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## Europe and extraterritorial asylum

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## 3 | The responsible actor

### 3.1 OUTLINE OF THE CHAPTER

Under the assumption that the mere setting of conditions of entry and residence and the controlling of the territorial border are insufficiently effective in achieving the political aims of immigration policies, European states increasingly rely on other states and actors in controlling migration movements towards their territories. The increased involvement of European states in the control of migration outside Europe has not only been described as a process of 'extraterritorialisation' or 'externalisation', but also in terms of 'privatisation', 'cooperation' and 'outsourcing'. This process may involve the delegation of powers to private parties, such as carriers, the transfer of powers to another state, or the setting up of a variety of cooperation arrangements in the sphere of migration control. The central purpose of this chapter is to lay down a conceptual legal framework for determining the circumstances under which states can be held internationally responsible for extraterritorial violations of human rights, which have, partly or in whole, been committed in conjunction with other actors.

The chapter explores three distinct but complementary mechanisms for arriving at the international responsibility of a state for violations of international law involving a plurality of actors. The first is the notion of attribution, which bridges acts of natural persons to the state and thereby serves to identify what conduct should be regarded as an 'act of state'. The rules on attribution form part of the so-called secondary rules of international law, as laid down in the International Law Commission's Articles on State Responsibility.<sup>1</sup> The second concept to be discussed, also laid down in the ILC Articles on State Responsibility, is that of derived responsibility, which holds that a state can be held separately but dependently internationally responsible on account of its involvement in the wrongful conduct of another state. A third avenue for allocating international responsibility is the doctrine of positive obligations, which articulates, amongst other things, that a state can incur a

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1 Draft Articles on Responsibility of States for Internationally Wrongful Acts, text adopted by the International Law Commission at its fifty-third session in 2001 (A/56/10), annexed to UN General Assembly Resolution 56/83 of 12 December 2001, in which the Assembly took note of the Articles and recommended them to the attention of Governments (hereafter 'ILC Articles' or 'ILC Articles on State Responsibility').

duty to engage in preventive or protective conduct in respect of activity of another actor. Positive obligations are commonly perceived as not forming part of the law on state responsibility, but as duties inherent to a state's primary, or substantive, international obligations. The chapter will indicate however, that the doctrine of positive obligations constitutes a necessary complement to the secondary rules of state responsibility, as it signifies that, even in the absence of a possibility of attributing conduct to a particular state or of establishing its derivative responsibility, a state may still, on account of its own involvement in a particular set of circumstances and the influence it wields over another actor, incur a positive duty to prevent or remedy wrongful conduct.

It is useful, for reasons of conceptual clarity, to set out that the question of the applicability of human rights law to the foreign activity of states as discussed in the previous chapter must be conceptually distinguished from the allocation of responsibility for international wrongful acts, which forms the topic of the present chapter. In the *Tehran Hostages* case, the ICJ held that it had to look at the conduct of the Iranian hostage takers which had overrun the US embassy in Tehran in 1979 from two points of view: 'First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.'<sup>2</sup> This is the basic rule for establishing the international responsibility of a state, now laid down in Article 2 of the ILC's Articles on State Responsibility: for a state to be held responsible for an internationally wrongful act, (a) the act (or omission) must be attributable to the state, and (b) the act (or omission) must constitute a breach of an international obligation of that state. The extraterritorial application of human rights treaties is essentially a matter falling under the second condition: if an individual cannot be said to fall within a state's jurisdiction, the state does not have the obligation to secure that person's human rights and there is consequently no question of a breach of an international obligation of that state.<sup>3</sup> In other terms, where the doctrine of attribution serves to isolate those acts and omissions which may be considered 'acts of the state' (and belongs to the secondary rules of public international law), the concept of 'jurisdiction' isolates those individuals which come within the purview of human rights obligations a state has entered into (and belongs to the field of a state's primary

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2 ICJ 24 May 1980, *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980 p. 3, para. 56.

3 Also see R.A. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in: F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004), p. 86.

obligations).<sup>4</sup> The law on state responsibility, which includes rules on attribution and derivative responsibility, does not deal with the scope and contents of a state's international obligations, but with the circumstances under which a state can be considered to act in breach of those international obligations and with the question what the consequences of the violation should be.<sup>5</sup>

Yet, as will be explained throughout the chapter, especially in the context of extraterritorial human rights violations involving a plurality of actors, questions of primary and secondary international law tend to become blurred. This is so because, firstly, the issues of determining whether a person falls within the jurisdiction of one state or another and to which state particular conduct should be attributed often require an assessment of the same factual circumstances and the application of analogous legal criteria. Secondly, the doctrine of positive obligations tends to trespass into the field of secondary international law, because human rights courts have often derived duties in respect of conduct of other international actors from the substantive scope of the state's human rights obligations, thereby not only complementing, but also potentially displacing, relevant rules laid down in the Articles on State Responsibility.

The chapter takes the following approach. It follows the structure of the International Law Commission's (ILC) Articles on State Responsibility, by discussing, firstly, the rules of attribution which are most relevant for this study (section 3.2): i) attributing conduct of individuals to the state; ii) attributing conduct of one state to another state; iii) attributing conduct of joint organs to a state. It will next discuss the notion of derivative responsibility and in particular the international law concept of 'aid and assistance' (section 3.3). In exploring the provisions of the ILC Articles, which have not attained the status of treaty law, it is especially identified how they have been applied in international case law (the ICJ and ECtHR), and how the mechanisms of attribution and derived responsibility relate to the doctrine of positive obligations.

Throughout the chapter, some preliminary conclusions are drawn on the manner in which international law governs the allocation of international responsibilities to states which engage in cooperation on or the outsourcing of their migration policies. The conclusions of the chapter further serve as a basis for delimiting the responsibilities of states in discussing state practices of external migration control in chapters 6 and 7.

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4 For a critical observation on the use of the 'primary' and 'secondary' language see: U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System', 78 *Nordic Journal of International Law* (2009), p. 53-72.

5 See, extensively, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press (2002), p. 14-16.

Before embarking upon this exercise, several preliminary remarks are in order. The first is that this chapter deals exclusively with state responsibility. The subjects of the law on state responsibility are obviously states, but there may be other international legal persons who are subjects of international law. The better overarching term for the whole legal framework dealing with the establishment and consequences of responsibility for international wrongful acts is the law on 'international responsibility'.<sup>6</sup> Within this overarching framework, attempts are undertaken to codify the law on responsibility of international organisations;<sup>7</sup> and with regard to individuals, the adoption of the Rome Statute of the ICC has provided an authoritative body of rules on individual criminal responsibility. But because this study deals primarily with the accountability of individual states active in regulating the movement of migrants outside their borders, this chapter explores the law on state responsibility only.

A second preliminary remark is that this chapter focuses on state responsibility for human rights violations *committed abroad or producing effects abroad*. In this connection, it is necessary to point out that the law on state responsibility does not distinguish between conduct occurring inside or outside a state's territory. As was also noted in the introduction of the previous chapter, the International Law Commission has affirmed that 'the acts or omissions of organs of the State are attributable to the State as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory'.<sup>8</sup> This is in conformity with the observation above that the question whether a state's international obligations should entail its responsibility also as regards conduct outside its territory will ordinarily be determined by the contents of the obligation, i.e. a question belonging to the 'primary rules' of international law. Nonetheless, it will be shown in this chapter that the element of territory may influence the application of various rules on state responsibility. One of this chapter's aims is to identify the circumstances under which that is so.

A third preliminary remark is that the chapter deals only with international responsibility for violations of *human rights*. Again, the starting point must be that the application of the law on state responsibility does not differentiate between various fields of substantive international law. The International Law Commission, legal doctrine and international case law confirm that the rules on state responsibility apply to every internationally wrongful act, including

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6 J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in: M. Evans (ed), *International Law*, Oxford University Press (2003), p. 446-448.

7 For the text of the Draft Articles on Responsibility of International Organizations adopted by the ILC on first reading see, Report of the International Law Commission on the work of its sixty-first session, UN GAOR, 64<sup>th</sup> Sess., Sup. No. 10, UN Doc. A/64/10 (2009), p. 19.

8 Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, vol. II, p. 84.

violations incurred under human rights treaties.<sup>9</sup> The case law of the European Court of Human Rights was in itself an important source of inspiration in the course of the ILC's drafting of the Articles on State Responsibility.<sup>10</sup> But this does not mean that human rights bodies are bound to apply the ILC Articles,<sup>11</sup> and occasionally human rights bodies and in particular the Strasbourg courts have embarked upon alternative paths of reasoning. This chapter expressly aims – where relevant – to identify and to account for these divergences.

### 3.2 INDEPENDENT RESPONSIBILITY

#### 3.2.1 Attribution and the act of state

Although often implied, rules of attribution are central to international law. This is because states are legal persons and can only act through natural persons. Without the concept of attribution, states would not only be incapable of acting, they could neither be held accountable for wrongdoings resulting from those acts.<sup>12</sup> One may also formulate it as follows: because the state itself is an abstraction, we need a legal construction to bridge acts of persons with the state; and that construction is the concept of attribution. Attribution allows us to think that a state, as if it were a natural person, is capable of acting.

Rules on attribution are central to international law, but subject to controversy. Three things are clear from the outset: there is not one rule defining the conditions for attribution; applying one rule or another depends on the

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9 See note 155 *infra*. See further M.D. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in: M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing (2004), p. 140. B. Simma, 'How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties', in V. Gowlland-Debbas, ed., *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, The Hague: Martinus Nijhoff (2000), p. 87. And, for a discussion: R.A. Lawson, *Het EVRM en de Europese Gemeenschappen. Bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties*, Deventer: Kluwer (1999), p. 217-222; R.A. Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21<sup>st</sup> Century?', in: M. Castermans, F. van Hoof and J. Smith (eds.), *The Role of the Nation State in the 21<sup>st</sup> Century: Human Rights International Organisations and Foreign Policy: Essays in Honour of Peter Baehr*, The Hague: Kluwer Law International (1998), p. 98-101.

10 This is very much apparent also from the final commentaries to the Articles, which frequently refer to Strasbourg case law.

11 Note however that several of the ILC Articles have been proclaimed to reflect – or to have contributed to the establishment of – customary international law, see further *infra* section 3.3.2. at n. 133.

12 J. Griebel and M. Plücker, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v. Serbia*', 21 *Leiden Journal of International Law* (2008), p. 602.

specific circumstances of a situation; and the rules to be applied are often contested in case law and legal doctrine.<sup>13</sup> The ILC has drawn up altogether 8 different rules for attribution in its Articles on State Responsibility, and has drafted additional rules for attributing acts to international organisations. Not all these rules are discussed here. With a view to the particular topic of this study, the three situations addressed in connection to the international law on attribution are: situations in which acts of natural persons or groups of persons should be attributed to a state (section 3.2.2); situations in which acts of one state should be attributed to another state (section 3.2.3); and situations where joint activity of states can be attributed separately to one or all of the states involved (section 3.2.4).

### 3.2.2 Attribution of acts of natural persons and groups of persons to the state

The rules on attribution of conduct to a state are premised on the theory that a state should not be held accountable for the conduct of all human beings or entities connected to a state on account of, for example, having the nationality of that state or being within its territorial sovereignty, but that a state is only internationally responsible for conduct in which the organisation of the state is, in one way or another, itself involved.<sup>14</sup>

Based on the ILC articles and international case law, especially that of the International Court of Justice, we may distinguish four core rules of attributing conduct of persons or entities to a state. These concern: responsibility for acts of *de jure* state organs, responsibility for acts of *de facto* state organs, responsibility for acts of private persons, and responsibility for conduct directed or controlled by a state.

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<sup>13</sup> Ibid, p. 603.

<sup>14</sup> See, for the underpinning of this theory, C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928), p. 76-77; I. Brownlie, *Systems of the Law of Nations: State Responsibility, Part I*, Oxford: Clarendon Press (1983), p. 132-166; and most extensively R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 95-126. In the Commentary to the ILC Articles this basic rule is stated as follows: 'Thus the general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State', Text of the draft articles with commentaries thereto, Report of the International Law Commission on the Work of Its Fifty-third Session (hereafter 'Commentary to the ILC Articles', UN GAOR, 56th Sess., Sup. No. 10, UN Doc. A/56/10 (2001); *Yearbook of the ILC 2001*, vol. II (Part Two), p. 38. Also see PCIJ 10 September 1923, *Case of Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion, PCIJ Series B, No. 6, p. 22 ('States can act only by and through their agents and representatives'). See further *infra* section 3.2.2.4.

### 3.2.2.1 Attribution of acts of *de jure* and *de facto* state organs to the state

The most basic – and hence, also the most latent – rule of attribution is that a state is responsible for the acts of all its organs. According to Article 4 ILC ('Conduct of organs of a State'):

- '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

This basic rule reflects two notions. The first is the principle of unity of the state, from which it follows that the conduct of all state organs, regardless of their function or position in the state, is attributable to the state. The second is that only if a person or entity acts in its capacity as a state organ, it can engage the responsibility of the state.<sup>15</sup> This latter notion is expressly laid down in Article 7 of the ILC Articles, dealing with *ultra vires* acts, which holds that all conduct of state organs or persons empowered to exercise elements of governmental authority are acts of states, also if it concerns an abuse of authority or an act in contravention of superior orders, *provided that the organ acts in a governmental capacity*.

The key question under Article 4 ILC Articles is how to define a person or entity as state organ. The second paragraph of Article 4 holds that a state organ '*includes any person or entity which has that status in accordance with the internal law of the State*'. In the *Genocide case*, the ICJ referred to state organs classified as such by the internal laws of the state as *de jure* state organs.<sup>16</sup> This classification will ordinarily depend on the characterisation of an entity as a state organ in domestic law, but may also follow from the legal embedding of an organ in a state, by taking account of the legal powers conferred upon the entity and the position it has in the constitutional structure of the state.<sup>17</sup> Relevant indicators, on a more practical level, may be such matters as by whom a person or body is appointed, to whom the person or body is subordinated,

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15 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 42. The requirement that the organ must act in its governmental capacity did feature expressly in the draft articles proposed by Special Rapporteur Ago, but was later omitted. See R. Ago, Third report on State responsibility, *Yearbook of the ILC 1971*, vol. II (Part One), p. 243 (see Article 5: '... are acting in that capacity ...').

16 ICJ 26 February 2007, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, paras. 386, 388; also see Commentary to the ILC Articles, *Yearbook of the ILC 2001*, vol. II (Part Two), p. 42.

17 *Ibid.*



by whom its salaries are paid and, ultimately, whether the person or entity is endowed by law with exercising public authority of the state.<sup>18</sup>

In its commentary, the ILC underlines that the internal laws of a state are not solely decisive in classifying an entity as state organ, by noting that sometimes, 'the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.'<sup>19</sup> Examples of state organs falling outside the ordinary constitutional framework of the state may be militias, religious authorities or political parties functioning parallel to the state.<sup>20</sup> The ILC refrains, in its articles and commentary, from dwelling upon the appropriate test to establish whether an entity is a *de facto* state organ, but the ICJ, most explicitly in the *Genocide case*, affirmed that conduct of persons or entities *de facto* operating as an agent of the state, is also to be attributed to the state:<sup>21</sup>

'[P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.'

As to the rationale of this rule, the ICJ considered that 'it is appropriate to look beyond the legal status alone, in order to grasp the reality of the relationship between the person taking action and the state' and that states should not be allowed 'to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious'.<sup>22</sup> The test of 'complete dependence' was drawn from its earlier judgment in the *Nicaragua* case, in which the ICJ had found it necessary to determine whether or not the relationship between the *contras* in Nicaragua and the United States government 'was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.'<sup>23</sup> This was found not to be the case, because 'the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their *complete dependence* on United States aid.'<sup>24</sup> In the *Genocide* case, the requirement of

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18 Ibid.

19 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, vol. II (Part Two), p. 42. Also see Brownlie (1983), p. 136.

20 Ibid.

21 *Genocide Case*, paras. 391-392; ICJ 27 June 1986, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua. Merits, Judgment*, I.C.J. Reports 1986, p. 14 at para. 109.

22 *Genocide Case*, para. 392.

23 *Military and Paramilitary Activities in Nicaragua*, para. 109.

24 Ibid, para. 110, emphasis added.

complete dependence of the Army of the Republika Srpska (VRS) on the Federal Republic of Yugoslavia was neither met, because the VRS retained 'some qualified, but real, margin of independence' and because notwithstanding the strong political, military and logistical relations and the very important support without which the VRS 'could not have conducted its crucial or most significant military and paramilitary activities', did this not 'signify a total dependence of the Republika Srpska upon the Respondent'.<sup>25</sup>

It appears from the relevant passages in *Nicaragua* and the *Genocide* case that the ICJ considers it inappropriate to classify an entity as a *de facto* state organ if it remains able to function in certain respects autonomous from the state. In *Nicaragua*, the Court attached particular relevance to the possibility that the *contras* could still embark upon certain activities without the support provided by the United States.<sup>26</sup> In paragraph 111 of the judgment, the ICJ held: 'Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this [...] support has not been, and indeed probably could not be, advanced in every respect.' And shortly before, in paragraph 108, the Court had considered that the evidence available to it did not warrant a finding 'that all contra operations reflected strategy and tactics wholly devised by the United States.' Equally, in the *Genocide* case, the ICJ considered it decisive that the VRS was not deprived of 'any real autonomy' and that it retained a 'real margin of independence'. Accordingly, it is required that the entity has no real autonomy and that the type and degree of control is qualitatively the same as the control a state exercises over its own organs.<sup>27</sup>

This rather high threshold must probably be explained from the far-reaching legal implications of equating an entity with state organs. The state becomes responsible for all acts of the entity, regardless of whether the entity acted contrary to state instructions and regardless of any consideration of influence or control asserted by the highest state officials over the specific act complained of.<sup>28</sup> To apply a lower threshold would imply that the state *could* become responsible also for acts which could have been initiated without its involvement, running counter to the basic rule that a state should not be held

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25 *Genocide Case*, para. 394.

26 It should be observed that the Court in *Nicaragua* did not make a very clear distinction between its application of the 'complete dependence' test and the 'effective control' test. This is also apparent from the Appeals judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, where the argument advanced by the Prosecution that the ICJ in *Nicaragua* had applied both an 'agency' test and an 'effective control' test was labeled as a 'misreading of the judgement of the International Court of Justice': ICTY 15 July 19, *Prosecutor v. Tadić* (Appeals chamber), no. IT-94-1-A, paras. 107 and 111-114.

27 Also see M. Milanović, 'State Responsibility for Genocide', 17 *EJIL* (2006), p. 577.

28 According to the ICJ: 'so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility', *Genocide Case*, para. 397.

responsible for persons or entities not acting on its behalf, or otherwise without its involvement.

The ‘complete dependence’ test as applied in the Genocide case has been criticised for dealing with relationships of the state with private persons or entities which are meant to fall under one of the other attribution rules, namely that of ‘effective control’ (Article 8 ILC Articles), to be discussed hereunder.<sup>29</sup> Given the differences in threshold and legal implications of the attribution rules of Articles 4 and 8 ILC Articles, this criticism is unpersuasive, although it must be underlined that the boundaries between the two attribution rules are not always clear. Moreover, both the *Nicaragua* and the *Genocide*-case concerned the peculiar issue of activities of (para)military forces established and active abroad. The test of ‘complete dependence’ and the criteria applied by the Court for determining the existence of such dependence may therefore be seen as setting precedence only for a particular set of circumstances.

### 3.2.2.2 Attribution of acts of private persons or entities

The second rule to be discussed here concerns the attribution of conduct of private persons or entities to the state. According to Article 5 ILC (Conduct of persons or entities exercising elements of governmental authority):

‘The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’

This provision is meant to take account of semi-public legal persons or parastatal entities which cannot be considered *de jure* or *de facto* state organs but which have been endowed with certain public functions. Examples of such entities mentioned in the ILC Commentary are private security firms acting as prison guards and, notably, private or state-owned airlines exercising delegated powers in relation to immigration control or quarantine.<sup>30</sup>

29 Griebel and Plücker (2008), p. 613-614. This also appears to be the view taken by the ICTY Appeals chamber in *Tadić*, which, in determining whether private persons can be regarded as *de facto* state organs, referred only to the notion of ‘control’ and not that of dependence: ‘Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials’, *Tadić* (Appeals chamber), paras. 98, 114.

30 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 43. Also see EComHR 12 October 1989, *Stocké v Germany* (Report), no. 11755/85, concerning a police informer who was considered to have acted on behalf of the German authorities and where the conduct was accordingly attributed to Germany (esp. para. 168).

The essential difference between situations covered by Articles 4 and 5 is that under the former, all acts of a state organ are attributable to the state – unless it concerns acts done in a personal as opposed to governmental capacity – while under Article 5 it is recognised that an entity may only partially exercise ‘elements of governmental authority’. Accordingly, under Article 5 of the ILC Articles, responsibility of the state is engaged only in so far as it concerns acts for which the entity has been empowered to exercise governmental authority and not for private or commercial activity in which the entity can engage of its own accord.<sup>31</sup>

Similar to the attribution of conduct of state organs to the state, Article 5 covers all conduct done in the exercise of governmental authority, implying that it also covers conduct involving an independent discretion to act; and that it is not necessary that the conduct complained of was carried out under the control or under express instructions of the state.<sup>32</sup>

In the context of this study, Article 5 ILC Articles is especially relevant in respect of carrier sanctions, where private carriers are prohibited from transporting improperly documented aliens and obliged to return aliens who are refused entry into the state.<sup>33</sup> The rule of Article 5 ILC Articles signifies that (i) the implementation of these obligations ought to be regarded as an exercise of governmental authority, also when the carrier has discretion in the manner of implementation, and that (ii) this implementing activity is attributable to the state.

### 3.2.2.3 Attribution of conduct directed or controlled by a state

The two rules described above have an important element in common: the state is responsible for all acts of the persons acting as an agent of the state, provided that they do act in that capacity, regardless of whether the agent acted within the limits of its competency and regardless of any consideration of influence or control asserted by the highest state officials over the act concerned. This is different with a third and the most controversial rule on attribution of conduct of persons or entities to a state, the attribution of conduct to a state on account of a state organ giving instructions or exercising control over non-state organs resulting in the commission of acts in breach of its international obligations. Under this rule, it is not the quality of being an ‘agent’ of the state which is decisive for establishing state responsibility, but the factual relationship between the state and the conduct complained of. According to Article 8 ILC Articles (Conduct directed or controlled by a State):

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31 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 43.

32 Ibid.

33 See, extensively, chapter 5.2.2.2.

‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’

Article 8 speaks of three disjunctive standards for this ‘incidental’ attribution of private conduct to the state: acting under instructions, acting under the direction, or acting under the control of the state. Especially the element of control has given rise to divergent views on its proper application. The discussion essentially evolves around the question whether it should suffice for attributing conduct of a private entity to the state that the state has asserted ‘overall’ or ‘decisive’ influence or control over a private entity or that it is required that the state has specifically directed or controlled the conduct complained of. The latter standard was adhered to by the ICJ in the *Nicaragua* and *Genocide* cases, while in other cases the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ECtHR have upheld the ‘overall control’ or ‘decisive influence’ standard. It is submitted hereunder that (i) the more lenient standard of ‘overall control’ may risk attributing conduct to a state in which it is not involved, potentially overstressing the international responsibility of the state; but that (ii) the wielding of overall influence or control over an entity may nonetheless give rise to international responsibility by virtue of the scope and contents of a state’s positive obligations. Although the relevant case law mainly involves the responsibility of states for wrongful activity of military factions which are active in another state and is therefore not directly of relevance for this study, the discussion is of theoretical significance, because it indicates how the rules on attribution and the doctrine of positive obligations constitute separate but conjunctive avenues for delimiting the international responsibility of the state.

In *Nicaragua*, after having discarded the possibility of equating the Nicaraguan rebels (the so-called *contras*) with organs of the United States, the next question was whether the United States, because of its financing, organising, training, equipping and planning of the operations of the *contras*, was nonetheless responsible for violations of international humanitarian law committed by those rebels.<sup>34</sup> The Court held that a high degree of ‘control’ was necessary for this to be the case:

‘United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.’

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34 But see also *Diplomatic and Consular Staff in Tehran*, para. 58.

(...) For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>35</sup>

Accordingly, and in line with the text of current Article 8 of the ILC Articles ('in carrying out the conduct'), the ICJ required not only that a state has directed, instructed or effectively controlled the operations of a military or paramilitary group, but also that this involvement of the state had a direct bearing on the specific conduct complained of. In his separate opinion, judge Ago, the former special rapporteur of the ILC on State responsibility, subscribed to the Court's approach and stressed the exceptional nature of this attribution rule:

'Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them [as persons acting on behalf of the United States – author]. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.'<sup>36</sup>

The Nicaragua-test<sup>37</sup> was held to be unpersuasive by the ICTY in the *Tadić* case.<sup>38</sup> The ICTY advanced, in respect of acts committed by individuals forming part of a hierarchically structured group, the more lenient standard of the state wielding overall control over that group:

'One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from

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35 *Military and Paramilitary Activities in Nicaragua*, para. 115.

36 *Military and Paramilitary Activities in Nicaragua*, *Separate opinion of Judge Ago*, para. 16.

37 The *Nicaragua*-test is often referred to as the 'effective control'-test. This designation is not entirely appropriate, as effective control over the operations in the course of which the alleged violations were committed was examined by the Court in close collaboration with the other factors currently mentioned in Article 8 ILC Articles, i.e. the factors of 'instructions' and 'direction'.

38 *Tadić* (Appeals chamber), para. 115.

an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.<sup>39</sup>

The ICTY reasoned that having overall control over the group is sufficient to engage the responsibility of that state for the group's activities, and this is regardless of whether or not each of these acts were specifically imposed, requested or directed by the state.<sup>40</sup> 'Clearly', the ICTY added, 'the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility'.<sup>41</sup> As to the precise standard of this overall control-test, the ICTY considered as follows:

'The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) 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. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.'<sup>42</sup>

Several legal commentators welcomed the approach of the ICTY.<sup>43</sup> Further, as was also advanced in legal writings, the ECHR, in its cases on the Turkish involvement in Northern Cyprus and Russian activity in Moldova, appears to have proceeded from a similar assumption that overall control suffices for the attribution of conduct of a private group to a state.<sup>44</sup>

In the case of *Loizidou v Turkey*, concerning the Turkish occupation of Northern Cyprus and the subsequent establishment of the 'Turkish Republic of Northern Cyprus' (the TRNC), the Court was confronted with the dual question whether the victims of human rights violations in Northern Cyprus fell under the 'jurisdiction' of Turkey in the meaning of Article 1 ECHR and whether the acts of the TRNC could be attributed to Turkey. After reiterating

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39 Ibid, para. 120.

40 Ibid, para. 122.

41 Ibid, para. 123.

42 Ibid, para. 137.

43 A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007), p. 649-668; Griebel and Plücken (2008), p. 601-622; M. Spinedi, 'On the Non-Attribution of the Bosnian Serbs' conduct to Serbia', 5 *Journal of International Criminal Justice* (2007), p. 829-838.

44 See especially Cassese (2007), p. 658-659, at n. 17 and 18.

that a State Party's obligations can also be incurred for acts and omissions producing effect outside that state's territory, the Court considered:

'It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.<sup>45</sup>

Although the Court does not distinguish all too clearly between the issues of attribution and jurisdiction and refers to effective control over territory instead of the TRNC, its reasoning appears to be that having effective control over Northern Cyprus means not only that all persons living there are brought within Turkish jurisdiction, but also that the TRNC can only be deemed to function as a subordinate local administration, i.e. as a *de facto* state organ of Turkey, implying that all the policies or actions of the TRNC are to be attributed to Turkey. The Court in any regard makes clear that detailed control over the particular acts of the TRNC was not required for acts of the latter to be attributed to Turkey. This reasoning was upheld in *Cyprus v Turkey*.<sup>46</sup>

In the case of *Ilascu a.o. v Moldova and Russia*, the European Court examined more closely the relationship between the state and the local administration, thereby bringing the applied criteria more in line with those applied by the ICJ in the *Nicaragua* case. The ECtHR held the Russian Federation to be fully responsible for the continuing illegal detention of the applicants and the ill-treatment they suffered at the hands of the separatists on the territory of Moldova. The Court considered it of 'little consequence' that agents of the Russian Federation had not participated directly in the events complained of; and instead considered that because the separatist regime in Transnistria was set up with support of Russia and remained under the 'effective authority,

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45 ECtHR 18 December 1996 *Loizidou v Turkey* (merits), no. 15318/89, para. 56. Also see ECtHR 23 March 1995, *Loizidou v Turkey* (preliminary objections), no. 15318/89, paras. 52 and 62.

46 ECtHR 10 May 2001, *Cyprus v Turkey*, no. 25781/94, esp. para. 77: 'Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey'.



or at the very least under the decisive influence, of the Russian Federation', and in any event because it 'survives by virtue of the military, economic and political support given to it by the Russian Federation', there was a 'continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate'.<sup>47</sup> The ECtHR did not however explicitly consider that the acts of the separatists should be attributed to Russia but referred to the positive obligation incumbent on it to put an end to the applicants' situation.

The ICJ, however, upheld the *Nicaragua*-standard in the *Genocide Case* (2007), and faulted the ICTY for engaging itself in matters pertaining to the law on state responsibility 'which do not lie within the specific purview of its jurisdiction' and for applying a test which was seen as overly broadening the scope of state responsibility.<sup>48</sup> It underlined that the rule embodied in Article 8 ILC Articles is substantially different from those enunciated in Articles 4 and 5: should it be accepted that the instructions given to, or direction or control asserted over the persons carrying out the conduct is sufficient to attract the state's responsibility, this does not mean that the perpetrators are to be characterised as organs of the state – implying that all their acts are to be attributed to the state – but merely that a state's responsibility is engaged for its own organs having issued instructions or asserted control resulting in other persons committing an international wrong.<sup>49</sup> Further, the Court explained at length why the overall control test is unsuitable for establishing state responsibility for acts committed by persons who cannot be equated with state organs:

'It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. (...) [A] State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article

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<sup>47</sup> ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, paras. 382, 392-394.

<sup>48</sup> *Genocide Case*, para. 403.

<sup>49</sup> *Ibid.*, para. 397. According to some authors, by emphasizing that responsibility is incurred by reason of instruction or control asserted by its own organs, the ICJ apparently abolished Article 8 as a rule of attribution proper; see Griebel and Plücken (2008), p. 605. Although the Court's wordings in paragraph 397 may be taken to allow for such a reading, it is doubtful whether the Court intended to make that point. Its firm pronouncements on the issue were primarily aimed at emphasising that if the conditions of Article 8 ILC Articles are fulfilled, this does not transform the controlled or instructed persons into state organs, without delving explicitly into the question whether the acts of the latter should in that case be attributed to the State or not. Indeed, in paragraph 419, the ICJ explicitly considers that, should it have been established that genocide would have been committed on the instructions or direction of the State, 'the necessary conclusion would be that the genocide was attributable to the State'.

8 cited above. This is so 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 was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.<sup>50</sup>

Several observations are in order in respect of the case law above. It is firstly notable that the ICTY (and the ECtHR in the Cyprus cases) not only favours a different standard of control – at least in so far as it concerns control over organised (military) groups – but that it also submits that the fact of being under such control brings with it that the group must be regarded as a *de facto* state organ, implying that all the group’s acts are to be attributed to the state. Given the more general nature of the control asserted by the state – not necessarily related to a specific act – this is a logical conclusion, but it does raise the question how this overall control-test relates to the existing rules codified in Articles 4 and 5 of the ILC Articles, which lay down the specific requirements for classifying natural persons as state organs. Rather than refining (or expanding) the attribution rule of Article 8 ILC Articles, the ICTY appears to present an altogether new rule, which, in its legal implications at least, bears more resemblance with Articles 4 and 5 of the ILC Articles, but stretches substantially the circumstances for attribution mentioned under those Articles, and in particular the ‘complete dependence’-test as formulated by the ICJ.<sup>51</sup>

Secondly, although seemingly contradictory, the divergent approaches taken by ICJ and ICTY do not appear to reflect a different perception on the nature of the law on state responsibility. We may summarize the rationale of the ICJ behind attributing acts of individuals to the state as one in which there indisputably must exist a connection between the state’s conduct and its international responsibility.<sup>52</sup> An approach must be adhered to in which it is ruled out that acts are attributed to the state which could well have been committed without its involvement.<sup>53</sup> This implies that persons, or groups of persons

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50 Ibid, para. 406.

51 Indeed, some of the cases brought forward by the ICTY in support of its ‘overall control test’, appear to have more resemblance with situations covered by Articles 4 and 5 – and possibly Articles 9 and 11 – of the ILC Articles than Article 8. The ICTY referred, for instance, to the *Kenneth P. Yeager* case, in which the Iran-United States Claims Tribunal had concluded that the local revolutionary committees had acted as *de facto* State organs of Iran because, amongst others, they had performed *de facto* official functions and that Iran could not tolerate the exercise of governmental authority by actors and at the same time deny responsibility for wrongful acts committed by them, Iran-United States Claims Tribunal 2 November 1987, *Kenneth P. Yeager v Islamic Republic of Iran*, Partial Award No. 324-10199-1, reprinted in 17 *Iran-United States Claims Tribunal Reports* (1987), p. 92.

52 *Genocide Case*, para. 145.

53 *Military and Paramilitary Activities in Nicaragua*, para. 115.

retaining some element of autonomy should not be regarded as *de facto* agents of the state and that their conduct can only engage the international responsibility of the state if there is some form of direct involvement of the state (in the form of instructions, directions or effective control) in particular conduct of that person or group. Cassese, on the other hand, giving voice to the reasoning behind the *Tadic* judgment, asserts that the latter test is inconsistent with another 'basic principle underpinning the whole body of rules and principles on state responsibility', namely that 'states may not evade responsibility towards other states when they, instead of acting through their own officials, *use* groups of individuals to undertake actions that do damage to other states'. Therefore, 'states must answer for actions contrary to international law accomplished by individuals over which they systematically wield authority'.<sup>54</sup> But, this reasoning equally reflects an understanding that states should be held responsible for acts committed on its behalf. The difference between the approaches of the ICTY and ICJ is that the ICJ departs from an urge to prevent the state being held responsible also for other acts; while the ICTY and the ECtHR depart from an urge to ensure that a state is *indeed* so held responsible. Hence, it is the test to arrive at the establishment of state responsibility which is contested, rather than the nature of the law on state responsibility.

This brings us to the third and final observation, which is that both tests may not be sufficiently apt to single out those acts for which the state should be held responsible. The problem with the 'overall control' test is that it simply accrues all acts of the controlled entity – also acts exercised in its own autonomy – to the state, whereas the problem with the test propounded by the ICJ is that it does not seem to attach legal implications to all the intricate forms in which a state may be involved in the activities of a private entity – through wielding influence, asserting general control or the provision of all kinds of support. It is in this connection that it should be observed that the attribution rules laid down in the law on state responsibility are not solely decisive for holding states accountable for their involvement in conduct of other actors. The fact that activity of a particular entity cannot be attributed to a state does not necessarily imply that the state cannot incur responsibility for its involvement in that activity. It may well be that the primary, or substantive, international obligations incumbent on the state give rise, on account of its own acts or omissions, to the state's responsibility. This point is especially salient within human rights law, where the doctrine of positive obligations may serve to establish the concurrent, or derived, responsibility of the state in respect of conduct of another actor. Hereunder, it is explained that the rules of attribution laid down in Part I of the ILC Articles and the doctrine of positive obligations serve as separate but conjunctive avenues for delimiting the international

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54 Cassese (2007), p. 654, 661, emphasis in original.

responsibility of the state when it is involved in the activities of a private entity.

#### 3.2.2.4 Positive obligations and due diligence

In order to better appreciate the divergent approaches of, let us say, the ICJ upon the one hand, and the ICTY and the ECtHR on the other, regarding the question of attributing conduct of private persons to the state, it is necessary to examine the doctrine of positive obligations, and especially the relationship of that doctrine with the law on state responsibility.

One can say that until fairly recently, the existence of duties of prevention and due diligence in connection to acts of private persons were deemed to form an integral part of the law on state responsibility, or at least, axioms delineating the extent to which states could be held internationally responsible for misconduct of private individuals. Somewhat simplified, two schools of thought can be said to have persisted into modern thinking on state responsibility for acts of individuals.<sup>55</sup>

The first school is that of *culpa*, in which the presumption is that a state can become responsible for the acts of individuals only through complicity. Grotius, commonly associated with this school, discarded the medieval principle of 'collective responsibility' according to which the state was regarded as a collectivity, whose members were responsible for the acts of any one member, implying that injury done by a member to a member of another state would enliven the responsibility of the whole state.<sup>56</sup> Instead, Grotius formulated the principle that acts of private individuals can normally not be ascribed to the state, unless a state can be held complicit for international wrongs of individuals through the notions of *patientia* (toleration) and *receptus* (refuge).<sup>57</sup> The term *patientia* refers to a state knowing that an individual has the intention to commit a wrongful act against a foreign state, and where the state fails to take action to prevent the act from being committed while it possesses the power to do so. The term *receptus* refers to the requirement of the state either to punish or to extradite private persons who are known to have committed crimes against foreign states. Failing to comply with the requirements of

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55 This distinction is drawn from R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC* 1972, Vol. II, p. 120-124; and F. Przetacznik, *Protection of officials of foreign states according to International law*, Dordrecht: Martinus Nijhoff (1983), p. 197 et seq. For an extensive overview of the doctrines of due diligence in relation to state responsibility, including the many subdivisions within the various schools of thought, see J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *N.Y.U. Journal of International Law and Politics* (2004), p. 265-306.

56 On the origins and proponents of the theory of collective responsibility, see extensively Hessbruegge, note above, p. 276-281.

57 Hugo Grotius, *De Jure Belli ac Pacis* (1625), translated by A.C. Campbell, Kitchener: Batoche Books (2001), Book II, Chapter 21, para. ii (p. 215-216).

*patientia* and *receptus* would, in the Grotian theory of culpa, imply that a state participates in the guilt of the individual – because ‘knowledge implies a concurrence of will’<sup>58</sup> – from which it, in modern terminology of state responsibility, would follow that the act is to be attributed to the state as a basis for its international responsibility.

The theory of culpa was followed by many writers,<sup>59</sup> but gradually gave way to another line of thought in which the element of culpa, or fault, was discarded as essential component of state responsibility. In this school of thought, identified by Ago as the one to which the very large majority of modern writings belong, state responsibility is derived directly from a duty of the state to exercise due diligence over individuals who are subject to its sovereignty. Triepel, for example, considered that the state, if it remains passive towards an individual injuring another state, does not become an accomplice of the individual, but is responsible only for its own failure to exercise due diligence, implying that the responsibility of the state is enlivened for its own omissions and not for the act of the individual.<sup>60</sup> Another writer belonging to this school is Eagleton, who stipulated that ‘the state is never responsible for the act of an individual as such: the act of the individual merely occasions the responsibility of the state by revealing the state in an illegality of its own – an omission to prevent or punish, or positive encouragement of, the act of the individual.’<sup>61</sup> Summarizing this school of thought, Ago held the basic rule to be as follows: ‘the state is internationally responsible only for the action, and more often for the omission, of its organs which are guilty of not having done everything within their power to prevent the individual’s injurious action or to punish it suitably in the event that it has nevertheless occurred.’<sup>62</sup>

The main difference between the two schools of thought lies in the question of equation of the act of the individual with that of the state. What the theories have in common, and what is important for our present purposes, is that they both depart from an understanding that the state is not just bound to abstain from committing internationally wrongful acts, but that it also has the duty, inherent to its capacity of being the sovereign power and thereby to constrain the actions of its subjects, to prevent them from committing international wrongful acts. Having spent the vast part of his Fourth Report on State Responsibility on reviewing countless judicial decisions and legal writings addressing the relationship between private acts and state responsibility, Ago proposed, on the basis hereof, the following provision to be incorporated in the Articles on State Responsibility:

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58 Ibid.

59 Among whom Pufendorf and Vattel. For more extensive references see esp. R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 121-122 and Hessbruege (2004), p. 281-292.

60 H. Triepel, *Völkerrecht und Landesrecht*, Leipzig: Siebeck (1899), p. 333-334.

61 Eagleton (1928), p. 77.

62 R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 122-123.

*'Article 11. – Conduct of private individuals*

1. The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.
2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.<sup>63</sup>

This provision was eventually not adopted by the International Law Commission, because it was felt that it could trespass into the field of 'primary rules', i.e. the rules that place obligations on states, and did therefore not necessarily belong to the rules determining whether those obligations have been violated and what the consequences of such violations should be.<sup>64</sup> This was, of course, not to mean that the ILC denied the existence of a doctrine of positive obligations or due diligence, but rather that it perceived the scope of a state's positive duties to be intrinsically linked to the contents of the obligation at issue. Special Rapporteur Crawford defended the omission of references to the nature of various obligations in the Draft Articles, by noting, amongst other reasons:

[T]he most important point is that the extent or impact of the law on state responsibility depends on the content and development of the primary rules, especially in the field of the obligations of the state with respect to society as a whole. There has been a transformation in the content of the primary rules since 1945, especially through the development of human rights. But it is the case, overall, that the classical rules of attribution have proved adequate to cope with this transformation. This is so because of their flexibility and because of the development, as part of the substantive body of human rights law, of the idea that in certain circumstances the state is required to guarantee rights, and not simply to refrain from intervening.<sup>65</sup>

It is, of course, true that obligations of prevention and protection have gradually been incorporated into human rights law. It is also true that on the basis of such obligations the ICJ in the *Genocide* case did consider the Former Republic of Yugoslavia to have violated the Genocide Convention, namely by doing nothing to prevent the massacres occurring in Srebrenica.<sup>66</sup> But this violation was not based on a general obligation on states to prevent the commission by other persons or entities of acts contrary to certain norms of general international law, but on the explicit reference in Article 1 of the Genocide Conven-

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63 Ibid, p. 126.

64 Summary records of the twenty-seventh session, *Yearbook of the ILC 1975*, Vol. I, p. 214; also see J. Crawford, First report on State responsibility, *Yearbook of the ILC 1988*, Vol. II, p. 6-7, esp at para. 16.

65 J. Crawford, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999), p. 439.

66 *Genocide Case*, para. 438.

tion to the substantive obligation incumbent on Contracting Parties to 'undertake to prevent and to punish' genocide.<sup>67</sup>

This leaves us with two remaining questions to be addressed. The first is to what extent, and on what basis, a general theory of due diligence in relation to activities of individuals can be said to exist and in particular, whether such duties also exist with regard to conduct outside a state's territory. The second is how this theory relates to the approaches of the ICJ, the ICTY and the ECtHR in the cases mentioned in the previous section.

Regarding the first question, and limiting ourselves to human rights obligations, we may depart from two assumptions. The first is the one arrived at in the previous chapter that a state's human rights obligations are not necessarily confined to a state's own territory. The second is that many, if not all, human rights are seen to bring with them duties of prevention and due diligence.<sup>68</sup> As to the question of a state's positive obligations outside its territory, it is useful to refer briefly to the approach of the ICJ regarding the obligation to prevent genocide, as it provides insightful considerations regarding the nature and basis of a state's positive obligations outside its territory, which may well apply to obligations other than the duty to prevent genocide alone.

The substantive obligations, *inter alia*, not to commit and to prevent and punish genocide enumerated in Articles I and III Genocide Convention were considered by the ICJ as 'not on their face limited by territory', but to apply 'to a State wherever it may be acting or *may be able* to act in ways appropriate to meeting the obligations in question.'<sup>69</sup> As to the extent of that ability in law and fact, the Court set out to determine the specific scope of the duty to prevent in the Genocide Convention. Regarding this duty, the ICJ found the notion of 'due diligence' to be of critical importance and it defined the parameters of this notion as follows:

'Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another,

67 Ibid, para. 429, in which the ICJ made clear that it did not 'purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law.'

68 For a general overview, see eg A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing (2004); B. Conforti, 'Exploring the Strasbourg case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in: M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing (2004), p. 129-137; and, for a theoretical underpinning, H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, Princeton University Press (1980), p. 52-53; and H. Shue, 'The Interdependence of Duties', in: P. Alston and K. Tomasevski (eds.), *The Right to Food*, Dordrecht: Martinus Nijhoff (1984), p. 83-85.

69 *Genocide Case*, para. 183, emphasis added.

is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.<sup>70</sup>

As to the moment on which the duty of due diligence comes into being, the Court considered decisive 'the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.'<sup>71</sup>

Applying these parameters to the facts of the case, the Court attached particular importance to the close links which existed between the FRY and the VRS and the ability of the former to exert influence over the latter. Given this position of 'influence' and the fact that the Belgrade authorities must have been 'aware' of the serious risk that tragic events were to happen in Srebrenica, the Court concluded:

'In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. (...) Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS.'<sup>72</sup>

It must be repeated that the Court expressly refrained from laying down a general framework applicable to duties to prevent certain acts.<sup>73</sup> The crime of genocide is obviously of special nature and the duty of states to prevent it is likely to require vigilance of the highest standard, which not necessarily applies to all human rights obligations. Nonetheless, the parameters used by the Court in defining the scope of the duty to prevent are worth noting. The duty of prevention is not based on a territorial limitation, but on the ability,

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70 Ibid, para. 430.

71 Ibid, para. 431. Cf. ICJ 9 April 1949, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, I.C.J. Reports 1949, p. 18-22; and *Military and Paramilitary Activities in Nicaragua*, para. 116.

72 Ibid, para. 438.

73 Ibid, para. 429.



or capacity to act; this capacity is, on the one hand, measured in legal terms (i.e. a state must always act within the limits of international law); and on the other hand measured in terms of influence over, or links between, the state and the acting individual(s).

This basic approach of the Court is in conformity with existing theories on state responsibility in relation to acts of individuals. While it is obvious that a state can be held responsible for its own acts, also if committed abroad – whereby the territorial locus is relevant primarily with regard to determining the substantive reach of a state’s obligations – with regard to omissions of the state, or duties of due diligence, the notion of territory may be more pertinent, as a state will not always be equally capable to act outside its territories as it is within its territories. It is probably for this reason that reference to a state’s territory is often made as a basis of a state’s responsibility for a failure of due diligence.<sup>74</sup> But, as various authors have stressed, this reference must be understood from the presumption that the state ordinarily has the power to regulate activity in its territory. Eventually, it is either the act of the state or the power or capacity to act which gives rise to international responsibility, with the notion of territory merely functioning as a presumption that the state is able to act.<sup>75</sup> Eagleton, in this regard, emphasised the importance of the criterion of ‘control’ in explaining a state’s duties of due diligence within its territory: ‘Since international law must prevail within each state, all states in consequence thereof are burdened with the obligation of respecting the rights, within their own territories, of other states or their members. The responsibility of the state for the acts of individuals is therefore based upon the territorial control which it enjoys, and which enables it, and it alone, to restrain and punish individuals, whether nationals or not, within its limits’.<sup>76</sup> The disconnection between territory and responsibility is perhaps most evidently present in the work of Brownlie, who emphasises that responsibility may stem both from harmful acts (or omissions) occurring outside state territory and from acts (or omissions) within a state’s territory which produce harmful

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74 See, amongst others, the references in Brownlie (1983), p. 165.

75 See eg Grotius, who based the responsibility of a State for a failure to prevent individuals from doing harm to foreign states on ‘the power’ it has prevent it, n. 57 *supra*. Vattel stipulated that a State ought not to permit ‘those who are under his command to violate the precepts of the law of nature’; E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), translated by C.G. Fenwick, Washington: Carnegie Institution (1916), book II, chapter VI, para. 72. Anzilotti based a State’s responsibility towards other States on a State’s ‘sphere of activities’, D. Anzilotti, ‘La Responsabilité Internationale des États: A Raison des Dommages Soufferts par des Étrangers’, 13 *Revue Générale de Droit Public* (1906), p. 290. And Ago derived State responsibility for acts of individuals on a State’s organs being guilty ‘of not having done everything *within their power* to prevent the individual’s injurious action’, R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 123, emphasis added.

76 Eagleton (1928), p. 77-78.

consequences outside state territory.<sup>77</sup> Like Eagleton, Brownlie refers to the notion of 'control' as a basis of state responsibility, whereby duties of the state regarding activities within its territorial sovereignty are derived from 'the actual or presumed control the state has over its own territory.'<sup>78</sup> Brownlie saw this proposition confirmed by the ICJ advisory opinion regarding the occupation by South Africa of Namibia, in which the Court had held South Africa responsible for the consequences of this occupation, by reasoning that 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis for state liability for acts affecting other states.'<sup>79</sup>

Based on the above, we may conclude that the question of private persons being inside or outside a state's territory is primarily relevant in terms of state responsibility in so far as it has a bearing on the question whether it affects the capability of the state to act. A state is presumed to wield influence – in the broadest meaning of the term – over persons inside its territory, but this is only a presumption, whereby a state may, on the one hand, lack control, or power, to constrain the acts of individuals within its territory<sup>80</sup> and, on the other hand, assert a relevant degree of control (or power or influence), over individuals outside its territory.

In the *Genocide* case the ICJ made a strict distinction between the question of attributing conduct of the VRS to the Former Republic of Yugoslavia and the duty of the FRY to prevent the VRS from committing genocide. In *Nicaragua*, after having concluded that alleged violations of humanitarian law committed by the *contras* could not be attributed to the United States, the ICJ nonetheless found it relevant that the United States must have been aware of the allegations of breaches of humanitarian law made against the *contras*, for this could have an impact on the lawfulness of the actions of the United States in connection to the *contras*. Eventually, the Court concluded that the United States had 'encouraged' the commission by the *contras* of acts contrary to humanitarian law, by producing and disseminating a manual on guerilla warfare, which amongst others justified the shooting of civilians, without however connecting this finding to a breach of the United States' obligations under international humanitarian law.<sup>81</sup>

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77 Brownlie (1983), p. 165, 180-188.

78 Ibid, p. 181.

79 ICJ 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at para. 118.

80 Cf. *Corfu channel*, p. 18: 'The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.'

81 *Military and Paramilitary Activities in Nicaragua*, paras. 116-122.

In the previous chapter, it was indicated that the European Court of Human Rights has also applied the doctrine of positive obligations to several cases concerning influence wielded over individuals in a foreign territory. The formula used in the cases of *Treska* and *Manoilescu* that 'Even in the absence of effective control of a territory outside its borders, the state still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention' corresponds to the theoretical considerations made above and the approach taken by the ICJ in the *Genocide Case*.<sup>82</sup> It supports a conclusion that the duty to take preventive or other positive action in respect of human rights interferences taking place in a foreign territory derives primarily from the influence a state wields over a particular situation and therewith the 'power', or capability, it has to prevent the occurrence of human rights violations. The establishment of the scope of this duty requires an inquiry, on the one hand, of the substantive international obligations of the state and the duties of due diligence inherent in them; and, on the other hand, an examination of the legal and factual capabilities of the state to change the course of events.

This leads to the conclusion that any useful comparison of the manner in which courts have established the international responsibility of the state on the basis of certain links between the states and (groups of) individuals situated in a foreign location, must not simply be based on an assessment of the manner in which the courts have applied the various attribution rules. It must also have regard to the question whether the courts have properly ascertained the existence of potential positive duties inherent to a state's international obligations and whether such duties were engaged as a result of the influence wielded by the state over the individuals. In this regard, the ICJ's more stringent approach in *Nicaragua* and the *Genocide Case* regarding attribution is well sustainable, so long as it does not neglect duties inherent in the wielding of influence. But likewise is the overall control test propounded by the ECtHR defensible, in the sense that it rightly attaches positive duties to the finding that a state wields a certain degree of control or influence over acts committed by individuals abroad.

### 3.2.3 ATTRIBUTION OF STATE CONDUCT TO ANOTHER STATE

The second category of situations falling under the rules of attribution which are relevant for this study are those where a state places one of its organs at the disposal of another state. Under operations of sea border control coordinated by the EU external borders agency Frontex for example, guest

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<sup>82</sup> See chapter 2.5.3.

officers of one EU Member State may be placed within the command structure of another Member State. EU Member States have further concluded agreements with third countries allowing for the conducting of joint sea patrols in the territorial waters of third countries or the posting of immigration officers in a third country, in order to assist in controlling the border.<sup>83</sup> The question raised by such arrangements is whether the activity of guest officers should be attributed to the host or the sending state.

According to Article 6 ILC Articles (Conduct of organs placed at the disposal of a State by another State):

'The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.'

The ILC Commentary stresses that this rule applies to exceptional situations and that, if the rule applies, the conduct is to be attributed only to the state at whose disposal the organ is placed and not to the state whose organ it is.<sup>84</sup> The latter rule was confirmed by the ICJ in the *Genocide case*.<sup>85</sup>

On its wording, Article 6 ILC appears to require, primarily, that the organ is exercising 'elements of the governmental authority' of the other state. This could be taken to mean that responsibility must be allocated to the receiving state if the organ acts in the name of that state or at its behest. The ILC Commentary however, notes that the words 'placed at the disposal of' are the essential condition for attributing conduct of the organ to the other state, whereby this condition is strictly interpreted as requiring not only that the organ must act with the consent, under the authority of and for the purposes of the receiving state, it must also act in conjunction with the machinery of that state and under the latter's 'exclusive direction and control, rather than on instructions from the sending state'.<sup>86</sup> The conditions of actually being under the authority of the receiving state and acting in accordance with the receiving state's instruction featured expressly in an earlier version of the Draft

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83 See extensively chapters 5 and 6.

84 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 44. Also see R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 53.

85 *Genocide Case*, para. 140 ('Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.').

86 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 44. Also see Report of the International Law Commission on the work of its twenty-sixth session, *Yearbook of the ILC 1974*, Vol. II (Part One), p. 287; and Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, p. 83.

Articles.<sup>87</sup> This strict standard is explained from the premise that states should only be held responsible for their own acts and omissions and that therefore the state organ must be under the genuine and exclusive authority of the receiving state.<sup>88</sup> Decisive, in other words, are the system within which the activities of the organ are performed and the authority actually responsible for the acts at the time they were performed.<sup>89</sup>

International jurisprudence confirms that the threshold for applying this rule is high. In the case of *X. and Y. v Switzerland* – which is noteworthy in the context of this study for it concerned the delegation of immigration control functions to another state – entry bans imposed by the Swiss aliens police on persons residing in Liechtenstein were held to be attributable to Switzerland.<sup>90</sup> The agreements in force between the two countries provided that the administration of matters concerning the entry, exit, residence and establishment of foreigners was entrusted to the Swiss authorities and that Liechtenstein had only the powers and functions corresponding to those Swiss cantons enjoyed in these matters. The argument of the Swiss government that its aliens police was merely exercising the public functions of Liechtenstein and that therefore its conduct could not be attributed to Switzerland was dismissed, because the aliens police functioned exclusively in conformity with Swiss law and there was no distinction in competences between acts concerning Liechtenstein and Switzerland. A similar conclusion was reached in the case of *Xhavara v Italy*, where the ECtHR considered that the conduct of the Italian navy policing the high seas and territorial waters between Albania and Italy pursuant to a treaty concluded with Albania, could not engage the responsibility of Albania. The treaty provided, amongst others, for the Italians to inspect migrant vessels in Albanian territorial waters, to verify the identity of the passengers and to order back the ships to Albanian ports.<sup>91</sup> And in *Vearncombe v the United Kingdom and Germany*, the European Commission concluded that the noise nuisance emanating from the British shooting range in Berlin-Gatow could only be attributed to the United Kingdom and not to the Federal Republic of Germany, for the shooting range was constructed entirely under the control of the British Military Government.<sup>92</sup>

By contrast, in the case of *Drozdz and Janousek v France and Spain*, the ECtHR held that conduct of French and Spanish judges carrying out judicial functions in Andorra, could not be attributed to France and Spain. The judges did not function in their capacity as French or Spanish judges, and French or Spanish

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87 R. Ago, Third report on State responsibility, *Yearbook of the ILC 1971*, vol. II (Part One), p. 274.

88 *Ibid*, p. 268.

89 *Ibid*, p. 269.

90 EComHR 14 July 1977, *X. and Y. v Switzerland*, nos. 7289/75 and 7349/76.

91 ECtHR 11 January 2001, *Xhavara and Others v. Italy and Albania*, no. 39473/98.

92 EComHR 18 January 1989, *Vearncombe a.o. v the United Kingdom and the Federal Republic of Germany*, no. 12816/87.

courts had no power of supervision over judgments and decisions rendered by the judges.<sup>93</sup> Although the task of the ECtHR was confined to the question of possible attribution to Spain or France and not to Andorra, we may assume that the requirements for attributing the conduct of the organ of one state to another as pronounced in Article 6 ILC were in this case fulfilled.

It follows from the above that the mere exercise of elements of the governmental authority of the other state is not sufficient for attributing conduct to the other state. Not only must the organ act 'on behalf' of the other state, it must also form part of the machinery of that state and it must be subject to that state's instructions – and not to that of the lending state.

If conduct of a state organ taking place in the territory of another state cannot be attributed to the latter state, the latter state is in principle not to be held responsible. In a provisionally adopted version of the Draft Articles, the ILC had considered it necessary to explicitly rule out any idea that the territorial state is in some way responsible solely because the specified conduct of organs of a foreign state took place in its territory:

*'Article 12. Conduct of organs of another State*

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

- 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.<sup>94</sup>

Thus, if the organ remains under the orders and exclusive authority of the state to which it belongs, its acts and omissions cannot be attributed to the state on whose territory the conduct takes place.<sup>95</sup> Much in line with our previous statements regarding obligations of due diligence in connection to acts of private persons however, the ILC qualified this rule by underlining that the territorial state always remains responsible for its own acts and omissions, also those relating to the conduct of the other state:

'[I]t is important to remember that, although the conduct of organs of a State acting in the territory of another State can in no event be attributed *as such* to the territorial State, the latter could nevertheless incur international responsibility for acts committed on the occasion of and in connexion with the conduct of such foreign organs. Those would not, of course, be acts of the organs of the foreign State, but acts of the organs of the territorial State, for example if they were unduly passive in their conduct in the face of acts prejudicial to a third State committed within the frontiers

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93 ECtHR 26 June 1992, *Drozd and Janousek v France and Spain*, no. 12747/87, para. 96.

94 Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, p. 83.

95 *Ibid.*

of the territorial State by an organ of a foreign State. In other words, the actions of foreign organs in the territory of a State, while not attributable to that State, may in certain cases afford a material opportunity for the territorial State to engage in conduct which might entail its international responsibility.<sup>96</sup>

This approach was followed by the ECtHR in the case of *Ilasçu*, where it considered that even though the exercise of authority by Moldova was limited in part of its territory, it was under a duty 'to take all the appropriate measures which it is still within its power to take' to ensure respect for fundamental rights and freedoms within its territory;<sup>97</sup> and by the HRC in the case of *Alzery v Sweden*, where Sweden was found to have failed to comply with its duty not to consent to or acquiescence in ill-treatment performed by foreign officials in its territory and therefore to have acted in violation of Article 7 ICCPR.<sup>98</sup>

The conclusion that attribution of conduct of an organ to the receiving state requires the organ to have been placed in the receiving state's command structure is particularly relevant for the various forms in which EU Member States have arranged joint missions of sea border control. In chapter 6 below, it is explained that the cooperation with third countries does generally not foresee in European 'guest officers' operating under the (exclusive) command of third states. In operations coordinated by the EU's border agency Frontex however, guest officers may as a rule only perform tasks and exercise powers under instructions of the host Member State, which constitutes an important indicator for attributing their activities to the host state.<sup>99</sup>

### 3.2.4 Attribution of joint conduct to the state

#### 3.2.4.1 Multiple state responsibility

Multiple states can be held responsible for a single event.<sup>100</sup> Under the law

<sup>96</sup> Ibid, p. 84.

<sup>97</sup> *Ilasçu a.o. v Moldova and Russia*, paras. 313, 331.

<sup>98</sup> HRC 10 November 2006, *Alzery v Sweden*, no. 1416/2005, para. 11.6. Note that the Human Rights Committee attributed the conduct of the American officials to Sweden, rather than established the responsibility of Sweden on the basis of its own omissions, i.e. a failure to prevent the maltreatment. Also see European Commission for Democracy through Law (Venice Commission), Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transport of prisoners, Opinion no. 363/2005, Strasbourg, 17 March 2006, doc. CDL-AD(2006)009, paras. 66, 116-120.

<sup>99</sup> See, extensively, chapter 6.5.

<sup>100</sup> This is confirmed in Article 47 ILC Articles, which articulates that where several states are responsible for the same internationally wrongful act, 'the responsibility of each state may be invoked in relation to that act'. According to the ILC Commentary, in such cases 'each state is separately responsible for the conduct attributable to it' and 'responsibility is not

of state responsibility, we may distinguish three categories of situations in which the responsibility of two or more states may be engaged. The first is where a plurality of states have acted independently in relation to an event, consisting of an injury to a third party, and where the acts can be attributed to the respective states under one of the attribution rules. Because the rules on attribution are not mutually exclusive, it is perfectly conceivable that such situations may arise.<sup>101</sup> International jurisprudence provides abundant examples of situations where two or more states were held internationally responsible for a single incident.<sup>102</sup>

The second situation giving rise to a plurality of responsibility is where one state participates in the internationally wrongful act of another state. These have also been termed situations of derived responsibility, and are discussed in section 3.3. of this chapter below.

The third situation, to be discussed in the present section, is where two or more states truly act in concert, and where the joint act engages the responsibility of all states contributing to the act. Typically, the existence of multiple state responsibility in situations of concerted action has been addressed in the context of states setting up common organs, such as joint administrations of foreign territories, joint commercial ventures or intergovernmental executive bodies not having the status of international organisations. But apart from common organs, one can also imagine situations in which states engage in joint activity or collaborative conduct of a more ad hoc character, such as in the sea border patrols conducted by vessels with a mixed crew of Spain and North African officials, the carrying out of joint expulsion flights by two or more Member States of the European Union, or the joint management of facilities for external processing of migrants.<sup>103</sup> These latter situations must

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diminished or reduced by the fact that one or more other states are also responsible for the same act'; Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 124.

101 Ibid; R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 53.

102 See eg the cases of *Ilascu a.o. v Moldova and Russia* and *Alzery v Sweden* referred to in the previous section. In *Corfu Channel*, Albania was held responsible for damages caused to United Kingdom vessels by mines in Albanian waters, even though the mines had not been laid by Albania (but, in all probability, by Yugoslavia). In *Celiberti de Caseriego v Uruguay*, the Human Rights Committee held Uruguay to have violated Article 9 ICCPR on account of its security forces having arbitrarily arrested and detained Mrs. Celiberti and her two children in Porto Alegre, Brazil, while this operation was found to have been carried out 'with the connivance' of the Brazilian police: HRC 29 July 1981, *Celiberti de Caseriego v Uruguay*, no. 56/1979, paras. 9-10. Also see HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979, para. 12. And, in the context of a joint procedural duty of states to investigate cross-border human trafficking: ECtHR 7 January 2010, *Rantsev v Cyprus and Russia*, no. 25965/04.

103 In the context of joint conduct of ad hoc nature, the ILC commentary speaks of two or more states which '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.



then be distinguished from situations where identical offences are committed in concert by two or more states, for example a joint military invasion into a third state, where each state acts through its own organs and where, consequently, each state is to be held responsible for its own conduct.<sup>104</sup>

### 3.2.4.2 *Attributing joint conduct to a state*

Holding states responsible for joint conduct or conduct of a joint organ not having the status of international organisation does not appear to give rise to particular problems under the law on state responsibility. It is not a situation expressly addressed in the ILC Articles, but, according to the International Law Commission, the solution is implicit in them: 'according to the principles on which those articles are based, the conduct of the common organ can only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts'.<sup>105</sup> This approach is upheld in the present commentary to the ILC Articles<sup>106</sup> and finds confirmation in international case law and arbitration.<sup>107</sup>

Although responsibility for joint activity or acts of common organs is not disputed as such, the determination of responsibility in these situations is not entirely without its difficulties. A first obstacle, which may come to the fore

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In that case the injured state can hold each responsible state to account for the wrongful conduct as a whole', Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 124.

104 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 54.

105 *Ibid.*

106 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 44, 64, 124.

107 In the *Eurotunnel Arbitration*, concerning the recovery of damages incurred by the Eurotunnel company from the United Kingdom and France governments on account of their alleged failure to prevent clandestine migrants from disrupting the operations of the tunnel beneath the English Channel, the Arbitral Tribunal considered the Intergovernmental Commission created by the UK and France to supervise the operation of the tunnel to be a joint organ of the two states, whose decisions require the assent of both states and where action taken by this Commission in breach of applicable international agreements would engage the responsibility of both state, *Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 179. In the *Case concerning certain phosphate lands in Nauru*, the ICJ found the trusteeship for Nauru not to have an international legal personality distinct from the states having been designated as the 'Administrative Authority' – i.e. Australia, New Zealand and the United Kingdom – and held that Australia could be sued alone for claims relating to the administration of the territory, even though the responsibility for the administration was shared with two other states. ICJ 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Reports 1992, p. 257-259, esp. paras. 45, 48. Also see the separate opinion of Judge Shahabuddeen, p. 283-284, who endeavors to connect Australia's accountability to existing pronouncements of the International Law Commission on state responsibility for acts of common organs.

in all cases where the establishment of the international responsibility of one state involves the scrutiny of the responsibility of another state, is the *Monetary Gold* principle, which articulates that the adjudication by an international court upon the responsibility of a state not party to the proceedings runs counter to the principle of international law that an international court can only exercise jurisdiction over a state with its consent.<sup>108</sup> The *Monetary Gold* principle is essentially a procedural barrier for obtaining redress before an international court and does not diminish the scope of a state's responsibilities as such.<sup>109</sup>

A second issue which has come to the fore is whether the principle of joint and several liability applies to compensation obligations arising from a determination of responsibility. Again, this is a matter which is primarily relevant for obtaining redress and not one touching upon the preliminary question of a state's international responsibility. Although Article 47 (2) ILC Articles expressly leaves open the question of distributing compensation obligations between the wrongdoing states, it has been argued that the principle of joint and several liability forms part of international law.<sup>110</sup>

Thirdly and most pertinently, it is not entirely clear when organs acting on the behalf of two or more states must be considered as joint organs. If it is accepted that responsibility for acts of common organs is not a matter warranting special attention under the ILC Articles, it would be sound to assume that an organ can be labeled as a common organ only if its acts can be attributed to more than one state in accordance with the existing attribution rules.<sup>111</sup> This would mean that an organ created by two or more states is to be considered a common organ if it can be regarded as a state organ of each of them under, for example, Articles 4 or 5 ILC Articles; or that an existing state organ which is put at the disposal of another state in accordance with the terms of Article 6 ILC Articles, can be considered a common organ if it

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108 ICJ 25 June 1954, *Monetary Gold Removed from Rome in 1943, Preliminary Questions*, ICJ Reports 1954, p. 32; ICJ 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, para. 88; ICJ 13 September 1990, *Land Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports 1990, p. 92, para. 56.

109 In *Nauru*, the ICJ clarified that the *Monetary Gold* principle will only preclude the ICJ from adjudicating upon a claim if the legal interests of a third state form 'the very subject-matter of the decision that is applied for', *Nauru*, para. 54.

110 See esp. J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988), p. 225-267; J. Crawford, Third report on State responsibility, 10 July 2000, UN Doc. A/CN.4/507/Add.2, paras. 272 and 276. In the *Corfu Channel* case, Albania was ordered to pay the full extent of the damages suffered by the United Kingdom: ICJ 15 December 1949, *Corfu Channel case (Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern)*, ICJ Reports 1949, p. 244.

111 This appears to be the ILC's approach: see esp. J. Crawford, Third report on State responsibility, 10 July 2000, UN Doc. A/CN.4/507/Add.2, para. 267.

*additionally* remains to function as an organ of the lending state, for example because it continues to receive instructions from, or continues to operate within the machinery of the sending state.<sup>112</sup> In accordance with the notion that there must always be a connection between the international responsibility of a state and its own sphere of activity, this may well imply that an organ, but the same holds true for other forms of collaborative conduct, can only be labeled as 'joint' when the activity complained of was carried out in accordance with the instructions of all states involved and that all responsible states had it in their power to prevent the alleged misconduct.

That there is a threshold for considering collaborative conduct as joint for establishing the responsibility of multiple states finds support in the inadmissibility decision in the case of *Saddam Hussein v 21 Contracting States to the ECHR*, where the ECtHR was not prepared, without more, to hold the respondent European countries responsible on account of their support for and/or taking part in the coalition which had invaded and occupied Iraq and in the course of which Saddam Hussein had been captured and allegedly been maltreated. Even though one respondent state, the United Kingdom, was accepted to have played a major part in the invasion and occupation of Iraq, the ECtHR considered that the responsibility of any of the respondent states could not be invoked 'on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.'<sup>113</sup> The Court found it of particular importance that the applicant had not indicated which respondent state (other than the US) had any – and if so, what – influence or involvement in his arrest and detention.

In the early case of *Hess v United Kingdom* (1975), the legal and factual embedding of the common organ was more precisely circumscribed. The complaint in that case concerned the long and secluded detention of Rudolf Hess in the Allied military prison in Berlin-Spandau. The supreme authority over the prison was vested in the four allied powers, with the executive authority consisting of four governors acting by unanimous decisions. Administration and supervision was at all times quadripartite, and instructions of the governors were carried out by prison staff appointed by the governors. The prison was guarded in monthly turns by military personnel of the four allied powers. The complaint was lodged against the United Kingdom alone.

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112 In this vein also S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in: P. Shiner and A. Williams, *The Iraq War and International Law*, Oxford: Hart (2008), p. 203-204, who argues that although it is not necessary for the organ to act on the joint instructions of both states, each of the states must retain (at least some) control over the action of the organ.

113 ECtHR 14 March 2006, *Saddam Hussein v Albania and twenty other states*, no. 23276/04.

The European Commission of Human Rights first considered the United Kingdom to act as ‘a partner in the joint responsibility which it shares with the other three powers’.<sup>114</sup> From this wording, one could be inclined to conclude that *Hess* is a schoolbook example of a case where conduct of a common organ gives rise to the responsibility of each of the participating states. The European Commission of Human Rights, nonetheless, found the complaint inadmissible, because it was ‘of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom’s participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter “within the jurisdiction” of the United Kingdom, within the meaning of Art. 1 of the Convention.’<sup>115</sup>

This is a prominent yet unsatisfactory example of how the notion of jurisdiction under human rights law may interrupt the ordinary application of the law on state responsibility. Under the reasoning of the European Commission of Human Rights, the fact that conduct of a common organ, which may be in violation of a person’s human rights, can be attributed to a state is insufficient for holding a state responsible. It is additionally required that the injured person finds himself within the jurisdiction of the state acting through the common organ, and this is, according to the Commission, simply not possible, because a joint authority cannot be divided into separate jurisdictions.

It is rather unfortunate that the Commission does not explain why the activities of a joint authority, which presumably exercises joint jurisdiction, cannot bring a person under the separate jurisdiction of each the states involved – rather than under none of them. From the perspective of the international law meaning of the notion of jurisdiction, the United Kingdom was perfectly within its right – as were the other allied powers – to block any decision concerning the detention regime which would raise issues under the ECHR. Possibly, the European Commission proceeded from the assumption that the requirement of ‘jurisdiction’ is indissociable and cannot be shared between two or more states, but this reasoning does not imperatively follow from the text of Article 1 ECHR (which merely requires a person to fall under a state’s jurisdiction – not excluding the possibility that a person may fall under the concurrent jurisdiction of another state) and is difficult to reconcile with later pronouncements of the ECtHR in, amongst other cases, *Ilasçu* (where the detainees were considered to fall both within the jurisdiction of Russia and Moldova) and *Treska* (where it was not excluded that both Italy and Albania could incur obligations towards the expropriated applicants).<sup>116</sup>

Of course, the case of *Hess* does point to a problem which is likely to come to the fore in all situations where states act through a common organ: due

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114 EComHR 28 May 1975, *Hess v United Kingdom*, no. 6231/73.

115 *Ibid.*

116 See section 3.2.2.4. above.

to the very nature of the organ, a state does not have it in its exclusive power, but depends on the willingness of other states, to bring about a change in the activities of the organ. Should the obligation at issue have been to immediately release Rudolf Hess, it may well be that the United Kingdom had neither the factual nor legal power to comply with such an obligation. But this argument would, in line with our observations on positive obligations in chapter 2.5.3. and section 3.2.2.4. above, seem to require a more in depth assessment of the nature of the obligation at issue and the legal and factual capabilities the United Kingdom had at its disposal to undertake particular action. In the case of *Hess*, the primary request of the applicant, his wife Ilse Hess, had been for the Commission 'to press the United Kingdom to step up its efforts to secure renegotiation of the Four Power Agreement in order to obtain the release' of her husband. Although the Commission's competence was confined to reviewing whether the ECHR had been complied with and did not extend to asserting 'pressure' on Contracting States, a reasoning under the doctrine of positive obligations is well sustainable that because the United Kingdom was legally and factually capable of exerting influence, it should therefore had taken steps to prevent possible violations under Articles 3 and 8 ECHR from occurring.

### 3.3 DERIVED RESPONSIBILITY FOR AIDING AND ASSISTING ANOTHER STATE

#### 3.3.1 Derived responsibility

The previous sections dealt with the international responsibility of states for conduct which is attributable to them and which constitutes an international wrong. As such, these rules and principles are well apt to be applied to situations of collaborative conduct of states, by way of holding each state independently responsible for conduct attributable to it, regardless of whether another state is also to be held responsible. There may however also be situations, and these are termed by the ILC as 'exceptions to the principle of independent responsibility',<sup>117</sup> where a state's international responsibility derives from, or depends upon, the conduct of another state. These situations, interchangeably denoted as situations of indirect,<sup>118</sup> derived,<sup>119</sup> dependent<sup>120</sup> or accessory<sup>121</sup> responsibility, have in common that a state has

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117 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 65.

118 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 52; J.D. Fry, 'Coercion, Causation and the Fictional Elements of Indirect State Responsibility', 40 *Vanderbilt Journal of Transnational Law* (2007), p. 615.

119 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 65; G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009), p. 5.

120 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 64.

not itself carried out the breach of international law, but where it has been involved, in one way or the other, in international wrongful conduct of another state and where, on account of that involvement, the state should separately assume responsibility. Chapter IV of the ILC Articles on State Responsibility deals with situations of derived responsibility and covers: (i) the situation where one state assists another in the commission of an international wrongful act (Article 16 ILC); (ii) the situation where a state directs and controls another state in the commission of an international wrongful act (Article 17); and (iii) the situation where one state coerces another to commit an international wrongful act (Article 18). One particular question raised by the incorporation of these categories of derived responsibility in the ILC Articles is how they correspond to the doctrine of positive obligations under human rights law, which may also entail a duty to undertake preventive or protective action in respect of human rights violations committed by another state.

Because Article 17 and 18 foresee in the rather atypical situations of imbalanced state relationships where one state dominates, threatens, or uses force against another state, they are not of immediate relevance to this study.<sup>122</sup> Far more pertinent is the first situation, that of 'aid and assistance', as many forms of cooperation in controlling migration embody the provision of all kinds of assistance by states at the receiving end of migration flows to countries of origin or countries of transit. This assistance can be financial, can take the form of the supply of surveillance and coast watching equipment, can consist of the training of border guards or of general programmes of capacity building. The argument has been made, most notably, that through assisting third states in closing the border, European states might facilitate the violation of refugee and other migrants' rights and therefore be complicit in the violation of those rights.<sup>123</sup> This section explores the contents of the international law concept of 'aid and assistance', or 'complicity',<sup>124</sup> and tries to establish, in particular, under what circumstances states can be held responsible for providing aid

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121 M. Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', 12 *Journal of Conflict & Security Law* (2008), p. 384.

122 In respect of Article 17 ILC Articles ('direction and control'), the ILC Commentary mentions that the term 'control' refers to domination over the commission of the wrongful act and not simply the exercise of oversight and that similarly, the word 'directs' does not encompass incitement or suggestion but 'actual direction of an operative kind', Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 69.

123 Eg Human Rights Watch, 'European Union Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees', New York, October 2006; A. Fischer-Lescano, T. Löhr and T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', 21 *IJRL* (2009), p. 280.

124 Originally, the notion of complicity featured in the work of the ILC, but was eventually dropped in favor of the more factual connotation of 'aid and assistance', in order to avoid inappropriate analogies with the term complicity in domestic law. Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 102.

which is, or may be, used to commit human rights violations. It is submitted that the notion of aid and assistance is scarcely developed within international law and that, specifically within human rights law, questions pertaining to the provision of aid and international cooperation are more typically addressed under the doctrine of positive obligations.

### 3.3.2 Aid and assistance

Unfortunately, there is surprisingly little international jurisprudence on the legal meaning and contours of the notion of aid and assistance in international law.<sup>125</sup> Scholarly writings are more readily available, but these neither display a firm consensus on the status of the concept in international law, nor on its precise contents.<sup>126</sup> We may nonetheless depart from the understanding that aid and assistance has at least some basis in international law. In his Seventh report on state responsibility, rapporteur Ago saw the existence of the norm confirmed by various examples, such as a state placing its territory at the disposal of another state to make it possible for that state to commit an act of aggression against a third state; the provision of means for the closure of an international waterway; the facilitation of the abduction of persons on foreign soil; and assistance in the destruction of property belonging to nationals of a third country.<sup>127</sup> Other examples mentioned are Security Council resolutions calling upon states not to render aid to activities of regimes previously held to be in violation of international law, such as the call upon states not to render assistance to the regime in Southern Rhodesia – which was labeled as a racist and therefore illegal regime – and the appeal on states not to provide Israel with ‘assistance to be used specifically in connection with settlements in the occupied territories’.<sup>128</sup>

On the basis hereof, and by ‘evoking the intention of progressive development of international law’, the ILC sought to formulate a general rule on the

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125 The most explicit pronouncement on the notion of ‘aid and assistance’ was made by the ICJ in the *Genocide Case*, paras. 419-424.

126 For comprehensive exercises, see especially J. Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’, 57 *British Yearbook of International Law* (1986), p. 77-131; B. Graefrath, ‘Complicity in the Law of International State Responsibility’, 29 *Revue Belge de Droit International* (1996), p. 370-380; K. Nahapetian, ‘Confronting State Complicity in International Law’, 7 *UCLA Journal of International Law & Foreign Affairs* (2002), p. 99-127; V. Lowe, ‘Responsibility for the conduct of other states’, 101 *Japanese Journal of International Law* (2002), p. 1-15; G. Nolte and H.P. Aust, ‘Equivocal Helpers – Complicit States, Mixed Messages and International Law’, 58 *ICLQ* (2009), p. 1-30.

127 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 58.

128 UN Security Council Resolution 232, 16 December 1966, UN Doc. S/INF/21/Rev. 1, para. 5; UN Security Council Resolution 465, 1 March 1980, UN Doc. S/INF/36, para. 7. On these examples and others, see extensively Quigley (1986), p. 83-95.

responsibility of states for their participation in wrongful acts of other states.<sup>129</sup> This was despite the suggestion of some members of the ILC to limit the application of the concept to a particular set of international obligations, such as those relating to the prohibition of the use of force.<sup>130</sup> Special rapporteur Crawford, when reviewing the provisionally adopted draft articles in 1999, admitted that the examples on which the ILC had earlier based a general norm of aiding and assistance were rather narrow and questioned whether the norm actually had a place in the draft articles.<sup>131</sup> Also in view of the explicit recognition of the prohibition to act in complicity with regard to specific prohibited conduct such as genocide or the use of force, the question remains valid to pose whether the existence or not of a norm of non-complicity is a matter belonging to the rules on state responsibility or rather to the field of a state's primary obligations.<sup>132</sup> Very much alike to the scope of a state's positive obligations, there is merit to the argument that not only the existence of a norm of non-complicity, but also the criteria for its application, may vary from one substantive obligation to another. The argument could further be advanced that instances of derived responsibility are essentially species of the more general duty of due diligence, under which for example, a prohibition to facilitate or render aid for the commission of a wrongful act forms part of wider preventive or protective duties under a particular human rights provision.

In view of the above, it does not come as a surprise that the international customary law status of 'aid and assistance' is also disputed. Contrary to the attribution rules laid down in chapter II of the ILC's Articles, which are widely pronounced as embodying rules of customary international law, opinions on the status of a general rule of complicity in international law remain divided, although the ILC and a majority of authors have argued in favor of such a status.<sup>133</sup> And the ICJ, albeit cursory and without further explanation, noted in the *Genocide* case that the notion of 'aid and assistance' is a category belonging to the customary rules constituting the law of state responsibility.<sup>134</sup> This is not the place to review these pronouncements. But it is sound to approach the international law concept of 'aid and assistance' with caution, especially

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129 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 59; Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 103.

130 See esp. the discussions in: Summary records of the thirtieth session, *Yearbook of the ILC 1978*, Vol. I, p. 233, 240 (Riphagen, Ago); Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 104.

131 J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 49 (para. 177).

132 *Ibid.*, p. 49, 51 (paras. 175, 187). Also see Graefrath (1996), p. 372.

133 For discussions, see: Quigley (1986), p. 81-107; Nahapetian (2002), p. 101-104; Nolte and Aust (2009), p. 7-10; Graefrath (1996), p. 378

134 *Genocide Case*, para. 419.



in so far as it aspires to embody a rule applicable to all international obligations. The ILC formulated the rule on aid assistance as follows:

‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:  
 (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and  
 (b) the act would be internationally wrongful if committed by that State.’

The scope of Article 16 is limited in several ways. First, assistance or aid must be given which enables another state, or which makes it materially easier for another state, to commit an international offence.<sup>135</sup> According to the ILC Commentary, ‘there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to the act.’<sup>136</sup> The notion of aid and assistance itself is not defined and may therefore be very broadly interpreted. The ILC has referred to the examples of economic aid, the use of a state’s territory or military bases, overflight, military procurement, the training of personnel and the provision of confidential information.<sup>137</sup> Further, the provision of aid of a legal or political nature, such as the conclusion of treaties which may facilitate the commission by the other party of a wrongful act, may come under the ambit of aid or assistance.<sup>138</sup> It is said that precisely because virtually all conceivable forms of support and interstate cooperation can be brought under Article 16 ILC Articles, the other conditions of Article 16 warrant strict application.<sup>139</sup>

A second condition is that the conduct complained of must be equally opposable to the acting and the assisting state, i.e. must constitute a breach of an international obligation of both states. In view of their universal application, this condition will ordinarily not pose problems under human rights treaties. Neither however, should the regional nature of other human rights treaties such as the ECHR be automatically taken to obstruct application of the notion of aid and assistance in respect of wrongful conduct carried out by a non-Contracting Party: Article 16 ILC does not require the act to be opposable to both states under the *very same* international obligation – it is merely

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135 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 58 (at para. 72).

136 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 5). Graefrath speaks of aid which must be ‘substantial’, Graefrath (1996), p. 373.

137 J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 50 (at n. 349).

138 Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 102.

139 Graefrath (1996), p. 374. It has been argued, moreover, that there should be a de minimis threshold for prohibited aid or assistance: Nolte and Aust (2009), p. 10-13.

required that the international wrongful conduct would also be wrongful if committed by the assisting state itself.<sup>140</sup>

The most troublesome and debated aspect of the concept of complicity as it has been laid down in Article 16 ILC is the requirement that the state has provided assistance 'with knowledge of the circumstances of the international wrongful act'. In itself, this could simply be understood as requiring that the assisting state is aware that the assistance will indeed facilitate an international wrongful act. But in the Commentary to the Articles, and throughout its work on the topic, the ILC has insisted that Article 16 ILC not only imposes the requirement of *knowledge*, but also that of *intent*: 'the aid and assistance must be given with a view to facilitating the commission of the wrongful act'.<sup>141</sup> And: 'A State is not responsible (...) unless the relevant State organ intended to facilitate the occurrence of the wrongful conduct.'<sup>142</sup> It is not entirely clear whether the ILC considers the element of intent to simply be demonstrated by proof that a state had knowledge of the circumstances or that it perceives intent as a separate condition referring to the motives which inspire the actions of assisting state, i.e. requiring that it is established that the assisting state had the express purpose to facilitate the commission of a breach of international law.<sup>143</sup> The ICJ, in addressing Article 16 ILC in the *Genocide* case, refused to pronounce itself on the question whether Article 16 ILC encompasses an intent requirement by noting that 'the least' that is required is that an organ or person acts knowingly of the crime to be committed.<sup>144</sup>

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140 This corresponds to the rationale of Article 16 that a state should not be allowed to do by another what it cannot do by itself. Also see Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 6).

141 *Ibid.*, at para. 5. The commentary to former Article 27 of the Draft Articles stated it as follows: 'As the article states, the aid or assistance in question must be rendered "for the commission of an internationally wrongful act", i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act.' Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 104 (at para. 18).

142 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 5).

143 In his Seventh report on state responsibility, Ago appears to equate the requirements of knowledge and intent: 'The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them.' R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 58 (at para. 72). Notably, Crawford, in a footnote in his Second report, also reduces the requirement of intent to proof of knowledge: 'The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances'. J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 51 (at

The insistence of the ILC on the requirement of intent may be regarded as surprising, not only because any reference to that requirement is absent in the text of Article 16 ILC, but also because the ILC has conscientiously avoided throughout its Articles on State Responsibility to refer to any element of fault or culpability, by noting that such requirements form part of the substantive – or primary – obligations of states and that the Articles should not lay down any presumption as regards subjective or objective standards for breaches of an obligation.<sup>145</sup>

On the one hand, the condition of intent under Article 16 ILC has been forcefully opposed by a variety of writers for it is seen to give rise to all sorts of problems which risk making the whole concept of complicity unworkable. One is that it is inherently problematic to conceive of the state as an actor capable of making conscious decisions and that it is virtually impossible to determine the state of mind of a state.<sup>146</sup> Another is that a requirement of intent could allow states to circumvent responsibility by simply omitting to make any public statements declaring their intent.<sup>147</sup> And thirdly, a requirement of intent would seriously narrow the scope of the norm, because states will seldom act out of the specific motivation or desire to commit international wrongs, less still to violate human rights, but are more likely prepared to incur the occasional breach of certain obligations while being in the pursuit of some perceivably higher aim.<sup>148</sup> These arguments support an understanding of the intent requirement that it should not refer to the mental motives underlying the assistance but rather to the threshold that it is established that the assisting state knows about the wrongful manner in which the assistance will be used.

On the other hand, the ILC's emphasis on the intent requirement has been explained from the view that there must be a certain threshold for triggering responsibility in accordance with Article 16 ILC, because otherwise all sorts of international cooperation which are in themselves generally beneficial, may attract the assisting state's responsibility.<sup>149</sup> A strict literal reading of Article 16 ILC would not obstruct the conclusion for example, that a state is to be held responsible for development aid it provides to another state in the knowledge that a small portion of that aid may well be used contrary to human rights.

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n. 362), emphasis added.

144 *Genocide Case*, para. 421.

145 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 34-35 (with further references). Also see R. Higgins, *Problems and Process: International Law and How We Use it*, Oxford University Press (1994), p. 160-161.

146 Quigley (1986), p. 111. This corresponds to the notion that international law is not normally concerned with the specific motivations of one or more State officials, but rather with the objective sufficiency or insufficiency of State action.

147 Graefrath (1996), p. 375; Nahapetian (2002), p. 126.

148 A. Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons', 87 *International Review of the Red Cross* (2005), p. 471; Quigley (1986), p. 111; Nahapetian (2002), p. 126.

149 Nolte and Aust (2009), p. 15; Graefrath (1996), p. 376.

Because practically every form of contact with another state which is engaged in human rights violations may be labeled as assistance, the category of situations to be brought under Article 16 ILC could thus become practically infinite. It is probably for this reason that the ILC has underlined, in discussing the 'knowledge' requirement, that there must not only be a 'clear and unequivocal link' between the aid or assistance and the subsequent wrongful conduct,<sup>150</sup> but also that it is not sufficient that the state is, or ought to be, aware of the 'eventual possibility' of such a use.<sup>151</sup> Rather, it is required that it is *established* that the assisting state *knows* that its aid *will* be put to wrongful use.<sup>152</sup> Others have also stressed that, in view of the broad concept of assistance and the great variety of situations in which states cooperate with one another, the link between the aid and the wrongful activity should not be too remote.<sup>153</sup> Adherence to a standard of some obvious link between the aid and assistance is also in conformity with the examples relied upon by the ILC in the drafting stages.<sup>154</sup> In these examples, the assistance was used primarily or specifically to commit the act in question and it was a certainty rather than a probability that the assistance rendered would be used for committing the act.

Having – somewhat – clarified the various elements of Article 16 ILC, it is now time to turn more specifically to the issue of aid or assistance in relation to obligations stemming from human rights treaties. In this connection, the ILC has repeatedly affirmed that the provision on aid and assistance also applies to human rights treaties.<sup>155</sup> A profound problem remains nonetheless that the concept has scarcely been acknowledged by human rights treaty monitoring bodies. To be sure, the concept of complicity may be said to have found recognition in human rights law, but under other terms than those referred to in Article 16 ILC. For example, in the course of the United States program of extraordinary renditions and secret detentions following the September 11 attacks, several European states were found to be 'complicit'

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150 J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 50 (at para. 180); Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 5).

151 Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 104 (at para. 18). Also see Nolte and Aust (2009), p. 10-12, 14, who speak of a requirement of 'certainty'.

152 Ibid. Also see *Genocide Case*, para. 432: '(...) an accomplice must have given support in perpetrating the genocide *with full knowledge of the facts*' and that it is not sufficient that 'the State has been aware, or should normally have been aware, of the serious danger that acts (...) would be committed', emphasis added.

153 Nolte and Aust (2009), p. 10-12; Boivin (2005) p. 471; Nahapetian (2002), p. 106. Graefrath (1996), p. 374.

154 See n. 127 and 128 *supra*.

155 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 67 (at para. 9); Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC 1978*, Vol. II (Part Two), p. 105 (at para. 22); Report of the Commission to the General Assembly on the work of its fifty-first session, *Yearbook of the ILC 1999*, Vol. II (Part Two), p. 71 (at para. 262).

in violations of human rights, in particular on account of the permitting of the unlawful transportation of detainees through their territory; and by allowing the secret detention of persons on their territory.<sup>156</sup> But these issues were not – and need not be – addressed under the terms of Article 16 ILC, but typically dealt with under well-developed doctrines under the various substantive human rights obligations, such as the obligation of states not to expose persons within their territory to ill-treatment meted out in the territory of another state; or the obligation to protect persons within their territory from harm emanating from a third party.<sup>157</sup> It transpires from these examples and others that, at least in so far as a victim of human rights violations is present on the territory of the assisting state, the doctrine of positive obligations is an adequate and sufficient tool for arriving at the state's responsibility.

It may however be more problematic to make operational duties of due diligence in respect of instances of facilitating wrongful conduct which is carried out by and in the territory of another state. In those situations, the notion that the state has special protective duties towards persons present in its territory is absent and it may consequently be more difficult to bring a victim under the scope of a state's positive obligations. One of the few examples of a situation involving the rendering of aid to another state having adverse human rights consequences in the other state brought before a human rights body is the case of *Tugar v Italy*, concerning an Iraqi mine clearer by profession, who stepped on a mine which had been laid by Iraq and was illegally sold to the Iraqi government by a private Italian company.<sup>158</sup> Relying on Article 2 ECHR, Tugar submitted that the Italian government had knowingly allowed the supply of anti-personnel mines to Iraq which were likely to be used indiscriminately. The European Commission of Human Rights found the complaint inadmissible, because there was 'no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible indiscriminate use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered'. It followed that the 'adverse consequences of the failure of Italy to regulate arms transfers to Iraq were too remote to attract the Italian responsibility'.

Although Tugar had phrased his complaint in terms resembling the international law concept of complicity, the European Commission understood

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156 Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states* (Report), Doc. 10957, 12 June 2006; European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, P6\_TA(2006)0316, 6 July 2006; House of Lords and House of Commons Joint Committee on Human Rights, *Allegations of UK Complicity in Torture* (Report), HL Paper 152, HC 230, 4 August 2009.

157 Also see HRC 10 November 2006, *Alzery v Sweden*, no. 1416/2005.

158 EComHR 18 October 1995, *Rasheed Haje Tugar v Italy*, no. 22869/93.

the complaint as one relating to a lack of protection of his right to life and Italy's positive obligation to appropriately regulate the arms trade. Should the *Tugar* case have been assessed in the terms of Article 16 ILC Articles, possibly relevant questions would have been whether the failure to regulate the arms trade contributed to the commission of the wrongful act, whether Italy could be said to have intended to assist Iraq or whether Italy was aware of the circumstances under which the mines would be put to use. The Commission applied a more straightforward test in simply noting that there was no 'immediate relationship' between the supply of weapons and their indiscriminate use and that the consequences were therefore too remote to attract Italy's responsibility. In terms of the notion of aid and assistance under international law, this reasoning does raise questions however, because the concept of aid and assistance is premised on the very idea that the responsibility of the assisting state derives from another state being the 'direct and decisive cause' of a violation. The Commission's reasoning may hence render the whole concept of aid and assistance virtually meaningless under human rights law, at least in those situations where the victim has never been inside the territory of the assisting state.

To summarise, it appears that under human rights law a distinction must be made between situations in which the victim of a violation of human rights is inside or outside the territory of the assisting state. In situations where the victim is present inside the assisting state's territory, it will ordinarily not be necessary to rely on the international law concept of aid or assistance to attract the assisting state's responsibility, because the responsibility directly hinges upon a state having acted in violation of its substantive duty to protect individuals within its territory. In situations where the victim is outside the assisting state's territory, this protective duty is more difficult to establish, implying that the notion of aid and assistance as laid down in the ILC Articles could be instrumental in fleshing out the nature of the relationship between the act of facilitation and the eventual wrongful act. There is however scarce case law confirming this proposition.

Further, even within the terms of Article 16 ILC Articles, the notion of aid and assistance would probably be too small a basis for holding EU Member States internationally responsible for forms of assistance to third countries in the course of migration control which involve, for example, the financing of reception schemes or border controls or the training of foreign officials. The requirement of a clear and unequivocal link between the facilitating act and the subsequent wrongful conduct and in particular the requirement that the assisting state knows that the aid will be put to wrongful use renders it problematic to consider general programmes of aid as giving rise to the responsibility of the assisting state. Although assistance in the form of the provision of patrol boats or money to third states engaged in *gross* or *systemic* violations of refugee and migrant rights could be construed as giving rise to the facilitating state's responsibility (under the reasoning that the latter state knew or

ought to have known that the aid would be put to unlawful use), it is less likely that assistance facilitating only *occasional* wrongdoings can also be brought under the ambit of Article 16 ILC Articles. Assuming that it must yet be proven that third states with whom European countries cooperate are engaged in systematic violations of migrant rights, it is henceforth problematic to label assistance rendered in the form of money, technical equipment or training as unlawful.

### 3.4 FINAL REMARKS

This chapter has shown that international law provides multiple mechanisms for allocating international responsibilities to states in situations where international wrongful conduct involves a plurality of actors. The chapter has underlined that the rules on attribution and derived responsibility laid down in the ILC's Articles on State Responsibility should not be assessed in isolation, but in conjunction with obligations inherent in the state's substantive, or primary, international obligations, especially those stemming from the doctrine of positive obligations. It follows that, in the determination of the responsibility of the state for wrongful conduct involving multiple actors, three separate but conjunctive questions may come to the fore: whether the act is actually committed by an agent of the state or should on some other account be attributed to the state; whether the state should be held separately responsible for wrongful activity which cannot be attributed to it but to which it has decisively or materially contributed; or whether the state, on account of its involvement in the circumstances giving rise to the wrongful conduct, has acted in breach of its protective or preventive duties inherent to its substantive international obligations.

A question which remains to be addressed is how the various rules for connecting a state's activity to internationally wrongful conduct as discussed in this chapter relate to the conclusions of the previous chapter, which described the personal scope of a state's human rights obligations in an extra-territorial context. It was said in the introduction to this chapter that the law on jurisdiction must be distinguished from the law on state responsibility. As Higgins has postulated: the law of jurisdiction is about *entitlements to act*, the law on state responsibility is about *obligations incurred when a state does act*.<sup>159</sup> Higgins' postulation obviously refers to jurisdiction in its ordinary meaning under public international law. From that understanding, the relationship between the notions of jurisdiction and state responsibility does not appear to give rise to particular problems: a state may not be entitled to act, but when it does act, it is accountable for the consequences.

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159 R. Higgins, *Problems & Process. International Law and How We Use it*, Oxford: Clarendon Press (1994) 146, emphasis in original.

But it was concluded in the previous chapter of this book that, under human rights law, the notion of jurisdiction has primarily been construed as implying a criterion of factual control by the state over the affected individual. As is also evidenced by case law discussed in this chapter, the construction of 'jurisdiction' as a factual criterion has tended to complicate the relationship between the delimitation of the personal scope of a state's human rights obligations and the law on state responsibility.

This is so because, firstly, in human rights law the term 'jurisdiction' gives expression to the link which must exist between the state and the individual and hence tends to leap over the various attribution rules which connect the state to particular activity. Because a 'jurisdictional link' between the state and the individual will normally depend on a state having engaged in certain conduct affecting the individual, it can well be that the concept of attribution is a prerequisite for the establishment of this jurisdictional link: in extraterritorial situations persons will normally only be brought under the jurisdiction of a state if they are sufficiently affected by an act of that state (or brought under the control of that state) – and that act (or assertion of control) has to be attributable to that state in the first place.<sup>160</sup>

Secondly and more fundamentally, because the term jurisdiction in human rights law deals with the wider link between the state and the individual, it may also replace or even defeat the rules associated with the allocation of state responsibility. It was described in this chapter that the regime on state responsibility has developed specific rules for attributing, for example, conduct of joint organs to a state and for holding states responsible for aid and assistance which is used by another state in violation of international law. These rules aim to ensure that states do not divest themselves of responsibility in situations where their involvement with a violation of an international norm may be indirect but nonetheless of such a decisive or materially important nature that it is appropriate to hold the state responsible. Important rationales behind these rules are further that a state should always be held responsible for the consequences of its own sphere of activity – also when that activity is linked in a less direct manner to wrongful conduct – and that a state should not be allowed to do through another actor what it cannot do by itself. But the notion of jurisdiction under human rights law, and especially a rather

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160 The case of *Stocké* may serve to illustrate this point. In that case, the European Commission of Human Rights, in respect of the conduct of a private police informer returning against his will a person present in France to Germany, developed the following general principle: '(...) authorized agents of a State not only remain under its jurisdiction when abroad, but bring other persons "within the jurisdiction" of that State to the extent that they exercise authority over such persons'. Thus, only if it could first be established that the police informer was an agent of the state, did the question of 'jurisdiction' arise. It follows that attribution is not only a requirement for establishing state responsibility, it *may* also be a requirement for establishing 'jurisdiction'. EComHR 12 October 1989, *Stocké v Germany* (Report), no. 11755/85, para. 166.



narrow outlook on that notion, may obstruct this application of the law on state responsibility. If the proposition is adhered to that the condition of 'jurisdiction' necessarily requires that the state is directly involved in activity affecting an individual, or that the state's activity directly affects an individual (or simply that the individual is under the state's control), some of the rules on state responsibility, but also the application of the doctrine of positive obligations, may become simply inapt to be applied to extraterritorial human rights violations, because these rules see precisely to circumstances where there may only be an indirect link between the individual and the acting state. It is therefore important to recall the conclusion of the previous chapter that more recent case law of the ECtHR and ICJ on positive obligations in an extraterritorial setting appears to proceed from a more generous understanding of the jurisdiction requirement, which was not seen to obstruct a reasoning under which a state can still incur a duty to ensure and protect a person's human rights even in the absence of effective factual control over an individual. This outlook on the jurisdiction requirement leaves room for accommodating the often intricate forms of international cooperation and assertions of state influence over other international actors, to which not only the doctrine of positive obligations, but also the law on state responsibility, have endeavored to provide appropriate legal solutions.

In chapters 6 and 7 of this study, it will be shown that the various mechanisms for allocating international responsibility as discussed in the present chapter provide useful guidance for delimiting the responsibilities of European states when they engage in external migration controls in conjunction with other actors.