

## Chapter 33

### **Criminal repression of CBRN-related violations which do not amount to international crimes**

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#### 1. Introduction

This chapter focuses on international obligations concerning the criminal repression of individual conduct which violates applicable law on chemical, biological and radio-nuclear agents (CBRN-related violations) but does not amount to an international crime. A number of CBRN-related violations, indeed, fall within the scope of treaty and customary definitions of international crimes and must be prosecuted as such, either at the national or at the international level.<sup>1</sup> These, however, do not exhaust the full range of CBRN events which may entail criminal law liability pursuant to international law. Additional international norms, which have their source in either treaty or case law, require States to criminally repress in their domestic legal systems a broader array of conduct involving CBRN agents. Those norms and the obligations they provide form the object of the present contribution.

A survey of primary sources reveals the existence of two main international obligations concerning the domestic repression of CBRN-related violations not amounting to international crimes.<sup>2</sup> The first two sections of the chapter are devoted to them: the obligation to criminalise, *ie* to adopt domestic penal legislation making a given individual conduct a criminal offence (second section); and the obligation to prosecute, *ie* to activate the judicial system for the purpose of prosecution by, at least, submitting a case to the competent authorities (third section). Both of these obligations can be extraterritorial in scope, as they may apply not only to conduct taking place in the territory of the State concerned, but also to that realised abroad. A further section considers the consequences of the failure to criminalise and/or to prosecute, which include State responsibility for breaches of treaty provisions and human rights responsibility for violating the right to life (fourth section). Some concluding remarks draw attention to the limits of a fragmented legal framework and to the increasing recourse to human rights case law as a source of general obligations (fifth section).

Obligations examined in this chapter can be found in several branches of international law which are relevant to CBRN events. They include arms control and disarmament law (ACDL), international counter-terrorism law (CTL), international environmental law (IEL), as well as other international conventions on

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<sup>1</sup> Obligations to prosecute CBRN-related international crimes are treated in ch 32 by Vierucci.

<sup>2</sup> Several collections and databases of primary sources are available, although they greatly differ in scope. The following ones have been used for this chapter: EUROJUST, *CBRN-E Handbook* (version VI, EUROJUST 2017); International Disaster Law project, IDL Database <<http://disasterlaw.sssup.it/disasters-database/>>; UNODC, 'The International Legal Framework against Chemical, Biological, Radiological and Nuclear Terrorism' (United Nations 2016); ILO, International agreements in the field of chemical safety and the environment <[https://www.ilo.org/safework/areasofwork/chemical-safety-and-the-environment/WCMS\\_118357/lang--en/index.htm](https://www.ilo.org/safework/areasofwork/chemical-safety-and-the-environment/WCMS_118357/lang--en/index.htm)> (all links were last accessed on 13 June 2021).

hazardous activities. A considerable number of international treaties in these fields lay out obligations to criminalise and/or to prosecute, whose application is particular in scope as they concern either one kind of CBRN-related violation or one type of CBRN agent. Conversely, the case law of the European Court of Human Rights (ECtHR) developed an obligation to prosecute which is general in scope, in that it applies to all kinds of events, regardless of the CBRN agent released or the conduct realised.

A few remarks can be added to introduce the taxonomy of international obligations considered in this chapter. To begin with, it is argued that a relationship can be drawn between, on the one hand, obligations to criminalise and to prosecute and, on the other hand, the distinction between prescriptive and adjudicatory jurisdiction in international law.<sup>3</sup> The following sections endorse this distinction, insofar as it may be useful to illustrate how obligations to criminalise and obligations to prosecute affect the limits imposed by international law on domestic criminal jurisdiction.

Second, this chapter links obligations to criminalise and obligations to prosecute to the four phases of the CBRN emergency management cycle and argues that obligations to criminalise reinforce the prevention of and preparedness against CBRN events, while obligations to prosecute improve States' capacity to respond to and recover from CBRN events.<sup>4</sup>

Finally, proper implementation also depends on a careful determination of the scope of each norm. To this end, the last section of the chapter adopts the distinction between obligations of conduct and obligations of result. It submits that obligations to criminalise shall be understood as obligations of result, while obligations to prosecute can be both obligations of result and obligations of conduct. Such a classification could provide guidance to national authorities in the implementation of relevant obligations and should help assess the level of State compliance.

## 2. Obligations to criminalise

In international law, obligations to criminalise impose on States a duty to enact domestic legislation that makes certain individual conduct, as defined in the relevant international source, a criminal offence in the national legal system. Such obligations are not a novelty in the international sphere, as they arose from the need of States 'to better organize the joint repression of certain criminal offences, more specifically those that damaged their collective interests and had a strong transnational dimension'.<sup>5</sup> They have become progressively more detailed over time, placing stronger constraints on States' jurisdictional discretion.<sup>6</sup> In spite of this, international norms providing obligations to criminalise have multiplied and represent today a common feature

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<sup>3</sup> The debate on the difference between prescriptive and adjudicatory jurisdiction and their further distinction from enforcement jurisdiction is broad and touches the meaning of jurisdiction itself, in national as well as in international law. Its consideration in this chapter is limited to the distinction as it applies in public international law concerning domestic criminal jurisdiction. For further elaboration see C Ryngaert, 'The Concept of Jurisdiction in International Law' in A Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015) 54-60.

<sup>4</sup> The CBRN emergency management cycle and its phases are introduced in Part I of this volume.

<sup>5</sup> P Gaeta, 'International Criminalization of Prohibited Conduct' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 63.

<sup>6</sup> A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 187, 210-13; and with reference to the European context D. Zerouki-Cottin, 'L'Obligation d'Incriminer Imposée par le Juge Européen, ou la Perte du Droit de ne pas Punir' (2011) 3 RSC.

of several discrete branches of public international law. This is particularly true when looking at those branches relevant to CBRN events, as CBRN-related violations are a typical example of transnational crime.

Obligations to criminalise CBRN-related violations are particular in scope, that is to say, they apply to CBRN-related violations in one particular branch of international law (eg CBRN terrorism) or to one type of CBRN agent only (*ie* chemical, biological, radiological or nuclear). Treaty-based obligations to criminalise appear in all major conventions on CBRN disarmament,<sup>7</sup> as well as in most conventions dealing with CBRN terrorism<sup>8</sup> and in a few treaties on the protection of the environment from the release of CBRN agents, including as a result of hazardous activities.<sup>9</sup> Moreover, with Resolution 1540(2004), the UNSC, acting in a quasi-legislative capacity, further expanded the category of CBRN terrorist conduct that States are required to prohibit as criminal offences.<sup>10</sup> The EU also adopted a Directive on the protection of the environment through criminal law, which sought to harmonise national legislation by introducing, among other offences, specific crimes concerning the management of waste, nuclear materials and other radioactive substances.<sup>11</sup> All these provisions are worded differently and vary considerably in scope. Similarities between norms belonging to the same field do, however, allow some general considerations to be made.

Criminalisation clauses enclosed in CTL treaties show the highest level of accuracy. They provide details on the objective and subjective elements of the offence, modes of liability, nature of penalties and grounds of jurisdiction. Prohibited conduct includes not only the commission of terrorist acts by means of CBRN agents but extends to any activity in preparation for the terrorist act, for instance, the manufacturing, procurement, acquisition, receipt, possession, alteration, transfer, and delivery of CBRN materials for terrorist purposes, as well as the financing of nuclear terrorism. Most of these provisions require a general *mens rea*, namely the commission of the relevant conduct with intent, often assisted by a specific *mens rea* (for example, the intention to cause death, serious bodily injury or destruction).<sup>12</sup> Besides requiring criminalisation of preparatory conduct, CTL treaties, as is typical of counterterrorism legislation, also extend criminalisation

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<sup>7</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972) (BTWC) art IV; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) (CWC) art VII(1)(a); Treaty on the Prohibition of Nuclear Weapons (2017) (TPNW) art 5(2).

<sup>8</sup> Convention on the Physical Protection of Nuclear Material (1979) (CPPNM) as amended art 7; International Convention for The Suppression of Terrorist Bombings (1997) (TBC) arts 2 and 4; International Convention for the Suppression of the Financing of Terrorism (1999) (TFC) arts 2 and 4; International Convention for the Suppression of Acts of Nuclear Terrorism (2005) (ICSANT) arts 2 and 5; Convention for The Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (1988) (SUA Convention) as amended arts 3, *3bis*, *3ter*, *3quater* and 5; Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005) (SUA Protocol) arts 2-4; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010) (Beijing Convention) arts 1 and 3.

<sup>9</sup> International Convention for the Prevention of Pollution from Ships (1973) (MARPOL) as amended art 4; London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) arts IV(1) and VII(2); London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1996) as amended arts 4(1) and 10(2); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) (Basel Convention) arts 4(4) and 9(5); Stockholm Convention on Persistent Organic Pollutants (2001) (Stockholm Convention) art 3(1). See also the Council of Europe Convention on the Protection of the Environment through Criminal Law (1998) art 4, which however has not yet entered into force.

<sup>10</sup> UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540 paras 2 and 3(d).

<sup>11</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28 art 3.

<sup>12</sup> The objective and subjective elements of the offences are described in the same provisions cited in n 8.

beyond direct perpetration to include other modes of liability, from attempt to co-perpetration and various forms of complicity.<sup>13</sup> The same provisions go so far as to require the fixing of appropriate penalties that take into account the gravity of the conduct.<sup>14</sup> Finally, it must be noted that all criminalisation clauses provided in CTL treaties are followed by enabling provisions on grounds of jurisdiction, which allow States Parties to extend their penal legislation based on the passive personality principle and on universal jurisdiction.<sup>15</sup>

ACDL and IEL treaties do not have provisions comparable in scope to those of CTL conventions. Obligations to criminalise in disarmament treaties limit themselves to requiring the enactment of penal legislation that prohibits individuals from undertaking the same activities which are prohibited to States.<sup>16</sup> The *actus reus* in this case includes conduct such as the development, production, acquisition, stockpiling, transfer, and use of CBRN weapons; the provisions are silent on the *mens rea* of the offence. One treaty adopts an open formula on grounds of jurisdiction, which must be interpreted as simply leaving States Parties the choice of extending jurisdiction beyond their national territory.<sup>17</sup> IEL treaties are equally short on detail, only obliging States to introduce appropriate national legislation to punish conduct carried out in contravention of the convention. This includes the discharge, dumping, illegal traffic and any unauthorised transboundary movement of prohibited materials.<sup>18</sup> One treaty demands the adoption of penalties ‘adequate in severity to discourage violations’.<sup>19</sup> It must be mentioned that these provisions stop short of explicitly requiring criminalisation, as they do not refer to ‘criminal’ sanctions but only to ‘penalties’ aimed at ‘punishing’ violations.<sup>20</sup> However, they have been consistently interpreted as introducing obligations to criminalise<sup>21</sup> and have been implemented in State practice through the adoption of penal legislation.<sup>22</sup> Finally, the abovementioned EU Directive on the protection of the environment through criminal law represents a notable exception in the field of IEL, as it lays down a detailed description of prohibited conduct, specifying the *mens rea*, modes of liability and type of penalties needed for each offence.<sup>23</sup>

A separate question is whether international law also provides for a general obligation to criminalise CBRN-related violations, *ie* an obligation applicable regardless of the CBRN agent released or the conduct

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<sup>13</sup> CPPNM as amended art 7(1)(h)-(k); TBC art 2(3); TFC art 2(4)-(5); ICSANT arts 2(3)-(4) and 7(1)(a); SUA Convention as amended art 3*quater*; SUA Protocol art 4(2); Beijing Convention art 1(4)-(5).

<sup>14</sup> CPPNM as amended art 7(2); TBC art 4(b); TFC art 4(b); ICSANT art 5(b); SUA Convention as amended art 5; Beijing Convention art 3.

<sup>15</sup> CPPNM as amended arts 8(2) and 8(4); TBC arts 6(2) and 6(4); TFC art 7; ICSANT arts 9(2) and 9(4); SUA Convention arts 6(2) and 6(4); SUA Protocol art 5; Beijing Convention art 8.

<sup>16</sup> See for relevant provisions n 7. The obligation to criminalise is explicit in the CWC and the TPNW, whereas the BTWC in art IV only provides for a duty to ‘take any necessary measures to prohibit’ relevant conduct. This duty has been interpreted as an obligation to enact penal legislation, see T Dunworth, RJ Mathews and TLH McCormack, ‘National Implementation of the Biological Weapons Convention’ (2006) 11 JC&SL 100-05.

<sup>17</sup> The TPNW art 5(2) allows States Parties to prohibit any activity undertaken ‘by persons or on territory under its jurisdiction or control’.

<sup>18</sup> See for relevant provisions n 10.

<sup>19</sup> MARPOL art 4(4).

<sup>20</sup> With the exception of the Basel Convention art 4(3).

<sup>21</sup> B-S Cho, ‘Emergence of an International Environmental Criminal Law?’ (2000) UCLA Journal of Environmental Law and Policy 11, 15ff; F Mégret, ‘The Problem of an International Criminal Law of the Environment’ (2011) 36 Columbia Journal of Environmental Law 198.

<sup>22</sup> MG Chalos and WA Parker, ‘The Criminalization of Maritime Accidents and MARPOL Violations in the United States’ (2010) 23 USF Maritime Law Journal.

<sup>23</sup> Directive 2008/99/EC (n 11) arts 3-5.

realised. Customary international law does not provide the answer. While it is accepted nowadays that a customary rule exists requiring States to criminalise at least some international crimes,<sup>24</sup> the same cannot be said of CBRN-related violations which only amount to transnational crimes. Considering the large membership of CTL conventions and the consistency of criminalisation clauses provided therein, perhaps an argument can be made that a customary obligation is emerging to criminalise transnational terrorist conduct, including CBRN terrorism.<sup>25</sup> Alternatively, it has been submitted that an ‘implicit’ obligation to criminalise has developed in human rights law.<sup>26</sup> The argument relies mainly on decisions of the ECtHR which found violations of the European Convention on Human Rights (ECHR) based on the lack of adequate criminalisation in the domestic legal system. To this end, the ECtHR interpreted some provisions of the Convention, including most notably Article 2, as imposing a duty to put in place ‘effective criminal-law provisions to deter the commission of offences’.<sup>27</sup> Those judgments, however, are of little relevance to our analysis, as they do not concern CBRN events. Even if their findings were extended beyond the circumstances of the specific case to argue that human rights law requires the criminalisation of CBRN-related violations generally, this would not represent a substantive addition to the treaty-based obligations examined above. Nevertheless, the reasoning of the Court stresses the preventive role of positive obligations, which are deemed necessary to secure the right to life: this rationale surely applies *mutatis mutandis* to the prevention of CBRN-related violations.

Two final considerations can enrich the analysis of relevant obligations and facilitate their classification. First, obligations to criminalise can be conceived of as international norms on States’ prescriptive jurisdiction, *ie* concerning the authority of States to define the scope of application of their laws to particular persons or conduct.<sup>28</sup> Contrary to the traditional view expressed in the *Lotus* judgment,<sup>29</sup> it is agreed today that States’ authority to prescribe is limited by international norms, so that its extension beyond accepted grounds of jurisdiction (territoriality and active nationality) needs to rely on permissive rules.<sup>30</sup> This is particularly important when States seek to apply domestic criminal law extraterritorially, based on the passive personality principle and on universal jurisdiction.<sup>31</sup> From the point of view of prescriptive jurisdiction

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<sup>24</sup> This is surely the case for war crimes, see *Furundžija case* (Judgement) ICTY-95-17/1 (10 November 1998) para 148.

<sup>25</sup> The emergence of customary rules on the criminal repression of terrorist offences is arguably prevented by the absence of an agreed definition of terrorism in international law. In support of the opinion that CTL treaties, together with other sources, constitute practice of a customary rule on the international crime of terrorism in times of peace, see A Cassese and P Gaeta, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 148.

<sup>26</sup> See M Longobardo, ‘The Italian Legislature and International and EU Obligations of Domestic Criminalisation’ (2021) 21 *IntlCLR*, who builds the argument on ECtHR decisions and General Comment no. 36 of the Human Rights Committee. A similar analysis is proposed by D Zerouki-Cottin (n 6) 576-78, relying on case law from both the ECtHR and the Court of Justice of the European Union.

<sup>27</sup> *Osman v. UK* ECHR 1998–VIII 3124 para 115, restated more recently in *Opuz v. Turkey* ECHR 2009-III 107 para 128; and in *Tunç and Tunç v. Turkey* App no 24014/05 (ECtHR, 14 April 2015) para 171.

<sup>28</sup> The distinction between prescriptive, adjudicatory and enforcement jurisdiction has been used in international law primarily to clarify the different constraints placed on each of these three categories. In our analysis, it helps to better assess the impact of obligations to criminalise and obligations to prosecute on the reach of State criminal jurisdiction. See International Law Commission (ILC), ‘Report of the International Law Commission on the Work of its 58th Session (1 May–9 June and 3 July–11 August 2006)’, UN Doc A/61/10 517; C Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 14-21; WS Dodge, ‘Jurisdiction in the Fourth Restatement of Foreign Relations Law’ (2017) 18 *Yearbook of Private International Law*.

<sup>29</sup> *The Case of the S.S. Lotus (France v. Turkey)* PCIJ Reports Series A No 10, 18-19.

<sup>30</sup> P Gaeta (n 5) 70-71.

<sup>31</sup> *ibid.*

then, obligations to criminalise can be regarded as rules on permitted grounds of jurisdiction. When a criminalisation clause allows States Parties to apply their legislation extraterritorially (as in CTL treaties), it provides a permissive rule on the exercise of passive personality and/or universal jurisdiction. Conversely, when the provision remains silent, the obligation to criminalise should be interpreted as limiting jurisdiction to the territoriality and active nationality principles.

Second, the latter remarks help disclose the functional relationship existing between the obligation to criminalise and the prevention and preparedness phases of the CBRN emergency management cycle. This connection stems from the purpose of the different provisions analysed in this section. On the one hand, criminalisation clauses enshrined in ACDL and IEL conventions seek to expand the scope of application of treaty-based prohibitions from States Parties to individuals subject to their jurisdiction. On the other hand, the aim of obligations to criminalise provided in CTL treaties is to create a web of prohibitions supported by competing claims of jurisdiction. What these norms have in common is the attempt to achieve maximum deterrence. It is precisely this objective that reinforces prevention because it supports States' efforts to avoid disaster risks and, at the same time, strengthens preparedness because it enhances their ability to effectively anticipate and respond to disasters. This conclusion is reflected in the ILC Draft Articles on the protection of persons in the event of disasters, which list the adoption of national legislation among the appropriate measures to prevent, mitigate, and prepare for disasters.<sup>32</sup>

### 3. Obligations to prosecute

Obligations to criminalise provided in international law affect the traditional discretion enjoyed by States in choosing which individual conduct entails criminal law liability in their domestic legal systems. An even stronger restriction is imposed by those norms which, in addition to demanding criminalisation, require States to activate their judicial system for the purpose of prosecution. In the latter case, one can talk of obligations to prosecute and a number of them can be found in the international law applicable to CBRN events. They differ in scope and produce a varying degree of interference with States' prosecutorial discretion. A distinction should therefore be made between, on the one hand, norms that merely require a State to submit a case to the competent authorities and, on the other hand, norms that provide a duty to bring the alleged offender to court. In the former case, the so-called 'Hague formula' is adopted:<sup>33</sup> it demands the intervention of law enforcement authorities (eg the launching of an investigation and/or the collection of evidence) but does not rule out prosecutorial discretion as to the initiation of criminal proceedings (so-called *opportunité de la poursuite*), provided such a discretionary power is recognised in the domestic legal system. Conversely, obligations to bring alleged culprits to court preclude prosecutorial discretion: they require that the suspect stands trial if sufficient evidence is gathered.<sup>34</sup> Both kinds of obligations to prosecute are reflected in

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<sup>32</sup> ILC, 'Draft Articles on the Protection of Persons in Event of Disasters' (2016) II(2) UNYBILC, Draft Article 9.

<sup>33</sup> From the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970).

<sup>34</sup> The distinction adopted in this section was first proposed by P Gaeta, 'Les Règles Internationales sur les Critères de Compétence des Juges Nationaux' in A Cassese and M Delmas-Marty (eds), *Crimes Internationaux et Juridictions Internationales* (PUF 2002).

international norms applicable to CBRN events. It is against this theoretical background that the considerations of this section should be read.

Obligations to prosecute CBRN-related violations are both particular and general in scope. The first appear mostly in treaties dealing with CBRN terrorism but can be found in IEL and ACDL conventions as well. As observed in the case of obligations to criminalise, provisions included in terrorism conventions tend to be much more detailed.

Starting our inquiry from CTL treaties, it is immediately clear that obligations to prosecute must be inferred from provisions offering an alternative between extradition or prosecution: prosecution is one out of two equivalent options to fulfil an obligation ‘to extradite or prosecute’ (*aut dedere aut iudicare*).<sup>35</sup> The provisions are phrased in almost identical terms in all CTL treaties<sup>36</sup> and the obligation to prosecute depends on three requirements: i) that an offence within the meaning of the convention has been committed, regardless of the territory where it took place; ii) that the alleged offender is found on the territory of the State Party; iii) that the offender is not extradited. If all three conditions are met, the State Party is under an obligation to submit the case to its competent authorities for the purpose of prosecution. These provisions thus leave it to the national authorities to decide whether or not to initiate criminal proceedings.<sup>37</sup> Still, most of these norms are combined with complementary obligations which, although not excluding prosecutorial discretion, commit the exercise of jurisdiction to the end of securing criminal liability. They concern in particular the obligation to ensure the presence of the alleged offender for the purpose of prosecution or extradition, including by taking the person into custody if necessary;<sup>38</sup> the obligation to make a preliminary inquiry;<sup>39</sup> the obligation to rule out the so-called political offence exception, *ie* to exclude that political and similar motivations may be used as a justification;<sup>40</sup> the obligation to afford the greatest measure of mutual legal assistance in order to make the repression of transnational conduct more effective.<sup>41</sup> States, moreover, bear a series of obligations aimed at the protection of victims of terrorism, including CBRN terrorism.<sup>42</sup>

Partly divergent considerations can be made as regards obligations to prosecute in the field of IEL. The Convention for the Prevention of Pollution from Ships requires States Parties under whose authority a ship operates to start proceedings upon being informed that a violation has occurred, provided they are satisfied

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<sup>35</sup> CPPNM as amended art 10; TBC art 8(1); TFC art 10(1); ICSANT art 11; SUA Convention as amended art 10; Beijing Convention art 10.

<sup>36</sup> See, for example, Beijing Convention art 10: ‘The State Party in the territory of which the alleged offender is found shall, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution’.

<sup>37</sup> The same is maintained by P Gaeta, ‘National Prosecution of International Crimes: International Rules on Grounds of Jurisdiction’ in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 1939.

<sup>38</sup> CPPNM as amended art 9; TBC arts 7(2) and 7(6); TFC arts 9(2) and 9(6); ICSANT arts 10(2) and 10(6); SUA Convention as amended art 7(1); Beijing Convention art 9(1).

<sup>39</sup> TBC art 7(1); TFC art 9(1); ICSANT art 10(1); SUA Convention as amended art 7(2); Beijing Convention art 9(2).

<sup>40</sup> TBC art 5; TFC art 6; ICSANT art 6.

<sup>41</sup> CPPNM as amended art 13; TBC art 10; TFC art 12; ICSANT arts 7(1)(b) and 14; SUA Convention as amended art 8bis; Beijing Convention art 17. The need to enhance coordination against the illegal movement of nuclear, chemical, biological and other potentially deadly materials has been emphasised by the UN Security Council as a means to strengthen the global response against transnational crimes, see UNSC Res 1373 (28 September 2001) S/RES/1373 para 4.

<sup>42</sup> For a restatement of existing international obligations and their sources, see Council of Europe, ‘Revised Guidelines on the Protection of Victims of Terrorist Acts’ (Council of Europe 2018).

that sufficient evidence is available.<sup>43</sup> If read carefully, this provision does not seem to leave room for the exercise of prosecutorial discretion. It should, therefore, be interpreted as precluding the *opportunité de la poursuite*. The obligation is, moreover, reinforced by a complementary duty to investigate.<sup>44</sup> Separate mention must be made of a convention on cooperation between customs administrations concluded in the framework of the European Union (Naples II Convention). It compels States to permit cross-border cooperation for investigation and prosecution in cases of illicit traffic in prohibited goods; the latter include dangerous and toxic waste, nuclear material and materials or equipment intended for the manufacture of atomic, biological and/or chemical weapons.<sup>45</sup>

Finally, an obligation to prosecute has been read into the text of the Chemical Weapons Convention, where it requires each State Party to '[n]ot permit in any place under its control' activities prohibited by the Convention.<sup>46</sup> According to the Organisation for the Prohibition of Chemical Weapons, based on this provision States 'should enforce the measures taken to proscribe prohibited activity', including through criminal prosecution of alleged offenders.<sup>47</sup> This interpretation would exclude the *opportunité de la poursuite*.

Moving to the exploration of the possible sources of a general obligation to prosecute CBRN-related violations, it seems possible to conclude today that a customary rule concerning the repression of terrorist conduct has consolidated.<sup>48</sup> According to the Special Tribunal for Lebanon (STL), such a customary rule includes an obligation to prosecute, since it imposes on any State the duty 'to prosecute and try persons on its territory or in territory under its control who are allegedly involved in terrorism'.<sup>49</sup> The assessment of the STL is based on the analysis of multinational conventions on terrorism, including those examined in this section, as well as on resolutions of the UN Security Council and the UN General Assembly on the fight against terrorism.<sup>50</sup> If the existence of a customary obligation to prosecute is accepted, it would inevitably apply also to the CBRN-related violations covered by those conventions.<sup>51</sup> The same conclusion cannot be reached in other fields of international law relevant to CBRN events, where there is a lack of sufficient practice to justify an argument to that end. It shall, therefore, be excluded that customary law provides a general obligation to prosecute CBRN-related offences independently from the nature of the event.

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<sup>43</sup> MARPOL arts 4(1): 'If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law'.

<sup>44</sup> MARPOL art 6(4).

<sup>45</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations (1998) art 19(2)(a).

<sup>46</sup> CWC art VII(1)(b).

<sup>47</sup> OPCW, 'Note by the Director-General on Compliance with Article VII: Legislation, Cooperation and Legal Assistance', CIII/ DG.1/Rev.1, 17 November 1998, 5-6.

<sup>48</sup> MA Newton, 'Terrorist Crimes and The *Aut Dedere Aut Judicare* Obligation' in L van den Herik and N Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP 2013) 71.

<sup>49</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, 16 February 2011, para 102.

<sup>50</sup> *ibid* paras 88ff.

<sup>51</sup> Note, however, that both the International Court of Justice and the International Law Commission refrained from taking a position on the existence of a customary obligation to extradite or prosecute, see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Obligation to Prosecute or Extradite)* (2012) ICJ Reports 422, para 54; and ILC, 'Final Report of the International Law Commission on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (2014) II(2) UNYBILC.



This makes it all the more important to call attention to a series of judgments of the ECtHR which have established a general obligation to prosecute in the context of dangerous activities. Out of five decisions in which the Court reiterated the same principles on the procedural aspect of the right to life (Article 2 ECHR), two judgments concern accidents involving the release of CBRN agents specifically;<sup>52</sup> three more deal with natural hazards.<sup>53</sup> The scholarship has duly emphasised the importance of this jurisprudence as a source of positive obligations to prevent infringements of the right to life resulting from dangerous activities.<sup>54</sup> Yet, one aspect deserves closer consideration. Besides imposing positive obligations to prevent disasters, the ECtHR extended its inquiry to the ‘judicial response’ required in the wake of a disaster. In a Grand Chamber decision, the Court found that, when violations of Article 2 result from the failure of public authorities to take measures that were necessary and sufficient to avert the risk inherent in a dangerous activity, ‘*the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted* may amount to a violation of Article 2’.<sup>55</sup> The paragraph clearly sets out an obligation to prosecute which precludes any exercise of prosecutorial discretion, since it requires pressing charges against State officials responsible for the failure to prevent. The judgments go so far as to require prosecution also in cases of negligence which ‘goes beyond an error of judgment or carelessness’, meaning that ‘the authorities in question, fully realising the likely consequences and disregarding the powers vested in them’ failed to adopt the necessary preventive measures.<sup>56</sup> Yet, in a recent decision concerning the transportation of dangerous goods, the Court nuanced its position, stating that ‘where negligence has been shown, the obligation may also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts’.<sup>57</sup> It is to be hoped that future case law will solve this ambiguity by clarifying whether the obligation to prosecute applies to negligent conduct.

It is important at this point to add some reflections that help to theoretically frame the survey of applicable international norms. First, it is submitted that obligations to prosecute can be regarded as rules on the exercise of adjudicatory jurisdiction, *ie* on the authority of States to apply their laws to specific cases through court adjudication, as opposed to obligations to criminalise which concern instead the exercise of prescriptive jurisdiction. As shown above, this classification is useful for assessing the different limits placed on different rules of jurisdiction. In this respect, it can be observed, first of all, that in criminal law, prescriptive and adjudicatory jurisdiction go hand in hand: because of the operation of the principle of legality, no adjudication is possible in the absence of previous criminalisation.<sup>58</sup> This has an often-overlooked implication:

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<sup>52</sup> *Öneryıldız v. Turkey [GC]* ECHR 2004-XII 79 paras 93-94; *Mučibabić v. Serbia* App no 34661/07 (ECtHR, 12 July 2016) para 125.

<sup>53</sup> *Budayeva and Others v. Russia* ECHR 2008-II 267 paras 140-142; *Kolyadenko and Others v. Russia* App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012) paras 190-191; *Özel and Others v. Turkey* App nos 14350/05, 15245/05 and 16051/05 (ECtHR, 17 November 2015) paras 188-189.

<sup>54</sup> See ch 28 by Venier. See also M Sossai, ‘States’ Failure to Take Preventive Action and to Reduce Exposure to Disasters as a Human Rights Issue’ in F Zorzi Giustiniani and others (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

<sup>55</sup> ECtHR, *Öneryıldız v. Turkey [GC]* (n 52) para 93 (emphasis added).

<sup>56</sup> *ibid.*

<sup>57</sup> *Sinin v. Turkey* App no 9441/10 (ECtHR, 6 June 2017) paras 58-59. The circumstances of the case were, however, different from the abovementioned examples, because the activity in question was not carried out by or under the responsibility of public authorities.

<sup>58</sup> International Covenant on Civil and Political Rights (1966) art 15.

obligations to prosecute a given conduct are always necessarily also norms requiring the criminalisation of the same conduct, if it is not already treated as an offence in the applicable law.<sup>59</sup> Second, while this entails that all limits to prescriptive jurisdiction are also necessarily limits on adjudicatory jurisdiction, the opposite is not true: adjudicatory jurisdiction can be subjected to further limitations. This is, indeed, the case in the field of CBRN-related violations, where most treaty-based obligations to prosecute are made contingent upon the presence of the alleged offender on the territory of the State Party.

Second, in parallel to what has been argued for the obligation to criminalise, a connection can be identified also between obligations to prosecute and the phases of the CBRN emergency management cycle. Criminal justice intervenes after an offence has been committed as the preeminent reaction of a legal system to breaches of its rules. Such reaction is never purely retributive in scope, as it always plays also a limited restorative function, reaffirming the legitimacy of the legal system and rebuilding trust in the institutions. Obligations to prosecute seek to reinforce both these functions: they call on States to devise the domestic criminal system in a way that enables judicial authorities to take action immediately after disasters, thereby supporting response, and that ultimately helps restore the social fabric of disaster affected communities, accelerating recovery.

#### 4. National implementation of obligations to criminalise and to prosecute

This section seeks to complete the analysis of applicable law by offering a framework to measure the level of State compliance with the international norms at issue. For this purpose, it reviews the scope of the two obligations according to the distinction between obligations of conduct and obligations of result.<sup>60</sup> This distinction is based on an assessment of the different characters of the obligations and can be helpful in matters of international responsibility, as it sheds light on what constitutes a breach of international law (one of the two components of an internationally wrongful act) and on the precise moment when a breach takes place.<sup>61</sup> For the purpose of the present section, obligations of conduct (or means) are obligations requiring States to do their best (to show ‘due diligence’) to reach a certain result, without the guarantee that the goal will be ultimately attained. Conversely, obligations of result impose a duty to achieve a predetermined goal. Therefore, obligations of conduct are breached when, under given circumstances, the State did not exert the required diligence; obligations of result are breached when the result demanded by the norm is not achieved. It remains to be seen how this framework applies to obligations to criminalise and obligations to prosecute.

To begin with, both obligations to criminalise and obligations to prosecute are positive obligations: they require the performance of a particular (series of) act(s). Since not only actions but also omissions may

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<sup>59</sup> This has been reaffirmed by the ILC with regard to obligations to extradite or prosecute, see ILC, ‘Final Report on the Obligation to Extradite or Prosecute’ (n 51) para 20.

<sup>60</sup> On this, see, generally, R Kolb, *The International Law of State Responsibility* (Edward Elgar 2017) 41. For a discussion of the different meanings attributed to the terms, see P-M Dupuy, ‘Reviewing the Difficulties of Codification: on Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 EJIL.

<sup>61</sup> Article 12 of the Articles on State Responsibility reads ‘There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character*’. The character of the obligation, indeed, does not determine whether a breach has taken place but gives indications as to how it comes into being.

constitute breaches of international obligations,<sup>62</sup> failure to implement obligations to criminalise and to prosecute, if attributable to a State, entails State responsibility. How and when a failure to criminalise or to prosecute engenders a breach is something which, as just said, depends on the character of the obligation.

The outcome of our inquiry suggests that obligations to criminalise shall be understood as obligations of result. This view is supported in legal doctrine.<sup>63</sup> The same position has been implicitly taken by the International Court of Justice (ICJ) in *Belgium v. Senegal*, where the Court stressed that obligations to criminalise in international conventions have ‘a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties *ensure that their legal systems will operate to that effect* and commit themselves to coordinating their efforts to eliminate any risk of impunity (emphasis added)’.<sup>64</sup> The reading of treaty rules on criminalisation leaves no room for doubt: States are not simply required to show diligence in their attempt to pass national legislation; full implementation demands introducing the offence into the domestic legal system. Therefore, treaty-based obligations to criminalise, including those reflecting customary law as in the case of terrorism, are violated when States do not amend their laws (if necessary) upon the entry into force of the obligation. This was suggested also by the ICJ with regard to the obligation to criminalise torture, which ‘has to be implemented by the State concerned as soon as it is bound by the Convention’.<sup>65</sup> Conversely, one commentator observed that the moment when a violation takes place may be different for ‘implicit’ obligations to criminalise. In this case, the breach would occur ‘only when the prevention or protection fails because of the lack of a criminal law provision’.<sup>66</sup> This can be explained by the fact that implicit obligations to criminalise have been inferred in human rights case law from more generic duties to prevent, which only require State authorities to show diligent conduct.<sup>67</sup> The relevance of implicit obligations to our analysis is, however, limited, since no judicial decision establishing such obligations directly addressed CBRN-related violations.<sup>68</sup>

Nevertheless, the last remark points out a general issue. The second section argued that a functional link can be determined between obligations to criminalise (not only implicit ones) and the prevention phase of the CBRN emergency management cycle. The preventive function of such obligations has been reaffirmed by the ICJ, as mentioned above. However, prevention rules typically set out due diligence obligations: they require State authorities to take all reasonable and necessary steps to prevent an event from occurring, not to guarantee that the event will eventually be averted.<sup>69</sup> Categorising obligations to criminalise as obligations of result may seem at odds with this conclusion. Yet, this contradiction, which is an ostensible one, can be easily explained

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<sup>62</sup> ILC, ‘Draft Articles on Responsibility of States for internationally wrongful acts, with commentaries’ (2001) II(2) UNYBILC, Draft Article 2.

<sup>63</sup> It has recently been adopted by M Longobardo (n 26). The same conclusion has been proposed and thoroughly discussed in the framework of human rights obligations by R Pisillo Mazzeschi, ‘Responsabilité de l’État pour Violation des Obligations Positives Relatives aux Droits de l’Homme’ (2008) 333 *Recueil des Cours de l’Académie de Droit International*, 311.

<sup>64</sup> *Obligation to Prosecute or Extradite* (n 51), para 75.

<sup>65</sup> *ibid.*

<sup>66</sup> M Longobardo (n 26).

<sup>67</sup> The same commentator pointed out a tendency to turn these obligations into implicit obligations of result which must be implemented immediately, *ibid.*

<sup>68</sup> See above Section 2.

<sup>69</sup> See ch 3 by Venier.

by the purpose underlying obligations to criminalise. As a matter of fact, the criminalisation of transnational offences can only be effective when the greatest number of States has adopted the same conduct as an offence in their domestic legal systems; otherwise deterrence cannot be achieved.<sup>70</sup> Obligations of result, which leave States less flexibility in the implementation phase, serve precisely this purpose.

As far as obligations to prosecute are concerned, it is necessary to consider separately the two forms that they assume, as examined in the third section. On the one side, obligations to submit a case to the competent authorities better fit the category of obligations of conduct.<sup>71</sup> Here, what is required of States is not that criminal prosecution eventually takes place, but that the authorities are in a position to make a decision whether to initiate proceedings.<sup>72</sup> Therefore, the obligation is breached if States fail to take procedural steps for the purpose of prosecution, such as making a preliminary inquiry and apprehending the suspect when necessary.<sup>73</sup> Conversely, international norms requiring States to initiate proceedings against the alleged offender, which have been detected in both treaty<sup>74</sup> and case law,<sup>75</sup> are obligations of result. They impose a duty to bring charges against suspected persons, ruling out any exercise of prosecutorial discretion. This kind of obligation to prosecute, therefore, is breached when the authorities decide not to start court proceedings, even though sufficient evidence has been gathered to support a criminal trial.<sup>76</sup> This conclusion has seemingly been questioned in a later decision of the ECtHR concerning violations of the right to life in the context of dangerous activities (although not activities related to CBRN events). In *Sinim v. Turkey*, the Court stressed that the judicial response to serious injury or death imposes obligations of means rather than result.<sup>77</sup> However, the reasoning of the Court is limited to the obligation ‘to have in place an effective independent judicial system’, a definition which does not reflect the meaning of obligations to prosecute adopted in this chapter.

It shall also be recalled that general obligations to prosecute drawn from the case law of the ECtHR additionally involve the human rights responsibility of the respondent State which failed to start proceedings. In the Grand Chamber judgment *Öneryıldız v. Turkey*, the Court found a violation of the procedural aspect of Article 2 ECHR because, although an effective investigation had been carried out, the necessary evidence had been collected and the person responsible had been identified, the national authorities only decided to commit the suspects to trial for ‘negligence in the performance of their duties’, bringing no charges related to the protection of the right to life.<sup>78</sup> In the execution of this, as well as of other judgments concerning the obligation to prosecute, the respondent States limited themselves to paying the amounts awarded in just satisfaction, but refrained from granting a retrial or from reopening the case or the investigation, due to domestic procedural

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<sup>70</sup> See P Gaeta (n 5) 63-64.

<sup>71</sup> For the opposite view, which, however, concerns the human rights obligation to set up a proper judicial system, rather than the specific duty to submit a case to the judicial authorities, see R Pisillo Mazzeschi (n 63) 352ff.

<sup>72</sup> ILC, ‘Final Report on the Obligation to Extradite or Prosecute’ (n 51) para 21.

<sup>73</sup> *ibid* para 17.

<sup>74</sup> See MARPOL art 4(1).

<sup>75</sup> ECtHR, *Öneryıldız v. Turkey [GC]* (n 52) para 93.

<sup>76</sup> A parallel can be drawn with the obligation to prosecute grave breaches of the Geneva Conventions. In that case, the same considerations offered lately by P Gaeta apply, see P Gaeta ‘Grave Breaches of the Geneva Conventions’ in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (OUP 2016) 631.

<sup>77</sup> ECtHR, *Sinim v. Turkey* (n 57) para 59.

<sup>78</sup> ECtHR, *Öneryıldız v. Turkey [GC]* (n 52) para 116.

limitations.<sup>79</sup> Yet, what is probably more relevant, the respondent State in the *Öneryıldız* case, in the wake of the ECtHR's decision, adopted 'general measures', including reforms of domestic criminal law which provided better prosecutorial options to try negligent conduct resulting in the loss of life.<sup>80</sup> General measures also resulted from the ECtHR's decision in *Özel v. Turkey*,<sup>81</sup> following which the respondent State extended prescription periods in respect of serious offences.<sup>82</sup>

Finally, most of the treaties examined above include provisions designed to promote national implementation of the obligations they introduce, including the obligations to criminalise and/or to prosecute. Such provisions generally pursue four objectives: to create monitoring organisations or other mechanisms;<sup>83</sup> to facilitate State cooperation;<sup>84</sup> to set up implementation funds;<sup>85</sup> and to establish sanctions or activate sanction mechanisms in case of non-compliance.<sup>86</sup>

## 5. Concluding remarks

This chapter has shown that States' efforts to repress CBRN-related violations not amounting to international crimes are guided by a rich set of international obligations, whose overarching purposes are to achieve deterrence through criminalisation and to attribute liability through prosecution. The outcome of our survey suggests two final considerations. First, although international law shows a strong tendency to govern the exercise of national criminal jurisdiction in response to CBRN events, the field is still marked by the extreme fragmentation of applicable rules, which is a consequence of the lack of a comprehensive instrument on the protection against CBRN disasters.<sup>87</sup> Second, the absence of general obligations, applicable regardless of the type of event or agent, encouraged the development of a case law which tried to fill the gap, aiming at a better protection of the right to life. This is a sign of the increasing recourse to human rights case law as a source of general obligations and may be yet more evidence of that shift from jurisdiction as a duty owed to other States to jurisdiction as a duty towards individuals, which is one achievement of international human rights law.<sup>88</sup> The status of execution of ECtHR judgments reviewed in this chapter indicates that States are open to reform their national criminal legislation to uphold a human rights-based obligation to prosecute. This consideration, however, rests on the limited number of cases decided so far on the matter and is only valid

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<sup>79</sup> The status of execution of ECtHR judgments can be checked on the website of the Department for the Execution of Judgments of the ECtHR <<https://hudoc.exec.coe.int/>>.

<sup>80</sup> Action report (15/05/2017) – Communication from Turkey concerning the case of *Öneryıldız v. Turkey* paras 38-44.

<sup>81</sup> ECtHR, *Özel and Others v. Turkey* (n 53).

<sup>82</sup> Action report (03/02/2017) – Communication from Turkey concerning the case of *Özel and Others* against Turkey paras 13-17.

<sup>83</sup> CWC art VIII; TPNW art 4; CPPNM as amended art 16; SUA Convention as amended art 15; Beijing Convention art 19; MARPOL art 11; London Convention arts VI(4) and XIV; London Protocol arts 9, 11 and 19; Basel Convention art 15(5); Stockholm Convention arts 15 and 16.

<sup>84</sup> BTWC arts V and VII; CWC arts IX and X; TPNW art 7; CPPNM as amended art 5; TBC art 15; TFC art 18; ICSANT art 7; SUA Convention as amended art 13; SUA Protocol art 12; Beijing Convention art 18; MARPOL arts 6(1) and 17; London Convention art IX; London Protocol art 13; Basel Convention art 10; Stockholm Convention art 12.

<sup>85</sup> CWC art X(7)(a); Basel Convention art 14; Stockholm Convention art 13.

<sup>86</sup> BTWC art VI; CWC art XII; London Convention art X; London Protocol art 15; Basel Convention art 20; Stockholm Convention art 17.

<sup>87</sup> E Sommaro, 'One Law to Bind Them All: International Law and Disaster Resilience' in A Herwing and M Simoncini (eds), *Law and the Management of Disasters: The Challenge of Resilience* (Routledge 2016) 247.

<sup>88</sup> A Mills, 'Rethinking Jurisdiction in International Law' (n 6) 209.

within a regional system, that of the Council of Europe, with a powerful monitoring body and a vigilant mechanism for the execution of judgments. The existence and implementation of similar obligations outside the ECHR, within the framework of international human rights law generally, is an issue which deserves further exploration.

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