

.....

Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility

Pierre-Marie Dupuy*

Abstract

As Special Rapporteur to the International Law Commission, Roberto Ago enlarged the vision of the scope of state responsibility, including new legal relations between the wrongdoer and the victim or third parties. He also eliminated any reference to damage in the definition of state responsibility. Finally, he proposed new classifications of wrongdoings and obligations. However, this latter makes use of a misleading terminology to designate inappropriate distinctions which do not necessarily correspond to any specific differentiation of legal regime in Part Two of the ILC's Draft Articles on State Responsibility. This is particularly the case for the classification of obligations of means and obligations of result. It is thus necessary to reassess the legal bearing of this distinction in terms of its civil law origin in order to decide whether it would be worthwhile to incorporate it, even indirectly, in the final version of the ILC's project. This is also the case for the overly sophisticated relationship established by Ago between some categories of obligations and wrongful acts. This paper argues that an opportunity now exists to make these distinctions more reliable and effective, even at the price of eliminating some of them.

* University of Paris (Panthéon-Assas, Paris 2), 12, Place du Panthéon, F-75231 Paris Cedex 05, France; Director of the *Institut des hautes études internationales de Paris*, Member of the *EJIL* Editorial Board. The author would like to thank Professor James Crawford for the early release of his Second Report on State Responsibility.

1 The ILC's Initial Option and Its Consequences

There was a time when the international law of state responsibility was basically simple and unified! Due largely to the positivist doctrine, led by Dionisio Anzilotti, the origin of responsibility lay in the commission by a state of a wrongful act. The damage produced by such an act, whether purely moral (or juridical) or both juridical and material, gave rise to the existence of an injured state. This latter, the right of which had been harmed, was able to seek reparation from the responsible state, through the means appropriate to the nature of the damage suffered. The main, if not the only consequence of the wrongful act, was to burden the responsible state with the subsidiary obligation of making reparation for the tortious results of its wrongdoing.¹

Then, the task of codifying this essential area of international law was taken up by the International Law Commission. After a false start,² it began this work on the basis of the erudite reports of one of the most brilliant internationalists of this century, Roberto Ago. He decided to make the definition of state responsibility even simpler, by leaving aside any reference to damage as a consequence of a wrongdoing. According to Article 1 of the first Part of the Draft Articles on State Responsibility, 'every internationally wrongful act of a State entails the international responsibility of that State'. Nor is mention made to damage in Draft Article 3. It limits the essential elements of an internationally wrongful act to two elements: 'a) a conduct consisting of an action or omission . . . attributable to the State under international law'; and b) the fact that this 'conduct constitutes a breach of an international obligation of the State'.

This is not the place to discuss the merits of this doctrinal choice. From a certain point of view, it consists less in the removal of damage as a basic element of the definition of state responsibility than in the reach of the ultimate consequence of Anzilotti's assertion, according to which 'the damage is implicitly bound up with the anti-legal nature of the act. To violate the rule is indeed always a disturbance of the interest it protects, and thus, of the subjective right of the person whose interest it is.'³ One may then argue, as Professor Paul Reuter did, that the ILC does not indicate damage as a constituent element of an international wrongful act because damage *is*

¹ See Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?', 11 *Michigan Journal of International Law* (1989) 105; *Idem*, 'Le fait générateur de la responsabilité internationale des Etats', 188 *RdC* (1984) 13, at esp. 78–80; *Idem*, *Droit international public* (1998, 4th ed.), at 411–439; see also Pellet, 'Remarques sur une révolution inachevée : le projet d'articles de la CDI sur la responsabilité des Etats', *Annuaire français de droit international* (1996) 7.

² Based on the reports of Mr Garcia-Amador, who had begun to codify the primary rules dealing with state obligations in relation to the protection of foreigners.

³ 'Le dommage se trouve compris implicitement dans le caractère antijuridique de l'acte. La violation de la règle est effectivement toujours un dérangement de l'intérêt qu'elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l'intérêt appartient', see Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers', 8 *Revue Générale de Droit International Public* (1906) nos. 1–2, at no. 1, 13. For a commentary, see Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States', 3 *EJIL* (1992) 139.

an inherent part of the breach of an international obligation.⁴ This option of the ILC is in line with the one it adopted while distinguishing between 'primary' and 'secondary' obligations. Violation of an obligation 'to do' or 'to abstain' from a specific conduct is one thing, for example, to duly respect the rights of foreign citizens on the national territory of a state; it is another thing to compensate the consequences of such a violation. Only the consequences of the breach of an obligation belong to the law of state responsibility, which deals only with 'secondary' rules.

This same option has nevertheless been taken up by the ILC, following the conclusions of its Special Rapporteur Ago, by introducing an enlarged vision of the scope of state responsibility. According to this vision, state responsibility includes any new legal relations between the wrongdoer and his victim or third parties.⁵ This has led, among other consequences, to a shift from an emphasis on the obligation (of reparation) on the part of the responsible state to an emphasis on the right(s) of the injured state(s), together with an expansion of this last concept, as shown in the current version of Draft Article 40.⁶

At the same time, as a result of the elimination of damage, the identification of the injured state becomes less clear, at least in some situations. This is particularly the case when the obligation violated is an *erga omnes* one. This means, per definition, that every state should feel injured by its breach, a vision closely tied to the institution of the international crime of state.⁷ As rightly pointed out by J. Combacau and D. Alland, commenting on the option chosen by the ILC as to the definition of state responsibility, 'the internationally wrongful act . . . ceases to be the homogeneous legal concept . . . but instead breaks down into a multiplicity of acts'.⁸

Eliminating damage also creates some new difficulties for the task of drawing up the second part of the ILC Draft Articles on the 'Content, Forms and Degrees of International Responsibility'. In classical terms, the customary law of state responsibility relied on a rather elementary categorization of damages. In particular, there was a distinction between moral or juridical damage, on the one hand, and material damage, on the other. To each category corresponded a special means of reparation: 'satisfaction' in one case, '*restitutio in kind*' or financial compensation in the other. However, once the elementary correspondence between wrongdoing and damage

⁴ Reuter, 'Le dommage comme condition de la responsabilité internationale', in *Idem, Le développement de l'ordre juridique international* (1995) 561; B. Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', 185 *RdC* (1984) 13, esp. at 33 *et seq.* See also Tanzi, 'Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?', in M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* (1987) 1.

⁵ R. Ago, Second Report, UN Doc. A/CN.4/233, paras 12–30 (*ILC Yearbook* (1970, II)); R. Ago, Third Report, UN Doc. A/CN.4/246 & Add. 1–3, para. 43; (*ILC Yearbook* (1971, II, Part 1)).

⁶ 'Meaning of Injured State', which is a very lengthy and rather complicated provision.

⁷ For a recent comment on responsibility for crime of state, see Bowett, 'Crime of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *EJIL* (1998) 163; see also Dupuy, 'Le fait générateur', *supra* note 1, esp. at 55–60 and 98–105, and *Idem*, 'Implementation of the Institutionalization of International Crimes of State', in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States* (1989), at 170.

⁸ Combacau and Alland, "'Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations', 16 *Netherlands Yearbook of International Law* (1985) 81.

breaks down, it becomes necessary to develop and refine the categorization of obligations whose breach will give rise to correlative categories of reparation. But on the basis of Draft Articles 1 and 3, the link between the origin of responsibility (referred to, rightly, in the original French of Ago's reports as, '*le fait générateur*') and its 'content, forms and degrees' becomes less concrete, more intellectual and, consequently, more difficult to assess.

This seems to be one basic reason why Roberto Ago, in conformity with the premises already laid down in his Hague Lectures of 1939,⁹ meant to establish a new categorization of obligations, the breach of which would eventually give rise to differentiated regimes of reparation. But this raises at least two new methodological questions:

(1) *How to categorize* obligations which give rise to specific forms of reparation without at the same time dismantling or making useless the very distinction between 'primary' and 'secondary' rules referred to above?

(2) And, *why categorize* if the distinction established between several categories of obligations and, consequently, of illicit acts do not result in corresponding differentiated categories of 'contents and forms' of responsibility?

A categorization of primary obligations which remains purely theoretical would be of no use. One must stress, at least within the scope of state responsibility as it is defined by the ILC, that the only apposite categorization of obligations is one which assists in determining the consequences of their violation, in terms of content, form and degree, or, to put it differently and in a broader sense, in terms of legal *regime*.

Now, it is submitted that some of the distinctions between categories of obligations provided in Part One of the Draft Articles as it was adopted on the basis of Ago's reports do not correspond to any specific differentiation of legal *regime* in Part Two. Such seems, in particular, to be the case in relation to the distinction between obligations of conduct and obligations of result in Articles 20, 21 and 23. Furthermore, the same distinction seems to introduce a classification into the law of state responsibility which, for several reasons, appears to be quite unsatisfactory when putting into practice the responsibility of states. It is this very distinction to which we shall now turn.

2 Misleading Terminology and Inappropriate Distinctions

Roberto Ago introduced a series of distinctions between wrongful acts; some are instantaneous, others are continuous, others are complex.¹⁰ This classification is connected in some way — though still not clearly enough — with another form of classification which deals with different kinds of obligations, as they are presumed to

⁹ R. Ago, 'Le délit international', 68 *RdC* (1939) 415.

¹⁰ See, *inter alia*, Dupuy, 'Le fait générateur', *supra* note 1, at 44–55; Wyler, 'Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite', 95 *Revue générale de droit international public* (1991) 881; Pauwelyn, 'The Concept of a "Continuing Violation" of an International Obligation: Selected Problems', 66 *BYbIL* (1995) 415; Salmon, 'Le fait étatique complexe : une notion contestable', 28 *Annuaire français de droit international* (1982) 709.

generate different types of wrongdoings when breached. This second classification is laid down in Articles 20–24. It begins with the distinction between the ‘breach of an international obligation requiring the adoption of a particular course of conduct’ (Article 20), and the ‘breach of an international obligation requiring the achievement of a specific result’ (Article 22). Another situation is dealt with in Article 23, which relates to the ‘breach of an international obligation to prevent a given event’.

Common law scholars are not familiar with the distinction between obligations of conduct and obligations of result. On the contrary, it is a classical differentiation for those trained in the civil law tradition, in particular the French system.¹¹ The problem with it, as it is generally understood, is that it means something rather different from what Ago intended in his reports.

In the civil law tradition, an obligation of conduct is, as rightly pointed out by Combacau, ‘*une obligation de s’efforcer*’, i.e. an obligation to endeavour or to strive to realize a certain result. Typical in this respect is the obligation of a doctor in relation to a patient. He or she must do everything that a reasonable person and competent physician can do in order to look after a patient. But a doctor has no obligation, in the strict meaning of the term, to heal or cure the patient. In contrast, in the case of an obligation of result, as it is commonly understood, there is a burden on the person who owes such an obligation to attain a precise result. When I buy a car, the seller has the obligation, after I have paid for it, to provide me with the car.

There is a good number of reasons why one may think of transferring this distinction into the international legal order. In particular, there is a range of circumstances in which a state must do its best to avoid certain situations coming into being, for instance, the pollution of an international river from sources based on its territory or, more generally, preventing private activities which take place on national territory causing damage to another state. According to the standards of ‘due diligence’, a state will only be held responsible in the event that the other state can prove that the damage it suffered could have been prevented if steps had been taken, steps which were actually *not* opted for by the defaulting state. The flexibility of such a concept has proved to be well adapted to the rapid evolution of certain branches of international law, by integrating new standards of diligence and guidelines into customary international law as they are progressively adopted by state practice.¹²

Now, the difficulty with Ago’s use of the same terms is that his understanding of the distinction is almost the opposite of that of the classical approach!

In the first case, he intended an obligation ‘requiring [the state] to adopt a particular

¹¹ See Reuter, ‘La responsabilité internationale, problèmes choisis’ (1955–1956), reprinted in Reuter, *supra* note 4, 377, esp. at 425 *et seq.*; Idem, ‘De l’obligation de négocier’, in ‘Il processo internazionale, Studi in onore di Gaetano Morelli’, 14 *Comunicazione e studi* (1975) 711; Conforti, ‘Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme’, 24 *Rivista di diritto internazionale privato e processuale* (1988) 233; Combacau, ‘Obligations de résultat et obligations de comportement, quelques questions et pas de réponse’, in *Mélanges offerts à Paul Reuter, le droit international, unité et diversité* (1992) 181.

¹² For an illustration in the field of the international protection of the environment, see for instance Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* (1991) 420.

course of conduct'; and Ago insisted on depicting these obligations as dictating to the state courses of conduct which are 'specifically determined'.¹³ Contrary to the usual sense of the term, then, the breach of an international obligation requiring the adoption of a particular course of conduct is not characterized by its flexibility but, on the contrary, by the strict legal determination of its content. This is shown by the examples used by the Special Rapporteur,¹⁴ who insisted that such obligations be introduced into the internal sphere of jurisdiction of the state. Further evidence of the fact that Ago's 'obligations of conduct' is distinctly contrary to the obligations of due diligence is that the latter are supposedly covered by Article 23, which states that there is 'a breach of an international obligation to prevent a given event' only if 'by the conduct adopted, the State does not achieve that result'.

Nor is the other category of obligations, those which require 'the achievement of a specific result', as dealt with in Article 22, any less in contrast with the civil law tradition than the 'obligations of conduct'; contrary to what authors trained in the civil law tradition had in mind, these obligations are characterized for Ago by the possibility given to the responsible state to postpone the entry into force of its responsibility by the exercise of substitutive obligations, basically related to the exhaustion of local remedies, as is stated in Article 22, at least when it relates to creation of damage to foreigners.

Clearly, the substantial problems do not lie with the terms themselves, but with the reality they designate. The question is not whether the classical civil law terminology is more appropriate than Ago's. The real issue is whether the distinction brought by Ago into Part One of the Draft Articles gives an appropriate description of the concrete way in which the breach of specific types of obligations has an impact on bringing into play the resulting state responsibility.

However, it is less than certain that this is the case. Let us take, for instance, as I have already done in an earlier piece,¹⁵ a provision like that laid down in Article 194(2) of the United Nations Convention on the Law of the Sea (1982), which reads as follows:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment. . . .

According to the classification of Draft Articles 20 and 21, to which category does Article 194(2) UNCLOS belong, since it provides us with a clear case of a narrow conjunction of obligations which combines a description of the way these are to be fulfilled with the goal that their fulfilment is intended to attain? Many other examples of the inappropriateness of Ago's criteria for categorizing obligations could be given.¹⁶

¹³ *Yearbook of the ILC* (1977, I) 233 (original French version); *Yearbook of the ILC* (1977, II) 31.

¹⁴ Such as the specific obligation not to enter places protected by a special legal status or the obligation to sink a boat, or the obligation to sell weapons (*ibid.*).

¹⁵ Dupuy, 'Le fait générateur', *supra* note 1, at 49; example also retaken by G. Lysén, *State Responsibility and International Liability of States for Lawful Acts. A Discussion of Principles* (1997), at 62.

¹⁶ See Combacau, *supra* note 11, at 185–186 and Dupuy, 'Le fait générateur', *supra* note 1, at 49–50.

The classification of state obligations in Articles 20 and 21 is of no use because it is, at one and the same time, too rigid and too approximate. This position, already expressed some 15 years ago by authors such as Jean Combacau,¹⁷ Ian Brownlie¹⁸ and the present author¹⁹ is most generally shared in the legal literature.²⁰ The same kind of criticism was equally expressed by several governments which commented on Articles 20 and 21. Denmark, France, Germany and the United Kingdom noted, respectively, that this or these distinctions ‘do not appear to have any bearing on the consequences of their breach as developed in part two’;²¹ that it has ‘no place in a draft of this kind and should be deleted’;²² that it ‘may also seem impractical to States less rooted in the continental European legal tradition’²³ and that ‘the finest of the distinction drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility’.²⁴

The distinction drawn in Articles 20 and 21 has not had a strong impact on international case law, even if the European Court of Human Rights has considered it three times in a more or less direct way,²⁵ without however awarding it great importance. Indeed, as recalled in the Second Report of James Crawford to the ILC, contrary to Judge Schwebel in his dissenting opinion,²⁶ the Chamber of the ICJ did not make recourse to it in the *ELSI* case (*USA v. Italy*).

The new Special Rapporteur is also very sceptical of the value of the distinction. Crawford’s view, rightly in this author’s opinion, is that, with regard to ‘the basic distinctions between obligations of conduct, result and prevention, as set out in articles 20, 21(1) and 23, there is clearly a strong case for simply deleting them’.²⁷ He urges, nevertheless, that room be left for discussion on this issue within the ILC. This explains why, after having invited the Commission to express its views on whether to retain the distinction in the text of Chapter III, he has maintained, to date, the draft of a new Article 20, comprising two paragraphs, which continue to reflect rather closely the earlier Articles 20 and 21(1). As expressly stated in paragraph 92 of his Report, ‘to express his own scepticism, however, [he] has placed the article in square brackets’, a precision which would appear to be a clear invitation to delete it! This may seem to be

¹⁷ Combacau, *supra* note 11.

¹⁸ I. Brownlie, *State Responsibility, Part One* (1983), at 241;

¹⁹ Dupuy, ‘Le fait générateur’, *supra* note 1, at 47–48.

²⁰ See, in particular, Tomuschat, ‘What is a “Breach” of the European Convention on Human Rights’, in R. Lawson and M. de Blois (eds), *Essays in Honour of Henri G. Schermers*, vol. 3 (1994) 335; B. Stern, *Responsabilité internationale* (1998), at para. 64; Lysén, *supra* note 15, at 62–63; P. Daillet, A. Pellet and D. Nguyen Quoc, *Droit international public* (1999, 6ème éd.), at paras 139, 473.

²¹ Denmark, UN Doc. A/CN.4/488, at 66.

²² France, UN Doc. A/CN.4/488, at 67.

²³ Germany, UN Doc. A/CN.4/488, at 67.

²⁴ United Kingdom, UN Doc. A/CN.4/488, at 46.

²⁵ See in particular *Colozza*, ECHR (1985) Series A, vol. 89; *De Cubber*, ECHR (1984) Series A, vol. 86, at 20, para. 35; see Tomuschat, *supra* note 20, and comment by J. Crawford, Second Report on State Responsibility, at paras 60–61 [hereinafter ‘Second Report’].

²⁶ See J. Crawford, Second Report, at paras 62–63; ICJ Reports (1989), at 72, 75–77, paras 121, 126–130.

²⁷ *Ibid.*, at para. 89.

a rather drastic solution; yet, it is a solution that could be justified, given the criticism to which the distinction has been subjected.

Finally, however, before taking a decision to delete any further reference to the distinction between ‘obligations of conduct’ and ‘obligations of result’ in relation to breaches of obligation and the form of responsibility that such action may produce, it seems worthwhile to consider the question again, this time from the very perspective of its traditional civil law meaning.

3 Returning to the Original Meaning of the Distinction

In the following observations, the two categories of ‘obligations of conduct’ and ‘obligations of result’ will be re-established in the classical civil law sense, not because of any supposed inherent superiority of this tradition but simply because it points to a different differentiation, the merits of which will also be tested here. Two elements, at least, seem worthy of note. The first concerns the real *scope* of the ‘obligations to endeavour’; the other, which is indeed related to the first, refers to the *way* in which a responsibility for breach of the same type of obligation effectively operates. This second element is of particular interest. If the distinction between ‘obligations to endeavour’ and ‘obligations to reach a precise result’ impacts to some extent on the way in which the wrongful act is stated, then it should be maintained, at least as a useful tool of legal analysis, if not necessarily as a formal and explicit classification to be included in the Draft Articles of Part One of the ILC.

As correctly summarized by Crawford, ‘in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one’s power to achieve a result, but without ultimate commitment’.²⁸ It is in this sense that the terms ‘obligations of conduct’ and ‘obligations of result’ will be used hereafter.

A True Scope of the Obligation of Conduct

This distinction between the two types of obligations is interesting in that, unlike the one used in the ILC Draft Articles inspired by Ago, it renders a faithful account of cases of state responsibility for breach of an obligation of *due diligence*.

There is here, again, a clear contrast between Ago’s version of the distinction and the original civil law one. In the latter, responsibility for lack of due diligence (or negligence) lies on the side of the breach of an ‘obligation of conduct’. The stress is placed on the actual conduct of the responsible state. In contrast, in Article 23, the stress is on the ‘given event’ which was to be prevented, i.e. the result to be achieved. In this provision, as in the one considered under Article 21(1), ‘there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result’.

²⁸ *Ibid.*, at para. 57.

As stated by James Crawford, in such a vision at least 'it is tempting to analyse obligations of prevention as "negative" obligations of result'.²⁹

In the classical conception of the distinction (i.e. the civil law one), the statement of a damage (whether this damage be purely moral or clearly material) suffered by state A, in a case of state responsibility for negligence as well as in other cases of state responsibility, invites *consideration of the conduct which was at its origin*. If a) it consists of a lack of diligence, and b) this lack is attributable to the organs of state B, the latter will be held responsible.³⁰ One may say, with regard to the very nature of the customary obligation of due diligence codified in the 1961 Vienna Convention,³¹ that 'it is a continuing obligation on the host State to take all appropriate steps to protect the mission'.³²

It remains that, even if it 'becomes more demanding if for any reason the mission is invaded or disturbed',³³ this obligation of prevention is definitively not an obligation whose breach only entails state responsibility when the result is not in conformity with what was required by it. Even in the *United States Diplomatic and Consular Staff in Tehran* case (*US v. Iran*), if Iran had been willing and able to demonstrate that it had actually taken all appropriate steps to avoid the taking of diplomats as hostages, then it would not have been held responsible by the Court. *What counts here is the violation of the best effort obligation, not the end result actually achieved*. It follows that an obligation of conduct cannot be considered, at the same time, as a sub-category of obligations of result.

Thus, a paradox in Crawford's current position, it seems, is that, after having qualified such a norm as posing 'obligations to do all in one's power to achieve a result, but without ultimate commitment', he nevertheless maintains Ago's original opinion in his new Draft Article 20(2); namely, that the decisive element for attributing responsibility to a state for breach of an obligation of prevention is still the *result* (which was not achieved) and not the actual *conduct* of the state.³⁴

In reality, the true breach of an obligation of conduct is not 'a negative obligation of result' but the breach of an obligation to behave (in a legally defined way). It is true that the Special Rapporteur himself does not seem very keen on the idea of retaining this Draft Article 20(2). However, even if it were formally removed, *it seems*

²⁹ *Ibid.*, at para. 85. Incidentally, Ago's conception hardly seems coherent with his initial option, which consisted in eliminating damage. Indeed, the non-achievement of the result is another way of reintroducing damage as a necessary condition for identifying the responsibility of the state concerned.

³⁰ It is precisely in this way, for instance, that the ICJ proceeded in the *Hostages* case, when, after having examined the facts resulting in a damage for the applicant state, the Court was led to the conclusion that 'the inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2 of the Vienna Convention on Diplomatic Relations', ICJ Reports (1980), at 31–32 (paras 63, 67).

³¹ Referred to both in Ago's Report and in the preceding judgment.

³² J. Crawford, Second Report, at para. 86.

³³ *Ibid.*

³⁴ This position is reflected in new Draft Article 20.2, the complete text of which reads as follows: 'An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.'

nevertheless important to be rid of the idea that obligations of prevention are to be left, even implicitly, on the side of obligations of result. Contrary to Crawford, and for the reasons set out above, the present author is of the opinion that, even in cases in which the situation to be prevented is defined in terms of the occurrence of damage,³⁵ obligations of prevention are a sub-category, but a sub-category of ‘obligations to endeavour’ (i.e. ‘obligations of conduct’ in the civil law sense), not of ‘obligations of result’. It follows that, if maintained, the new Draft Article 20(2) should be substantially modified. This point is of importance because it has an impact on the ‘*modus operandi*’ (i.e. the way in which the responsibility for breach of this type of obligation is established or constituted).

B Responsibility for Breach of an Obligation of Conduct and its ‘Modus Operandi’

Retaining the classical civil law distinction between ‘obligations of conduct’ and ‘obligations of result’ (the first including the sub-category of ‘obligations of prevention’) in the first Part of the Draft Articles is an option which should be chosen only if the consequences for the legal regime of the responsible state following a breach are clearly differentiated, or, at least, for the way in which the constitution of the breach is established. This must be verified.

Let us, for a time, consider the way in which responsibility for a breach of an obligation of conduct functions. Take, for instance, an obligation which is both an obligation of prevention and an obligation of conduct; that of avoiding the pollution of an international river, as was mentioned earlier in this paper. International pollution occurs. It affects the downstream country, due to an accidental release of polluting products into the river in the upstream state, as happened on the Rhine River in 1985 after an accident suffered by the Sandoz Factory in Switzerland led to polluted waters entering Germany and France (a case which was settled *à l’amiable*, without giving

³⁵ For the contrary opinion of J. Crawford, see his Second Report, at para. 87. It is difficult to admit that an obligation could belong to one category or the other simply because it contains, or does not contain, explicit mention of the negative result to be avoided. Once again, what is important is the content of the duty to prevent, not the consequences, even in the case that they consist in the realization of the situation which was to be prevented. The only exception is when, according to specific standards established in a convention, a quantified level of pollution by a specific element, for instance, is strictly forbidden. In that situation, one comes close to a type of strict liability, in which the simple realization of the prohibited situation demonstrates the liability of the concerned state. Nevertheless, even in such a case, this type of quantified legal norms establishes no more than a presumption of liability, and a reverse of the burden of proof. But even this case does not provide us with a true exception; if the state accused of pollution is able to demonstrate that it nevertheless had taken all reasonable or precisely prescribed steps to avoid the pollution, then it will not be considered responsible for the pollution. See P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d’origine technologique et industrielle* (1977), at 259–275, and *Idem*, ‘Le fait générateur’, *supra* note 1, at 83–84. The ‘standardization’ of ecological standards has proved in recent years to be an important and developing trend. See for instance P. Sands, *Principles of International Environmental Law* (1995).

rise to any international litigation).³⁶ In this case, there was a Convention binding on the concerned states: the 1976 Bonn Convention for the Protection of the Rhine River against Chemical Pollution³⁷. Article 7 of this Convention contains the following provision:

The Contracting Parties shall take all necessary statutory and administrative action in order to guarantee that storage of the substances listed in annexes I and II is organized so as to avoid any danger of polluting the waters of the Rhine.³⁸

This is clearly an obligation of conduct, not of result. What it sets down are the means to be set up, not the end result, which is the avoidance of pollution. If the case had given rise to a judicial settlement, part of the claim could have been that the accident had revealed a breach by Switzerland of its obligation under Article 7 of the Convention. It would have, nevertheless, been for the acting state(s), say Germany and/or France, to demonstrate that 'all necessary statutory and administrative action' had actually *not* been taken to avoid pollution of the Rhine waters. What would have been at stake in such a situation would have been, one way or the other, *the specific conduct* of the Swiss Government in the concrete case, in light of the accident, as it actually occurred. The 'event' to be avoided, i.e. damage to the Rhine downstreams, would have only been the legal reason why the judge had to look into the actual conduct of the concerned state *before* the accident took place. If convinced by the evidence produced by the claimant(s), the Court or Tribunal would have held Switzerland responsible for the damage caused and, if so requested, the judges would have estimated the damage produced as a consequence of the release into the Rhine of chemical products.

The temporal dimension of the responsibility, i.e. the question of the *momentum a quo* the breach of an obligation was performed (dependent, according to Ago's classification in Articles 18, 24 and 25 on the question whether the wrongful act extended over time or not) is also very much tied up with the concrete conduct of the responsible state. The connection between the type of material obligation violated and the temporal categorization of wrongdoings committed is nevertheless extremely difficult to establish in a purely abstract and *a priori* way.³⁹ This is one reason why some governments, such as the United Kingdom, rightly criticized this part of Ago's draft as an exercise of over-codification.⁴⁰

³⁶ See A. C. Kiss, "'Tchernobâles" ou la pollution accidentelle du Rhin par les produits chimiques', *Annuaire français de droit international* (1987), at 719 *et seq.* In that case, the accident did not give rise to the international responsibility of Switzerland because an arrangement was directly negotiated between the private firm Sandoz and the downstream countries. For a commentary, see also Dupuy, 'L'Etat et la réparation des dommages catastrophiques', in F. Francioni and T. Scovazzi, *International Responsibility for Environmental Harm* (1991), at 138–140.

³⁷ Text in E. Brown-Weiss, P. Szasz and D. Magraw, *International Environmental Law, Basic Instruments and References* (1992), at 442–458.

³⁸ *Ibid.*, at 446.

³⁹ See Dupuy, 'Le fait générateur', *supra* note 1, at 51–55.

⁴⁰ UN Doc. A/CN.4/488, at 47–48. See the comment of J. Crawford in his Second Report, at paras 94–135.

Whatever the case may be, it is suggested that the introduction of the distinction between ‘obligations of conduct’ as obligations to endeavour and ‘obligations of result’ as obligations to reach a certain goal could help in determining the *momentum a quo* without embarking upon an overly sophisticated temporal classification of wrongdoings.

In the first case (obligations of conduct, including obligations of prevention) a breach will be constituted from the moment that the conduct of the state has been proved not to have been in conformity with the behaviour required by the applicable law. In the particular case of an obligation of prevention, such a conclusion is in conformity with the statement that the decisive element here is the actual conduct of the state, and not the result attained (see *supra*). It is also in line with the premises laid down in Draft Article 1. If it is true that ‘every international wrongful act of a State entails the international responsibility of that State’, then the mere commission of that wrongful act is sufficient to make it responsible. The situation is different when it goes on a true obligation of result; for instance, if a state is party to a treaty of economic integration which includes the elimination of customs taxes before 1 January 2000, a breach will be constituted at 0.00 a.m. on 2 January if, at that very time, the customs taxes have not been withdrawn.

It would consequently make sense to retain a formal categorization of obligations, which could be introduced under the formulation of ‘obligations to endeavour’ and ‘obligations to achieve’,⁴¹ leaving out⁴² any special provision for ‘obligations of prevention’ since they belong to the first category (obligations of conduct). It would be a simplification, in terms of conceptualization; and, contrary to the situation prevailing in the project as it now stands, it would be an operational distinction, which could be, one way or the other, referred to in the Second Part of the Draft Articles, as will be discussed below.

It may nevertheless be quite understandable that such a proposal should meet with the criticism of ILC members or of some governments. One possible objection, as in the present situation, continues to be that it is always unsettling, if not hazardous, to formally categorize primary obligations, given that certain concrete situations will never neatly fall into one category or the other. As shown by even the most highly skilled attempts to categorize international obligations,⁴³ it seems to be very difficult to completely rule out this kind of problem.

4 Some Complementary Suggestions

Indeed, the project, as formulated on the basis of Ago’s reports and thus relying on a twofold classification, runs the risk of over-categorization. As seen above, one

⁴¹ If one wants to avoid any confusion with the original classification presented by R. Ago under the wording ‘obligations of conduct’ (or means) as opposed to ‘obligations of result’.

⁴² Contrary to what is currently the case at Draft Article 23.

⁴³ See Combacau and Alland, *supra* note 8.

classification deals with primary obligations; the other, in Articles 23–25, concerns the wrongful facts giving rise to state responsibility. There is, of course, an evident connection between the two, as a wrongdoing is nothing more than the breach of a legal obligation.

The problem, however, is that the two sets of classification do not necessarily correspond. It follows that, instead of introducing clarity into the Draft Articles, this double classification makes it even more complicated! This is particularly demonstrated by the sophisticated relationship existing between, on the one hand, the ‘breach of an obligation by a complex act of the State’ defined under Article 18(5) and, on the other hand, its consequences as to the ‘moment and duration’ of this breach (Article 25(3)). This category is itself connected, in Ago’s conception, with the violation of ‘an obligation of result’ in the sense of Article 21, already analysed.

The very example given by the ILC itself to demonstrate the value of this end-product of several cross-categorizations is very helpful, since it effectively demonstrates that it simply does not work!⁴⁴ Article 9(1) of the International Covenant on Civil and Political Rights states that ‘No one shall be deprived of his liberty except on such grounds . . . as are established by law.’ And Article 9(5) adds that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’. In his Sixth Report, Ago was of the opinion that this juxtaposition makes it possible for the state to remain in conformity with the law if, instead of achieving the main result (i.e. the prohibition of any arbitrary arrest), it nevertheless carries out what he refers to in the original French as ‘*le résultat de rechange*’ (‘the spare result’), consisting in the allocation of reparation to the victim. This interpretation seems either to suppose that an arbitrary arrest or detention is not wrongful, or that, although wrongful, these acts do not result by themselves in the responsibility of the concerned state. The first conclusion is irreconcilable with the clear meaning of Article 9(1) of the Covenant. The second is inconsistent with the basic rule set out in Article 1 of Ago’s Project itself!

In reality, with regard to the temporal classification of wrongful acts, the only type of wrongful act that creates problems to such an extent that serious thought should be given to the possibility of its withdrawal is that of the ‘complex wrongful act’. On the contrary, the distinction between ‘instantaneous’ and ‘continuing’ breaches, already recognized in state practice and in case law, is both simple and operational. The retention of ‘continuing’ breaches is all the more justified, since it has a direct impact on the Second Part of the Draft Articles, at Article 41, which deals effectively with the cessation of wrongful acts.

From a more general point of view, considering the inherent difficulty of determining the appropriate level of categorization of both primary obligations and of breaches, one may consider that the best is the least, the criterion being, as mentioned earlier, that any distinction retained should have a substantial impact on the side of the implementation of state responsibility contemplated in Part Two of the Draft Articles, or should at least implicitly support one of the rules it contains.

⁴⁴ See Dupuy, ‘Le fait générateur’, *supra* note 1, at 52–53.

Nevertheless, instead of trying to establish a formal and rigid relationship between primary obligations, wrongful acts and the time of their commission, a more flexible approach would consist of enunciating, in an additional Article to conclude Part One, a non-exhaustive list of relevant factors to be taken into consideration for the creation of the conditions necessary to assign state responsibility. An example of this approach is already given in Article 42 which, in its second part, deals with reparation.

Special emphasis could be given to two factors in particular, among others, which do not seem to have been sufficiently taken into account to date, at least in the substance of the Draft Articles. Without going into too much detail, the first factor is a consideration of the *actual conduct of the responsible state*, in relation to the comments made above concerning state responsibility in the case of a breach of an obligation of conduct (including obligations of prevention).

The other factor worthy of particular mention is the social ‘importance’ of the obligation breached. As noted by Crawford,⁴⁵ this aspect was recently given an enhanced importance in international case law in a decision of a Chamber of the International Criminal Tribunal for the Former Yugoslavia. In its judgment of 10 December 1998 in the *Prosecutor v. Anto Furundzija* case, the Tribunal took into account the importance of the obligation (corresponding to the subsequent gravity of the breach) for the identification of the *momentum a quo* a state could be held responsible for the violation of the declared *erga omnes* and peremptory obligation; namely, the obligation to prevent, prohibit and punish acts of torture.⁴⁶ In such a case, ‘whether the enactment of inconsistent legislation constitutes of itself a breach of international law depends on the content and importance of the primary rule’.⁴⁷

Considering the growing importance of peremptory norms of general international law, in particular in the field of the responsibility for breaches of international human rights and humanitarian law, the ‘social importance’ of the breach, as recognized ‘by the international community as a whole’ could be noted in this non-exhaustive list of relevant factors to be considered in identifying the features of a state’s responsibility over a spectrum of situations. This last suggestion remains, however, quite dependent on the future decided upon for the notion of ‘crime of state’, whatever its definitive name may be, in the new Draft Articles of the ILC.

⁴⁵ See J. Crawford, Second Report, at paras 69–76, dealing with human rights obligations, and paras 77–80 on the primary rules and their interpretation.

⁴⁶ See International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998, at paras 149–150: ‘Normally, the maintenance of passage of international legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect.’

⁴⁷ J. Crawford, Second Report, at para. 78.

Conclusion

Paul Reuter, a former member of the ILC, having served on it for more than three decades, and one of the most respected specialists in the law of state responsibility, insisted in his very last paper on the inherent difficulties of the exercise of codification as a pre-legislative function. He stressed the special responsibility of the ILC in the codification of the international law of state responsibility, precisely because of the technical complexity of this branch of the law but also because of its political importance. These considerations call for the introduction of more flexibility and less dogmatism in the project, while reinforcing, at the same time, its conceptual coherence. It is also vital, as several governments insisted in their respective commentaries, that simplicity of operation of the norms as a condition for efficiency be seen as a priority. As already demonstrated in his first two reports, the new Special Rapporteur seems to be most aware of these necessities. Let us wish him a safe and successful trip through the hostile jungle of the law of state responsibility!