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**THE NEW DRAFT ARTICLES OF THE INTERNATIONAL LAW
COMMISSION ON THE RESPONSIBILITY OF STATES FOR
INTERNATIONALLY WRONGFUL ACTS:
A REQUIEM FOR STATES' CRIME?***

Alain Pellet**

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1. INTRODUCTION

On Thursday 31 May 2001, the International Law Commission (ILC) adopted, by consensus, at the second reading, the draft articles on the responsibility of states for internationally wrongful acts.¹ It has thus almost put an end to a saga² which goes back more than seventy years to 1927 when a committee of experts constituted by the League of Nations decided to put the subject on the agenda of the Codification Conference of 1930, with very little success.³ As for the ILC, it put the subject on the agenda in 1955⁴ before finally completing its investigation forty-six years and five Special Rapporteurs⁵ later.

Amongst the many problems encountered in this drawn-out enterprise, the question of the unity or plurality of regimes of responsibility is without doubt one of the most difficult that the Commission had to address. There is no doubt that, besides the general rules applicable to the situation created by the occurrence of an internationally wrongful act, there are specific regimes of responsibility which replace these rules,⁶ complement them or partially depart from them. But much more delicate and controversial is the question of knowing whether certain breaches entail (*de lege lata*) or should entail (*de lege ferenda*) specific consequences additional or alternative to those under general law.

1. This is a new title. The draft was previously entitled: 'State responsibility'. This late but welcome change has the merit of clearly distinguishing, in languages other than English, *responsibility* for a wrongful act from *liability* for harmful consequences arising out of acts not prohibited by international law.

2. By its resolution 56/83 adopted without a vote on 12 December 2001, the General Assembly 'takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action' (para. 3).

3. Cf., C. Rousseau, *Droit international public*, Vol. 1, *Introduction et sources* (Paris, Sirey 1971) p. 358 or A. Pellet, 'Remarques sur une révolution inachevée: le projet d'articles de la C.D.I. sur la responsabilité des Etats', 42 *AFDI* (1996) p. 7.

4. See the summary of the first stages of the examination of the subject in *ILC Yearbook* (1969) Vol. II, pp. 135-138, paras. 64-84.

5. In chronological order: Frederico V. Garcia Amador (1955-1961), Roberto Ago (1963-1979), Willem Riphagen (1980-1986), Gaetano Arangio-Ruiz (1987-1996) and James Crawford (1997-2001).

6. It is possible to speak in this case - but only in this case - of self-contained regimes; on this point see note by B. Simma, 'Self-Contained Regimes', 16 *NYIL* (1985) pp. 111-136, or Gaetano Arangio-Ruiz, Third Report on the responsibility of States, in *ILC Yearbook* (1992) Vol. II, Part One, pp. 32-33, paras. 84-88.

Ago implicitly answered in the affirmative when he had the celebrated Article 19 of the draft articles adopted by the Commission in 1976⁷ and confirmed in 1996,⁸ in both cases unanimously, and in the following terms:

- ‘1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for 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.
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:
 - a) a serious breach of an international obligation of essential importance 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.
4. Any internationally wrongful act which is not a international crime in accordance with paragraph 2 constitutes an international delict.’⁹

Adopted twenty years later, articles 51-53 of the 1996 draft¹⁰ were based on this concept with a rich potential of consequences but the actual consequences that these articles drew from the notion may seem extremely disappointing, to the point that an argument was derived from it to ‘kill crime’¹¹ as if, from the fact

7. See the fifth report of R. Ago on the responsibility of states, in *ILC Yearbook* 1976, Vol. II, Part One, pp. 24-54, paras. 72-155, and the report of the Commission, *ibid.*, Part Two, pp. 95-122.

8. The draft articles on the responsibility of states adopted at the first reading by the ILC is reproduced in the report of the Commission on its 48th session in *ILC Yearbook* (1996) Vol. II, Part Two, pp. 125-151.

9. *Ibid.*, p. 131.

10. See *ibid.*, pp. 146-147.

11. See for example, the extremely critical article by Robert Rosenstock, ‘An International Criminal Responsibility of States?’ in *International Law at the Eve of the XXIst Century – Views from the International Law Commission* (New York, United Nations 1997) pp. 265-285; see also the first report of J. Crawford on the responsibility of states, 1998, A/CN.4/490/Add.1, para. 51 and Add.3, paras. 86 and 92, and J. Barboza, ‘State Crimes: A Decaffeinated Coffee’ in L. Boisson de Chazournes, V. Gowlland-Debbas and G.M. Abi-Saab, eds., *L’ordre juridique international, un système en quête d’équité et d’universalité - Liber Amicorum Georges Abi-Saab* (The Hague, Martinus Nijhoff 2001) pp. 357-375.

that a mountain had given birth to a mouse, it was necessary to flatten the mountain ...

Happily the draft adopted at the second reading in 2001 does not entail such a drastic consequence: if the word 'crime' has been carefully banished from the text, the substance still remains (2); and if the consequences which have been specifically derived from it are fairly innocuous, in the eyes of some, the draft, thanks to the 'safeguard clauses' with which it is liberally sprinkled, reasonably preserves the future (3).

2. THE WORD AND ITS SUBSTANCE 'CRIMES' OR 'SERIOUS BREACHES'?

2.1 What's in a word ...

A noticeable feature of the 2001 draft is the complete absence of the word 'crime' which does not appear a single time. Even more than that: Part One, dedicated to 'internationally wrongful acts', does not contain a single provision that is even remotely similar to the previous Article 19.

In an article co-authored with two of his assistants, Professor Crawford gives an explanation for this disappearance which is, in essence, generally convincing except at the level of terminology: 'Part One proceeds from the idea that internationally wrongful acts of a State form a single and same category and that the criteria which are applied to these acts (in particular those related to attribution and to circumstances precluding wrongfulness¹²) are independent of any distinction between 'delictual' and 'criminal' responsibility.¹³

This vocabulary, however, demonstrates that the ILC Special Rapporteur does not understand - or refuses to understand - the full significance that Ago and the other authors of the draft in the first reading gave to the word 'crime' which, in their mind, was devoid of any 'penal' connotation.

As has been very well demonstrated by Professor Marina Spinedi, the Commission did not have the slightest intention 'to attach to these acts forms of responsibility similar to those provided in the criminal law of modern domestic legal systems'.¹⁴ But, despite the very clear indications in this direction given by the ILC in the Commentary on the first reading of draft article 19,¹⁵ Crawford

12. On this second point, the current author has several doubts - see below, p. 78.

13. J. Crawford, P. Bodeau and J. Peel, 'La seconde lecture du projet d'articles sur la responsabilité des États et de la Commission du Droit International', 104 *RGDIP* (2000) p. 931 and 'The ILC's Draft Articles on State Responsibility: Toward Completion of a Second reading', 94 *AJIL* (2000) p. 672.

14. 'International Crimes of State: The Legislative History' in J.H.H. Weiler, A. Cassese and M. Spinedi, eds., *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, (Berlin, W. de Gruyter 1989) p. 52.

15. See the analysis of G. Abi-Saab, 'The Uses of Article 19', 10 *EJIL* (1999) pp. 344-346.

has not maintained any less firmly his opposition to the word 'crime', in relying quite wrongly on analogies with internal law¹⁶ even though he recognized explicitly that '[the] idea that responsibility in international law is neither "civil" nor "criminal" but simply "international" is scarcely contested'.¹⁷

The ILC Special Rapporteurs clearly play a prominent rôle, at least within the framework of the subjects for which they are in charge.¹⁸ There was, therefore, little chance that the Commission would pay no heed to the determined opposition of its Special Rapporteur, even if this opposition happened to be based on a very controversial argument. All the more because Crawford's opposition to the word 'crime' was along the same lines as that of several states¹⁹ and of part of the literature²⁰ and because, if the term has its virtues, it also has disadvantages.

Included in the first category is, above all, usage - a usage on which the Commission relied in 1976 and that its draft has, in turn, reinforced. As the ILC Commentary on the previous article 19 shows, several conventions use the word 'crime' to refer to the most serious assaults upon the international legal order: genocide, apartheid, aggression, etc.²¹ and, as criticized as it has been, the word has become adopted in internationalist literature. Furthermore, it has the merit of stigmatizing the forms of behaviour to which it refers, behaviour which constitutes the most serious attack 'upon the fundamental interests of the international community'.

On the other hand, this terminology has undeniably a criminal connotation and is, therefore, misleading as, quite clearly, international responsibility is neither civil nor criminal, but *sui generis*, peculiar to public international law, like administrative responsibility is peculiar to domestic public law (and even if, in these two cases, the analogies with civil law are undoubtedly more pronounced than those that can be made with criminal law). Indeed, this 'criminal' connotation is not unacceptable as it concerns actual crimes that threaten the cohesion of the international community in its 'hard core', which is limited to a very small number of essential values, and which allow one to talk of 'community'. Conversely, to qualify as a 'delict' any internationally

16. See for example, his first report on the responsibility of states, A/CN.4/490 Add.3, para. 81.

17. *Ibid.*, Add.1, para. 60 (iv).

18. Cf., A. Pellet, 'La codification du droit de la responsabilité internationale - Tâtonnements et affrontements' in Boisson de Chazournes et al., *op. cit.* n. 11, at pp. 301-302 and 'Conclusions générales' in S.F.D. I., Colloquium in Aix-en-Provence, *La codification du droit international* (Paris, Pedone 1999) p. 335.

19. Cf., *ILC Yearbook*, Responsibility of States - Commentaries and observations received from governments, A/CN.4/488 and Add. 1 to 3, and the summary that J. Crawford gave in his first report on the responsibility of states, 1998, A/CN.4/490/Add.1, paras. 52-60.

20. See in particular Rosenstock, *op. cit.* n. 11, at pp. 276-284 or Barboza, *op. cit.* n. 11, at pp. 358-359.

21. See *ILC Yearbook* 1976, Vol. II, Part Two, para. 59 of the Commentary, pp. 118-119.

wrongful act which is not a crime, as was the case in paragraph 4 of the previous article 19, was obviously open to criticism: even if 'civil delicts' exist, the word conveys a clear sense of criminal law, even though the cohesion of the international community is not such that one can assume that it is interested in the repression of these acts.

The breach of a bilateral trade treaty does not imply any attack upon the interests of the 'international community as a whole' – it is a bilateral affair that must be settled, and cannot be settled but in a purely bilateral framework; *actio popularis* is inadmissible here. In this respect, the *dictum* of the ICJ in the *South-West Africa* case remains as convincing today as it was in 1966.²² But this does not affect states' crimes, as the Court recognized in its celebrated *corrigendum* to this quite categorical position four years later:

'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.²³

The dichotomy between crimes and delicts had the advantage of clearly making this distinction; but it had the disadvantage of evoking concepts more familiar to a criminal than an internationalist approach.

A simple manner of resolving the problem could have consisted of abandoning the word 'delict' (by deleting paragraph 4 of the previous article 19) while maintaining the term 'crime', a course of action infinitely less open to criticism. However, in accordance with its Special Rapporteur, the International Law Commission, without any significant opposition, came round to accepting a more radical solution: there would be no mention of crimes nor delicts, and these words which cause anger would be replaced by their definition.

However, it was necessary neither 'to throw out the baby with the bathwater' nor, using the pretext of the consensus on terminology, to abandon an indispensable concept, even recognising the relative cohesion of the international community, as limited as it is at the present time.

22. In its Judgment of 18 July 1966, the Court refused to 'allow the equivalent of an *actio popularis* or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present' (*ICJ Rep.* (1966) p. 47).

23. Judgment of 5 February 1970, *Barcelona Traction Light and Power Company, (second phase)*, *ICJ Rep.* (1970) p. 32.

2.2 ... provided the substance is retained

In his first report in 1998, Professor Crawford expended considerable energy to 'rid himself' of the problem. Paradoxically, he established himself as the most convincing defender of the concept of the international crime of a state ... understood in a penal sense. He also made great and ingenious efforts in outlining what 'would be necessary for a regime of state criminal responsibility in the proper sense of the term',²⁴ while still recognising that 'no doubt considerable imagination would be called for in giving effect to requirements such as these in relation to international crimes of state',²⁵ before advocating the deletion of article 19 (and, 'consequently', articles 51 to 53) and the inclusion of a safeguard clause that would indicate 'that the exclusion from the draft articles of the notion of 'international crimes' of states is without prejudice (a) to the scope of the draft articles, which would continue to cover all breaches of an international obligation whatever their origin, and (b) to the notion of 'international crimes of States' and its possible future development, whether as a separate topic for the Commission or through state practice of the competent international organizations'.²⁶

Supported with eagerness by the members of the Commission who, not without reason, saw this as an opportunity to postpone indefinitely a concept that they condemned or did not understand, this proposal was unacceptable to those who could not conceive of genocide and the innocuous breach of a trade treaty being placed at the same level and subject to the same legal regime.

Following a debate²⁷ that was sometimes passionate but which scarcely added anything new to debates already widely reported in the literature²⁸ the Commission had to take note 'that no consensus existed on the issue of the treatment of 'crimes' and 'delicts' in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development

24. A/CN.4/490/Add.3, para. 91.

25. *Ibid.*, para.92.

26. *Ibid.*, para.101.

27. See the summary (which does not translate all the passion!) given in the ILC Report on the proceedings of its fiftieth session, 1998, General Assembly, Official Documents, 53rd session, supplement No. 10 (A/53/10), paras. 283-331.

28. For the abundant literature devoted to the international crime of the state, see Weiler et al. op. cit. n. 14, at p. 368 and the studies cited by Gaetano Arangio-Ruiz in his fifth report (A/CN.4/453 and Add. 1 to 3), J. Crawford, first report (A/CN.4/490/Add.1, fn. 29 and attached bibliography) and P.M. Dupuy, 'Responsabilité et légalité' in S.F.D.I., Colloquium in Le Mans, *La responsabilité dans de système international* (Pedone, Paris 1991) fn. 13, pp. 268-269.

in the draft articles of key notions such as obligations *erga omnes*, peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by Article 19; ...'²⁹

The serious drawback to this delay solution was that, once more, the Commission was postponing its decision on the question of the duality of the legal regimes applicable to internationally wrongful acts. There was, therefore, a risk of falling back into the pitfalls of the first reading: the former Special Rapporteur, Professor Arangio-Ruiz had examined the consequences of wrongful international acts in an undifferentiated manner, without distinguishing between consequences of crimes on one hand and those of offences on the other, resulting in a 'telescoping' between the two regimes and in serious lacunae in the regime of crimes.³⁰

This was also the mode of operation of his successor, who waited two years (and the last year of his mandate) before tackling again head-on, in his fourth and final report,³¹ the question of international crimes of the state. Meanwhile, the Commission had adopted the essence of his draft without concerning itself with the possibility of a regime of responsibility particular to the most serious breaches of international law.

It is true that in the previous year 2000, Professor Crawford had opened the way to a solution when he asked whether 'further consequences [i.e., further to those usually associated with an internationally wrongful act] could again be brought under the category of gross, egregious and systematic breaches of obligations to the international community as a whole'.³² He answered in the affirmative by holding that 'if one leaves aside the controversial terminology of 'crimes', [the consequences derived from crimes by articles 52 and 53 of the draft adopted at the first reading] are broadly acceptable ...'.³³ It was a partial and disguised 'conversion' to the concept of crime, except for the word itself, and on this basis the Drafting Committee adopted, provisionally, draft articles 41 and 42, which constitute Chapter III of Part Two of the Draft on the 'Contents of the international responsibility of States', replacing the previous articles 51 and 53 of the 1996 draft.³⁴

The word 'crime' was carefully avoided. But this chapter had to be applied 'to the international responsibility which is entailed by an internationally

29. ILC Report on the proceedings of its fiftieth session, *supra* para. 331.

30. See A. Pellet, 'Vive le crime! Remarques sur les degrés de l'illicite en droit international', in ILC, *International Law*, etc., op. cit. n. 11, at pp. 307-311 or 'Remarques sur une révolution inachevée: le projet d'articles de la C.D.I. sur la responsabilité des Etats', *AFDI* (1996) p. 24.

31. A/CN.4/517, paras. 43-53.

32. Third report on the responsibility of states, A/CN.4/507/Add.4, para. 407.

33. *Ibid.*, para. 410.

34. ILC report on the proceedings of its 52nd session, General Assembly, Official Documents, 55th session, supplement No. 10 (A/55/10), p. 120.

wrongful act that constitutes a serious breach by a state of an obligation to the international community as a whole and essential for the protection of its fundamental interests'.³⁵ This formula constituted a very acceptable definition of international crimes of a state; it allowed retention of the substance while getting rid of the word.

Although the plenary Commission was not able to examine the draft articles provisionally adopted by its Drafting Committee, it decided to publish them in its report as an appendix to the chapter devoted to responsibility³⁶ in order to allow the representatives of states to respond during the debates of the Sixth Commission of the General Assembly.

In so doing, the Commission was taking a risk to re-open the debate on international crimes of states, which indeed happened: the subject was widely debated and again the concept was fiercely contested by certain governments.³⁷ On the basis of these reactions, the Special Rapporteur recommended retaining Chapter III of Part Two while revising it 'thoroughly'.³⁸

It is difficult to agree that this is what he actually proposed and what the Commission did. The draft articles definitively adopted in 2001³⁹ differ, in effect, only marginally from those provisionally adopted by its Drafting Committee in the previous year. Putting aside several purely editorial changes, the only significant changes are twofold:

— in the first place, the very title of the chapter (and, consequently, the wording of paragraph 1 of the new article 40 – which replaces article 41 of 2000) has been modified again: from 'Serious breaches of essential obligations to the international community as a whole' to 'Serious breaches of obligations under peremptory norms of general international law';

— in the second place, the possibility of aggravated or punitive damages in the case of breaches of this type is no longer included in the draft.

This omission will briefly be commented upon below.⁴⁰ As far as the first change to the final draft is concerned, it really is fundamentally 'cosmetic'. It is basically another way of saying more or less the same thing: besides 'ordinary' breaches of international law of which only the direct victims are justified in making a complaint, there are breaches of a particular seriousness which put at

35. Draft article 41, para. 1.

36. ILC Report on the proceedings of its 52nd session, op. cit. n. 34, at pp. 124-140.

37. See the thematic summary of the debates, A/CN.4/513, paras. 89-121; the most determined opposition came from the large Western countries with the notable exception of Italy and the Scandinavian countries. However, some small states were equally worried about the consequences of the concept notably as regards countermeasures (see below, pp. 74-76).

38. Fourth report, A/CN.4/517, para. 53.

39. The full text is reproduced in the ILC Report to the General Assembly on the Work of its 53rd Session (A/56/10), pp. 43-59 and is annexed to A/RES/56/83 (see *supra* n. 2).

40. See *infra*, p. 72.

peril the essential interests of the international community as a whole and which call for separate reactions on the part of all members of this community.

The explicit reference to peremptory norms of general international law in the new version of Chapter III of Part Two of the draft is not without advantage. The concept of *jus cogens*, while much disputed in the past, is now very generally accepted.⁴¹ Besides, the approach retained by the Commission has the merit of shedding light on the uniqueness of the concept and the multiplicity of its consequences which are not limited to treaty law.

There is, however, a drawback: the draft articles definitively adopted by the ILC do not define what must be understood by a 'peremptory norm of general international law'. From this fact, one is led, implicitly but undoubtedly, to the concept of *jus cogens* appearing in article 53 of the Vienna Convention of 1969. This provision has three unfortunate characteristics in regard to responsibility:

— in the first place, the 1969 text defines peremptory norms only in terms of their consequences in matters of treaty law, which is not very rational from the standpoint of the law of international responsibility: that amounts to saying that when a rule renders a conflicting treaty invalid, its breach entails particular consequences in matters of responsibility; this is a not very useful combination of two quite distinct branches of law;⁴²

— in the second place, for many authors, the concept of *jus cogens* has, in addition to its 'social' content, a 'logical' dimension; it covers not only the rules which constitute the foundations, the cement, of the international community but also those without which no legal system would be conceivable and, in the first place, the principle *pacta sunt servanda*; it is clear that only the first are relevant as far as the legal regime of international responsibility is concerned;⁴³

— in the third and final place, the 1969 definition refers to the 'international community of States as a whole' when, in the ILC draft articles, it is only a

41. Even France, a traditional adversary of the concept, at least in the case of Art. 53 of the Vienna Convention of 1969 on the Law of Treaties, seems to have revised its opinion as has often been demonstrated recently, particularly the counter-proposals made by this country to the draft articles provisionally adopted by the ILC Drafting Committee in 2000. France has not systematically contested the provisions referring to *jus cogens* (Arts. 21 and 51 (d)) (A/CN.4/488, pp. 68 and 140).

42. See for example D. Bowett, 'Treaties and State Responsibility', in M. Virally, ed., *Le droit international au service de la paix, de la justice et du développement: melanges Michel Virally*, (Paris, Pedone 1991) p. 137-145; P. Weil, 'Droit des traités et droit de la responsabilité' in E. Jimenez de Arachaga and M. Rama-Montaldo, eds., *Le droit international dans un monde en mutation - Liber Amicorum en hommage au professeur Eduardo Jimenez de Arechaga* (Montevideo, Fundacion de cultura internacional 1994) pp. 523-543; P.M. Dupuy, 'Droit des traités, codification et responsabilité internationale', 43 *AFDI* (1997) pp. 7-30 or P. Weckel, 'Convergence du droit des traités et du droit de la responsabilité internationale', *RGDIP* (1998) pp. 647-684.

43. Concerns of this nature had already been expressed by certain authors before the adoption of the final draft by the ILC, in particular Abi-Saab, loc. cit. n. 15, at pp. 348-349; or Pellet (1997) op. cit. n. 30, at p. 306.

question of the international community as a whole - 'full stop';⁴⁴ one can argue that since the adoption of the Convention of Vienna, the concept of international community has been expanded; in any case, this dichotomy is not one of the happiest and the co-existence of two distinct 'international communities' in the draft is a source of confusion.

Despite this, the 2001 draft is certainly moving in the right direction. It omits the 'red rag' which the word 'crime' constituted and deprives authors and states of terminological arguments which were based upon this word - arguments used to oppose the necessary duality of regimes of responsibility, depending on whether the internationally wrongful act affects the particular interests of one or several given states or those of the international community (of states?) as a whole. It thus preserves the basic achievements of the 'revolutionary' approach of Roberto Ago who succeeded in having included that international responsibility was not the situation resulting from *damages* caused by an internationally wrongful act but due to this act itself, thereby 'objectifying' the system of international responsibility.⁴⁵

Moreover, while taking note of the existence of the two categories of breaches, the new ILC draft confines those relating to obligations under peremptory norms of general international law within narrow limits which must be approved: they derive from the limited degree of integration and solidarity which characterizes the international community. This is the reason why the Commission has not submitted all the breaches of obligations arising under the rules of *jus cogens*⁴⁶ to an aggravated regime of responsibility: the only obligations falling under the remit of Chapter III of Part Two are *serious* breaches of these obligations and paragraph 2 of article 40 states:

'A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.'

It is clear that any act of torture is morally and legally reprehensible and constitutes the breach of a peremptory norm.⁴⁷ The fact remains that an isolated

44. See Art. 33, para. 1 ('The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation breached and on the circumstances of the breach') and Art. 48, para. 1(b) ('Any State other than the injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if : (...) (b) The obligation breached is owed to the international community as a whole').

45. Cf., Pellet (1996) op. cit. n. 30, at pp. 7-32, in particular pp. 10-13.

46. The ILC is correct to speak of breaches of 'obligations' and not of 'norms'; the norms do not cause any obligation which could give birth to an internationally wrongful act - cf., Art. 2(b) of the draft.

47. It also gives place to the international criminal responsibility of the individual who is the perpetrator - cf., the judgment of the Chamber of first instance of the International Criminal Tribunal for Former Yugoslavia of 10 December 1998 in the case *Furundzija*, IT-95-17/1-T, which defines the

act of torture does not threaten the foundations of the international legal order, unlike the systematic and gross use of torture, even if the state only employs (or tolerates) it for purely domestic purposes without relation to an international conflict. Hence, in a well known case, France was convicted for torture by the European Court of Human Rights;⁴⁸ independently of one's opinion on how well-founded this conviction was, France would certainly not be characterized as a 'criminal' state (in the sense of the previous article 19 of the 1976 ILC draft). This isolated act, which occurred in a police station and was insufficiently punished by the French courts, as reprehensible as it was, does not constitute a gross nor systematic breach of an obligation under a peremptory norm of general international law such as, undoubtedly, would include torture;⁴⁹ the international community was not destabilized as a result of this act. It is a different matter when the breach involves systematic policies characterized by contempt for human rights such as those put in practice in recent times in the Chile of Pinochet, the Argentina of the military dictatorship or, today, in China, Afghanistan and elsewhere.

Some people will not fail to be astonished, or even indignant, that the ILC draft contains no provision for any means whatsoever of establishing the fact of these serious breaches.

A proposal along these lines, based on article 66 of the Convention of Vienna, was made during the discussion at the first reading of the draft articles on the responsibility of states.⁵⁰ Due to a lack of time and will, the ILC postponed examination of the proposal until the second reading. Discussion of this proposal was not resumed on this occasion. This would anyway hardly have had any point given that the Commission decided not to recommend formally to the General Assembly that its draft articles be adopted as a convention.⁵¹

In any case, such a provision does not appear indispensable: the object of the draft is to describe the basic rules (of a 'secondary' nature) applicable to the responsibility of states for internationally wrongful acts. The implementation of these rules comes under the same mechanisms, and is submitted to the same rules, as any norm of general international law: 'Under the rules of present-day international law (...) each state establishes for itself its legal situation *vis-à-vis* other States'⁵² and the absence of a judicial assessment is the rule rather than an exception. It is not, for that matter, without interest to note that Article 66 of the

prohibition of torture as a norm which is peremptory *erga omnes* (paras. 151-157).

48. Grand Chamber, judgment of 28 July 1999, *Selmouni*, request No. 25803/94.

49. See *supra* n. 47.

50. Document, ILC (XLVIII)/CRD,4/Add. 1. See also paras. 9 to 12 of the Commentary of article 51 of the draft articles in ILC *Yearbook* 1996, Vol. II, Part Two, p. 70.

51. In a more general manner, the Commission refused to include in its draft a part relating to the settlement of disputes, partly for the same reason.

52. Arbitral Award of 9 December 1978, *Agreement relating to air services of 27 March 1946 (USA v. France)*, RIAA, Vol. XVIII, p. 443, para. 81.

Convention of Vienna, has so far never been applied in any way. If, in a future that is hopefully far away,⁵³ states decide to adopt as a convention the draft articles on responsibility, they will always be at liberty to insert a comparable provision – experience shows that it is of limited interest.⁵⁴

Like ‘international crime of the State’, from which it is distinguished only by the name (or the absence of any particular denomination), the concept of a ‘serious breach of an obligation under a peremptory norm of general international law’, reflects the idea that there are ‘fundamental interests of the international community’ which it is advisable to safeguard in a special way. It is what articles 19 and 51 to 53 of the 1996 ILC draft attempted to do; it is also the objective pursued by articles 40 and 41 of the 2001 draft. Both drafts cautiously recognize the limited but comforting advances of ‘communitarian’ sentiment and of solidarity in the global international community, as had already been done, in their own way, by articles 53 and 64 of the Convention of Vienna.⁵⁵ With or without the name, definitely, ‘*Vive le crime!*’⁵⁶

3. WHAT IS SAID AND NOT SAID – THE CONSEQUENCES OF ‘CRIMES’

3.1 What is said

One can congratulate oneself that the ILC did not allow itself to be intimidated by the pressure to which it was subjected by a handful of powerful and influential states and, in accordance with its mission, has maintained, as an integral whole, the project of codification (more than of progressive development) for which it has been responsible and which would have been seriously truncated and unbalanced by the deletion of provisions relating to serious breaches of obligations under peremptory norms of general international law.⁵⁷ But equally so, one is forced to note that the explicit consequences that it

53. The author of this article is in favour of allowing the ILC draft articles ‘to live their life’ for several years before undertaking, if necessary, their adoption as a convention: time will permit the passions that some of its provisions (in general, the most ‘progressive’) still excite to wane, and to separate ‘good law from bad’.

54. On this point, the author has changed his position from that expressed several years ago in another article (cf., Pellet (1997) op. cit. n. 30, at pp. 294-296).

55. It is striking that the draft articles on responsibility adopted in 2001 make several references to the concept of peremptory norms of general international law; in addition to Arts. 40 and 41, see Arts. 26 and 50, para. 1(d).

56. See *supra* n. 31.

57. It goes without saying that, in the process of codification entrusted to the Commission, the states have the last word which is as it should be. But the ILC has the right and the duty to propose to the states, completely independently and in all conscience, drafts which are complete, consistent and take into consideration changes in the international community and its law. What happens subsequently with

has drawn from this concept are, at least in part when sticking to the text of the draft, deceptive and incomplete.

Although he proclaimed his intention of reviewing ‘thoroughly’ the previous draft articles 51 and 53 dedicated to the consequences of international crimes of states,⁵⁸ the Special Rapporteur, J. Crawford, has not done anything to this effect, and these articles have been moved from the 1996 draft to the provisional text of 2000 (in the form of article 42) then to the final draft of 2001 (article 41) without manifest change.

The latter reads as follows:

Article 41

Particular consequences of a serious breach of an obligation under this chapter

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 recognise as lawful a situation created by a serious breach within the meaning of article 40 nor render aid or assistance in maintaining that situation.
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.

No doubt, this provision is more ‘sober’ than those which it is replacing. But the changes are more apparent than real.

In comparison with the 1996 draft:

— the previous article 51⁵⁹ has disappeared from the 2001 text; but, clearly, the first part of the sentence of paragraph 3 of the new article 41 fulfils the same function and the expression ‘*particular consequences*’ in the title of this provision also provides the same;

— similarly, the previous article 52⁶⁰ has not been maintained; but Special Rapporteur Crawford clearly demonstrated in his third report that the article was superfluous; he indicated firmly that there was no reason for making, in this regard, a distinction between the consequences of ‘crimes’ and those of other

its drafts is no longer its own business.

58. See *supra* n. 38.

59. ‘An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.’ Text in *ILC Yearbook* (1996) Vol. II, Part Two, p. 70.

60. ‘Where an internationally wrongful act of a State is an international crime: (a) an injured state’s entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs c and d of article 43 [according to which the restitution would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation or would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act]; (b) an injured State’s entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45’ (which prohibits the injured State from formulating ‘demands which would impair the dignity of the State which has committed the internationally wrongful act’) - text *ibid*.

internationally wrongful acts.⁶¹ basically, the limitations in the previous provisions relating to the forms of reparation, to which article 52 was meant to derogate (and that the new project somewhat diminished), rested on the idea of proportionality (there was a desire to avoid a situation in which the reparation would entail a cost out of proportion to the damage sustained or the seriousness of the breach); moreover, as it concerns a matter of 'crimes', whereby the breaches are, by definition, particularly serious, this proportionality can be considered as being 'put up a notch'; there is no reason for necessarily abandoning this condition;

— finally, paragraphs 1 and 2 of the new article 41 are to the same effect, though in a more precise form which is undoubtedly less open to controversy than what was stated in the previous article 53.

Although it has been indicated as such in the literature,⁶² the consequences were not so innocuous.

The obligation to cooperate in order to put an end to 'serious breaches'⁶³ is quite a specific consequence of serious breaches: it has never been claimed that the solidarity among states is sufficiently solid to impose upon them a (positive) duty of cooperation to put an end to any internationally wrongful act whatever its nature. The structure peculiar to the international community, initially composed of juxtaposed sovereignties, evidently precludes such an obligation.⁶⁴ The obligation which is recognized in paragraph 1 of Article 41 is therefore, symbolically at least, in contradiction with classical international law and is in conformity with the (modest) advances of international solidarity. Moreover, it bears an indispensable guarantee: by invoking that all states must cooperate, 'by lawful means', to put an end to serious breaches, it precludes the use of armed force in a manner contrary to the United Nations Charter, which should reassure those who could fear that the article legitimizes 'Zorro style' operations of the type led by NATO in Kosovo.⁶⁵

The prohibitions, reinstated in paragraph 2 of article 41 of the 2001 draft, of

61. A/CN.4/507/Add.4, para. 408.

62. See n. 12.

63. The previous Art. 53 distinguished between the obligation 'to cooperate with other States in carrying out the obligations under subparagraphs *a* and *b*' (obligations of non-recognition and non-assistance) (paragraph *c*) and that of 'to cooperate with other States in the application of measures designed to eliminate the consequences of the crime' (paragraph *d*). That was uselessly complicated and, in any case, paragraph *c* had no real substance distinct from that of paragraphs *a* and *b*.

64. Which, for that matter, does not exist in internal law either from which it is excluded by the idea that no one is supposed to mete out justice to himself; conversely, at the heart of the state, citizens have an obligation to cooperate with the forces of order and justice (as states must lend their aid to the Security Council in the exercise of its principal responsibility in the matter of maintaining peace and international security), but this is no longer a problem of the law of responsibility but of maintaining public order.

65. The current author is not convinced, in the circumstances in which it took place, that the NATO operation cannot be seen as lawful (see A.Pellet 'La guerre du Kosovo - Le fait rattrapé par le droit', 1 *Forum du Droit international* (1999) pp. 160-165).

not recognising as lawful a situation created by a serious breach of a peremptory norm of general international law, and of not rendering aid or assistance in its maintenance, are no longer deprived of their significance. The first more than the second assuredly, the latter simply being, in principle, the consequence, or the continuation, of the obligation stated in paragraph 1.

It has been asserted that the obligation of non-recognition was not specific to situations resulting from 'crimes'.⁶⁶ This is not right: certainly, a state not directly injured by an 'ordinary' internationally wrongful act has no say in recognising a situation created by such an act. But the reason is that the situation concerns exclusively the responsible and the directly injured states, this other state is 'not concerned'; it is a third party in relation to the situation and does not have to take a position in this regard.⁶⁷ On the other hand, it goes without saying that the injured state is perfectly within its right to forget the past and to recognize, if it wishes, the harmful consequences of a breach of which it is the victim. As Antonio Cassese writes: 'under the "old" law [still in force regarding "ordinary" internationally wrongful acts] the consequences of international delinquencies were only a "private business" between the tortfeasor and the claimant'.⁶⁸ Moreover, article 20 of the draft states that 'valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State ...' and article 45, of which the logical connection with the previous article is nothing less than obvious, declares that:

'The responsibility of a State may not be invoked if:
(a) the injured state has validly waived the claim'

This consent or waiver must, of course, be 'valid', which means, in particular, that it must not concern the commission of an act contrary to an obligation deriving from a rule of *jus cogens*. The exact purpose of this article is, in effect, to protect weak states against themselves or against the pressures to which they are submitted by more powerful states. It is for this reason that a treaty conflicting with a peremptory norm of general international law is rendered absolutely void by Article 53 of the 1969 Vienna Convention. It is also why a state which is a victim of a serious breach of an obligation arising under such a norm may not elect to waive, even voluntarily or in matters concerning it, its right to invoke the responsibility of the perpetrator.

Furthermore, the situation appears totally different from that resulting from 'ordinary' breaches of international law. In the case of 'serious breaches', the circle of interested states is no longer limited to the state (or states) responsible,

66. Cf., Rosenstock, *op. cit.* n. 11, at p. 284.

67. See n. 54.

68. A. Cassese, 'Remarks on the Present Legal Regulation of Crimes of States', in *Le Droit international a l'heure de sa codification - Etudes en l'honneur de Roberto Ago* (Milan, Giuffrè 1987) p. 50.

on one side, and to the injured state (or states) on the other; all the members of the 'international community of states as a whole' are concerned. The breach 'has become a "public affair" involving not only the two parties directly concerned but also the world community at large'.⁶⁹ Consequently, the direct victim(s) of the breach would undermine the collective interests of this whole by waiving the right to invoke the responsibility of the author of the breach, the implementation of which interests the entire international community.

It is in this regard that the distinction employed in Chapter I ('Invocation of the responsibility of a State') of Part Three of the 2001 draft articles ('Implementation of the international responsibility of a State') becomes genuinely meaningful. Article 42 limits the definition of the injured state to the cases in which the obligation breached is owed to:

- '(a) That State individually; or
- (b) A group of States including that State or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.'

The latter provision refers to what is nowadays commonly named 'integral obligations'.⁷⁰

For its part, article 48 concerns 'the invocation of responsibility by a State other than the injured State'. Paragraph 1 distinguishes in this regard obligations *erga omnes partes*⁷¹ from obligations owed 'to the international community as a whole' (which clearly includes the obligations arising under norms of *jus cogens*).⁷²

Based upon these assumptions, all the states concerned (all the states of the world in the intention of sub-paragraph b) of paragraph 1, may claim from the responsible state:

- 'a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition [⁷³] in accordance with article 30; and

69. Ibid.

70. See F. Coulée, *Droit des traités et non-réciprocité - Recherches sur l'obligation intégrale en droit international public*, thesis (Paris II 1999).

71. If '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' (para. a).

72. Para. b.

73. The Commission had left in abeyance the question of assurances and guarantees of non-repetition pending the judgment of the ICJ in the *La Grand (Germany v. USA)* case (see document A/CN.4/L.602, notes 6 and 8); after the judgment was given, on 27 June 2001, the Commission definitely adopted this formulation even though it can be maintained that it does not fit with the Court's Judgment which implies that assurances and guarantees of non-repetition are part of the satisfaction

b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.’

These prerogatives are not limited to cases of serious breaches of peremptory norms of general international law. They are nevertheless open to this hypothesis, which very likely represents that in which states ‘other than the injured state’ are most inclined to act, as a certain number of precedents have clearly demonstrated.⁷⁴ At the same time, the distinction between ‘serious breaches’ on one hand (Art. 40) and the other breaches on the other hand (Art. 48, sect. 1 (b)) of peremptory norms of general international law is justified: the former involves consequences which are added not only to those of ‘ordinary’ internationally wrongful acts (the ‘crimes’ of art. 19 of the 1996 draft), but also to those of breaches of obligations arising under the rules of *jus cogens* which cannot be qualified as ‘serious’ within the meaning of article 40 of the project.

These ‘concentric circles’ of responsibility perhaps complicate a little the issues. However, given that these various hypotheses do correspond to the great variety of actual situations, their consideration by the ILC project is a cause for congratulation.

3.2 What is not said

The fact remains that the ILC Articles are far from describing, even *de lege lata*, all the consequences deriving from serious breaches of a peremptory norm of general international law.

Still, it is necessary to give credit in this regard to the Special Rapporteur who, in his third report in 2000, attempted to relax somewhat the ‘constricted’ conception of these consequences as they were presented in the draft adopted at the first reading. He argued for the inclusion in the draft of two new elements of which at least the second was a considerable advance:

— firstly, Professor Crawford proposed ‘that in the case of gross breach of community obligations, the responsible State may be obliged to pay punitive damages’;⁷⁵

— secondly, he suggested that a provision be made for the possibility for ‘any other State [to] take countermeasures (...) in order to ensure the cessation of the breach [of an obligation owed to the international community as a whole] and

(see e.g., paras. 121-127 of the Judgment).

74. See in particular, the examples of countermeasures by states not directly injured (which the Special Rapporteur incorrectly terms ‘collective countermeasures’) in the third report of James Crawford on the responsibility of states, A/CN.4/507/Add. 4, paras. 391-394).

75. A/CN.4/507/Add.4, para. 409; but see n. 84.

reparation in the interests of the victims'.⁷⁶

In the two cases, the Drafting Committee followed his suggestions, at least in part.

Article 42, paragraph 1, of the draft provisionally adopted by this committee in 2000 actually provided that:

'A serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach'.⁷⁷

This was certainly a rationalisation compared with the 1996 draft which contained a comparable provision in article 45 but which was dedicated to satisfaction as a means of reparation of all internationally wrongful acts⁷⁸ and not of crimes in particular. Yet, if the idea of punitive damages is not well established in positive international law,⁷⁹ it is entirely inappropriate with regard to 'simple' breaches of international law, not having a particularly serious character. It was therefore moved to the chapter specific to the consequences of serious breaches.

The fact remains that this idea of punitive damages has a criminal connotation which tallies poorly with the instinctive rejection by the Special Rapporteur, a number of states and members of the Commission of all 'criminal drift'.⁸⁰ This is undoubtedly why, in 2001, Crawford denied that the provision was related to punitive damages contrary to what he had stated the previous year,⁸¹ while, at the same time, defending the retention of this provision in the draft.⁸² His position was not adopted by the Drafting Committee which, after a lively debate, decided to delete the provision, a move which was subsequently approved by the plenary Commission. It is not clear whether this deletion should be regretted: the 'decriminalisation' of the draft should probably be taken to its logical conclusion.⁸³ In any case, this provision would have consisted of a progressive development of international law to which the states had shown quite significant reticence⁸⁴ and which was not indispensable (or

76. Draft article 50B, *ibid.*, para. 413.

77. See the ILC Report on the proceedings of its 52nd session, General Assembly, Official Documents, 55th session, supplement No. 10 (A/55/10), p. 120.

78. The terms of paragraph 2 of this provision: 'Satisfaction may take the form of one or more of the following: (...) c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement' - text in *ILC Yearbook* (1996) Vol. II, Part Two, p. 63.

79. Cf., the fourth report. See however, the second report on the responsibility of states by Professor Gactano Arangio-Ruiz in *ILC Yearbook* (1989) Vol. II, Part One, p. 41, paras. 139-140.

80. On this point see above, p. 58

81. See n. 78.

82. Fourth report, A/CN.4/517, para. 45.

83. But this should not allow a mechanism of the 'civil' type to be seen in international responsibility. See n. 17.

84. See the thematic summary of the debates of the Sixth Committee during the 55th session of the General Assembly, A/CN.4/513, paras. 110-112.

which, in any case, would have been worthy of a more thorough study than those presented by the two last Special Rapporteurs on the topic).

Much more regrettable is the deletion, in the final draft, of draft article 54 which had been provisionally adopted in 2000 by the Drafting Committee in accordance with the suggestion by Professor Crawford mentioned above. Paragraph 2 of this short-lived provision was as follows:

‘In the cases referred to in article 41 [i.e., in the case of a serious breach of essential obligations to the international community], any State may take countermeasures, in accordance with the present Chapter, in the interest of the beneficiaries of the obligation breached’.⁸⁵

This text probably concerned the recognition of the most important consequence of ‘serious breaches’. It was perfectly logical: once all the states have an interest in an obligation essential to the international community to which they belong, it is legitimate that they are in a position to ensure that this obligation is complied with. It would be vain to pretend that the UN Security Council could ensure such compliance:

— on the theoretical level, the law of international responsibility and that of the Charter or, more widely, that of maintaining peace and international security are two distinct branches of international law and the draft articles on responsibility must be sufficient in themselves – even if it is specified, as does article 59, that they are ‘without prejudice to the United Nations Charter’;

— on the practical level, one cannot but think of the parable of the blind leaning on the paralysed: by not granting to states the possibility of reacting individually (or collectively) they must rely entirely on the mechanisms of the Charter and, consequently, on the pleasure of the Security Council and its permanent members; if genocide is committed or apartheid is instituted, the states must remain with their arms crossed in the face of Council inaction; this is the institutionalisation of Munich!

Moreover, draft article 54 of 2000 gave guarantees against abuse:

— the right of non-injured states to take countermeasures was limited to that of acting ‘in the interest of the beneficiaries of the obligation breached’, in particular persons or peoples whose fundamental rights had been flouted, and not in their own interest;

— these countermeasures must respect the limits placed upon all response to unlawfulness in regard to their object (draft articles 50 and 51) and to their conditions (article 53), in particular as regards the fundamental demand of proportionality (article 53);

— paragraph 2 of draft article 54 required states taking, jointly or collectively,

85. Text in the ILC Report on the proceedings of the 52nd session, General Assembly, Official Documents, 55th session, supplement No. 10 (A/55/10), p. 139.

countermeasures of this type to 'cooperate to ensure that the conditions laid down in this chapter for making use of countermeasures are fulfilled',⁸⁶ which, indeed, seemed obvious.

Despite this abundance of precautions, the draft provoked cynicism or a lack of understanding, and extremely lively criticism from states within the Sixth Commission of the General Assembly in 2000⁸⁷ which led to a majority of ILC members changing the position taken the previous year and deciding in favour of simply deleting article 54 from the draft.⁸⁸

This decision was a significant step backwards from the position adopted by the Drafting Committee the previous year, and even from that implied in the 1996 draft articles. Article 40, paragraph 3, of the latter stated that 'the expression 'injured State' means, if the internationally wrongful act constitutes an international crime [⁸⁹], all other States'.⁹⁰ As the right to take countermeasures was recognized, by article 47 of the draft,⁹¹ to all injured states, clearly all states have the same right in the case of a crime.

This is no longer the case if the draft adopted definitively in 2001 is taken literally. This draft still limits the right to take countermeasures to injured states. However, and this is a huge difference, the member states of the international community may no longer claim to be included in this category, even in the case of a serious breach of a peremptory norm of general international law as article 48, paragraph 1,⁹² explicitly denies them this right.

This observation can be characterized using the same terminology as that employed above – namely, as a 'regressive development' of international law.

However, it is not so clear that the final draft on the responsibility of the state for internationally wrongful acts deserves this opprobrium. Undoubtedly, the deletion from the draft of article 54 and the absence of any replacement provision weigh heavily upon it, but, in the absence of a positive rule which explicitly authorises all states to adopt countermeasures in the case of a serious breach of an obligation essential to the international community, the ILC included in its draft a safeguard clause which not only does not preclude this possibility but is even worded in such a way that it appears to recognize it. The

86. Ibid.

87. Cf., the thematic summary of the debate in the Sixth Committee during the 55th session of the General Assembly, A/CN.4/513, paras. 174-182.

88. See the ambiguous defence of this provision by the Special Rapporteur in his fourth report, A/CN.4/517, paras. 70-74.

89. A note at the bottom of the page stated: 'The term "crime" is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as "international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia*, avoiding the penal implication of the term.'

90. Text in *ILC Yearbook* 1996, Vol. II, Part Two, p.63.

91. Ibid.

92. See *supra* p. 72.

new article 54, entitled 'Measures taken by States other than an injured State' has been phrased as follows:

'This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1^[93] to invoke the responsibility of another State, to take lawful measures against that State to ensure the cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.'

Paradoxically, what was very narrowly framed in quite precise rules in the 2000 version is suddenly recognized *de facto* and widely deregulated in the final draft. There is of course cause for joy that, in the case of a (not inevitably serious) breach, the right to react is, in fact, recognized for all states interested in the respect of an obligation even when they are not 'injured' within the meaning of the draft. It can be regretted that the regime of those 'measures' (that the ILC visibly wanted to distinguish from countermeasures open to injured states) is more vague and uncertain than that previously envisaged. At least, room for future evolution has been made both for the consolidation of the right to react of all Members of the international community in the case of a breach of an obligation arising from a peremptory norm of general international law and for the legal framework of these measures.

There is here, for that matter, a trait which is quite characteristic of the final draft: it preserves the future. This is particularly true for the issue of legal consequences of 'serious breaches'. Article 54 not only does not preclude individual or collective responses to these breaches but, furthermore, the second sentence of paragraph 3 of article 41 itself, the only provision in the entire draft which is explicitly dedicated to the consequences of serious breaches,⁹⁴ states that this article is 'without prejudice ... to such further consequences that a breach to which this chapter applies may entail under international law'.⁹⁵

The door has hence been left open, not only for future evolution but even for the inclusion, today, among the consequences of serious breaches of norms of *ius cogens*, of situations not explicitly mentioned in the draft but nonetheless part of positive law.

93. See *ibid.*

94. For the complete text see *supra* p. 68.

95. This specific safeguard clause is additional to those in Part Four. Art. 55 ('*Lex specialis*') preserves the applicability of special rules relating to the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state. (In his contribution to *Festschrift Roberto Ago* - see *supra* n. 68 - Antonio Cassese, on the basis of practice, demonstrated superbly the principles especially applicable to serious breaches of obligations essential for safeguarding the right of peoples to self-determination - pp. 51-54 - and of those relating to the protection of fundamental human rights - pp. 54-62). Moreover, in pursuance of Art. 56, 'the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles'.

This article cannot be the framework of a detailed presentation of these lacunae which the author has already set out in a previous article⁹⁶ on the 1996 draft which remains relevant as the 2001 draft essentially employs the same approach in relation to the consequences of 'serious breaches'. There are not many lacunae but they are very important. It will suffice to indicate them below.

The most fundamental is undoubtedly the 'transparency of the state'. The responsibility of the state is certainly not of a criminal nature nor, in any case, was the objective of the ILC draft articles to codify the rules applicable to a possible criminal responsibility of states even if one could ask whether, for example, the sanctions against defeated Germany of 1945 or Saddam Hussein's Iraq after the 'Gulf War', or even Yugoslavia after the Kosovo affair are not of a criminal nature.⁹⁷ But the international responsibility 'in short' of a state can, nevertheless, entail criminal consequences when the leaders of a state responsible for an internationally wrongful act are brought before a criminal court, either national or international, to account for their acts. This constitutes a serious derogation from the fundamental principle of immunity of state leaders – including heads of state – which can only be explained by breaking through the veil of the state, which is the only means of reaching the men (and women) beyond the institution. It is only possible if the breach of international law by the state constitutes a serious breach of a norm of *jus cogens*, of which the transparency of the state is one of the necessary consequences, failing which the jurisdiction of the courts concerned, which is generalized, would be inexplicable.

Another consequence, already established in positive law, is the possibility of an *actio popularis*,⁹⁸ it being understood that this does not establish the jurisdiction of courts not otherwise based on the pre-existing consent of the states involved. However; if this jurisdictional link exists, any state enjoying it will be able to request that the court seized grant them the rights that they hold pursuant to the infringement by the state responsible for the breach of the interests essential to the international community as a whole.

Finally, it is possible to think that a serious breach of a peremptory norm of general international law cannot fail to have some impact on the legal regime of 'circumstances precluding wrongfulness'. This appears to be implicit in certain articles of the draft:

— as indicated above,⁹⁹ in order to constitute such a circumstance, the consent of the injured state must, according to article 20, be 'valid', which does not occur in the case of a 'serious breach';

96. See Pellet (1997) *op. cit.* n. 30, at pp. 310-312.

97. *Contra* Barboza, *op. cit.* n. 11, p. 360, fn. 10.

98. See *supra* p. 60.

99. See *supra* pp. 70-71.

— self-defence¹⁰⁰ is defined by the United Nations Charter, to which article 21 explicitly refers, and can only constitute a response to an act of aggression, typical of a serious breach of a norm of *jus cogens*; and

— the particular regime of ‘measures’ in response to serious breaches is covered, in an ambiguous manner as is well known,¹⁰¹ by article 54 which constitutes, in its way, an exception to the countermeasures regime referred to in article 22.

But it is above all article 26 which, by compelling, in all cases, respect for peremptory norms, is the closest to the particular regime specific to the consequences of ‘serious breaches’. The article is as follows:

‘Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.’

Adopted only by a small margin by the Drafting Committee in 2001, this provision replaces draft article 21 while widening its scope considerably in comparison with the draft provisionally adopted by the same Committee the previous year.¹⁰² This provision constitutes the continuation of the legal regime of serious breaches of rules of *jus cogens* since it clearly implies that a state may not respond to these breaches by committing, in turn, a similar breach.¹⁰³ This clarification is useful. It can, however, be criticized for its lack of location: it appears in the chapter relating to circumstances precluding wrongfulness and not in the chapter dealing with ‘serious breaches’, and the wording only implies, without saying it explicitly, that one cannot invoke any circumstance precluding wrongfulness to justify an internationally wrongful act showing this character.

It is, indeed, a venial sin.

In general, the final draft brings about, at least in the area covered by this article, some not negligible improvements to the 1996 version. It consecrates, by a slightly laborious circumlocution, the existence of the late international crime of the state, which, like the phoenix, has risen again from the ashes in

100. This concept could have been omitted from the draft: in so far as it raises the issue of Charter law and not that of responsibility.

101. See *supra* p. 76.

102. ‘The wrongfulness of an act of a State is precluded if the act required in the circumstances by a peremptory norm of general international law’ - text in ILC Report on the proceedings of its 52nd session, General Assembly, Official Documents, 55th session, supplement No. 10 (A/55/10), p. 129.

103. This is also done by Art. 51, para. 1, which is particularly poorly drafted and which concerns countermeasures: ‘Countermeasures shall not involve any derogation from: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) Obligations for the protection of fundamental human rights; (c) Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby; (d) Other obligations under peremptory norms of general international law; (e) Obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents.’

which some wanted to bury it,¹⁰⁴ as the concept responds to an evident need of the contemporary international community. The draft does not preclude any of the consequences that the concept infers and which are already anchored in positive international law, even if it does not always state them explicitly or with sufficient firmness. And it does not preclude future evolution, not even the possibility of an international criminal responsibility of states.

Is the international crime of the state dead? Long live the serious breaches of obligations arising under peremptory norms of general international law! It amounts to exactly the same – the expression is only more cumbersome ...

104. It is not without interest to note that the last two ILC Special Rapporteurs on the subject, both of whom were more than sceptical in this respect at the beginning, have finally been won over, if not to the word at least to the idea. This is to their credit.