohibition of crimes against humanity.

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216 See SD Murphy, 'Second Report on Crimes against Humanity' (21 January 2016) A/CN.4/690 [4].

217 Art 7 RSICC; cf HRC, 'Detailed findings of the Independent Fact-Finding Mission on Myanmar' (16 September 2019) A/HRC/42/CRP.5 [213]-[219].

218 *Jurisdictional Immunities* (n23) 141[95]; Commentary to Art 15 ARSIWA [5]; Preamble [4], ILC, 'Prevention and Punishment of Crimes against humanity' in ILC, 'Report of the International Law Commission in its Seventy-first session' (20 August 2019) A/74/10 [44] ('DACAH'); also, eg, T Weatherall, *Jus Cogens* (CUP 2015) 219-223.

In contrast to the Genocide Convention, the DACAH explicitly stipulate that '[e]ach State has the obligation not to engage in acts that constitute crimes against humanity.'[219] Crimes against humanity are defined in the draft articles in terms identical to Article 7 of the Rome Statute.[220] That said, the current ILC draft is ambiguous as to a point that was central in the *Bosnia* and *Croatia Genocide* cases, namely, the issue of complicity and associated offences. On the one hand, Article 6 of the DACAH seems to only enjoin states to criminalise under their domestic law the commission, attempt, ordering or instigation, aiding and abetting, and superior's failure to prevent and punish crimes against humanity. The Commentary does not address the issue of state responsibility for these acts.[221] On the other hand, the Commentary indicates that complicity and associated offences are 'ways by which natural persons might engage in such crimes' implying that these forms of wrongdoing constitute themselves crimes against humanity for the purposes of Article 3 DACAH.[222] Also, there is no indication in the draft that the Commission intended to depart from the core legal findings of the ICJ in the *Bosnia* and *Croatia Genocide* cases that encompassed the obligation not to commit all the acts under Article III CPPCG.[223] In this respect, Article III CPPCG is also couched in terms of an obligation to 'criminalise' providing which conduct 'shall be

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219 Article 3(1) DACAH; Commentary to Art 3 DACAH [3] citing *Bosnia Genocide* (n46) 113[166].

220 Art 2 DACAH; Art 7 RSICC; SD Murphy, 'Crimes against Humanity and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2017) 109 AJIL 822, 835.

221 cf Commentary to Art 3 DACAH [6] citing only Arts 16-18 ARSIWA.

222 Commentary to Art 6 DACAH [5].

223 Commentary to Art 3 DACAH [3].

punishable'.[224] Thus, on balance, the obligation not to engage in acts constituting crimes against humanity includes the obligation to abstain from aiding, abetting, and assisting, or contributing to, such acts and, potentially, from attempting such acts.[225]

It could be maintained that such obligations would be redundant since the conduct that is characterised as crimes against humanity would be unlawful if committed by a state as a violation of its human rights obligations under treaties or customary international law. On a basic level, crimes against humanity, much like genocide, are 'essentially derived from human rights law'.[226] However, state obligations arising under human rights instruments differ from the dual obligation not to commit crimes against humanity in two significant respects. First, whilst some human rights might be subject to derogation in exceptional situations,[227] the prohibition of crimes against humanity is absolute.[228] Second, a state's human rights obligations concern persons which are subject to that state's jurisdiction.[229] State jurisdiction in this context is 'primarily

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224 cf *Bosnia Genocide* (n46) 117[174]; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Separate Opinion of Judge Tomka) [2007] ICJ Rep 310, 335-336[47].

225 SD Murphy, 'Fourth Report on Crimes against Humanity' (18 February 2019) A/CN.4/725 [117] (mentioning that the obligation not to engage in acts constituting crimes against humanity includes the obligation not to assist such acts).

226 D Akande and A Tzanakopoulos, 'The Crime of Aggression in the ICC and State Responsibility' (2017) 58 HJIL Online 33, 34.

227 eg Art 4 ICCPR; Art 15 ECHR.

228 Art 3(3) DACAH.

229 eg Art 2(1) ICCPR; Art 1 ECHR.

territorial'.[230] In particular, although the jurisdiction requirement does not have an exclusively territorial character in international human rights law,[231] it is not completely unconstrained by spatial considerations.[232] By contrast, the obligation not to engage in acts constituting crimes against humanity is 'not limited by territory' *simpliciter*.[233] To paraphrase the ICJ, '[t]he significant relevant condition concerning the obligation not to commit [crimes against humanity] and the other acts enumerated in [draft] Article [6] is provided by the rules of attribution'.[234] So, state responsibility for crimes against humanity or associated acts will arise whenever and wherever these acts are committed by an individual whose acts are attributable to the state.

The DACAH constitute an illustrative example of the operation of the duality of obligations in synergy with human rights instruments. So, for example, state acts of encouragement or support to crimes against humanity committed abroad by individuals whose acts are not attributable to the state would be wrongful under DACAH. For example, a state will act wrongfully if a state organ provides weapons or training to, or shares information with, an agent of another state or non-state actor in the knowledge that they will be used for the commission of crimes against humanity in another state.[235] Such state acts of encouragement and support do not seem to constitute breaches of

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230 eg *Wall AO* (n161) 179[109]; *Banković and ors v Belgium and ors* [GC] 2001 ECHR-XII 333, 351-352[59].

231 eg *Wall AO* (n161) 179[109]; *Medvedyev v France* [GC] 2010 ECHR-III 61, 91-92[64].

232 See, eg, *Al-Skeini and ors v the United Kingdom* [GC] 2011 ECHR-IV 99, 166-170[130]-[142]; *Hirsi Jamaa and ors v Italy* [GC] 2012 ECHR-II 97, 131[72]; *Jaloud v the Netherlands* [GC] 2014 ECHR-VI 229, 297-299[139]; and, notably, M Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 EJIL 121, 130-131.

233 Commentary to Art 3 DACAH [4] citing *Bosnia Genocide* (n46) 120[183].

234 *Bosnia Genocide* (n46) 120[183].

235 See below Chapter 4.IV.

human rights instruments under the mainstream interpretation.[236] Thus, the duality of the prohibition of crimes against humanity serves, or could serve, to fill important gaps in the protection of elementary human rights.

To sum up, the DACAH lay down prohibitions relating to the commission of crimes against humanity and associated acts as dual obligations along the lines established in the Genocide Convention. It has also been shown that the prohibition of crimes against humanity under the DACAH differs in several respects from the current framework of international human rights law. It is at least arguable that these provisions of the DACAH merely codify rules of customary international law which possess a peremptory character.[237]

IV. Duality of Obligations across Formal Sources: Substance over Form

1. Rules on the Identification and Interpretation of International Obligations of Individuals and General International Law

The fact that an instrument establishes dual obligations under international law does not necessarily mean that the same instrument will always constitute the legal backdrop of a specific invocation of state responsibility or of a legal action against an individual. For example, the prohibition of genocide is applicable to states pursuant to both the Genocide Convention and customary international law.[238] Obligations stemming from treaties and customary international law 'retain their separate existence' even if they

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236 See, *mutatis mutandis*, M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 125-126; M Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 EJIL 817, 821-822.

237 Preamble [4] DACAH and Commentary to Preamble DACAH [5]; also G Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 236, 252; along similar lines, D Scheffer, 'Crimes Against Humanity and the Responsibility to Protect' in LN Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) 305, 320.

238 *Reservations AO* (n94) 23.

are identical in content.[239] Therefore, either rule can afford a basis for the invocation of state responsibility. In relation to individuals, although the Genocide Convention clearly intends to address them directly, in practice their responsibility under international law will not necessarily derive directly from that Convention. The Statutes of the *ad hoc* Tribunals are mainly jurisdictional in character.[240] The Tribunals formally apply customary international law or specific treaty provisions mentioned therein.[241] More importantly, the ICC is bound to apply its own constituent instruments in the first place.[242] In practical terms, the provisions of the Rome Statute defining the crimes under the jurisdiction of the ICC do not only have jurisdictional implications; they rather find direct application and, therefore, they are substantive in character.[243] The international obligations of individuals stemming from customary international law, the Rome Statute, or other treaties also retain their formally separate existence.[244] These considerations are applicable for all obligations identified as dual in this study. The rules applicable to states under the Genocide Convention or the GCs or the UN Charter or customary international law, on the one hand, and the rules addressed to individuals under

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239 *Nicaragua* (n138) 95[178].

240 Milanović, Is… (n54) 28-29; *Milutinović and ors* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise) IT-99-37-AR72, AC (21 May 2003) [9]; also *Delalić and ors* (Judgment) IT-96-21-A (20 February 2001) [178].

241 UNSG, 'Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) S/25704 [34]; UNSG, 'Report of the Secretary General pursuant to Paragraph 5 of Security Council Resolution 955 (1994)' (13 February 1995) S/1995/134 [11]-[12]; see also M Milanović, 'State Responsibility for Genocide: A Follow Up' (2007) 18 EJIL 669, 681.

242 Art 21(1)(a) RSICC; *Al-Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, PTC-I (4 March 2009) [44]; eg GM Pikis, *The Rome Statute for the International Criminal Court* (Nijhoff 2010) 78.

243 In this sense: Milanović, Is… (n54) 34-38; see, eg, *Katanga* TCJ (n183) [39]-[40].

244 *Bemba Gombo* (Judgment) ICC-01/05-01/08-3343, TC-III (21 March 2016) [72].

the Rome Statute or customary international law, on the other, retain a formally separate existence.[245]

The purpose of this section is to establish whether, and if so to what extent, the formal separation of the relevant rules applicable to states and individuals leads to a discrepancy in material terms between the rules addressed to states and those addressed to individuals.[246] It is trite that 'a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.'[247] Whether two identical norms will be interpreted or applied in a similar manner depends in part on the compatibility of any general rules that might govern the identification and interpretation of these primary norms.[248]

As to customary international law, it is established that the principle *nullum crimen sine lege* does not preclude the criminal responsibility of individuals on the basis of customary international law.[249] However, it has been suggested that the 'elements of

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245 eg *Bosnia Genocide* (Kreća) (n126) 512[90.1].

246 eg Gaeta, On… (n117) 641-642; Cassese, LJIL (n191) 845.

247 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 76[10].

248 *mutatis mutandis*, A Nollkaemper, 'The Power of Secondary Norms to Connect the International and National Legal Orders' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 45, 47.

249 With respect to the *lex scripta* requirement, cf, eg, Art 15(2) ICCPR; Art 7(2) ECHR; *Kononov v Latvia* ECHR 2010-IV 35 [205]-[213]; Ambos, Treatise (n74) 92-93.

the customary law process' may not be 'analogically applicable to international criminal law'.[250] That is because the principle *nullum crimen sine lege* entails also a requirement of specificity of criminal regulation (*lege certa*) that is absent or under stress in the case of customary international law.[251] Yet, this criticism is misplaced. It is true that the ICTY reserved its power to refrain from exercising its jurisdiction over a crime listed in its Statute, 'if customary international law d[id] not provide a sufficiently precise definition'.[252] However, the ICTY did not lay down any alternative criteria for the identification of rules of customary international law. Indeed, as the ILC opined, the principles on the identification of customary international law are based on the criteria of state practice and *opinio iuris* which are the same 'in all fields of international law',[253] international criminal law being no exception.[254] Besides, whether a rule of customary international law establishes an international obligation of individuals or whether it is consonant with the specificity requirement are matters pertaining to the

250 Y Kirakosyan, 'Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared' in L Van Den Herik and C Stahn, *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 149, 154.

251 ibid 154-155.

252 *Vasiljević* (Judgment) IT-98-32-T (29 November 2002) [202].

253 Commentary to Conclusion 2 [6], ILC, 'Conclusions on the Identification of Customary International Law' in ILC, 'Report of the International Law Commission – Seventieth Session' (30 April-1 June and 2 July-10 August 2018) A/73/10 [66].

254 M Wood, 'First Report on Identification of Customary Law' (17 May 2013) A/CN.4/663 [68]-[75]; cf, also, from a normative point of view: T Rauter, *Judicial Practice, Customary International Criminal Law and* Nullum Crimen Sine Lege (Springer 2017) 233-234.

content of the rule.[255] In this respect, the identification of a rule, including one of customary international law, necessarily precedes its interpretation or the assessment of its content, be that its addressees or its specificity.[256]

In addition, the interpretation of treaty rules is governed by the same principles regardless of the content of the underlying obligations.[257] In principle, special interpretative principles by virtue of a special rule of international law can displace any interpretative rules under general international law. In this vein, it has been argued that the principle of legality as enshrined in the Rome Statute displaces the customary rules of treaty interpretation wholly or partly.[258] Yet, it is rather unclear how the customary rules of interpretation contradict the principle of legality. On its face, the Rome Statute being a treaty, the only existing, accessible, and foreseeable international rules to positively ascertain the content of a treaty provision would be the ones reflected in the VCLT. Unsurprisingly, not only has the ICC confirmed the applicability of the customary rules of treaty interpretation reflected in Articles 31 and 32 VCLT, but it has also confirmed that 'the Vienna Convention sets forth one general rule of interpretation … and one alone.'[259] This means that the interpretation of the Rome Statute 'consists of a *single*

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255 eg Kjeldgaard-Petersen (n81) 6.

256 cf, more generally, J D'Aspremont, 'The Idea of "Rules" in the Sources of International Law' (2014) 84 BYBIL 103, 117; P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126, 138-139.

257 R Kolb, 'Is There a Subject-Matter Ontology in Interpretation of International Legal Norms?' in M Andenas and E Bjorge (eds), *A Farewell to Fragmentation* (CUP 2015) 473, 485.

258 Art 22 RSICC; eg D Jacobs, 'International Criminal Law' in J Kammerhofer and J D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 451, 468-470; Akande, Sources (n59) 44-45; LN Sadat and JM Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 LJIL 755, 762-763.

259 *Katanga* TCJ (n183) [44]; on the status of Arts 31 and 32 VCLT see eg *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, 812[23]; *Bosnia Genocide* (n46) 109-110[160].

combined operation, which places appropriate emphasis on the various means of interpretation indicated … in articles 31 and 32 [VCLT].'[260]

Undoubtedly, the confusion stems from a misunderstanding of the permissible limits of the interpretative exercise under the customary rule of interpretation. It is common to every legal system of responsibility that an act does not constitute a breach of an obligation unless the subject of that obligation is bound by the obligation in question at the time the act occurs.[261] Doctrines of strict interpretation or the impermissibility of analogy are corollaries of this fundamental principle.[262] Yet, such doctrines are useless in ascertaining the content of a legal rule; they are by definition a last resort when positive interpretative means fail. As an ICC Trial Chamber has very aptly found,

> th[e] principle [ie *in dubio pro reo*] only entails that, where doubt cast by an equivocal term or phrase as to the exact meaning of a provision cannot be dispelled by the General Rule or supplementary means of interpretation, it must be resolved in favour of the subject…and not in favour of the drafter, who was unclear. [263]

General international law also recognises this notion of strict interpretation as supplementary means of interpretation.[264]

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260 Conclusion 2(5), ILC, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission' in ILC, 'Report of the International Law Commission – Seventieth Session' (30 April-1 June and 2 July-10 August 2018) A/73/10 [51] (emphasis added).

261 Art 13 ARSIWA; Art 22(1) RSICC; ILC, 'Report of the ILC on the work of its twenty-eighth session' (1976) II(2) YbILC 1, 90[11].

262 Art 22(2)-(3) RSICC; *Katanga* TCJ (n183) [51]; eg, see Commentary to Art 13 ARSIWA [9]; (for the implications of the intertemporal rule for treaty interpretation).

263 *Katanga* TCJ (n183) [53].

264 *Territorial Jurisdiction of the International Commission of the River Oder (UK and ors v Poland)* [1929] PCIJ Ser A No 23, 26; also R Jennings and A Watts, *Oppenheim's International Law* (9th edn OUP 1992) 1278; WTO, *EC – Measures Concerning Meat and Meat Products (Hormones) – Appellate Body Report* (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R [165].

Similarly, the principle of legality as enshrined in Article 22(2) RSICC does not prohibit all uses of analogy in the interpretation of the definitions of crimes,[265] as this would render certain provisions of the Statute meaningless.[266] It only circumscribes the use of analogy by precluding the *extension* of the definition of a crime (read: an international obligation) in order to attach legal consequences to an act that was not criminalised (read: did not breach an international obligation in force) at the time of commission.[267] In this sense, it does not materially depart from the principle applicable to states, since recourse to analogy cannot extend 'the scope and substance of the commitments entered into' by a state.[268] As a result, it is hard to see how the principle of legality as encompassed in the Rome Statute contradicts in any way the customary rule of interpretation reflected in the VCLT.

To sum up, the duality of certain obligations is not controverted by any disparity in the general framework for the identification and interpretation of rules of international law as it applies to states and individuals. From a normative perspective, this result is unsurprising. Seemingly disparate considerations converge on the necessity of clear standards of law-ascertainment. In the case of individuals, the main consideration

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265 P Currat, 'L'interprétation du Statut de Rome' (2007) 20 Revue québécoise de droit international 137, 152-154; see also MC Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 306; Special Panel for the Trial of Serious Crimes in the District Court of Dili, *Da Silva* (Judgement) Case No 04a/2001 (5 December 2012) [75] (interpreting the identical provision of Art 12.2 UNTAET Regulation No 2000/15).

266 See, notably, Art 7(1)(k) RSICC ('Other inhumane acts of a similar character…') and Bassiouni (n265) 406.

267 W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 548.

268 cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, 419-420[62]-[63]; more generally, Anzilotti, Cours (n9) 116; K Strupp, 'Les règles générales du droit de la paix' (1934) 47 RdC 259, 337-338; *contra* S Vöneky, 'Analogy in International Law' (2008) MPEPIL [8]-[9].

is the principle of legality.[269] In the case of states, it is the principle of sovereignty.[270] Indeed, the preponderance of evidence suggests that the rules on the identification and interpretation of rules of international law do not differ depending on whether these rules apply to states or individuals. Differences, if any, in interpretative outcomes do not arise because of the incompatibility of the applicable principles, but because of the application of the same principles to different instruments.[271] Most relevant for this inquiry are the constituent instruments of the courts or tribunals implementing the rule. The next sub-section examines this point.

2. Duality of Obligations and the Statutes of International Criminal Courts and Tribunals

Plurality of implementing agencies has always been an intrinsic feature of international law.[272] States are free to settle their disputes in whatever way they deem fit.[273] Evidently, the fact that states enjoy freedom to choose the means through which they will settle their legal disputes does not impact the content of their international obligations. In the same vein, the application of all the rules establishing international obligations of individuals has been entrusted to different implementing agencies from those available to states. Leaving domestic implementation aside, international criminal courts and tribunals are competent with respect to the international obligation(s) of individuals. State compliance with their own obligation(s) is determined normally in a decentralised

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269 cf, *mutatis mutandis*, Jackson, Complicity (n116) 188.

270 ibid.

271 Kolb, Is… (n257) 481; R Gardiner, *Treaty Interpretation* (2nd edn OUP 2015) 483; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) [2015] ITLOS Rep 4 [57].

272 eg, L Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28 EJIL 13, 16-30.

273 Art 33 and 95 UN Charter.

manner by states, or by some international dispute settlement mechanism, or other competent organs like the political organs of the UN.[274] However, the fact that different mechanisms exist for the implementation of state and individual responsibility is not as such an indication that different substantive standards apply.[275] Equally irrelevant for the underlying substantive law is the fact that international courts and tribunals are usually not formally bound by a finding given by other international courts or tribunals.[276] The specific statutory frameworks of these implementing agencies define which body of law they are tasked to apply and it is on that basis only that substantive discrepancies might arise. It is therefore appropriate to have a look at the specific contexts where the prohibitions in question find application.

A common feature of the constituent instruments of international criminal courts and tribunals is that they often contain identical provisions or explicitly refer to instruments that are primarily applicable to states. With respect to genocide, in the context of the *ad hoc* Tribunals, Articles 4 ICTY and 2 ICTR Statutes reproduce Articles II and III of the Genocide Convention verbatim. However, these provisions only define the Tribunals' jurisdiction. For that reason, the core prohibitions of the Genocide Convention have found direct application with regard to individuals both as treaty rules[277]

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274 A Pellet, 'D'un crime à l'autre – La responsabilité de l'État pour violation de ses obligations en matière de droits humains' in *Études en Honneur du Professor Rafâa Ben Achour* (Konrad Adenauer Stiftung 2015) 317, 335; Webb (n12) 21-23; see, eg, Arts VIII and IX CPPCG; Art 2(4), 39, and 51 UN Charter.

275 cf Webb (n12) 153-158.

276 See eg *Karadžić* (Judgment) IT-95-5/18-AR98bis.1 (11 July 2003) A-2330[94]; *Bemba Gombo* TCJ (n244) [72]; *Croatia Genocide* (n108) 133[461].

277 eg *Kajelijeli* (Judgment) ICTR-98-44A-T (1 December 2003) [802]; *Muhimana* (Judgment) ICTR-95-1B-T (28 April 2005) [492].

and as reflective of customary rules of identical content.[278] Moreover, although not formally bound by judgments of the ICJ, the ICTY has deferred to the ICJ's interpretation of the prohibition of genocide, acknowledging that 'the ICJ is (…) the competent organ to resolve disputes relating to the interpretation of the Genocide Convention.'[279] In the context of the ICC, Article 6 RSICC relating to genocide is materially identical to Article II CPPCG, albeit a 'curious feature' of the RSICC provision is that it does not refer to the Genocide Convention by name.[280] Yet, a Pre-Trial Chamber has found that 'the definition of the crime of genocide provided for in article 6 of the Statute *is the same* as that included in article II of the 1948 Genocide Convention.'[281] Therefore, the ICC has made clear that the Statute does not materially depart from the Genocide Convention, and, indeed, has been inclined to apply them interchangeably with the customary or treaty prohibitions, when circumstances so require. Conversely, the ICJ takes into account 'where appropriate, of the decisions of international courts and tribunals … in examining the constituent elements of genocide'.[282] All these findings affirm that the constituent elements of genocide in all those contexts do not materially differ, but rather that all these courts apply a materially identical rule.[283]

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278 eg *Krstić* (Judgment) IT-98-33-T (2 August 2001) [541]; *Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [495].

279 *Tolimir* (Judgment) IT-05-88/2-A (8 April 2015) [226].

280 S Rosenne, 'The International Criminal Court and the International Court of Justice: Some Points of Contact' in J Doria and ors (n142) 1003, 1004.

281 *Al-Bashir* AW-2009 (n242) [121] (emphasis added).

282 *Croatia Genocide* (n108) 61[129].

283 See, eg, Commentary to Art 15 ARSIWA [3] and fn257; also V-Đ Degan, 'Responsibility of States and Individuals for Genocide and other International Crimes' in I Buffard, J Crawford, A Pellet, and S Wittich (eds), *International Law between Universalism and Fragmentation—Festschrift in Honour of Gerhard Hafner* (Nijhoff 2008) 511, 514.

As to grave breaches of international humanitarian law, both the ICTY Statute and the ICTR Statutes contain explicit references to the Geneva Conventions and their Protocols.[284] In addition, the Appeals Chamber has affirmed the application of Article 85 AP-I—that enumerates the violations that are criminalised under AP-I—*qua* treaty law.[285] Besides, as has been shown, the duality of the obligations that bind individuals according to customary international humanitarian law is a necessary implication of the approach of the *ad hoc* tribunals.[286] The Rome Statute not only contains materially identical provisions to Common Article 3 and the grave breaches regime of the Geneva Conventions, but it also incorporates them by reference.[287] In addition, although no specific reference is made to the Additional Protocols or the Hague Regulations in the RSICC, several provisions of those instruments are reflected in material terms in the Statute.[288] Moreover, these rules are covered by the chapeau reference to 'serious violations of the laws and customs applicable in…armed conflict…, within the established framework of international law'.[289] Indeed, the ICC has shown its willingness to apply the Geneva Convention and their Protocols alongside other instruments of the law of

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284 Art 2 ICTY Statute (grave breaches of GCs); Art 4 ICTR Statute (Common Article 3 and AP-II).

285 eg *Kordić & Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) [41]-[42], [63].

286 See text accompanying nn163-167.

287 Art 8(2)(a), 8(2)(c), 8(2)(b)(xxii) and (xxv), and 8(2)(e)(vi) RSICC

288 On the differences between Art 85 AP-I and Art 8 RSICC see Henckaerts, The Grave… (n146) 691; P Gaeta, 'The Interplay Between the Geneva Conventions and International Criminal Law' in A Clapham, P Gaeta, and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 737, 743-744. On the specific provisions of the Hague Regulations reflected in the RSICC see: R Bartels, 'The Interplay between International Human Rights Law and International Humanitarian Law during International Criminal Trials' (2018) 12 Human Rights & International Legal Discourse 44, at fn24.

289 Art 8(2)(b) and (e) RSICC.

armed conflict when circumstances require it.[290] This means not that discrepancies cannot arise from the interpretation and application of the relevant provisions in light of their contexts.[291] There are similarly minded prohibitions in international humanitarian law addressed to states that are even more extensive in scope compared to the ones addressed to individuals, the prohibition of excessive collateral civilian casualties being a case in point.[292] The explicit reference to the Geneva Conventions and the chapeau reference to the 'established framework of international law' serve thus a delimiting role:[293]

> If customary or conventional international law stipulates in respect of a given war crime set out in…the Statute an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it.[294]

This means that the ICC's obligation to apply in the first place its constituent instruments under Article 21 RSICC has limitations. Violations constituting war crimes under the Rome Statute must constitute at the same time, at the very least, violations of the law of applicable in armed conflict. To that end, the ICC must either interpret the

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290 eg *Bemba Gombo* TCJ (n244) [70]; *Lubanga* (Judgment) ICC-01/04-01/06-3121-Red, AC (1 December 2014) [277].

291 As to the general point see: M Forteau, 'Les renvois inter-conventionnelles' (2003) 49 AFDI 71, 93; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) (Separate Opinion of Judge Gaja) [2015] ICJ Rep 394, 394-395[2].

292 Y Arai-Takahashi, 'Excessive Collateral Civilian Casualties and Military Necessity – Awkward Crossroads in International Humanitarian Law between State Responsibility and Individual Criminal Liability' in C Chinkin and F Baetens (eds), *Sovereignty, Statehood and State Responsibility – Essays in Honour of James Crawford* (CUP 2015) 325, 327-329.

293 eg *Lubanga* ACJ (n290) [322].

294 *Ntaganda* (Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9") ICC-01/04-02/06-1962, AC (15 June 2017) [54].

substantive provisions of the Statute more narrowly so as to materially coincide with the rules applicable in armed conflict or *in extremis* directly apply the more restrictive rule of that law. In this way, obligations of individuals under the Rome Statute cannot be more extensive than obligations provided primarily for states under the international law of armed conflict.[295]

The drafting techniques employed for the definition of crimes against humanity and aggression reveal a pattern. On the one hand, the DACAH explicitly establish the obligation of states not to engage in acts constituting crimes against humanity which are defined in identical terms with Article 7 RSICC.[296] This is meant to show that these provisions are substantively identical.[297] On the other hand, the definition of the crime of aggression in Art 8*bis* RSICC refers explicitly to the UN Charter and UNGA Resolution 3314 and reproduces their wording verbatim. This implies 'more than a mere cite of source'.[298] Indeed, these formally distinct rules seem to have a closer relationship than being mutually 'relevant' for the purpose of interpretation.[299] The relationship between the formally different provisions establishing the definition of crimes against humanity and aggression for states and individuals is much closer than the relationship that these provisions have, say, with international human rights law or *jus ad bellum*,

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295 A Zimmermann, 'Comment: Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law—Synergy and Conflict?' in W Heintschel von Heinegg and V Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer 2007) 215, 219.

296 Art 2 DACAH.

297 Preamble [7] DACAH and Commentary to Art 2 DACAH [1] and [8].

298 Y Dinstein, *War, Aggression and Self-Defense* (5th edn CUP 2011) 139.

299 Forteau (n291) 77-81; see Art 31(3)(c) VCLT.

respectively. Rather, these techniques of verbatim incorporation of the rule or incorporation by reference to the formal source of the rule (*renvoi*) presumably reflect the parties' intention to avoid to the maximum extent possible any substantive discrepancies in the parallel interpretation and application of these instruments. They signify that these formally distinct rules are the same in material terms or, at the very least, that the rule applicable to individuals cannot exceed in substantive terms the rule of international law applicable to states to which it refers.

This inquiry has identified two ways in which the duality of the obligation is established and maintained across formally distinct sources. First, states might choose to formulate international obligations of states and individuals in the exact same terms, as they did with genocide and crimes against humanity. Second, whenever states establish an obligation binding on all individuals, they introduce a direct *renvoi* to an instrument binding on states. As a result, obligations of individuals cannot be more extensive than obligations provided primarily for states.

V. Interim Conclusion

This chapter has recalled the default position of the individual under international law and the gradual departure of international law from absolute state-centrism. In principle, the conduct of individuals–including those through which the state is acting–is not regulated by international law. Acts of individuals are relevant to international law as acts of the state or as acts the occurrence of which the state is obligated under some rule to prevent or supress. Any ensuing responsibility for the state and the individual, even if it relates to the same conduct, will arise under different legal orders; that is, under international law for the state and under domestic law for the individual. Nevertheless, there is no rule in international law that prevents states from imposing jointly or collectively obligations on individuals. In principle, international obligations may address

individuals regardless of their link to a state and, as a result, they are distinct from international obligations addressed to the state. However, the attempt to disassociate the state and the individual through which the state is acting leads to incompatibilities. For the purposes of state responsibility, the state can only act through individuals and, therefore, the notions of the state and its individual organ are virtually indivisible.

On account of this fundamental premise of international law, the substantive law addressing the state and the individual through which the state acts coalesces into a 'duality' of certain obligations, so that the same conduct is unlawful both for the state and the individual. It has been demonstrated that certain formal instruments establish obligations of identical content for states and individuals. Gradually, such obligations have been transcribed to other instruments and have also attained the status of rules of customary international law. As a result, at least the core prohibitions of genocide, aggression, war crimes, and crimes against humanity can be described for analytical purposes as a set of formally distinct rules separately addressed to states and individuals.[300] However, these rules materially reflect the same underlying core prohibitions under treaty and customary international law that were intended to address both states and individuals.

This chapter has also examined the implications of this formal bifurcation of rules establishing dual obligations from the perspective of general international law and with respect to specific instruments establishing implementing agencies for the responsibility of individuals. In this respect, it has been shown that the same rules on the identification and interpretation of international legal rules apply regardless of their content or addressees. Any divergence concerning the content of the applicable obligation can

[300] Along similar lines, Dominicé (n86) 152; O'Keefe, ICL (n6) 80-81.

occur only as a result of the application of the same principles to different instrument(s). A closer look at these different instruments demonstrates that the rules establishing dual obligations remain entangled either because they are identically phrased or because these instruments contain direct references (*renvoi*) to each other. This entanglement means that they are not merely mutually relevant for the purposes of interpretation but rather bound in a much closer dynamic relationship. The content of one rule is co-determined by the content of the other rule. Specifically, the techniques of verbatim incorporation or *renvoi* allow formally different but materially identical rules to be applied interchangeably, whereas the legal findings of one body to be used by another directly as an authoritative or highly convincing determination of the (materially) same rule. Even in situations where differentiations exist, the technique of *renvoi* ensures that international obligations imposed on individuals under all circumstances do not exceed in material terms the obligations of states. To this end, a seemingly broader international obligation of individuals needs to be interpreted as coextensive–ie identical–with the international obligation of states and *in extremis* the narrower obligation applicable on states is directly applied on individuals.

Chapter 3. Duality of the Internationally Wrongful Act

I. Introduction

The essence of the duality of obligations is that the same conduct is wrongful for both the state and the individual through which the state acts. However, the definition of the conduct that will trigger responsibility is also dependent upon the parallel application of the 'general' rules governing the establishment of state and individual responsibility under international law.[1] These are the rules of international law that establish the general conditions under which a state or an individual is considered responsible for internationally wrongful conduct regardless of the content of the specific international obligation allegedly violated.[2] In plain terms, these rules determine in a general way when a state or an individual is responsible and for what.

The establishment of state and individual responsibility is governed by different general rules both in form and, to a large extent, in substance.[3] From a formal perspective, the general conditions for the establishment of individual responsibility are provided for in customary international law and applicable treaties, most notably, the general provisions of Part 3 of the Rome Statute. These rules prescribe the conditions under

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1 This chapter uses the term 'general' rules in this context in preference to other similar terms like 'secondary' or 'trans-substantive' along the lines suggested in: General Commentary to ARSIWA [1]. On other terms see: DD Caron, 'The Basis of Attribution and other Trans-substantive Rules' in RB Lillich, DB Magraw and DJ Bederman (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1998) 109, 110. On the conceptual difficulties of classifying the rules relating to the establishment of responsibility in whole or in part as secondary rules in the conventional sense, that is, as rules establishing the consequences of a wrongful act see, eg, G Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) 97 RDI 981*ff*.

2 G Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 236, 247-248.

3 BI Bonafé, 'Reassessing Dual Responsibility for International Crimes' (2016) 73 Seqüência (Florianópolis) 19, 21.

which an individual is responsible for a crime. The general conditions for the establishment of state responsibility are found in customary international law as it is for the most part reflected in Part One ARSIWA. They define in general terms which conduct constitutes an act of state and under what general conditions an act of state is considered wrongful.

In substantive terms, the rules on the engagement of state and individual responsibility also differ on account of the different aims they pursue and the vast disparity between state and individual obligations and capacities under international law.[4] First, the rules on individual responsibility complement (at least, for the time being) only a handful of obligations and are geared towards the imposition of criminal sanctions. The rules of state responsibility are meant to encompass all possible undertakings of states and, as such, are by design agnostic as to the content of the obligation or 'the nature of the wrongful act'.[5] As a result, the two regimes of responsibility operate at a different 'level of abstraction' (« *niveau d'abstraction* »).[6] Notably, whilst culpability is an essential requirement of individual responsibility even at the international level,[7] state responsibility often arises even in the absence of fault. Hence, fault is not a general condition for the establishment of state responsibility.[8] Accordingly, certain rules might be general for the purposes of the establishment of individual responsibility without

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4 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, 61[129].

5 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 209[401].

6 cf P Reuter, 'Principes de droit international public' (1961) 103 RdC 425, 584-585 (discussing how the rules of state responsibility compare to domestic systems of civil and criminal liability).

7 eg S Glaser, 'Culpabilité en droit international pénal' (1960) 99 RdC 467, 482-483.

8 eg F Capotorti, 'Cours général de droit international public' (1994) 248 RdC 9, 253.

having the same potential for generalisation in the context of state responsibility. Second, individuals incur international responsibility in principle regardless of any connection to a state.[9] Thus, as will be demonstrated below, certain principles that govern the engagement of state responsibility might be irrelevant or inapposite for the purposes of individual responsibility.[10] Accordingly, 'dual' obligations give rise to two autonomous types of responsibility and 'each responsibility is governed by its own rules'.[11] The state and the individual are independently and individually responsible for their own internationally wrongful conduct.

The question thus arises whether the general rules of the law of state or individual responsibility militate against the duality of the underlying breach or, conversely, whether they tend to accommodate or even mandate such duality. The content of obligations is often co-dependent upon their systemic context.[12] The fact that the two regimes apply independently does not preclude overlaps between the responsibility of different entities. Certain situations are inherently complex, in that they cannot be readily reduced into completely independent relationships.[13] Even if the definition of a state

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9 *Tadić* (Judgment) IT-94-1-T (7 May 1997) [573].

10 P-M Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State' in A Cassese, *The Rome Statute of the International Criminal Court: A Commentary* vol-II (OUP 2002) 1085, 1096.

11 J Salmon and P Klein, 'Questions relatives à l'article 31, §1, c du Statut de la Cour Pénale Internationale – Réponses à la question 1, a)' (2000) 33 RBDI 363, 364; also Dupuy, International… (n10) 1098.

12 A Nollkaemper, 'The Power of Secondary Norms to Connect the International and National Legal Orders' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011); E Kok, 'The Principle of Complicity under International Law–Its Application to States and Individuals in Cases involving Genocide, Crimes against Humanity and War Crimes' in L van den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Nijhoff 2012) 557, 586.

13 A Clapham, 'Issues of Complexity, Complicity and Complementarity: from the Nuremberg Trials to the Dawn of the new International Criminal Court' in P Sands (ed), *From Nuremberg to The Hague: The Future of international Criminal Justice* (CUP 2009) 30, 33-34.

organ hinges wholly or partly on the status of an entity under the law or practice of the state or on the nature of the functions that it exercises,[14] 'a [state] organ [is] nothing but a human being or collection of human beings'.[15] The foundational principles of independent responsibility and of the unity of the state militate in favour of an 'individualistic' approach to the establishment of state responsibility.[16] This means that the conduct element forms a bridge between the law of state responsibility and the law of individual responsibility; they both rely on the empirical establishment of the conduct of natural persons.[17] The very essence of dual obligations is that the same conduct committed by an individual capable of engaging state responsibility would constitute an internationally wrongful act for both the state and for the individual—a *dual internationally wrongful act*. General rules should give effect to, rather than distort, this unique feature of these obligations.

In order to establish whether this duality is maintained despite the application of different general rules in state and individual responsibility under international law, the first step is to establish whether the function of these general rules is not fundamentally different. In other words, to establish whether these dual obligations operate in compatible legal frameworks. As a preliminary point, a clarification is in order about

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14 L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite : Solutions classiques et nouvelles tendances' (1984) 189 RdC 9, 55 and 62; Capotorti (n8) 248.

15 ILC, 'Summary Record of the 1213th meeting' (1973) I YbILC 54, 56[30] (Ago).

16 A Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524, 526.

17 J Wolf, 'Individual Responsibility and Collective State Responsibility for International Crimes: Separate or Complementary Concepts under International Law?' in B Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill 2016) 3, 34.

the terminology used in this chapter. Attribution of conduct is the logical or legal operation which determines the author of conduct, that is, an action or omission.[18] Imputation of responsibility is the legal operation which determines the subject of the legal consequences of a wrongful act, that is, the subject of responsibility.[19] Normally, the author of a wrongful act and the subject of responsibility arising from that act are the same entities in which case responsibility is original or direct. Thus, attribution of conduct to an entity is by logical and legal implication a necessary condition for the responsibility of that entity.[20] By contrast, imputation of responsibility occurs autonomously when the author of an act and the subject of responsibility arising therefrom are different entities. In this case, an entity is 'indirectly' or 'vicariously' responsible for the wrongful act of another entity, even when the conduct constituting the wrongful act is not attributable to it.[21]

Historically, state responsibility has been understood as a corollary of sovereignty.[22] As the state exercises exclusive control over its territory or even beyond it, it has the responsibility for occurrences in this area that cause injury to other subjects of

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18 eg CF Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue égyptienne de droit international 91, 92; D Anzilotti, *Cours de droit international* vol-I (G Gidel tr, Sirey 1929) 252. For the shortcomings of the use of the term 'imputation' in this context, see: Commentary to Art 2 ARSIWA [12].

19 eg JD Fry, 'Attribution of Responsibility' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2015) 98, 102-103.

20 eg O de Frouville, 'Attribution of Conduct to the State: Private Individuals' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 257, 257.

21 ILC, 'Report of the International Law Commission on the work of its twenty-seventh session, 5 May-25 July 1975' (1975) II YbILC 49, 73[11].

22 eg *Island of Palmas Case (Netherlands, USA)* [1928] II RIAA 829, 839.

international law.[23] The state could conceivably be considered complicit or 'vicariously' responsible for injury caused by conduct of individuals through its omission to prevent and punish the authors of that conduct.[24] The current regime of state responsibility marks a departure from this fiction of the 'omnipresence of the State'.[25] The source of the responsibility of the state is the breach of an international obligation through conduct that can be attributed to it, not the injury it might cause to other states or their nationals.[26] Attribution of conduct is an indispensable legal condition for the responsibility of the state.[27] Even when the responsibility of the state is occasioned by injurious acts of third parties, such responsibility is still 'direct' or 'original': it arises from its omission to prevent or punish these acts in breach of an international obligation of that state to take such action.[28] The foundational principle of the law of state responsibility is that '[e]very internationally wrongful act of a state entails the international

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23 eg C Eagleton, *The Responsibility of States in International Law* (NYUP 1928) 44; see R Rosenstock, 'The ILC and State Responsibility' (2002) 96 AJIL 792,792-793.

24 eg FV García-Amador, 'Sixth Report on International Responsibility' (1961) II YbILC 1, 46-47 (Arts 2, 7, and 8); L Oppenheim, *International Law: a Treatise* (3rd edn, Roxburgh 1920-1921) 244-245; H Kelsen, 'Théorie du droit international public' (1953) 84 RdC 1, 90-91; JA Hessbruege, 'The Historical Development of Doctrines of Attribution and Due Diligence in International Law' (2003-4) 36 NYUJILP 265, 283 and 295.

25 ILC, 'Summary Record of the 2556th Meeting' (1998) I YbILC 241, 246[36] (Crawford); also R Ago, 'Fourth Report on State Responsibility' (1972) II YbILC 71, 126[145].

26 eg B Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages' (1984) 185 RdC 9, 34-61.

27 C de Visscher, *La Responsabilité des États* (Biblioteca Visseriana 1924) 91.

28 eg K Strupp, 'Das Völkerrechtiche Delikt' in F Stier-Somto (ed), *Handbuch des Völkerrechts* Bd-III Abt-III (1920) 32.

responsibility of that state'.[29] Thus, the state is independently and individually responsible only for its own conduct.[30]

This premise might appear incompatible with the function of the general rules on individual responsibility. Let us take the hypothetical scenario of the director of the intelligence services of state X who sends her deputy to train a paramilitary group seeking to gain independence from state Y in guerrilla warfare. The deputy advises different ways to cause mass panic by shelling markets and schools during busy hours and kidnapping or assassinating workers' representatives and religious figures. The group subsequently launches a massive campaign of atrocities against the civilian population. In a criminal court, it is possible that the director and her deputy will be charged with and found guilty of war crimes and crimes against humanity. However, under the rules of state responsibility, only the actions of the director and her deputy are attributable to state X. State X could not be held responsible for the atrocities against the civilian population. It will only incur responsibility for the acts of its organs to the extent that they are in breach of its international obligations. This example illustrates how the function of the general rules on the establishment of state and individual responsibility might differ. The conditions for the establishment of individual criminal responsibility might appear to operate as rules on the imputation of responsibility even for acts of others.[31]

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29 Art 1 ARSIWA.

30 Commentary to Art 1 ARSIWA [6]; J Crawford, *State Responsibility—The General Part* (CUP 2013) 334.

31 See, eg, E Kok, 'The Principle of Complicity under International Law–Its Application to States and Individuals in Cases involving Genocide, Crimes against Humanity and War Crimes' in L van den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Nijhoff 2012) 557, 564.

By contrast, the law of state responsibility is founded upon the principle of independent responsibility.

This chapter challenges this understanding and, in so doing, it proposes an analytical and terminological framework in which dual obligations operate. The first section clarifies the notion of attribution of conduct in the law of state responsibility. The law of state responsibility is premised upon the principle of independent responsibility which mandates that states are responsible only for their own conduct. At the same time, the fact that attribution of conduct to states is a normative operation does not mean that it is unmindful of acts of human beings. Exceptionally, attribution of conduct to states hinges on the relationship between individuals having the status of state organs and individuals which do not have that status (section II). On the basis of this insight, the section that follows argues that attribution of conduct in international criminal law is a normative operation much like in the law of state responsibility. Furthermore, attribution of conduct and breach of an international obligation are indispensable conditions for the responsibility of an individual under international law (section III). Thus, the origin ('*fait générateur*') of international responsibility is the internationally wrongful act 'whichever entity commits an internationally wrongful act.'[32]

II. Attribution of Conduct in the Law of State Responsibility: From the Principle of Self-Organisation to a 'Real Link' between Individuals

The purpose of this section is to critically examine attribution of conduct in the law of state responsibility with a view to establishing whether there can be a substantive overlap with the respective principles of the law of individual responsibility. In the law of state responsibility, the rules of attribution of conduct serve to designate an act of a

[32] Commentary to Art 3 ARIO [1]; also J Crawford, 'The System of International Responsibility' in Crawford and ors (n20) 17, 18.

natural person as an act of a state, because states as corporate entities can only perform physical actions or omissions through natural persons.[33] The task of defining what constitutes state activity in general terms differs radically from any process conceivably applicable to individuals. This is because the process of attribution of conduct appears at first as synonymous with establishing that a natural person or group of persons has the status or the function of a state organ.[34] States cannot in principle be held responsible in the absence of conduct undertaken by some person with an 'institutional' or 'organic' link to the state with the exception of only strictly delimited circumstances. For the purposes of individual responsibility, these notions are irrelevant, as are the situations of *ex post facto* acknowledgment or adoption of conduct or forms of succession to responsibility.[35] Yet, under customary international law, certain rules of attribution of conduct consist of a 'real link' or factual relationship between the state–ie state organs–and natural persons or groups of natural persons.[36] These rules can conceivably find parallel concepts in the law of individual responsibility. This section lays out the background of the rules of attribution of conduct in the law of state responsibility and the distinction between the status, function and 'real link' test. It then discusses the supplementary test of a 'real link' underlying attribution of conduct in the context of state responsibility.

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33 Ago, Second Report (n1) 189-90[38]-[39]; L Condorelli and C Kreß, 'The Rules of Attribution: General Considerations' in Crawford and ors (n20) 221, 221; *contra* G Arangio-Ruiz, 'Second Report on State Responsibility' (1989) II(1) YbILC 1, 51[173].

34 eg F Messineo, 'Attribution of Conduct' in Nollkaemper/Plakokefalos, Principles (n19) 65; K Boon, 'Are Control Test Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 14 MelJIL 330, 342.

35 cf Art 10-11 ARSIWA; Condorelli/Kreß (n33) 231-232; Messineo (n34) 66-67.

36 cf ILC, 'Report of the Commission to the General Assembly' (1974) II(1) YbILC 157, 283[2]; on similar classifications cf Messineo (n34) 65-66; Boon (n34) 342.

Whilst attribution of conduct is an operation effected by international law, states as sovereign entities remain free to organise themselves in any way they deem fit.[37] As a corollary, it is axiomatic that conduct of persons having the status of state organs under the domestic law of a state or exercising governmental authority delegated by a state through its domestic law constitutes an act of that state under international law.[38] As an offset, the autonomy of international law is maintained through the operation of two principles that are firmly established. First, the conduct of a state organ acting in that capacity is attributable to the state regardless of whether that organ exceeded its authority or contravened instructions.[39] Second, conduct of persons not having the status of state organs or exercising governmental authority under domestic law can be considered an act of state under international law for the purposes of international responsibility in 'residual' or 'supplementary' cases.[40] These rules of attribution of conduct complement domestic law in defining who is a state organ[41] and provide for residual cases where conduct of persons, which do not qualify as state organs under any definition, is exceptionally attributable to the state.[42]

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37 eg Condorelli, RdC (n14) 51; ILC, 'Summary Record of the 1212th Meeting' (1973) I YbILC 49, 50-51[18]-[24] (Elias).

38 Art 4-5 ARSIWA; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 87[62]; ILC, 'Summary Record of the 2553rd Meeting' (1998) I YbILC 228, 232[29] (Pellet).

39 P-M Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in Crawford and ors (n20) 173, 175-176; cf Art 7 ARSIWA; *Croatia Genocide* (n4) 130-131[449]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 242[213]-[214] and 251[243].

40 G Distefano and A Hêche, 'L'organe *de facto* dans la responsabilité internationale: *Curia, quo vadis*?' (2015) 61 AFDI 3, 8; cf ILC, 'Summary Record of the 2562th Meeting' (1998) I YbILC 282, 289[77] (Drafting Committee Report).

41 Art 4(2) ARSIWA.

42 cf Art 8-11 ARSIWA.

From a purely theoretical point of view, the articulation of the rules underlying attribution of conduct in these residual or supplementary cases is a conceptual minefield. One way to understand attribution in these cases is as hinging on 'the nature of the activity performed'.[43] Attribution of conduct in these cases depends on 'the public character of the function or mission in the performance of which the act[ion] or omission contrary to international law was committed'.[44] However, the implicit assumption of this approach is that it is possible to develop a customary definition of 'state' or 'public functions' completely independent from domestic law for the purposes of international responsibility.[45] Yet, the distinction between public and private functions is a concept of domestic law.[46] From a practical perspective, the absence of uniform practice impedes the elaboration of a clear-cut definition of these terms.[47] Moreover, as a matter of principle, the state is not only freely self-organised, but also there is no material limit to its authority and by necessary implication to the content of its international obligations and its capacity to incur international responsibility.[48] The law of state responsibility strikes a balance between these conflicting considerations. On the one

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43 ILC, 'Report of the Commission to the General Assembly' (1974) II(1) YbILC 157, 285[11].

44 R Ago, 'Third Report on State Responsibility' (1974) II(1) YbILC 199, 264[191] and 267[197].

45 Condorelli, RdC (n37) 52.

46 ibid 71.

47 eg Boon (n34) 334; Commentary to Art 5 ARSIWA [6]; eg ILC, 'Summary Record of the 2554th Meeting' (1998) I YbILC 236, 237[28]-[29] (Hafner).

48 cf H Kelsen, *Principles of International Law* (Rinehart and Winston 1952) 241 ('The competence of the state is not limited "by nature"…'); unlike, eg, international organisations: cf Art 2(d) ARIO.

hand, a 'functional' test independent from domestic law features in the law of attribution both as a basis of attribution in manifest cases[49] and, latently, as grounds for denying attribution.[50] On the other hand, such 'functional' test focusing on the public or governmental nature of the activity is not the only one for establishing attribution of conduct independently from domestic law.[51]

In parallel to these rules, supplementary rules of attribution of conduct build on factual criteria. As a starting point, the ICJ held that acts of persons 'charged by a competent organ of the…State to carry out a specific operation' are attributable to the state.[52] This approach was further elaborated in the *Nicaragua* case. The case related to the activities of a paramilitary group, the *contras*, which fought against the socialist government of Nicaragua with the support of the US. Nicaragua claimed, *inter alia*, that the US were responsible for the atrocities committed by the *contras* in their paramilitary operations in violation of international humanitarian law. The ICJ could not establish 'complete dependence and control' of the *contras* upon the US so as to equate the *contras* with US organs.[53] It further inquired whether the US had 'directed or enforced' the impugned violations or whether the latter were committed in the course of

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49 See Commentary to Art 4 ARSIWA [11] and, eg, *Kristian Almås and Geir Almås v. The Republic of Poland* (Award) PCA Case No 2015-13 (27 June 2016) [207] and [210]; Art 9 ARSIWA and Commentary to Art 9 ARSIWA [4].

50 cf Art 6-7 ARSIWA; *Bosnia Genocide* (n5) 203-204[388]-[389].

51 *Military and Paramilitary Activities in and Against Nicaragua* (Merits) (Separate Opinion of Judge Ago) [1986] ICJ Rep 181, 188-189[16]; also Ago, Fourth Report (n25) 120[136].

52 *United States Diplomatic Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3,29[58].

53 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16, 62[109].

operations under their 'effective control', and finding that they had not been so, it denied attribution of these acts to the US.[54]

This 'control' criterion appears at first as an allusion to the fiction of 'indirect' responsibility,[55] since the acts of the state organ do not necessarily have the effect of rendering or equating the individual with an organ of the state.[56] In other words, substituting the notion of the state 'organ' for the notion of 'control' could imply the existence of two subjects of law—the superior and the subordinate or the principal and the agent—where there is presumptively only one subject of international law: the state.[57] Structuring attribution rules to reflect such an understanding would render them tautological or bring attribution of conduct too close to primary rules of international law.[58] To illustrate this point, Article 8 ARSIWA in its current form provides that conduct of individuals or groups is attributable to a state if they are 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. This formulation is circular. Evidently, to apply Article 8 ARSIWA, it is necessary to define first under which conditions the state—an abstraction—instructs, directs, or controls a person or group in a factual sense. If it were self-evident when the state

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54 ibid 64[115]; see also *Tadić* (Judgment) (Separate and Dissenting Opinion of Judge McDonald) IT-94-1-T, TC (7 May 1997) 287, 296.

55 *Nicaragua* (Ago) (n51) 189 at fn1.

56 *Bosnia Genocide* (n5) 207[397] *contrast* Ago, Fourth Report (n25) 96 at fn119.

57 G Arangio-Ruiz, 'State Responsibility Revisited – The Factual Nature of Attribution of Conduct to the State' (2017) 100 RDI (Supplement No. 1) 1, 12-13.

58 cf J Griebel and M Plücken, 'New Developments Regarding Rules of Attribution? The International Court of Justice in *Bosnia v. Serbia*' (2008) 21 LJIL 601, 606-611; W Riphagen, 'Seventh Report on State Responsibility' (1986) II(1) YbILC 1, 11[6].

acts in the physical world, then rules of attribution of conduct would be entirely redundant.[59]

However, it is intrinsic in the normative character of attribution of conduct that '[i]n theory, the conduct of all human beings…might be attributed to the State' if states so wished.[60] Hence, any inconsistency is only apparent since 'international responsibility [of the state] would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control'.[61] This rule of attribution does not consist of the delegation of state functions to a private individual.[62] Under the rule of Article 8 ARSIWA, it is immaterial whether the relevant conduct involves a governmental activity or the exercise of governmental authority of that state.[63] Rather, the conduct of persons not having the status or not performing the function of a state organ under domestic law is considered an act of state under international law, if there is a 'real link' between these persons and a state organ under domestic law.[64] In the final analysis, this test is nothing but a test of the factual relationship between individuals or groups of individuals.

Having established what the supplementary test is about, what remains to be examined is its scope and content. The test of Article 8 ARSIWA for the purposes of

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59 cf Arangio-Ruiz, Second Report (n33) 51-53[173]-[177].

60 Commentary to Pt I Ch II ARSIWA [2].

61 *Bosnia Genocide* (n5) 207[397]; also SR.2562 (n40) 289[79] (Drafting Committee Report); also

62 cf text accompanying nn44-51.

63 Commentary to Art 8 ARSIWA [2]; also, eg, *Gustav FW Hamester GmbH &Co KG v. Republic of Ghana* (Award) ICSID Case No ARB/07/24 (18 June 2010) [180].

64 Commentary to Art 8 ARSIWA [1].

attributing an act of an individual to the state is not simply whether a state organ causally contributed to that act of the individual, much less to the damage arising therefrom.[65] Rather, the notion of 'control' has been accepted as the defining test, although the degree of control has been in the past a point of considerable contention.[66] On the one hand, the *Tadić* AC introduced a variable notion of control diverging from the *Nicaragua* test of effective control.[67] First, it found that military and paramilitary groups are to be considered as *de facto* organs of the state if the state wielded 'overall control' over them 'not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.'[68] Second, the Appeals Chamber distinguished this case from the one of individuals or unorganised groups. These acts could only be attributed to a state if the individuals or unorganised groups acted under its specific instructions.[69] Third, it identified a third control test according to which persons may be assimilated to state organs based on their actual behaviour within the structure of the state even in the absence of specific instructions.[70]

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65 Commentary to Pt I Ch II [4]; also D Bederman, 'Contributory Fault and State Responsibility' (1990) 30 VJIL 335, 354; I Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471, 479; *contra* R Quadri, 'Cours général de droit international public' (1964) 113 RdC 237, 485-489.

66 See, eg, A Cassese, 'The *Nicaragua* and the *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649, 663; R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791, 794-795.

67 *Tadić* (Judgment) IT-94-1-A, AC (15 July 1999) [137]-[144]

68 ibid [123] and [131].

69 ibid [141].

70 ibid.

On the other hand, the ICJ further developed the principles at play, rejecting emphatically the *Tadić* approach. Under Article 8 ARSIWA, conduct of private individuals or groups of individuals is attributable to a state if they are 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. It is only when *de iure* state organs exercise 'effective control' or direction, or issue specific instructions 'with respect to each operation in which the alleged violations occurred' that the act is attributable to the state.[71] By contrast, the concept of *de facto* organs has been reserved only for persons who 'in fact act under such strict control by the state' or 'in fact…act in "complete dependence" on the state…of which they are merely its instrument.'[72] This notion of *de facto* organs appears 'somewhere in between' the organic or functional tests set out in Article 4 and the test of Article 8 ARSIWA, but is distinct from both.[73] Much like Article 8, the rule appears to describe, or at least include, a real link between a person or group of persons having the status of a state organ and a person or group not having that status. Otherwise, the rule would be a tautology contradicting the purpose of the rules of attribution of conduct in the law of state responsibility. However, unlike Article 8, this degree of control entails the attribution of all acts of this person or group to the state.[74] In other words, no other connection of the state to a specific act is needed.[75]

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71 *Bosnia Genocide* (n5) 208[400].

72 ibid 205[392]-[393].

73 A Pellet, 'Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues' in P Kovács (ed), *International Law—A Quiet Strength* (Pázmány 2011) 111, 125.

74 S Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 493, 501.

75 M Milanović, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) 22 LJIL 307, 312.

To sum up, the rules of attribution of conduct constitute an indispensable condition for the responsibility of the state. In substantive terms, rules of attribution of conduct are the product of the paradoxical relationship between the autonomy of international law from domestic legal orders and the freedom of the state to organise itself through its domestic law. In this context, the central notions of 'state organ' and 'governmental authority' are defined in international law by reference primarily to domestic law. In supplementary or residual cases, attribution of conduct to the state relies on a factual relationship between persons having the status of state organs under domestic law and persons which do not have that status. In the final analysis, this 'real' link is a relationship between individuals. As a result, this notion may parallel notions that can be found in the law of individual responsibility.

III. The Concept of Attribution of Conduct and the Principle of Independent Responsibility in the Law of Individual Responsibility

1. Normative Attribution of Conduct in the Law of Individual Responsibility

Having established what the notion of attribution of conduct is about in the law of state responsibility, the further question is whether international criminal law knows an equivalent legal operation and what are its implications for the purposes of imputation of responsibility. This section shows what the role of attribution of conduct is in the law of individual responsibility and how this law has gradually incorporated the principle of independent responsibility.

The law of individual responsibility has been traditionally influenced to a large extent by domestic criminal laws. In the international law of individual responsibility, much like in domestic law, it is axiomatic that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other

way participated.'[76] Yet, at least in domestic criminal laws, attribution of conduct to an individual appears at first as a redundancy expressed at best in terms of natural causation.[77] Thus, the physical author of the conduct constituting the crime will also be responsible for that crime provided that the mental elements are present.[78] General rules seem to turn on the question whether to hold an individual responsible for the crime or not; functionally, they operate as rules on imputation of responsibility.[79]

A mismatch between the author of the conduct and the subject of responsibility arising therefrom may emerge in situations where more individuals are involved in a wrongful act. The international law of individual responsibility, drawing from domestic criminal systems, knows essentially two systems for holding individuals criminally responsible in these situations: the unitary and the differentiated model of participation.[80] The unitary model of participation was essentially reflected in the practice relating to World War II.[81] This model renders all individuals causally contributing to a crime responsible for the crime alike and independently from any other participants.[82] The extent of the contribution of each individual participant has only a role at the stage of determining the consequences of responsibility, that is, at the stage of sentencing or

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76 *Tadić* ACJ (n67) [186].

77 See GP Fletcher, *Rethinking Criminal Law* (OUP 2000) 455 at fn1.

78 eg *Kunarac and ors* (Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) [390].

79 Fletcher (n77) 492 with the possible exception of some defences, eg, self-defence.

80 eg E Van Sliedregt, *Individual Criminal Responsibility* (OUP 2012) 66-67.

81 A Eser, 'Individual Criminal Responsibility' in Cassese (n10) 767, 784; KJ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 254.

82 Van Sliedregt (n80) 66; Eser (n81) 781; cf *'Justice' Case (US v Altstoetter and ors)* (Opinion and Judgment) [1947] III TWC 954, 1063.

mitigation.[83] The differentiated model of participation features in the practice of the *ad hoc* tribunals and the ICC.[84] This model is premised upon the distinction between perpetrators/principals and accomplices/accessories.[85] The former are 'persons whose conduct constitutes the crime *per se*', whereas the latter are those 'whose conduct is solely connected to the crime committed by another person'.[86] In this sense, the wrongfulness of the act of the accomplice/accessory is dependent upon, or derivative from, the wrongfulness of the act of the perpetrators/principals.[87]

Attribution of conduct as an analytically distinct operation in the international law of individual responsibility becomes apparent, in the first place, upon the application of the distinction between perpetrators/principals and accomplices/accessories in the complex setting of crimes under international law.[88] According to the Rome Statute, a person may commit a crime not only personally 'as an individual', but also 'jointly with another or through another person, regardless of whether that other person is criminally responsible'.[89] This provision gives expression to the concept of 'remote or non-physical perpetrator'.[90] The author of certain conduct is not exclusively the person

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83 M Jackson, *Complicity in International Law* (OUP 2015) 18.

84 Van Sliedregt (n80) 74; eg *Katanga* (Judgment) ICC-01/04-01/07-3436, TC-II (7 March 2014) [1387]; *Tadić* ACJ (n67) [229].

85 Eser (n81) 782.

86 *Katanga* TCJ (n84) [1384].

87 *Lubanga* (Judgment) ICC-01/02-01/06-2842, TC-I (14 March 2012) [998].

88 eg K Ambos, 'Remarks on the General Part of International Criminal Law' (2006) 4 JICJ 660, 662-664.

89 Art 25(3)(a) RSICC.

90 E Van Sliedregt, 'Perpetration and Participation in Article 25(3)'in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 499, 499.

physically carrying out that conduct. The law may 'overcome or set aside the individualistic causation requirements by way of normative ascription'.[91] In particular, apart from physical commission of the material elements of the crime, the law of individual responsibility encompasses as forms of 'commission' the normative concepts of Joint Criminal Enterprise (JCE), prevalent in the jurisdiction of the ICTY, and control theory, prevalent in the case law of the ICC.[92] Hence, attribution of conduct becomes a 'legal' or 'normative' operation much like in the law of state responsibility: the author of certain conduct is the person which the law designates as the author of the conduct by operation of these rules. The author of the conduct constituting the crime–so construed–will also be responsible for that crime as a perpetrator provided that the relevant mental elements are met and there are no applicable defences.[93]

2. The Principle of Independent Responsibility in the Law of Individual Responsibility

Having established that normative attribution of conduct is part of the law of individual responsibility, the further question is whether the law on individual responsibility knows the principle of independent responsibility. In other words, is it analytically correct to say that individuals are responsible only for the acts attributable to them that are in breach of their international obligations? On the one hand, the distinction between principals/perpetrators and accomplices/accessories is reflected in the provisions of the

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91 K Ambos, *Treatise on International Criminal Law* Vol-I (OUP 2013) 86; Van Sliedregt (n80) 72.

92 eg *Lubanga* (Judgment) ICC-01/04-01/06-3121-Red, AC (1 December 2014) [473]; *Milutinović and ors* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise) IT-99-37-AR72 ICTY, AC (21 May 2003) [20]

93 *Milutinović and ors* (Judgment) IT-05-87-T (26 February 2009) [165] *in fine*.

Statutes of international criminal courts and tribunals. On the other hand, these provisions are ambiguous as to whether they operate as rules for the imputation of responsibility for the act of the principal/perpetrator or whether they are wrongs as such.[94] From a terminological perspective, it is quite common to refer to these provisions as stipulating modes of criminal liability or responsibility rather than forms or modes of wrongdoing.[95] As will be shown, the ambiguity was of mostly theoretical significance whilst international criminal tribunals had only a criminal mandate. Nonetheless, the principle of independent responsibility becomes central in the context of reparations proceedings before the ICC.

The Statutes and practice of the *ad hoc* tribunals shed little light on the issue. These Statutes provide that '[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4[5] of the present Statute, shall be individually responsible for the crime.'[96] The provision on command responsibility is couched in even more agnostic terms merely indicating that 'the fact that any of the acts…was committed by a subordinate does not relieve his or her superior of criminal responsibility'.[97] On the one hand, these provisions can be construed as having only jurisdictional implications. In this sense, the tribunals would have jurisdiction over these acts which, much like the acts

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94 V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 60; F Zorzi Giustiniani, 'The Responsibility of Accomplices in the Case Law of the *Ad Hoc* Tribunals' (2009) 20 CLF 417, 418.

95 eg M Jackson, 'The Attribution of Responsibility and Modes of Liability in International Criminal Law' (2016) 29 LJIL 879-895. This study uses the terms 'forms' or 'modes of wrongdoing' instead of modes of criminal liability or criminal responsibility in accordance with the findings of the ICC (see text accompanying n111).

96 Art 6(1) ICTR Statute; Art 7(1) ICTY Statute.

97 Art 6(3) ICTR Statute; Art 7(3) ICTY Statute.

of the principals, constitute 'serious violations of international humanitarian law' for the purposes of the Statutes.[98] On the other hand, the provisions can also be interpreted as rendering accomplices responsible for the crimes of others in which they merely participated.[99]

Similarly, the *ad hoc* tribunals' practice lends support to both arguments. Indeed, although the distinction between principals/perpetrators and accomplices/accessories features heavily in the reasoning of the majority of the *ad hoc* tribunals' judgments,[100] its function for the purposes of imputation of responsibility remains elusive. The ICTY is a case in point. The ICTY AC has enunciated that 'aiding and abetting involves a lesser degree of individual criminal responsibility than co-perpetration'.[101] Whilst this pronouncement is a strong indication against vicarious responsibility, it does not entirely dismiss this notion. The ICTY case law on command responsibility was less consistent on this point.[102] Moreover, the distinction between principals/perpetrators and accomplices/accessories is only equivocally reflected in its dispositions.[103] In the main, ICTY Trial Chambers' dispositions find the accused guilty for genocide, crimes against humanity, and so on, without mentioning the precise mode of

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98 Art 1 ICTR Statute; Art 1 ICTY Statute.

99 eg C Eboe-Osuji, '"Complicity in Genocide" versus "Aiding and Abetting Genocide"' (2005) 3 JICJ 56, 72; N Schrijver, 'Regarding "Complicity in the Law of International Responsibility" from Bernard Graefrath: The Evolution of Complicity in International Law' (2015) 48 RBDI 444, 450.

100 eg B Goy, 'Individual Criminal Responsibility before the International Criminal Court – A Comparison with the Ad Hoc Tribunals' (2012) 12 ICLR 1, 10-11.

101 *Kvočka and ors* (Judgement) IT-98-30/1-A (28 February 2005) [92].

102 eg Jackson, Complicity (n83) 112-114.

103 D Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law' (2011) 64 CLP 255, 261; Jackson, Complicity (n83) 87-88.

wrongdoing.[104] In other decisions, even when the disposition mentions the mode of wrongdoing, it is often ambivalent as to whether accomplices/accessories are found responsible for their own acts or for the acts of perpetrators/principals.[105] Verdicts which make clear that accomplices are pronounced guilty for their own conduct in connection to the crime are the exception.[106]

To a certain extent, the same ambiguity persists in the Rome Statute. Article 25(3) RSICC stipulates that

> [i]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits…; (b) [o]rders, solicits or induces…; (c)…aids, abets or otherwise assists…; (d) [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose…;…(f) [a]ttempts to commit such a crime…'.

The provision on superior or command responsibility is framed in similar terms.[107] These provisions could be construed as rendering participants responsible for the underlying crime of the perpetrator/principal.[108] However, there are several indications

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104 JG Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 LJIL 165, at fn141; cf, eg, *Brđanin* (Judgment) IT-99-36-T (1 September 2004) [1067], [1071], [1075], [1152].

105 cf, eg, *Boškoski and Tarčulovski* (Judgment) IT-02-84-T (10 July 2008) [607]; *Popović and ors* (Judgment) IT-05-88-T (10 June 2010) [IX].

106 eg *Krstić* (Judgment) IT-98-33-A (19 April 2004) [VII] ('FINDS…Radislav Krstić guilty of aiding and abetting genocide'); *Popović and ors* (Judgment) IT-05-88-A (30 January 2015) [2117] ('ENTERS…new convictions against Pandurević for aiding and abetting…murder as a violation of the laws or customs of war (Count 5 in part)…'); *Hadžihasanović and Kubura* (Judgment) IT-01-47-T (15 March 2006) [IX] ('FINDS the Accused Hadžihasanović, as a superior pursuant to Articles 3 and 7(3) of the Statute:… Count 3: GUILTY of failing to take the necessary and reasonable measures to punish the murder of Mladen Havranek at the Slavonija Furniture Salon in Bugojno on 5 August 1993').

107 Art 28 RSICC ('shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control …').

108 Jackson, Complicity (n83) 87-88; also KJ Heller, 'The Reprieve Drone Strike Communication I — Jurisdiction' (*Opinio Juris,* 24 February 2014) <http://opiniojuris.org/2014/02/24/reprieve-drone-strike-communication-jurisdiction/>.

against this interpretation. First, Article 25(2) RSICC stipulates that '[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.' In this context, it seems unlikely that Articles 25(3) or 28 RSICC render persons criminally responsible for crimes which they have not committed themselves. Rather, a combined reading suggests that a person commits a crime within the jurisdiction of the ICC for the purposes of Article 25(2) RSICC by the different modes of commission and participation of Article 25(3) and 28 RSICC.[109] Second, the provisions of Article 25(3)(e) and (f) RSICC include the inchoate crimes of attempt and direct and public incitement to commit genocide under the rubric of individual criminal responsibility.[110] Accordingly, a TC has remarked that '[i]n effect, article 25 of the Statute merely identifies various forms of unlawful conduct'.[111] Moreover, as one PTC remarked, 'a fundamental difference exists between the forms of commission…which establish liability for one's own crimes, and Article 28…which establishes liability for violation of duties in relation to crimes committed by others.'[112] Third, this interpretation is reflected in the dispositions of the ICC. The specific mode of individual criminal responsibility is always mentioned in the disposition.[113] Such a reference would be redundant if accomplices/accessories

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109 K Ambos, 'Article 25' in K Ambos and O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (3nd edn Beck 2016) 979, 986.

110 *a contrario* G Werle, 'Individual Criminal Responsibility in Article 25' (2007) 5 JICJ 953, 956.

111 *Katanga* TCJ (n84) [1386].

112 *Gbagbo* (Decision on confirmation of charges) ICC-02/11-01/11-656, PTC-I (12 June 2014) [262]; similarly, *Bemba Gombo* (Judgment) ICC-01/05-01/08-3343, TC-III (21 March 2016) [173].

113 *Katanga* TCJ (n84) [XII] ('GUILTY, under article 25(3)(d) of the Statute, as an accessory to the crimes committed on 24 February 2003 of: murder…'); *Bemba Gombo* TCJ (n112) [752] ('GUILTY, under Article 28(a) of the Statute, as a person effectively acting as a military commander, of the crimes of: murder…'); *Bemba and ors* (Judgment) ICC-01/05-01/13-1989-Red, TC-VII (19 October 2016) ('[T]he Chamber finds …Mr Fidèle Babala Wandu GUILTY, under

were found responsible for the acts of perpetrators/principals and not for their own acts. It follows that Articles 25(3) and 28 RSICC do not constitute forms of vicarious responsibility. They rather complement the definition of 'crimes within the jurisdiction of the [ICC]'.[114]

In more theoretical terms, criminal responsibility is 'by definition of an individual nature…with no possibility of substituting the responsibility of a third party for that of the person in question.'[115] In principle, the fact that the wrongfulness of an act depends on the wrongfulness of the principal act does not necessarily mean that accomplices/accessories are vicariously responsible for the wrongs of others.[116] As the ILC has emphasised, the accomplice/accessory 'is held responsible for his own conduct which contributed to the commission of the crime notwithstanding the fact that the criminal act was carried out by another individual.'[117] The practice of international criminal courts and tribunals should not be construed as challenging this premise. Rather, it seems more likely that any ambiguity stems from the fact that the distinction between principals/perpetrators on the basis of doctrines of joint or indirect perpetration and accessories/accomplices is subtle and context-specific.

Article 70(1)(c), in conjunction with Article 25(3)(c) of the Statute, of having aided in the commission by Mr Bemba, Mr Kilolo and Mr Mangenda of the offence of corruptly influencing witnesses…').

114 cf Art 5 and 25(2) RSICC.

115 C Escobar Hernández, 'Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction' (29 May 2015) A/CN.4/686 [97].

116 SH Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 CalLR 323, 337.

117 Commentary to Art 2 DCCAPSM [11].

To illustrate this point, the ICC Statute seems to make further distinctions between those ordering, inducing, or soliciting a crime ('instigators') and those aiding, abetting, or assisting a crime or contributing to the commission of a crime by persons acting with a common purpose.[118] A TC held that the provisions of the Statute militate in favour of a distinction between 'the instigator, the intellectual author, without whom the offence would not have been committed, or not in this form' and 'the encouragement or moral support [which] may be qualified as "abetting"'.[119] This would imply that instigation operates wholly or partly as a rule of attribution of conduct akin to a form of indirect perpetration through another person, whereas abetting constitutes a distinct wrongful act.[120] The ICC AC has implicitly affirmed this view in its sentencing decision by finding that the instigator should not 'be generally considered less culpable than the person who acts upon the instigation'.[121] Similarly, some practice of the *ad hoc* tribunals suggests that those who plan, instigate, or order a crime can under certain circumstances be considered principals/perpetrators.[122] The letter of the Statutes seems to place planning, instigation, and ordering on the same footing as commission in contrast to 'otherwise aid[ing] and abet[ing] in the planning, preparation or execution of a

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118 See Art 25(b)-(d) RSICC.

119 *Bemba Gombo and ors* (Judgment) ICC-01/05-01/13-1989-Red, TC-VII (19 October 2016) [81].

120 cf Van Sliedregt (n80) 76 (suggesting that indirect perpetration is a form of 'intellectual perpetration').

121 *Bemba and ors* (Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute") ICC-01/05-01/13-2276-Red, AC (8 March 2018) [59].

122 Goy (n100) 56; cf *Seromba* (Judgment) ICTR-2001-66-A (12 March 2008) [171]-[172].

crime'.[123] Accordingly, an ICTY Trial Chamber has found that those who plan, instigate, or order may incur responsibility for a crime if they fulfil the mental elements of the crime regardless of the knowledge or intent of the physical executors of the act.[124] In a similar vein, the ICTY AC has found that an individual commits a crime under the doctrine of JCE, if a JCE member 'explicitly or implicitly request[s] [a] non-JCE member to commit such a crime or instigate[s], order[s], encourage[s], or otherwise avail[s] himself of the non-JCE member to commit the crime.'[125] In these situations, the process at play is the elaboration of the concept of attribution of conduct on the basis of normative ascription and its distinction from forms of wrongdoing rather than the assertion of a doctrine of indirect responsibility.

At the same time, international criminal courts and tribunals have rarely been called upon to clarify whether accomplices/accessories are responsible for the acts of principals/perpetrators or for their own separate wrongful act. This is because this thorny issue is not indispensable, but rather complicates the discharging of their main mandate, that is, conviction and sentencing. From a normative and moral perspective, it might be desirable 'to ensure that the label describing criminal conduct accurately reflects its wrongfulness and its severity'.[126] However, in the final analysis, no instrument contains a numerical formula for the imposition of punishment in international

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123 See n96.

124 *Milutinović* TCJ (n93) [158] and [181].

125 *Krajišnik* (Judgment) IT-00-39-A (17 March 2009) [226].

126 D Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity' (2007) 43 Stanford JIL 221, 255; Guilfoyle (n103) 260; cf *Lubanga* ACJ (n92) [462].

criminal law.[127] From the perspective of the judge, '[w]hen a legal norm gives courts the choice between two or more solutions, all of them legal ones…, it gives them latitude or freedom of decision, whence comes what is termed their discretion or discretionary power.'[128] In the abstract, all crimes and all modes of commission and participation seem equally 'blameworthy'.[129] Thus, the ambiguity as to the function of the distinction between principals/perpetrators and accomplices/accessories at the level of imputation of responsibility is the corollary of the criminal tribunal's discretion with respect to sentencing.[130] This is particularly the case with respect to the *ad hoc* tribunals which have an exclusively criminal mandate.

By contrast, the ICC has the power 'to make an order directly against a convicted person specifying appropriate reparations to, or in respect to, victims'.[131] As the AC has enunciated '[t]he goal of reparations is not to punish the person but indeed to repair the harm caused to others.'[132] For this reason, the guiding principle is the 'principle of accountability "for the offender"' which requires that 'offenders account for their acts'.[133] A necessary corollary of this principle is that reparation is owed only for

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127 M Aksenova, *Complicity in International Criminal Law* (Hart 2016) 203-204; see Art 23 ICTR Statute; Art 24 ICTY Statute; Art 78 RSICC.

128 M Bedjaoui, 'Expediency in the International Court of Justice' 71 BYBIL 1, 3.

129 *Katanga* TCJ (n84) [1387].

130 S Kim, *A Collective Theory of Genocidal Intent* (Springer 2016) 38.

131 Art 75(2) RSICC.

132 *Katanga* (Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, AC (8 March 2018) [184].

133 *Lubanga (I)* (Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with amended order for reparations) ICC-01/04-01/06-3129, AC (3 March 2015) [65] and [69].

the harm caused by the acts which are legally attributable to the specific offender, but not for acts legally attributable to others. Such an interpretation is also reflected in the practice relating to the determination of the scope of liability of convicted individuals. Thus, co-perpetrators have been held liable for the entirety of the harm ensuing from the crime committed jointly or through others.[134] By contrast, accomplices/accessories have only been held proportionally liable for their own wrongful contribution to the harm resulting from the crime in which they participated.[135] This practice points to two conclusions. First, co-perpetrators or indirect perpetrators are held responsible for the entirety of the conduct that is legally attributed to them, namely, for conduct carried out by them personally and jointly and/or through others. Second, accomplices/accessories are held responsible only if and to the extent acts attributable to them have a sufficiently direct causal link with the harm claimed. It therefore becomes apparent that '[i]n international law, accomplices are liable for their *own* wrongdoing, rather than vicariously liable for the principal offender's wrongdoing'.[136]

What emerges from this analysis is the process of gradual integration of the concept of independent responsibility in the law of individual responsibility. The principle was latent as long as international law focused exclusively on the criminal sanctioning of the acts of individuals. The evolution of individual responsibility to encom-

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134 *Lubanga (II)* (Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu) ICC-01/04-01/06-3379-Red (15 December 2017) [276]-[278]; *Al-Mahdi* (Reparations Order) ICC-01/12-01/15-236, TC-VIII (17 August 2017) [110].

135 *Katanga* (Ordonnance de réparation en vertu de l'article 75 du Statut) ICC-01/04-01/07-3728, TC-II (24 March 2017) [263]-[264].

136 CI Keitner, 'Remarks on Complicity under the Alien Tort Statute' (2015) 109 ASIL Proceedings 175, 176 (emphasis in the original).

pass a reparatory aspect has made the principle of independent responsibility an indispensable premise. Hence, all individuals, much like states, are responsible only for conduct that is legally attributable to them and in breach of their international obligations.

IV. Interim Conclusion

This analysis demonstrates that both state responsibility and individual responsibility are circumspect towards the concept of vicarious or indirect responsibility. In the context of state responsibility, the reason is the fundamental principle that every internationally wrongful act of a state entails the international responsibility of that state. The law of individual responsibility has developed to envisage the principle that 'offenders account for their acts'. This principle is functionally identical to the principle of independent responsibility. As an offset, attribution of conduct not only is a normative operation in both regimes, but such operation involves comparable considerations. In the context of state responsibility, attribution of conduct is not only a question of the status or function of a person or group, but exceptionally a question of the relationship between persons or groups. In the context of individual responsibility, it seems established that attribution of conduct is not merely a question of causation, but rather a normative operation, that is, an operation governed by international law that hinges on the relationship between the physical author of an act and its author under the law.[137] Thus, in analytical terms, conduct (ie action or omission) must as a bare minimum fulfil two conditions for responsibility to arise: (i) that it must be legally attributable to the subject

[137] Commentary to Pt I Ch II ARSIWA [9]; Crawford, General Part (n30) 113-115; Condorelli/Kreß (n33) 225; Ambos, Treatise I (n91) 86; Van Sliedregt (n80) 72.

of an international obligation; and (ii) that it must constitute a breach of that international obligation.[138] These general conditions apply 'whatever the act[ion] or omission might be, and irrespective of who is the subject of the obligation.'[139] The next two chapters will assess the duality of the internationally wrongful act by grappling with these two general conditions: breach and attribution of conduct, respectively.

138 FV García-Amador, 'Report on International Responsibility' (1962) II YbILC 173, 184-185[58]; NL Reid, 'Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility' (2005) 18 LJIL 795, 808.

139 García-Amador (n138) 184-185[58]; also C Eustathiades, 'Les sujets du droit international et la responsabilité internationale: nouvelles tendances' (1953) 84 RdC 397, 422.

Chapter 4. Duality of the Breach of the International Obligation

I. Introduction

The previous chapter has established that dual international obligations operate in compatible frameworks of international responsibility. This chapter examines how the duality of international obligations is translated into dual breaches of international obligations. From an analytical perspective, 'it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated'.[1] Yet, it is difficult to speak about identity of the obligations binding on states and individuals in material terms whilst examining them in total separation from the rules that determine in a general way when this obligation is violated.[2] In the final analysis, defining an obligation means to define what the author of its violation actually does.

As a preliminary point, 'obligations *erga omnes*', 'rules of *ius cogens*', 'crimes under international law' are legal categories commonly used to describe various rules of international law or the international obligations arising therefrom.[3] However, these categories are actually meant to describe legal effects of rules, rather than to prescribe such effects. So, for instance, the prohibition of genocide is a peremptory rule that supersedes other rules of international law not having the same character, and also an *erga*

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1 R Ago, 'Second Report on State Responsibility' (1970) II YbILC 177, 178[7].

2 *contra* BI Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Nijhoff 2009) 247-249.

3 cf, eg, G Gaja, 'Obligations *Erga Omnes*, International Crimes, *Jus Cogens*: A Tentative Analysis of Three Related Concepts' in J Weiler, A Cassese, and M Spinedi (eds), *International Crimes of States – A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter 1989) 151, 159.

omnes obligation, in that, it is owed to the international community as a whole.[4] As we have seen, the prohibition of genocide is also a 'crime under international law', that is, an international obligation of individuals entailing their responsibility under international law.[5] On account of their subject-matter, genocide, war crimes, crimes against humanity, and aggression have been associated with the notion of 'serious breaches of peremptory norms of general international law'.[6] Yet, this characterisation serves a purpose specific to the law of state responsibility, that is, to define which specific types of wrongful acts bring about aggravated consequences.[7] By contrast, the rules relating to the establishment of state responsibility apply uniformly regardless of the subject-matter of the obligation or the circumstances of the specific breach.[8] In principle, to the extent that the obligation is 'dual', a breach of that obligation by an individual acting on behalf of the state entails the responsibility of both the state and that individual.[9] It depends on the circumstances of that specific act whether this act will also entail further 'particular' consequences.

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4 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 32[33].

5 See Chapter 2.III.1.

6 Commentary to Art 40 ARSIWA [4]; BI Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Nijhoff 2009) 27-28.

7 Commentary to Art 40 ARSIWA [8] and fn651.

8 J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 RdC 9, 472-473.

9 A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 618-619; also Bonafè, Relationship (n6) 246.

That said, the obligations which have been identified as dual in this thesis share certain common characteristics which bear exactly on the establishment of responsibility. First, these obligations contain mental elements alongside material elements.[10] Second, dual obligations tend to proscribe a plurality of interrelated conduct rather than isolated acts.[11] These features are so pronounced so as to merit separate consideration in the general rules of individual responsibility and those of state responsibility, respectively.[12] Third, another implication of the duality of obligations is that it renders conceivable forms of 'derivative' internationally wrongful acts amongst states and individuals. These forms of wrongdoing would normally be inconceivable, as individuals are in principle not bound by international law and, in any case, their international obligations could differ in material terms from international obligations of states. The law of individual responsibility encompasses rules that capture these relationships in general terms. At the same time, specific rules of international law seem to build upon the duality of the 'principal' wrong to encompass 'derivative' wrongs of state 'complicity' in individual wrongs, the rule on complicity in genocide being the most notable example.[13]

The purpose of this chapter is to investigate whether it is possible to speak of dual breaches of international obligations. Section II deals with the 'personal' aspect of dual obligations. It examines the application of mental elements of dual obligations in the context of the establishment of state responsibility. Section III deals with the 'collective' aspects of dual obligations, namely, the fact that these obligations often comprise conduct defined in aggregate as wrongful. It demonstrates the ways that both the

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10 Art 30 RSICC.

11 Art 14-15 ARSIWA.

12 Art 30 RSICC; Art 14-15 ARSIWA.

13 cf Art III(e) CPPCG.

law of state and individual responsibility give expression to this feature of dual obligations by reference to the functionally equivalent notions of breaches consisting of a composite act and complex crimes, respectively. Section IV turns to forms of wrongdoing under the law of individual responsibility and their relationship to international obligations of states under specific rules of international law or the rules of state responsibility. The chapter illustrates the ways in which dual obligations produce dual breaches, that is, wrongs consisting of the same conduct for states and individuals through which the state is acting.

II. Duality of the Breach and Mental Elements

From the viewpoint of state responsibility, states as collective entities remain abstractions, and as such cannot literally speaking exhibit mental dispositions.[14] The mental elements, when provided for in specific rules, need to be established either by reference to the mental state of the individual through which the state acts (*animus agendi*) or be somehow 'objectivised'. [15] This depends on the content of each specific rule.[16] The dual obligations identified in the previous chapter have largely the typical structure of crimes consisting of mental elements alongside material ones.[17] This is not only because cul-

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14 eg D Anzilotti, 'La responsabilité internationale des états a raison des dommages soufferts par étrangers' (1906) 13(3) RGDIP 285, 287; C Tomuschat, 'International law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 RdC 9, 281-282.

15 Nollkaemper, Concurrence (n9) 634; also G Palmisano, 'Fault' (2007) MPEPIL [24]-[29]; on a theory of 'objectivised' fault see, notably, G Arangio-Ruiz, 'Second Report on State Responsibility' (1989) II(1) YbILC 1, 53[178].

16 eg R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 GYIL 9, 49.

17 A Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425, 434.

pability is a *conditio sine qua non* of individual criminal responsibility under international law.[18] Analytically speaking, the mental element is an element of the obligation. The Rome Statute makes this explicit by containing a provision defining these notions in a general manner, whilst clarifying that the rule prescribing the obligation might provide otherwise.[19] For example, the essential characteristic of genocide is that the underlying conduct must be undertaken 'with intent to destroy in whole or in part a national, ethnic, racial, or religious group as such'.[20] Less noticeably, the underlying acts of violence 'presuppos[e] the existence of an intentional element (which is altogether distinct from the "specific intent" necessary to establish genocide)'.[21] Another notable example is that the acts proscribed by GCs and AP-I need to be 'wilful' or 'committed wilfully' for them to qualify as 'grave breaches'.[22]

This brings to the fore a tension intrinsic in the relationship between state and individual responsibility. On the one hand, reliance on the state of mind of the individ-

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18 S Glaser, 'Culpabilité en droit international pénal' (1960) 99 RdC 467, 482-483.

19 Art 30 RSICC.

20 Art II CPPCG; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, 62[132]; *Brđanin* (Judgment) IT-99-36-T (1 September 2004) [695].

21 *Croatia Genocide* (n20) 138[474]; also *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 121[186]-[187].

22 Arts 50 GC-I, 51 GC-II, 130 GC-III, 147 GC-IV; Art 85 AP-I.

ual acting on behalf of the state would seemingly render the establishment of state responsibility for genocide or other 'dual' obligations requiring intent 'ancillary',[23] 'subsidiary'[24] or 'subalternate'[25] to the establishment of individual responsibility. On the other hand, and as an offset, it has been suggested that the intent of the state cannot be equated with that of the individual acting of its behalf, but that rather 'State intent' is manifested in the form of a policy originating from the highest level of government.[26] As a bare minimum, state responsibility in such circumstances requires the establishment of 'the acquiescence by the state's military and political authorities in or even approval of the criminal behaviour of their subordinates'.[27] Such acquiescence can be evidenced by the absence of any state action to prevent or punish the relevant acts of state organs.[28] Conversely, in the absence of such policy, the state may only be responsible for failure to prevent or suppress the relevant conduct even if committed with the requisite intent by individuals whose acts are attributable to the state.[29] The question

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23 C Tams, 'Article I' in C Tams, L Berster, and B Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide – A Commentary* (Beck/Nomos/Hart 2014) 33, 62.

24 H Ascensio, 'La responsabilité selon la Cour Internationale de Justice dans l'affaire de génocide bosniaque' (2007) 111 RGDIP 285, 295.

25 M Drumbl, 'Collective Responsibility and Postconflict Justice' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (CUP 2011) 23, 50.

26 *Bosnia Genocide* CR 2006/21, [11]-[15] (Brownlie); O Corten, 'L'arrêt rendu par la CIJ dans l'affaire du *Crime de Génocide (Bosnie-Herzégovine c. Serbie)*: Vers un assouplissement des conditions permettant d'engager la responsabilité d'un État pour génocide?' (2007) 53 AFDI 279, 275; also, similar normative arguments based on domestic law analogies: H Fox, 'The ICJ's Treatment of Acts of the State in Particular the Attribution of Acts to the State' in N Ando (ed), *Liber Amicorum Judge Shigeru Oda* (Kluwer 2002) 147, 158-160.

27 P Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 EJIL 631, 641.

28 K Bannelier and T Christakis, 'Qu'est-ce qu'un génocide et quand un état est-il responsable pour le crime? Analyse de l'arrêt rendu par la CIJ dans l'affaire *Bosnie-Herzégovine c. Serbie-et-Monténégro* (26 février 2007)' (2007) 40 RBDI 257, 282; cf DD Caron, 'State Crimes: Looking at Municipal Experience with Organizational Crime' in M Ragazzi (ed), *International Responsibility Today* (Nijhoff 2005) 23, 29-30.

29 Gaeta, On… (n27) 646-648.

that therefore arises is whether the duality of obligations identified in the previous part is distorted in the sense that mental elements have different meaning in the context of state and individual responsibility.

In normative terms, the very idea of 'state intent' as a putative feature of certain obligations serves a delimiting goal. Its purpose is to distinguish acts which are sanctioned by the policy of political and military authorities of the state, from acts which are not so sanctioned, even if committed with the requisite intent by individuals whose acts are attributable to the state. The underlying consideration is that certain violations, like those prohibiting genocide or war crimes, are exceptionally serious, so that additional safeguards should be in place to prevent 'trivialising' them.[30] Yet, despite its noble underpinnings the notion of 'state intent' is incurably elusive.[31] Who and how needs to adopt such a policy? Does this policy need to be promulgated by the competent organs and according to the procedure under domestic law? If not, whence should this policy originate? Is it the head of state, the legislative, the executive, the military leadership; or, maybe, an army general or minister? Would perhaps the orders of a vicious brigadier or a rogue police director suffice?

From the perspective of the law of state responsibility, it is clear that the idea of a governmental policy requirement as an equivalent of intent for states is inimical to the principle of the unity of the state.[32] One of the fundamental premises of the general law of state responsibility is that the notion of 'state fault' or 'state intent or malice' is

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30 ibid 647; also Corten (n26) 272.

31 AB Loewenstein and SA Kostas, 'Divergent Approaches to Determining Responsibility for Genocide' (2007) 5 JICJ 839, 846-847.

32 M Milanović, 'State Responsibility for Genocide' (2006) 17 EJIL 553, 568.

an unnecessary duplication.[33] The acts of state organs and agents are themselves emanations of the state. Accordingly, the fault of the state cannot consist of anything other than the fault of the individual whose acts are attributable to the state.[34] Neither the precise position of the organ within the state apparatus nor whether it exceeded its authority or contravened any instructions given by its superiors bear on the issue of the responsibility of the state.[35] The seriousness of the matter at hand does not affect the application of the 'normal principles of state responsibility'.[36] Therefore, the law of state responsibility militates for, rather than precludes, a common meaning of the mental element of dual obligations as applied to states and individuals.

The question of 'state intent' as an element of dual obligations should not be conflated with the methodology of proving a fact and, particularly, how to 'assess the relevance and probative value of…evidence'.[37] The same fact can be proven by different methods. Notably, the *mens rea* is normally inferred from the act itself (*re ipsa*).[38] So, for the purposes of state responsibility, the identification of specific individuals

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33 R Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) 149-150.

34 R Ago, 'La colpa nell'illecito internazionale' in R Ago, *Scritti sulla responsabilità internazionale degli Statti* vol-I (Jovene 1978) 271, 287; also R Quadri, 'Cours general de droit international public' (1964) 113 RdC 237, 459-460; A Bianchi, 'State Responsibility and Criminal Liability of Individuals' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 16, 18; Milanović (2006) (n32) 568.

35 Art 4 and 7 ARSIWA; *Croatia Genocide* (n20) 130-131[449]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 242[213]-[214] and 251[243].

36 EECC, *Prisoners of War—Eritrea's Claim 17* (Partial Award) [2003] XXVI RIAA 27, 41[47]; EECC, *Prisoners of War—Ethiopia's Claim 4* (Partial Award) [2003] XXVI RIAA 77, 88[38].

37 *Croatia Genocide* (n20) 74[180].

38 A Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Articles on State Responsibility' (1999) 10 EJIL 397, 400; also M Koskenniemi, 'Evil Intentions or Vicious Acts? What Is *Prima Facie* Evidence of Genocide?' in M Tupamäki (ed), *Liber Amicorum Bengt Broms* (ILA Finnish Branch 1999) 180, 196.

acting for the state, or the determination of their mental disposition, might be unnecessary in the context of a specific case.[39] The intentional character of a plurality of acts attributable to the state could be inferred from a stated policy or a discernible pattern of conduct.[40] Still, in substantive terms, this means not that intent is somehow 'ascribed' to the state independently from the intent of the individuals through which the state acts.[41] Rather, in the circumstances of the case, the intent of these individuals is sufficiently established for the purposes of that case.[42] In this light, the state and the individual obligation do not have a different content, but rather the facts constituting its breach might be proven in a different way from case to case.

The relevant practice regarding genocide and grave breaches of international humanitarian law affirms the duality of the breach of these obligations in line with the foundational principle of the unity of the state. As far as genocide is concerned, the ICJ's approach with respect to mental elements leaves little doubt as to the duality of the breach. In defining the content of the obligation not to commit genocide under Article III(a) of the Convention, the Court referred to the definition of genocide under Article II. According to the Court, 'genocide…comprises "acts" and an "intent"',[43] that

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39 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) (Separate Opinion of Judge Gaja) [2015] ICJ Rep 394, 396[3].

40 ibid; also Bonafè, Relationship (n6) 126.

41 RM Smith, 'State Responsibility and Genocidal Intent: A Three Test Approach' (2016) 34 AYBIL 87, 91.

42 Milanović (n32) 568-569.

43 *Bosnia Genocide* (n21) 121[186].

is, 'the physical element, namely the act perpetrated or *actus reus*, and the mental element, or *mens rea*'.[44] The acts constituting the *actus reus* 'are by their very nature conscious, intentional or volitional acts' and 'in addition to those mental elements…[genocide] requires the establishment of the "intent to destroy, in whole or in part,…the [protected] group as such"'.[45] It follows that these mental elements are an inextricable element of the conduct that the state is obligated not to commit through its organs or persons or groups whose acts are attributable to it under the Convention. It is plain from the ICJ's pronouncement that 'the definition at the core of both state and individual responsibility' is the same.[46] Thus, in substantive terms, a finding that an individual whose acts are attributable to the state committed genocide necessarily implies that the state committed genocide.[47] The object of proof is 'the same fact and the same wrong', that is, the commission of genocide by one or more individuals whose acts are attributable to the state.[48]

However, as described above, the method of establishing the same fact is not necessarily the same. Indeed, the Court clearly distinguished the elements of genocide from the methodology of proving their existence. In this respect, although the physical and mental elements of genocide are 'analytically distinct', the two elements 'are linked' in the sense that 'the characterization of the acts and their mutual relationship

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44 *Croatia Genocide* (n20) 62[130].

45 *Bosnia Genocide* (n21) 121[187]; also *Croatia Genocide* (n20) 62[132].

46 P Behrens, 'Between Abstract Event and Individualized Crime' (2015) 28 LJIL 923, 925.

47 See, eg, D Akande and A Tzanakopoulos, 'The Crime of Aggression in the ICC and State Responsibility' (2017) 58 HJIL Online 33, 34.

48 A Gattini, 'Evidentiary Issues in the ICJ's *Genocide* Judgment' (2007) 5 JICJ 889, 894.

can contribute to an inference of intent.'[49] Thus, an inference of intent can be drawn from the establishment of a plan or policy or from a consistent pattern of conduct.[50] This does not mean that two different concepts of genocide exist for states and individuals.[51] Rather, from an evidentiary perspective, it might be unnecessary to establish the genocidal intent of a specific individual whose acts are attributable to the state for a finding that the state committed genocide.[52]

In retrospect, the ICJ's approach does not contradict the previous practice of the International Commission of Inquiry on Darfur, Sudan ('the UN Commission'), with respect to the definition of genocide. Proponents of the 'state intent' argument often refer to the UN Commission's finding that 'the Government of Sudan did not pursue a policy of genocide'.[53] On this basis, the UN Commission concluded 'one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent.'[54] Nonetheless, in its context, this *dictum* does not support the 'state intent' point. Indeed, the UN Commission held that 'there are more indicative elements that show a lack of genocidal intent'.[55] For instance, on the basis of an analysis of the pattern of attacks, the UN Commission concluded that 'the intent of the attackers

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49 *Croatia Genocide* (n20) 61-62[130].

50 *Bosnia Genocide* (n21) 198[376]; *Croatia Genocide* (n20) 66[145].

51 A Gattini and G Cortesi, 'Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case' (2015) 28 LJIL 899, 903-904.

52 *Croatia Genocide* (Gaja) (n39) 396[3].

53 UNSG-UNSC, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' S/2005/60 (1 February 2005) [518].

54 ibid.

55 ibid [513].

was not to destroy an ethnic group as such.'[56] What is more, the UN Commission did not preclude the possibility that certain individuals, even government officials, might have harboured such genocidal intent, which was to be established on a case-by-case basis.[57] In this light, there is no indication that this understanding has any bearing on the duality of the breach. Indeed, the Darfur Commission's findings as to state responsibility for those acts were at best inconclusive.[58] It recommended that Sudan was under the obligation 'to pay compensation for all the crimes perpetrated in Darfur by its agents and officials or de facto organs' without making any exception for genocide.[59] Therefore, the Commission's findings can hardly support the claim that genocide as an internationally wrongful act of states requires the existence of the genocidal intent of the central government authorities.[60] To the extent that issues of state responsibility were addressed, the UN Commission's recommendations are in line with the ICJ's approach based on the identity of the state and individual obligation not to commit genocide.[61]

Analogous observations can be made with respect to the assessment of grave breaches of international humanitarian law. In the *Armed Activities* case between the

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56 ibid [514].

57 Darfur Report (n55) [520]

58 Darfur Report (n55) [598]

59 ibid [597] and [600].

60 For the contrary reading see: eg Loewenstein and Kostas (n31) 845; Gaeta, On… (n27) 642; A Abass, 'Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry in Darfur' (2007) 31 Fordham International Law Journal 871, 907.

61 *Popović and ors* (Judgment) IT-05-88-A (30 January 2015) [437].

DRC and Uganda, the Court made a finding of 'grave breaches of international humanitarian law'.[62] These violations largely correspond to grave breaches of the GCs and AP-I which are characterised as war crimes.[63] Crucially, the Court dismissed for lack of evidence the DRC's claim that Uganda pursued 'a deliberate policy of terror confirmed…by the almost total impunity of the soldiers and officers responsible for the alleged atrocities'.[64] The finding of grave breaches despite the rejection of this argument is important for this inquiry for two reasons. First, it shows that the acquiescence or approval of the state's highest political and military authorities is not a legal ingredient of the state obligation not to commit grave breaches of international humanitarian law. Second, the obligation not to commit grave breaches of international humanitarian law and the obligation to prevent and suppress these grave breaches are two distinct legal obligations.[65] Hence, the fact that Uganda had presumptively taken adequate legislative or administrative measures to prevent and suppress grave breaches did not absolve it from its obligation not to commit such grave breaches through the acts attributed to it.

What emerges from this analysis is that the duality of the internationally wrongful act is not distorted as a result of the application of mental elements to states. The argument that the will of the state is somehow equated with the will of the higher or highest authorities of the state is not tenable in theory. From a doctrinal perspective, the fundamental principle of the unity of the state is inimical to such a notion of 'state intent'. What is more, the elusive criterion of acquiescence by higher or highest authorities

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62 *Armed Activities* (CO) (n35) 239[207].

63 ibid 241[211], 244[219], and 280[345(3)]; cf Chapter 2.II.2.

64 ibid 241-242[212].

65 cf text accompanying n28.

conflates the negative obligations not to commit with the positive obligations to prevent. Findings relating to genocide and grave breaches of international humanitarian law do not point to an exception to these considerations. The duality of the obligation needs to further be distinguished from evidentiary matters and, particularly, the methodology of assessing the relevance and probative value of evidence. In this respect, the intent of the authors of the act can be inferred, even without naming the authors, from the 'specific circumstances of the case'.[66] These circumstances might include a stated policy originating from the highest authorities of the state. Nonetheless, the approval or acquiescence of the highest authorities of the state is not an element of the obligation.

III. Duality of the Breach and Composite Breaches

1. Dual Obligations and Classification of Breaches of International Obligations under the Law of State Responsibility

In their current simplified form,[67] the ARSIWA contain two provisions which define the 'notion of a breach of an international obligation…in general terms' and correspond to two different types of internationally wrongful acts.[68] On the one hand, Article 14 ARSIWA provides for situations where a breach of an international obligation is constituted by an act of state having a non-continuing or a continuing character or by its failure to prevent an event ('simple' breaches). On the other hand, Article 15 ARSIWA provides for the situation where the breach of an international obligation consists of 'a series of actions or omissions defined in aggregate as wrongful', namely, 'breaches

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66 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 240[26].

67 See earlier version: Arts 18-23, ILC, 'Draft Articles on State Responsibility provisionally adopted by the Commission on first reading' (1996) II(2) YbILC 58, 60-61.

68 Commentary to Chapter III Part One ARSIWA [1].

consisting of a composite act'.[69] This section clarifies the contours of this distinction and discusses the structure of dual obligations against the backdrop of the distinction.

According to the Commentary, the difference between the two provisions lies in the structure of the underlying obligation.[70] In the situation provided under Article 14 ARSIWA, each action or omission, whether instantaneous or continuous, taken separately, constitutes a separate breach and thus a separate internationally wrongful act.[71] As a result, the breach starts when the act is performed or the event, which triggers the obligation of the state to act, occurs and lasts as long as the action or the omission continues.[72] Thus, if angry crowds invade and occupy the consular posts of another state without the police doing anything about it, the host state would be in breach of its international obligation to afford protection to these premises from the moment of the invasion and as long as the occupation continues.[73] Similarly, if state organs later join the crowds in the occupation of these premises or authorise the continuation of the occupation, the state commits from that moment and as long as the occupation lasts a different breach of the inviolability of consular premises.[74] In theoretical terms, each

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69 Art 15(1) ARSIWA.

70 Commentary to Art 15 ARSIWA [4].

71 R Ago, 'Le délit international' (1939) 68 RdC 415, 522.

72 Art 14 ARSIWA.

73 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJ Rep 3, 32-33[67]-[68]; cf Art 22(2) VCDR.

74 *Tehran Hostages* (n73) 36[77]; cf Art 22(1) VCDR.

action or omission attributable to the state taken separately would be sufficient to establish a separate breach of the international obligation and would thus constitute a unique internationally wrongful act.[75]

By contrast, the underlying assumption of Article 15 is that an obligation cannot be so reduced into individual acts in that no breach would exist by definition when the first action or omission is performed.[76] In fact, no action or omission in isolation would amount to a breach of that specific obligation. Thus, for example, the arrest and detention of a person by the police, even if unlawful under human rights law, cannot as such amount to an enforced disappearance.[77] An enforced disappearance will only occur if this act is followed 'by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'.[78] Conversely, this refusal or concealment cannot as such amount to an element of enforced disappearance, but only if it is preceded by the deprivation of liberty.[79] The fact that the initial arrest or detention was an element of an enforced disappearance will only be revealed after the fulfilment of the element of refusal.[80] Hence, whilst the wrongful act of enforced disappearance will be committed, as a matter of fact, at the moment of the refusal or concealment and as long as the

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75 Ago, Le délit… (n71) 522.

76 Commentary to Art 15 ARSIWA [7].

77 See *Aboufaied v Libya* (Individual Opinion of Committee member Sir Nigel Rodley) CCPR/C/104/D/1782/2008 (21 March 2012) in UNHRC, 'Report of the Human Rights Committee' A/67/40 (Vol. II) (2011-2012) 123, 123-124.

78 Art 2 CED; also Art 7(1)(i) and 7(2)(i) RSICC; Art 7(1)(i)(2)(a) ICC Elements of Crimes; *Varnava and ors v Turkey* [GC] 2009 ECHR-V 13, 63[148].

79 Art 7(1)(i)(2)(b) ICC Elements of Crimes.

80 cf Commentary to Art 15 ARSIWA [7].

secret detention lasts, the breach starts, as a matter of law, when the arrest occurs.[81] In this situation, a series of interrelated actions or omissions correspond to a single, composite, breach of an international obligation and thus to a single, composite, wrongful act.[82]

The exact conditions upon which certain acts amount to a breach of an obligation by a composite act are to be established by reference to that obligation.[83] Pursuant to the ILC, Article 15 ARSIWA deals solely with rules establishing 'composite' or 'systematic' obligations.[84] Such rules are presumably of an exceptional character and should be distinguished from 'single obligations breached by a "composite" act'.[85] Indeed, breaches of international obligations by a state might involve to a larger or lesser extent a plurality of actions or omissions.[86] For example, the breach of an obligation not to exceed the taking of a specified amount of water from a boundary river occurs when the quota is exceeded.[87] It is inconsequential to the time of the breach whether the state has failed to fulfil its obligation by, for example, issuing an exorbitant number

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81 Art 15(2) ARSIWA.

82 *El-Masri v the Former Yugoslav Republic of Macedonia* [GC] 2012 ECHR-VI 263, 347[240].

83 I Brownlie, *System of the Law of the Nations: State Responsibility – Part I* (OUP 1983) 197; more generally, J Pauwelyn, 'The Concept of a "Continuing Violation" of an International Obligation: Selected Problems' (1996) 66 BYBIL 415, 420.

84 Commentary to Art 15 ARSIWA [4]; J Crawford, 'Second Report on State Responsibility' (1999) II(1) YbILC 3, 36[121]-[124]; A Gattini, 'Breach of an International Obligation' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2015) 25, 47.

85 Commentary to Art 15 ARSIWA [4].

86 cf, the critique of G Arangio-Ruiz, 'L'Etat dans le sens du droit des gens et la notion du droit international' (1975) 26 Österreichische Zeitschrift für öffentliches Recht 265, para 70 arguing against the ILC's 'individualistic' approach regarding establishment of state responsibility because of the 'composite' character of most acts of the state.

87 Crawford, Second Report (n84) 36[123].

of licences to private users, because conduct prior to the exceeding of the quota 'is of a preparatory character and…"does not qualify as a wrongful act"'.[88]

That said, the distinction between 'single obligations breached by a "composite" act' and 'composite' obligations is not as straightforward in all cases. According to the ARSIWA, a composite obligation comprises a series of actions or omissions which are defined in aggregate as wrongful.[89] In other words, it consists of multiple material elements that need to be fulfilled cumulatively. In addition, according to Ago, what distinguishes the 'composite delict' is that 'the plurality of conducts corresponds…to a plurality of delicts, a plurality of breaches of an international obligation different to the one that violates the aggregate.'[90] Despite the formulation of Article 15 ARSIWA, the Commentary follows closely Ago's understanding.[91] One implication of this approach is that a single material act can produce a plurality of delicts in this sense, thereby meriting a different legal qualification from the component delicts. For instance, the deployment of a chemical weapon can cause multiple deaths each of which constitutes an analytically distinct wrongful killing (eg as a violation of the right to life), whereas the aggregation of such killings constitutes a separate wrong (eg extermination as a crime against humanity). Therefore, the notion of 'composite' obligations covers obligations consisting of multiple material elements and obligations whose elements consist of multiple breaches of other international obligations. At the same time, several invest-

88 *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 54[79].

89 Art 15(1) ARSIWA.

90 Ago, Le délit… (n71) 522; also R Kolb, *The International Law of State Responsibility* (Elgar 2017) 53.

91 Commentary to Art 15 ARSIWA [4]-[5].

ment tribunals rely on Article 15 ARSIWA for the determination of the time of an unlawful taking of property by an accumulation of distinct measures directed to deprive a person of its property ('creeping expropriation').[92] In these cases, the circumstances of the breach seem to be decisive; it is readily apparent that a taking of property can as easily be effected through a single physical or juridical act. However, creeping expropriation can also be seen as a separate obligation, and indeed a composite one by definition in that it presupposes a specific purpose and a certain threshold of material injury or harm.[93] More generally, a rule can exhibit 'intrinsic unitary tendencies'; namely, the same rule can lay down both single and composite obligations.[94] This is a matter of interpretation of each specific rule.

Most of the dual obligations examined in this study represent the prime examples of the notion of composite obligations under the ARSIWA. The nature of the prohibition of genocide as a 'composite' or 'systematic' obligation has been noted by the ILC regardless of the responsible entity by reference to the Statutes of the ICTY and ICTR and the Rome Statute.[95] A feature of the definition of genocide is that its material elements are provided for in the plural,[96] whereas the specific mental element of genocide

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92 eg *Société Générale v Dominican Republic* (Award on Preliminary Objections) LCIA Case No. UN 7927 (19 September 2008) [91]; *Gemplus S.A. and ors v United Mexican States/Talsud S.A. v United Mexican States* (Award) ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4 (16 June 2010) [12-44]; also Kolb (n90) 51; on the notion of 'creeping expropriation', see A Ruzza, 'Expropriation and Nationalization' (2017) MPEPIL [12].

93 cf, along similar lines, *El Paso Energy International Company v Argentine Republic* (Award) ICSID Case No ARB/03/15 (31 October 2011) [516]-[518] ('creeping violation of the F[air] [and] E[quitable] T[reatment] standard').

94 cf Ago, Le délit… (n71) 522.

95 ibid [3].

96 cf Art II(a)-(e) CPPCG; Art 6(a)-(e) RSICC; Art 2(a)-(e) ICTR St; Art 4(a)-(e) ICTY Statute.

implies an accumulation of acts directed against a group.[97] The fact that each single act must be committed with the relevant intent, broadly construed, is not as such sufficient for genocide, as 'genocide is different in kind from individual acts of ethnically or racially motivated killing'.[98] Rather, each act ordinarily assumes its qualification as genocide in relation to previous or subsequent acts. Along similar lines, a crime against humanity is separate from its component human rights violations.[99] In a similar vein, the objective threshold required for an act of aggression presupposes that such act will often consist of a series of interrelated acts which separately constitute wrongful uses of force.[100] Another notable example are grave breaches of AP-I and the corresponding provisions in the AP-I which are structured around the notion of 'attacks' or prohibit acts that are directed against the 'civilian population as such'.[101] Much like creeping expropriation, the composite character of the obligation is not negated by the fact that attacks against individual civilians are also prohibited.[102] In all these situations, a plurality of acts which might be separate in time and in space is regarded as a unity from a legal perspective.

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97 Commentary to Art 15 ARSIWA [3].

98 ibid [4]; Crawford, Second Report (n84) 36[124]; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Counter-Claims) (Separate Opinion of Judge Lauterpacht) [1997] ICJ Rep 278, 282[13]; *contra* Gattini (n84) 49.

99 Commentary to Art 15 ARSIWA [5].

100 See, *mutatis mutandis*, *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161, 191-192[64]; *Armed Activities (CO)* (n35) 223[146] (relating to the similarly structured notion of an armed attack).

101 eg, Art 49(1) AP-I ('*acts* of violence against the adversary, whether in offence or defence'); Art Art 51(2),(4)-(7) AP-I.

102 Art 51(2) AP-I.

The notion of breaches consisting of a composite act needs to be distinguished from other notions. First, the composite structure of the breach is analytically distinct from the notion of intent as a mental element.[103] What renders a plurality of acts a unity is not a subjective element or intent alone,[104] but the fact that multiple acts have a common object and purpose and cumulative effects.[105] In this sense, a composite breach objectively consists of interrelated acts assembled into a pattern or a plan, rather than an aggregate of unrelated actions or omissions.[106] Whilst the determination of this objective element 'can require an inquiry into intent' or 'can contribute to an inference of intent', this element remains 'analytically distinct' from intent.[107] Thus, for example, a State policy or plan expressing the intent to commit genocide could demonstrate that even seemingly disparate acts of violence directed against members of a protected group constitute genocide.[108]

Second, breaches consisting in a composite act are not the same with the putative element of state intent. Schabas claims that 'establishing that [an act] was orga-

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103 Pauwelyn (n83) 420.

104 *contra* A Vermeer-Künzli, 'Invocation of Responsibility' in Nollkaemper/Plakokefalos, Principles (n84) 251, 262.

105 R Ago, 'Seventh Report on State Responsibility' (1978) I(1) YbILC 31, 47[38] ('are interrelated by having the same intention, content and effects…'); P-M Dupuy, 'Le fait générateur de la responsabilité internationale des États' (1984) 188 RdC 9, 45; *mutatis mutandis*, *Tecmed v United Mexican States* (Award) ICSID Case No ARB (AF)/00/2 (29 May 2003) [62]

106 JJA Salmon, 'Duration of the Breach' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 383, 391-392.

107 cf *Croatia Genocide* (n20) 61-62[130].

108 Along these lines, *Croatia Genocide* (n20) 65[143] and 66[145]; A Pellet, 'Responsibility of States in Cases of Human-rights or Humanitarian-law Violations' in J Crawford, AG Koroma, S Mahmoudi, and A Pellet (eds), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz* (Brill 2017) 230, 247-248; see also text accompanying n106-107.

nized…and that it was not simply a random act does not necessarily respond to a requirement that [such act] be committed pursuant to a State policy.'[109] Thus, according to Schabas, the fact that the Srebrenica massacre allegedly originated from 'a last minute, improvised business, devised by General Mladić and his close subordinates on or about July 11-15, 1995' would mean that it was not an act of genocide.[110] The lack of a strategic plan involving the rest of the political or military leadership of Serbia or Republika Srpska would preclude a finding of genocide.[111] It is this aspect of the state policy requirement that has been rejected in practice and is plainly incompatible with the principle of the unity of state.[112] To clarify this point, it is trite that the superior-subordinate relationship is a pervasive structural feature of the state. The coordination needed for cumulative conduct to be directed towards a common object and purpose will in many cases be effected through a chain of command. However, this is not what makes the breach consisting of a composite act. The notion of breaches consisting of a composite act does not necessarily imply nor entail any hierarchical approval or acquiescence from the highest political or military authorities or the central government (which would contradict the principle of the unity of the state). Indeed, it is possible for a multiplicity of acts to be the outcome of coordination amongst peers in the hierarchical sense, for example, between multiple members of the armed forces or the police at the same hierarchical (even low) level.[113] The notion of breaches consisting of a

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109 W Schabas, 'State Policy as an Element of International Crimes' (2008) 98 JCLC 953, 958.

110 ibid.

111 ibid.

112 On the point of fact see: *Bosnia Genocide* (n21) 165-166[295]. On the point of law see: *Croatia Genocide* (n20) 130-131[449].

113 See, *mutatis mutandis*, *Nikolić (Dragan aka 'Jenki')* (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-96-2-R61 (20 October 1996) [26] ('Although

composite act only indicates that 'the cumulative conduct constitutes the essence of the wrongful act'.[114]

Third, this structural feature also needs to be distinguished from the notion of 'serious breaches of peremptory norms of general international law'. It can be argued that the situations encompassed in Article 15 and Article 40 ARSIWA overlap to a certain extent. Indeed, as the ILC has noted, 'some of the most serious acts in international law are defined in terms of their composite character'.[115] A serious breach of an obligation arising out of a peremptory norm of general international law will normally consist of a composite act, since random or isolated acts cannot qualify as a gross or systematic failure to fulfil an obligation.[116] Yet, this overlap is only partial. In principle, the notion of breaches consisting of a composite act does not necessarily encompass only 'serious breaches' or only obligations arising from peremptory norms. In other words, the notion of breaches consisting of a composite act describes a structural feature, but it does not suggest that such breaches are more serious than others.[117] Whether the breach of an obligation entails aggravated state responsibility is an issue pertaining to the consequences, not the establishment of responsibility.

[crimes against humanity] need not be related to a policy at a State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.').

114 Commentary to Art 15 ARSIWA [4].

115 ibid [3].

116 Art 40(2) ARSIWA; see Commentary to Art 40 ARSIWA [8] and fn651; *mutatis mutandis*, JJA Salmon, 'Le fait international complexe: Une notion contestable' (1982) 28 RGDIP 709, 709.

117 cf, eg, on the purpose of Chapter III, Part Two ARSIWA: G Abi-Saab, 'The Uses of Article 19' (1999) 10 EJIL 339, 345-346.

To sum up, the law of state responsibility establishes, or presupposes, a variety of classifications of rules and breaches, but not all of them have a bearing on the establishment of responsibility. The sole relevant distinction for this purpose is the one envisaged in Articles 14 and 15 ARSIWA. These provisions establish two scenarios of breaches of international obligations. First, the normal case will be that a breach of an international obligation will consist of an action or omission which might have a continuous or non-continuous character or might depend on the existence of an external instantaneous or continuous event. Second, a breach of an international obligation might exceptionally consist of a series of interrelated actions or omissions. In these situations, these actions or omissions, which are distinct in fact, are considered a unity as a matter of law on account of the structure of the specific obligation. This is a common feature of the preponderance of obligations examined in this thesis. The following section turns to the manifestation of this feature in the law of individual responsibility.

2. Breaches Consisting of Composite Acts and the Law of Individual Responsibility

The further question that needs to be examined is whether this structural feature known in the law of state responsibility is reflected in the context of the law of individual responsibility. In other words, whether certain dual obligations, when applied to individuals, can ordinarily be breached by a series of interrelated acts or omissions and not by an isolated act. As will be demonstrated, this is the case with many obligations identified as dual in this thesis. This section argues that the composite character of the obligation manifests itself in the law of individual responsibility in two ways. First, a frequent characteristic of many dual obligations is that they contain or imply contextual elements. So, the act has to form part of a pattern of interrelated acts, whilst isolated acts remain beyond the realm of international law or constitute different wrongs. Sec-

ond, another emanation of the composite character of the obligation in the law of individual responsibility is the reversal of the notions of perpetrator and accomplice. As the cumulative conduct constitutes the essence of the wrongful act, the conduct of each individual is assessed on the basis of its relationship with that cumulative conduct. The confluence of these considerations affirms the composite character of the underlying obligations confirming thus the dual character of the breach.

Genocide is a paradigmatic in this respect, as it is both individual and collective.[118] At a very basic level, the concept of genocide is based on 'an individual's misconduct that satisfies the requirements of genocide as a criminal offense'.[119] Indeed, the definition of genocide does not require the destruction of the protected group; the crime is complete when the enumerated acts are committed with the requisite intent.[120] What is more, the prohibition of genocide addresses not only 'rulers', still less only states.[121] On its face, it requires no nexus with a state or organisation at all;[122] it addresses all individuals alike.[123] In theory, the commission of acts on a large scale by the individual

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118 G Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the *Darfur* Case' (2005) 3 JICJ 539, 545.

119 S Kirsch, 'Two Notions of Genocide: Distinguishing Macro Phenomena from Individual Misconduct' (2009) 42 Creighton Law Review 347, 349.

120 D Nersessian, *Genocide and Political Groups* (OUP 2010) 17.

121 Art IV CPPCG; Commentary to Art 17 DCCAPSM [10].

122 *Popović* ACJ (n61) [430].

123 *Kayishema and Ruzindana* (Judgment) ICTR-95-1-A (1 June 2001) [170]; see also Commentary to Art 17 DCCAPSM [10].

accused is not required although the scale of atrocities is relevant to the assessment of *mens rea*.[124]

At the same time, the objective and mental elements of genocide transcend normally the capabilities of an individual acting alone.[125] The intended victim is an entire racial, national, ethnic, or religious group as a separate and distinct entity or a 'substantial' part thereof.[126] Violence against its individual members is only an incremental step towards the destruction of the group.[127] An individual acting alone cannot possibly mean to cause such destruction, still less know that such destruction will, or at least could possibly, occur in the ordinary course of events.[128] Even if an individual engaging in isolated acts desires the destruction of a group, this cannot be possibly evidence of genocidal intent; more likely it will be evidence of 'delusion'.[129] On the one hand, the definition of genocide would serve little practical purpose if it required that the protected group were actually destroyed in whole or in a substantial part or the scale of

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124 eg *Ndindabahizi* (Judgment and Sentence) ICTR-2001-71-I, TC-I (15 July 2004) [471]; *Seromba* (Judgment) ICTR-2001-66-I, TC (13 December 2006) [371]; also *Karadžić* (Judgment) IT-98-5/18-T (24 March 2016) [542] and fn1723.

125 W Schabas, Genocide in International Law (2nd edn CUP 2009) 246.

126 eg Commentary to Art 17 DCCAPSM [8]; *Krstić* (Judgment) IT-98-33-A (19 April 2004) [37]; *Sikirica and ors* (Judgment on Defence Motion to Acquit) IT-95-8-T (3 September 2001) [89]; *Stakić* (Judgment) IT-97-24-T (31 July 2003) [521]; *Al-Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, PTC-I (4 March 2009) [114]; also *Bosnia Genocide* (n21) 126[198]; *Croatia Genocide* (n20) 64[139].

127 HRC, '"They came to destroy": ISIS Crimes against the Yazidis' (15 June 2016) A/HRC/32/CRP.2 [10].

128 cf Art 30(1)(b) RSICC; C Kreß, 'The Darfur Report and Genocidal Intent' (2005) 3 JICJ 562, 565-567; C Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18 EJIL 619, 623; W Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide' (2005) 18 LJIL 871, 884.

129 See eg *Mpambara, Jean* (Judgment) IT-01-65-T (11 September 2006) [8] at n7.

atrocities were such that destruction were concretely threatened.[130] Yet, on the other hand, some objective backdrop is required to distinguish intent from what can only be perceived objectively as an impossible attempt at best.[131] Therefore, genocide ordinarily presumes that several individuals are involved,[132] but for the unlikely scenario that an individual has the means to at least conceivably threaten such destruction.[133] In practical terms, the genocidal intent must be discernible in the collective act itself apart from the intent of individual perpetrators.[134] Certainly, a context of violence directed against a protected group does not make it more likely that the accused intended the destruction of the group, still less that the accused committed intentionally the underlying acts.[135] However, the absence of the context makes it impossible that the accused possessed genocidal intent, unless she had the means to even conceivably threaten the destruction of the protected group alone. Hence, the establishment of the context is 'a *necessary*, but not *sufficient* part' of most genocide cases.[136] In fact, 'there is no record, in law or

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130 See *Al-Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) (Separate and Partly Dissenting Opinion of Judge Anita Ušacka) ICC-02/05-01/09-3, PTC-I (4 March 2009) [19] and fn26; and *Al-Bashir* (Second Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-02/05-01/09-94, PTC-I (12 July 2010) [15]. In this respect, the finding in *Al-Bashir* AW-2009 (n126) [124] that 'a concrete threat to the existence of the targeted group, or part thereof' should be considered obsolete.

131 C Kreß, 'The Crime of Genocide under International Law' (2006) 6 ICLR 461, 471-472.

132 *Krstić* (Judgment) IT-98-33-T (2 August 2001) [548]-[549].

133 cf W Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes' (2010) 23 LJIL 847*ff.*

134 *Krstić* TCJ (n132) [548]; JRWD Jones, '"Whose Intent Is It Anyway?" Genocide and the Intent to Destroy a Group' in LC Vohrah and ors (eds), *Man's Inhumanity to Man* (Kluwer 2003) 467, 476-478.

135 KJ Heller, 'International Criminal Tribunal for Rwanda – Genocide – Conspiracy to Commit Genocide – Complicity in Genocide – Mens Rea – Judicial Notice' (2007) 101 AJIL 157, 159; JB Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate 2006) 118.

136 *Karemera* (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice) ICTR-98-44-AR73(C) (16 June 2006) [36] (emphasis added).

history' where the genocidal intent of the accused was established in the absence of a broader context of violence directed against a protected group.[137]

The fact that an objective backdrop is a necessary, but not sufficient, condition for the establishment of genocide renders it an implicit element of genocide alongside genocidal intent. In other words, since someone's wish to bring about the destruction of the group would not suffice for genocide without an objective backdrop, the existence of an objective backdrop cannot only be a method of proving genocidal intent. Indeed, the ICC Elements of Crimes make this element explicit by requiring that 'the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.[138] It is true that the ICC Elements of Crimes probably cannot be construed as a subsequent agreement regarding the interpretation of the Genocide Convention under Article 31(3)(a) VCLT, as the participation in the Genocide Convention and the Rome Statute do not completely overlap.[139] On the other hand, such discrepancy is only marginal and the negotiation of the ICC Elements of Crimes involved parties to the Genocide Conven-

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137 G Simpson, 'Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law' in A Nollkaemper and H Van Der Wilt (eds), *System Criminality in International Law* (CUP 2009) 69, 71; Bonafè, Relationship (n6) 134; cf *Jelisić* (Judgment) IT-95-10-A (5 July 2001) [68] (where the applicable evidentiary standard was that 'no reasonable Trial Chamber could have found that he had such an intent') but see eg *Krajišnik* (98*bis* Judgment – Transcript) Case No IT-00-39-T (19 August 2005) 17119-17120: where the TC-I rejected the contention of the defence that no reasonable trier of fact could have found that genocide was committed in, *inter alia*, Brčko (the area where Goran Jelisić committed his crimes).

138 Arts 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7) ICC Elements of Crimes; V Oosterveld, 'The Elements of Genocide' in RS Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 41, 44; also E Wilmshurst, 'Genocide' in R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Law and Procedure* (3rd edn CUP 2014) 205, 208-209.

139 *Croatia Genocide* (Gaja) (n39) 394-395[2].

tion that were not parties, but only signatories, to the Rome Statute. In fact, the contextual element was proposed by such a state.[140] Therefore, the contextual element might reflect subsequent practice in the application of the Genocide Convention that is relevant to its interpretation under Article 31(3)(b) or 32 VCLT.[141] Thus, from a formal perspective, the provision of the ICC Elements of Crimes must or at least should be taken into account in interpreting the Genocide Convention.[142]

A further implication of the composite character of genocide is reflected in the determination of the perpetrator of genocide. After all, to define an obligation is to define what its subject actually must do. As an ICTY TC has proclaimed, '[g]enocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means'.[143] To use the terminology of the ICC Elements of Crimes with respect to other crimes, genocide has a 'complex nature' in that it presumes 'more than one perpetrators as part of a common criminal purpose'.[144] In the context of acts like genocide, it might be that the physical perpetrator at the execution level personally perpetrates insufficient acts or lacks the requisite knowledge to

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140 PCNICC, 'Proposal submitted by the United States of America – Draft Elements of Crimes' PCNICC/1999/DP.4 (4 February 1999).

141 C Kreß, 'The Crime of Genocide and Contextual Elements' (2009) 7 JICJ 297, 302; cf Conclusion 4(3) and 11(2), ILC, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission' in ILC, 'Report of the International Law Commission – Seventieth Session' (30 April-1 June and 2 July-10 August 2018) A/73/10 [51].

142 cf, *mutatis mutandis*, D Akande and A Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29 EJIL 939, 948-949.

143 *Krstić* TCJ (n132) [550].

144 eg fn17, ICC Elements of Crimes.

qualify as principal of the crime.[145] Conversely, the person who oversees the commission of the entirety of the act cannot qualify as an accomplice or responsible superior, because such form of responsibility presupposes that a principal has committed genocide.[146] So, lest the physical or mental elements of genocide are watered down, genocide would never be committed in law.[147] As a result, for all international criminal courts and tribunals, the perpetrator of genocide is not exclusively or even necessarily the person physically committing its material elements.[148]

This point can be illustrated by a series of cases relating to the Srebrenica genocide. First, the ICTY Prosecution did not pursue any charges of genocide or complicity in genocide against a soldier for killing Muslim men in Branjevo farm (Pilica).[149] Second, for another TC, the finding that a second lieutenant of the Bosnian Serb forces 'committed murder' in the Srebrenica area with knowledge of the genocidal plan was insufficient for a conviction for committing genocide.[150] The TC entered a conviction for aiding and abetting genocide after finding that the accused's 'participation and role

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145 eg K Ambos, 'What Does 'intent to destroy' Mean?' (2009) 91 IRRC 833, 855-856.

146 *Krstić* TCJ (n132) [643]; see H Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart 2009) 117.

147 cf, eg, the criticisms on the case law of the ICTR: AKA Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based interpretation' (1999) 99 Columbia Law Review 2260, 2282; S Kim, *A Collective Theory of Genocidal Intent* (Springer 2016) 29.

148 cf Art 25(3)(a) RSICC; *Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) [776]; also *Seromba* (Judgment) ICTR-2001-66-A (12 March 2008)[171]-[172]; *Gacumbitsi* (Judgment) ICTR-2001-64-A (7 July 2006) [60]-[61].

149 eg *Erdemović* (Indictment) IT-96-22 (22 May 1996) [11]-[12].

150 *Popović and ors* (Judgment) IT-05-88-T (10 June 2010) [1397].

in the operation viewed in this context is not overarching'.[151] Along similar lines, Bosnian Serb police officers and foot soldiers that shot at Bosnian Muslims in the Kravica Warehouse were convicted for aiding and abetting genocide, rather than commission of genocide. In the event, it was found that the defendants were only aware of the general context and their contribution, although considerable, was not indicative of genocidal intent.[152]

More generally, in domestic legal orders, the essence of committing any offence is bringing about its material elements.[153] Nonetheless, the composite structure of genocide militates often for the 'reversal of the notions of perpetrator and accomplice' (« *le renversement des notions d'auteur et de complice* »).[154] This is not to say that genocide is leadership crime.[155] Rather, the important point is that the composite character of genocide militates for a departure from a purely 'individualistic' methodology for the establishment of responsibility.[156] The perpetrator of genocide is not the person committing violent acts against the protected group, no matter how tenuous or artificial the

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151 ibid [1410]

152 See, eg, *Mitrović* (Verdict) X-KRŽ-05/24-1 (7 September 2009) [251]-[264]; *Stupar and ors* (Appellate Verdict) X-KRŽ-05/24 (9 September 2009) [560]-[573] (Appellate Division of the Court of Bosnia and Herzegovina) [note that the Appellate Division explicitly relies on ICTY jurisprudence on this point]; also *Vuković and Tomić* (Verdict) X-KR-06/180-2 (2 July 2010) [568]-[581] (War Crimes Section I of the Court of Bosnia and Herzegovina).

153 *Ngudjolo* (Judgment) (Separate Opinion of Judge Van den Wyngaert) ICC-01/04-02/12-4, TC-II (18 December 2012) [44].

154 R Maison, *La responsabilité individuelle pour crime d'État en droit international public* (Bruylant 2004) 328; cf, also, eg, N Jain, *Perpetrators and Accessories in International Criminal Law – Individual Modes for Collective Crimes* (Hart 2014) 113.

155 cf Kim (n147) 230.

156 cf A Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524, 526.

link with the collective act may be. As genocide consists of a plurality of acts, the establishment of the breach of this obligation depends on the relation of the individual actor with other actors and an essentially collective act. It follows that genocide cannot be reduced to its individual component acts for the purposes of the establishment of the breach.[157] Rather, the composite structure of the breach requires a 'relational' approach to the establishment of the breach.[158] As will be explained in more detail in chapter 5, the different doctrines of mutual attribution of conduct in the law of individual responsibility are intended to reflect such a 'relational' approach.[159]

In light of these considerations, many of the obligations identified in this thesis as dual present comparable structural features. Aggression is defined as an act 'which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[160] Similarly, several acts constituting crimes against humanity pursuant to Article 7(1) of the Rome Statute presuppose a plurality of interrelated conduct, extermination,[161] sexual slavery and forced pregnancy,[162] enforced disappearances,[163]

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157 Maison (n154) 121; see also *Attorney-General (Israel) v Eichmann* (1961) 36 ILR 18 (District Court of Jerusalem), 234[193]: 'The extermination campaign was a single comprehensive act, not to be split up in the acts or operations performed by sundry people at sundry times and in sundry places.'

158 On the notion of 'relational' approach cf A Nollkaemper, 'Shared Responsibility for Human Rights Violations: A Relational Account' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017) 27*ff*.

159 See Chapter 5.III.1 and 5.III.2(c) and (d).

160 Art 8*bis*(1) RSICC.

161 Art 7(1)(b) and 7(2)(b) RSICC; Art 2(1)(b) and 2(2)(b) DACAH; eg *Vaslijević* (Judgment) IT-98-32-T (29 November 2002) [227] and [229].

162 Art 7(1)(h) and 7(2)(g) RSICC; Art 2(1)(h) and 2(2)(g) DACAH due to the requirement that the act is committed 'with the intent of affecting the ethnic composition of any population'; see also Art 7(1)(g)-2, fn17, ICC Elements of Crimes.

163 Art 7(1)(i) and 7(2)(i) RSICC; Art 7(1)(i) and fn23, ICC Elements of Crimes

and apartheid[164] being the obvious examples. It is also arguable that the composite character of the act is a feature of all acts constituting crimes against humanity. Crimes against humanity require a contextual element of 'widespread or systematic attack against a civilian population', that is, 'a course of conduct involving the multiple commission of acts…pursuant to or in furtherance of a State or organizational policy to commit such attack'.[165] As an ICC PTC enunciated, '[t]he commission of the acts referred to in article 7(1) of the Statute constitute the "attack" itself'.[166] Along similar lines, many breaches of international humanitarian law which qualify as war crimes cannot reasonably be committed by an isolated act, but presuppose a multiplicity of coordinated conduct.[167] For instance, war crimes stem from, or mirror the structure of, certain provisions of AP-I that prohibit 'attacks' directed against the 'civilian population as such'.[168] These formulations suggest that these wrongs are of a 'complex nature' in that they presume 'more than one perpetrators as part of a common criminal purpose'.[169] In other words, much like acts constituting elements of genocide, the legal characterisation of each act as an element of aggression, of a crime against humanity, or of a grave breach of international humanitarian law is dependent upon previous

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164 Art 7(1)(j) and 7(2)(h) RSICC; Art 2(1)(j) and 2(2)(h) DACAH; Commentary to Art 15 ARSIWA [4].

165 Art 7(2) RSICC; Art 2(2) DACAH; Commentary to Art 15 ARSIWA [2].

166 *Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424, PTC-II (15 June 2009) [75].

167 *Ngudjolo* TCJ (Van den Wyngaert) (n153) [47]; see, eg, Arts 25, 28, and 56 Hague Regulations; Arts 50 GC-I, 51 GC-II, 130 GC-III, 147 GC-IV; Arts 8(2)(b)(v),(xiii)-(xvi), and (xxvi) RSICC.

168 eg, Art 85(3)(a)-(d), 85(4)(a)-(d) AP-I; see also Arts 8(2)(b)(i)-(iv), (viii)-(x), and (xxiv)-(xxv) RSICC.

169 fn17 and 23, ICC Elements of Crimes; also, in more general terms, *Tadić* (Judgment) IT-94-1-A, AC (15 July 1999) [191].

and/or subsequent acts. As a result, a plurality of acts is regarded as a unity from a legal perspective.

From a doctrinal perspective, this structure is not as a matter of law or logic a necessary feature of all breaches of dual obligations. Indeed, this is a matter of interpretation of each specific rule. For example, certain war crimes, like murder, may consist of a single act unconnected to other crimes, even though such act will only be considered a war crime if it 'took place in the context of and was associated with' an armed conflict.[170] Nonetheless, what the above analysis shows is that the composite structure constitutes a frequent feature of the breach of dual obligations and indeed applicable both to states and individuals. This is unsurprising, since the notion of composite wrongful acts was developed in the law of state responsibility by reference to its domestic criminal law counterparts.[171] In the law of individual responsibility, this is explicitly reflected in the notion of 'complex' crimes, but also in contextual elements, and underlies the determination of the perpetrator of these wrongful acts.[172]

What emerges from a synthesis of the analysis on the law of state and individual responsibility is that the breach of dual obligations very often does not consist exclusively of isolated acts. The definitions of genocide, aggression, crimes against humanity and several grave breaches of international humanitarian law constituting war crimes

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170 Art 8, Introduction (c) RSICC; G Mettraux, 'Nexus with Armed Conflict' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 435, 435.

171 Ago, Le délit… (n71) 519 and 522; also G Distefano, 'Fait continu, fait composé et fait complexe dans le droit de la responsabilité' (2006) 52 AFDI 1, 52; F Paddeu, *Justification and Excuse in International Law* (CUP 2017) 26 ; cf E Wyler, 'Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite' (1991) 95 RGDIP 881, 909 (criticising the Commission for drawing from criminal law).

172 See n169.

are couched in terms which suggest that they ordinarily constitute an aggregate of conduct. As a result, a multitude of interrelated acts or omissions must be regarded as a unity; a single, composite, breach. This feature is applicable both with respect to states and individuals.

IV. Duality of Obligations and Derivative Breaches

1. Duality of Obligations and Prohibition of Aid or Assistance in Internationally Wrongful Acts

The previous sections have examined the application of two features of the breach of dual obligations: mental elements and composite structure. The systematic elaboration of these features in disparate sources does not distort the duality of the breach. In furtherance of this inquiry, this section turns to the more complex issue of the 'derivative' breaches or wrongs in the law of individual responsibility and their relationship with obligations of states. As has been demonstrated in the previous chapter, chapter 3, international obligations of individuals consist of derivative wrongs. These obligations comprise 'forms of unlawful conduct' distinct from the principal wrongful conduct for which the individual is responsible independently under international law.[173] These forms of wrongdoing are derivative in the sense that they encompass conduct whose wrongfulness depends upon the commission of an internationally wrongful act by another individual.[174] This section shows how the duality of obligations under international law constitutes the legal background against which these obligations consisting of derivate wrongs emerge. The immediate implication of the duality of responsibility for the structure of state obligations is the emergence of rules prohibiting state participation in the wrongful acts of individuals.

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173 *Katanga* (Judgment) ICC-01/04-01/07-3436, TC-II (7 March 2014) [1386].

174 *Lubanga* (Judgment) ICC-01/02-01/06-2842, TC-I (14 March 2012) [998].

To start, the law of individual responsibility envisages the prohibition of aiding, abetting or otherwise assisting or contributing in the commission of crimes under international law.[175] By contrast, the law of state responsibility is circumspect towards the 'common consideration of many subjects in a single delict, which appears as the characteristic work of the configuration and nature of domestic criminal law.'[176] Unlike criminal law, where all individuals are presumptively bound by more or less the same rules, different actors have different obligations under international law.[177] Indeed, international obligations can (and do) vary from state to state due to the 'mainly bilateral structure of international law'.[178] As a result, the establishment of state responsibility 'tend[s] to privilege simple forms of responsibility, as against more complex forms, such as complicity, capacitation, or assistance'.[179] For instance, the *Corfu Channel* case between the UK and Albania related to damage caused to UK warships by mines laid in the territorial waters of Albania by a third party. The ICJ could not establish that Albania colluded in the minelaying either by requesting a third party's assistance or by acquiescing to its actions.[180] However, Albania's knowledge of the existence of a minefield in its territorial waters triggered its obligation to warn UK vessels of this danger.[181] Albania was found independently responsible for its own omission rendering the legal

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175 Arts 25(3)(c) RSICC; Arts 6(1) ICTR Statute; Arts 7(1) ICTY Statute.

176 Ago, Le délit… (n71) 523.

177 A Clapham, 'Issues of Complexity, Complicity and Complementarity: from the Nuremberg Trials to the Dawn of the new International Criminal Court' in P Sands (ed), *From Nuremberg to The Hague: The Future of international Criminal Justice* (CUP 2009) 30, 51-52.

178 B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 2 RBDI 371, 372.

179 S Marks and A Clapham, *International Human Rights Lexicon* (OUP 2005) 14.

180 *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, 17.

181 ibid 22.

assessment of the conduct of the 'principal perpetrator' or its relation to Albania irrelevant for the purposes of establishing its responsibility. In this way, complex legal situations tend to be reduced to simpler ones.

In the law of state responsibility, there is still no rule absolutely prohibiting states to aid, abet, or otherwise assist internationally wrongful acts of others *simpliciter*. Article 16 ARSIWA, which reflects customary international law pursuant to the ICJ, only encompasses the prohibition of aid or assistance by one state in the commission of an internationally wrongful act of another state.[182] Whilst the prohibition of Article 16 ARSIWA significantly extends the international obligations of states,[183] it remains cognisant of the principle of independent responsibility.[184] Rather than holding states to international obligations to which they are not bound, the responsibility of a state for aiding or assisting the internationally wrongful act of another state only arises if 'the act would be internationally wrongful if committed by that' state.[185] This requirement does not pertain to the identity of the form or source,[186] but rather to the identity of the content, of the international obligation binding on the principal and on the assisting state.[187]

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182 *Bosnia Genocide* (n21) 217[420].

183 V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 Journal of International Law and Diplomacy 1, 12.

184 Commentary to Chapter IV Part One [8] and Art 16 ARSIWA [6].

185 Art 16(b) ARSIWA.

186 cf, eg, HP Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 264-265.

187 J Crawford, *State Responsibility—The General Part* (CUP 2013) 410.

These structural characteristics of international law cast at first some doubts on the possibility of rules prohibiting state participation in the acts of individuals. Traditionally, since individuals were not perceived as subjects of international law, they could not commit an internationally wrongful act.[188] However, this consideration is inapplicable where individuals are bound by an international obligation.[189] Indeed, according to the ILC,

> the international responsibility that an entity may incur under international law for aiding or assisting another entity in the commission of internationally wrongful act does not appear to depend on the nature and character of the entities concerned.[190]

The fact that individuals can incur international obligations does not necessarily mean that a general prohibition of aiding or assisting can find application in the relations between states and individuals. In keeping with the principle of independent responsibility, the normative premise of the prohibition only finds application when an internationally wrongful conduct of an individual would also be an internationally wrongful act of a state if committed by that state.[191] Consequently, whilst the nature or character of the entity might be immaterial, the international responsibility that an entity incurs under international law for aiding and assisting another entity depends on the duality of obligations incumbent on these entities.

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188 Anzilotti (n14) 14-15.

189 O de Frouville, 'Attribution of Conduct to the State: Private Individuals' in Crawford and ors (n106) 257, 277; also R McCorquodale & P Simmons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598, 613-614.

190 Commentary to Art 14 ARIO [1].

191 M Jackson, *Complicity in International Law* (OUP 2015) 215; 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) 24 LJIL 989, 994; cf *mutatis mutandis* Art 14(b) and 58(b) ARIO.

The ICJ has implicitly confirmed this approach, most notably, by affirming the dual character of the prohibition of 'complicity in genocide' under Article III(e) CPPCG.[192] Also, the ILC has adopted this approach in the DACAH.[193] In this context, the obligation of the state not to commit crimes against humanity should be construed as including the obligation not to engage in '…aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime'.[194] What makes possible the articulation of these rules as state obligations not to participate in wrongful acts of individuals is the dual character of the underlying prohibitions.[195]

In retrospect, this approach was not unprecedented, but is rather implicit in earlier pronouncements of the ICJ. As a preliminary observation, no provision explicitly prohibits assistance in violations of international humanitarian law by other actors.[196] In the *Nicaragua* judgment, the Court found that states are 'bound to refrain from encouragement of persons or groups…to commit violations of Article 3 which is common to all four Geneva Conventions'.[197] This obligation was derived from the general principle 'to "respect" the Conventions and even to "ensure respect" for them "in all circumstances"' enshrined in Common Article 1 GCs.[198] The logical and legal prerequisite

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192 *Bosnia Genocide* (n21) 117[174].

193 Commentary to Art 3 DACAH [3] and [5]; see Chapter 2.II.4.

194 cf Arts 3 and 6(2)(c) DACAH; SD Murphy, 'Fourth Report on Crimes against Humanity' (18 February 2019) A/CN.4/725 [117].

195 eg Jackson (n191) 201-202; Tams (n23) 57.

196 V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 205; Aust (n186) 385.

197 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16, 129[255].

198 ibid 114[220].

in this pronouncement was that Common Article 3 GCs lays down dual obligations addressing both states and other entities engaging in a non-international armed conflict.[199] On the basis of the Court's findings in *Nicaragua*, it is hardly disputed that states have the obligation to abstain from encouraging, but also from aiding or assisting, violations of international humanitarian law committed by others, whether states or entities not having that status.[200] Other treaties contain prohibitions of specific forms of state assistance in internationally wrongful acts of individuals including genocide, crimes against humanity, and/or war crimes.[201]

The 'nesting' of the obligation to abstain from aid, assistance, or encouragement in the context of an apparently wider rule could possibly bear on its content.[202] In particular, states have an obligation not only to respect, but also to ensure respect for the law of armed conflict by third parties.[203] Whilst a finding of a 'principal' violation is

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199 On the personal scope of Common Article 3 see, eg, E Roucounas, 'Facteurs privés et droit international public' (2002) 299 RdC 9, 344; A Kjeldgaard-Petersen, *The International Personality of the Individual* (OUP 2018) 121-124.

200 J-M Henckaerts, 'Article 1: Respect for the Convention' in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2016) at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> MN 158-163; R Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in A Clapham, P Gaeta, and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 111, 130; J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987) 57 BYBIL 77, 92; Aust (n186) 388.

201 eg Art 6(3), Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) (2013) 52 ILM 988.

202 cf, *mutatis mutandis*, A Nollkaemper, 'Complicity in International Law: Some Lessons from the US Rendition Program' (2015) 109 ASIL Proceedings 177, 179 (commenting on 'the nesting of the idea of complicity in human rights regimes').

203 *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 199[158]; also 30th International Conference of the Red Cross, 'Resolution 3—Reaffirmation and Implementation of International Humanitarian Law: Preserving Human Life and Dignity in Armed Conflict' (30 November 2007) [1]-[2].

necessary, the threshold of application of this obligation is presumably lower.[204] However, the obligation to abstain from encouraging, aiding, or assisting violations has been treated as 'completely different' from the positive obligation to ensure respect for international humanitarian law.[205] The reasons for maintaining this distinction are pragmatic. In substantive terms, whilst the obligation to abstain is firmly established, the status and precise content of the positive obligation is contested.[206]

In addition, the more stringent requirements for the establishment of *Nicaragua*-type assistance prohibitions can have a bearing on the consequences of the assisting state's responsibility.[207] First, this issue can be relevant for the determination of the appropriate form and extent of reparation.[208] Notably, in the *Bosnia Genocide* judgment, the Court held that reparation in the form of compensation was inappropriate due to the lack of a sufficient link between Serbia's failure to fulfil its analogous positive obligation to prevent genocide and the Srebrenica genocide.[209] By contrast, in both the *Nicaragua* and the *Armed Activities* judgments, the Court held that reparation was due

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204 O Corten and P Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the *Corfu Channel* Case' in K Bannelier, T Christakis, and S Heathcote (eds), *The ICJ and the Evolution of International Law* (Routledge 2011) 313, 332; cf, *mutatis mutandis*, *Bosnia Genocide* (n21) 222-223[432].

205 *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) (Separate Opinion of Judge Koojimans) [2004] ICJ Rep 219, 233[49]; see eg *Armed Activities (CO)* (n35) 281[345(3)].

206 eg *Wall AO* (Koojimans) (n205) 233[49]; *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) (Separate Opinion of Judge Higgins) [2004] ICJ Rep 207, 217[39]; F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 YIHL 3, 60; C Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble' (2010) 21 EJIL 125, 169-170.

207 cf Art 33(1) ARSIWA.

208 Lanovoy (n196) 324.

209 *Bosnia Genocide* (n21) 233-234[462].

without excluding compensation for damage arising from encouragement or incitement of violations of international humanitarian law.[210] Thus, whilst the question of reparation is fact-specific, it could reasonably be argued that a finding of a violation of the *Nicaragua*-type assistance rule implies in most cases a sufficient link to establish the appropriateness of compensation for financially assessable damage.[211] This question is distinct from whether such compensation would amount to the entirety of the damage caused by the 'principal' violation or should be evaluated differently.[212] Second, the availability and proportionality of countermeasures is closely linked to the injury caused by an internationally wrongful act.[213] As a corollary, whether a state has wrongfully participated in the 'principal' internationally wrongful act or has merely failed to prevent it has direct consequences on the availability and the content of possible responses against that state.[214] In light of these differences, it is important to distinguish between, on the one hand, the obligation under the law of armed conflict prohibiting aid, encouragement, or assistance to a violation of that law and, on the other hand, the obligation of the state to prevent or stop violations of international humanitarian law.

To sum up, international responsibility for aiding and assisting the commission of an internationally wrongful act constitutes a corollary of the duality of international obligations. In this light, the emergence of rules prohibiting state aid and assistance in

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210 *Nicaragua* (n197) 148-149[292(13)]; also *Armed Activities (CO)* (n35) 257[259]-[260] and 281[345(3),(5)]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (Declaration of Judge *ad hoc* Verhoeven) [2005] ICJ Rep 355, 358-359[4].

211 cf, *mutatis mutandis*, Commentary to Art 16 ARSIWA [10].

212 ibid.

213 cf Arts 49 and 51 ARSIWA.

214 *mutatis mutandis*, L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 IYHR 233, 244-245.

internationally wrongful acts of individuals stems from the fact that states and individuals are bound by materially the same, even if formally different, international obligations. This is not merely a theoretical possibility. The prohibitions of 'complicity in genocide', the obligation to abstain from encouraging and aiding or assisting violations of international humanitarian law even by individuals, and the ILC's approach with respect to crimes against humanity are an attestation to this development.

2. Duality of the Breach of Obligations Prohibiting Aid or Assistance in Internationally Wrongful Acts

The previous section has established that the duality of obligations opens up the possibility for the existence of international obligations of states not to aid or assist internationally wrongful acts of individuals. Such obligations already exist with respect to genocide and violations of international humanitarian law in all circumstances, whereas one connected to crimes against humanity is in incipient form. In addition, states are obligated under Article 16 ARSIWA not to aid or assist an internationally wrongful act of another state. In parallel, the law of individual responsibility provides for general prohibitions not to aid, abet, or assist in, or contribute to, internationally wrongful acts of other individuals. Of course, these forms of wrongdoing only graft onto a handful of international obligations of individuals, namely, genocide, crimes against humanity, war crimes, and the crime of aggression.[215] In the case of the crime of aggression, this obligation applies only to persons in a position effectively to exercise control over or to direct the political or military action of the state.[216]

These rules clearly differ in form, whereas they could potentially differ also in substance, largely due to their differing scopes of application. In addition, unlike the

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[215] Jackson (n191) 219 at fn2.

[216] Art 25(3*bis*) RSICC.

law of individual responsibility, whenever the organs of a single state are involved in the commission of an internationally wrongful act, the state would be responsible for that act. This is the case, for instance, even if some organs perform the wrongful act, other organs assist in that act, and other organs just turn a blind eye. In these situations, whereas these organs would be responsible only for their conduct *qua* individuals, the unity of the state requires that the state is treated as one indivisible unit and, as a result, the state is responsible for committing one internationally wrongful act.[217] However, a discrepancy arises when the only conduct attributable to the state falls short of commission of the 'principal' wrongful act. In these situations, the parallel application of the rules prohibiting aid or assistance in internationally wrongful acts for states and individuals leaves open the possibility that an individual state organ could be held internationally responsible *qua* individual for conduct which the state might lawfully carry out.[218]

This section examines the content and the potential duality of the breach of obligations encompassing assistance to wrongdoing and proposes a framework for addressing any discrepancies. As a preliminary point, whilst these obligations arise in different contexts, they share certain common structural characteristics. They prohibit (a) the conduct of one actor (b) contributing to the commission of an internationally wrongful act by another actor (c) with the requisite mental element. The following sub-

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[217] cf *Bosnia Genocide* (n21) 200[380].

[218] J Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 ILSAJICL 525, 533.

sections focus on the parallel application of the constituent elements of these international obligations of states and individuals. Sub-section (d) will briefly discuss the implications of any discrepancies between these obligations.

(a) Obligations Prohibiting Aid or Assistance to Internationally Wrongful Acts and the Conduct Element

The notions of aiding and abetting under the law of individual responsibility and aid and assistance under the law of state responsibility 'strongly resemble' each other.[219] On the one hand, aiding and abetting under the law of individual responsibility consists of two conduct elements that need to be fulfilled in the alternative, although these elements are usually discussed as a single unified form of wrongdoing.[220] 'Aiding' denotes the provision of 'practical or material assistance'.[221] The notion of 'abetting' describes 'moral or psychological assistance'.[222] 'Assistance' only appears in the Rome Statute as an umbrella term which engulfs the provision of both material and moral support to the perpetration of an offence.[223] On the other hand, in the context of state responsibility, the conduct element of 'aid or assistance' in Article 16 ARSIWA in principle encompasses any conduct that facilitates the commission of an internationally wrongful act by another state.[224] Although at first there appears to be no material discrepancy

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219 Lanovoy (n196) 70; also M Aksenova, *Complicity in International Criminal Law* (Hart 2016) 179.

220 eg A Eser, 'Individual Criminal Responsibility' in A Cassese, *The Rome Statute of the International Criminal Court: A Commentary* vol-II (OUP 2002) 767, 798.

221 *Bemba Gombo and ors* (Judgment) ICC-01/05-01/13-1989-Red, TC-VII (19 October 2016) [88]; eg *Blaškić* (Judgment) IT-95-14-A (29 July 2004) [46].

222 *Bemba and ors* TCJ (n221) [89].

223 Jackson (n191) 70; Eser (n220) 798; *Bemba and ors* TCJ (n221) [87].

224 Aust (n186) 195; Jackson (n191) 153; Lanovoy (n196) 94-95.

between these two rules as to the conduct element, they do not necessarily coincide, as they have quite different personal and material scopes of application. One basic, but perhaps overstated, issue is the treatment of omissions under the rules on assistance to wrongdoing in the law of state and individual responsibility.[225] Two further problematic aspects for the duality of obligations prohibiting aiding and assistance to internationally wrongful acts are the treatment of moral support and the more theoretical issue of aiding and abetting to attempted commission.

As to the issue of omissions, the ICJ has found that obligations of states to abstain from aiding or assisting an internationally wrongful act—in the event the prohibition of complicity in genocide under the Genocide Convention interpreted in light of Article 16 ARSIWA—'plac[e] States under a negative obligation, the obligation not to commit the prohibited acts'.[226] As such, they are distinguished from positive obligations of states to undertake an action, such as to prevent and punish genocide.[227] This distinction between negative and positive obligations is not unknown to the law of individual responsibility. Aiding and abetting under the law of individual responsibility is distinct from the obligation of commanders and other persons in positions of authority to act in order to prevent and suppress the wrongful acts of their subordinates, that is, superior responsibility.[228] In fact, the scope of the doctrine of aiding and abetting by

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225 Lanovoy (n196) 71.

226 *Bosnia Genocide* (n21) 217[420] and 222-223[432].

227 ibid 222-223[432].

228 eg E Van Sliedregt, *Individual Criminal Responsibility* (OUP 2012) 125-126; G Boas, 'Omission Liability at the International Criminal Courts—A Case for Reform' in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 204, 223; cf *Delalić and ors* (Judgment) IT-96-21-T (16 November 1998) [334]; *Strugar* (Judgment) IT-01-42-T (31 January 2005) [355].

omission in the international law of individual responsibility is rather narrow.[229] Early pronouncements of the *ad hoc* tribunals seemed 'to exclude, in principle, complicity by failure to act or omission'.[230] Gradually, it was accepted that the *actus reus* of aiding and abetting may consist solely of an omission 'when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support' to the perpetration of a crime.[231]

Nonetheless, unlike domestic criminal laws,[232] positive obligations of individuals under international law are rather sparse. In addition, a duty to act under domestic law cannot afford a basis for individual responsibility under international law in this context.[233] From a formal perspective, international criminal courts are precluded from directly applying the domestic law of any particular state.[234] From a normative perspective, this form of cherry-picking from domestic law would jeopardise the foundational principle of the independence of individual responsibility under international law from the responsibility of the individual under domestic law. Thus, one explanation for references to domestic law in this context is to ensure that the international rule encom-

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229 Van Sliedregt (n228) 125-126.

230 *Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [536].

231 eg *Mrkšić and Šljivančanin* (Judgment) IT-95-13/1-A (5 May 2009) [49]; *Orić* (Judgment) IT-03-68-A (3 July 2008) [43].

232 eg A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 4 EJIL 695, 703.

233 cf, eg, Jackson (n191) 104-108; Lanovoy (n196) 63-64.

234 UNSG, 'Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) S/25704 [34]; UNSG, 'Report of the Secretary General pursuant to Paragraph 5 of Security Council Resolution 955 (1994)' (13 February 1995) S/1995/134 [11]; also Art 21(1)(c) RSICC; *Muthaura, Kenyatta, Ali* (Decision on the "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)") ICC-01/09-02/11-421, AC (1 May 2012) [11].

passing such positive international obligations of individuals was foreseeable and accessible to the individual accused at the time of commission according to the principle of legality.[235] Furthermore, there is no conceivable justification for state obligations, which are not binding on individuals, to afford a basis for a duty of the individual to act in the context of aiding and abetting by omission, despite some sparse unfortunate references in case law.[236] Quite the contrary, this approach would vastly enlarge the scope of international obligations of individuals under international law.[237]

The idiosyncratic character of the doctrine of aiding and abetting by omission becomes apparent upon closer inspection of the rules which constitute the basis of the individual's duty to act and which occasion the wrongfulness of its omission. The landmark rulings of the ICTY on the issue rely on Article 13 GC-III and Art 11(1) AP-I relating to the 'serious breach' or 'grave breach' of 'any unlawful act or omission by the Detaining Power causing death or seriously endangering the health' of persons in its custody.[238] In *Mrkšić* and *Šljivančanin*, the ICTY AC observed that the duty to protect under Art 13 GC-III appeared to belong to the Detaining Power, but 'not to the exclusion of individual responsibility'.[239] Indeed, the provision establishes explicitly a

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235 cf, eg, *Mrkšić/Šljivančanin* ACJ (n231) [72]; also *Nyiramasuhuko and ors* (Judgment) ICTR-98-42-A (14 December 2015) [2194].

236 cf *Rutaganira* (Judgment) ICTR-95-1C-T, TC-III (14 March 2005) [78]-[79] (curiously finding that 'international law places upon a person vested with public authority a duty to act in order to respect human life').

237 Boas, Omission (n228) 221.

238 *Mrkšić/Šljivančanin* ACJ (n231) [70]; also *Popović* TCJ (n150) [1544]-[1545]; *Orić* (Judgment) IT-03-68-T (30 June 2006) [304] and fn860 (citing both Art 13 GC-III and Art 11(1) AP-I); cf also Art 11(4) AP-I; also JS Pictet, *The Geneva Conventions of 12 August 1949—Commentary* vol-III (ICRC 1952) 140.

239 *Mrkšić/Šljivančanin* ACJ (n231) [72].

dual obligation and indeed one that prohibits omissions.[240] In the absence of a crime of pure omission in its Statute or case law, the AC gave effect to positive obligations of individuals though the construction of aiding and abetting torture and murder of prisoners of war by omission.[241] The ICTR tried to reproduce this approach by relying on the analogous provisions of Article 7 and 13 AP-II which are applicable in non-international armed conflict.[242] It is true that this construction is alien to the law of state responsibility.[243] However, the duality of the breach remains intact. The same conduct—ie the omission—would constitute a breach of international obligations for both the state and the individual state organ.

Another indication militating in favour of the duality of the breach is the treatment of courses of conduct consisting of both actions and omissions. In the law of individual responsibility, the conduct element of aiding and abetting can be fulfilled by multiple acts and omissions that contribute to the crime, even if each of them might have not amounted separately to aiding and abetting.[244] Thus, the action of being present at the scene of the crime may constitute tacit approval or encouragement of the crime under certain circumstances, often when the spectator is in a position of authority

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240 M Duttwiler, 'Liability for Omission in International Criminal Law' (2006) 6 ICLR 1, 11.

241 C Gosnell, 'Damned If You Don't: Liability for Omissions in International Criminal Law' in W Schabas, Y McDermott and N Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013) 101, 131.

242 cf *Nyiramasuhuko and ors* (Judgment) ICTR-98-42-T (24 June 2011) [5897]-[5899]; I Peterson, 'Criminal Responsibility for Omission in the ICTY and ICTR Jurisprudence' (2018) 18 ICLR 749, 767-768.

243 Commentary to Art 47 ARSIWA [8]; Crawford, General Part (n243) 403; see text accompanying nn180-179.

244 cf, eg, *Blagojević and Jokić* (Judgment) IT-02-60-A (9 May 2007) [284].

over the perpetrator.[245] As the ICTY AC held, 'this form of aiding and abetting is not, strictly speaking, criminal responsibility for omission'.[246] The approach in the context of the state obligations under examination does not materially differ. Thus, in the *Armed Activities* case, the ICJ found that Uganda violated its obligations under international humanitarian law and international human rights law 'by the conduct of its armed forces which…incited ethnic conflict and failed to put an end to such conflict'.[247] The relevant conduct consisted of the Ugandan presence causing a conflict between ethnic groups, of the 'encouragement and military support' to the seizure of lands by one ethnic group against the other, and of Ugandan 'troops [standing] by during the killing and [failing] to protect the civilians'.[248] The Court distinguished this violation from Uganda's failure to abide by its due diligence obligations as an occupying power in its *dispositif*.[249] It is hard to deny the strong similarities between the ICJ's approach in the *Armed Activities* case and the approving spectator doctrine under the law of individual responsibility. Similarly, a paradigmatic situation of aid and assistance under Article 16 ARSIWA occurs when a state allows its territory to be used by another state for committing a wrongful act against a third state.[250] This course of conduct involves an 'action' of the state,[251] even if this action—the permission—can be inferred for evidentiary purposes

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245 J Ingle, 'Aiding and Abetting by Omission before the International Criminal Tribunals' (2016) 14 JICJ 747, 763-764; eg *Aleksovski* (Judgment) IT-95-14/1-T (25 June 1999) [87]; *Kayishema and Ruzindana* ACJ (n123) [201]; *Bemba and ors* TCJ (n221) [89].

246 eg *Brđanin* (Judgment) IT-99-36-A (3 April 2007) [273].

247 *Armed Activities (CO)* (n35) 281[345(3)].

248 ibid 240-241[209].

249 ibid 281[345(3)].

250 Commentary to Art 16 ARSIWA [8].

251 cf Art 3(f) UNGA Res 3314 (XXIX) ('the action…').

from circumstantial evidence. For example, this evidence may consist of the state's prolonged inaction combined with the manifest character of the 'principal' violation which clearly calls for action on the part of the state.[252] It follows that, as in case of the establishment of individual responsibility, the conduct element of state obligations not to aid or assist may be fulfilled by a course of conduct involving both actions and omissions.

As to the issue of abetting, it is clear that the general law of state responsibility does not seem to encompass mere incitement, still less sympathy, by one state to the internationally wrongful act of another state.[253] However, this discrepancy between the applicable standards in the law of state and individual responsibility is attenuated by the operation of specific rules providing for state prohibitions not to aid or assist in internationally wrongful acts. With respect to the obligation not to engage in 'complicity in genocide' under Article III(e) CPPCG, the Court found that '"complicity"…*includes* the provision of the means to enable or facilitate the commission of the crime'.[254] Thus, the non-exhaustive language implies that the notion of complicity in genocide is not limited to physical aid or assistance, but encompasses encouragement.[255] The

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252 cf P Palchetti, 'State Responsibility for Complicity in Genocide' in P Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 381, 385; P Weckel, 'L'arrêt sur le génocide: Le soufflé de l'avis de 1951 n'a pas transporté la Cour' (2007) 111 RGDIP 305, 327; Lanovoy (n196) 96 (qualifying this scenario as one of omission).

253 *Nicaragua* (n197) 129[255]; Commentary to Chapter IV Part One [6]; Crawford, General Part (n187) 403; G Nolte and HP Aust, 'Equivocal Helpers—Complicit States, Mixed Messages, and International Law' (2009) 58 ICLQ 1, 13; Jackson (n191) 154; Lanovoy (n196) 70; Palchetti (n252) 378; also Ago, Seventh Report (n105) 55[63]; Quigley, Complicity (n200) 80.

254 *Bosnia Genocide* (n21) 216-217[419] (emphasis added).

255 Palchetti (n252) 387; cf Crawford, Second Report (n84) 46[161] at fn361 (earlier iteration of this interpretation); for a different reading of the *Bosnia Genocide* judgment, cf, Jackson (n191) 208-209; J Wolf, 'Individual Responsibility and Collective State Responsibility for International Crimes: Separate or Complementary Concepts under International Law?' in B Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill 2016) 3, 9.

Court's approach was unambiguous with respect to the obligation not to participate in violations of international humanitarian law committed by other actors.[256]

As to the last point, the Rome Statute, unlike the Statutes of the *ad hoc* tribunals, prohibits participation not only in a consummated crime, but also in an attempted one.[257] The general rules of state responsibility do not foresee cases of 'inchoate responsibility' such as attempt,[258] still less prohibit state aid or assistance to an attempted internationally wrongful act of another state.[259] Whilst the ICJ has confirmed the duality of the obligation not to attempt genocide and the DACAH foresees conceivably such an obligation with respect to crimes against humanity, there is no such prohibition for states with respect to war crimes and aggression.[260] In principle, wider state obligations to ensure respect for the law of armed conflict would not encompass such conduct since no breach of these obligations can be established without the occurrence of a violation.[261] According to the case law of Nuremberg tribunals, attempt was not a war crime under international law.[262] Nonetheless, the Rome Statute does not seem to exclude responsibility for attempt for these acts.[263]

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256 *Nicaragua* (n197) 129-130[255]; *Armed Activities (CO)* (n35) 281[345(3)]; Aust (n186) 388-389; Kok, Complicity (n12) 677-678; cf J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law vol-I* (CUP 2009) 511.

257 Art 25(3)(b) and (d) RSICC.

258 Crawford, Second Report (n84) 55[212]; cf Art 25(3)(f) RSICC.

259 Graefrath (n178) 374.

260 Art III(b) CPPCG; *Croatia Genocide* (n20) 128-129[441].

261 Art 14(3) ARSIWA; *mutatis mutandis Bosnia Genocide* (n21) 221-222[431].

262 *The 'Flick' Case (US v Flick and ors)* (Judgment and Opinion) [1947] VI TWC 1187, 1210.

263 *Ntaganda* (Judgment) ICC-01/04-02/06-2359, TC-VI (8 July 2019) [877].

To conclude, the application of the conduct element of obligations prohibiting state contribution to genocide, war crimes, and aggression parallels in many respects the application of the conduct element of aiding and abetting under the law of individual responsibility, but there are some discrepancies. On the one hand, aiding and abetting by omission is geared towards the application of entirely exceptional positive obligations of individuals which are also binding on states. On the other hand, questions arise with respect to the treatment of abetting in the context of aggression and aiding and abetting to attempted commission. At first, the parallel application of the relevant rules could lead to the responsibility of a state organ *qua* individual for acts which would not be unlawful for the state.

(b) Obligations Prohibiting Aid or Assistance in Internationally Wrongful Acts and the Nexus Requirement

The second structural feature of the relevant obligations is the required objective nexus between the act of assistance and the principal act. The nexus element has been contested in both the law of individual responsibility and the law of state responsibility, but the mainstream approach does not appear to materially differ in these two bodies of law. As a result, the application of the nexus element does not appear to have any bearing on the content and potential duality of the obligation not to participate in genocide, crimes against humanity, war crimes, or aggression.

In the context of the law of individual responsibility, there appears to be a discrepancy between the case law of the *ad hoc* tribunals and the ICC on the nexus required between the act of aiding or abetting and the 'principal' offence. The *ad hoc* tribunals have held that acts of aid, encouragement, or support must make a 'substantial contribution', or have a 'substantial effect', on the commission of a crime so as to qualify as

aiding and abetting.[264] Pronouncements of the ICC are split between those accepting a 'substantial contribution' threshold[265] and those finding that a different[266] or no threshold applies.[267]According to the broader formulation, the required nexus between the act of the aider and abettor and the principal act is that 'the assistance must have furthered, advanced or facilitated the commission' of the crime.[268] Under all tests, it is firmly established that the contribution need not be a precondition (*conditio sine qua non*) of the commission of the principal offence.[269] Moreover, in practical terms the division is more apparent than real, since both ICTY and the ICC tend to assess this element on a case-by-case basis.[270] There is only one aspect of the 'substantive contribution' test which could potentially drastically limit its scope, but should now be considered moot. According to a line of cases, in assessing whether the acts of the aider and abettor have a 'substantial effect' on the perpetration of a crime, it must be established that these acts 'are specifically directed to assist, encourage, or lend moral support to the perpetration of that crime'.[271] The basic idea is that if the assistance provided by the accused

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264 eg K Ambos, *Treatise on International Criminal Law* Vol-I (OUP 2013) 130-131.

265 eg *Lubanga* TCJ (n174) [997]; *Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10- 465, PTC-I (16 December 2011) [279] (tentatively concerning Art 25(3)(c) RSICC).

266 *Mbarushimana* DCC (n265) [285]; *Katanga* TCJ (n173) [1632]-[1633] ('significant contribution' concerning Art 25(3)(d) RSICC).

267 eg *Al-Mahdi* (Decision on the confirmation of charges) ICC-01/12-01/15-84 (24 March 2016) [26]; *Bemba and ors* TCJ (n221) [93].

268 *Bemba and ors* TCJ (n221) [94]; cf *Bemba and ors* (Judgment) ICC-01/05-01/13-2275, AC (8 March 2018) [18].

269 eg *Blaškić* ACJ (n221) [48]; *Kayishema and Ruzindana* ACJ (n123) [201]; *Bemba and ors* TCJ (n221) [94].

270 *Taylor* (Judgment) SCSL-03-01-A (26 September 2013) [391]; also Jackson (n191) 73.

271 *Stanišić and Simatović* (Judgment) IT-03-69-T (30 May 2013) [1264].

can be used for both lawful and unlawful activities, such assistance could only be unlawful if it has a 'direct link' with the unlawful activities.[272] However, the ICTY AC reversed its previous findings holding that the specific direction requirement is neither an element of aiding and abetting nor implicit in the substantiality test.[273] As a result, the nexus requirement is limited to a case-by-case assessment of whether the conduct actually facilitated the commission of the crime.

The law of state responsibility mirrors to a large extent the approach of the law of individual responsibility with respect to the required nexus between the act of aid or assistance by one state and the 'principal' internationally wrongful by another state under Article 16 ARSIWA. In this context, the aid or assistance clearly needs not be 'essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act'.[274] In other words, the aid or assistance needs not be a *conditio sine qua non* of the 'principal' internationally wrongful act.[275] Besides this point, the ILC provides little guidance on what contribution should be considered significant. On the one hand, the Commission indicates that the application of Article 16 is limited only to cases where the aid or assistance is 'clearly linked to the subsequent wrongful act'.[276] This qualification could be construed as requiring 'the existence of a

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272 *Perišić* (Judgment) IT-04-81-A (28 February 2013) [44]; cf Art 2(1)(d) DCCAPSM.

273 *Sainović and ors* (Judgment) IT-05-87-A (23 January 2014) [1649]; *Stanišić and Simatović* (Judgment) IT-03-69-A (9 December 2015) [106]; also *Popović* ACJ (n150) [1758]; *Taylor* ACJ (n270) [481].

274 Commentary to Art 16 ARSIWA [5]; Jackson (n191) 158; Lanovoy (n196) 97.

275 Aust (n186) 212-213; Crawford, General Part (n187) 402.

276 Commentary to Art 16 ARSIWA [5].

specific link between the aid and the wrongful act' in a way akin to the 'specific direction' requirement expounded and later rejected by the ICTY AC.[277] For example, a contribution of a fungible nature (eg financial resources) would not fulfil this requirement, unless it can be established that it was specifically provided for the commission of the internationally wrongful act (eg earmarked).[278] On the other hand, the Commission states that the nexus requirement can be fulfilled even when the aid or assistance is 'only an incidental factor in the commission of the primary act'.[279] This suggests that there is no limitation as to the nature of the assistance, but rather there is only a *de minimis* threshold.[280] The findings of the ICJ disfavour a specific link requirement. In *Bosnia Genocide*, the Court accepted in principle that the nexus requirement of the obligation to abstain from 'complicity in genocide', and by implication of Article 16 ARSIWA, is fulfilled even by a 'general policy of aid and assistance' if that policy in fact 'enable[s] or facilitate[s] the commission of genocide.[281] It follows that the causa-

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277 ILC, 'Summary Record of the 2578th Meeting' (1999) I YbILC 74, 79[41] (Simma) (emphasis added); cf NHB Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108 AJIL 722, 744.

278 cf ILC, 'Comments and Observations Received from International Organizations' (2007) II(1) YbILC 17, 22 (IMF) (citing Commentary to Art 16 ARSIWA [5]).

279 Commentary to Art 16 ARSIWA [10].

280 Lanovoy (n196) 185-186; Lowe (n183) 5.

281 *Bosnia Genocide* (n21) 218[422] and 223[432]; also *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Dissenting Opinion of Judge *ad hoc* Mahiou) [2007] ICJ Rep 381, 453-454[127]; *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Declaration of Judge Keith) [2007] ICJ Rep 325, 354-355[8] (both confirming that the majority found that the material elements of complicity in genocide were met).

tive link under Article 16 ARSIWA and the obligation prohibiting complicity in genocide is established when the aid or assistance actually facilitates the wrongful act,[282] not unlike the mainstream view in the law of individual responsibility.

In sum, the analysis of the nexus element of aiding and abetting in the law of individual responsibility and aid or assistance in the law of state responsibility reveals a remarkable degree of similarity between the applicable standards. In this respect, the analysis demonstrates that the application of the nexus element tends to affirm, rather than distort, the duality of the breach of the underlying obligations.

(c) Obligations Prohibiting Aid or Assistance to Internationally Wrongful Acts and Mental Elements

The third common structural feature of the relevant obligations is that they encompass mental elements. The mental element of aiding and abetting under the law of individual responsibility is hotly contested, although, as we will see, the practical significance of the split is rather limited. The same cannot be said about the mental element of aid or assistance under the law of state responsibility. The application of the mental elements of specific state obligations not to participate in violations of dual obligations mirrors closely the aiding and abetting standard under the law of individual responsibility.

The *mens rea* element of aiding and abetting in the law of individual responsibility has certain controversial aspects, as there appears to be a tension between the jurisprudence of the *ad hoc* tribunals and the letter of Article 25(3)(c) RSICC. In general terms, the *mens rea* of aiding and abetting is twofold to reflect its twofold essential

[282] Commentary to Art 16 ARSIWA [5] ('must actually do so'); Graefrath (n178) 374; Jackson (n191) 158 ('materially facilitates').

material elements, that is, the act of aiding and abetting and the principal offence.[283] The jurisprudence of the *ad hoc* tribunals is almost unanimous that the mental element with respect to both these acts is knowledge.[284] By contrast, Article 25(3)(c) RSICC provides that the act of assistance must be made '[f]or the purpose of facilitating the commission of…a crime'. One strand of pre-trial decisions interprets this element as requiring that the facilitation is intentional—ie not accidental or negligent.[285] Such an interpretation does not depart from the approach of the *ad hoc* tribunals, as knowledge suffices for such a finding of intent under the Rome Statute.[286] By contrast, a TC found that it is not sufficient that the aider and abettor 'merely knows' that the act of facilitation will assist a crime, but the assistance must be lent 'with the aim of facilitating the offence'.[287] In practical terms, the ICC TC's approach has comparable effects with the 'specific direction' requirement, aiming to exclude situations where there is certainty that the act facilitates a crime but it also pursues a possibly lawful aim.[288] The TC cautioned that this elevated subjective standard only relates to the act of facilitation.[289]

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283 eg Van Sliedregt (n228) 113-114.

284 eg Jackson (n191) 75; Lanovoy (n196) 66-67; see, generally, *Haradinaj and ors* (Judgment) IT-04-84-A (19 July 2010) [58]; *Mrkšić/Šljivančanin* ACJ (n231) [159]; *Blaškić* ACJ (n221) [50]; with respect to specific intent crimes eg: *Krstić* ACJ (n126) 140-141; *Simić* (Judgment) IT-95-9-A (28 November 2006) [86].

285 *Blé Goudé* (Decision on confirmation of charges) ICC-02/11-02/11-186, PTC-I (11 December 2014) [167]; *Ongwen* (Decision on confirmation of charges) ICC-02/04-01/15, PTC-II (23 March 2016) [43]; *Al-Mahdi* DCC (n267) [26] ('intends to facilitate'); eg JG Stewart, 'An Important New Orthodoxy on Complicity in the ICC Statute?' (*James Stewart Blog*, 21 January 2015) <http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/>.

286 cf Art 30 RSICC.

287 *Bemba and ors* TCJ (n221) [97].

288 cf *Perišić* (Judgment) (Joint Separate Opinion of Judges Theodor Meron and Carmel Agius) IT-04-81-A (28 February 2013) [3]; *Perišić* (Judgment) (Separate Opinion of Judge Ramaroson) IT-04-81-A (28 February 2013) [7]-[9].

289 *Bemba and ors* TCJ (n221) [97].

With respect to the principal offence, the aider or abettor must only know that this will occur, not unlike the jurisprudence of the *ad hoc* tribunals.[290]

However, such act would not necessarily be lawful under the Rome Statute. Article 25(3)(d) prohibits any contribution to the commission of the crime by a group of persons whose 'purpose must be to commit the crime or must encompass its execution'.[291] Whereas Article 25(3)(c) deals with individual assistance to single acts, Article 25(3)(d) RSICC envisages individual assistance to a crime committed by a plurality of persons acting with a common criminal purpose, that is, a complex crime.[292] The *mens rea* of Article 25(3)(d) RSICC is awareness that the conduct contributed to the activities of the group of persons acting with a common purpose and that the group intended to commit the crime.[293] In this respect, Article 25(3)(d) RSICC can hardly be distinguished in its application from the mainstream jurisprudence of the *ad hoc* tribunals on aiding and abetting. Notably, the commission of a crime by a group of persons acting with a common purpose is a characteristic form of perpetration in the ICTY.[294] Thus, in most cases, any contribution to the principal crime is prohibited if it is made with knowledge considering the complex character of most crimes under discussion.[295]

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290 ibid [98].

291 *Katanga* TCJ (n173) [1627]; also n266.

292 K Ambos, 'The ICC and Common Purpose—What Contribution is required under Article 25(3)(d)?' in n C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 592, 596.

293 *Katanga* TCJ (n173) [1638] and [1640]-[1642]; Van Sliedregt (n228) 145.

294 *Katanga* TCJ (n173) [1625]; cf *Tadić* ACJ (n169) [222] (referring to Art 25(3)(d) RSICC as indication of practice in favour of JCE).

295 See text accompanying nn160-169.

Turning to the law of state responsibility, the responsibility of the state for aiding or assisting another state in the commission of an internationally wrongful act is contingent upon establishing that the state 'd[id] so with knowledge of the circumstances of the internationally wrongful act'.[296] It is clear that this element is assessed by reference to a person or group of persons whose acts are attributable to the state.[297] Despite the formulation of Article 16 ARSIWA, the Commission elaborates two distinct elements in its Commentary.[298] First, 'the relevant State organ or agency providing aid or assistance must be aware of the circumstances of the wrongful act'.[299] Second, the aid or assistance must be given 'with a view to facilitate the commission of the wrongful act' in the sense that the 'relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful act'.[300]

On the one hand, the terms 'knowledge of the circumstances of the wrongful act' can be interpreted as establishing a one-dimensional mental element encompassing only the 'principal' wrongful act.[301] In practical terms, an example would be a state which provides financial resources to another state knowing that the latter state commits human rights violations. Under this view, it appears less consequential whether the state is aware or not that its act facilitates an internationally wrongful act of another

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296 Art 16(a) ARSIWA.

297 *Bosnia Genocide* (n21) 417[420]; H Moynihan, 'Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility' (2018) 67 ICLQ 455, 465.

298 Commentary to Art 16 ARSIWA [3].

299 ibid.

300 ibid [5].

301 cf Lanovoy (n196) 240; eg ILC, 'Summary Record of the 2577th Meeting' (1999) I YbILC 67, 69[18] (Rao).

state bringing the notion of aid or assistance closer to due diligence obligations in this respect.[302] In essence, the aiding or assisting state undertakes the risk that its acts could possibly facilitate that wrongful act by knowing the circumstances of the 'principal' wrongful act.[303] On the other hand, it has been argued that knowledge that the act of assistance facilitates the 'principal' wrongful act will not suffice.[304] Thus, in the previous example, the assisting state would not incur responsibility even if it knew that the resources would in whole or in part be used for human rights violations.[305] Rather, it must in addition desire or aim at assisting the human rights violations which, in effect, is an alternative way to introduce a specificity requirement into the prohibition of aid or assistance.[306]

In this context, the most reasonable interpretation of Article 16 ARSIWA is that the state must know the circumstances of the wrongful act and, in addition, it must know that its act facilitates the wrongful act of another state.[307] This interpretation creates in principle no conflict between the text of Article 16 ARSIWA and its Commentary.[308] The terms 'knowledge of the circumstances of the wrongful act' are capable of

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302 Lowe (n183) 10.

303 cf Aust (n186) 237-241 (critically).

304 Crawford, General Part (n187) 407-408; Aust (n186) 236.

305 cf Graefrath (n178) 375 (critically).

306 E De Wet, 'Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request' (2018) 67 ICLQ 287, 306; cf text accompanying nn276-278.

307 Lowe (n183) 8; Palchetti (n252) 389-390; Jackson (n191) 161-162; with respect to a previous draft of the provision, Quigley, Complicity (n200) 112-113; Ago, Seventh Report (n105) 58[72] ('knowledge of the specific purpose for which the State receiving certain supplies intends to use them').

308 As to the general point of interpretation: G Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 BYBIL 10, 19-20.

encompassing both the act of facilitation and the 'principal' wrongful act.[309] Moreover, it is reasonable to assume that the relevant state organ 'intended' to facilitate a wrongful act, if it is aware that its act would facilitate the internationally wrongful act of another state.[310] In this sense, the knowledge requirement 'serves to limit the risk of the State that provided aid to another State which, unbeknownst to it, used that aid to finance an unlawful activity'.[311] This interpretation mirrors the mainstream approach of the law of individual responsibility in material terms.

The establishment of state responsibility for encouraging violations of international humanitarian law and complicity in genocide do not depart from this interpretation. In *Nicaragua*, the Court considered whether the publication and dissemination of a manual encouraging the commission of violations of international humanitarian law, which an armed opposition group committed, was unlawful. According to the Court, in this context, 'it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable'.[312] Having established that the US organs were 'aware of, at the least, allegations' of violations committed by the *contras*, the Court determined that the conduct of the US amounted to 'encouragement, which was likely to be effective'.[313] The Court's reasoning suggests that the unlawfulness of the US acts hinged on two factors: awareness of alleged violations committed by the *contras* and foreseeability that the US acts actually

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309 cf SR.2577 (n301) 69[16] (Economides).

310 Moynihan (n297) 471; also Lowe (n183) 8.

311 ILC, 'Summary Record of the 2605th Meeting' (1999) I YbILC 274, 278-279[25] (Drafting Committee Report).

312 *Nicaragua* (n197) 130[256].

313 ibid.

encouraged these violations. It could be argued that the 'nesting' of the prohibition of encouragement in the context of common Article 1 GCs led the Court to rely on a standard of constructive knowledge.[314] This would in turn mean that the obligation expounded by the Court is closer to a notion of due diligence obligation rather than aid or assistance or complicity.[315] However, it seems more likely that the Court was explaining its approach as to the use of circumstantial evidence rather than enunciating a legal standard.[316] On the basis of the evidence, the inference could be drawn that the US organs were aware that violations were committed by the *contras* and that their acts would be effective in encouraging these violations. Under this interpretation, the obligation not to aid, assist, or encourage, violations of international humanitarian law committed by others requires awareness of the violations and awareness that the aid actually facilitates the commission of these violations. Either way, it appears that the duality of the obligation is not distorted as the obligation of the state would not be narrower than the obligation of the individual.

In the *Bosnia Genocide* case, the basic point of contention was the mental element required for 'complicity in genocide' under Article III(e) CPPCG. This was a particularly vexatious issue for the *ad hoc* tribunals, whose Statutes, unlike that of the

314 cf, *mutatis mutandis*, Nollkaemper, Complicity (n202) 180.

315 Corten/Klein (n204) 325.

316 cf text accompanying nn37-42; *mutatis mutandis*, NHB Jørgensen, 'Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 Chinese JIL 11, 33.

ICC, provided specifically for 'complicity in genocide' in addition to aiding and abetting as a general mode of wrongdoing.[317] In the ICJ proceedings, both Bosnia-Herzegovina and Serbia agreed that the establishment of 'complicity in genocide' pursuant to Article III(e) CPPCG required proof of the accomplice's intent to destroy the protected group.[318] Bosnia-Herzegovina further contended that a second form of complicity to genocide consisted of aiding and abetting, or aiding and assisting, the commission of a wrongful act without the provider of the aid necessarily sharing the criminal intent of the perpetrator of the act.[319] According to Bosnia-Herzegovina, this rule was evidenced by the materially equivalent rules of Article 16 ARSIWA, the *Nicaragua* assistance rule, and aiding and abetting under the law of individual responsibility.[320] In response, the Court relied in its decision on Article 16 ARSIWA for the interpretation of Article III(e) CPPCG, despite admitting that the provision only encompassed a relationship between states.[321] As to the mental element, the Court held that the conduct of an organ or person furnishing aid or assistance to a perpetrator of genocide does not qualify as complicity in genocide 'unless at the least that organ or person acted knowingly…, in particular, was aware of the specific intent…of the principal perpetrator'.[322]

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317 NHB Jørgensen, 'Complicity in Genocide and the Duality of Responsibility' in B Swart, A Zahar, and G Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 247, 253-259.

318 *Bosnia Genocide* CR 2006/31 [76] (Pellet); *Bosnia Genocide* CR 2006/19 [218] (de Roux).

319 *Bosnia Genocide* CR 2006/31 [78] (Pellet) (labelled as '*la « complicité de l'article IIIe) » à la « complicité Nicaragua »*').

320 ibid [77]-[78] (Pellet); cf *Bosnia Genocide* (Memorial of the Government of the Republic of Bosnia and Herzegovina) (15 April 1994) [6.4.1.2]-[6.4.1.4]; *Bosnia Genocide* (Reply of Bosnia and Herzegovina) (23 April 1998) [181]-[191] (citing Article 16 ARSIWA and its previous draft Art 27, *Nicaragua* (n197) 65[116], and Article 7(1) ICTY Statute).

321 *Bosnia Genocide* (n21) 217[420].

322 ibid 218[421].

This finding of the Court leaves open the possibility that the *mens rea* of the state obligation to abstain from 'complicity in genocide' could require more than knowledge.[323] However, the Court's pronouncement clearly supports the duality of the prohibition of 'complicity in genocide'.[324] The context of the Judgment suggests than any stricter mental element does not stem from the general principles relating to state responsibility, but rather from the interpretation of Article III(e) CPPCG in the context of international criminal law.[325]

To conclude, it is important to synthesise the legal standards applicable in the law of state and individual responsibility. In the law of individual responsibility, the mental element of aiding and abetting is knowledge that an act facilitates a crime and knowledge of the essential elements of the principal crime. Article 25(3)(c) RSICC lends itself to the interpretation that a higher threshold applies with respect to the act of assistance, but only with respect to acts of individual assistance to individual crimes. The mental element of the rule on aid or assistance under Article 16 ARSIWA appears contested, although a twofold knowledge requirement seems to be the more reasonable interpretation. In any case, whatever the position in general international law might be, the conduct of an individual state organ amounting to aiding and abetting under the law of individual responsibility would fall under the specific obligations with respect to genocide, crimes against humanity, and grave violations of international humanitarian law. However, the ambiguity with respect to the fault element of Article 16 ARSIWA

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323 cf, eg, Aust (n186) 236; Crawford, General Part (n187) 407; but also *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) (Declaration of Judge Bennouna) [2007] ICJ Rep 359, 361.

324 cf Weckel (n252) 324.

325 M Milanović, 'State Responsibility for Genocide: A Follow Up' (2007) 18 EJIL 669, 683; Corten/Klein (n204) 327; cf *Krstić* ACJ (n126) [142].

can have a bearing on the duality of the obligation not to participate in aggression. In other words, it is possible that certain conduct of an individual leader in connection to the commission of the crime of aggression by the leader of another state could amount to aiding and abetting aggression under the law of individual responsibility without such conduct being wrongful for the state under the law of state responsibility. Nonetheless, the more reasonable interpretation is that the mental element of aiding and abetting in the law of individual responsibility and aid or assistance in the law of state responsibility are materially identical.

(d) Duality of Obligations under International Law and Obligations Prohibiting Aid or Assistance to Internationally Wrongful Acts

The analysis so far has shown that the duality of obligations underlies the structure of certain wrongs that would otherwise be inconceivable in international law. It has also shown that international obligations of individuals prohibiting aid or assistance to internationally wrongful acts of individuals are matched by materially equivalent or wider obligations of states to a large extent. At the same time, there are disparities between the international obligations of individuals consisting of forms of wrongdoing and international obligations of states which should cause us to pause. The fact that individual leaders could possibly be held internationally responsible in relation to a crime of aggression committed by the leaders of other states under circumstances which would not constitute a breach of the relevant obligations of the former state is one such situation. Similarly, ambiguities about the key elements of prohibitions of aid and assistance persist with respect to genocide, crimes against humanity and grave breaches of international humanitarian law. At first, such situations seem quite common in international law, different actors having normally different international obligations.

However, one might question whether this approach can be applied uncritically in the context of war crimes and aggression. In fact, as has been shown, both practice and doctrine are cognisant of the duality underlying the obligations under discussion. For instance, the ambiguity as to the exact content of the state obligation not to assist violations of international humanitarian law had an implicit bearing on the ICTY's findings relating to 'specific direction'.[326] Conversely, the affirmation of the duality of the obligation not to assist the commission of widespread and systematic crimes against a civilian population was important, even if *obiter*, for the rejection of the 'specific direction' requirement.[327] Notably, as has been shown, certain prohibitions of aid and assistance are dual because specific rules provide for dual obligations.[328] More importantly, the Rome Statute contains a direct *renvoi* to the GCs and the 'established framework of international law' with respect to war crimes or to the UN Charter with respect to the crime of aggression. This constitutes a significant limitation, as it mandates the ICC even to depart from the letter of the Rome Statute in cases of discrepancies.[329] The interpretation of Article 25(3) RSICC should not circumvent this limitation. Rather, even these international obligations of individuals must be interpreted in line

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326 cf *Perišić* (Appeal Brief) IT-04-81-A (10 April 2012) [16]-[37]; *Perišić* ACJ (n272) [72]; also R Nieto-Navia, 'State Responsibility in Respect of International Wrongful Acts of Third Persons: The Theory of Control' in MC Bassiouni and ors (eds), *Global Trends: Law, Policy & Justice: Essays in Honour of Professor Giuliana Ziccardi Capaldo* (OUP 2013) 495, 504; also B Van Schaack, 'The Many Faces of Complicity in International Law' (2015) 109 ASIL Proceedings 184, 187; S Darcy, 'Assistance, direction, and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors' (2014) 96 IRRC 243, 265.

327 *Taylor* ACJ (n270) [459]-[462].

328 cf Article 3(e) CPPCG and Articles 3 and 6 DACAH.

329 cf *Ntaganda* (Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9") ICC-01/04-02/06-1962, AC (15 June 2017) [54].

with the international obligation of states and *in extremis* the narrower rule applicable on states should be directly applied to individuals.

V. Interim Conclusion

The analysis has tested the duality of obligations against the backdrop of three structural elements of the breach of these obligations. As dual obligations are meant to encompass individuals, these obligations comprise mental elements. At the same time, the duality of certain obligations allows for the common consideration of states and individuals in the commission of wrongful acts under specific rules of international law. In this respect, it has been shown that the applicable standards of aiding and abetting under the law of individual responsibility and aid or assistance under specific international obligations of states and, to a large extent, under the general rule of state responsibility, do not materially differ. Situations in which the state organ would be responsible *qua* individual for acts that are lawful for the state, whilst conceivable, remain purely speculative and should be resolved along the lines proposed in this thesis.

This gradual convergence of the applicable standards in cases of overlap is not a matter of mere coincidence. The establishment of responsibility in international law clearly favours an 'individualistic' approach. In the case of states, this approach is required by the principle of the unity of the state. In other words, the law of state responsibility is premised on the fact that any organ of the state whether collective or individual can engage the responsibility of the state. In the case of individuals, the relevant normative considerations are the principle of individual responsibility.[330]

[330] eg Art 25(2) RSICC.

This chapter has also identified a countervailing tendency. As dual obligations are also addressed to states, a feature commonly found in dual obligations is their composite character in terms of state responsibility or complex character in terms of individual responsibility. Whilst in theory the juxtaposition of this feature with mental elements could be an additional cause for differentiation between the content of the international obligations of states and individuals, in practice it is not. Indeed, for evidentiary purposes, the relationship between mental elements and contextual elements can be mutually reinforcing. Thus, as we have seen, a pattern of conduct can lead to an inference of intent. Along similar lines, in the specific context of crimes against humanity, a sufficiently discernible pattern of conduct can lead to the inference of the existence of a state or organisational policy or plan.[331] Similarly, it is possible to aggregate seemingly disparate acts into a pattern if the intent of specific persons in positions of power or a state or organisational policy or plan is proven with certainty.[332] In all these situations, the point is not that the higher or highest authorities of the state or the organisation authorised the acts or acquiesced to their commission, but that for certain international obligations 'the cumulative conduct constitutes the essence of the wrongful act'.[333]

That said, this structural feature has multifaceted implications for the establishment of responsibility, as it requires that a plurality of acts must be considered a unity from a legal perspective. This puts the principle of independent responsibility under

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331 JD Ohlin, 'Organizational Criminality' in E Van Sliedregt and S Vasiliev (eds), *Pluralism in International Law* (OUP 2014) 107, 120; eg *Bemba Gombo* (Judgment) ICC-01/05-01/08-3343, TC-III (21 March 2016) [160].

332 Along similar lines, *Croatia Genocide* (n20) 61-62[130] and 65[143]; cf *Croatia Genocide* (Gaja) (n39) 394-395[2].

333 Commentary to Art 15 ARSIWA [4].

pressure. The unity of the act entails that the responsibility of an individual actor cannot be established independently from other actors, but rather hinges to a greater or lesser extent on the relation of the act of the individual actor with the acts of others. If certain wrongs are to be considered identical for states and individuals, this may have implications for the interpretation and application of the general rules relating to the engagement of state and individual responsibility in a specific case. Indeed, as the Commission has cautioned, 'there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.'[334] Chapter 5 will address these issues in more detail.

[334] Commentary to Part One, Chapter II ARSIWA [4]; also L Condorelli and C Kreß, 'The Rules of Attribution: General Considerations' in Crawford and ors (n106) 221, 225.

Chapter 5. Duality of Attribution of Conduct

I. Introduction

Attribution of conduct is the operation which determines the author of certain act or omission. As shown in Chapter 3 in both the law of state and individual responsibility this operation has a normative character. In other words, it is based on rules of law and not on natural causation. Nonetheless, the fact that attribution of conduct is a normative operation in both the international law of state and individual responsibility in no way implies that the same rules necessarily govern the question of attribution of conduct in the two regimes.[1] It does, however, entail certain consequences that are common in both regimes. In the first place, the rules of attribution of conduct in both regimes, much like any other rules of international law, are subject to evolution through their modification or displacement by subsequent or special rules of international law.[2] In more substantive terms, rules of attribution of conduct are not innately 'neutral' or inherently unresponsive to regulatory problems stemming from the lack of primary norms.[3] Rather, they unavoidably reflect explicit or implicit normative choices as to which acts

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1 eg P-M Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State' in A Cassese, *The Rome Statute of the International Criminal Court: A Commentary* vol-II (OUP 2002) 1085, 1096; S Rosenne, 'State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility' (1998) 30 NYJILP 145, 162.

2 cf Art 55-56 ARSIWA; Art 22(3) RSICC; also L Condorelli and C Kreß, 'The Rules of Attribution: General Considerations' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 221, 226; J Crawford, *State Responsibility—The General Part* (CUP 2013); *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 208-209[401].

3 cf, eg, I Plakokefalos, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy' (2017) 28 EJIL 587, 588.

entail responsibility.[4] In the context of individual responsibility, an illustrative example is the leader-foot soldier dilemma.[5] The substantive implications of the normative nature of attribution of conduct are even more pronounced in the context of state responsibility. Indeed, as the ILC has admitted, '[i]n theory, the conduct of all human beings…might be attributed to the State'.[6] If states so wish, rules on attribution of conduct can serve 'as a complementary instrument (alongside primary rules) for attaining substantive aims'.[7] Therefore, whilst attribution of conduct operates differently in the context of state and individual responsibility, the possibility cannot be precluded that the two regimes approximate each other in substantive terms if and to the extent that their substantive aims overlap.

This thesis has already identified two significant points of overlap. First, Chapter 2 has already identified several obligations of the same content which are imposed on the state and on the individual acting on its behalf. This duality of obligations has clear implications for the purposes of attribution of conduct. These obligations would be meaningless if attribution of conduct to the state excluded the attribution of the same conduct to the individual and *vice versa*.[8] In other words, the duality of obligations

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4 eg G Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) 97 RDI 981, 989-990; more critically, P Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 HJIL 1, 11-13.

5 See Chapter 4.III.2.

6 Commentary to Part One, Chapter II ARSIWA [2].

7 C Kreß, 'L'organe *de facto* en droit international public—Réflexions sur l'imputation à l'État de l'acte d'un particulier à la lumière des développements récents' (2001) 105 RGDIP 93, 123.

8 For the view that the exclusive attribution of conduct to the state constitutes the *raison d'être* of immunities *ratione materiae* for the individual undertaking the conduct: see, eg, H Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 CaLR 530, 540; *Blaškić* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-04, AC (29 October 1997) [38]; R Van Alebeek, *The Immunity of States and Their Officials in*

inexorably entails the duality of attribution of conduct in the sense that the same conduct must be attributed twice for the purposes of international responsibility. At least so far as the relationship of the responsibility of the state and of the individual through which the state acts is concerned, dual attribution of conduct is a constant feature of international law.[9]

Second, Chapter 3 has already demonstrated that certain rules of attribution of conduct in the law of state responsibility and the analogous concepts of the law of individual responsibility operate in comparable ways. In particular, whilst the characterisation of an act as an act of a state under international law hinges on the status of its author under the domestic law of the state as a state organ or on the governmental nature of the act, these are not the only relevant considerations. Rather, rules of attribution of conduct in the law of state responsibility exceptionally provide for a 'real link' between persons or groups of persons having the status of state organs with persons or groups of persons which do not have this status.[10] At the same time, in the law of individual responsibility, the perpetrator of a crime is not necessarily the person executing any physical acts. The principles of international law that determine the perpetrator of a crime for the purposes of individual responsibility are not crimes in themselves; they

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International Criminal Law and International Human Rights Law (OUP 2008) 241; R Pedretti, *Immunities of Heads of States and State Officials for International Crimes* (Brill 2015) 25.

9 Commentary to Art 66 ARIO [2]; Commentary to Art 58 ARSIWA [3]; cf, more generally, RA Kolodkin, 'Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (2008) II(1) YbILC 157, 179-180[89]. For the distinct issue of dual attribution of conduct to states and international organisations see, eg, A Tzanakopoulos, *Disobeying the Security Council* (OUP 2011) 36.

10 Commentary to Art 4 ARSIWA [2]; also Art 8 ARSIWA.

are merely ways in which wrongful acts are committed.[11] Notably, forms of commission do not comprise mental elements, but only involve ways in which the required mental elements of each crime are established.[12] These rules operate as rules of attribution of conduct. In both regimes, the rules of attribution of conduct are not meant to prescribe or proscribe conduct.[13] They merely attach conduct to a person or entity for the purposes of international responsibility.[14] What is more, the common feature amongst these specific rules of attribution of conduct is that they constitute expressions of 'normative causality'; they lay down factual circumstances which are legally sufficient in order to connect human conduct to the subject of an international obligation.[15]

The purpose of this chapter is to examine whether the parallel operation of these rules of attribution of conduct in the law of state and individual responsibility leads to or distorts the duality of the internationally wrongful act. In other words, whether such operation leads to the responsibility of both the state and of the individual through which the state acts for the same or, in the end, for different conduct. For the purposes of this thesis, the duality of the internationally wrongful act comes under pressure on several fronts, the duality of obligations notwithstanding. First, rules of attribution of conduct in the law of state responsibility can possibly parallel forms of participation—constituting a separate wrong in the law of individual responsibility—distorting thus

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11 *Kvočka and ors* (Judgement) IT-98-30/1-A (28 February 2005) [91].

12 Art 25(3)(a) RSICC; *Brđanin* (Judgment) (Partly Dissenting Opinion of Judge Shahabuddeen) IT-99-36-T (3 April 2007) [15]-[17]; *a contrario*, Art 25(3)(c) and (d) RSICC.

13 *Kvočka* ACJ (n11) [91]; also Commentary to Part One, Chapter II ARSIWA [4].

14 Commentary to Art 2 ARSIWA [5]; on individuals: K Ambos, *Treatise on International Criminal Law* Vol-I (OUP 2013) 86; E Van Sliedregt, *Individual Criminal Responsibility* (OUP 2012) 72.

15 cf, *mutatis mutandis*, J D'Aspremont, 'The Articles on the Responsibility of International Organisations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 IOLR 15, 21.

the duality of the internationally wrongful act. This would be the case if, for example, conduct of an individual state organ amounting to aiding and abetting genocide committed by the members of an armed group would be sufficient to establish that the 'principal' act of genocide was an act of state under international law. Second, such duality would also be distorted if forms of commission under the law of individual responsibility were not encompassed in the rules of attribution in the law of state responsibility providing for a real link. That would be the case if, for example, an individual state organ were considered a perpetrator of genocide alongside members of a paramilitary armed group under the joint criminal enterprise doctrine or control theory, whilst the same link would be insufficient to attribute the underlying act of genocide to the state. Third, whilst the attribution of conduct to both the state and the individual through which the state acts is the norm, complications arise when state organs are involved in the same wrongful act with organs of other states. In such a situation, the rules of attribution of conduct in the law of individual responsibility provide for the attribution of conduct of one individual to the other through the doctrines of joint criminal enterprise or control over the crime. Such mutual or reciprocal attribution of conduct is an operation extraneous to the law of state responsibility.[16] As a result, it is possible for individuals who are organs of multiple states to be responsible *qua* individuals as co-perpetrators of genocide, crimes against humanity, war crimes, or aggression, without the states on behalf of which they are acting being internationally responsible for that same conduct. In all these situations, the state and the individual state organ would be responsible for different conduct by operation of the general rules on the establishment of international responsibility, despite the duality of the underlying obligation.

[16] R Kolb, *The International Law of State Responsibility* (Elgar 2017) 216.

Hence, the analysis proceeds as follows. Section II delimits the rules of attribution of conduct to the state consisting of a 'real link' from cases of complicity or participation of state organs in acts of others, described in Chapter 3. Section III follows the inverse approach. It analyses the rules of attribution of conduct in the law of individual responsibility—joint criminal enterprise and control over the crime—and examines how they parallel the rules of attribution of conduct in the law of state responsibility consisting of a 'real link'. Section IV discusses the duality of the internationally wrongful act in situations where the same conduct is attributed under the law of individual responsibility to individuals having the status of organs of different states. The chapter argues that the duality of obligations entails the duality of attribution of conduct. The argument goes beyond the obvious claim that the same conduct can be attributed both to the state and to the individual through which the state acts entailing the direct responsibility of both. This chapter argues that a further implication of the duality of obligations is that the formally disparate rules that govern attribution of conduct in the law of individual responsibility tend to converge in material terms with those of state responsibility to the extent that they overlap with them. To this extent and in line with the terminology used in this thesis, it is possible to speak of dual principles of attribution of conduct in the international law of state and individual responsibility.

II. Attribution of Conduct in the Law of State Responsibility based on a 'Real Link' and Participation in the Law of Individual Responsibility

The most obvious rule of attribution describing a 'real link' between an individual or group having the status of state organs and acting in that capacity, on the one hand, and an individual or group not having that status, on the other, is the rule of customary international law reflected in Article 8 ARSIWA.[17] As described in Chapter 3, the acts

[17] *Bosnia Genocide* (n2) 207[397].

of individuals not having the status of state organs or not exercising elements of governmental authority are attributed to the state, if these individuals act 'on the instructions of, or under the direction or control of, the State in carrying out that conduct'.[18] The ILC states in the Commentary that the rule consists of three distinct criteria of attribution of conduct.[19] However, there is no generally accepted definition of the notions of 'instructions', 'direction' or 'control' or of their relationship and the ordinary meaning of the three terms used in Article 8 ARSIWA is very similar.[20] In fact, the ILC Commentary only specifies two situations in which conduct is attributable to the state. The first situation relates to persons acting 'on the instructions' of the state in carrying out the conduct, whilst the second one consists of persons acting 'under the direction or control' of the state.[21] This section starts from the core relationship of 'instructions' or instigation reflected in Article 8 ARSIWA (section 1). It then examines the situation of 'direction or control', or 'effective control', encompassed in the same provision and how it parallels the notion of 'effective control' in the law of individual responsibility (section 2). For the purposes of this study, the interpretation and application of this rule can have a bearing on the duality of the internationally wrongful act, as it might suggest that states and individuals are responsible for different conduct, despite the duality of certain obligations.

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18 Art 8 ARSIWA.

19 Commentary to Art 8 ARSIWA [7].

20 K Mačák, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21 JCSL 405, 411.

21 Commentary to Art 8 ARSIWA [1] and [3]-[6]; also eg *Bosnia Genocide* (n2) 208[400] ('…in accordance with that State's instructions or under its "effective control"').

1. 'Instigation Theory'[22] in Article 8 ARSIWA and Instigation in the Law of Individual Responsibility

The core of the relationship described in Article 8 ARSIWA consists of a state organ giving 'instructions' to an individual not having the status of an organ to perform a specific act. According to the last Special Rapporteur, Article 8 ARSIWA draws to some extent from the domestic concept of agency.[23] Whilst the term 'agent' appears in the Commentary,[24] the Commission uses in the particular context of Article 8 both the terms 'authoriz[ation]' and 'instigation' to describe the relevant situation.[25] This implies that the relationship required for attribution of private conduct to the state in these cases may also consist of 'a measure of participation or complicity on the part of State organs' in the acts of individuals or groups not having that status.[26] However, unlike the case of obligations of states or individuals to prevent, punish, or not to assist internationally wrongful acts of other actors, such participation or complicity does not constitute itself an internationally wrongful act. In this sense, such participation constitutes no complicity at all,[27] but rather elicits the attribution to the state of both the act of state

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22 G Arangio-Ruiz, 'State Responsibility Revisited–The Factual Nature of Attribution of Conduct to the State' (2017) 100 RDI (Supplement No. 1) 1, 38.

23 J Crawford, 'First Report on State Responsibility' (1998) II(1) YbILC 1, 56[284]; also, eg, I Brownlie, *System of the Law of the Nations: State Responsibility – Part I* (OUP 1983) 38; D Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 CJIL 83, 89; N Tsagourias, 'Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 LJIL 801, 805.

24 Commentary to Part One, Chapter II ARSIWA [2].

25 Commentary to Art 8 ARSIWA [2].

26 ILC, 'Report of the International Law Commission on the work of its twenty-seventh session, 5 May-25 July 1975' (1975) II YbILC 49, 72[7] and 79-80[32]; also ILC, 'Summary Record of the 1311th Meeting' (1975) I YbILC 38, 41[24] (Ushakov) and, *a contrario*, 39[5] (Ustor) (on previous drafts of ARSIWA).

27 M Jackson, *Complicity in International Law* (OUP 2015) 178 at fn18; J Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 ILSAJICL 525, 529.

organs and of the act in which state organs participated or were accomplices.[28] The ICJ explicitly confirmed this approach by placing the real link required for attribution of conduct in these cases within the broader category of complicity and, particularly, ordering or instigation.[29] Therefore, the real link required for attribution of conduct in the law of state responsibility is at least partially based upon the concept of instigation which has clear parallels in the law of individual responsibility.[30]

In the law of individual responsibility, instigation encompasses quite different types of relationships, namely, ordering, soliciting, inducing, and prompting another to commit a wrongful act.[31] Ordering is distinguished from other forms of instigation by requiring that the instigator exerts some form of *de iure* or *de facto* authority over the perpetrator which does not need to amount to a superior-subordinate relationship.[32] According to several commentators, this distinction should mark the boundary between

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28 P Okowa, 'State and Individual Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (2009) 20 FYIL 143, 172-178 (characterising the relevant relationship as governmental complicity); cf R Ago, 'Fourth Report on State Responsibility' (1972) II YbILC 71, 96[64].

29 *Bosnia Genocide* (n2) 216-216[419] ('giving instructions…to commit a criminal act is considered as the mark of complicity in the commission of that act…in certain national systems of criminal law'); also Cerone (n27) 526-527; E Savarese, 'Complicité de l'État dans la perpétration d'actes de génocide: Les notions contiguës et la nature de la norme' (2007) 53 AFDI 280, 285-286.

30 Commentary to Chapter II Part One ARSIWA [2] ('under the direction, instigation or control of those organs'); Kreß (n27) 101 and 127. Earlier drafts: ILC, 'Report of the Commission to the General Assembly' (1974) II(1) YbILC 157, 284[5] and 285[8] ('it must be proved that the person or group… performed a given task at the instigation of [state] organs'); also R Ago, 'Third Report on State Responsibility' (1974) II(1) YbILC 199, 266[194]; Crawford, First Report (n23) 40[197].

31 Art 25(3)(b) RSICC; Art 6(1) ICTR Statute; Art 7(1) ICTY Statute; cf, more generally: M Jackson, 'State Instigation in International Law: A General Principle Transposed' (2019) 30 EJIL 391, 392. On the inclusion of planning under the notion of instigation see: H Olásolo and E Carnero Rojo, 'Forms of Accessorial Liability under 25(3)(b) and (c)' in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 557, 575.

32 eg *Nahimana and ors* (Judgment) ICTR-99-52-A (28 November 2007) [481]; *Semanza* (Judgment) ICTR-97-20-A (20 May 2005) [363]; *Kordić & Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) [28].

perpetrating or being a principal to an act and wrongful participation in the act of others in the context of individual responsibility.[33] Moreover, instigation is distinguished from inciting or abetting a wrongful act.[34] Although the distinction is obscured in practice, the difference appears to hinge on the effects of the instigation on the principal act, not its form. According to the prevailing jurisprudence of the *ad hoc* tribunals, instigation appears to cover any form of exertion of influence by one person over another to commit a wrongful act if it has some effect on the commission of that act.[35] In this sense, instigation constitutes a wrong separate from the principal act, but is hardly extricable from abetting.[36] In its qualified form, the instigator must have generated the final determination of the physical perpetrator to commit the concrete wrongful act.[37] Conversely, there is no instigation if the physical perpetrator is already determined to commit the act without the act of the instigator (*omnimodo facturus* test).[38] This requirement can be evidenced by the fact that the physical perpetrator is bound to abide by the instigation because the instigator is in a position of authority over that perpetrator (viz ordering). It may also be proved by some marked action of the instigator to obtain that conduct, such as coercion, threats, enticement, or promises.[39] According to this view,

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33 eg Ambos, Treatise I (n14) 163; Jackson, Complicity (n27) 68.

34 Art 25(3)(b)-(c) RSICC; Art 6(1) ICTR Statute; Art 7(1) ICTY Statute.

35 eg *Šešelj* (Judgment) MICT-16-99-A (11 April 2018) [124]; *Nahimana* ACJ (n32) [480]; *Kordić & Čerkez* (n32) [27].

36 W Schabas, *The International Criminal Court: A Commentary* (2nd edn OUP 2016) 577; cf Van Sliedregt (n14) 108.

37 *Bemba Gombo and ors* (Judgment) ICC-01/05-01/13-1989-Red, TC-VII (19 October 2016) [81]; cf *Blaškić* (Judgment) IT-95-14-T (3 March 2000) [270] ('The essence of instigating is that the accused causes another person to commit a crime').

38 *Bemba and ors* TCJ (n37) [81].

39 cf, eg, *Šešelj* (Judgment) IT-03-67-T (31 March 2016) [295].

instigation is a form of 'intellectual authorship' of an act which comes close to, or supplements indirect perpetration in that it constitutes a link occasioning the attribution of conduct of other individuals to the instigator.[40] As a result, the instigator is considered responsible for the wrongful act in the same way as the perpetrator.[41]

The rule of attribution reflected in Article 8 ARSIWA is based on a notion of instigation which is also qualified.[42] The rules of attribution of conduct do not envisage the situation where a state organ incites conduct in general or expresses sympathy or encouragement for the conduct of a person not having that status.[43] For example, in the *Tehran Hostages* judgment, the Court found that the statements of Ayatollah Khomeini inviting Iranian students 'to expand with all their might their attacks against the United States' did not amount to an 'authorization to undertake the specific operation of invading and seizing the United States Embassy'.[44] In a similar vein, 'congratulations after the event' or 'statements of official approval' of the impugned acts, whilst these acts were continuing, were also insufficient to establish that these acts were acts of Iran under international law.[45] Along similar lines, in the *Nicaragua* judgment, the issuance and dissemination by the US of a 'manual' detailing tactics in violation of international

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40 *Bemba and ors* TCJ (n37) [81]; *Seromba* (Judgment) ICTR-2001-66-A (12 March 2008) [171]; cf Van Sliedregt (n14) 102.

41 *Bemba and ors* (Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute") ICC-01/05-01/13-2276-Red, AC (8 March 2018) [59]; for the comparative perspective see: J Pradel, *Droit pénal comparé* (4th edn Dalloz 2016) 82-86; GP Fletcher, *Rethinking Criminal Law* (OUP 2000) 644-645.

42 cf Kreß (n7) 125.

43 eg Mačák (n20) 416.

44 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJ Rep 3, 29-30[59].

45 ibid.

humanitarian law were insufficient to attribute the concrete violations committed by the *contras* to the US.[46] Less conspicuously, in the *Bosnia Genocide* judgment, the Court required that state instructions had to be given with the specific intent of genocide for the acts of the physical perpetrators constituting genocide to be attributed to the state.[47] Such a requirement mirrors the circumstances under which international criminal tribunals consider the instigator a principal or perpetrator of a crime.[48] All these examples suggest that not all kinds of relationships which conceivably fall under the notion of instigation are relevant for the purposes of attribution of conduct to the state.[49] There are two interpretations on the specific kind of relationship required for attribution of conduct under the rule reflected in Article 8 ARSIWA.

On the one hand, it is possible to construe the terms 'instructions' or 'direction' as involving a specific form of instigation, namely, 'ordering or commanding…persons to undertake a certain conduct'.[50] To illustrate this point, in the *Nicaragua* judgment, the Court denied attribution because it could not establish that the US 'directed or enforced the perpetration' of the specific acts.[51] One way to read this finding is that a request by a state organ to a person or group not having that status to undertake certain

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46 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16, 65[116].

47 *Bosnia Genocide* (n2) 214-215[413].

48 See Chapter 3.III.2.

49 T Becker, *Terrorism and the State* (Hart 2006) 320.

50 A Cassese, 'The *Nicaragua* and the *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649, 663; also F Dopagne, 'La responsabilité de l'état du fait des particuliers: les causes d'imputation revisitées par les Articles sur la Responsabilité de l'état pour fait internationalement illicite' (2001) 34 RBDI 492, 507-508; Kolb (n16) 80.

51 *Nicaragua* (n46) 64-65[115].

conduct is insufficient for attributing that conduct to the state.[52] It is required in addition that the person or group finds itself under the *de iure* or *de facto* authority or subordination or general control of the state organ.[53] This corresponds to the approach known in the law of individual responsibility which considers ordering as a form of commission of a wrongful act.[54]

On the other hand, the preponderance of evidence suggests that the emphasis of the rule of attribution of conduct is not the authority that the state exercises generally over the individual, but on the specificity of its instruction and its effect on the commission of the act. The terms 'instructions', 'direction' and 'control' are used disjunctively in Article 8 ARSIWA.[55] This entails that they do not cover the exact same situation.[56] According to the ILC Commentary, under the rubric of state 'instructions' are covered, *inter alia*, 'cases where state organs supplement their own action by recruiting or instigating private persons'.[57] This implies that the key issue for attribution of conduct in these cases is not the establishment of a hierarchical relationship, but can also involve, for instance, a private contract between the state organ and the individual not

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52 cf Kreß (n7) 125 (critical).

53 L Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: Solutions classiques et nouvelles tendances' (1984) 189 RdC 9, 102; Mačák (n20) 415; along similar lines: eg *EDF (Services) v Romania* (Award) ICSID Case No ARB/05/13 (8 October 2009) [203]-[205]; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (Award) ICSID Case No ARB/04/13 (6 November 2008) [173]; *White Industries Australia Limited v The Republic of India* (Final Award) UNCITRAL (30 November 2011) [8.1.18]; *Kristian Almås and Geir Almås v. The Republic of Poland* (Award) PCA Case No 2015-13 (27 June 2016) [268]-[272].

54 NHB Jørgensen, 'Complicity in Genocide and the Duality of Responsibility' in B Swart, A Zahar, and G Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 247, 268.

55 Commentary to Art 8 ARSIWA [7];

56 cf P-M Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility' in A Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Hart 2004) 3, 10.

57 Commentary to Art 8 ARSIWA [2].

having that status.[58] Whilst the core of the relationship consists of a service requested by the state and rendered by the private person or group,[59] the latter might act as a 'free agent'.[60] Notably, even the *Nicaragua* pronouncement on lack of attribution is not only based on the form of the state instruction, but also on the fact that the impugned acts 'could well be committed…without the control of the United States'.[61] Thus, in contrast to a hierarchical relationship, the crucial issue is 'whether the [state] organs…*originated* the wrongful act by issuing instructions to the perpetrators' and, conversely, 'whether, as a result, the conduct of [those] organs, having been *the cause* of the commission of acts in breach of [the state's] international obligations, constituted a violation of those obligations'.[62] Accordingly, acts which are devised and carried out solely by persons not having the status of state organs are not attributable to the state on this basis, even if these persons act so under the influence or with the support of the state.[63] This test—effectively, an *omnimodo facturus* test—mirrors the distinction between abetment and instigation in its qualified form—or 'intellectual' perpetration—under the law of individual responsibility.[64]

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58 G Distefano and A Hêche, 'L'organe *de facto* dans la responsabilité internationale: *Curia, quo vadis*?' (2015) 61 AFDI 3, 13; H Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2011) 114-117; ND White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 Criminal Justice Ethics 233, 238; Kreß (n7) 126-127; Savarese, Complicité (n29) 288.

59 Condorelli (n53) 102.

60 Crawford, General Part (n2) 146.

61 *Nicaragua* (n46) 64-65[115].

62 *Bosnia Genocide* (n2) 207[397] (emphasis added); cf, for a similar view, L Cameron and V Chetail, *Privatizing War* (CUP 2013) 221-223.

63 cf *Tehran Hostages* (n44) 29-30[59]; *Bosnia Genocide* (n2) 213-214[412].

64 Kreß (n7) 126-127.

What emerges from this analysis is that the core relationship required for attribution of conduct under Article 8 ARSIWA is at least partially based on the concept of instigation. However, this notion has a variable meaning even in the international law of individual responsibility which has developed further distinctions to reflect different degrees of responsibility. The analysis shows that the relationship required for attribution of conduct to the state corresponds only to forms of instigation which entail the attribution of the principal act to the instigator in the law of individual responsibility. In this sense, it is possible to speak of the duality of the principles of attribution of conduct in the law of state and individual responsibility. As an upshot, the duality of the internationally wrongful act remains undistorted in cases involving violations of dual obligations.

2. 'Direction or Control' in Article 8 ARSIWA and the Notion of 'Effective Control' in the Law of Individual Responsibility

Apart from this core relationship, the ILC specifies another situation in which conduct is attributable to the state, namely, where persons or groups act 'under the direction or control of' a state organ.[65] According to the ILC, unlike the situation of 'instructions', the emphasis is on the degree of control which must be exercised by the state.[66] As discussed in Chapter 3, the ICJ went further and distinguished this case from the case of *de facto* organs.[67] Unlike the case of *de facto* organs which is based solely on the general relationship between the state and the person or group, the exercise of control

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65 Commentary to Art 8 ARSIWA [1] and [3]-[6].

66 ibid [4]; eg *Bosnia Genocide* (n2) 208[400] ('…in accordance with that State's instructions or under its "effective control"').

67 *Bosnia Genocide* (n2) 208[400].

must relate to each operation or conduct giving rise to the internationally wrongful act.[68] However, it suffices that the persons or groups act under the 'effective control' of a state organ, whereas the case of *de facto* organs requires a different level of control.[69] Besides this point, there is no clear definition of the term 'effective control' for the purposes of attribution of conduct under the rule reflected in Article 8 ARSIWA.[70]

The ambiguity as to the exact meaning of 'effective control' can have a bearing on the duality of the internationally wrongful act. In particular, the notion of 'effective control' forms one of the constituent elements of a distinct form of wrongdoing in the law of individual responsibility, namely, command or superior responsibility.[71] However, this form of wrongdoing cannot be conflated with the operation of attributing conduct to an individual.[72] Rather, the superior is solely responsible for the failure to properly exercise effective control over subordinates who commit wrongful acts.[73] The question, therefore, arises whether the definition of 'effective control' in the context of individual responsibility can parallel or inform the definition of 'effective control' for the purposes of attribution of conduct to a state under international law.[74] This section further examines whether and to what extent the notion of 'effective control' as defined

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68 ibid; also Commentary to Art 8 ARSIWA [7].

69 *Bosnia Genocide* (n2) 208[400].

70 N Perova, 'Disentangling 'Effective Control' Test for the Purpose of Attribution of the Conduct of UN Peacekeepers to the States and the United Nations' (2017) 86 NJIL 30, 53.

71 eg Art 28 RSICC; *Orić* (Judgment) IT-03-68-A (3 July 2008) [20]; *Bemba Gombo* (Judgment) ICC-01/05-01/08-3343, TC-III (21 March 2016) [180].

72 *Gbagbo* (Decision on confirmation of charges) ICC-02/11-01/11-656, PTC-I (12 June 2014) [262]; similarly, *Bemba Gombo* TCJ (n71) [173].

73 *Orić* ACJ (n71) [20]; *Bemba Gombo* TCJ (n71) [180].

74 cf K Boon, 'Are Control Test Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 14 MelJIL 330, 373; Perova (n70) 55.

in the law of individual responsibility parallels the general standard of the law of state responsibility with regards to the determination of the status of a *de facto* organ of the state.

In particular, unlike the law of state responsibility, the law of individual responsibility provides for a positive definition of the term 'effective control'. In this context, 'effective control' is invariably defined as 'the material ability to prevent or punish' wrongful conduct or 'submit the matter to the competent authorities'.[75] This definition, however, is somewhat misleading, because 'effective control' in this sense is insufficient to trigger individual responsibility in most cases. Rather, the material ability to prevent or punish must be premised upon a pre-existing superior-subordinate relationship between an accused and the physical perpetrators of the relevant acts to amount to 'effective control'.[76] For instance, a police officer may be materially able to prevent and punish crimes of private individuals within her jurisdiction, but this would not make her responsible as a superior.[77] It follows that superior responsibility does not normally attach to all persons who have the material ability to prevent and punish conduct. Rather, such ability needs to emanate from some form of hierarchical structure or chain of command to which both the superior and the subordinate belong.[78] The Rome Statute

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75 eg *Delalić and ors* (Judgment) IT-96-21-A (20 February 2001) [256]; *Bemba Gombo* TCJ (n71) [183]; R Cryer, 'General Principles of Liability' in R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Law and Procedure* (3rd edn CUP 2014) 353, 386.

76 *Halilović* (Judgment) IT-01-48-A (16 October 2007) [210]; *Bagosora and Nsegiyuma* (Judgment) ICTR-98-41-A (14 December 2011) fn687; also *Nyiramasuhuko and ors* (Judgment) ICTR-98-42-A (14 December 2015) [995].

77 *Halilović* ACJ (n76) [59].

78 N Karsten, 'Distinguishing Military and Non-military Superiors' (2009) 7 JICJ 983, 994-995; H van der Wilt, 'Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control' in CC Jalloh (ed), *The Sierra Leonean Court and its Legacy* (CUP 2013) 144, 148; cf *Bemba Gombo* TCJ (n71) [184].

makes this somewhat more explicit by qualifying the term 'control' by the terms 'command' and, less unambiguously, 'authority'.[79]

At the same time, the possession of formal or *de iure* authority over persons is neither a necessary nor a sufficient condition for a finding of a superior-subordinate relationship or of 'effective control' over these persons.[80] For example, a superior-subordinate relationship has been found to exist between a minister of family affairs and a paramilitary organisation.[81] Conversely, an ICTY TC could not conclude that Perišić, the Chief of the Yugoslav Army Staff, had effective control over members of the Bosnian Serb army—formally Yugoslav Army personnel—involved in the Srebrenica massacre, despite him possessing a degree of *de iure* authority over them.[82] According to the TC, Perišić had effectively relinquished to the authorities of Republika Srpska his powers to discipline or to issue binding orders to these forces.[83] In practical terms, the factors indicating the existence of a superior-subordinate relationship and effective control are the same. They may include, *inter alia*, the authority to issue orders to the perpetrators of the wrongful act and whether these orders were actually followed;[84] the

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79 Art 28 RSICC.

80 eg *Delalić* ACJ (n75) [254]; *Halilović* ACJ (n76) [210]; *Bemba Gombo* TCJ (n71) [189].

81 *Nyiramasuhuko* ACJ (n76) [991]-[1004].

82 *Perišić* (Judgment) IT-04-81-T (6 September 2011) [1667].

83 ibid [1771] and [1777].

84 eg *Strugar* (Judgment) IT-01-42-A (17 July 2008) [256]; *Halilović* ACJ (n76) [207]; *Bemba Gombo* TCJ (n71) [188].

capacity to promote, replace, remove or discipline the perpetrators or initiate investigations;[85] and independent access, and control over, the finances, weapons, means of communications and other means of the relevant group.[86] More generally, a superior-subordinate relationship manifests itself as 'effective control', that is, the material ability to prevent or punish conduct of the subordinate.[87] Thus, the notions of superior-subordinate relationship and effective control are 'intrinsically linked'.[88]

These considerations notwithstanding, there is evidence suggesting that the notion of 'effective control' in the law of individual responsibility can be extricated from subordination. For example, a superior-subordinate relationship has been found to exist between business owners and their employees.[89] More notably, certain Nuremberg tribunals accepted that commanders in charge of occupied territory—so-called executive commanders—may be individually responsible as superiors for crimes committed in that area by persons which are not under their command.[90] Such a responsibility stemmed from the general obligation of the occupying power under Article 43 of the Hague Regulations to take all measures to 'restore, and ensure, as far as possible, public

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85 eg *Perišić* TCJ (n82) [1776]; *Halilović* ACJ (n76) [183]; *Bemba Gombo* TCJ (n71) [188].

86 eg *Bemba Gombo* TCJ (n71) [188]; cf *Milošević (Slobodan)* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004) [304].

87 *Nyiramasuhuko* ACJ (n76) [995].

88 *Bemba Gombo* TCJ (n71) [178].

89 *Musema* (Judgment) ICTR-96-13-A (27 January 2000) [880]; also *The 'Roechling' Case* (Judgment) [1948] XIV TWC 1075, 1088; *The 'Roechling' Case* (Judgment on appeal) [1949] XIV TWC 1097, 1136-1137; cf, more ambiguously, *The 'Pohl' Case* (Judgment) [1947] V TWC 958, 1051-1056; more strikingly, between a 'spiritual leader' and an armed group see: *Fofana/Kondewa* (Judgment) SCSL-04-14-A (28 May 2008) [177]-[189].

90 *'High Command' Case (US v Von Leeb and ors)* (Judgment) [1948] XI TWC 462, 542-549; *'Hostages' Case (US v List and ors)* (Judgment) [1948] XI TWC 1230, 1260 and 1271.

order and safety'.[91] In the event, the question was how military commanders of the *Wehrmacht* could be held responsible for the atrocities committed by persons who formally did not belong to the German army, but to the German state security agencies and their proxies operating in occupied territories (eg *SS, Einsatzgruppen*).[92] In these circumstances, the tribunal held that the commander is the 'instrument by which occupancy exists'.[93] As a result, military subordination was not the only factor determining responsibility, because a commander exercises administrative authority as well.[94] It is conceivable that the Nuremberg tribunals elaborated a scenario peculiar to occupied territories where military commanders are *de facto* superiors to, and possess effective authority and control over, parts of the civilian administration of these territories. However, a broader interpretation suggests that executive commanders' responsibility is co-extensive with their area of command covering even acts of the civilian population in the occupied territory, such as pogroms by the inhabitants of territory.[95] Article 87(1) AP-I on the duties of commanders and superiors seems to reflect such a broader notion of control,[96] whilst the *ad hoc* tribunals have sided with this broader interpretation.[97]

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91 cf *Delalić* ACJ (n75) [258].

92 *'High Command'* (n90) 546-547; *'Hostages'* (n90) 1256.

93 *'High Command'* (n90) 544.

94 ibid 543-544; '*Hostages'* (n90) 1256.

95 eg O Triffterer and R Arnold, 'Article 28' in O Triffterer and K Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn Beck 2016) 1056, 1093-1094; I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 AJIL 573, 580-581; Ambos, Treatise I (n14) 210-211.

96 J de Proux, 'Article 87' in Y Sandoz, C Swinarski and B Zimmermann (eds), Commentary in the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Nijhoff 1987) [3555].

97 *Delalić* ACJ (n75) [258].

This suggests that, in the law of individual responsibility, the notion of 'effective control' is not necessarily equated with a core relationship of strict subordination with the physical authors of the wrongful act. As the superior remains responsible only for her own omission, such responsibility can stem more broadly from the relationship between business owners and their employees or even the exercise of authority and control over territory.

Turning to the law of state responsibility, there are reasons to doubt whether this notion of 'effective control' drawn from the law of individual responsibility can parallel, or at least inform the interpretation of, the standard of Article 8 ARSIWA. First, the notion of 'effective control' in the general rule of state responsibility cannot be conflated with the material ability of the state to prevent or punish certain conduct.[98] The term 'control' cannot be equated with the exercise of mere oversight, whereas the term 'direction' means 'actual direction of an operative kind'.[99] The power or potential of the state to control certain activity is insufficient of itself for the purposes of attribution and the control must actually be exercised so as to produce the specific conduct.[100] At the very least, the state needs to exercise its control over a specific operation of which the specific conduct forms an integral part.[101] Second, whilst the doctrine of command or superior responsibility in the law of individual responsibility has expanded

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98 cf K Trapp, 'Of Dissonance and Silence; State Responsibility in the *Bosnia Genocide* Case' (2015) 62 NILR 243, 249-250; Perova (n70) 55.

99 Commentary to Art 17 ARSIWA [7] and Commentary to Art 8 ARSIWA fn153.

100 Crawford, First Report (n23) 56[284].

101 Commentary to Art 8 ARSIWA [3]; *Nicaragua* (n46) 64-65[115].

to encompass civilian superiors and a handful of acts committed in peacetime, it is essentially a creation of the law applicable in international armed conflicts.[102] In this particular context, the obligation of military commanders, whatever their rank, to exercise command 'is inseparable from the status of armed forces'.[103] Indeed, armed forces of a state are defined in the law of armed conflict as 'all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates'.[104] The independence of this definition from any notion of domestic law hinges on establishing that the members of these forces, groups, or units, are commanded by a person belonging to a party who is responsible for her subordinates.[105] Moreover, customary international law provides that the state party to the conflict 'shall be responsible for all acts committed by persons forming part of its armed forces'.[106] As a result, the state is directly responsible for all their conduct, even if undertaken contrary to specific instructions, or in excess of authority, or even in a purely private capacity.[107] By contrast, the function of the rule reflected in Article 8 ARSIWA is different, because it does not render or equate the individual with an organ of the state.[108] As a result, a specific link must be established between the control exercised by the state and the

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102 cf Art 86(2) and 87(1) AP-I.

103 de Proux, Article 87 (n96) [3549].

104 Art 43(1) AP-I.

105 C Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 EJIL 989, 1009; Tonkin (n58) 86-87; cf J de Proux, 'Article 43' in Sandoz and ors (n96) [1672] and fn20.

106 Art 3 Hague Convention IV; Art 91 AP-I; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 242[214].

107 eg M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401, 405-406; F Kalshoven, 'State Responsibility for Warlike Acts of the Armed Force' (1991) 40 ICLQ 827, 837-838; Condorelli (n53) 148.

108 *Bosnia Genocide* (n2) 207[397].

specific conduct whose attribution to the state is in question.[109] Therefore, whilst the same term—'effective control'—is used in the law of state and individual responsibility, it does not necessarily have the same meaning or the same function in each context.

Despite these considerations, there are still conceivable parallels between the notion of 'effective control' in the law of individual responsibility and the standards of attribution of conduct in the law of state responsibility.[110] In particular, there are certain commonalities in reasoning between the establishment of 'effective control' for the purposes of superior responsibility and the determination of the status of a *de facto* state organ in the law of state responsibility. So, for instance, the ICJ and the ICTY relied on the same consideration to deny, on the one hand, the status of the Bosnian Serb forces as *de facto* organs of Serbia and, on the other, the existence of a superior-subordinate relationship based on the effective control of General Perišić over these forces.[111] This consideration was the inability of the Yugoslav political and military authorities to issue orders on the Bosnian Serb army evidenced by their failure to impose on them specific strategic choices, such as the acceptance of a peace plan.[112] More generally, the factors that, according to the ICJ, weigh into the determination of whether a person or group is a *de facto* organ of the state are comparable, albeit not identical, to the factors relating

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109 eg M Milanović, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) 22 LJIL 307, 314; S Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 493, 502-503; cf ILC, 'Summary Record of the 2562nd Meeting'(1998) I YbILC 282, 289[79] (Drafting Commission Report).

110 cf Boon (n74) 372-373.

111 cf R Nieto-Navia, 'State Responsibility in Respect of International Wrongful Acts of Third Persons: The Theory of Control' in MC Bassiouni and ors (eds), *Global Trends: Law, Policy & Justice: Essays in Honour of Professor Giuliana Ziccardi Capaldo* (OUP 2013) 495, 504.

112 *Bosnia Genocide* (n2) 205-206[394]; *Perišić* TCJ (n82) [1772].

to 'effective control' in the context of superior responsibility.[113] They include whether the state created the group or appointed the person in the relevant position;[114] whether the state selected, paid, or installed the leaders of a group;[115] whether the person or group was subordinated and received their orders from the state;[116] whether the state controlled, or could control, the way in which the group's finances or other resources were put to use;[117] and whether the state wholly devised the strategy and tactics of a group[118]. This similarity is not merely coincidental, at least so far as the establishment of command and control over armed forces is concerned.[119] In the backdrop of both inquiries lies essentially the same consideration: the determination that a person—which, in the context of the identification of *de facto* organs, is a state organ acting in that capacity—has authority and control over a hierarchical structure or chain of command.

That said, the applicable legal standard for the determination of the status of a person or group as a *de facto* state organ is not identical with the notion of 'effective control' in the law of state or individual responsibility. In the law of state responsibility, *de facto* state organs are only persons who 'in fact act under such strict control by the state' or 'in fact…act in "complete dependence" on the state…of which they are merely

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113 See text accompanying nn84-86.

114 *Nicaragua* (n46) 62[109]; *Armed Activities (CO)* (n106) 226[160].

115 *Nicaragua* (n46) 63[112].

116 cf *Bosnia Genocide* (n2) 203[388] and 205-206[394]-[395].

117 *Armed Activities (CO)* (n106) 226[160].

118 *Nicaragua* (n46) 61-62[108].

119 cf Triffterer/Arnold (n95) 1092; UNSG-UNSC, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' S/2005/60 (1 February 2005) [123].

its instrument.'[120] In this context, the difference between 'strict control' and the standards laid down in Article 8 ARSIWA is not merely temporal relating to the duration of the relationship,[121] but one of degree.[122] Complete dependence means that the person or group 'lack[s] any real autonomy'; even 'some qualified, but real, margin of independence' of the person or group would suffice to deny its status as *de facto* state organ.[123] As will be shown below, this relationship is described in a different standard of the law of individual responsibility, namely, 'control over the organisation'.

By contrast, the notion of effective control in the law of individual responsibility boils down to a relationship which enables the superior to prevent or punish conduct of subordinates.[124] Whilst this relationship exists very often between *de iure* state organs or at least within a *de facto* chain of command strictly controlled by a state organ, practice relating to other *de facto* superiors—notably, business owners and executive commanders—suggests that this need not be the case. In the context of the establishment of state responsibility, a comparable notion of effective overall control features ambiguously mainly in pronouncements of the ECtHR relating to occupied territories or territories under the control of secessionist administrations. In this context, earlier decisions could be interpreted as suggesting that effective overall control of the state over territory renders persons or groups administering or even operating in that territory *de facto*

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120 *Bosnia Genocide* (n2) 205[392]-[393].

121 O de Frouville, 'Attribution of Conduct to the State: Private Individuals' in Crawford and ors (n2) 257, 271.

122 Distefano/Hêche (n58) 27-28.

123 *Bosnia Genocide* (n2) 205-206[394]; also eg *Unión Fenosa Gas SA v Egypt* (Award) ICSID Case No ARB/14/4 (31 August 2018) [9.106].

124 See n75.

state organs under the general rules of state responsibility.[125] However, more recent decisions of the ECtHR have clarified that the effective overall control test represents an element of the obligations of the state under the ECHR which are distinct from the general rules of state responsibility concerning attribution of conduct.[126] This supports the conclusion that the 'complete dependence/strict control' test differs in material terms from a relationship of 'effective control' enabling the state to prevent or supress conduct of individuals.

To recap, this section has built upon the observation that the same term, 'effective control', features both in the law of state responsibility in the context of Article 8 ARSIWA and in the law of individual responsibility as part of the superior responsibility doctrine. Yet, the notion of 'effective control' in the law of individual responsibility has different meaning and serves different purposes than the rule reflected in Article 8 ARSIWA. Whilst the term in the law of individual responsibility denotes a general relationship which engages an individual's positive obligation to take action to prevent or suppress wrongful acts of other individuals, the law of state responsibility uses it to describe a specific link between a state organ and the act of a person or group not having that status. For the purposes of state responsibility, a general relationship of effective control appears to lie at best 'in the shadowland between attribution and causation'.[127]

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125 See, eg, *Loizidou v Turkey* [GC] (1997) 23 EHRR 513, 530[52]; *Cyrpus v Turkey* [GC] ECHR 2001-IV 1, 25[77]; *Ilaşcu v Moldova and Russia* [GC] ECHR 2004-VII 179, 282[392]-[393]; also AJJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72 BYBIL 255, 271-274; Cassese (n50) 658; Talmon, ICLQ (n109) 508-511; Kreß (n7) 107-109.

126 eg *Catan and ors v Moldova and Russia* [GC] ECHR 2012-V 309, 359[115]; *Chiragov and ors v Armenia* [GC] ECHR 2015-III 135, 210[168]; *Mozer v Moldova and Russia* [GC] App no 11138/10 (ECtHR, 23 February 2016) [102]; eg M Milanović, 'Jurisdiction and Responsibility' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 97, 103-104; de Frouville (n121) 269.

127 Crawford, First Report (n23) 42[208].

In practice, the establishment of the status of a person as a commander or superior possessing effective control over persons or groups committing wrongful acts follows similar lines of reasoning and is based on comparable factors as the determination of the status of persons or groups as *de facto* state organs. But despite these commonalities, the legal standards governing these determinations are distinct and the material ability of the state to prevent or punish conduct usually forms part of specific positive obligations rather than part of the attribution test. It thus becomes evident that the effective control test as part of a separate mode of wrongdoing in the law of individual responsibility does not mirror the attribution test in the law of state responsibility.

III. Attribution of Conduct in the Law of State Responsibility based on a 'Real Link' and Attribution of Conduct in the Law of Individual Responsibility

The purpose of this section is to analyse the rules of attribution of conduct in the law of individual responsibility—joint criminal enterprise (JCE) and control over the crime—and to examine how they parallel the rules of attribution of conduct in the law of state responsibility consisting of a 'real link'. In particular, this thesis has already established that certain rules of attribution of conduct in the law of state responsibility consist of a 'real link' between an individual or group having the status of a state organ and acting in such capacity, on the one hand, and an individual or group not having that status, on the other. Such rules of attribution have a comparable function with the JCE and the control over the crime doctrines in that they lay down a factual relationship between individuals which connects human conduct to the subject of an international obligation. Because of this overlap, the duality of the internationally wrongful act in cases involving violations of dual obligations comes under pressure. For example, it would be impossible to speak of a dual internationally wrongful act if a state official

commits genocide as a participant in a JCE or as an indirect perpetrator or co-perpetrator alongside persons not having the status of state organs without the same relationship being sufficient to attribute the acts of these private persons to the state.[128]

Sub-section 1 focuses on the concept of globality which was prevalent in the pronouncements of the ICTY concerning attribution of conduct under both the law of state responsibility and individual responsibility. This sub-section first introduces the JCE doctrine and the underlying concept of globality (sub-section 1(a)). It further demonstrates how the parallel application the JCE doctrine and the rules of attribution of conduct under the law of state responsibility can lead to the paradoxical situation where a state organ can be considered as the perpetrator of certain act *qua* individual without such conduct being attributed to the state (sub-section 1(b)). Sub-section 2 will demonstrate how this paradox is resolved in the context of the ICC through the application of tests that are substantially equivalent to those in the law of state responsibility, namely, they are both based on the concept of control. This sub-section first introduces the rules of attribution of conduct applied by the ICC based on control (sub-section 2(a)). It then shows how the concept of 'control over the person' mirrors in substance the tests of attribution of conduct under the law of state responsibility (sub-section 2(b)). The next two sub-sections deal with the concept of functional or joint control over conduct in the law of individual responsibility (sub-section 2(c)) and how this concept parallels notions of the law of state responsibility (sub-section 2(d)).

1. Globality and Attribution of Conduct in the Law of State and Individual Responsibility

(a) Globality and Attribution of Conduct in the Law of Individual Responsibility

[128] Jørgensen (n54) 268; cf *Milošević (Slobodan)* 98*bis* Decision (n86) [288].

The purpose of this section is to lay out the basic characteristics and normative underpinnings of the doctrine of joint criminal enterprise. According to the case law of the *ad hoc* tribunals, JCE constitutes a form of 'commission' of a crime under customary international law.[129] In substantive terms, JCE draws to a considerable extent from the concept of conspiracy which allows courts to draw a 'large circle' around all participants in a collective criminal venture and to pronounce them all co-conspirators.[130] Much like conspiracy, the core of the JCE doctrine consists of an express or implied agreement to commit one or more crimes, albeit conspiracy is an inchoate offence.[131] In particular, the JCE doctrine fundamentally consists of three features: (i) a plurality of persons; (ii) a common plan or design which amounts to or involves the commission of a crime; and (iii) participation by the accused in the JCE that need not involve the commission of a specific crime, 'but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.'[132] The emphasis is on the shared intent of the participants to see an overall, global, common criminal plan through, rather

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129 *Milutinović and ors* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise) IT-99-37-AR72, AC (21 May 2003) [20]; *Stakić* (Judgment) IT-97-24-A (22 March 2006) [62]; *Ntakirutimana (Elizaphan and Gérard)* (Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2014) [462]; also V Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia' (2005) 5 ICLR 167, 175.

130 JD Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 LJIL 771, 776; also A Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia' (2006) 6 ICLR 63, 112-115; G Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the *Darfur* Case' (2005) 3 JICJ 539, 544.

131 eg Art III(b) CPPCG; *Nahimana* ACJ (n32) [896].

132 *Tadić* (Judgment) IT-94-1-A, AC (15 July 1999) [227].

than on the effects of their individual contributions to the commission of the complex crime.[133]

The common criminal purpose or plan is JCE's defining feature. In particular, the JCE doctrine envisages three forms of collective criminality.[134] First, the 'basic' form of JCE or JCE-I refers to the situation where more persons act pursuant to a common plan or purpose and possess the same criminal intention.[135] There is no need that such persons are organised in a military, political, or administrative structure.[136] Second, the 'systemic' form or JCE-II, describes situations where the offences are committed by members of 'organized criminal systems', such as military or administrative units running concentration camps and comparable systems.[137] If the existence of such an organised criminal system is established, then there is no need to prove an agreement between the individual accused and the physical perpetrators in relation to each of the crimes committed with a common criminal purpose.[138] Third, the so-called 'extended' form, envisages the liability of a participant to a common criminal purpose or plan where one or more perpetrators commit a crime that, whilst outside the common purpose or plan, is a natural and foreseeable consequence of that common purpose (JCE-

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133 *Lubanga* (Decision on Confirmation of Charges) ICC-01/04-01/04-803, PTC-I (29 January 2007) [329].

134 *Tadić* ACJ (n132) [195]; A Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 JICJ 109, 111-114.

135 eg *Tadić* ACJ (n132) [196]; *Kvočka* ACJ (n11) [82]; *Vasiljević* (Judgment) IT-98-32-A (25 February 2004) [97].

136 eg *Tadić* ACJ (n132) [227].

137 eg ibid [202]-[203]; *Kvočka* ACJ (n11) [82]; *Vasiljević* ACJ (n135) [98].

138 *Krnojelac* (Judgment) IT-97-25-A (17 September 2003) [96].

III).[139] Furthermore, the doctrine of JCE as applied by the ICTY does not require that a member of the JCE physically executed the material elements of the crime.[140] Rather, the 'link' required between the accused and the crime can be found 'in the fact that [other] members of the joint criminal enterprise use the principal perpetrators as "tools" to carry out the crime'.[141] The AC did not explicitly lay down a legal basis for the attribution of the acts of the physical executors to a member of the JCE, but rather held that the existence of this link is assessed on a case-by-case basis.[142] More generally, the doctrine of JCE seems to consider irrelevant in the final analysis whether an agreement or plan or another specific link exists between an accused and the persons carrying out the material acts constituting the wrongful act.[143] All that matters is that the accused partakes in an overall—global—criminal purpose and these acts are part of that purpose or a natural and foreseeable consequence of its pursuance.[144]

The emphasis on the overall plan is also evidenced by the application of the contribution requirement of the JCE doctrine. In particular, the conduct of an accused must constitute neither a necessary nor a substantial, but a significant, contribution to the crimes that form the common purpose for that accused to be considered a perpetrator.[145] In practical terms, the contribution of the accused need not relate directly to the

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139 eg *Tadić* ACJ (n132) [204]; *Kvočka* ACJ (n11) [83]; *Vasiljević* ACJ (n135) [99].

140 *Brđanin* (Judgment) IT-99-36-A (3 April 2007) [410].

141 ibid [412]; *Martić* (Judgment) IT-95-11-A (8 October 2008) [168].

142 *Brđanin* ACJ (n140) [413]; *Martić* ACJ (n141) [169].

143 *Brđanin* ACJ (n140) [410].

144 ibid [410]-[411].

145 *Brđanin* ACJ (n140) [430]; *Kvočka* ACJ (n11) [97-8]; *Krajišnik* (Judgment) IT-00-39-A (17 March 2009) [662].

execution of any specific material act, but it might also consist of acts or omissions 'that in some way are directed to the furthering of the common plan or purpose'.[146] For example, an ICTY TC found that the political activities of the President of the Bosnian Serb Assembly—such as participation in the formulation and implementation of general policies against the Bosnian Muslims, inflammatory public speeches, and failure to exercise proper supervision and to investigate misconduct—were a sufficient contribution to the overall plan consisting of persecution, deportation, extermination, murder, and other inhumane acts against the Bosnian Muslims.[147] The objective requirement is less exacting than, or at best equivalent to, aiding and abetting.[148] In principle, JCE, and thus commission of a crime, and aiding and abetting are distinguished by the fact that the perpetrator partakes in the common criminal purpose, whereas the aider and abettor does not.[149]

What becomes apparent from this brief overview of the JCE doctrine is the core idea of globality as the normative basis of—mutual or reciprocal—attribution of conduct. The reasoning behind the adoption of JCE as a form of commission is the structure of crimes under international law as complex crimes, that is, wrongful acts by a plurality

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146 *Tadić* ACJ (n132) [229]; *Krajišnik* ACJ (n145) [695]; *Kvočka* ACJ (n11) [187]; eg G Werle and F Jessberger, *Principles of International Criminal Law* (3rd edn OUP 2014) 201-202.

147 See *Krajišnik* (Judgment) IT-00-39-T (27 September 2006) [1121]; also *Krajišnik* ACJ (n145) [687] and [695]; also H van den Wilt, 'Joint Criminal Enterprise and Functional Perpetration' in A Nollkaemper and H Van Der Wilt (eds), *System Criminality in International Law* (CUP 2009) 158, 175.

148 K Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 JICJ 159, 171; cf, eg, *Mladić* (Judgment) IT-09-92-T (22 November 2017) [3561].

149 A Eser, 'Individual Criminal Responsibility' in A Cassese, *The Rome Statute of the International Criminal Court: A Commentary* vol-II (OUP 2002) 767, 792; Cassese, Proper (n134) 115-116; *Kvočka* ACJ (n11) [90].

of persons in furtherance of a common criminal design.[150] The underlying assumption in dealing with such complex situations is that 'all those who in some degree participate in [a] crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable'.[151] As a corollary, 'the acts of any of [the participants], within the scope of the overall plan, become the acts of all the others'.[152] In other words, conduct undertaken in the implementation of the common purpose is equally attributed to all those who partake in that purpose regardless of the effect of their individual contributions in such implementation. Hence, the responsibility of each individual participant extends to the complex crime rather than the individual contribution which in isolation might not be covered by a rule of international law.

(b) Globality and Attribution of Conduct in the Law of State Responsibility

The purpose of this section is to establish whether the notion of globality inherent in the JCE doctrine can inform or parallel the operation of rules of attribution of conduct in the law of state responsibility. This section, first, shows how the concept of globality was central in ICTY's understanding of attribution of conduct under the general rules of state responsibility leading to the duality of the internationally wrongful act in cases of violations of dual obligations. The remainder of the section demonstrates how the parallel application of the JCE doctrine and the rules of attribution of conduct as interpreted by the ICJ could conceivably lead to the responsibility of the state and of the

150 eg *Tadić* ACJ (n132) [191]; *Kvočka* ACJ (n11) [80].

151 cf, *mutatis mutandis*, *Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) [254] (with respect to the crime of torture).

152 *The 'Pohl' Case* (Supplemental Judgment of the Tribunal) [1948] V TWC 1168, 1173 cited in E Van Sliedregt, 'Perpetration and Participation in Article 25(3)'in Stahn (n31) 499, 502-504.

individual state organ for considerably different conduct and breaches of different obligations.

The ICTY did not limit itself in extrapolating principles of individual responsibility. Rather, it also incidentally applied rules of attribution of conduct under the law of state responsibility, most notably, in order to determine whether the conflict in Bosnia-Herzegovina was of an international or non-international character. The ICTY AC recognised 'control' as the defining test of attribution of conduct of private individuals to the state, despite pronouncing that international law does not always require the same degree of control.[153] Yet, a closer look at the legal findings of the ICTY AC casts doubt on whether control was really the underlying consideration.[154] Indeed, there are notable commonalities in reasoning between attribution of conduct to an individual under the JCE doctrine and the AC's interpretation of the relevant rules of attribution of conduct for the purposes of state responsibility.

In particular, the AC identified three situations in which private individuals are considered *de facto* state organs. In the first such situation, if the state issues specific instructions to single private individuals or not militarily organised groups concerning the commission of particular conduct, these individuals or groups are considered *de facto* organs of the state in carrying out that conduct.[155] As a corollary, the acts of these individuals or groups are attributable to the state even if the state entrusts these persons with a lawful task in the performance of which they commit acts constituting the breach

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153 *Tadić* ACJ (n132) [117]; de Hoogh (n125) 262-263.

154 cf *Bosnia Genocide* CR 2006/16 [112] (Brownlie); Talmon, ICLQ (n109) 517.

155 *Tadić* ACJ (n132) [118].

of an international obligation.[156] The second such situation was inferred from authorities dealing with crimes committed in concentration camps.[157] In these cases, the crimes committed by civilian inmates, who were given minor positions of authority in these camps, were considered war crimes committed by the members of the SS.[158] From this authority, the Tribunal inferred a rule of attribution for the purposes of state responsibility that mirrors JCE-II from the law of individual responsibility.[159] According to this rule, private individuals may be assimilated to state organs 'on account of their actual behaviour within the structure of a state (and regardless of any possible requirement of state instructions)'.[160] This is the case when private individuals act 'within the framework of, or in connection with, armed forces or in collusion with state authorities'.[161] These findings suggest that the AC's interpretation of the general rule of attribution pursuant to the law of state responsibility can easily encompass all situations in which a state organ commits a crime through participation in a JCE alongside private individuals executing the material elements of the wrongful act.[162]

The emphasis on globality as the underlying consideration for the attribution of conduct of private individuals to the state becomes more apparent in the third situation

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156 ibid [119].

157 de Frouville (n121) 270.

158 *The Belsen Trial* [1945] II LRTWC 121, 152 (in *obiter*).

159 *Tadić* ACJ (n132) [202]-[203]; see text accompanying nn137-138.

160 *Tadić* ACJ (n132) [142] (emphasis omitted).

161 ibid [144]; de Hoogh (n125) 263-264.

162 cf Darfur Report (n119) [123] and [125].

elaborated by the AC relating to organised and hierarchically structured groups. Members of these groups are to be considered as *de facto* organs of the state if the state wields 'overall control' over such groups.[163] Such degree of 'control' exists if the state 'has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.'[164] In the event, the AC reasoned its finding that the Bosnian Serb army (VRS) constituted a *de facto* organ of Yugoslavia on the basis that the Yugoslavian army (VJ) and the VRS 'possessed shared military objectives' and 'were of the same mind'.[165] This relationship sufficed in the absence of any specific instructions given by VJ members to the VRS.[166] Attribution of conduct in this situation clearly parallels the establishment of responsibility of an individual under the JCE doctrine in the absence of a specific link between that individual and the executors of the material elements of the crime.[167] The affinity between the JCE doctrine for the purposes of individual responsibility and the 'overall control' test of the ICTY for the purposes of state responsibility becomes apparent in the reasoning of Vice-President Al-Khasawneh's dissent in the *Bosnia Genocide* judgment. According to his opinion, the normative basis of the 'overall control' test is that it 'account[s] for situations in which there is a common criminal purpose'.[168] In other words, 'when the common objective is the commission

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163 *Tadić* ACJ (n132) [120].

164 ibid [131].

165 ibid [153] (emphasis omitted).

166 ibid.

167 See text accompanying nn140-144; cf also BI Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Nijhoff 2009) 186.

168 *Bosnian Genocide* (Merits) (Separate Opinion of Vice-President Al-Khasawneh) [2007] ICJ Rep 241, 256-257[39].

of international crimes, to require both control over the non-state actor and the specific operation…is too high a threshold'.[169] The emphasis is on the fact that the state partakes in a—global—common purpose, rather than on the relationship between a state organ with the persons or groups whose conduct allegedly constitutes the wrongful act.[170]

However, subsequent practice contradicts these legal findings of the ICTY relating to state responsibility. First, the standards of attribution propounded by the ILC and confirmed by the ICJ make no distinction in their application between a single individual and a structured group.[171] Second, the idea of globality has no role in the determination of the status of a person or group as a *de facto* state organ. State control must leave no real margin of autonomy to a person or group to entail its characterisation as a *de facto* state organ.[172] As the ICJ held in *Nicaragua*, 'participation…in…the selection of…targets, and the planning of the whole of its operation' is insufficient for attribution of conduct of a person or group to the state.[173] Third, the ICTY AC treated Article 8 ARSIWA as a basis for the determination of the status of persons or groups as *de facto* organs of the state.[174] However, its function is substantially narrower, namely, the attribution to the state of conduct of persons or groups, notwithstanding the

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169 ibid.

170 Kreß (n7) 127-128; also J Wolf, 'Individual Responsibility and Collective State Responsibility for International Crimes: Separate or Complementary Concepts under International Law?' in B Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill 2016) 3, 30.

171 Kreß (n7) 131; Crawford, General Part (n2) 153-154.

172 *Bosnia Genocide* (n2) 205-206[394]; eg Talmon, ICLQ (n109) 499.

173 *Nicaragua* (n46) 64-65[115].

174 *Tadić* ACJ (n132) [117]; also Talmon, ICLQ (n109) 506-507.

fact that they do not have the status of *de iure* or *de facto* organs.[175] As a result, the relationship described in Article 8 ARSIWA needs to be established with respect to each specific conduct or operation for it to be attributed to the state.[176] These contradictory approaches to attribution of conduct under the law of state responsibility between the ICTY and the ICJ have implications for the duality of the internationally wrongful act in cases involving violations of dual obligations. Conduct attributable to a state organ *qua* individual under the JCE doctrine would not necessarily be attributable to the state under the rules of attribution of conduct consisting of a 'real link'.

This becomes apparent by examining how the features of the JCE doctrine compare to the relationship provided for in Article 8 ARSIWA as understood by the ILC and the ICJ. At first glance, the feature of a common criminal purpose or plan does not directly correspond to any of the situations encompassed in Article 8 ARSIWA, albeit some parallels may be drawn between the two.[177] As has been shown previously, the notion of state 'instructions' does not necessarily involve a hierarchical relationship, but may also involve an agreement between the state organ and an individual or group to discharge a certain task.[178] In this sense, under the scenario of state 'instructions', it is possible to envisage situations where private persons act 'in collusion with' state organs or, more tenuously, with the state organs' 'acquiescence or connivance'.[179] In

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175 P Palchetti, 'De Facto Organs of a State' (2017) MPEPIL [10].

176 *Bosnia Genocide* (n2) 208[400]; eg Milanović, Comment (n109) 313-314.

177 E Kok, 'The Principle of Complicity under International Law–Its Application to States and Individuals in Cases involving Genocide, Crimes against Humanity and War Crimes' in L van den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Nijhoff 2012) 557, 569.

178 See text accompanying nn55-64.

179 E Savarese, 'Issues of Attribution of conduct to States of Private Acts: Between the Concept of *de facto* Organs and Complicity' (2005) 15 IYIL 111, 117; cf, eg, *Tadić* ACJ (n132) [144];

fact, in the *Bosnia Genocide* judgment, the Court found that 'what was said…regarding the attribution to the Respondent of acts of genocide' was sufficient to exclude Serbia's responsibility also for conspiracy to commit genocide.[180] This implies that a common agreement or plan to commit the Srebrenica massacre was relevant for the issue of attribution of that massacre to Serbia according to the Court.[181] However, the fact that the Court considered the question of conspiracy separately from attribution suggests that proof of an agreement or plan between the Serbian authorities and the Bosnian Serb authorities would not have been sufficient for the attribution of the Srebrenica massacre to Serbia.[182]

Consequently, the two further features of the JCE doctrine appear particularly problematic in comparison to the law of state responsibility as applied by the ICJ. First, the doctrine of JCE does not require that the executors of the material elements of a crime are members of the JCE.[183] Second, the required contribution of a perpetrator under the JCE doctrine consists of any act which furthers the common criminal purpose whatever its effects on its realisation.[184] This includes assistance at the planning stage

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Ilaşcu (n125) 264[318]; *mutatis mutandis*, *El-Masri v the Former Yugoslav Republic of Macedonia* [GC] 2012 ECHR-VI 263, 337[206].

180 *Bosnian Genocide* (n2) 216[417].

181 JD Ohlin, 'State Responsibility for Conspiracy, Incitement, and Attempt to Commit Genocide' in P Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 374, 375; cf, from a comparative criminal law perspective, KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (OUP 1991) 74 ('Certainly the language (if not the substance) of common purpose or conspiracy tends to be that of authorization…')..

182 cf, *a contrario*, Kok, Complicity (n177) 571-572.

183 See text accompanying nn140-144.

184 See text accompanying nn145-149.

without the need to prove a direct link to the perpetrators of the material acts constituting the crime or their commission.[185] By contrast, for the purposes of attribution of conduct to the state, the crucial consideration is whether the state 'originated' the wrongful act or that the specific instructions of the state were 'the cause' of that act.[186] Thus, for example, in the *Armed Activities* case, the fact that Uganda 'decided…to launch an offensive together with various factions' was insufficient for the attribution of the forcible acts of these factions to Uganda in the absence of a more specific link between the state and these acts.[187] It follows that the relationship required by the rules of Article 8 ARSIWA is considerably more exacting than the one envisaged by the JCE doctrine.

One way to maintain the duality of the internationally wrongful act in these situations is to construe the laxer requirements of the JCE doctrine as an implicit element of the dual obligation under consideration. In particular, in the *Bosnia Genocide* case, Bosnia-Herzegovina argued that because of the nature of genocide—particularly, its mental element—the control of the state had to be assessed on the basis of the whole body of operations of the direct perpetrators of genocide.[188] In the event, the Court rejected this contention. In the absence of an express *lex specialis*, the Court held that the physical acts constitutive of genocide had to be attributable to the state under the general rules of state responsibility for the state to be found responsible for a violation

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185 C Meloni, 'Fragmentation of the Notion of Co-Perpetration in International Criminal Law?' in L Van Den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Nijhoff 2012) 481, 486; Haan (n129) 183.

186 *Bosnia Genocide* (n2) 207[397].

187 *Armed Activities (CO)* (n106) 225[155] and 226[160].

188 eg *Bosnia Genocide* CR 2006/8 [67]-[68] (Pellet).

of the prohibition of genocide.[189] It follows that it is perfectly conceivable in this case that an individual state organ can 'commit' genocide *qua* individual, whilst the acts of that individual state organ (automatically attributable to a state as they are) would only amount to a violation of the prohibition of complicity in genocide or of the obligation to prevent genocide.[190]

This analysis shows that the duality of the internationally wrongful act can be distorted by the parallel operation of rules of attribution of the law of state and individual responsibility, the duality of obligations notwithstanding. However, this development would lead to the curious situation where 'the same rule[s] prescrib[e] different standards of conduct depending on the quality of the actor'.[191] Fundamental considerations militate against such an interpretation. First, this interpretation seems incompatible with the 'individualistic' methodology of the law of state responsibility which is the necessary implication of the principle of the unity of the state. In other words, it cannot be easily presumed that the same rule prescribes different standards for states and individuals, because the activity of the state must be explicable at the very least on the basis of the acts of state organs, individual or collective. Second, as we have seen in Chapter 2, such an interpretation is not supported by the rules providing for the relevant international obligations of individuals which require that these obligations are identical with, or at the very least narrower than, the respective obligations of states. Therefore, the imposition on individuals of obligations exceeding those imposed on states through

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189 *Bosnia Genocide* (n2) 208-209[401].

190 Jørgensen, Duality (n54) 268.

191 cf Kok, Complicity (n177) 587.

an expansive notion of commission is questionable from the perspective of the principle of legality.[192]

In this light, the analysis has demonstrated that the same normative consideration of globality underlies both the doctrine of JCE and the ICTY's understanding of the operation of the rules of attribution of conduct under the law of state responsibility. As a result, their parallel operation leads to the duality of the internationally wrongful act. Conversely, the ICJ's rejection of the ICTY's approach to state responsibility was directed precisely against the normative basis of globality as inimical to the fundamental principle of independent responsibility that has implications for both regimes.[193] The following section turns to developments in the law of individual responsibility that demonstrate a construction of attribution of conduct based on considerations that are functionally equivalent to those at play in the field of attribution of conduct in the law of state responsibility. As will be seen, these developments have remedied the distorting discrepancies that the ICTY understanding brought to the fore.

2. Control and the Attribution of Conduct in the Law of State and Individual Responsibility

(a) Control over the Crime in the Law of Individual Responsibility

The ICC Statute, unlike those of the *ad hoc* tribunals, includes a detailed provision on individual responsibility which distinguishes persons whose conduct is constitutive of the commission of a crime and persons whose contribution has a connection to the

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192 See Chapter 2.IV.

193 *Bosnia Genocide* (n2) 210[406].

commission of a crime by others.[194] The ICC Statute does not require that a person carries out the relevant acts directly and personally 'as an individual', but commission can also take place 'jointly or through another person'.[195] As a result, the ICC has developed normative standards of attribution of conduct to determine when an individual commits a crime.[196] This determination is based on the criterion of control over the commission of the offence.[197] An individual or multiple individuals exercise such control when they 'decide whether and how the offence will be committed'.[198]

Analytically speaking, the approach used by the ICC involves a normative assessment of two distinct relationships either separately or in combination. On the one hand, commission of a crime 'through another person' or 'indirect perpetration' calls for an assessment of the 'relationship between the person actually carrying out the incriminated conduct and the person in the background, as well as the latter's relationship to the crime' ('control over the person').[199] On the other hand, commission of a crime 'jointly' with another person or 'co-perpetration' or 'joint perpetration' requires an assessment of the role of the accused person in the specific circumstances of a crime committed by a plurality of persons acting in concert ('functional control over the act').[200] The case of 'joint commission of a crime through another person' or 'indirect

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194 Art 25(3) RSICC; *Lubanga* (Judgment) ICC-01/04-01/06-3121-Red, AC (1 December 2014) [462]; *Katanga* (Judgment) ICC-01/04-01/07-3436, TC-II (7 March 2014) [1384]; eg Ambos, Treatise I (n14) 145-146.

195 Art 25(3)(a) RSICC; *Lubanga* ACJ (n194) [458].

196 Van Sliedregt (n152) 499; cf *Lubanga* ACJ (n194) [473].

197 eg Werle/Jessberger (n146) 198; *Lubanga* ACJ (n194) [469].

198 *Lubanga* DCC (n133) [330].

199 *Lubanga* ACJ (n194) [465].

200 ibid [473].

co-perpetration' calls for a combined assessment of both these relationships in order to determine whether a specific accused exercised the required control over the conduct constituting the crime.[201]

These differing notions of control in the law of individual responsibility can have a bearing on the duality of the internationally wrongful act in cases concerning violations of dual obligations. This study has already established that certain rules of attribution of conduct in the law of state responsibility consist of a 'real link' between an individual or group having the status of a state organ and acting in such capacity, on the one hand, and an individual or group not having that status, on the other. In particular, both the identification of *de facto* state organs and the application of the rules of Article 8 ARSIWA depend on the establishment of differing levels of control over persons or groups whose conduct forms the internationally wrongful act. Because of this overlap, the question arises whether the notion of 'control over the person' and 'functional control over the act' in the context of individual responsibility can parallel the situations described in the relevant rules of attribution of conduct in the law of state responsibility.

(b) Control over the Person and Attribution of Conduct in the Law of State and Individual Responsibility

The ICC Statute provides specifically that a person can commit a crime 'through another person'.[202] In this situation, the conduct of the person who carries out the incriminated conduct is attributed to the accused 'by virtue of the accused's control over that

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201 *Katanga and Ngudjolo* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717, PTC-I (30 September 2008) [490].

202 Art 25(3)(a) RSICC.

person'.[203] This section first elaborates on the concept of 'control over the person' in the law of individual responsibility. It then turns to examine the relevance of this notion of control for the purposes of attribution of conduct under the law of state responsibility. As will be shown, the concept of 'control over the person' corresponds in material terms to the standards of attribution under the general rules of state responsibility based on a 'real link' between a state organ and a private person or group.

The notion of 'control over the person' involves the exercise of control over the will of the physical author.[204] In conceptual terms, the form of commission applied by the ICC originates in domestic concepts of indirect perpetration or innocent agency.[205] Much like domestic systems, the indirect perpetrator typically uses another person as an instrument or tool to bring about the material elements of a crime under circumstances in which that person acts lawfully or is not criminally responsible for whatever reason (eg acts under duress, coercion, or in error of fact).[206] Nonetheless, under the Rome Statute, the control exerted by the indirect perpetrator needs not reach such a level so as to justify the relevant physical acts or exculpate their physical author.[207] The

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203 *Lubanga* ACJ (n194) [465]; Eser (n220) 793; F Jessberger and J Geneuss, 'On the Application of a Theory of Indirect Perpetration in *Al-Bashir*: German Doctrine at The Hague?' (2008) 6 JICJ 853, 855.

204 H Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart 2009) 110; *Lubanga* DCC (n133) 332.

205 T Weigend, 'Indirect Perpetration' in Stahn (n31) 538, 538-539; also Jessberger/Geneuss (n203) 857.

206 eg *Katanga* TCJ (n194) [1402]; Olásolo, Criminal (n204) 111-114; Ambos, Treatise I (n14) 154-155.

207 eg *Katanga/Ngudjolo* DCC (n201) [495]-[496]; S Manacorda and C Meloni, 'Indirect Perpetration *versus* Joint Criminal Enterprise' (2011) 9 JICJ 159, 169-170; Eser (n220) 794-795.

Statute explicitly provides for situations of commission through another person 'regardless of whether that other person is criminally responsible' and so the scope of the provision extends beyond innocent agency.[208]

In this regard, the ICC has put emphasis in its case law on the situation in which the required level of control emanates from an 'organised apparatus of power'.[209] Two considerations are relevant for attribution of conduct to a specific accused, namely, 'control over the organisation' and 'control over the crime committed by means of the organisation'.[210] First, the establishment of 'control over the organisation' requires the consideration of two factors, namely, the structure of the organisation and the position of the individual accused within the organisation. The key structural feature of the organisation consists of the functional automatism in the execution of the orders issued by a superior.[211] Specifically, as the organisation consists of several members, if one physical perpetrator for some reason abandons the implementation of the order, another member of the organisation would be available to execute the act.[212] As to the position of the accused within the organisation, indirect perpetrators can be considered only

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208 Art 25(3)(a); T Weigend, 'Problems of Attribution in International Criminal Law—A German Perspective' (2014) 12 JICJ 253, 259; cf UN, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court – vol II' (A/51/22) GAOR Supp No 22A (1996), 80-84 (a proposal limiting the scope of the provision only to cases of innocent agency was considered and rejected).

209 *Katanga* TCJ (n194) [1403]; *Al-Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, PTC-I (4 March 2009) [216]; also *Kenyatta, Muthaura and Ali* (Decision on Confirmation of Charges) ICC-01/09-02/11-383 (23 January 2012) [297]; *Ntaganda* (Decision on confirmation of charges) ICC-01/04-02/06-309, PTC-II (9 June 2014) [104].

210 *Katanga* TCJ (n194) [1407].

211 *Katanga/Ngudjolo* DCC (n201) [515]-[518]; *Katanga* TCJ (n194) [1409]; Olásolo (n204) 122.

212 *Katanga* TCJ (n194) [1408]; cf C Roxin, 'Crimes as Part of Organised Power Structures' (2011) 9 JICJ 193, 198-199; Olásolo (n204) 122.

those persons which possess 'control over the organisation', that is, 'they control, effectively and undisturbed [original: *sans interférence possible*], at least part of [the organisation]'.[213] In practical terms, this assessment often involves factors comparable to the establishment of effective authority and control under Article 28 RSICC, but its purpose is markedly different.[214] The combination of these two considerations allows the inference that the physical executors of the material elements or other members of the organisation who do not exert this kind of control are left in reality 'without…liberty to decide whether the crime is to be executed'.[215] Of course, they remain fully responsible for the acts they physically carry out potentially as perpetrators of other crimes or as accomplices to the crime of the indirect perpetrator provided that they did so intentionally.[216] Second, the accused must steer the organisation towards the commission of a crime and thus exert control over the events occasioning the crime.[217] Hence, only the persons in the organisation 'who conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution' can be considered perpetrators of the specific crime.[218]

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213 *Katanga* TCJ (n194) [1412]; also Ambos, Treatise I (n14) 159-160.

214 Ambos, Treatise I (n14) 159; cf, eg, *Hussein* (Decision on the Prosecutor's Application under article 58) ICC-02/05-01/12-1, PTC-I (1 March 2012) [30]-[35]; *Katanga/Ngudjolo* DCC (n201) [513]; *Katanga* TCJ (n194) [1419]-[1420]; text accompanying nn75-88.

215 *Katanga* TCJ (n194) [1411]; *Ntaganda* (Judgment) ICC-01/04-02/06-2359, TC-VI (8 July 2019) [778]; also Olásolo (n204) 124-125.

216 A Gil Gil, '*Mens Rea* in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator' (2014) 14 ICLR 82, 87.

217 *Katanga* TCJ (n194) [1411]; Olásolo (n204) 124-125.

218 *Katanga* TCJ (n194) [1412].

The ICC has explicitly indicated that the concept of 'control over the organisation' is not the only form, still less an essential element, of committing a crime 'through another person'.[219] For instance, the *ad hoc* tribunals found in cases of genocide that a perpetrator is the person which 'directed and played a leading role in conducting and, especially supervising' the course of conduct constituting the crime.[220] Along similar lines, the specific modalities of control over the crime through another person laid down in the ICC's case law—ie conceiving the course of conduct, overseeing its preparation, controlling its performance and execution—can be extricated from the structural requirement of control over the organisation. Notably, the ICC held that 'the sole indispensable criterion' under Article 25(3)(a) RSICC is that the indirect perpetrator exercises, one way or another, control over the crime committed through another person.[221]

The notion of control over the person developed in the context of individual responsibility parallels in material terms the control tests required for attribution of conduct of private individuals to the state under the law of state responsibility. According to the ICJ, 'persons, groups of persons or entities may…be equated with State organs…provided that in fact [they] act in "complete dependence" on the State, of which

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219 *Katanga* TCJ (n194) [1406].

220 *Gacumbitsi* (Judgment) ICTR-2001-64-A (7 July 2006) [60]; also, eg, *Munyakazi* (Judgment) ICTR-97-36A-A (28 September 2011) [136]; *Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) [776]; *Seromba* ACJ (n40) [171]-[172]; B Goy, 'Individual Criminal Responsibility before the International Criminal Court – A Comparison with the Ad Hoc Tribunals' (2012) 12 ICLR 1, 35-37.

221 *Katanga* TCJ (n194) [1406] (NB. The original French version is somewhat more intelligible than the official English translation: '*[L]e seul critère indispensable…est que l'auteur indirecte exerce, d'une façon ou d'une autre…un contrôle sur le crime commis par l'intermédiaire d'une autre personne*'); also *Katanga/Ngudjolo* DCC (n201) [497].

they are merely the instrument'.[222] This relationship seems not merely to involve similar considerations but to materially correspond to the standard enunciated by the ICC for the determination of control over the organisation or, potentially, over a person. Under the standard of control over the organisation, it is required that the accused is 'in full control of' the organisation so that the physical executors of the material elements are left in reality 'without…liberty to decide whether the crime is to be executed'.[223] It follows that the object of proof is the same relationship in cases involving violations of dual obligations by the state and the individual state organ. This relationship consists of the lack of any real autonomy of the private individual or group from the state organ and, conversely, of the exercise of full control by the state organ over the private individual or group.

That said, the establishment of this relationship suffices for the determination of the status of a private individual or group as a *de facto* state organ leading to the attribution of all the acts of that individual or group to the state.[224] By contrast, in the law of individual responsibility, the exercise of control over the organisation is neither a sufficient nor a necessary basis for attribution of the conduct. Indeed, in this context, the sole indispensable requirement for the attribution of the conduct constituting the crime to the accused is the exercise of control over that conduct.[225] This criterion in-

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222 *Bosnia Genocide* (n2) 205[392].

223 *Al-Bashir* AW-2009 (n209) [222]-[223]; *Katanga* TCJ (n194) [1411].

224 *Bosnia Genocide* (n2) 208[400]; eg Talmon, ICLQ (n109) 501; Milanović, Comment (n109) 313-314.

225 *Katanga* TCJ (n194) [1406].

cludes the situation where the perpetrator 'direct[s] and play[s] a leading role in conducting and, especially supervising'[226] the course of conduct constituting the crime or 'conceive[s] [it], overs[ees] its preparation…, and control[s] its performance and execution'.[227] Translated in terms of state responsibility, this relationship mirrors the situation of persons acting under the control of the state in carrying out specific conduct reflected in Article 8 ARSIWA. Thus, for example, in the *Nicaragua* judgment, the ICJ found that certain acts were attributable to the US, because they were carried out 'by persons in the pay and acting on the instructions of [the CIA], under the supervision and with the logistic support of United States agents'.[228] More generally, the standard of control in the law of state responsibility is satisfied when state organs control all the acts that are said to be wrongful throughout all stages of their realisation, namely, from their conception to their execution.[229] This congruence has clear implications for the duality of the internationally wrongful act in cases involving violations of dual obligations. The relationship that underlies the attribution of conduct to the state under Article 8 ARSIWA and to an individual state organ *qua* individual under the law of individual responsibility is the same in material terms. Namely, the state organ exerts its control over the private individual or group so as to produce the conduct constituting the wrongful act, just as an individual exerts control over another individual who is the physical author of an act in law of individual responsibility.

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226 *Gacumbitsi* ACJ (n220) [60].

227 *Katanga* TCJ (n194) [1412].

228 *Nicaragua* (n46) 48[80]; also Tonkin (n58) 117; Boon (n74) 337.

229 Distefano/Hêche (n58) 18; Talmon, ICLQ (n109) 503.

This section has argued that the criterion of control over the person developed in the context of individual responsibility materially parallels the relevant rules of attribution of conduct in the law of state responsibility. First, the concept of innocent agency and 'control over the organisation' involves materially identical considerations with the 'complete dependence' standard used in the law of state responsibility for the determination of *de facto* state organs—ie the complete dependence/full control test. Second, the criterion of 'control over the crime committed through another person' has the same function and consists of a relationship equivalent to that provided for by the standard of attribution of conduct reflected in Article 8 ARSIWA. To this extent, the duality of the internationally wrongful act is preserved due to the duality of the respective standards of attribution of conduct in the law of state and individual responsibility.

(c) Functional Control over the Act in the Law of Individual Responsibility

In addition to commission through another person, the Rome Statute envisages the situation where an individual commits a crime 'jointly with another person'.[230] In this situation, the law attributes to a person not only the conduct that she physically carries out, but also conduct carried out by others with which that person acted in concert in order to bring about the material elements of the wrongful act.[231] Hence, an individual can be considered a perpetrator of the wrongful act committed in concert with other persons, even if her conduct would not amount separately to that wrongful act, on the basis of the 'reciprocal imputation of their respective acts'.[232] According to the ICC case law, such mutual or reciprocal attribution of conduct is based on 'joint control over

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230 Art 25(3)(a) RSICC.

231 S Wirth, 'Co-perpetration in the *Lubanga* Trial Judgment' (2012) 10 JICJ 971, 971-972.

232 *Lubanga* ACJ (n194) [445]; also *Ntaganda* TCJ (n215) [780].

the crime' or, from the perspective of the individual accused, functional control over the act. This section lays out the features of the concept of functional control over the act in the law of individual responsibility.

The starting point of the ICC's approach to the commission of a crime 'jointly with another person' is the functional control of the individual over the conduct constituting the crime, that is, the accused's 'ability to dominate' its commission.[233] The notion of joint or functional control over the act 'is rooted in the principle of the division of essential tasks for the purpose of committing a crime between…persons acting in a concerted manner.'[234] In this context, none of the participants has complete control over the course of conduct constituting the crime, but each of them depends upon on one another for its commission.[235] Consequently, all participants share control over the crime, because each of them can decide whether and how it will be committed by not carrying out their task.[236]

In analytical terms, perpetration 'jointly with another person' or co-perpetration rests upon the fulfilment of two conditions. First, it must be established that two or more individuals work together in the commission of the crime which requires an express or implied, previously arranged or materialising extemporaneously, agreement

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233 M Cupido, 'Pluralism in Theories of Liability' in E van Sliedregt and S Vasiliev (eds), *Pluralism in International Criminal Law* (OUP 2014) 128, 131; cf *Katanga/Ngudjolo* DCC (n201) [485]; *Lubanga* DCC (n133) [330].

234 *Lubanga* DCC (n133) [342]; also JD Ohlin, E Van Sliedregt and T Weigend, 'Assessing the Control Theory' (2013) 26 LJIL 725, 727.

235 *Lubanga* (Judgment) ICC-01/02-01/06-2842, TC-I (14 March 2012) [994]; *Lubanga* DCC (n133) [342]; (Judgment) IT-97-24-T (31 July 2003) [440].

236 ibid.

between these persons.[237] This agreement need not be specifically or exclusively directed at the commission of a crime, but it is sufficient that it involves a 'critical element of criminality'.[238] Namely, the agreement must involve the commission of the crimes charged or its implementation must lead to their commission in the ordinary course of events.[239] Second, according to the ICC AC, 'a co-perpetrator is one who makes, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime'.[240] The essential nature of the contribution is what entails the control of each co-perpetrator over the commission of the wrongful act and distinguishes the ICC approach from the JCE doctrine.[241]

Despite its central role in the ICC's approach to joint perpetration, the relevant pronouncements are still ambiguous as to what exactly makes a contribution 'essential' so as to entail the characterisation of a person as co-perpetrator of a crime. From the outset, it seems established that a co-perpetrator does not need to carry out physically any of the material elements of the crime.[242] In fact, the AC has found that '[t]he essential contribution can be made…depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived.'[243] The key ambiguity in

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237 *Lubanga* ACJ (n194) [445].

238 eg *Lubanga* TCJ (n235) [984]; *Kenyatta* DCC (n209) [399].

239 *Kenyatta* DCC (n209) [399]; also *Lubanga* ACJ (n194) [451] overruling *Lubanga* TCJ (n235) [948].

240 *Lubanga* ACJ (n194) [469].

241 LD Yanev, *Theories of Co-perpetration in International Criminal Law* (Brill 2018) 429.

242 *Lubanga* ACJ (n194) [458]; also *Lubanga* TCJ (n235) [1003].

243 *Lubanga* ACJ (n194) [469] (references omitted).

these findings is that control can be construed in purely causal terms. From the perspective of causality, a contribution is essential if it constitutes a *conditio sine qua non* of the realisation of the crime according to the agreed plan or in the way it was actually realised.[244] Accordingly, a contribution made entirely at the planning or preparatory stage of the crime, such as providing the means for its commission, can logically be a *conditio sine qua non* of its realisation.[245] Thus, the act of the scientist who in accordance with a common plan oversees the development of chemical weapons could be construed as a *conditio sine qua non* of a chemical attack against the civilian population.[246] That is because it is possible to argue that the scientist had at some point in time the power to frustrate the commission of the attack by withholding her contribution according to the plan.[247] At the very least, it could be argued that such a contribution entailed the power to frustrate the commission of the crime in the way it was realised in the sense that 'without it the crime would not be committed or would be committed in a significantly different way'.[248] Therefore, apart from cases where more individuals physically carry out the material elements of a crime requiring causation (eg murder), such an interpretation of essentiality would obviate the distinction between commission and aiding and abetting.[249]

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244 *Lubanga* TCJ (n235) [999]; eg L Yanev and T Koojimans, 'Divided Minds in the *Lubanga* Trial Judgment: A Case against the Joint Control Theory' (2013) 13 ICLR 789, 795.

245 Yanev (n241) 433-434.

246 Ohlin/Sliedregt/Weigend (n234) 732.

247 cf Yanev (n241) 433-434.

248 cf *Blé Goudé* (Decision on Confirmation of Charges) ICC-02/11-02/11-186 (11 December 2014) [135]; *Gbagbo* DCC (n72) [230] and [234].

249 Ohlin/Sliedregt/Weigend (n234) 732; Wirth (n231) 987; also A Gil Gil and E Maculan, 'Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision

A closer look upon the findings of the ICC AC suggests that the contribution of the co-perpetrator must be linked to the execution of the elements of the crime for it to qualify as essential.[250] However, requiring that a person directly and personally executes the material elements of the crime would render the provision of the Statute for joint commission redundant.[251] In this context, the link between the contribution and the execution of the crime cannot be construed in purely causal terms. Rather, what is required is 'a normative assessment of the role of the accused person in the specific circumstances of the case'.[252] Thus, contributions made at the planning or preparation stage of the crime are not excluded provided that they entail the power to frustrate the execution of the *actus reus* of the crime.[253] The case law suggests that the person who directs the execution of the crime, even from a distance through technical means, or maintains control over its execution as a 'master' of the criminal plan can be considered

on the Confirmation of Charges in the *Lubanga* case to the *Katanga* judgment' (2015) 28 LJIL 349, 357-359.

250 GilGil/Maculan (n249) 358; *Ngudjolo* (Judgment) (Separate Opinion of Judge Van den Wyngaert) ICC-01/04-02/12-4, TC-II (18 December 2012) [44] and [46]; for the domestic perspective: N Jain, *Perpetrators and Accessories in International Criminal Law–Individual Modes for Collective Crimes* (Hart 2014) 124; *Lubanga* DCC (n133) fn425.

251 Ohlin/Sliedregt/Weigend (n234) 730; Art 25(3)(a) RSICC.

252 *Lubanga* ACJ (n194) [473].

253 cf *Blé Goudé* (Decision on Confirmation of Charges) (Partly Dissenting Opinion of Judge Christine Van den Wyngaert) ICC-02/11-02/11-186-Anx (11 December 2014) [8].

a co-perpetrator of the physical perpetrators.[254] In other words, joint perpetration operates in these situations as a form of 'intellectual perpetration' based on criteria that are comparable to commission through another person.[255]

In fact, the current case law of the ICC deals with the majority of these cases by combining both modalities of control over the crime into a single form of commission, namely, joint commission through another person or indirect co-perpetration.[256] In this situation, two or more persons 'jointly contro[l] the action of a person to such a degree that the will of that person becomes irrelevant, and that his or her action must be attributed to the co-perpetrators as if it were their own'.[257] What distinguishes this situation from indirect perpetration is that 'it is not required that each co-perpetrator be individually in a position of control with respect to some or all of the direct perpetrators.'[258] Rather, it suffices that the co-perpetrators are jointly in control of the persons they utilise for the commission of the crime.[259] In practical terms, two main scenarios may come under this rubric.[260] First, one or more persons have jointly control over an

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254 Ambos, Treatise I (n14) 153 (notably cited as the authority in support of the finding in *Lubanga* ACJ (n194) [469] at fn874); see *Lubanga* TCJ (n235) [1004]; *Bemba and ors* TCJ (n37) [806]; *Harun and Ali Kushayb* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07-1, PTC-I (27 April 2007) [103].

255 See text accompanying nn219-221; cf *Ngudjolo* (Van den Wyngaert) (n250) [14] (critical); Wirth (n231) 984-986 (arguing that indirect perpetration or indirect co-perpetration would have been a more appropriate charge in these cases).

256 eg *Katanga/Ngudjolo* DCC (n201) [491]; *Al-Bashir* AW-2009 (n209) [211]; *Hussein* AW (n214) [20]; *Gbagbo* DCC (n72) [230]; *Blé Goudé* DCC (n248) [137]; *Kenyatta* DCC (n209) [297]; *Ntaganda* DCC (n209) [104]; *Ongwen* (Decision on confirmation of charges) ICC-02/04-01/15, PTC-II (23 March 2016) [41].

257 *Ongwen* DCC (n256) [39]; also *Blé Goudé* DCC (n248) [136].

258 *Blé Goudé* DCC (n248) [136].

259 ibid.

260 *Al-Bashir* AW-2009 (n209) [210].

organisation which they steer towards the commission of a crime.[261] Second, two or more persons each possessing control over a different organisation use these organisations to jointly commit a crime.[262] In both situations, the indirect co-perpetrator makes physically a contribution at the preparatory or planning stages of the crime. However, the control that the indirect co-perpetrator exercises over the persons executing the *actus reus* compensates for the lack of contribution at the execution stage. Hence, the indirect co-perpetrator makes in law a contribution to the execution of the crime, albeit indirectly 'through another person'.[263]

Consequently, in normative terms, the basis of the assessment of the 'essentiality' requirement is the definition of the specific crime (ie *qua* international obligation) and the configuration of the specific conduct constituting the wrongful act as it occurred.[264] At the core of this approach lies a—yet unsystematised in the ICC case law—distinction between essential elements of the crime as it occurred and peripheral elements of the criminal activity.[265] The starting point of this approach is that co-perpetrators are in principle only those who, in accordance with the common plan, execute the material elements of the crime either directly and personally or indirectly through another person.[266] Whilst it is conceivable that more persons jointly bring about a single

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261 T Weigend, 'Perpetration through an Organisation—The Unexpected Career of a German Legal Concept' (2011) 9 JICJ 91, 110-111; Ambos, Treatise I (n14) 157-158; eg *Ntaganda* DCC (n209) [116]-[117]; cf *Lubanga* TCJ (n235) [1270]; Wirth (n231) 984-986.

262 Ambos, Treatise I (n14) 157-158; also Cryer (n75) 368-369; Weigend in Stahn (n205) 553-554; cf *Katanga/Ngudjolo* DCC (n201) [493] and [519]-[520].

263 *Ongwen* DCC (n256) [39]; similarly, *Blé Goudé* DCC (Van den Wyngaert) (n253) [8].

264 Wirth (n231) 987-988.

265 cf JD Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in Stahn (n31) 517, 529.

266 *Blé Goudé* DCC (n248) [136].

element (eg multiple soldiers beat a prisoner of war to death), the main normative assumption is the predominantly complex character of crimes under international law *qua* international obligations and the resulting unity of the wrongful act.[267] In this context, mutual attribution is elicited by the fact that the contribution of each co-perpetrator corresponds to a material element of the crime which in isolation would attract a different legal qualification or be lawful. At the same time, the 'essentiality' of the contribution is also dependent upon a normative assessment of the degree of involvement in the crime as it occurred.[268] Mutual attribution cannot take place no matter how tenuous the link with the overall act without leading to absurd results. For example, the finding that Lubanga (the political and military leader of an armed group comprising thousands of soldiers) was a direct co-perpetrator of recruitment of possibly thousands of child soldiers physically committed by low-level officers entails that each officer individually also recruited thousands of child soldiers. As an offset, according to the ICC, control over the crime lies with the person who makes, directly or indirectly, a contribution 'without [which] the crime would not be committed or would be committed in a significantly different way'.[269] In this respect, the 'essentiality' requirement plays a delimiting role alongside the common plan and *mens rea*.[270]

In sum, two main competing notions of functional control over the act for the purposes of attribution of conduct in the law of individual responsibility can be identified. The power to frustrate the commission of the crime can be construed as a causal

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267 See Chapter 4.III.2.

268 Wirth (n231) 988.

269 *Blé Goudé* DCC (n248) [135]; *Gbagbo* DCC (n72) [230] and [234].

270 cf H Olásolo, 'Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the *Stakić* Appeal Judgement' (2007) 7 ICLR 143, 158; Wirth (n231) 980-981.

or normative requirement, although this section has demonstrated that the practice of the ICC clearly favours the latter. On the one hand, in causal terms, functional control over the crime rests with any person who, according to a common plan, makes a contribution that is a *conditio sine qua non* for its commission. It is immaterial whether the person made a contribution at the planning or preparatory stages of the crime or whether such contribution was lawful or wrongful as such. On the other hand, in normative terms, the direct or indirect commission of an essential element of the conduct constituting the crime entails the power to frustrate the commission of the crime. Analytically speaking, two different operations are at play. First, 'control over a person' for the purposes of attribution of conduct in the law of individual responsibility is not necessarily exclusive, but may lie with more persons. Second, the direct or indirect commission of an essential element of a complex crime leads to the responsibility of the accused for the entire complex crime. Under this approach, functional control over the act and the resulting mutual attribution of conduct is a corollary of the primarily complex character of the crime *qua* international obligation and the unity of the crime *qua* internationally wrongful act.

(d) Functional Control over the Act and the Law of State Responsibility

Unlike the law of individual responsibility, joint conduct is a blind spot of the law of state responsibility.[271] As a matter of fact, it is perfectly possible to imagine situations where state organs act in concert with persons or groups not having that status.[272] This

[271] cf F Messineo, 'Attribution of Conduct' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2015) 65, 79.

[272] eg V Bilková, 'Armed Opposition Groups and Shared Responsibility' (2015) 62 NILR 69, 71.

section demonstrates how situations of joint conduct feature in pronouncements relating to the establishment of state responsibility. In particular, this section argues that the establishment of state responsibility in certain cases materially parallels, or even coincides, with the notion of functional control over the act known in the law of individual responsibility. As will be shown, the idea of functional control over the act in the context of state responsibility can be construed either as an instantiation of the rule reflected in Article 8 ARSIWA or as a manifestation of the composite character of specific obligations and the resulting unity of the wrongful act.

At the outset, the situation of joint conduct appears at odds with the framework of state responsibility. Rules on attribution of conduct are often understood as revolving one way or another around agency, but not around involvement or participation of any other kind.[273] This general consideration is reflected in the formulation of Article 8 ARSIWA pursuant to which conduct is attributable to the state if '*the person or group of persons* is in fact acting on the instructions of, or under the direction or control of, the state in carrying out certain conduct'.[274] The commonly held view is that this standard of attribution of conduct depends on two variables along a sliding scale, namely, the specificity of state authorisation or instigation and the subordination of the person or group.[275] Attribution of conduct based on a 'real link' covers a continuum of agency relationships: from state instructions to a free agent to carry out a specific task (express

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273 eg DD Caron, 'The Basis of Attribution and other Trans-substantive Rules' in RB Lillich, DB Magraw and DJ Bederman (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1998) 109, 128 and 138-142; Becker (n49) 44-45; Jackson, Complicity (n27) 176.

274 Art 8 ARSIWA (emphasis added).

275 On the metaphor of the sliding scale cf FL Kirgis, 'Custom on a Sliding Scale' (1987) 91 AJIL 146-151.

agency) to complete dependence of the person upon the state in which case no specific instructions are needed (*de facto* agency).[276] In this scheme, unlike instructions or direction, control needs to be established with respect to an operation, that is, a broader course of conduct in which the conduct giving rise to the wrongful act forms only a part.[277]

However, the legal pronouncements of the ICJ cast some doubt on the prevalent interpretation of Article 8 ARSIWA. First, the ICJ uses the term 'operation' without any distinction between the situations encompassed in Article 8 ARSIWA.[278] This suggests that the requirement of specificity does not vary depending on whether the state instructs, directs, or controls a person or group.[279] Second, the ICJ clearly distinguishes the concept of agents or *de facto* organs of the state from situations of 'effective control' covered by Article 8 ARSIWA.[280] As a result, the notion of *de facto* organs appears to render the situation of 'effective control' a 'redundant category' under the predominant interpretation.[281] Third, according to the ICJ, the exact formulation of the applicable test is that conduct is attributable to the state 'where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised *effective control over the action* during which the wrong

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276 Crawford, General Part (n2) 145-146; ILC, 'Summary Record of the 2681st Meeting' (2001) I YbILC 90, 93[28] (Drafting Committee Report).

277 Distefano/Hêche (n58) 29-30; Mačák (n20) 423; cf Commentary to Art 8 ARSIWA [8].

278 eg *Tehran Hostages* (n44) 28[58]; *Bosnia Genocide* (n2) 208[400].

279 See also SR.2562 (n109) 289[79] (Drafting Committee Report).

280 *Bosnia Genocide* (n2) 208[400].

281 B Stern, 'The Elements of the Internationally Wrongful Act' in Crawford and ors (n2) 193, 206.

was committed'.[282] So, whereas the ILC's formulation suggests that the 'object' of control is the person or group carrying out the conduct,[283] the ICJ's dictum puts emphasis on the conduct or operation giving rise to the wrongful act.[284] It is true that unless certain conduct legally attaches to a state, it is impossible to assess whether such conduct is in breach of an international obligation of that state.[285] However, the operation of attribution of conduct to a state does not take place in the abstract; it always relates to a claim about a violation of an international obligation.[286] Hence, although attribution of conduct and breach of an international obligation are analytically distinct elements, 'there is often a close link between the basis of attribution and the particular obligation said to have been breached'.[287] In the case of the rule reflected in Article 8 ARSIWA, these two elements are 'inextricably interwoven' in the sense that the precise scope of the conduct to be attributed to the state depends on the content of the obligation whose breach is alleged.[288]

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282 *Bosnia Genocide* (n2) 210[406] (emphasis added); also *Nicaragua* (n46) 64-65[115] ('effective control of the…*operations* in the course of which the alleged violations were committed' (emphasis added)).

283 Kreß (n7) 138.

284 Talmon, ICLQ (n109) 502; Boon (n74) 348.

285 Stern (n281) 201.

286 cf General Commentary ARSIWA [1] and [3]; eg, Kolb (n16) 70-71.

287 Commentary to Part One, Chapter II ARSIWA [4]; also Condorelli/Kreß (n2) 225; P-M Dupuy, 'Le fait générateur de la responsabilité internationale des États' (1984) 188 RdC 9, 37.

288 W Riphagen, 'Seventh Report on State Responsibility' (1986) II(1) YbILC 1, 11[6]; also B Boutin, 'Attribution of Conduct in International Military Operations' (2017) 18 MelJIL 154, 136.

As a result, the notion of 'effective control' of the rule reflected in Article 8 ARSIWA lays itself open to multiple interpretations which can include certain situations of joint conduct. As we have seen in the context of the law of individual responsibility, the notion of control over the act has multiple meanings. Namely, an individual may dominate the commission of a wrongful act not only by subordinating the will of another to its own, but also by making a co-ordinated essential contribution in its commission.[289] The notion of 'effective control' in the law of state responsibility could be interpreted as encompassing certain aspects of the concept of functional control over the act as known in the law of individual responsibility.[290] As we have seen in the previous section, two interpretations of functional control over the act are possible, namely, one based on causality and another based on normative considerations. Although both of these constructions are mirrored in findings relating to state responsibility, the overwhelming preponderance of evidence supports the latter.

To start with the first possible interpretation, the terms 'direction or control' in Article 8 ARSIWA are provided in the alternative and the situation of 'direction' already encompasses a degree of subordination of the will of the person to the state.[291] Additionally, the discussion in the run up of the adoption ARSIWA reveals that a standard of control—distinct from the standard of direction—may envisage situations where state organs coordinate with persons or groups not having that status in carrying out

289 cf text accompanying nn233-241.

290 cf Kreß (n7) 128-129.

291 Commentary to Art 8 ARSIWA [7]; Kreß (n7) 138; cf Mačák (n20) 417-418; Crawford, General Part (n2) 146 (at fn28).

specific conduct.[292] To illustrate this point, in the *Mapiripán Massacre* case, the IACtHR could not establish that there was a 'dependent relationship' between the official army and the paramilitary group that executed the massacre.[293] In the event, the paramilitaries approached the location of the massacre 'with full knowledge, logistic preparations, and collaboration by the Armed Forces', the Armed Forces having left the civilian population without any protection by unjustifiably transferring troops to other places.[294] The IACtHR held that 'the behaviour of…the members of the paramilitary group are attributable to the State insofar as they acted *in a situation* and in areas *under the control of the State*.'[295] To reach this conclusion, the IACtHR took into account that (i) the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance…of the Armed Forces of the State';[296] and (ii) the massacre resulted 'from a set of actions and omissions by State agents and private citizens, conducted in a coordinated, parallel or linked manner, with the aim of carrying out the massacre.'[297] These findings echo one interpretation of the concept of functional control over the act as it is known in the law of individual responsibility. The IACtHR

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292 *Compare* SR.2562 (n109) 289[79] (Drafting Committee Report) and Crawford, First Report (n23) 40[197]; see ILC Report (1974) (n30) 284[5]; ILC Report (1975) (n26) 79-80[32]; ILC, 'Comments and Observations received from Governments' (2001) II(1) YbILC 33, 49 (Netherlands); Distefano/Hêche (n58) 13.

293 *Case of the Mapiripán Massacre v Colombia* Ser C no 134 (IACtHR, 15 September 2005) [102] and [120].

294 ibid [116].

295 ibid [120] (emphasis added).

296 ibid [120] (emphasis added).

297 ibid [123] (emphasis added).

proceeds to establish the two key elements of joint control over the act, namely, a common purpose and an essential contribution, albeit in causal terms as a *conditio sine qua non* of the realisation of the conduct constituting the wrongful act.[298]

The problem with this interpretation is how to distinguish situations of coordination that elicit attribution of conduct to the state under Article 8 ARSIWA from situations that do not. A test based on factual causality is patently unfit for that purpose 'for the omnipresence of the state means that…anything could be attributed to it.'[299] It is clear that, as elaborated in Chapter 4, mere aid or assistance of state organs to the acts of persons or groups that do not have that status does not entail the attribution of these acts to the state.[300] What is more, the power or ability to prevent the impugned conduct or to influence its authors unfettered by any notion of subordination may only be considered in the context of specific positive obligations of the state.[301] In fact, most of findings of the IACtHR cited in favour of the attenuation of the relevant standard of attribution relate more to either the state's compliance with its positive obligations to protect the rights at issue or to a different rule of attribution of conduct.[302] Notably,

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298 cf text accompanying nn242-249.

299 ILC, 'Summary Record of the 2555th meeting' (1998) I YbILC 241, 246[36] (Crawford); Commentary to Chapter II, Part One [4].

300 *Nicaragua* (n46) 65[116]; *a contrario Bosnia Genocide* (n2) 217[420].

301 eg *Bosnia Genocide* (n2) 120[183].

302 *Case of 19 Merchants v Colombia* Ser C no 109 (IACtHR, 5 July 2004) [140]-[141]; *Case of Ituango Massacre v Colombia* Ser C no 148 (IACtHR, 1 July 2006) [138]; *Case of the Rochela Massacre v Colombia* Ser C no 163 (IACtHR, 11 May 2007) [101]-[102] ('[T]he State allowed the involvement and cooperation of private individuals in the performance of certain duties…which, in general, are within the exclusive competence of the State…'); also Plakokefalos (n3) 593; M Hakimi, 'State Bystander Responsibility' (2010) 21 EJIL 341, 353-354 (on earlier cases); *contra* eg V Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 EJIL 563, 582-583; 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) 24 LJIL 989, 996.

even in the *Mapiripán Massacre* judgment, Colombia was found responsible in the end only for its 'non-fulfilment of its…obligations to *ensure* the effective exercise of human rights in said *relations amongst individuals*'.[303] It follows that the notion of control in the law of state responsibility cannot be easily extricated from the notion of 'direction'.[304]

This does not mean that all situations encompassed by the notion of functional control over the act in the law of individual responsibility fall completely outside the scope of Article 8 ARSIWA. As we have seen, the contributions that have been considered as essential for the purposes of individual responsibility consisted of 'assist[ing] in formulating the relevant strategy or plan, becom[ing] involved in directing or controlling other participants or determin[ing] the roles of those involved in the offence'.[305] In the law of state responsibility, the application of the 'effective control' test by the ICJ in the facts of specific cases mirrors closely these findings. For example, in the *Nicaragua* judgment, the Court could not establish that US organs took a direct part in the execution of certain military operations. Nonetheless, it found that these operations were attributable to the US, because 'agents of the United States participated in the planning, direction, support and execution of the operations'.[306] Along similar lines, in the *Bosnia Genocide* judgment, the Court examined, in the context of the application

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303 *Mapiripán Massacre* (n293) [123] (emphasis added).

304 Perova (n70) 55; also, *mutatis mutandis*, T Dannenbaum, 'Translating a 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 HJIL 113, 156-157 (both taking a relationship of subordination as an explicit or implicit starting point); but see eg Trapp, Dissonance (n98) 249-250.

305 *Lubanga* TCJ (n235) [1004].

306 *Nicaragua* (n46) 50-51[86] (emphasis added).

of Article 8 ARSIWA to the facts of the case, whether the Yugoslavian leadership 'was involved in planning the attack or inciting the killing of non-Serbs';[307] whether the Yugoslavian army or security services 'assisted the [perpetrators]…before the attack' or 'participat[ed] in the preparation for executions';[308] and whether any state organs 'were involved' in the massacre.[309] This similarity in reasoning is not coincidental. It suggests that, in the law of state responsibility, 'direction or control' cannot be equated with complete power over the persons or groups carrying out the conduct.[310] Or, in other words, 'effective control' does not connote exclusive control over the action or operation during which the wrong was committed, but such control may rest with more than one parties.[311] It follows that 'effective control' under Article 8 ARSIWA can also be joint.[312] As a result, the notion of 'effective control' under Article 8 ARSIWA can include situations in which an organ exercises joint control over the person or group committing the act in a manner materially identical to the relevant rules of the law of individual responsibility.

This section has shown that certain situations of joint conduct can fall within the scope of Article 8 ARSIWA. In terms of individual responsibility, these situations

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307 *Bosnia Genocide* (n2) 212-213[410].

308 ibid 212-213[410]-[411].

309 ibid 213-214[412].

310 Commentary to Art 8 ARSIWA [1] (fn153) and Commentary to Art 17 ARSIWA [7].

311 *compare* Art 6 ARSIWA, Ago, Third Report (n30) 273[213] and Commentary to Art 6 ARSIWA [3] *in fine*; also *Jaloud v the Netherlands* [GC] 2014 ECHR-VI 229 [151] (contrasting the standard of Art 6 to that of Art 8 ARSIWA); *mutatis mutandis*, *Nuhanović v Netherlands* Case no LJN:BR5388 (5 July 2011) ILDC 1742 (NL 2011) (The Hague Court of Appeals) [5.9] *in fine*; *Netherlands v Nuhanović* ECLI/NL/HR/2013/BZ9225 (6 September 2013) ILDC 2061 (NL 2013) (Netherlands Supreme Court) [3.11.2].

312 S Besson, 'Concurrent Responsibilities under the European Convention on Human Rights' in Van Aaken and Motoc (n126) 156, 172-173.

correspond to the circumstances under which a state organ *qua* individual can be considered as an 'intellectual perpetrator' of certain crime. However, the core notion of joint commission of a crime in the law of individual responsibility is somewhat different, for it also includes situations in which a plurality of individuals directly or indirectly commit the elements of the crime. For example, a soldier of one state, acting in concert with a private individual, beats a civilian to death during an armed conflict. For the purposes of state responsibility, it is difficult to understand what exactly makes conduct 'joint' in these situations.[313] Faced with such scenarios, the IACmHR propounded that 'in cases in which members of paramilitary groups and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary groups act as agents of the State.'[314] However, from a pragmatic viewpoint, these situations can also be dealt with as a matter of the international obligation in question, not as an issue of attribution of conduct.[315] The conduct of the individual state organ constitutes separately a breach of the obligation in question, notwithstanding the fact that non-attributable acts factually constitute concurrent causes.

However, the application of this approach becomes more complex in the situation where an international obligation is defined as an aggregate of conduct like the ones discussed in this thesis. The complexity arises because breaches of these obligations usually consist of a plurality of acts which are separate in time and in space. In the law of individual responsibility, the direct or indirect commission of one element

313 Messineo (n271) 79.

314 IACmHR *Riofrío Massacre v Colombia* Rep No 62/01 (6 April 2001) [51]; also, eg, IACmHR *Monsignor Arnulfo Romero y Galdámez v El Salvador* Rep No 37/00 (13 April 2000) [64];

315 cf, eg, *Rantsev v Cyprus and Russia* App no 26965/04 (ECtHR, 7 January 2010) [320]-[321].

of the crime entails in principle the responsibility of the individual for the entire complex crime on the basis of mutual attribution of conduct. In the context of state responsibility, the law is not as clear. In the *Bosnia Genocide* case, Bosnia-Herzegovina argued that, because of the composite character of genocide, the test of 'effective control' under Article 8 ARSIWA should not be applied in relation to each specific act but in relation to the whole body of operations of Republika Srpska.[316] The Court held that the rules for the attribution of conduct did not vary depending on the nature of the obligation in the absence of an express *lex specialis*.[317] It then laid down the test under Article 8 ARSIWA as follows:

> [g]enocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.[318]

The interpretation of this pronouncement poses some difficulty. Clearly, what is attributable to the state under Article 8 ARSIWA is not genocide at large, but the physical acts constitutive of genocide.[319] What the Court seems to suggest is that if the physical acts constitutive of genocide have been carried out only in part by persons on the instructions or directions of the state or under its effective control, then the state would be responsible for the genocide *qua* internationally wrongful act only to that extent. However, if the killing of, say, six members of a protected group qualified as genocide, then attribution of these killings to the state would lead to its responsibility for those

316 *Bosnia Genocide* (n2) 208-207[401].

317 ibid.

318 ibid.

319 eg M Milanović, 'State Responsibility for Genocide' (2006) 17 EJIL 553, 567.

acts of genocide.[320] The state would be responsible for these internationally wrongful acts *simpliciter*, not part thereof or to some extent. The overall pattern of conduct would have no legal relevance of itself.[321]

What forces the Court to use such contrived language is the fact genocide is a composite obligation defined as an aggregate of conduct.[322] In this context, whether certain physical acts constitute genocide is clearly a matter of extent; the extent to which those acts taken together are sufficient to constitute the single, composite, internationally wrongful act.[323] When the physical acts constitutive of genocide have been carried out under the effective control of the state (or are otherwise attributable to it) only in part, then, in principle, no breach of the composite obligation can be established.[324] Whilst it could be argued that acts which are not attributable to the state could be taken into account to infer the genocidal intent of the authors of the physical acts which are attributable to the state, the problem remains that the attributable acts might be objectively insufficient to constitute genocide.[325] In this light, the most reasonable interpretation of the Court's findings is that whether a state is responsible for the genocide *qua* composite internationally wrongful act is also a question of extent. Thus, for example, the Court examines whether specific killings qualify as 'an element of the genocide

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320 A Gattini, 'Breach of an International Obligation' in Nollkaemper/Plakokefalos (n271) 49.

321 cf, on the general point of repeated acts, JJA Salmon, 'Duration of the Breach' in Crawford and ors (n2) 383, 391; *Ireland v United Kingdom* [Plenary] (1979-80) 2 EHRR 25, 77-78[159].

322 Commentary to Art 15 ARSIWA [3].

323 Art 15(1) ARSIWA.

324 Talmon, ICLQ (n109) 503.

325 cf *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) (Separate Opinion of President Tomka) [2015] ICJ Rep 156, 165[26]; Commentary to Art 11 ARSIWA [11].

committed in the Srebrenica area' rather than as separate acts of genocide.[326] To the extent that acts attributable to the state are of a sufficient number to amount to a breach of the composite obligation of the prohibition of genocide, the state would be responsible for the genocide *qua* composite wrongful act even if these attributable acts constitute only a part of that composite act.[327]

The case law of the ECtHR can provide further guidance as to this point. In the *El-Masri* case, North Macedonia (at the time the former Yugoslav Republic of Macedonia) arrested El-Masri and handed him to the custody of the CIA that mistreated him on the territory of North Macedonia and later transferred him to Afghanistan where he was detained incommunicado. The ECtHR qualified the applicant's arrest and subsequent detention in its entirety as an 'enforced disappearance', that is a wrongful act arising from the breach of a composite obligation.[328] On this basis, the ECtHR found North Macedonia responsible for the entire duration of the applicant's captivity.[329] The crucial point in this case was not merely the acquiescence or connivance of North Macedonia with respect to acts of CIA agents committed on its territory.[330] Rather, the key fact that elicited this finding was that North Macedonia had through its own agents

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326 *Bosnia Genocide* (n2) 214-215[413].

327 Commentary to Art 15 ARSIWA [8] ('The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided that a sufficient number of acts has occurred to constitute a breach.')

328 *El-Masri* (n179) 346-347[239]-[240].

329 *El-Masri* (n179) 348[241].

330 cf J Crawford and A Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Van Aaken and Motoc (n126) 178, 188-189; also, eg, A Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (*EJIL!Talk*, 24 December 2012) <https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>; Lanovoy, Use (n302) 583; Jackson, Complicity (n27) 194 (at fn123).

committed an essential element of the enforced disappearance—ie the arrest.[331] Indeed, the ECtHR treated differently cases where the state only connived with the CIA to use its territory for similar operations or acquiesced to such use. The state was only found responsible for its act of facilitation that exposed the applicant to the risk of mistreatment.[332] More generally, the common consideration of multiple acts as a single internationally wrongful act is not justified merely by the fact that these are were committed with common intention.[333] Much like the law of individual responsibility, each actor's conduct constitutes an essential element of the composite wrongful act in the sense that it corresponds to an element of the composite obligation. These elements are correlated on the basis of their common object, purpose, or intention, as the case may be, depending on the content of the specific obligation. Therefore, the common consideration of more actors in the same wrongful act constitutes a manifestation of the composite character of the underlying obligation and the resulting unity of the wrongful act.

To conclude, the question of joint conduct constitutes a pivotal point for the duality of the internationally wrongful act in cases involving the violation of dual obligations. Whilst the law of individual responsibility lays down rules allowing for the mutual attribution of conduct of individuals, the question of joint conduct constitutes an obscure point of the in law of state responsibility. This section has shown that the

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331 see, for a similar reading of the judgment, M Barnabó, 'Le violazioni sistematiche della Convenzione Europea dei Diritti dell'Uomo come *composite act* ai sensi dell'art. 15 del progetto di articoli sulla responsabilità degli Stati' (2018) 101 RDI 753, 763-765; for a similar use of the concept of composite acts, cf *Ilaşcu* (n125) 264[321] and [383]-[384].

332 eg *Al Nashiri v Poland* App no 29761/11 (ECtHR, 24 July 2014) [517]-[518] and [531]; *Nasr et Ghali c. Italie* App no 44883/09 (ECtHR, 23 February 2016) [229]-[230], [241] and [302]; *Abu Zubaydah v Lithuania* App no 46454/11 (ECtHR, 31 May 2018) [657] and [642]-[643].

333 cf A Vermeer-Künzli, 'Invocation of Responsibility' in Nollkaemper/Plakokefalos, Principles (n271) 251, 261-262; A Van Pachtenbeke and Y Haeck, 'From *De Becker* to *Varnava*: The State of Continuing Situations in the Strasbourg Case Law' (2010) 1 EHRLR 47, 53-54.

notion of 'effective control' under Article 8 ARSIWA can operate in a manner akin to the concept of functional control over the act as known in the law of individual responsibility. That is because effective control cannot be equated with exclusive control over a person or operation. What is more, the establishment of state responsibility approximates the concept of joint commission in the situation where a violation of a composite obligation is at issue. That is because the violations of these obligations consist of multiple acts which are considered a unity from the perspective of the law, even though they are distinct in fact. In this context, this section has demonstrated that relevant findings are indicative of an approach which resonates with the concept of functional control over the act. The state would be responsible for the single, composite, wrongful act, because conduct attributable to it amounts to a breach or a distinct element of the composite obligation qualifying thus as an essential element of that wrongful act. As a result, the duality of the internationally wrongful act is maintained on account of comparable conceptions of control in the law of state and individual responsibility and the composite character of dual obligations.

IV. Duality of Attribution of Conduct in Situations involving Conduct of Individuals acting as Organs of Different States

The last point that needs to be examined in this chapter is whether the duality of the internationally wrongful act is distorted in situations where more states are involved in the violation of a dual obligation. As a matter of fact, the relationships described in the previous sections can arise between individuals having the status of organs of two different states. In these situations, it is conceivable that conduct attributable to a state organ *qua* individual on the basis of instigation or joint perpetration would not be attributable to the state. This section deals with the situation where a state organ instigates another state organ in the commission of certain conduct. It then turns to the question

of joint perpetration of certain conduct by individuals having the status of organs of different states.

This chapter has shown that Article 8 ARSIWA encompasses certain cases of instigation. By contrast, according to the traditional view, cases of instigation between states raise issues of 'vicarious' or 'indirect' responsibility.[334] What is imputed to the state is not the conduct of another state, but the responsibility arising from the internationally wrongful act of that other state.[335] According to ARSIWA in its current form, a state is responsible for the internationally wrongful act of another state, whose commission it directs and controls (Article 17 ARSIWA) or coerces (Article 18 ARSIWA).[336] Article 17 ARSIWA is particularly relevant for this thesis, because the extent to which this provision in its present form reflects the concept of indirect responsibility is dubious. It is important to note that the original proposal of Special Rapporteur Ago relying on practice of the 19th and early 20th century was that responsibility rests solely with the 'dominant' state at the exclusion of the responsibility of the 'subordinate' state.[337] However, the ILC never adopted this proposal.[338] At the same time, under the general rule of attribution of Article 8 ARSIWA, when a state directs and controls certain conduct, that conduct is attributable to that state under the general rules

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334 eg R Ago, 'La responsabilità indiretta nel diritto internazionale' in R Ago (ed), *Scritti sulla responsabilità internazionale degli Statti* Vol-I (Jovene 1978) 3, 18; C de Visscher, *La Responsabilité des États* (Biblioteca Visseriana 1924) 93.

335 R Ago, 'Eighth Report on State Responsibility' (1979) II(1) YbILC 4, 4-5[3].

336 Arts 17-19 ARSIWA.

337 Ago, Eighth Report (n335) 25-26[45]-[47].

338 Art 19 ARSIWA; Commentary to Art 17 ARSIWA [9].

of attribution.[339] What is more, the provision of Article 17 ARSIWA explicitly requires that the act of the 'subordinate' state be internationally wrongful if committed directly by the 'dominant' state.[340] As both elements of the internationally wrongful act are present, the responsibility of the directing and controlling state must be considered direct, not vicarious.[341] In this regard, there is practice suggesting that establishing the wrongfulness of the act of the 'subordinate' state is not a necessary condition for the responsibility of the 'dominant' state.[342]

In this regard, it is possible to construe the rule proposed by the ILC in Article 17 ARSIWA as a special rule of attribution of conduct applicable only to the relationship between states.[343] In particular, the text of Article 17 ARSIWA appears to preclude one aspect of the general rule of attribution under Article 8 ARSIWA, namely, the situation where a state organ acts on the 'instructions' of the organ of another state.[344] Nonetheless, the preclusive effect of Article 17 ARSIWA is doubtful, because practice

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339 ILC, 'Summary Record of the 2576th Meeting' (1999) I YbILC 60, 66[45] (Yamada); ILC, 'Summary Record of the 2577th Meeting' (1999) I YbILC 67, 71[33] (Rosenstock) and 72[45] (Simma); ILC, 'Summary Record of the 2578th Meeting' (1999) I YbILC 74, 74[2] (Hafner).

340 Art 17(b) ARSIWA.

341 eg A Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63, 76; JD Fry, 'Attribution of Responsibility' in Nollkaemper/Plakokefalos, Principles (n271) 98, 118-119; cf G Schwarzenberger, *International Law as Applied by International Courts and Tribunals* vol-I (3rd edn Stevens 1957) 624-625; F Capotorti, 'Cours général de droit international public' (1994) 248 RdC 9, 255; R Quadri, 'Cours général de droit international public' (1964) 113 RdC 237, 475-476; Brownlie (n23) 188 (arguing against the concept of 'vicarious' or 'indirect' responsibility).

342 ITLOS, *The M/V "Norstar" Case (Panama v Italy)* (Preliminary Objections) [2016] ITLOS Rep 44 [173]; *contra* Art 17 ARSIWA.

343 See E Kok, *Indirect Responsibility in the Contemporary Law of State Responsibility* (Prufrock 2018) 75.

344 ibid 72.

referring to the provision after its adoption is virtually non-existent.[345] Quite the contrary, there are instances of practice which point to the opposite conclusion. Notably, in the *Norstar* case, ITLOS found Italy responsible for, *inter alia*, the arrest and detention of a vessel effected by the Spanish authorities in the execution of a letter rogatory issued by Italian courts without mentioning Article 17 ARSIWA.[346] Obviously, a state requesting judicial assistance is not 'dominating' another state to execute any particular act, whereas the requesting judge does not provide direction 'of an operational kind' to the law enforcement agencies of the executing state.[347] Rather, the request of judicial assistance can only amount to 'instructions' or instigation to carry out certain conduct under the terminology of the ARSIWA.[348] What elicits the parallel attribution of conduct of the organs of one state to another state is that the instruction of one state 'originated' the conduct constituting the wrongful act or that the instruction of the state is 'the cause' of the conduct constituting the wrongful act.[349] In the *Norstar* case, this was

345 UNGA, 'Responsibility of States for internationally wrongful acts – Compilation of decisions of international courts, tribunals and other bodies' (20 June 2017) A/71/80/Add.1 (the report records one reference in an arbitral award which was inadvertent and the arbitral tribunal actually quotes Article 4 ARSIWA); see *Tokios Tokelès v Ukraine* (Decision on Jurisdiction) ARB/02/18 (2004) IIC 258 fn113.

346 ITLOS, *The M/V "Norstar" Case (Panama v Italy)* (Merits) 2019 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf> [230].

347 Commentary to Art 17 ARSIWA [7]; more generally, Jackson, State Instigation (n31) 395.

348 Kok, Indirect Responsibility (n343) 72-73; see *Stephens v Malta (no 1)* [Sec] App no 11957/07 (ECtHR, 21 April 2009) [52] ('[T]he act complained…, having been *instigated* by Malta…and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain.' (emphasis added)); also *Toniolo v San Marino and Italy* [Sec] App no 44853/10 (ECtHR, 26 June 2012) [56].

349 *Bosnia Genocide* (n2) 207[397]; also *"Norstar"* (PO) (n342) [167] ('without the Decree of Seizure, there would have been no arrest'); cf, *mutatis mutandis*, Art 61 ARIO and Commentary to Art 61 ARIO [7].

evidenced by the fact that Spain was under a legal obligation to execute the letter rogatory under an applicable treaty.[350] However, the ARSIWA Commentary suggests that this is not the only case where the conduct of an organ of one state can be attributed to another state. For example, it mentions that where one state bribes an organ of another state to perform some official act, this act is attributable to the corrupting state 'under article 8 or article 17 [ARSIWA]'.[351] Therefore, whilst state 'incitement' or 'encouragement' of the acts of another state is clearly excluded by the general rules of state responsibility,[352] the situation where the state 'deliberately procure[s] the breach by another state' is not.[353] This situation does not give rise to a separate wrongful act of the instigating state like aid or assistance,[354] but falls under either Article 8 ARSIWA or Article 17 ARSIWA properly construed as a rule of attribution of conduct.[355] In this light, the duality of the internationally wrongful act is not distorted in cases of 'instructions' or instigation.[356]

A second point of apparent disparity between the law of state and individual responsibility is the treatment of joint conduct when the acts of organs of different states are involved. As a matter of law, the general principle is that each state is separately

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350 *"Norstar"* (PO) (n342) [167].

351 Commentary to Art 7 ARSIWA [7] fn150.

352 *Nicaragua* (n46) 129[255]; Commentary to Chapter IV Part One [6].

353 Commentary to Art 16 ARSIWA [6]; *mutatis mutandis*, *Belhaj and ors v Straw and ors* [2017] UKSC 3; [2017] AC 947 [77] (Mance).

354 cf C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in Crawford and ors (n2) 281, 285; from a normative perspective, Jackson, State Instigation (n31) 412-413.

355 Commentary to Art 7 ARSIWA [7] fn150.

356 See, generally, Chapter 5.II.1.

responsible only for conduct attributable to it and in breach of its international obligations.[357] According to the traditional understanding of the law of state responsibility, even if a plurality of states proceed in concert and with common intent to violate an international obligation binding on all of them, each of them would be responsible for a separate, albeit similar, wrongful act.[358] For example, the responsibility of the Axis powers after WWII was established individually and separately for each of them and implemented through distinct peace treaties, notwithstanding their wilful and concerted co-belligerency.[359] Evidently, this feature of the law of state responsibility brings the duality of the internationally wrongful act in cases involving violations of dual obligations under pressure.

That said, international law clearly recognises situations in which a plurality of states are responsible for the same internationally wrongful act which go beyond the exceptional cases of so-called 'indirect' responsibility.[360] As a matter of principle, rules of attribution of conduct have a 'cumulative effect', that is, the application of one rule of attribution does not exclude the parallel application of another.[361] Moreover, unless a contrary rule applies,[362] rules of attribution of conduct in the law of state responsibility can operate in parallel with respect to more than one actors, so that the same conduct is

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357 Commentary to Art 47 ARSIWA [3].

358 R Ago, 'Seventh Report on State Responsibility' (1978) I(1) YbILC 31, 54[59]; P D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in Nollkaemper/Plakokefalos, Principles (n271) 208, 242.

359 Brownlie (n23) 189; D'Argent, Reparation (n358) 242.

360 Art 47 ARSIWA; for international organisations: Art 48 ARIO.

361 Commentary to Chapter II, Part One ARSIWA [4].

362 cf, eg, Art 6-7 ARSIWA; more controversially, Art 7 ARIO.

attributable to all of them.[363] For example, two states can establish a joint organ in which case conduct carried out by that organ would be attributable to both of them on the basis of the rules reflected in Article 4 or 5 ARSIWA.[364]

More pertinently, the ARSIWA clearly anticipate the situation where 'two or more States…combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation.'[365] However, the Commission chose not to lay down any specific criteria to determine in which circumstances a plurality of states can be considered as 'acting jointly', but rather points to 'chapter II [Part One] on the attribution of wrongful act to a State' for the 'question of co-participants'.[366] This reference to the rules of attribution of conduct can be construed in two ways. First, certain rules of attribution of conduct cover the situation in which organs of a state act jointly with persons or groups of persons regardless of their status as private individuals or organs of another state. Second,

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363 Commentary to Art 1 ARSIWA [6]; SR.2681 (n276) 93[24] (Drafting Committee Report); Messineo (n271) 70; see, eg, Commentary to Chapter IV, Part One ARSIWA [9]; *contra* eg J Barboza, 'International Criminal Law' (1999) 278 RdC 1, 78.

364 Commentary to Chapter IV, Part One ARSIWA [2]; Commentary to Art 47 ARSIWA [2]; S Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in P Shiner and A Williams (eds), *The Iraq War and International Law* (Hart 2008) 185, 199; eg *Eurotunnel Arbitration* (Partial Award) PCA Case No 2003-06 (30 January 2007) [179]; WTO, *Turkey: Restrictions on Imports of Textile and Clothing Products—Report of the Panel* (31 May 1999) WT/DS34/R [9.43].

365 Commentary to Art 47 ARSIWA [2]; also *Oil Platforms* (Merits) (Separate Opinion of Judge Simma) [2003] ICJ Rep 324, 358[76]; S Besson, 'La pluralité d'Etats responsables—Vers une solidarité internationale?' (2007) 17 SZIER/RSDIE 13, 22; C Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in Shiner/Williams (n364) 161, 168-177; M den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012) 95-96; Brownlie (n23) 190-191; J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1987) 57 BYBIL 77, 80; V Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 Journal of International Law and Diplomacy 1, 10-11; HP Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 219-221; cf, eg, *Samoan Claims* (Germany/Great Britain/United States of America) [1902] IX RIAA 15, 27.

366 ILC, 'Summary Record of the 2605th Meeting' (1999) I YbILC 274, 278-279[25] (Drafting Committee Report).

it is conceivable that a single internationally wrongful act consists of a plurality of acts which are attributable to a state only in part. In this case, the state would be responsible for the internationally wrongful act, because it contributes to the internationally wrongful act through conduct attributable to it, and such contribution is an element of that internationally wrongful act.[367] However, given that the presumption is in favour of separate responsibility, such a scenario is exceptional and presumably hinges on the circumstances of the specific wrongful act. As a result, the conclusions reached in the previous sections are applicable in the relationships between organs of different states as well. First, as the *Jaloud* case attests, effective control under Article 8 ARSIWA does not mean exclusive control, but more states can exercise such control over a person or operation jointly.[368] Second, as the *El-Masri* case attests, the composite structure of the obligation and the resulting unity of the wrongful act militates for the responsibility of all states engaging though conduct attributable to them in the breach of the obligation for the same composite internationally wrongful act.[369]

This section has addressed the complexities arising from situations involving more states for the duality of the internationally wrongful act. It was argued that the concept of 'indirect' responsibility cannot be construed as setting aside the attribution of certain conduct to the state whose organs instigate organs of another state to commit that conduct. As a result, the duality of the internationally wrongful act is not distorted in cases of 'instructions'. In addition, the principle of independent responsibility appears to support, rather than distort, the duality of the internationally wrongful act in

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367 Dominicé (n354) 282-283.

368 See nn311-312.

369 See nn328-329.

situations of joint control over a person by the operation of the general rules of attribution of conduct. What is more, the involvement of multiple states does not appear to contradict the conclusions reached in the previous section that the establishment of state responsibility approximates the concept of joint commission in the situation where a violation of a composite obligation is at issue. All states would be responsible for the single, composite, wrongful act, because conduct attributable to them amounts to a breach or a distinct element of the composite obligation qualifying thus as an essential element of that composite wrongful act.

V. Interim Conclusion

To recap, this chapter has started from the observation that certain rules of attribution of conduct in the law of state responsibility envisage a 'real link' between individuals or groups having the status of state organs and individuals or groups who do not. In parallel, the international law of individual responsibility has developed rules which determine the author of allegedly wrongful conduct on the basis of normative ascription. These two sets of rules have a comparable function, namely, the determination of the author of certain conduct for the purposes of international responsibility, based on comparable criteria, that is, a relationship between individuals.

The analysis demonstrates clear evidence of a gradual process of convergence in material terms between rules of attribution of conduct in the law of state and individual responsibility to the extent that they overlap. The driving force behind such gradual convergence is the fundamental principle of independent responsibility and the duality of obligations. On the one hand, a state 'is responsible only for its own conduct,

that is to say, the conduct of persons acting, on whatever basis, on its behalf.'[370] Accordingly, rules of attribution of conduct in the law of state responsibility are geared towards the individualisation of responsibility building upon concepts of agency and instigation in a manner approximating the establishment of individual responsibility.[371] On the other hand, whilst rules of attribution of conduct are applicable across wrongs of diverse content, they essentially reflect normative judgments about the scope of international obligations.[372] A necessary implication of the duality of obligations is that broader considerations prevalent in the law of international responsibility affect the content and operation of rules of attribution of conduct in the law of individual responsibility. The analysis shows that another principle which appears to be applicable regardless of the nature of the entity in question, whether the state or the individual, is that, in international law, responsibility stems one way or another from the effective exercise of power or control.[373] This principle is reflected with clarity in the construction of rules of attribution of conduct in both the law of state and individual responsibility.

Specifically, whilst the role of control in both the law of state and individual responsibility is pervasive, its content is contested as it encompasses a continuum of relationships including the legal or material ability to prevent certain conduct, a general relationship of co-dependence, or the complete power over the will of a person or group.

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370 *Bosnia Genocide* (n2) 210[406].

371 A Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524, 526.

372 J Crawford and J Watkins, 'International Responsibility' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 283, 288.

373 *Delalić* ACJ (n75) [197] citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 54[118];

This chapter has examined the role of these gradations of control for the purposes of attribution of conduct in the law of state and individual responsibility. What emerges from the analysis is that the standards of attribution of conduct in the law of individual responsibility mirror to an almost indistinguishable extent the different conceptions of control for the purposes of attribution of conduct in the law of state responsibility. Thus, the JCE doctrine shares the same normative assumptions as the concept of 'overall control' or 'globality' and ends up operating in the same way. In a similar vein, this chapter has shown how the establishment of control over the crime developed in the context of the ICC mirrors closely the application of the criterion of 'complete dependence' and 'effective control' in the context of state responsibility. To this extent, it is possible to speak of dual principles of attribution of conduct in the law of state and individual responsibility. The broader normative point that can be drawn from the developments recorded thus far is that the imposition of international obligations to more and diverse actors occasions the amalgamation of seemingly disparate principles into common principles of international responsibility. The following chapter focuses on related developments in the context of the content of state and individual responsibility.

Chapter 6. Duality of the Content of State and Individual Responsibility

I. Introduction

The previous chapters have established how the duality of obligations leads to dual internationally wrongful acts. The corollary of the duality of the internationally wrongful act is the duality of responsibility, that is, the international responsibility of the state and the individual for the same conduct. This chapter turns to the 'content' of state and individual responsibility, that is, the 'new legal relations' or 'legal consequences' or 'secondary international obligations' that follow from the commission of an internationally wrongful act by a state or an individual.[1] Two closely related questions arise in this context. First, do the consequences of the internationally wrongful act for the state and for the individual differ, and how? Second, does the responsibility of the one actor affect the responsibility of the other actor?[2]

At first, the duality of state and individual responsibility may appear as an issue of little practical importance. The content of state and individual responsibility under international law is governed by different sets of secondary rules in both form and, to a certain extent, substance.[3] Individual responsibility under international law has been

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1 For the nomenclature, see General Commentary to ARSIWA [1]-[2]; Art 28 ARSIWA; Commentary to Art 33 ARSIWA [4].

2 eg A Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014) 115; more generally, J Crawford, 'Third Report on State Responsibility' (2000) II(1) YbILC 3, 72[263].

3 *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, 61[129]; also BI Bonafè, *The Relationship between State and Individual Responsibility for International Crimes* (Nijhoff 2009) 237-238; O Quirico, *International 'Criminal' Responsibility* (ELD edn, Routledge 2019) para 3.1.2.2.

understood for the most part in criminal terms.[4] By contrast, states are not normally subject to criminal sanctions.[5] The principal consequence of state responsibility is the obligation to make reparation.[6] In addition, the responsible state incurs the obligation to cease its wrongful act if it is continuing and, if circumstances so require, to offer assurances and guarantees of non-repetition.[7] Similarly, even though certain internationally wrongful acts, namely serious breaches of peremptory norms of international law, entail 'particular' consequences, such consequences cannot compare to the punishment of a person.[8] They include the obligation of all states to cooperate to end this act through lawful means, not to recognise as lawful a situation created by such an act, and not to render aid or assistance in maintaining that situation.[9] Thus, although state and individual responsibility under international law can arise from the same conduct,

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4 ILC, 'Report of the International Law Commission to the General Assembly' (1951) II YbILC 123, 134[58(c)] citing IMT, 'Judgment and Sentences – October 1, 1946' (1947) 41 AJIL 172, 221 ('only by punishing individuals who commit…crimes [against international law] can the provisions of international law be enforced').

5 *Blaškić* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-04, AC (29 October 1997) [25]; also *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 115[170]; cf, for the character of measures taken by the Security Council, V Gowlland-Debbas, 'The Security Council and Issues of Responsibility under International Law' (2012) 353 RdC 185, 286.

6 Art 31 ARSIWA; B Stern, 'Et si on utilisait le concept de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des États' (2001) 47 AFDI 3, 9.

7 Art 30 ARSIWA.

8 J Verhoeven, 'Vers un ordre répressif? Quelques Observations' (1999) 45 AFDI 55, 61 ; Bonafè (n3) 233.

9 Art 41 ARSIWA.

the content of the relevant secondary obligations arising from such a dual internationally wrongful act remain distinct.[10] The two regimes of responsibility can apply concurrently without the application of the one affecting the other.[11]

That said, the content of state and individual responsibility are only partially different. As a matter of principle, once it is admitted that individuals can be subjects of international obligations and thus of international responsibility, there is no international rule preventing the emergence of a secondary obligation of individuals to make reparation alongside states.[12] Indeed, the ILC did not exclude 'developments…in the field of individual civil responsibility'[13] or, more precisely, an international 'obligation to make reparation' alongside criminal responsibility.[14] Notably, the ICC has the power 'to make an order directly against a convicted person specifying appropriate reparations to, or in respect to, victims'.[15] As will be demonstrated, the provision of Article 75 RSICC affirms the existence of a secondary obligation of individuals to make reparation under international law.[16] Thus, it is hard to maintain that individuals are only subject to punishment under international law, whilst only states have an obligation to

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10 eg J Wolf, 'Individual Responsibility and Collective State Responsibility for International Crimes: Separate or Complementary Concepts under International Law?' in B Krzan (ed), *Prosecuting International Crimes: A Multidisciplinary Approach* (Brill 2016) 3, 5.

11 eg A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 636-638.

12 eg C Eustathiades, 'Les sujets du droit international et la responsabilité internationale: nouvelles tendances' (1953) 84 RdC 397, 458-460; FV García-Amador, 'Report on International Responsiblity' (1956) II YbILC 173, 188-189; more generally: H Lauterpacht, *International Law and Human Rights* (Praeger 1950) 41.

13 Commentary to Art 58 ARSIWA [2].

14 Commentary to Art 66 ARIO [3].

15 Art 75(2) RSICC.

16 eg ILA, 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)—International Law Association—International Law Committee

make reparation.[17] Rather, a dual internationally wrongful act may also entail dual consequences for states and individuals, that is to say, materially identical secondary international obligations.[18] For instance, both the state and the individual can incur the obligation to pay compensation for the damage caused to the victims by the same wrongful act; say, an act of aggression or genocide. The exact contours of this duality call for further examination. The duality of content also raises the question whether the responsibility of the state affects the individual's obligation to make reparation and *vice versa* in cases of dual internationally wrongful acts.[19]

The chapter argues that a dual internationally wrongful act may entail dual consequences. However, this duality of consequences should exert no influence on the application of the relevant secondary obligations. The chapter deals first with the implications of concurrency between the secondary obligations of the state and the criminal responsibility of the individual (Section II). Section III turns to an examination of the legal basis, nature, and content of the obligation of individuals to make reparation in the context of international criminal proceedings. It argues that this obligation constitutes a secondary international obligation of individuals, that is to say, a consequence

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for Victims of Armed Conflict—Prepared by Professor Reiner Hoffmann' (2010) 74 ILARC 295, 307-308[3].

17 eg, E Dwertmann, *The Reparations System of the International Criminal Court* (Nijhoff 2010) 22; A Bianchi, 'State Responsibility and Criminal Liability of Individuals' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 16, 19.

18 cf, similarly, P Webb, 'Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide' in L Van den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 117, 135-136.

19 C McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP 2012) 157; C Marxsen, 'Unpacking the International Law on Reparation for Victims of Armed Conflict' (2018) 78 ZaöRV 521, 538; cf, eg, P D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2015) 208, 209 and 212.

of their internationally wrongful act that mirrors the general obligation in state responsibility to make full reparation. Section IV focuses on the duality of the obligation to make reparation based on an examination of the notion of injury. This section shows that situations of dual internationally wrongful acts can give rise to dual obligations to make reparation for the same injury wholly or partly and proposes ways to address this overlap.

II. Concurrency of Secondary Obligations of States and Criminal Responsibility of Individuals under International Law

The implications of the concurrency between the obligations of states arising under the law of state responsibility and the criminal responsibility of individuals under international law is an issue that has drawn significant scholarly attention in the past.[20] On a practical level, a legally relevant link between state responsibility and individual criminal responsibility possibly arises because disciplinary or penal action against the individual authors of the conduct constituting the internationally wrongful conduct features in the law of state responsibility as a form of reparation. Investigation or prosecution of individuals could exhaust, according to certain commentators, state responsibility for dual internationally wrongful acts.[21] On a conceptual level, one view maintains that individual criminal responsibility under international law is a consequence of state responsibility.[22] This view is premised on the idea that the individual state organ normally eludes the purview of international law, because its acts are legally attributable to the

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20 cf, eg A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 636-638; Bonafè (n3) 221-238.

21 S Rosenne, 'State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility' (1998) 30 NYJILP 145, 164; Bonafè (n3) 237-238.

22 R Maison, *La responsabilité individuelle pour crime d'État en droit international public* (Bruylant 2004) 19-23.

state.[23] According to this view, international law may circumvent the separate personality of the state only in cases of 'serious violations of peremptory norms of general international law' (previously known as 'international crimes').[24] This section discusses these two points in turn.

It is hard to maintain that the prosecution of individuals would suffice on its own to exhaust the responsibility of the state for the dual internationally wrongful acts at issue.[25] The obligation to prosecute individual perpetrators of certain conduct is mainly a matter of specific primary state obligations.[26] These primary obligations are distinct from the primary international obligations of the state not to engage in acts of genocide, crimes against humanity, or grave breaches of international humanitarian law.[27] The violation of each of these obligations entails separately state responsibility including the obligation to make reparation for injury caused by each of these wrongful acts.[28] Along similar lines, it is highly unlikely that a criminal judgment against an individual perpetrator affords any measure of satisfaction by the responsible state to the injured state.[29] Of course, satisfaction consisting in a declaration of illegality constitutes

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23 eg J Barboza, 'International Criminal Law' (1999) 278 RdC 1, 78.

24 eg A Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crimes?' (2001) 22 NYIL 55, 77; R Maison, 'The "Transparency" of the State' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 717, 717-718; for nomenclature: Art 40(1) ARSIWA and Commentary to Art 40 ARSIWA [8] at fn651.

25 See n21.

26 eg Nollkaemper (n20) 636.

27 eg *Bosnia Genocide* (n5) 117[174]; see Chapter 2.III.

28 A Zimmermann and M Teichmann, 'State Responsibility for International Crimes' in A Nollkaemper and H Van Der Wilt (eds), *System Criminality in International Law* (CUP 2009) 298, 304-305.

29 *contra* Nollkaemper (n20) 638.

a common form of reparation and it is often the remedy of choice of courts and tribunals dealing with state responsibility.[30] Nonetheless, criminal courts and tribunals have no jurisdiction over states and, therefore, lack the power to declare the wrongfulness of state conduct.[31] At best, a criminal judgment constitutes a form of reparation made by the responsible individual or an instantiation of the state obligation to ensure protection of the human rights of the victims.[32]

In parallel, the exact position of disciplinary and penal action against individuals within the law of state responsibility is debatable. The ARSIWA provide that such a measure constitutes a modality of satisfaction.[33] However, international courts have been in the main reluctant to order such a form of reparation against a state.[34] What is more, the practice upon which the ILC relied lends itself to the interpretation that specific primary obligations to prosecute were at issue.[35] At any rate, considering the 'fundamental character of the…obligations breached' and the fact that they usually involve material damage, restitution or, if not possible, compensation is the most appropriate

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30 Art 37(2) ARSIWA.

31 eg ECCC, *Kaing Guek Eav ('Duch')* (Appeal Judgement) Case no 001/18-07-2007-ECCC/SC, Supreme Court Chamber (3 February 2012) [679].

32 See text accompanying n103; cf, eg, D Orentlicher, 'Report of the independent expert to update the Set of Principles to Combat Impunity—Addendum' (18 February 2005) E/CN.4/2005/102/Add.1, Principle 1.

33 Commentary to Art 37 ARSIWA [5].

34 eg E Wyler and A Papaux, 'Satisfaction' in Crawford and ors (n24) 623, 630; for relevant requests before the ICJ see: *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJ Rep 3, 6[8]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 183-184[24].

35 Crawford, Third Report (n2) 56[192]; C Dominicé, 'La satisfaction en droit des gens' in B Dutoit and E Griesel (eds), *Melanges Georges Perrin* (Payot 1984) 91, 105-108.

form of reparation.[36] At the same time, awards of compensation and satisfaction are not mutually exclusive.[37] Therefore, within the framework of ARSIWA, prosecution of individuals merely complements, rather than displaces, other forms of reparation in giving full effect to the obligation of full reparation.

Turning to the second point, there is little doubt that the same act can entail both individual criminal responsibility under international law and the secondary obligations associated with state responsibility for 'serious breaches of peremptory norms'.[38] However, this does not mean that the former is a consequence of the latter. First, as has been exhaustively argued earlier in this thesis, acts entailing individual criminal responsibility under international law do not necessarily qualify as 'serious breaches' for the purposes of state responsibility, even though they do often require an element of organisation.[39] Second, the ICJ has determined the existence of consequences similar to the ones arising from 'serious breaches' in the case of the breach of the obligation to 'respect the right of self-determination' which does not give rise as such to individual criminal responsibility.[40] This implies that individual criminal responsibility is not a necessary consequence of state responsibility for 'serious breaches'. Third, from a conceptual

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36 cf *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, 691[161].

37 eg *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 103-104[273] and 105[278].

38 eg Commentary to Art 66 ARIO [2].

39 See Chapter 3.III.1; cf, eg, C Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' (2002) 13 EJIL 1161, 1178.

40 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf> [180]; see Commentary to Art 41 ARSIWA [2]; cf D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 813, 836-837.

point of view, criminal responsibility is 'by definition of an individual nature'; a person cannot be held criminally responsible for another person's criminal act.[41] Hence, individual criminal responsibility cannot constitute a complement of state responsibility, still less a substitute for the lack of state 'criminal' responsibility.[42] Fourth, and less conspicuously, according to the ILC, obligations similar to the ones associated with 'serious breaches' may exist for persons or entities other than states (or international organisations).[43] The most notable case is the obligation not to recognise as lawful the situation arising from such serious breaches that also arises for the responsible entity, unlike the other obligations encompassed in Article 41 ARSIWA that exist for all states.[44] The ICC has explicitly found that the obligation 'not to recognise situations created by certain serious breaches of international law' constitutes 'a general principle of law'. [45] In the event, the TC found that the accused could not benefit from the fact certain children were unlawfully incorporated into the armed forces under his command to avoid responsibility for the war crime of sexual violence against these children.[46] This suggests that any relationship between individual criminal responsibility and state responsibility for 'serious breaches' stems at best from 'the character and importance

41 C Escobar Hernández, 'Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction' (29 May 2015) A/CN.4/686 [97].

42 cf, eg, for an early iteration of this view, FV García-Amador, 'Report on International Responsibility' (1956) II YbILC 173, 183[51] and 212-213[206]-[209].

43 Commentary to Art 42 ARIO [8].

44 cf, *mutatis mutandis*, Commentary to Art 41 ARSIWA [9]; Tams (n39) 1162.

45 *Ntaganda* (Second decision on the Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9) ICC-01/04-02/06-1707, TC-VI (4 January 2017) [53] citing Article 41(2) ARSIWA.

46 ibid.

of the…obligations involved'.[47] However, the state and the individual are each bound by these dual international obligations and are independently responsible for their violation.[48] These considerations lead to the conclusion that the commission of a 'serious breach' by a state can neither entail nor affect the criminal responsibility of the individual under international law.

To conclude, in cases of dual internationally wrongful acts, the secondary obligations of states and the criminal responsibility of individuals co-exist in a complementary way without affecting each other. At a conceptual level, the criminal responsibility of individuals under international law does not originate from the responsibility of the state. From a more practical viewpoint, whereas the state is instrumental in the implementation of individual responsibility, this is not the sole consequence of its own internationally wrongful act. As the ILC has opined, 'the state is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out'.[49]

III. The Obligation of Full Reparation in the Law of Individual Responsibility

The *locus classicus* of the consequences of an internationally wrongful act is the pronouncement of the PCIJ that 'it is a principle of international law…that any breach of an engagement involves an obligation to make reparation' and that 'reparation must, as far as possible, wipe out all the consequences of the illegal act'.[50] Undoubtedly, this

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47 *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 200[159].

48 eg E Wyler and L Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms' in Nollkaemper/Plakokefalos (n48) 284, 287-288.

49 Commentary to Art 58 ARSIWA [3].

50 *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Merits) [1928] Ser A No 17, 29 and 47.

obligation of full reparation is firmly entrenched in the law of state responsibility.[51] The purpose of this section is to examine the applicability of this fundamental principle in the context of individual responsibility. As will be shown, up until the adoption of the Rome Statute, individual responsibility for violations of international law had for all practical purposes an exclusively criminal character. By contrast, the Rome Statute is premised on the assumption that individual responsibility under the Statute is not exhausted in liability for punishment but includes the obligation of the responsible individual to make reparation. This obligation co-exists with, but remains distinct in several crucial aspects from, criminal responsibility under international law. Rather, this obligation functionally corresponds to, and partially derives from, the general principle of the law of state responsibility.

From a historical perspective, the practice preceding the adoption of the Rome Statute was largely agnostic as to the existence of an obligation of individuals to make reparation alongside individual criminal responsibility. None of the instruments prior to the Rome Statute discussed earlier in this thesis mentions specifically an obligation of individuals to make reparation or even a state obligation to impose such obligation on individuals under domestic law.[52] In addition, the issue of reparation was largely irrelevant for international criminal tribunals prior to the ICC, as they had an exclusively criminal mandate.[53] Their Statutes only provided for restitution of wrongfully acquired property or proceeds to their rightful owners as a penalty against a convicted

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[51] Art 31(1) ARSIWA; eg J Crawford, *State Responsibility—The General Part* (CUP 2013) 480-481.

[52] E-C Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 IRRC 529, 545; but see eg Art 14 CAT; Art 24 CED; Art 12(3) DACAH

[53] Art 1 ICTY Statute; Art 1 ICTR Statute; also, eg, Art 27 IMT Charter.

person without the tribunals ever ordering such measure.[54] At the same time, upon establishing the ICTY, the Security Council indicated that its work was 'without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.[55] The judges of the *ad hoc* tribunals expanded on this issue in the Rules of Procedure and Evidence. Specifically, following the conviction of the accused of a crime causing injury to a victim, that victim could bring an action in a national court or other competent authority to obtain compensation 'pursuant to the relevant national legislation'.[56] The tribunals' judgment was to be binding as to the findings of criminal responsibility.[57] The reference to national legislation seems to suggest that any obligation of the individual to compensate would arise under domestic law. Another possible interpretation is that domestic law provides only the procedural framework for the implementation of an international obligation directly anchored or implied in the rules of the *ad hoc* tribunals.[58] Whilst this issue could have practical implications—concerning, for example, the application of domestic provisions on exclusion or limitation of liability or on statutes of limitation—there is no reported practice with respect to these provisions.[59] In sum, this practice of the Security Council and the *ad hoc* tribunals is mainly declaratory or programmatic in

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54 Art 24(3) ICTY Statute; Art 23(3) ICTR Statute; also Rule 105 ICTY Statute; Rule 105 ICTR Statute; also Art 19 SCSL Statute; Art II(3) Allied Control Council Law No 10 (20 December 1945) XV TWC 23; I Bottigliero, *Redress for Victims of Crimes under International Law* (Springer 2004) 202-205.

55 UNSC Res 827 (25 May 1993) S/RES/827 OP [7].

56 Rule 106(B) ICTY RPE; Rule 106(B) ICTR RPE.

57 Rule 106(C) ICTY RPE; Rule 106(C) ICTR RPE.

58 C Tomuschat, *Human Rights—Between Idealism and Realism* (3rd edn OUP 2014) 410.

59 eg C Ferstmann and SP Rosenberg, 'Reparations in Dayton's Bosnia and Herzegovina' in C Ferstmann, M Goetz and A Stephens (eds), *Reparations for Victims of Genocide War Crimes and Crimes Against Humanity* (Nijhoff 2009) 483, 484.

character. At best, it evidences some recognition of the principle that internationally wrongful acts of individuals entail the obligation to make reparation alongside criminal responsibility.

In contrast to these antecedents, the ICC has a 'restorative' alongside its 'punitive' function.[60] The ICC can make an order directly against a convicted person specifying appropriate reparations to, or in respect to, victims including restitution, compensation, and rehabilitation.[61] The legal basis upon which a convicted individual is called upon to make reparation merits closer examination. According to the ICC AC, 'the obligation to repair harm arises from the individual criminal responsibility for the crimes which caused the harm and, accordingly, the person found to be criminally responsible for those crimes is the person to be held liable for reparations'.[62] The most reasonable interpretation of the AC's reference to 'individual criminal responsibility' is that it concerns the foundational principle that 'a person who commits a crime within the jurisdiction of the ICC shall be *individually* responsible *and* liable for punishment'.[63] An effective interpretation of this provision suggests that the commission of a crime under the jurisdiction of the ICC can entail other consequences in addition to liability for punishment.

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60 eg *Bemba Gombo* (Final decision on the reparation proceedings) ICC-01/05-01/08-3653, TC-III (3 August 2018) [3].

61 Art 75(2) RSICC. (NB. This study uses the terms 'reparations/reparation' interchangeably when referring to the Rome Statute. Commentators claiming that there is a substantive difference between the singular and the plural form overlook the formulation of the French ('réparation') and Spanish ('reparación') versions of the Statute: see, eg, Marxsen (n19) 522-523.)

62 *Lubanga (I)* (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012) ICC-01/04-01/06-3129, AC (3 March 2015) [99].

63 Art 25(2) RSICC (emphasis added).

These consequences are distinct from criminal responsibility. The ICC, as a criminal court, cannot order an individual to make reparation for injury caused by a crime under its jurisdiction without a prior conviction of that individual for that crime.[64] However, to say that responsibility to repair harm 'arises from criminal conviction'[65] conflates the substantive obligation with its procedural context.[66] Along similar lines, the suggestion that criminal responsibility entails the obligation to repair is bound to cause confusion.[67] That is because the Statute clearly distinguishes the reparation system from applicable penalties.[68] For instance, the gravity of the crime or the personal circumstances of the convicted person (eg indigence) are irrelevant for reparations in contrast to sentencing.[69] What is more, as the AC has affirmed, '[t]he goal of reparations is not to punish the person but…to repair the harm caused to others'.[70] Therefore, the secondary obligation to make reparation, much like liability for punishment, is a

64 eg *Ruto and Sang* (Decision on the Requests regarding Reparations) ICC-01/09-01/11-2038, TC-V(A) (1 July 2016) [7]; also *Lubanga (I)* ACJ-R (n62) [65].

65 *Katanga* (Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, AC (8 March 2018) [179].

66 eg F Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression' (2012) 10 JICJ 249, 253.

67 cf, eg, G Gaja, 'Eighth Report on Responsibility of International Organizations' (2011) II(1) YbILC 81, 101-102[118].

68 Rosenfeld (n66) 259-260; McCarthy, Reparations (n19) 77-79; cf Art 77 RSICC.

69 *Katanga* ACJ-R (n65) [184]; *Lubanga (I)* ACJ-R (n62) [99]-[101].

70 *Katanga* ACJ-R (n65) [184].

corollary of a crime *qua* internationally wrongful act.[71] However, it needs to be established separately and according to different rules from criminal responsibility.[72]

In particular, Article 75(1) obligates the ICC to establish principles relating to reparation, while it leaves it to its discretion to determine the scope of damage, loss or, injury in each case and to 'state the principles upon which it is acting'.[73] According to one interpretation, the powers of the ICC in the context of reparations are 'quasi-legislative' or 'an almost legislative function'.[74] This means that the ICC's mandate extends to laying down the applicable substantive law relating to reparations with binding effect for convicted individuals.[75] The legal implication of this view is that the obligation of individuals to make reparation only arises from the order of the ICC and does not exist in international law outside the context of such an order.[76] However, the text of the

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71 C Tomuschat, 'The Responsibility of Other Entities: Private Individuals' in Crawford and ors (n24) 317, 321.

72 C Stahn, 'Reparative Justice after the *Lubanga* Appeal Judgment' (2015) 13 JICJ 801, 809.

73 At 75(1) RSICC; eg D Shelton, *Remedies in International Human Rights Law* (3rd edn OUP 2015) 169.

74 McCarthy, Reparations (n19) 131; Dwertmann (n17) 50.

75 R Gallmetzer, 'The Trial Chamber's Discretionary Power to Devise the Proceedings before it and its Exercise in the Trial of *Thomas Lubanga Dyilo*' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 501, 512; also O Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?' (2019) 19 ICLR 505, 516-517 citing ICC-ASP, 'Reparations' (20 December 2011) ICC/ASP/10/Res.3 OP [1].

76 C McCarthy, 'The Rome Statute's Regime of Victim Redress: Challenges and Prospects' in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 1203, 1208.

Statute as a whole disfavours such an interpretation. Article 75 constitutes a jurisdictional rather than a substantive provision; it addresses the ICC, not individuals.[77] Both the states parties and the ICC have confirmed that the ICC establishes reparations principles on a case-by-case basis 'in the context of its judicial proceedings'.[78] The ICC, as a judicial organ, has formally no law-making function that extends beyond procedural or administrative matters that are 'necessary for its routine functioning'.[79] Therefore, the ICC's role is to determine the relevant principles in each case according to its applicable law.[80] This implies that the obligation of individuals to make reparation has its basis, at least in part, on rules external to the Statute.

Indeed, the Statute refers to the concept of reparations and to the forms that reparations can take that include restitution, compensation, and rehabilitation.[81] However, neither the Statute nor the Rules define these notions, rendering necessary the recourse to other sources of international law.[82] It is hard to maintain that an autonomous concept of reparations exists in the customary international law on individual

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77 P D'Argent, 'Le droit de la responsabilité complété? Examen des *Principes Fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*' (2005) 51 AFDI 27, 42.

78 ICC-ASP, 'Strengthening the International Criminal Court and the Assembly of States Parties' (24 November 2016) ICC-ASP/15/Res.5 Annex I [13]; also *Lubanga (I)* ACJ-R (n62) [55].

79 On the power of the ICC to adopt regulations, see, Art 52 RSICC; C Staker and D Jacobs, 'Article 52' in K Ambos and O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (3nd edn Hart 2016) 1352, 1356.

80 eg *Lubanga (I)* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06-2904, TC-I (7 August 2012) [182]-[183].

81 Art 75(1)-(2) RSICC.

82 eg L Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 17 IJHR 368, 376; Rosenfeld (n66) 254-255.

responsibility considering the paucity of practice before the Statute.[83] Equally, the development of reparation principles, which are specific to individual responsibility, by deriving them solely from domestic laws, is not apposite for the context of the ICC. For instance, a TC has found that the notion of joint and several responsibility cannot apply before the ICC, because the ICC lacks the power to adjudicate claims between convicted persons.[84] More generally, the ICC reparation system is neither civil nor criminal, but *sui generis* compared to domestic legal systems.[85] Thus, analogies with domestic law—whilst still possible in cases of gaps—are not always appropriate.

That said, the principle that a wrongful act entails the obligation to make reparation is established not only in domestic legal systems, but also in general international law.[86] In hindsight, the PCIJ articulated the obligation of full reparation as applicable to all breaches of international law without specifying to whom this obligation is owed or its beneficiaries.[87] Along similar lines, the PCIJ did not stipulate the subject of the obligation, the rule being 'a general conception of law'.[88] This implies that the obligation of full reparation originates from the international wrongfulness of the act, not the

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83 eg A-M de Brouwer and M Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance' in G Sluiter and ors, *International Criminal Procedure: Principles and Rules* (OUP 2013) 1298, 1366.

84 eg *Katanga* (Ordonnance de réparation en vertu de l'article 75 du Statut) ICC-01/04-01/07-3728, TC-II (24 March 2017) [263].

85 *Lubanga (II)* (Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, AC (18 July 2019) [248].

86 Art 21(1)(b)-(c) RSICC; see, eg, L Zegveld, 'Victims' Reparations Claims and International Criminal Courts' (2010) 8 JICJ 79, 85 and 101.

87 Crawford, Third Report (n2) 17[25]; cf, eg, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 184 (with respect to international organisations).

88 *Factory at Chorzów* (n50) 29.

nature of its obligor, obligee, or beneficiary.[89] Notably, the reference to 'principles relating to reparations' in Article 75(1) RSICC alludes to the UNGA resolutions on the issue,[90] which do not differentiate between the content of the state and individual obligation to make reparation.[91] The ICC's practice affirms that the international obligation of individuals to make reparation takes shape in a way that mirrors the secondary obligation of states to make reparation under general international law.

First, the ICC's practice affirms that the standard of reparation does not differ in the law of state and individual responsibility. Specifically, the ICC AC has enunciated that the content of the obligation of individuals to make reparation 'corresponds to the general principle of public international law' of full reparation.[92] It is possible to argue that the transposition of the principle of full reparation to individuals might be inappropriate for policy reasons.[93] For instance, given the extent of damage caused by the crimes under the jurisdiction of the ICC, reparation orders may exceed the financial

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89 cf, similarly, M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 637.

90 C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP 2012) 102.

91 BPRV [15]; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, annexed to UNGA Res 40/34 (29 November 1985) [8]-[13]; see, notably, *Bemba Gombo* (Joint Submission by the United Nations containing Observations on Reparations pursuant to Rule 103 of the Rules of Procedure and Evidence) ICC-01/05-01/08-3449 (18 October 2016) [19]-[20].

92 *Katanga* ACJ-R (n65) [178] citing, *inter alia*, *Factory at Chorzów* (n50) 47 (emphasis added).

93 On the formation of general principles of law within the 'international legal system' and the notion of 'transposition', see: M Vázquez-Bermúdez, 'First Report on General Principles of Law' (5 April 2019) A/CN.4/732 [169]-[174].

capacities of convicted persons or have crippling effects for their reintegration to society.[94] However, these considerations should not lead to the understatement of injury caused, but rather can be taken into account in determining the appropriate modalities in each case or in enforcing a reparation order, for instance, by payment in instalments.[95] Besides, comparable concerns about the fairness of the principle of full reparation have been expressed within the context of state responsibility without leading to the rejection of the principle.[96] In any case, the formulation of the principle in both the law of state responsibility and individual responsibility allows for some flexibility in pursuing the objective of wiping out the consequences of the wrongful act.[97] Therefore, the obligation of full reparation, which is firmly established in the law of state responsibility, can be transposed to the law of individual responsibility.[98]

Second, the Rome Statute expressly refers to forms of reparation that are applicable to states.[99] The ICC has defined these notions in terms identical to the UN Basic Principles on Reparation for Victims,[100] which find their basis on the general law of

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94 eg M Henzelin, V Keiskanen and G Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes' (2006) 17 CLF 317, 339-340.

95 *Al-Mahdi* (Reparations Order) ICC-01/12-01/15-236, TC-VIII (17 August 2017) [114]; McCarthy, Reparations (n19) 83.

96 Commentary to Art 34 ARSIWA [5].

97 *Factory at Chorzów* (n50) 47 ('as far as possible'); *Katanga* ACJ-R (n65) [178] ('where possible').

98 McCarthy, Reparations (n19) 84; see BPRV [18].

99 cf BPRV [19]-[21]; Art 34 ARSIWA; also Rosenfeld (n66) 257.

100 *Lubanga* (Order for Reparations) ICC-01/04-01/06-3129-AnxA, AC (3 March 2015) [35]-[43].

state responsibility in this respect.[101] In addition, although satisfaction does not feature explicitly in the Rome Statute, the Statute's enumeration is not exhaustive.[102] In fact, an apology made by the convicted person or judicial declarations of wrongfulness constitute forms of reparation ordered against convicted individuals mirroring the practice applicable to states.[103] Similarly, whilst ARSIWA does not mention rehabilitation, the provision of expert assistance and services to the individual victims of certain violations constitutes a specific instantiation of restitution or satisfaction.[104] Besides, compensable damages may include the costs of such rehabilitation.[105] To be sure, the application of these common principles to states and individuals might yield different results. Thus, for instance, 'juridical' restitution is a modality of reparation made commonly by states,[106] but is inappropriate for convicted persons as they lack the capacity to promulgate juridical acts *qua* individuals.[107] However, this means not that the obligation of full reparation has a different content in the law of state and individual responsibility or that 'forms of reparations owed by states differ from reparations that can be awarded

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101 eg T Van Boven, 'Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms—Final Report' (2 July 1993) E/CN.4/Sub.2/1993/8 [48]; more recently: T Van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Ferstmann and ors (n59) 19, 38.

102 *Lubanga* AC Order (n100) [34].

103 *Al-Mahdi* TC Order (n95) [71]; also ECCC, *Kaing Guek Eav ('Duch')* (Judgement) Case no 001/18-07-2007-ECCC/TC, TC (26 July 2010) [653] and fn1153; for state responsibility see: Art 37(2) ARSIWA.

104 D'Argent, Le droit (n77) 52; McCarthy, Reparations (n19) 170-174.

105 see, eg, *Corfu Channel (United Kingdom v Albania)* (Assessment of Compensation) [1949] ICJ Rep 244, 249 (with respect to medical costs); BPRV [20(e)].

106 Commentary to Art 35 ARSIWA [5].

107 McCarthy, Reparations (n19) 159.

against convicted persons'.[108] Rather, depending on the circumstances of the specific case, certain forms of reparation are more appropriate than other such forms in giving effect to the obligation of full reparation.[109]

In light of this analysis, it is possible to conclude that the consequences of individual responsibility under international law are not limited to liability for punishment. The law of individual responsibility provides in parallel for a secondary obligation of individuals to make reparation. This obligation does not appear to be a peculiarity of the Rome Statute. Importantly, the Statute applies also to acts of nationals of non-parties to the Statute.[110] In fact, it has so applied at the request of the Security Council and non-parties.[111] In addition, this obligation resonates with the practice of other criminal tribunals and of non-parties to the Statute.[112] In this light, it is possible to conclude that these developments represent the recognition of a broader principle of international responsibility in the context of individual responsibility.[113] Individuals as subjects of international obligations have the secondary obligation to make full reparation for damage, loss, or injury caused by their internationally wrongful act.[114] To this extent, the

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108 *Duch* ACJ (n31) [652].

109 Commentary to Art 34 ARSIWA [6]; Art 75(2) RSICC.

110 Arts 12(2)(a), 12(3), 13(b) RSICC.

111 Examples include the situations in Ukraine, Darfur (Sudan), and Libya.

112 eg Art 45 ACJHPR Statute (not yet in force); for 'hybrid' tribunals, see: Art 27 EAC Statute; Art 22(7)-(11) and 44(6) Law no 05/L-053 of 3 August 2015 on Specialist Chambers and Specialist Prosecutor's Office (Kosovo); for domestic practice, see: ICRC, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule151_sectionb>. Note that the reference of the Commentary to Art 66 ARIO [3] to the obligation to make reparation originates from a proposal of Iran, a non-party to RSICC: Gaja, Eighth Report (n67) 101-102[118] citing UNGA Sixth Committee, 'Summary Record of the 16th Meeting' (16 December 2009) A/C.6/64/SR.16 [51].

113 ILA Draft Declaration (n16) 307-308[3]; cf, similarly, K Ambos, *Treatise on International Criminal Law* Vol-III (OUP 2016) 195.

114 D Shelton, 'Reparations' (2015) MPEPIL [31].

obligation of individuals corresponds in form and substance to the secondary obligation of states to make reparation for their internationally wrongful acts. The next section turns to the implications of this duality of the obligation of full reparation in situations where both the state and the individual are responsible for the same conduct.

IV. Duality of the Obligation to Make Reparation and Duality of Responsiblity

1. Duality of the Obligation to Make Reparation for Injury Caused by the Dual Internationally Wrongful Act

The transposition of the obligation of full reparation in the law of individual responsibility has implications in cases of dual internationally wrongful acts. The responsible individual is obligated under international law to make reparation for any harm caused by the dual internationally wrongful act alongside the responsible state. In doctrinal terms, the duality of state and individual responsibility under international law constitutes a particular instance of 'shared' responsibility: both actors are responsible for a single harmful outcome.[115] As will be shown, the traditional configuration of state responsibility seems to disfavour in principle any kind of sharing of responsibility between responsible states and individuals, because in legal terms the beneficiaries and object of the respective secondary obligations are different. However, the gradual recognition of individuals as beneficiaries of international obligations of states under the law of state responsibility creates the potential of overlap to the extent that states and individuals may be called upon to make reparation for the same harm or injury.

To start, the counterparties of the obligation of reparation might appear self-evident. A person or entity who by a wrongful act injures the rights or legally protected interests of another has an obligation to make reparation for the injury caused and the

[115] A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MJIL 359, 366-368.

injured party has a correlative right to receive it.[116] However, in international law, the entity that holds rights and legally protected interests is typically one or more states. The entity however that actually sustains harm may be one or more individuals. Traditionally, the law of state responsibility bridges this apparent gap by way of a legal fiction.[117] The state as the sole right-holder under international law is entitled to invoke the responsibility of the wrongdoing state and claim reparation for any injury caused by the violation including for any harm suffered by its nationals.[118] In so doing, 'the state is in reality asserting its own rights'.[119] The harm caused to the individual 'can only afford a convenient scale for the calculation of the reparation due to the State'.[120] The state of nationality is in no way obligated to pursue or settle the claim or to pay any compensation received by the responsible state to the harmed individuals or use it for their benefit.[121] In this way, the traditional law of state responsibility construes the secondary obligation to make reparation as a bilateral relationship between the responsible state and the injured state. As a result, no question of sharing of responsibility between responsible states and individuals can arise because in legal terms 'the damage suffered by an individual is never identical in kind with that which will be suffered by a state'.[122] Thus, even if the harmed individual has a direct remedy against the responsible state,

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116 Zegveld (n86) 81.

117 A Pellet, 'The Second Death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection' (2008) 7 LPICT 33, 34.

118 eg D Anzilotti, 'La responsabilité internationale des états a raison des dommages soufferts par étrangers' (1906) 13(1) RGDIP 5, 5-6.

119 *Mavrommatis Palestine Concessions (Greece v United Kingdom)* [1924] PCIJ Ser A No 2, 11-12; also *Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 24.

120 *Factory at Chorzów* (n50) 28.

121 Commentary to Art 19 DADP [5].

122 *Factory at Chorzów* (n50) 28.

still more against the responsible individual, this has no impact upon the rights of the injured state.[123]

The extent to which this traditional configuration has changed is a matter of intense debate. From the outset, it is no longer in doubt that individuals can have rights under international law.[124] It is also becoming increasingly acceptable that rights arising from the international responsibility of the state 'may accrue directly' to individuals.[125] In this respect, the prohibitions of genocide, crimes against humanity, grave breaches of international humanitarian law, and aggression involve to a greater or lesser extent rights or at least protected interests of individuals alongside to those of the state. Notably, the fact that these acts are unlawful under all circumstances and without interposition of domestic law can lead to the inference that each individual enjoys a right or at least an interest not to be subjected to them.[126] In addition, genocide and crimes against humanity could be construed as grave violations of human rights entailing an obligation to make reparation to individuals.[127] Similarly, it is possible to argue that individuals have certain rights or legally protected interests under international humanitarian law

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123 ibid 27-28.

124 eg *Jadhav (India v Pakistan)* (Judgment) 2019 <https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf> [115].

125 Art 33(2) ARSIWA; Van Boven, Study (n101) [46]; cf *Wall AO* (n47) 198[152]-[153]; P D'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in P-M Dupuy and ors (eds), *Common Values in International Law—Essays in Honour of Christian Tomuschat* (Engel 2006) 463, 473; on the application of the principle of full reparation by human rights courts see eg *Papamichalopoulos and ors v Greece (Article 50)* [Chamber] App no 14556/89 (ECtHR, 31 October 1995) [36]; *Velásquez Rodríguez Case (Compensatory Damages)* Ser C No 7 (IACtHR, 21 July 1989) [25]-[26].

126 C Tomuschat, 'Individual Reparation Claims in Instances of Grave Human rights Violations: The Position under General International Law' in A Randelzhofer and C Tomuschat (eds), *State Responsibility and the Individual* (Kluwer 1999) 1, 11-13.

127 eg UNSG-UNSC, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' S/2005/60 (1 February 2005) [598]; HRC, 'Report of the OHCHR Investigation on Sri Lanka' (16 September 2015) A/HRC/30/CRP.2 [190].

entailing a substantive entitlement to reparation under international law.[128] The silence of Article 3 of Hague Convention IV and Article 91 AP-I as to the beneficiaries of the states' obligation to pay compensation for violations of international humanitarian law has been interpreted as affirming this view.[129] This is more so with respect to violations of the law of non-international armed conflict where there is by definition no state to claim reparations for violations of that law causing harm to individuals.[130] Moreover, the antecedent of the UN Compensation Commission suggests that reparation provided by a state may also accrue to individuals in cases of violations of the *ius ad bellum*.[131] However, the terminology of rights might be somewhat misleading.[132] Notably, in the absence of special rules, the implementation of the international responsibility of the

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128 BPRV [15]; ILA Draft Declaration (n16) 299; eg R-J Wilhelm, 'Le caractère des droits accordés à l'individu dans les Conventions de Genève' (1950) 32 IRRC 561-590; T Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 251-253; P Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011) 305, 318-322; cf, eg, *Al-Mahdi* TC Order (n95) [14]; *contra* eg R Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 27-34; K Parlett, *The Individual in the International Legal System* (CUP 2011) 225.

129 eg *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Dissenting Opinion of Judge Yusuf) [2012] ICJ Rep 291, 294[13]-[14]; F Kalshoven, 'State Responsibility for Warlike Acts of the Armed Force' (1991) 40 ICLQ 827, 833 and 850; C Greenwood, 'International Humanitarian Law (Laws of War)' in F Kalshoven (ed), *The Centennial of the First International Peace Conference* (Nijhoff 2000) 161, 250; BPRV, preamble [1].

130 L Hill-Cawthorne, 'Rights under International Humanitarian Law' (2018) 28 EJIL 1187, 1209-1211; eg Darfur Report (n127) [598]; Sri Lanka Report (n127) [1260].

131 eg A Fischer-Lescano, 'Subjektivierung völkerrechtlicher Sekundärregeln' (2007) 45 AdV 299, 330-331; A Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 EJIL 161, 170-171; see eg Governing Council of the UNCC, 'Criteria for Expedited Process of Urgent Claims' (2 August 1991) S/AC.26/1991/1; more generally: Y Dinstein, *War, Aggression and Self-Defence* (5th edn CUP 2011) 111 ('the obligation to indemnify the victims of aggression'); but see ILA Draft Declaration (n16) 301.

132 cf, *mutatis mutandis*, P D'Argent, 'Non-Renunciation of the Rights Provided by the Conventions' in P Gaeta, A Clapham and M Sassòli (ed), The 1949 Geneva Conventions: A Commentary (OUP 2015) 145, 150.

state for the violations under discussion remains primarily an inter-state affair.[133] What is more, whether the secondary obligations arising from state responsibility are applicable before domestic courts is in principle a matter of domestic law even in cases where individual rights under international law are involved.[134] In any case, as a matter of principle, 'the duty to make reparation is a rule that exists independently of those rules which concern the means by which it is to be effected'.[135]

Under the general rules of state responsibility, the 'right' arising from the obligation of reparation can 'accrue' to individuals in two ways when it comes to the specific wrongful acts under discussion.[136] First, the obligations under discussion belong to the category of *erga omnes* (or at least *erga omnes partes*) obligations.[137] They are owed to the international community as a whole (or to a group of states as such) and establish collective interests.[138] As a result, a state may invoke the responsibility of the wrongdoing state, even when the violation does not affect its nationals.[139] In such a

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133 P D'Argent, *Les réparations de guerre en droit international public* (Bryulant 2002) 580-581; Tomuschat, Individual (n126) 14.

134 M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401, 419; cf, eg, *Request for Interpretation of the Judgment of 31 March 2004 in the Case* Concerning Avena and Other Mexican Nationals (Mexico v United States of America) *(Mexico v United States of America)* (Judgment) [2009] ICJ Rep 3, 17[44]; as to the obligation to provide effective remedies with respect to crimes against humanity and violations of international humanitarian law: Art 12(3) DACAH; BPRV [12]-[14]; ILA, 'Resolution 1/2014—Reparation for Victims of Armed Conflict' (2014) 76 ILARC 17-18.

135 *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99, 140[94].

136 cf Art 33(2) ARSIWA.

137 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 32[33]; *Wall AO* (n47) 199[157]; *Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, 449[68].

138 Art 48(1) ARSIWA.

139 G Gaja, 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21 EJIL 11, 13.

case, a 'state other than the injured state' may claim performance of the obligation of reparation not for its own benefit but 'in the interest of the injured state or of the beneficiaries of the obligation breached.'[140] So, for instance, in the *Croatia Genocide* case, Serbia requested in its counter-claim that Croatia, *inter alia*, 'pay[ed] full compensation to the members of the Serb national and ethnic group from the Republic of Croatia'.[141] The Court declared the counter-claim admissible (even though it rejected it on the merits).[142] Presumably, had Serbia requested reparation for its own benefit, the counter-claim would have been inadmissible for lack of proof that the victims were its nationals.[143] In this situation, it is possible to argue that the obligation of reparation is owed directly to the individual victims or, more precisely, 'to several states or the international community as a whole' but the corresponding right (or benefit) accrues directly to the individual victims.[144]

Second, according to the ILC, even when the secondary obligation of reparation exists towards a state, reparation does not accrue necessarily or exclusively to that state.[145] In this respect, the ILC notes that when a state exercises diplomatic protection

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140 Art 48(2)(b) ARSIWA; see L-A Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1140; A Vermeer-Küntzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*' (2007) 56 ICLQ 553, 558.

141 *Croatia Genocide* (n3) 29 and 31[50].

142 ibid 59-60[123]

143 cf *Armed Activities (CO)* (n34) 276[333]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Separate Opinion of Judge Simma) [2005] ICJ Rep 334, 346[32].

144 Art 33(1) ARSIWA; cf, along similar lines, Gaeta (n128) 315; B Stern, 'The Obligation to Make Reparation' in Crawford and ors (n24) 563, 567 and 569; R Pisillo-Mazzeschi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility' (2004) 14 IYIL 39, 44-45.

145 Commentary to Art 33 ARSIWA [3].

over its nationals, it 'do[es] so in its own right or that of its national—or both'.[146] In principle, the injury suffered by the individual is not transposed to the state by way of a fiction.[147] Rather, reparation for the injury suffered by the individual should be made for the benefit of the injured individual.[148] However, one practical consideration is that it is quite common for states to accept settlements for less than the full value of the damage actually incurred by the individual.[149] Accordingly, with respect to victims of war crimes and crimes against humanity, the ICJ in an *obiter dictum* did not accept 'a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted'.[150] Another practical consideration is that states receiving funds from the responsible state do not always distribute them to individual victims.[151] In this respect, the ICJ in the same case has indicated that if the state uses these funds to rebuild its economy or infrastructure instead of distributing them to the individual

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146 Commentary to Art 1 DADP [5].

147 G Gaja, 'Quel préjudice pour un état qui exerce la protection diplomatique?' in D Alland and ors (eds), Unity and Diversity—Essays in Honour of Professor Pierre-Marie Dupuy (Brill 2014) 487, 489; see *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 324, 344[57].

148 Art 19(c) DADP; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) (Declaration of Judge Greenwood) [2012] ICJ Rep 391, 391[1]; also Pellet (n117) 56-57; cf G Gaja, 'Is a State Specially Affected When its Nationals' Human Rights are Infringed?' in LC Vohrah et al (eds), *Man's Inhumanity to Man—Essays in Honour of Antonio Cassese* (Kluwer 2003) 373, 379 (He suggests that to the extent that the state of nationality claims reparation for injuries of individuals caused by the violation of *erga omnes* obligations, it does so in the interest of the beneficiaries of the obligation breached, ie individual victims, under Art 48(2)(b) ARSIWA).

149 Commentary to Art 19 DADP [6]; see D'Argent, Les réparations (n133) 761-774.

150 *Jurisdictional Immunities* (n135) 141[94]; similarly, A Gattini, *Le riparazioni di guerra nel diritto internazionale* (CEDAM 2003) 668; S Furuya, 'Waiver or Limitation of Possible Reparation Claims of Victims' (2018) 78 ZaöRV 591, 594; but see Art 51 GC-I; Art 52 GC-II; Art 131 GC-III; Art 148 GC-IV.

151 Commentary to Art 19 DADP [6].

victims, these individuals do not have a claim against the state responsible for the internationally wrongful act.[152] Notably, the Court left open the possibility that individual victims may have a claim against the receiving state. In fact, the ECtHR has found in two cases involving multiple violations of human rights that the applicant government exercising diplomatic protection has an international obligation to distribute the amount awarded to individual victims.[153] In the case of the obligations discussed in this thesis, practice is somewhat conflicting. Practical considerations, like the number of individual victims or institutional capacity, have also arguably played a role.[154] Therefore, on balance, it is not possible to confirm that the entitlement to reparation accrues to individuals under the general rules of state responsibility in all cases. Rather, the obligation of the responsible state exists towards and accrues directly to the injured state, even if the latter state must or should transfer the entirety or parts of the reparation received to individual victims.

The law of individual responsibility has the exact opposite starting point. The Rome Statute provides direct access to victims of violations of dual obligations in order to seek reparation against convicted individuals before the ICC. The ICC has no power to order a state to make reparation to the victims of a crime under ICC jurisdiction

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152 *Jurisdictional Immunities* (n135) 143-144[102].

153 *Cyprus v Turkey* (Just Satisfaction) [GC] App no 25781/94 (ECtHR, 12 May 2014) [58] citing *Diallo* (Compensation) (n147) 344[57]; *Georgia v Russia* (Just Satisfaction) [GC] App no 13255/07 (ECtHR, 31 January 2019) [77]-[79].

154 See Governing Council of the UNCC, 'Distribution of Payments and Transparency' (24 March 1994) S/AC.26/Dec.18; but *contrast Diallo* (Compensation) (n147) 344[57] ('the sum awarded to Guinea…is intended to provide reparation for [Mr. Diallo]'s injury') with *Armed Activities* (CO) (n34) 257[259] ('this injury was caused to the DRC by Uganda').

committed by that state's individual organs.[155] The ICC Rules of Procedure and Evidence define victims in the first place as natural persons who have suffered harm as a result of a crime under ICC jurisdiction.[156] The definition of victims includes 'organisations or institutions' when such a crime causes 'direct harm to any of their property which is dedicated to…humanitarian purposes'.[157] Under this provision, it is possible for 'government departments' to participate in reparation proceedings concerning, for example, damage to hospitals or other civilian objects, cultural property, or the environment.[158] In theory, the formulation of Article 75 RSICC is open to the interpretation that a state or international organisation could claim reparation 'in respect of' victims in the exercise of diplomatic or functional protection.[159] Nonetheless, the drafting history of the Statute suggests that the purpose of the phrase was to account for victims' families and successors.[160] Accordingly, a TC declared inadmissible Nigeria's request for reparation with respect to killed members of its army on the grounds that, *inter alia*, loss of life cannot qualify as loss of property of an organisation.[161] This finding plausibly extends to all kinds of injury suffered personally by individuals, even if acting on

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155 *Lubanga (I)* ACJ-R (n62) [105]; ICC-ASP, 'Resolution on Victims and Affected Communities, Reparations, and Trust Fund for Victims' (17 December 2014) ICC-ASP/13/Res.4 [9]; C Muttukumaru, 'Reparation to Victims' in RS Lee (ed), *The International Criminal Court—The Making of the Rome Statute* (Kluwer 1999) 262, 267.

156 Rule 85(a) ICC RPE; eg *Katanga* TC Order (n84) [36]-[37].

157 Rule 85(b) ICC RPE; eg *Al-Mahdi* TC Order (n95) [43].

158 S Fernández de Gurmendi, 'Definition of Victims and General Principles' in RS Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 427, 432-433.

159 cf Rosenfeld (n66) 263 (tentatively).

160 cf PCNICC, 'Preliminary Draft Consolidated Text—Article 66 Reparation of Victims' (25 March 1998) A/AC.249/1998/WG.4/CRP.5 at fn1.

161 *Banda and Jerbo* (Decision on Victims' Participation at the Hearing on the Confirmation of Charges) ICC-02/05-03/09-89, PTC-I (29 October 2010) [46].

behalf of a state.[162] Namely, states can seek reparation for injury caused to their property *qua* victim organisations or institutions, but not in lieu of individuals or private legal persons having their nationality. Therefore, the determination of the victim of the crime—and thus the beneficiary of reparation—hinges in the first place on the establishment of 'damage, loss and injury' or 'harm' caused by the specific crime of the convicted individual to a natural person or organisation.[163]

At the same time, the fact that individual victims are the ultimate beneficiaries of the obligation of reparation in most cases does not necessarily mean that such reparations will accrue directly and individually to them. Notably, the ICC is not bound to make an award directly to victims, but only to specify appropriate reparation to, or in respect of, victims.[164] Crucially, the ICC is free to order collective reparations through the Trust Fund for Victims ('the Fund') either at the exclusion of or in combination with individual awards.[165] This is so especially 'where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate'.[166] Such awards can consist of socio-economic or other programmes or the construction of communal infrastructure through the Fund or an implementing organisation chosen by the Chambers or the Fund.[167] In concrete terms, according to the ICC AC,

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162 E Pobjie, 'Victims of Crime of Aggression' in C Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017) 816, 850.

163 eg *Katanga* TC Order (n84) [36]-[37].

164 Art 75(1) and (2) RSICC; Dwertmann (n17) 112.

165 Rule 97(1) ICC RPE; *Lubanga* AC Order (n100) [33].

166 Rule 98(2) ICC RPE.

167 L Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 IJHR 1204, 1208; cf *Lubanga* (Information Regarding Collective Reparations) ICC-01/04-01/06-3273, TFV (13 February 2017).

'there is [no] internationally recognized right to a consideration of individual applications for reparations, in cases where the applicable law provides for both individual and collective awards for reparations and a collective award is made'.[168] Rather, the persons to which reparation accrues are the victims on an individual or collective basis, but also possibly an intergovernmental, international or national organisation approved by the Fund including potentially state agencies.[169]

The analysis so far has shown that who can claim reparation, whom the obligation of reparation is owed to, who will receive reparation in the first place, and whom reparation ought to benefit, are distinct and context-specific issues in both regimes. The formulation of the principle of reparation as an obligation instead of a right aims to mask precisely these complexities.[170] In the final analysis, the scope and beneficiaries of the obligation of reparation is contingent essentially upon the allocation to an internationally wrongful act of 'injury' or 'harm' in both regimes.[171] In the law of state responsibility, the notion of injury includes any material and moral damage caused by the internationally wrongful act.[172] Material damage is defined as damage to property or other interests of the state and its nationals that is financially assessable.[173] Moral or non-material damage covers 'harm other than material damage which is suffered by an

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168 *Lubanga (I)* ACJ-R (n62) [155].

169 Pobjie (n162) 850; Dwertmann (n17) 124-127; Rule 98(4) ICC RPE; ICC-ASP, 'Regulations of the Trust Fund for Victims' (3 December 2005) ICC-ASP/4/Res.3 [73]-[75]; cf *Al-Mahdi* TC Order (n95) [67].

170 Crawford, Third Report (n2) [25]; *contrast* Art 31(1) ARSIWA with Art 40(1), ILC, 'Report of the International Law Commission on the work of its thirty-seventh session' (1985) II(2) YbILC 1, 25-27.

171 Art 31(1) ARSIWA; Art 75 RSICC.

172 Art 31(2) ARSIWA.

173 Commentary to Art 31 ARSIWA [5].

injured entity or individual' and 'is cognizable under international law'.[174] This includes, for instance, individual pain and suffering, loss of loved ones, and loss of reputation.[175] Along similar lines, in the law of individual responsibility, the notions of 'damage, loss and injury' include any physical, economic, psychological, and moral harm caused to natural persons and direct harm to the property of states and other organisations dedicated for humanitarian purposes.[176]

At the same time, both regimes seem to be hesitant towards the notion of juridical injury that focuses on the entity against whom the wrongful act or crime is committed.[177] Broadly construed, this notion is unhelpful for the purposes of reparation with respect to genocide, crimes against humanity, war crimes, and aggression which are obligations *erga omnes* and thus committed against the international community as a whole.[178] Narrowly construed, this notion conflates the internationally wrongful act with the fact that injury or harm needs to be cognisable under international law.[179] For instance, the fact that aggression constitutes a grave violation of the sovereignty, territorial integrity, or political independence of a state has never precluded the award of reparation for, say, consequential loss of life, property, or displacement of the nationals

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174 *Diallo* (Compensation) (n147) 333[18].

175 ibid 334[21]; Commentary to Art 31 ARSIWA [5].

176 *Al-Mahdi* TC Order (n95) [43]; *Katanga* TC Order (n84) [74]; *Lubanga* AC Order (n100) [10].

177 On this concept in the law of state responsibility cf: Stern, Le concept (n6); in the law of individual responsibility cf: T Dannenbaum, 'The Criminalization of Aggression and Soldiers' Rights' (2018) 29 EJIL 859, 875.

178 cf Commentary to Art 31 ARSIWA [5] and fn454; Zegveld (n86) 85.

179 cf, *mutatis mutandis*, ILA Draft Declaration (n16) 304; on this aspect of the notion of injury see: D'Argent, Les réparations (n133) 564; B Bollecker-Stern, *La préjudice dans la théorie de la responsabilité internationale* (Pedone 1973) 382; *Duch* ACJ (n31) [416].

of that state as interests protected under international law.[180] Therefore, the scope of the obligation of reparation does not so much depend on the identification of the subject of a correlative right breached by the internationally wrongful act, but rather on the determination of injury and causation.

Indeed, the law of both state and individual responsibility rely on the same two-pronged enquiry for the determination of the scope of reparation.[181] First, it needs to be established whether the internationally wrongful act is a cause in fact, that is a 'but/for' condition, of the specific damage, loss, or injury claimed.[182] Second, the internationally wrongful act must have a legally sufficient causal nexus with the damage, loss, or injury claimed.[183] In principle, the ICC has indicated that the causal link required is to be determined in light of the specificities of the case.[184] However, it uses so far invariably the standard of 'proximate cause' for the assessment of which it takes into consideration whether it was reasonably foreseeable that the wrongful act would cause the harm claimed.[185] The same test has been formulated in identical terms by the Eritrea-Ethiopia Claims Commission which dealt with the question of state responsibility for violations

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180 cf, eg Gattini, Le riparazioni (n150) 531-536; D'Argent, Les réparations (n133) 619-621; also SD Murphy, W Kidane and TR Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (OUP 2013) 137-144.

181 see, eg, Commentary to Art 31 ARSIWA [10]; I Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471, 475; D Bederman, 'Contributory Fault and State Responsibility' (1990) 30 VJIL 335, 349 (on the law of state responsibility); *Lubanga (I)* TCJ-R (n80) [250] (on the law of individual responsibility).

182 eg *Lubanga* AC Order (n100) [59]; *Bosnia Genocide* (n5) 233-234[462].

183 eg EECC, *Final Award—Eritrea's Damages Claims* [2009] XXVI RIAA 512, 529[39]; *Lubanga (I)* TCJ-R (n80) [250].

184 *Lubanga (I)* ACJ-R (n62) [125].

185 *Lubanga* AC Order (n100) [59]; *Katanga* TC Order (n84) [162]; *Al-Mahdi* TC Order (n95) [44].

of *jus ad bellum* and *jus in bello*.[186] This identity of standards is not coincidental. In the law of state responsibility, the ILC also abstained from adopting a particular formula in the ARSIWA indicating that this requirement 'is not necessarily the same in relation to every breach of an international obligation'.[187] Therefore, the test of causation tends to converge in the two regimes, as it ought to, because it relates to breaches of the same obligations in material terms. In this light, the allocation to an internationally wrongful act of 'injury' or 'damage, loss, or injury' is a common operation in the law of state and individual responsibility based on common standards. As a result, the object of reparation in the law of state and individual responsibility can be the same in cases of dual internationally wrongful acts.

To recap, this section has shown that that the traditional position of international law militates against any notion of shared responsibility between states and individuals. The two forms of responsibility arise towards different injured parties and with respect to different injury in legal terms. However, the recognition of individual rights or interests under international law alongside those of the state has put the traditional fiction of the transposition of the injury of individuals to the state under pressure. At the very least, individuals can be considered beneficiaries of the secondary obligation of states and individuals to make reparation under international law whether directly or indirectly, on an individual or a collective basis, in lieu or alongside the state. A synthesis of the analysis on state and individual responsibility reveals a significant area of overlap between the secondary obligation of states and individuals to make reparation in cases of dual internationally wrongful acts. Both the responsible state and the responsible

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186 EECC, *Final Award—Eritrea's Damages* Claims (n183) 529[39]; EECC, *Final Award—Ethiopia's Damages Claims* [2009] XXVI RIAA 639, 656[39].

187 Commentary to Art 31 ARSIWA [10].

individual may be called upon to make reparation for material, physical, psychological, and moral harm of natural persons and direct harm to the property of states and other organisations dedicated for humanitarian purposes caused by the dual internationally wrongful act. The next section examines whether and how this overlap can affect the respective obligations to make reparation in cases of dual internationally wrongful acts.

2. Duality of State and Individual Responsibility as Shared Responsibility

This section examines whether the overlap of state and individual responsibility can actually lead to the sharing or the distribution of consequences amongst the responsible state and the responsible individual in cases of dual internationally wrongful acts.[188] As will be shown, the existence of parallel obligations to make reparation with respect to the same injury has no bearing on the scope of the responsible state's or individual's obligation to make reparation. However, the performance of the obligation to make reparation by one party could have implications for its performance by the other at least as far as compensation is concerned.

To start, the principle of full reparation entails that the responsible state or individual must make reparation for the entirety of the injury caused by the internationally wrongful act. In the law of state responsibility, the necessary implication of this principle is that 'responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.'[189] Similarly, in the law of individual responsibility, it is irrelevant for the convicted person's liability whether other individuals have also contributed to the harm resulting from the crimes for which the person has

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188 A Nollkaemper and I Plakokefalos, 'Introduction' in Nollkaemper/Plakokefalos (n19) 1, 6-7.

189 Commentary to Art 47 ARISWA [1].

been convicted.[190] On account of the duality of the obligation of full reparation, these implications manifest themselves also in the cases of dual internationally wrongful acts. Thus, the fact that the individual is liable to make reparation does not exonerate the state of its responsibility to make reparation for the injury caused by the same act.[191] Conversely, the fact that the state is obligated to make reparation does not affect the obligation of the individual to make reparation for the harm caused by the same act.[192] In this sense, the responsibility of the state and the individual in cases of dual internationally wrongful acts can be characterised as 'separate' or 'joint responsibility' in the terminology of the ILC.[193] Both the state and the individual are responsible in full for the injury caused by the dual internationally wrongful act.

The further question is whether the performance of the obligation to make full reparation by one actor can affect its performance by the other. On the one hand, the obligation of reparation in the form of restitution and satisfaction can be performed independently in multiple responsibility situtations without the risk of duplication.[194] In the case of restitution, the responsible state and the responsible individual must take each the course of action that is not materially impossible or disproportionately burdensome to them to restore the original situation.[195] In some instances, the state would be

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190 *Katanga* ACJ-R (n65) [178].

191 cf, eg, *Katanga* TC Order (n84) [323]; *Al-Mahdi* TC Order (n95) [36].

192 cf, eg, *Lubanga* AC Order (n100) [9].

193 Commentary to Art 47 ARSIWA [6]; Commentary to Art 48 ARIO [1].

194 JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 YJIL 225, 241; S Besson, 'La pluralité d'Etats responsables—Vers une solidarité internationale?' (2007) 17 SZIER/RSDIE 13, 23; A Orakhelashvili, 'Division of Reparation between Responsible Entities' in Crawford and ors (n24) 647, 657.

195 McCarthy, Reparations (n19) 159.

in the position to provide restitution (eg juridical restitution, return of occupied territory), whereas in others it would be the individual (eg return of stolen property).[196] Similarly, parallel measures of satisfaction cannot in principle lead to duplication notwithstanding the fact that they might be pecuniary in form. For instance, typical forms of satisfaction in the law of state responsibility include pecuniary awards designed to express apology.[197] In the law of individual responsibility, forms of reparation that are meant to address communal harm and provide a collective benefit or individualised pecuniary awards of a symbolic character qualify most likely as modalities of satisfaction.[198] Still, in principle, satisfaction is the remedy for not financially assessable injuries arising, *inter alia*, 'from the very fact of the breach of the obligation'.[199] This kind of injury is distinct for each responsible person or entity notwithstanding the duality of the internationally wrongful act.[200]

On the other hand, the performance of the obligation of full reparation in the form of compensation is intrinsically 'limited by the damage suffered'.[201] In cases of dual internationally wrongful acts, the plurality of responsible actors is compounded by the plurality of injured entities. Whereas this complexity is latent with respect to restitution and satisfaction, the determination of compensation brings these issues to the

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196 cf text accompanying n107.

197 I Brownlie, *System of the Law of Nations: State Responsibility—Part I* (OUP 1983) 199; Commentary to Art 37 ARSIWA [5]; see, eg, *Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and which related to related to Rainbow Warrior Affair (New Zealand/France)* [1990] XX RIAA 215, 274[127]-[128].

198 McCarthy, Reparations (n19) 170-174; cf, eg, *Katanga* TC Order (n84) [299].

199 Commentary to Art 37 ARSIWA [3].

200 McCarthy (n19) 157; cf, *mutatis mutandis*, D'Argent, Reparation (n19) 240-241.

201 Commentary to Art 47 ARSIWA [9].

fore. Where multiple actors are responsible for the same internationally wrongful act, 'the state, person, or entity' injured by the violation cannot recover by way of compensation more than the damage suffered.[202] What is more, when multiple persons or entities are entitled to claim reparation, the responsible person or entity 'can[not] be compelled to pay the reparation due in respect of the damage twice over.'[203]

These considerations seem to apply also with respect to the dual responsibility of the state and the individual through whom the state acts, at least in principle. According to the Rome Statute, awards of reparation to the victims by national or international bodies do not affect the rights of victims to receive reparations under the Rome Statute and *vice versa*.[204] However, the ICC has consistently stressed that the Chambers or the Fund are able to take into account other awards or benefits received by the victims from other bodies 'in order to guarantee that reparations are not applied unfairly or in a discriminatory manner'.[205] In this context, the Chambers or the Fund can take into account, where practicable, significant payments made to the victims to avoid the risk of duplication or double recovery.[206] In a similar vein, the fact that an award was made to individual victims against a responsible individual cannot affect the right of the injured state to receive reparation from the responsible state.[207] In this context, there is

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202 cf Crawford, Third Report (n2) 77[284]; similarly, for the overlap of state and individual responsibility, McCarthy (n19) 157.

203 *Reparations AO* (n87) 186; Commentary to Art 46 ARSIWA [4]; Commentary to Art 47 ARIO [2].

204 Art 75(6) RSICC; *Lubanga* AC Order (n100) [9]; *Lubanga (I)* TCJ-R (n80) [201].

205 *Lubanga* AC Order (n100) [9]; *Lubanga (I)* TCJ-R (n80) [201].

206 *Katanga* TC Order (n84) [319]-[320].

207 cf, *mutatis mutandis* Art 16 DADP; Art 46 ARSIWA.

no logical or legal inconsistency in taking into account the payment of compensation by the responsible individual to the victims in order to avoid double recovery against the responsible state to the extent that compensation relates to injury suffered by the victims. Notably, the principle of double recovery is only concerned with the actual recovery of more than the amount of the damage and requires actual payment in full.[208] In other words, it belongs to the (somewhat underdeveloped) 'general rules regarding payment'.[209] A necessary caveat is that the obligation of reparation of the state and the individual only partially overlap and there is a multitude of ways in which the obligation of reparation can be performed. As a result, the ways to avoid double recovery depend on a case-by-case assessment.[210] What is more, the internal relationship between the responsible state and the responsible individual remains an issue of domestic law.[211]

What emerges from this analysis is that the duality of the internationally wrongful act has in principle no bearing on the scope of the respective obligations to make reparation of the responsible state and the responsible individual. Complications arise conceivably in the case of compensation. In principle, the injured party cannot recover by way of compensation more than the damage it has suffered. Thus, the preclusion of double recovery appears also as a dual principle of international responsibility. As a result, in cases of dual internationally wrongful acts, the performance of the obligation of full reparation by an individual can have interstitial effects on the determination or

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208 Commentary to Art 47 ARSIWA [9].

209 *Factory at Chorzów* (n50) 61.

210 cf, eg, *Venezuela Holdings B.V. and ors v Bolivarian Republic of Venezuela* (Award) ICSID Case No ARB/07/27 (9 October 2014) [378].

211 BPRV [15].

the modalities of compensation due by the state and *vice versa*. In this limited sense, it is even possible to argue that the duality of state and individual responsibility can lead in fact to the sharing of consequences amongst the responsible actors.

V. Interim Conclusion

This chapter has interrogated the strict separation 'between the spheres of state responsibility and individual responsibility under international law' on account of the different content of responsibility.[212] It has shown that the two regimes of responsibility have indeed certain differences as far as the criminal character of the responsibility of the individual is concerned. To this extent, the chapter has shown that the criminal responsibility of the individual is not a consequence of the responsibility of the state. What is more, whereas state obligations to implement the responsibility of the individual exist under specific or even general rules of international law, this does not exhaust the content of state responsibility in the case of dual internationally wrongful acts. Rather, to this extent, the secondary obligations of the state and those of the individual have a different content and co-exist without affecting each other.

The transposition of the obligation of full reparation from the law of state responsibility into the law of individual responsibility as a general principle of public international law upsets this configuration. The duality of the internationally wrongful act can lead to dual consequences, this is, materially identical secondary obligations of states and individuals. Still, it is possible to maintain the strict separation of state and individual responsibility into distinct spheres. Whereas in empirical terms the state and the individual are responsible with respect to the same harmful outcome, the traditional fiction of state responsibility entails that the injury of the state is never identical with

[212] eg Tams (n39) 1173.

that suffered by an individual in legal terms. In this context, the true variable is the gradual recognition of individual rights and interests under international law that brings this traditional understanding under pressure. On account of this development, the objects of the secondary obligations of states and individuals to make reparation can be in whole or in part the same. This overlap does not affect in principle the scope of the responsibility of the state or the individual to make reparation for injury caused by the dual internationally wrongful act. However, the performance of the obligation to make reparation by the responsible individual can have interstitial effects for its performance by the responsible state in cases of dual internationally wrongful acts and *vice versa*.

Chapter 7. Conclusion

This thesis has demonstrated how the duality of international responsibility of states and individuals arises and what it entails. The duality of state and individual responsibility is not merely a coincidence between the factual basis of claims against states and that of prosecutions against individuals. Rather, it arises from the operation of rules of international law. In particular, certain rules of international law impose dual obligations. That is to say, they address both states and individuals. The prohibitions of genocide, grave breaches of international humanitarian law, crimes against humanity, and aggression constitute the most representative examples of such obligations. From a legal policy perspective, the duality of obligations is a necessary implication of states' intention to adopt rules imposing international obligations on individuals, at least in part, because of their capacity as state organs. In this context, it would amount to a legal, if not logical, absurdity to allow the state to engage in conduct which is prohibited under all circumstances for the natural persons comprising its apparatus. From a formal perspective, this duality is established in the same instrument or through the techniques of verbatim incorporation or incorporation by reference to the formal source of the rule (*renvoi*). As a result, even when these obligations arise from different formal sources, the content of the international obligation of the individual is necessarily co-determined by the corresponding obligation of the state.

The thesis has further tested this proposition against the interpretation and application of specific features of these obligations, namely, mental elements, composite or complex character, and prohibitions of aid and assistance. The analysis shows a clear tendency towards the gradual convergence of the applicable standards in cases of overlap. Any attempt to disassociate the state and the individual by and through which the

state acts would lead to incompatibilities. This is because, for the purposes of state responsibility, the notions of the state and its individual organ are virtually indivisible by virtue of the foundational principle of the unity of the state. At the same time, the duality of obligations is meant to ensure that international obligations of individuals do not exceed those of states in material terms. This is mandated by the very construction of the provisions that stipulate the obligations of individuals discussed in this thesis.

This duality of obligations entails that the same conduct is attributable twice for the purposes of international responsibility, namely, to the state and to the individual. The analysis has shown that the foundational principle of independent responsibility underlies the establishment of both state and individual responsibility. At the same time, attribution of conduct in the respective regimes is a normative operation based partly on comparable standards. In this respect, rules of attribution consisting of the factual relationship between natural persons tend to coalesce into dual principles of attribution of conduct. This thesis has argued that the notions of instigation, 'full' or 'complete' control, and 'effective' control represent materially identical tests that determine both the attribution of conduct of individuals to the state and to other individuals. To this extent, they constitute dual principles of attribution of conduct. At the same time, the composite structure of the underlying obligation and the resulting unity of the wrongful act occasions the mutual attribution of conduct in the law of state responsibility in a manner analogous to the law of individual responsibility. By operation of these processes, the state and the individual whose acts are attributable to the state can incur international responsibility for the very same conduct—a dual internationally wrongful act.

Another insight gained by this inquiry is that a strict separation of state and individual responsibility on account of their consequences can no longer be maintained.

It is true that individual responsibility has still a predominant criminal component, whereas states are not subject to criminal sanctions. However, the transposition of the principle of full reparation attests to the permeability between the law of state and individual responsibility. As a result, dual internationally wrongful acts may also entail dual consequences. The obligation of individuals to make reparations co-exists and in fact overlaps with the secondary obligation of states to make reparation in cases of dual internationally wrongful acts. Even in this context, duality of responsibility is equivalent to the foundational principle of independent responsibility. In substantive terms, this principle states that each actor is separately responsible for conduct attributable to it and its responsibility is not reduced or diminished by the fact that another actor is also responsible under international law.[1]

The crux of the matter is that the development of the law of individual responsibility does not—and ought not—take place in contrast to or in separation from the law of state responsibility. What this thesis has shown is that seemingly disparate principles of state and individual responsibility tend to converge into dual principles of international responsibility in cases of overlap. In this respect, the broader normative claim that can be drawn from this study on the duality of state and individual responsibility is that as far as the law of responsibility is concerned

> [i]nternational law is not a series of fragmented specialist and self-contained regimes bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.[2]

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1 Commentary to Art 47 ARSIWA [1].

2 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) (Declaration of Judge Greenwood) [2012] ICJ Rep 391, 394[8].

The duality of the rules concerning attribution of conduct and of the principles governing reparation are cases in point. As international obligations address more and diverse actors, overarching, or even interstitial, principles of international responsibility can emerge.[3] In this sense, the dualities recorded in this thesis are aspects of an emerging common law of international responsibility.

[3] M Chinen, Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility (2014) 25 EJIL 703, 729-730; K Boon, 'Are Control Test Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 14 MelJIL 330, 376-377.

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