

Responsibility of States in Cases of Human-rights or Humanitarian-law Violations

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The topic of this paper has been dwelled upon again and again.¹ However, I deem it interesting to review this literature briefly in a book honouring Djamchid Momtaz. Professor Momtaz is known as one of the world's very best specialists in international humanitarian law and nothing concerning

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1 See e.g. I. Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties', 56 *Netherlands International Law Review*, 2009, pp. 170–171; L. A. Castellanos-Jankiewicz & E. Wylter, 'State Responsibility and International Crimes', in W. A. Schabas & N. Bernaz (eds), *Routledge Handbook of International Criminal Law*, Routledge, 2010, pp. 385–405; D. M. Chirwa, 'State Responsibility for Human Rights', in M. A. Baderin & M. Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond*, Ashgate, 2010, pp. 397–410; D. Fleck, 'Individual and State Responsibility for Violations of the *Ius in Bello*: An Imperfect Balance', in W. H. von Heinegg & V. Epping (eds), *International Humanitarian Law Facing New Challenges*, Springer, 2007, pp. 171–206; A. R. Jay, 'The European Convention on Human Rights and the Black Hole of State Responsibility', 47 *International Law and Politics*, 2014, pp. 207–244; M. Longobardo, 'State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources', 63 *Netherlands International Law Review*, 2016, pp. 252–274; B. Simma, 'Human Rights and State Responsibility', in A. Reinisch & U. Kriebaum (ed), *The Law of International Relations: Liber amicorum Hanspeter Neuhold*, Eleven International Publishing, 2007, pp. 359–381; C. Tomuschat, 'Specificities of Human Rights Law and International Humanitarian Law Regarding State Responsibility', in R. Kolb & G. Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Elgar, 2013, pp. 198–222; A. A. Cançado Trindade, 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: the Crime of State revisited', in M. Ragazzi, *International Responsibility Today*, Brill Nijhoff, 2005, pp. 253–269; and A. Zimmerman & M. Teichman, 'State Responsibility for International Crimes', in H. van der Wilt & A. Nollkaemper (eds), *System Criminality in International Law*, Cambridge University Press, 2009, pp. 298–313. This topic is at the cross-road of subjects on which I have written extensively; see e.g. A. Pellet, 'Vive le crime! Remarques sur les degrés de l'illicite en droit international', in ILC, A. Pellet (ed), *International Law at the Dawn of the Twenty-First Century—Views from the I.L.C.*, UN, 1997, pp. 287–315; A. Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts: A Requiem for States' Crimes?', 32 *Netherlands Yearbook of International Law*, 2001, pp. 55–79; A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *European Journal of*

international responsibility is unknown to him.² In doing so, I have been struck by the frequent 'human rightist' approach taken by the authors in question;³ they seem to consider that special treatment has been, or should be, reserved for human-rights violations. This is not so and this approach evinces ignorance of the developments in the law of State responsibility in cases of breach of obligations arising from peremptory norms of international law. It therefore seems of interest to focus on these developments and to show that, although perfectible, the new rules of State responsibility are indeed applicable to responsibility of States in cases of serious violations of human rights or humanitarian law

The global background to the question of the responsibility of States in cases of serious breaches of obligations arising from peremptory norms—including human-rights or humanitarian-law violations and of obligations to prevent and to punish, consists of two layers:

- the law of international responsibility of States with the development of a special regime for aggravated violations;
- the development of international criminal law (and international criminal justice), which raises the issue of the combination of State responsibility with that of individual perpetrators.

International Law 1999, pp. 425–434; A. Pellet, 'Responsabilité de l'État et responsabilité pénale individuelle en droit international', *Série de Conférences du Bureau du Procureur*, Cour pénale internationale, La Haye, 30 May 2006, available at https://www.icc-cpi.int/NR/rdonlyres/71E341A4-C87D-4192-8732-BA18A8B3517E/0/ICCOTPo60530Pellet_Fr.pdf, and A. Pellet, 'Chapitre 48. La responsabilité de l'État pour la commission d'une infraction internationale', in H. Ascensio, E. Decaux & A. Pellet (eds), *Droit international pénal*, Pedone, 2012, pp. 607–630.

2 Among D. Momtaz' writings of relevance for the present topic, see e.g.: 'Le droit international humanitaire applicable aux conflits armés non internationaux', 292 *Recueil des cours*, 2002, pp. 1–145; M. J. Matheson & D. Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Brill Nijhoff, 2010, p. 1032; D. Momtaz, 'L'exercice de la compétence de la Cour pénale internationale à l'égard des crimes commis au Darfour', in A. Constantinides & N. Zaikos (eds), *The diversity of international law: essays in honour of Professor Kalliopi K. Koufa*, Brill Nijhoff, 2009, pp. 597–606; D. Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority', in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 237–246; 'La controverse sur le statut de la Palestine', in R. Wolfrum, M. Seršić & T. M. Šošić, *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas*, Brill Nijhoff, 2015, pp. 102–115.

3 See: A. Pellet, 'Human Rightism' and International Law', 10 *Italian Yearbook of International Law*, 2000, pp. 3–16.

1 An Aggravated Regime of State Responsibility

1.1 *Re-thinking the Law of State Responsibility*

There can be no doubt that, as expressed with remarkable concision in Article 1 of the Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission of the United Nations (ILC) and annexed to General Assembly Resolution 56/83 of 12 December 2001: '[e]very internationally wrongful act of a State entails the international responsibility of that State.' However, an internationally wrongful act is not necessarily an 'offence' in the criminal meaning of that term.

It is however true that there has been, in some respects, a 'criminalization' of the law of international responsibility which has resulted in its 'objectification'. Traditionally, the responsibility of States under international law was defined as being similar to 'civil responsibility',⁴ while, as now codified in the ILC Articles finally adopted in 2001, it is 'neither civil or criminal' but⁵ simply 'international responsibility'.

The most sensational expression of the new way of thinking lies in the absence of damage as a pre-condition for entailing States' international responsibility. Not that damage lacks a role in the new law of international responsibility, but it enters into play only at the reparation stage.⁶ As for triggering responsibility only two elements are necessary:

4 D. Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers*, Pedone, 1906, reprinted in *Scritti di diritto internazionale pubblico*, Padoue, CEDAM, 1956, vol. II-1, pp. 161–162, and in *Cours de droit international*, Éd. Panthéon-Assas, 1999 (reprinted), pp. 466–468; C. Eagleton, *The Responsibility of States in International Law*, New York University Press, 1928, p. 182; K. Strupp, 'Das Völkerrechtliche Delikt', *Handbuch des Völkerrechts*, Kohlhammer, 1920, tome III, Part. 1, pp. 217 *et seq.*; C. de Visscher, 'La responsabilité des États', *Bibliotheca Visseriana*, Brill, 1924, tome II, pp. 115–116; E. Jiménez de Aréchaga, 'International Responsibility', in M. Sørensen (ed.), *Manual of Public International Law*, Palgrave Macmillan, 1968, pp. 564–572; D. P. O'Connell, *International Law*, Stevens, 1965, vol. II, p. 1019–1020; see also J. Combacau & S. Sur, *Droit international public*, Montchrestien-Lextenso, 10th edition, 2012, pp. 517–531.

5 J. Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490 and Add. 1–7, *ILC Yearbook* 1998, vol. II, Part 1, p. 13, para. 54; see also R. Ago, Third Report on State Responsibility, UN Doc. A/CN.4/246 and Add. 1–3, *ILC Yearbook* 1971, Vol. II, Part. 1, p. 209, para. 38.

6 See Article 34, ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, annexed to UN Doc. A/RES/56/83, 12 December 2001.

Article 2. *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

This evolution, which is tremendously important and is now accepted by a clear majority of States and scholars is largely due to Roberto Ago's brilliant intuition.⁷

I suggest that there is no exaggeration in saying that this has changed our very conception of international law itself: it now appears as a common good of the international society of States, in some respects of the international community of States and, maybe, of the community of mankind or of the whole humanity. Law must be respected *per se*, in itself, not only because a violation has caused an injury to another State.

This calls for at least two more remarks:

- *First*, this is effectively the way the mechanism of responsibility works in domestic law: you have to comply with the law. If you don't, you are subject to penal prosecution; if, in addition, you have caused an injury you must make reparation for it. If you jump the lights you will be fined whether or not you have hurt a pedestrian.
- *Second*, this new approach is a sign of the existence of a community of values which did not exist in the past or, at least, was not perceived as existing. In the Westphalian society of states, responsibility was a bilateral, purely inter-personal, concern. Inasmuch as it is possible today to speak of a 'community' of states *volens nolens* having common interests and even sharing common values, then, very logically, all States have an interest in the respect of legal rules reflecting such interests and values.

This 'objective' conception of responsibility reflects the relative progress of international solidarity. In a society where sovereignties were juxtaposed and where the very concept of international 'community' had no existence, responsibility could easily be defined on a purely inter-subjective basis, that is to say exclusively by the effects it produced in the relations between States directly concerned. This is no longer possible when one accepts that law is no

7 R. Ago, 'Le délit international', 68 *Recueil des Cours*, 1939, pp. 415–554. See also R. Ago, Second Report on State responsibility, UN Doc. A/CN.4/233, *ILC Yearbook* 1970, Vol. II, pp. 177–197; and Third Report, *supra*, note 5, pp. 199–274.

longer exclusively the guarantor of the independence of States, but also the reflection and the guarantee of their interdependence and of their common interests, of which the 'international community' is the imperfect custodian. Therefore, the consequences of establishing the responsibility of the State cease to be unique (obligation to make reparation) and include more generally (and more in keeping with reality) all the responses to the internationally wrongful act recognized in international law. This includes the right of States to take counter-measures, on behalf of the injured State or of the beneficiary of the breached obligations, under certain conditions.⁸ As Djamchid Momtaz excellently notes: '*En cas de violation d'une obligation du droit international humanitaire, obligation erga omnes par excellence, tous les Etats ont un intérêt à agir et sont évidemment habilités à prendre des mesures pour que la violation de ce droit cesse, même s'ils ne peuvent se prévaloir d'un préjudice direct et subjectif.*'⁹

On the other hand, it is logical and, indeed, inevitable, to distinguish two categories of internationally wrongful acts: those concerning only relations between States which do not question the very foundations upon which the weak integration of the international community is based; and those which, on the contrary, threaten the fundamental interests of the international community as a whole.

1.2 From Common Values to Peremptory Norms

It must also be recognized that these common values are limited, at world level at least. While the community of values within the State is well established and covers a large part of 'living together', the sense of solidarity is much more limited internationally;¹⁰ and even should necessity create commonality *vide* global warming or more generally, the preservation of the environment, the corresponding legal rules are, for the most part, still in their infancy. And the diversity of ideologies and historical and cultural backgrounds of some 200 States forming the international society make difficult the crystallization of most rules and principles concerning national and international governance or the protection of human rights.

With this in mind, at least some of these principles have reached the stage of peremptory norms of general international law (or *jus cogens*) defined in

⁸ See below pp. 18–19.

⁹ D. Momtaz, 'Les défis des conflits armés asymétriques et identitaires au droit international humanitaire', in M. J. Matheson & D. Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Brill Nijhoff, 2010, p. 92.

¹⁰ There can be special solidarities, based on common values, at regional levels; this is clearly the case in Europe and in Latin America.

Article 53 of the 1969 Vienna Convention on the Law of Treaties¹¹ as norms 'accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted and which can be modified only by [...] subsequent norm[s] of general international law having the same character'. Despite frequent attempts by human-rights activists, including some scholars,¹² to use this concept as a tool for enhancing progress in the protection of human rights or humanitarian law even if the test is rather vague, it is pointless to consider all or a great many human-rights principles as belonging to *jus cogens*. Law has nothing to gain by galloping before reality: it will always be brought back to realism as shown by the misfortune of the 'new international economic order': for having confused its wishes with hard law, the Third World sold the shop for sixpence.¹³ Law can take stock of and consolidate values, it is not the role of lawyers to confuse their own values and aspirations with existing legal rules.

Most of the limited number of peremptory norms listed as part of positive international law exist in the field of human rights. Given the enormous disparities in the conceptions of human rights and, more widely, of the relationship between the sovereign State and the individual around the world, this might look astonishing. This situation is mainly the consequence of post-World-War-II trauma, or more exactly of the repulsion universally felt *vis-à-vis* Nazi abominations. The speech attributed to Goebbels following the petition addressed by Franz Bernheim to the League of Nations¹⁴ would certainly no more be in

¹¹ 1155 UNTS 331.

¹² See Pellet, *supra*, note 3.

¹³ See A. Pellet, 'Le bon droit et l'ivraie – Plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international)', in *Mélanges Charles Chaumont*, Pedone, 1984, pp. 470 and 480–482, also published in A. Pellet, *Le droit international entre souveraineté et communauté*, Collection Doctrines, Pedone, 2014, pp. 189 and 198–200.

¹⁴ 'Gentlemen, each is lord in his manor. We are a sovereign State. All this individual said is not your business. We do what we deem appropriate with our socialists, our pacifists and our Jews and we have no control to endure neither from humanity nor from the LoN! In reality, this text is apocryphal; but the episode is nevertheless very symbolic and edifying (see e.g.: G. Burgess, 'The Human Rights Dilemma in Anti-Nazi Protest: The Bernheim Petition, Minorities Protection, and the 1933 Sessions of the League of Nations', *CERC Working Papers Series*, no. 2/2002, p. 56; or J. H. Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century', 14 *Human Rights Quarterly*, 1992, pp. 455–459. The real text of the Goebbels' speech, which was read to journalists (and not before the Assembly of the LoN) was published in German in J. Goebbels, *Signale der neuen Zeit (Messages from the new era)*, Zentralverlag der NSDAP, 1934 (J. H. Burgers, *ibid.*, p. 457, note 2). For a pious legendary version, see: M. Agi, *De l'idée d'universalité comme fondatrice du concept des droits de l'homme d'après la vie et l'œuvre de René Cassin*,

keeping with contemporary international law: *basic* human rights—not all human rights—have become the common concern of mankind and, as such, they are protected by peremptory norms of general international law.

Given that not all rules protecting human rights are peremptory—and, therefore, not all violations are ‘crimes’ within the meaning defined above—it remains that peremptory norms are essentially norms protecting human rights. The list is not easy to establish,¹⁵ not least because *jus cogens* norms are not rigidly fixed.¹⁶ However, as far as fundamental human rights are concerned,¹⁷ a minimal list would certainly include the prohibition of the use of force in contravention of the UN Charter, the right of peoples to self-determination, the prohibition of slavery, human trafficking, racial discrimination,¹⁸ torture and genocide, and crimes against humanity; together with ‘a great many rules of humanitarian law applicable in armed conflict’.¹⁹

The same goes for the list of breaches giving rise to the increased responsibilities of States: they concern mainly the protection of fundamental human rights. Thus Article 19, paragraph 3, of the ILC draft of 1996 on State responsibility gave the following examples of ‘State crimes’:

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

Alpázar, 1980, p. 354; or M. Bettati, *Le droit d'ingérence – Mutation de l'ordre international*, Odile Jacob, 1996, p. 18; See also R. Cassin, ‘Les droits de l'homme’, 140 *Recueil des cours*, 1974, p. 324.

15 For a recent firm clarification according to which the right of access to a court is not *jus cogens*, see *Al-Dulimi and Montana Management Inc. v Switzerland* (App. 5809/08[2016]), para. 136.

16 See Article 53, para. 1, of the Vienna Convention on the Law of Treaties, adopted the 23 May 1969, entry into force the 27 January 1980, 1155 UNTS 331: peremptory norms ‘... can be modified [...] by [...] subsequent norm[s] of general international law having the same character.’

17 The most widely generally accepted peremptory norms outside human rights and humanitarian law include the prohibition of the use of force in contravention of the UN Charter (for a recent reaffirmation, *Sargsyan v Azerbaijan* (App. 40167/06 [2015]), para. 21 and, probably, the basic diplomatic immunities (see *Diplomatic and Consular Staff in Tehran* (United States of America v Iran), Judgment, *ICJ Reports 1979*, p. 20, para. 41).

18 For a recent reaffirmation see *Granier y Otros (Radio Caracas Televisión) v Venezuela*, Inter-American Court of Human Rights, Judgment, 20 June 2015, para. 215.

19 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 257, para. 69; see also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 199, para. 157.

- (a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- (b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
- (d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.²⁰

This list is marked by the context in which it was established and an indisputable sense of demagoguery;²¹ however, there is no doubt that the ‘crimes’ listed *sub litt.* (c) are the best examples of uncontroversial ‘serious breaches’.²²

In the (Bosnian) *Genocide* case, the ICJ questioned the interrelationship between the prohibition of genocide on the one hand, and the duty to prevent and punish genocide²³ and it described the main components of these two last duties.

Concerning the duty to prevent, the Court considered that

it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. (...) In this area the notion of ‘due diligence’, which calls for an assessment *in concreto*, is of critical importance. Various parameters operate

20 Report of the International Law Commission on the work of its twenty-eighth session, *ILC Yearbook 1976*, Vol. II, Part. 2, p. 75.

21 See Pellet, ‘Vive le crime!...’, *supra*, note 1, pp. 299–301.

22 For confirmation, see: Report of the ILC on the work of its 53th session, *ILC Yearbook 2001*, Vol. II, Part. 2, pp. 112–113, paras. 4 and 5 of the commentary of Article 40.

23 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, *ICJ Reports 2007*, p. 43, see in particular pp. 199–201, para. 379–383, and pp. 219–229, para. 425–450.

when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. (...) On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question...²⁴

Although the Court warned that it did not 'purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law,'²⁵ it can be asserted that these guidelines generally apply to all peremptory norms protecting fundamental human rights—which all imply for all States a duty to prevent.

Less can be inferred from the *Genocide* case concerning the obligation to punish the authors of a genocide, since in its 2007 judgment, the Court, very controversially, concluded that, the genocide in Srebrenica not having been carried out in Serbia's territory, Serbia could not be 'charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide...'²⁶ However, despite the disastrous ICJ Judgment in *Yerodia*,²⁷ the general philosophy should be the same: since the rules prohibiting breaches of fundamental human rights reflect common values of the whole community of States, all components of this community should be under an obligation to punish the authors of such breaches²⁸—at least when they have a title to do so.²⁹

24 Ibid., p. 221, para. 430. For further clarifications concerning the obligation to prevent, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 3 February 2015, *ICJ Reports*, notably p. 44, para. 95, p. 46, para. 98 or p. 61, para. 153.

25 *ICJ Reports 2007*, supra, note 23, p. 220, para. 429.

26 Ibid., p. 226, para. 442.

27 Where the Court denies the existence of an 'exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity' (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, *ICJ Reports 2002*, p. 28, para. 54).

28 See Momtaz, 'L'exercice de la compétence...' supra, note 2, p. 601.

29 For reasons which would be too long to be exposed in the present paper, the author is strongly opposed to an 'absolute' universal jurisdiction when the State exercising

1.3 From Peremptory Norms to International 'Crimes' of States

Very logically, *jus cogens* consisting as it does of norms belonging to a particular category, produces specific legal effects which are added to those normally resulting from an internationally wrongful act—and this was very probably in Ago's mind when he suggested his new approach to the responsibility of States.³⁰ This resulted in a differentiation between two categories of internationally wrongful acts in Article 19 of the ILC first-reading draft articles adopted in 1996:³¹ crimes and delicts.³² While Ago and the ILC had initially not linked this concept of an international crime of a State to that of *jus cogens* for rather obscure reasons,³³ the ILC directly linked both concepts in its final draft in which Articles 40 and 41 relate to 'the international responsibility that is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law'.

It can of course be argued that the 2001 Articles do not expressly refer to 'international crimes' of States. However,³⁴ the word has simply been replaced by its definition; but I deem it absolutely clear that the concept itself has not changed: those two articles take note of the existence of two different forms of State international responsibility and (very shyly) initiate a progressive development and codification of the consequences of particular serious breaches of international law.

Although it could have been seen as a step backward, the omission of the word 'crime' to name the most serious violations of international law—those stemming from peremptory norms—must be welcome: it flushes the concept out of its penal connotation while, fortunately, maintaining the difference

jurisdiction cannot prevail itself of a territorial or national (or, maybe, a treaty) link entitling it to punish.

30 See Ago, Second Report, supra, note 7, pp. 183–185.

31 Draft article 19 was first adopted in 1976 (see Report of the International Law Commission on the work of its twenty-eighth session, *ILC Yearbook 1976*, Vol. II, Part. 2, pp. 95–122, para. 78 and Pellet, 'The New Draft Articles...', supra, note 1, p. 57).

32 Article 19, paras. 2 and 4: '2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime' and '4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict'.

33 See Report of the ILC, supra, note 31, pp. 119–120, para. 62 of the commentary of Article 19; R. Ago, Fifth report on State Responsibility, UN Doc. A/CN.4/291 and Add.1 and 2, *ILC Yearbook 1976*, Vol. II, Part. 1, p. 53, para. 150.

34 Pellet, 'The New Draft Articles...', supra, note 1, pp. 55–79, see in particular at pp. 58–67.

between 'ordinary' breaches of international law on the one hand and 'serious breaches of obligations arising under a peremptory norm' on the other.

2 International 'Crimes' of States and Criminal Responsibility of Individuals under International Law

However, this means neither that States cannot commit 'crimes' in the penal sense of the word, nor that the notion of 'serious breaches of obligations arising under peremptory norms of international law' has no relationship with this notion.

2.1 *A Criminal Responsibility of States?*

The first point is a delicate and controversial one. In 1998, in his first Report to the ILC as Special Rapporteur on the responsibility of States Professor Crawford, while not denying that there existed an international criminal responsibility of States, alleged that it had nothing to do with the topic under review.³⁵ He was both right and wrong.

Crawford was right in that the 'serious breaches' as dealt with in the draft were certainly not necessarily 'criminal' and in that it was clearly outside the scope of the project to prescribe sanctions imposed on the authors of infractions, let alone to organize proceedings for inflicting such penal sanctions. He was also right in that it can certainly not be excluded that there are precedents of State behaviours which have resulted in 'criminal-like' repression as were the sanctions imposed on Germany and its allies following the two World Wars or the measures decided by the Security Council under Chapter VII of the UN Charter. However, I would think that these precedents relate to other chapters of public international law, namely the law of war or that of the Charter—which is clearly distinct from the law of international responsibility.³⁶ As a consequence, the ILC was right to exclude from its Articles any penal connotations—not only by abandoning the penal terminology implied by the words 'crime' and 'delict', but also by not envisaging any repressive sanctions

³⁵ See Crawford, First report, *supra*, note 5, pp. 18–19, para. 70; or p. 23, paras. 91–93.

³⁶ On the distinction and the relationship between both fields, see M. Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'État*, Pedone, 2006, p. vi-699, in particular p. 631.

(including aggravated interests, as was done in the 1996 first draft)³⁷ with the apparent exception of counter-measures, to which I will come later.³⁸

But the Special Rapporteur was wrong to suggest completely abandoning the distinction between two different kinds of breach: it is obvious that the violation of a provision of a trade treaty on the reduction of custom duties is different in kind—not only in degree—from the breach of the rule prohibiting genocide.

Wisely, the Commission did not follow Crawford here and, in conformity with the suggestions he finally made in his fourth and last Report,³⁹ included in its final draft a short Chapter—not to say a rump Chapter—dealing with 'serious breaches by a State of an obligation arising under a peremptory norm of general international law'. The good thing in this decision is that it preserves the idea that the breaches of some legal norms, reflecting universally recognized fundamental values, call for stronger reactions than those of 'ordinary rules'. The unfortunate aspect is that the reactions in question, as described in Article 41 of the ILC Articles are reduced to a minimum.

According to that provision:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

These consequences are less insignificant than sometimes alleged.⁴⁰ But they are of limited interest for our inquiry: they have clearly no implication in criminal matters.

More relevant is paragraph 3 of Article 41, which provides:

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

³⁷ See Article 45(2)(c), *ILC Yearbook 1996*, Vol. II, Part. 2, p. 63.

³⁸ See Section 2.3.

³⁹ See *ILC Yearbook 2001*, Vol. II, Part. 1, pp. 12–13, para. 47.

⁴⁰ See Pellet, 'The New Draft Articles . . .', *supra*, note 1, pp. 69–70; A. Pellet, 'Les articles de la C.D.I. sur la responsabilité de l'État pour fait internationalement suite – et fin?', 48 *Annuaire Français de Droit International*, 2002, pp. 17–18; or Pellet, 'Chapitre 48. La responsabilité de l'État . . .', *supra*, note 1, pp. 617–619.

Among the non-expressed consequences of a 'serious breach', one is crucial: the 'transparency' of the State.⁴¹

2.2 *Penal Consequences of Serious Breaches of Obligations Arising under a Peremptory Norm of General International Law*

Even though State responsibility, at least as dealt with in the 2001 ILC Articles, is not of criminal nature, it may result in criminal consequences when leaders of a State responsible for an internationally wrongful act are sued in a criminal court, either national or international. This is a serious departure from the fundamental principle guaranteeing immunity of leaders—including Heads of State—which can only be explained by the piercing of the State veil, which alone makes it possible to reach the individual beyond the institution. This is possible only if that State's breach of international law constitutes a serious breach of an obligation arising from a norm of *jus cogens*. The transparency of the State is one of the necessary consequences. It is true that the unfortunate *Yerodia* judgment rendered by the ICJ in 2002 cast doubts that this principle is now part of positive law;⁴² it is nonetheless applied in the Statutes of all international criminal courts and tribunals, from the Nuremberg Tribunal to the ICC, although States take precautions to limit their jurisdiction.⁴³

However, the ICJ maintained in another Judgment that 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.'⁴⁴

In any case, the punishment of officials who commit these crimes 'does not *per se* release the State itself from its own international responsibility for such acts.'⁴⁵ In this respect, Article 25 of the Rome Statute provides that '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'⁴⁶ In return, Article 58 of the ILC Articles on State responsibility specifies that '[t]hese articles are

41 See e.g. R. Maison, 'The "Transparency" of the State' in Crawford, Pellet & Olleson (eds), *supra*, note 2, pp. 717–724.

42 *Arrest Warrant of 11 April 2000*, *supra*, note 27, p. 3, in particular p. 24, para. 58.

43 See Montaz, 'L'exercice de la compétence de la Cour pénale internationale...', *supra*, note 2, p. 600.

44 *Jurisdictional Immunities of the State* (Germany v Italy, Greece intervening), Judgment, *ICJ Reports 2012*, p. 139, para. 91.

45 Report of the ILC, *supra*, note 31, p. 104, para. 21 of the commentary of Article 19.

46 See also, Article III (3) (b) the Resolution adopted in 2009 by the Institut de droit international on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, 73 *IIL Yearbook 2009*, p. 228.

without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' As explained in the commentary on this Article:

Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.⁴⁷

Furthermore, in its 1996 Judgment on the Preliminary Objections filed by Serbia in the *Genocide* case, the ICJ has recognized that 'Article IX [of the 1948 Genocide Convention]⁴⁸ does not exclude any form of State responsibility',⁴⁹ even though it was fully aware that the International Criminal Tribunal for the Former Yugoslavia (ICTY) had criminal jurisdiction over individuals, regardless of their official functions.

2.3 *Reacting to 'Serious Breaches'*

Now, contrasting with the tremendous progress of international criminal law,⁵⁰ the implementation of the special legal regime applying to serious breaches is most uncertain—for mainly two reasons:

47 Report of the ILC, *supra*, note 21, p. 142, para. 3 of the commentary of Article 58.

48 78 UNTS 277.

49 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Preliminary Objections, Judgment, 11 July 1996, *ICJ Reports 1996*, p. 616, para. 32. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, 26 February 2007, *supra*, note 22, p. 119–120, paras. 181–182; or *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, 3 February 2006, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, *ICJ Reports 2006*, p. 72, para. 28.

50 In writing this, I am mindful of the impatience shown by many specialists towards the insufficiency of international criminal justice and the criticisms addressed to the ICC—which I largely share. Nevertheless, in spite of the recent denunciation of the Statute by several African States and Russia's withdrawal of its signature, one cannot ignore the impressive progresses in international criminal law achieved since the early 1990s.

- *first*, the absence of compulsory jurisdiction to make findings with binding effect as to the existence of the breaches; and
- *second*, the absence of any mechanism of forced implementation under international law.

Both obstacles are linked to weaknesses inherent in international law and, beyond, in the international society of States, which can be described only very imperfectly as a ‘community’. However, they are not absolute.

There do exist international courts which may have their words on the responsibility of States for ‘serious breaches’ but their intervention can only be uncertain and sometimes indirect.

The ICJ (or, as the case may be, *ad hoc* arbitral tribunals) can decide on the responsibility of States,⁵¹ including of course on responsibility for serious breaches; and it has done so (not always very convincingly) in several cases.⁵² The Court’s jurisdiction is limited by the consensual principle; however, this inconvenience is less significant in such cases than in other cases before the Court. In effect, another consequence specific to serious violations, which is already an integral part of positive law, is the possibility of an *actio popularis* (with the understanding that it does not establish the jurisdiction of a court or tribunal not based on an existing consent of the States involved).⁵³ However, any State which can invoke a jurisdictional link has an interest sufficient to enable it to request the court or tribunal to grant it the benefit of the right stemming from the violation of the essential interests of the international community as a whole.

⁵¹ It is with boundary cases one of the two main fields in the World Court activities.

⁵² See e.g. *Corfu Channel case*, (United Kingdom of Great Britain and Northern Ireland v Albania), Judgment, *ICJ Reports 1949*, p. 4; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Judgment, *ICJ Reports 1986*, p. 14; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgment, *ICJ Reports 2005*, p. 168; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, supra, note 23, p. 43; *Jurisdictional Immunities of the State*, supra, note 44, p. 99; and *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), Judgment, *ICJ Reports 2012*, p. 422; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v Serbia), 3 February 2015, supra, note 24, p. 5.

⁵³ *Armed Activities on the Territory of the Congo (New Application: 2002)*, supra, note 48, pp. 31–32, paras. 64 and pp. 51–52, para. 125. See also *Jurisdictional Immunities of the State*, supra, note 44, p. 141, para. 95; or ECHR, Grand Chamber, 21 November 2001, *Al-Adsani v United Kingdom*, Rep. 2001-XI, p. 101, para. 61.

In some respects, the *Hissène Habré* case is a step on this promising path. In its judgment of 20 July 2012, the ICJ concluded that it had no jurisdiction to decide on Belgium’s submissions relating to breaches of customary law obligations;⁵⁴ but the Court accepted that it ought to assess the Belgian submission’s bearing upon the violation of the Convention against Torture⁵⁵ and that, even if Belgium had endured no special harm as a consequence of Senegal’s behaviour,

[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.⁵⁶

Obviously, human-rights courts and international criminal tribunals can also have their say in matters involving State responsibility for ‘serious breaches’. This is very directly the case for regional courts of human rights when they decide on the most serious allegations of breaches of the human-rights conventions that instituted them. This is the case, for example, when a State is convicted by the European Court of Human Rights of torture⁵⁷ or racial discrimination.⁵⁸

Things might seem less obvious as far as international criminal courts and tribunals are concerned. However, it must be recalled that, as recognized in Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996:

⁵⁴ *Questions relating to the obligation...*, supra, note 52, p. 445, para. 55.

⁵⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

⁵⁶ *Ibid.*, p. 450, para. 69.

⁵⁷ See e.g. *Selmouni v France*, (App 25803/94 [1999]); *Al-Adsani v United Kingdom*, (App 35763/97 [2001]); *Chitayev v Russia*, (App 59334/00 [2007]); *Al-Nashiri v Poland*, (App 28761/11 [2014]).

⁵⁸ *Cyprus v Turkey*, (App 25781/94 [2001]); See also *Juridical Condition and Rights of the Undocumented Migrants*, Inter-American Court of Human Rights, Advisory Opinion, 17 September 2003, Series A, no. 18, para. 101.

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.⁵⁹

Therefore, when an international criminal tribunal decides on the guilt of an official, it indirectly decides on the responsibility of the State itself.⁶⁰ As the ICTY noted in the *Tadić* case, when it recognized the penal responsibility of the accused, 'The continued indirect involvement of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the armed conflict in the Republic of Bosnia and Herzegovina . . . gives rise to issues of State responsibility . . .'⁶¹

As noted by Professor R. Maison, this logic could even be inverted since it can be sustained that '*la sanction pénale de l'individu trouve sa source dans la réaction au crime d'État*.'⁶² If this is the case, '*[l]e crime d'État fait donc naître deux formes de responsabilité internationale – la responsabilité de l'État, présentant une nature collective, la responsabilité pénale de ses agents – qui sont étroitement imbriquées. Ainsi, la responsabilité individuelle peut être considérée comme une forme de réparation de l'illicite étatique*.'⁶³ However tightly linked, the responsibilities remain distinct.

59 Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, *ILC Yearbook 1996*, Vol. II, Part. 2, p. 26; see also Article 27 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, or Article III of the 2009 Resolution of the IDI, *supra*, note 46. For an uncertain statement of the Rule see: *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), [2000] A.C. 147, House of Lords, Judgment, 24 March 2000; *Cass. Crim.*, 13 March 2001, *S.O.S. Attentats et as. (Khadafi)*, *Bull.* p. 218; or *A. v Attorney General and Others*, no BB.2011.140, TPF 2012, Swiss Federal Criminal Court, 25 July 2012, p. 97, paras. 5.4.3–5.5.

60 This idea is the core thesis presented in R. Maison, *La responsabilité individuelle pour crime d'État en droit international public*, Bruylant/Ed. de l'Université de Bruxelles, 2004, p. xiv–547.

61 *Prosecutor v Tadić*, Case No. IT-94-I-IT, Trial Chamber II, Judgment, International Criminal Tribunal for the former Yugoslavia, 7 May 1997, para. 606.

62 'The criminal punishment of the individual is rooted in the reaction to State crime.' (Maison, *supra*, note 59, p. 433).

63 'Two forms of international responsibility stem from a State crime—the responsibility of the State, with a collective nature, the criminal liability of its agents—which are closely intertwined. Thus, individual responsibility can be seen as a form of reparation for the wrongful act of the State', *Ibid.*, p. 511.

From the differentiation between the crime of the individual and the responsibility of the State which he or she represented stem several important consequences:

- International criminal courts and tribunals apply rules of criminal law embodied in their Statutes. The ICJ is called upon to settle interstate disputes in accordance with international law as summarily set out in Article 38 of its Statute;
- Applicable standards of evidence differ:⁶⁴ even though the facts are identical, their legal characterization may be different depending on the responsibility at stake: the international responsibility of the State or the criminal responsibility of its leaders. Thus, in the *Genocide* case, the Court said that it attaches

the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.⁶⁵

- Rules on criminal conviction of an individual—who may only be convicted in the absence of any 'reasonable doubt'—are distinct and more demanding than those relating to the attribution to a State of an internationally wrongful act.

Therefore, in a particular case, the ICC, or, in the Bosnian case, the ICTY, may condemn an individual for any reason other than his or her participation in genocide, but the offense or offenses for which he or she was condemned may appear as elements of a genocide instigated and organized by a State; in other words, crimes against humanity and war crimes committed by persons

64 D. Groome, 'Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?', 31 *Fordham International Law Journal*, 2007, pp. 945–976.

65 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina v Serbia and Montenegro), 26 February 2007, *supra*, note 23, p. 209, para. 403.

convicted by the ICTY or the ICC or accused before this Tribunal or this Court can constitute elements of genocide even though, considered in isolation, they do not justify a charge or conviction for such offence.

The near-absence of any mechanism of forced implementation under international law is another congenital weakness of international law. However, here again, it is in some respects less pronounced when 'serious breaches' are at stake than for other violations of international law. There are two reasons for this.

First, concerning 'ordinary breaches', the traditional mechanism for giving effect to the principles and rules applying to international responsibility were (and remain) 'counter-measures'—that is, an international variant of the law of retaliation. According to Article 49 (1) of the ILC Articles, '[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations' concerning reparation and the other consequences of an internationally wrongful act. Moreover, besides being submitted to various conditions,⁶⁶ counter-measures must not affect any obligation arising from peremptory norms of general international law.⁶⁷ Thus defined, counter-measures are illustrative of the traditional approach of State responsibility: they are purely 'inter-subjective' and quasi-exclusively aimed at obtaining reparation. However, in this respect too, the ILC Articles offer promising prospects by 'communitizing' the invocation of the responsibility of the State and the reactions called by 'serious breaches':

- (i) under some conditions, Article 42 recognizes that '[a] State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to (...) (b) a group of States including that State, or the international community as a whole';
- (ii) according to Article 48, paragraph 1:
Any State other than an injured State is entitled to invoke the responsibility of another State (...) if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.
 and

⁶⁶ Including proportionality (Article 51) and, in principle, reversibility (Article 49(2)).

⁶⁷ This is the meaning of the uselessly complicated Article 50 of the ILC Articles.

- (iii) most importantly, Article 54 states that the rules on counter-measures in the ILC Articles do not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

There can be no doubt that there is a marked discrepancy between the very idea of these 'measures'—usually called 'sanctions'—on the one hand and the traditional international legal system characterized by its fundamental decentralization and the absence of any authority over juxtaposed sovereign States. The simple fact that sanctions can be imposed by international institutions and, in some cases, by individual States or regional organizations acting in the name of the international community, shows that this long-established analysis of international law is no longer tenable—even though it still accurately describes essential aspects of it, as shown by the survival of counter-measures as a valid means to react to internationally wrongful acts. The existence of sanctions bears witness to the slow establishment of the concept of community within the international legal order, in line with institutions like *jus cogens* or international crimes.⁶⁸ These rules end the exclusive *tête-à-tête* between the injured State and the wrongdoer and introduce into the game a third actor: the international community of States.⁶⁹ Breaches of rules whose respect is of interest for all States can give rise to action by all of them. There are, admittedly, important limits, the main one being the prohibition of the use of military force.

For their part, 'measures' that can be decided by the Security Council under Chapter VII of the Charter are not subject to such limitations—at least, the Council is not barred from utilizing armed force as provided for in Article 42. Indeed, not more than the Charter as a whole, Chapter VII has been conceived as providing means for reacting to international wrongful acts, including serious breaches of obligations arising from peremptory norms of international law. However, the UN system has progressively evolved so that coercive measures may be used to sanction serious violations of peremptory norms of

⁶⁸ On the break-up marked by Article 54 of the ILC Articles from the traditional approach of State responsibility, see e.g.: A. Pellet & A. Miron, 'Sanctions', in R. Wolfrum et al. (eds), *The Max Planck Encyclopaedia of Public International Law*, vol. 1x, Oxford University Press, 2012, pp. 11–12.

⁶⁹ Or defensibly the international community *tout court*—but this a vast and complicated issue.

international law other than the prohibition of the use of force. In so doing, the Security Council '*met les ressources du droit de la sécurité collective à la disposition du droit de la responsabilité*'.⁷⁰

Through the enlargement of the concept of 'threat to the peace', a link has progressively been created between humanitarian disasters (and the risks they involve) and Chapter VII of the Charter. If it is true that not all violations of international law necessarily threaten international peace and security, the most serious breaches of the most essential obligations of international law always constitute a violation of the fundamental interests of the international community and, as long as peace cannot be reduced to the mere absence of war, massive violations of human rights or humanitarian law, even if they occur in one State, are 'international concerns' because, potentially at least, they threaten international peace and security—and can also turn into truly international armed conflicts. Examples are the tragedies of Bosnia and Herzegovina, Rwanda or Darfur, or the civil war in Libya or Syria. In this perspective, there is nothing incongruous in the characterization by the Security Council of situations of massive violations of human rights and of the law of armed conflict as 'threats to peace' that could trigger the application of Chapter VII of the Charter.⁷¹

3 Conclusion

By way of conclusion:

- (i) Contemporary general international law includes useful tools to deal with human-rights violations, and obligations to prevent and to punish serious violations of human rights and international crimes;
- (ii) These violations do not offer a 'legal profile' different from that of other serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*);

⁷⁰ 'puts the resources of the law of collective security at the disposal of law of responsibility' (Forteau, *supra*, note 36, p. 631).

⁷¹ See in particular J. M. Sorel, 'L'élargissement de la notion de menace contre la paix', in SFDI, colloque de Rennes, *Le chapitre VII de la Charte des Nations Unies*, Pedone, 1995, pp. 3–57; or M. Zambelli, *La constatation des situations de l'article 39 de la Charte des Nations Unies par le Conseil de sécurité – Le champ d'application des pouvoirs prévus au chapitre VII de la Charte des Nations Unies*, Helbin & Lichtenhaum, 2002, pp. 267–285.

- (iii) While it cannot be excluded that, in exceptional circumstances, States entail some kind of criminal responsibility, the legal regime of these 'serious breaches' does not involve criminal aspects;
- (iv) However, they call for reactions from the international community of States as a whole (*actio popularis*) before international courts and tribunals or at diplomatic level; 'sanctions' not involving the use of force; measures taken by the Security Council; and
- (v) These 'community' reactions do not exclude the criminal responsibility of the individuals who are the direct authors of the breaches even when they have acted in their capacity as State officials.