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# *A Return Ticket to 'Communitarisme', Please*

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## **Abstract**

*In Article 41 of its Draft Articles on State Responsibility, the International Law Commission gave expression to community interests in relation to serious breaches of peremptory norms, without giving in to the pitfalls of an over-progressive development of the subject. However, when it came to the rules on invocation of responsibility, the ILC fell back into a stale, bilateralistic response. This imbalance, more than being a symptom of schizophrenia or a sign of disingenuousness, is probably the undesired result of a dichotomy in the ILC Draft between 'serious breaches of peremptory norms' and 'violations of obligations owed to the international community as a whole'. Yet, overall, the ILC's choices accurately reflect the current transitional state of international law.*

## **1 Introduction: The Position of 'Not Directly Injured' States in the ILC's Work 1981–2001**

It is not an easy task to evaluate the duties of states likely to invoke responsibility for serious breaches of obligations under peremptory norms, without taking into account their rights too.

The problem of striking a balance between rights and obligations as consequences of serious breaches of peremptory norms has accompanied the ILC's work for the last 20 years. In view of the fundamental bilateralist approach followed by the ILC, the position of the directly injured state — the state injured in the sense of Article 42 — is quite clear and straightforward. The position of other states, which are entitled under Article 48 to invoke responsibility 'in some shared general interest', as the ILC commentary puts it, is not so clear and straightforward.<sup>1</sup> Therefore, the analysis in this article will mostly concentrate on some problematic issues with regard to these latter states, dealt with in Articles 41 and 48 of the Draft.

First, however, a brief review of the developments which led to these Articles is

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<sup>1</sup> Cf. ILC Report on its 53rd Session to the General Assembly, UN Doc. A/56/10, commentary to Article 42, para. 3.

appropriate. In 1984, Draft Article 14 of Part Two, dealing with the consequences of an international crime, was first presented by Special Rapporteur Riphagen. Some bewilderment arose as a consequence. Although in its first paragraph the Article proclaimed the existence of such additional rights and obligations as are determined by the applicable rules accepted by the international community as a whole, the second paragraph contained a list of obligations,<sup>2</sup> but made no mention whatever of additional rights.

Of course, Riphagen's difficulty was due to the drafting of Article 5 of Part Two, on the concept of the injured state. Under this concept, in the case of an international crime, *all* states were considered *ipso facto* injured on an equal basis, with all the consequences that this entailed in terms of reparation, countermeasures and so forth. His solution rested not so much in granting new rights to those states — which we will here label '*omnes* states' — as by envisaging new mechanisms to exercise their rights. In Article 14(3), Riphagen proposed to subject the exercise of rights and obligations 'unless otherwise provided for by an applicable rule of general international law, *mutatis mutandis* to the procedures embodied in the UN Charter with respect to the maintenance of international peace and security'.

Unfortunately, Riphagen did not have enough time to fully develop his thoughts on this crucial issue. In his brief comment to Article 14, presented one year later, he maintained that reaction to an international crime was 'comparable to a measure of collective self-defence'.<sup>3</sup> In addition to particular circumstances and arrangements, said Riphagen, the 'not directly injured' state 'should exercise its new rights and perform its new obligations within the framework of the organized community of States'.<sup>4</sup> It is not clear what Riphagen meant by that formula. Probably he was referring to the United Nations, but not as an international organization acting within its specific competences, but rather as a 'material organ' of the international community as a whole. Only thus can one begin to understand the references in Article 14(3), *mutatis mutandis*, to the Charter's procedures on international peace and security, or to understand Riphagen's belief that Article 14(3) did not overlap with Article 4, which left unaffected the UN's rules and procedures relating to the maintenance of peace and security.<sup>5</sup>

<sup>2</sup> See, however, Dupuy, 'The Implications of the Institutionalization of International Crimes of States', 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* (1989) 170, for whom the obligations of Article 14(2) 'seem to be going entirely along the right road' (*ibid.* at 181), and who suggested to 'insist more on the obligations of objectively injured States than on their rights' (*ibid.* at 184).

<sup>3</sup> Cf. *ILC Yearbook* (1985), vol. II, Part One, at 14, para. 9.

<sup>4</sup> *Ibid.* at para. 10.

<sup>5</sup> It is no wonder that such a decisively new and radical view was met at that time with reluctance or incomprehension. For example, Dupuy, *supra* note 2, at 181, wondered about 'the scope and particularly the applicability of the provisions'; Simma, 'Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission', 24 *Archiv des Völkerrechts* (1986) 357, at 401, pleaded for a reformulation of Article 14 so as to reconfirm the 'UN Supersystem', as already recognized by Article 4, and in addition to codify more clearly and in more stringent terms the third states' countermeasures; Conforti, 'In tema di responsabilità degli Stati per crimini internazionali', in *Studi in onore di Ago*, vol. III

In 1987, when Arangio-Ruiz was appointed the new Special Rapporteur, it was a commonly held view that Riphagen's five-year term would be seen in context as an *intermezzo* in the ILC's codification work. With hindsight, however, it is clear that it was in fact Arangio-Ruiz's 10-year term which proved to be the *intermezzo* for the issues under discussion. As is well known, Arangio-Ruiz took some pains before presenting his Draft Articles on the consequences of international crimes in 1995, and, as he himself conceded, although with a certain understatement, his proposals, especially those related to the institutional aspects, presented 'a relatively high degree of progressive development'.<sup>6</sup> Briefly, Article 19 of Part Two called for, as a preliminary condition for the applicability of the other rules relating to the *omnes* obligations and rights, either the Security Council's or the General Assembly's positive finding on the *fumus juris* of the existence of an international crime; moreover, Article 19 also required as a prerequisite an ICJ judgment on the existence of an international crime.

The negative reaction by the majority of ILC members was unmistakable: according to the 1995 ILC report, Arangio-Ruiz's proposals 'were described as too broad to be realistic and as revolutionary and unattuned to States' sense of international law'.<sup>7</sup> It is interesting to observe, though, that, even in the complex framework drafted by Arangio-Ruiz, the obligations of the *omnes* states (Draft Article 18) were tightly connected to their rights (Draft Articles 16 and 17), and that, with regard to the role of the ICJ, notwithstanding its utopianism, Arangio-Ruiz's proposal resolved with elegance the controversial question of the *jus standi* of the *omnes*, by reversing the perspective from a right, as it is usually conceived, to a burden in order to trigger the consequences of the international crimes regime.

The ILC had little time in which to conduct a full debate on the merits of Arangio-Ruiz's proposals. In 1996, Arangio-Ruiz resigned and the Drafting Committee was instructed to deal swiftly with the remaining Articles in order to approve the entire Draft by the end of that session. In the 1996 Draft, too, the obligations of the *omnes* states are connected to their rights (though in an odd manner): whereas the additional rights are trivial in nature and are cursorily dealt with in Article 52 under the overall title of 'specific consequences of international crimes', the additional obligations in contrast are carefully detailed in Article 53.

In making a brief assessment of the ILC's work in the past five years, it is important to dwell on the Draft as it was approved by the Drafting Committee in 2000. There the problem of a fair balance between the obligations and rights of all states in the case of a

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(1987) 99, at 107, strictly opposed any idea of reactions against international crimes outside the UN and suggested *de jure condendo* an extension of competences and institutional mechanisms of the UN General Assembly in particular. A notable exception is that of Picone, 'Interventi delle Nazioni Unite e obblighi erga omnes', in P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale* (1995) 517, at 574. The author criticized, though, the solution proposed by Riphagen to impose 'in any case' a UN procedural competence, without taking into account the fact that the states acting *uti universi* are free to decide whether to have recourse to the UN or not, at what stage and for which aspects of the operation.

<sup>6</sup> Cf. *ILC Yearbook* (1995), vol. II, Part Two, at 44, para. 239.

<sup>7</sup> *Ibid.*, at 47, para. 250.

serious breach of an essential obligation towards the international community (as the former ‘international crimes’ had been reconceptualized) had been satisfactorily resolved. On the one hand, there were the obligations of the *omnes* in Article 42, which substantially affected the content of the previous Article 53. On the other hand, going further than the possibility of exemplary damages envisaged in Article 41, the main stress was laid on Article 54(2), which recognized the power of every state, and not just the victim state, to adopt countermeasures ‘in the interest of the beneficiaries of the obligation breached’. In the Third Report of Special Rapporteur Crawford, the connection between the two opposites — rights and obligations — was clear from the outset, because the two Articles followed one another.<sup>8</sup>

The rule in Article 54(2) was removed from the Draft, partly because of the negative reaction by some states and partly as a result of a final compromise in the ILC’s Open Ended Working Group. The more elusive formulation was to be understood as a *quid pro quo* for the better drafting and strengthening of Articles 40 and 41, but, as we shall see below, that goal has not been attained.

A further element of imbalance and uncertainty has been built into the final Draft because of the textual distinction between ‘serious breaches of obligations under peremptory norms of general international law’, as they are now defined in Articles 40 and 41, and the ‘violations of obligations owed to the international community as a whole’, which are mentioned in Article 48(1). Apart from those commentators who are critical of the very existence of either or both of the two concepts, international doctrine is divided on the distinction between the two and its implications. It is widely believed that *erga omnes* obligations form the broader category, in which the inner core of *jus cogens* rules are to be found.<sup>9</sup> In the ILC’s view, ‘there is at the very least substantial overlap’ between the two concepts.<sup>10</sup> Rather than an ontological difference, it is a mere difference in accent, in that the first concept emphasizes the priority of some essential obligations, whereas the second concept focuses on the legal interest which all states have in ensuring compliance with those obligations. Although one can easily agree with these remarks, nevertheless the last minute differentiation of the two concepts by the ILC in Part Two, Chapter III, and Part Three, Chapter I, of the Draft disturbs the overall balance. The ILC’s attempt in the commentary to recombine *ad unum* what it itself had separated is highly commendable, but it remains true that this classification could give rise to some doubts and complications, as we shall see below.

<sup>8</sup> In Crawford’s view, it would have been ‘bizarre’, if the consequences of a grave breach of an essential *erga omnes* obligation should result only in additional burdens and obligations for third states. Cf. ILC Report on its 52rd Session to the General Assembly, UN Doc. A/55/10, para. 358.

<sup>9</sup> Cf. Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’, in Weiler, Cassese and Spinedi, *supra* note 2, at 155. For a more marked conceptual separation of the two categories, see Picone, ‘Obblighi reciproci ed obblighi *erga omnes* degli Stati nel campo della protezione internazionale dell’ ambiente marino dall’ inquinamento’, in V. Starace (ed.), *Diritto internazionale e protezione dell’ ambiente marino* (1983) 15, at 40.

<sup>10</sup> ILC Report, *supra* note 1, commentary to Part Two, Chapter III, para. 7.

## 2 Draft Article 41: *Communitarisme's* Triumph?

In dealing with the subject of the particular consequences of a serious breach of an obligation under peremptory norms of general international law, the ILC was faced with a seemingly insoluble problem, namely, how to delineate a bundle of consequences to match the gravity of the situation and to demonstrate the cohesion of the international community, without at the same time getting into the muddy and troubled waters of institutionalism. In the end, the ILC succeeded, not least because of its introduction of and its stress on the very concept of peremptory norms. As was well said by René Jean Dupuy some time ago, the international community can only be grasped as a normative community through the operation of *jus cogens*.<sup>11</sup>

Yet some of the solutions offered are unsatisfactory and utterly rudimentary, and, despite their appearance of *communitarisme*, leave one with a sense of half-heartedness.

### A Article 41(1): *The Duty of Solidarity*

Article 41(1) sets out the obligation to cooperate to bring to an end through lawful means any serious breach. This obligation was progressively strengthened during the ILC's work. Absent from Riphagen's Article 14, the provision appeared in Article 53(d) of the 1996 Draft in a significantly milder and more articulated form, as an obligation 'to cooperate with other States in the application of measures designed to eliminate the consequences of the crime'. In the Draft provisionally adopted in 2000, the newly formulated obligation, with the important proviso of 'as far as possible', was inserted into Article 41 at the end in paragraph (2)(c). In the final Draft it appears at the beginning of paragraph (1).

These changes are more than a mere tidying up of the text. They send a clear message on the priority of the duties of solidarity in the international community.<sup>12</sup> One is reminded of the Grotian tradition of solidarism over pluralism in the concept of the international community and particularly in the enforcement of rules,<sup>13</sup> a tradition which is of course still alive and well.<sup>14</sup> Yet, as the commentary reveals, the ILC itself is not certain whether it codified or developed international law.<sup>15</sup> It is

<sup>11</sup> Cf. R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (1986) 151. See also Pellet, 'Remarques sur une révolution inachevée, le projet d'articles de la CDI sur la responsabilité des états', 42 *Annuaire français de droit international* (1996) 7, at 12.

<sup>12</sup> With regard to Article 53 of the 1996 Draft, Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994-VI) 217, at 317, maintained that 'the very existence of Draft Article 53 is a remarkable victory of community interest over bilateralist reflexes nowhere more profoundly entrenched than in the field of state responsibility'.

<sup>13</sup> Cf. Bull, 'The Importance of Grotius in the Study of International Relations', in H. Bull, B. Kingsbury and A. Roberts (eds), *Hugo Grotius and International Relations* (1992) 65, at 87.

<sup>14</sup> Cf. e.g. Tomuschat, 'Die internationale Gemeinschaft', 33 *Archiv des Völkerrechts* (1995) 1, at 20, for whom the concept of solidarity is the *Lebenselixier* of the international community.

<sup>15</sup> ILC Report, *supra* note 1, commentary to Article 41, para. 3: 'it may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law.'

evident that in drafting the rule the ILC found inspiration in the famous 1971 ICJ *Namibia Opinion*: the ICJ expressly indicated, as a consequence of the continued illegal presence of South Africa in Namibia, the obligation for all states not to recognize and assist (which is now codified in Article 41(2)), but not necessarily the obligation to cooperate between themselves.<sup>16</sup>

The ICJ's omission is even more significant, if one considers that, just one year before it introduced the very concept of obligations *erga omnes*, the Declaration of Principles on Friendly Relations and Cooperation of States had been adopted by the General Assembly, in which the obligation of cooperation, of course in more general terms, is regarded as one of the seven fundamental principles of the entire body of contemporary international law.<sup>17</sup> In paragraph 4(a) of the Declaration, states are required to cooperate for the maintenance of international peace and security, and in paragraph 4(b) the same duty of cooperation extends to the promotion and respect of human rights and fundamental freedoms and to the elimination of every kind of racial discrimination and religious intolerance. Therefore, one may infer that, if the obligation to cooperate has been recognized as a general rule for the protection of peace and the promotion of human rights, the same must be true whenever these supreme values are seriously violated. Taking due account of the strong political connotation of the Declaration,<sup>18</sup> it is apparent that the ILC codified, rather than developed, the obligation to cooperate in bringing the violation to an end.

Yet the ILC's hesitancy here is justified. Indeed, the real crux arises with regard to the boundaries and mechanisms of the obligation to cooperate. In Article 53 of the 1996 Draft, the obligation was divided into two paragraphs, which satisfied two different needs: subparagraph (c) dealt with the obligation to cooperate in order to fulfil the obligations of non-recognition and non-assistance; subparagraph (d) concerned the obligation to cooperate in the application of measures designed to eliminate the consequences of the crime. In the final Draft, only this second aspect has been retained and strengthened. It might be thought that the formula is sufficiently broad to cope with both aspects, but, on a closer look, this is not the case. A different, admittedly very conjectural, explanation would be that what the ILC wanted to say was that a true obligation to cooperate arises only when positive measures are

<sup>16</sup> Cf. Simma, 'International Crimes: Injury and Countermeasures', in Weiler, Cassese and Spinedi, *supra* note 2, at 305, n. 90. One of the reasons for that omission has to be looked for in the unwillingness of the ICJ to touch on what at that time was a politically disputed issue of direct UN involvement in the administration of the territory, with the odd result that the opinion left in total abeyance the essential point of whom, instead of South Africa, the states could have entered into relations with concerning the Namibian territory. Cf. Rovine, 'The World Court Opinion on Namibia', 11 *Columbia Journal of Transnational Law* (1972) 203, at 234.

<sup>17</sup> On the duty of solidarity and cooperation in light of the Friendly Relations Declaration, see Neuhold, 'Die Pflicht zur Zusammenarbeit zwischen Staaten: Moralisches Postulat oder völkerrechtliche Norm?', in *Festschrift für Verdross* (1980) 598.

<sup>18</sup> For criticism of the status of the Declaration under general international law, see Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 *RdC* (1972) 419, at 519; and, for a dismissive assessment of the principle of cooperation as codified in the Declaration, see *ibid.*, at 572.

concretely envisaged, whereas the 'negative' obligations of non-recognition and non-assistance are binding for every single state independently of the existence of mechanisms of cooperation. If this interpretation is correct, this would mean that the ILC implicitly took a definite and negative position on an important and much debated question, namely, that of the admissibility of unilateralism.<sup>19</sup> Some governments took this view: The Netherlands, in its written observations on the Draft, remarked that the emphasis laid on cooperation would 'prevent States from going it alone'.<sup>20</sup> But, in view of the whole drafting history of the Article, which carefully avoided the question of who would be entitled to begin such an action, the complete silence of the commentary on this point, and the explicit statement of the Chairman of the Drafting Committee that the paragraph was 'not intended to exclude unilateral actions by states',<sup>21</sup> it is going too far to infer such a wide-ranging prohibition from the simple text of the Article.<sup>22</sup>

As for the mechanisms of cooperation, the Article is totally silent, nor is the commentary very helpful.<sup>23</sup> The commentary merely states that cooperation between states, apart from non-institutional forms, could be organized within the framework of a competent international organization, in particular the United Nations.<sup>24</sup> This rather perfunctory remark raises more questions than it answers. First, the Draft already includes Article 59, which expressly excepts the UN system. It follows, both from the logic of the Draft and from its customary character, that the cooperation which is referred to here is something different from that institutionalized in the UN. But here a new reason for uncertainty arises, because the text of the commentary does not speak of cooperation *within or through* an international organization, but rather of *in the framework of* an international organization. The choice of this phraseology recalls Riphagen's approach, but without developing it any further.

Apart from this ambiguous remark, no mention is made of how to face the many

<sup>19</sup> On this debate, see the United States–Europe Symposium on Unilateralism in International Law, published in 11 *EJIL* (2000), especially the contributions by Dupuy (*ibid.*, at 19), Chinkin (*ibid.*, at 31) and Pellet (*ibid.*, at 385).

<sup>20</sup> UN Doc. A/CN.4/515, at 58.

<sup>21</sup> Statement by Mr Tonka, ILC Report, *supra* note 1, at 44.

<sup>22</sup> In 1984, Simma, *supra* note 16, at 305 and 315 respectively, observed that Riphagen's Draft Article 14 had tried to develop 'community reactions', without really leaving the field of traditional bilateralism, and concluded by expressing his concern that 'these new conceptions are being grafted upon international law without support through, and any attempt at, adequate institution-building'. For a more optimistic view, see M. Iovane, *La tutela dei valori fondamentali nel diritto internazionale* (2000) 338, for whom throughout the ILC's codificatory effort the discussion on the relationship between the Charter's dispositions on the maintenance of international peace and security on the one hand and the consequences of international crimes on the other hand would show 'a generalized mistrust of unilateral solutions' (author's translation).

<sup>23</sup> With regard to Article 42 of the 2000 Draft, which in substance differed only slightly from the final draft Article 41, A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001) 408, observes that it is as remote as possible from any 'institutionalized solution' (author's translation).

<sup>24</sup> Cf. ILC Report, *supra* note 1, commentary to Article 41, para. 2.

problems which a non-institutionalized cooperation could give rise to.<sup>25</sup> It is probably correct that each case must be decided on its own merits, but it is also true that some peculiar problems are likely to arise in a rather predictable manner. What should be done, for instance, when states, all moved by a *bona fide* intent to bring the violation to an end, diverge on the issue of the appropriateness or scale or duration of economic sanctions?

Particular problems also arise when a serious breach of an obligation under peremptory norms of general international law assumes the character of an aggression. Does the obligation to cooperate go as far as to eliminate the time-honoured rules on neutrality? This question, which is obviously relevant under general international law and which has been engaging international doctrine for a long time now, does not seem to have been of great concern to the ILC.<sup>26</sup> Yet it cannot be said that the issue is resolved by Draft Article 59. Indeed, under general international law, in the not uncommon case that the UN Security Council does not succeed in determining the state responsible for the aggression and as a result does not take coercive measures, every state is free to evaluate the situation as it thinks fit, by exercising its right to collective self-defence or staying neutral. The doctrine concedes that in a case of blatant violation the neutrality should not work to the advantage of the wrongdoer,<sup>27</sup> but nevertheless these qualifications lie behind the overall obligations of cooperation enunciated in Article 41(1).<sup>28</sup>

## B Article 41(2): The Duties of Isolation

Draft Article 41(2) sets out the twin obligations not to recognize as lawful a situation created by a serious breach, and not to render aid or assistance in maintaining that

<sup>25</sup> See also Iovane, *supra* note 22, at 382, according to whom an international customary norm would now be emerging, which would require 'a phase of preventive understanding between sufficiently representative elements of the international community' (present author's translation) as a condition for the legitimacy of the adoption of collective countermeasures, but does not further develop the central question of the ways in which the 'collective will' could take shape, apart from some passing remarks on the practice of diplomatic conferences.

<sup>26</sup> Presenting the Draft Articles to the plenary on 17 August 2000, the then Chairman of the Drafting Committee, Gaja, stated that the qualification 'as far as possible' was made precisely 'in order to take into account circumstances such as legal obligations binding some states that may prevent them from cooperating, such as certain obligations under the law of neutrality'.

<sup>27</sup> See Thürer, 'UN Enforcement Measures and Neutrality. The Case of Switzerland', 30 *Archiv des Völkerrechts* (1992) 63, who also considers whether, 'in an extreme case of blatant violation against the prohibition of the use of force, the direct blockage or massive hindrance of sanctions by third states' on the part of the neutral state 'could amount to aiding and abetting a breach of law' (*ibid.*, at 77). Doebling, 'Neutralität und Gewaltverbot', 31 *Archiv des Völkerrechts* (1993) 193, goes much further and, arguing from the duty to cooperate, reaches the conclusion that the neutral state, which refuses to cooperate, has the burden of presenting decisive arguments for its behaviour (*ibid.*, at 199).

<sup>28</sup> However, for the view that 'the obligations imposed by Article 41 are not demanding', see Crawford, Peel and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *EJIL* (2001) 963, at 978.

situation. Through these obligations, the ILC gave substance to the fundamental idea of the social ban on and isolation of the outlaw.<sup>29</sup>

The first of these obligations appears *prima facie* to be well settled in customary international law.<sup>30</sup> Precedents such as the Stimson doctrine, Article 1(10) of the Declaration on Friendly Relations or the ICJ's *Namibia Opinion* come readily to mind. But a certain prudence is still necessary, when one considers that the ICJ did not specify whether the obligation of non-recognition is derived from general international law or rather from pertinent UN resolutions.<sup>31</sup> But, in addition to the central issue of its customary character, to which we shall return below, there are further doubts about the scope of the obligation and its specificity, which call for closer examination.

First, with regard to the scope of the obligation, it is not at all clear to which situations it applies. At present, it would still be premature to speak of an obligation of non-recognition in the event of situations other than that of a regime established or maintained by the illegal use of force, with which the forcible opposition to self-determination is equated.<sup>32</sup> On this point, the ICJ's *Namibia Opinion* appears peculiarly ambiguous. It has not been sufficiently remarked that the illegality of South Africa's presence in Namibia, from which the ICJ drew all the consequences we are discussing, was not directly motivated by South Africa's odious practice of *apartheid*, which the Court only recalls in a final *obiter dictum*, but by the termination of the mandate due to South Africa's 'failure to comply with the obligation to submit to supervision and to render reports to the General Assembly'.<sup>33</sup> If one also considers the ICJ's ambiguity on the nature of the obligation (as noted above), it is probably correct to infer that the ICJ did not consider the reason for the illegality to be the determining factor, but rather the institution from which the decision originated.

Secondly, with regard to the scope of the obligation, and again taking the ICJ's *Namibia Opinion* as a guide, the duties that the ICJ concretely inferred from the

<sup>29</sup> The importance of the aspect of disapproval and isolation of the wrongdoer in an uninstitutionalized legal order is also stressed by Iovane, *supra* note 22, at 388. For a more reserved view, see A. Cassese, *International Law in a Divided World* (1986) 228, for whom duties of non-recognition are a 'last-resort measure in those cases where the UN proves unable to bring about a return to legality by resorting to the sanctions provided for in the Charter'.

<sup>30</sup> On the subject, see the seminal work by Lauterpacht, *Recognition in International Law* (1947) 420 *et seq.* For the customary nature of the rule, see Crawford, Peel and Olleson, *supra* note 28, at 978. For a more reserved position, however, see I. Brownlie, *Principles of Public International Law* (5th ed., 1998) 96, who speaks of a 'duty of states parties to a system of collective security or other multilateral conventions not to support or condone acts or situations contrary to the treaty concerned'.

<sup>31</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971) 16.

<sup>32</sup> Cf. N.Q. Dinh, P. Dailler and A. Pellet (eds), *Droit international public* (6th ed., 1999) 558.

<sup>33</sup> ICJ Reports (1971) 50, para. 104.

obligation not to recognize are well known.<sup>34</sup> But, on closer examination, the ICJ left too many aspects of the matter in doubt, and these have not been clarified by the ILC either. For instance, states were told by the ICJ that they had to abstain from entering into agreements with South Africa, but nothing was said about the fate of previously concluded treaties, on which the Court remarked only that states had to abstain from invoking those treaties which involved ‘active intergovernmental cooperation’, whatever this formula may mean. Economic relations were forbidden, but only those which had the effect of ‘entrenching’ the authority of South Africa in Namibia. Apart from the difficulty of ascertaining which economic relations would fall under the prohibition and which not, it is apparent that the Court here left the field of negative obligations and entered a different sphere, that of ‘active measures of pressure’, as they were labelled critically in the Dissenting Opinion of Judge Petrén,<sup>35</sup> and which are *de facto* equivalent to economic sanctions.<sup>36</sup>

Due to the vagueness of many of the formulas employed by the ICJ, and the lack of subsequent clarification, it is no wonder that today we are still confronted with notable uncertainty, even from the most authoritative courts, with regard to this issue, as the divergences of the jurisprudence of the European Court of Justice and the European Court of Human Rights in relation to the Turkish Republic of Northern Cyprus (TRNC) clearly show.<sup>37</sup>

<sup>34</sup> ICJ Reports (1971) 55, paras 121–124: (1) the duty to abstain from concluding agreements with South Africa in all cases in which the Government of South Africa purported to act on behalf of or concerning Namibia; (2) the duty to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the territory of Namibia and to abstain from sending consular agents to Namibia; and (3) the duty to abstain from entering into economic and other forms of relationships or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory. The duties should not, however, have the effect of depriving the people of Namibia of any advantages derived from international cooperation. In particular, the invalidity of South Africa’s acts could not extend to those acts, such as registration of births, deaths and marriages, the effects of which could be ignored only to the detriment of the inhabitants of the territory.

<sup>35</sup> *Ibid.*, at 135.

<sup>36</sup> In the same sense, see Brownlie, *supra* note 30, at 519. Cf. also Rovine, *supra* note 16, at 232. Once again, one could speculate on the reasons which persuaded the Court to refrain from directly addressing the issue, most probably the fact, which the Court was well aware of, that Resolution 276 had been the result of a delicate compromise in the Security Council between those members which insisted on taking coercive measures against South Africa and those members which resisted any such idea.

<sup>37</sup> In SC Res. 541 (1983), the Security Council called upon ‘all States not to recognize any Cypriot State other than the Republic of Cyprus’, and, in SC Res. 550 (1984), the Security Council reiterated the duty of all states ‘not to recognize the purported State of the Turkish Republic of Northern Cyprus’ and ‘not to facilitate or in any way assist the aforesaid secessionist entity’. The jurisprudence of both the ECJ and the ECHR can be criticized, though for different reasons. In a case dealing with the acceptance of phytosanitary certificates issued by the Turkish Cypriot Chamber of Commerce, the European Court of Justice held that the rules on the origin of products were founded on the principle of mutual reliance and cooperation and that such cooperation with the authorities of an entity such as the TRNC was excluded, though the negative decision was not motivated by the *duty* of non-recognition, but from the mere *fact* of the non-recognition by the Member States. See Case C432/92, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd* [1994] ECR I–3087, at 3116. The problematic of the *duty* not to recognize and its implications under general international law also escaped the attention of Talmon, ‘The Cyprus Question Before the European Court of Justice’, 12 *EJIL* (2001) 727, who criticizes the ECJ

On a deeper level of analysis, it may even be questioned whether the obligation of non-recognition really has any specific meaning. Should a state violate the obligation, the result would be that by its actual conduct it contributed to strengthening the position of the responsible state, and hence that objectively it aided the responsible state in maintaining that situation. By this very language, though, we have already entered the realm of what the ILC depicts as a distinct obligation under Article 41, namely, the obligation not to render aid or assistance.

Indeed, this obligation can be considered as a logical consequence of the previous one. One way to distinguish them would be to say, as has been suggested,<sup>38</sup> that the obligation of non-recognition is a negative one, while the obligation not to render aid or assistance implies the taking of positive acts. This distinction, though, gives rise to another set of problems with regard to Draft Article 16, which deals with 'aid or assistance in the commission of an internationally wrongful act'.

Is it possible and practicable to transfer to international law the criminal law distinction between an accomplice and an abettor? The problem has been repeatedly but not entirely successfully tackled by the ILC.<sup>39</sup> The attempt to distinguish the two situations temporally is not very convincing, at least in cases of the wrongful act having a continuous character (Draft Article 14(2)) in which the commission of the wrong extends in time for so long as the non-conformity with international law endures.<sup>40</sup>

Also, in the final Draft, it does not appear that the coordination problem has been overcome. In the commentary to Draft Article 41(2), the ILC points to the fact that the norm goes further than that of Draft Article 16, because it applies notwithstanding the duration of the wrong. But it is particularly on the issue of the consequences of a breach that the distinction between the two norms becomes blurred. Suppose that a state aids another in committing a serious breach of a peremptory norm: the former will expose itself to the consequences envisaged by the joint application of Draft Articles 41, 48 and 54. But where the state limits itself to aiding and abetting the responsible state in maintaining the wrongful situation, what consequences would

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jurisprudence because it would be equivalent to the imposition of economic sanctions, the competence for which rests solely with the political institutions of the Community. The distinction between 'administrative *de facto* cooperation' (which the author considers permissible) and recognition is not very convincing; and his methodological approach, which leads him to put practice drawn from the non-recognition of the Manciuquò, the DDR and Taiwan on the same footing, is also debatable. More recently, the European Court of Human Rights misread the 'non-detriment exception' made by the ICJ, by affirming that the local remedies rule falls under this exception, even if, as in the case under discussion, some of the claims should have been brought before military courts of the occupying power. Application No. 25781/94, *Cyprus v. Turkey*, judgment of 10 May 2001, 11 BHRC 45. Unfortunately, even the ILC adheres to the ECHR's view in its commentary to Article 41: cf. ILC Report, *supra* note 1, commentary to Article 41, para. 10.

<sup>38</sup> Cf. Statement by the Chairman of the Drafting Committee, Gaja, at the 2662nd meeting, held on 17 August 2000, at 28.

<sup>39</sup> Cf. Draft Articles 27 and 53 of the 1996 Draft.

<sup>40</sup> Not surprisingly, some commentators, like Simma, *supra* note 16, at 305, held Article 27 to be the 'counterpart' for all international wrongs of the special consequences set out in Article 53 for international crimes.

arise? In such a case, why should other states not for instance call for cessation, or make a claim for reparation, or adopt sanctions, or indeed apply the whole range of consequences envisaged by the same Articles?

### **C Article 41(3): Caution or Perplexity?**

Article 41 closes with a provision which states: ‘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.’ The sentence is perplexing for many reasons. One might think that, in addition to Draft Article 55 (which admits the possibility of *lex specialis* systems of international responsibility), Draft Article 56 (which provides that the Draft Articles are without prejudice to other norms of general international law not codified in the Draft) and Draft Article 59 (which excepts the UN system), there would be no need for another exclusionary clause, particularly with regard to a matter which forms the object of a specific chapter of the Draft.<sup>41</sup>

In its commentary, the ILC rightly argues that particular consequences may depend on the particular content of the primary rule, but the commentary does not provide us with any examples or explanation, except for an elusive hint on aggression. On the issue of aggression, it is easy to agree with the ILC, because this gravest of all internationally wrongful acts entails peculiar consequences, which could even assume a punitive character.<sup>42</sup> But, apart from that passing remark, the commentary does not even distinguish between those consequences which already exist under international law and those which are yet to be developed.<sup>43</sup>

The sense of evasion that pervades the commentary on this point leaves the reader in doubt as to whether either the ILC did not completely carry out its task or the subject-matter is really not yet ripe for codification under present international law. Probably there are elements of both aspects at work here. Yet international law doctrine should not shun a more in-depth discussion but instead should try to delineate those patterns and trends which are already discernible in present-day international law. They will be addressed here very briefly, because they have more to do with rights and powers than with obligations, but still they present some aspects which are relevant in our context.

The first remark deals with the *jus standi* for the *omnes*. In addition to the few procedural aspects dealt with in Draft Article 48 (to which we shall return below), the ILC’s Draft is silent on this central and much-debated matter. Therefore, one is left with the catch-all provision of Draft Article 41(3) in which one can find whatever one chooses. This is not the place to discuss whether the ‘legal interest’ which the ICJ recognized for all states in its celebrated *Barcelona Traction dictum* refers to a subjective

<sup>41</sup> For a different opinion, see Gaja, ‘Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?’, 10 *EJIL* (1999) 365, at 369.

<sup>42</sup> On this issue, see N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (2000) 167 *et seq.*

<sup>43</sup> Cf. ILC Report, *supra* note 1, commentary to Article 41, para. 14: ‘the fact that such further consequences are not expressly referred to in Chapter III does not prejudice their recognition in present-day international law, or their further development.’

right in a traditional sense, a peculiar mostly procedural right similar to the latter, a subjective right of a collective nature, or is akin to public law concepts such as that of *intérêt légitime*.<sup>44</sup> My concern here relates more to the relationship between the character of the obligation invoked and the question of jurisdictional title. I refer in particular to the situation which the ICJ's 1995 *East Timor* judgment produced. As perceptive commentators noted, the refusal of the ICJ to take jurisdiction in the case, because of the lack of the third necessary party, was not the result of an unfortunate and unforeseeable constellation of facts; rather its profound significance was 'striking at the heart' of the implementation of *erga omnes* obligations.<sup>45</sup> With specific regard to the matter under discussion here, the result of that jurisprudence is to render the obligations of Article 41 in most cases unjusticiable, since by definition they imply the previous commission of a wrongful act by another state.<sup>46</sup>

Could one have reasonably expected the ILC to find a way out of the impasse? The answer depends on the position one takes on a more fundamental question, namely, the existence of a link between peremptory norms of international law and the compulsory jurisdiction of the ICJ. On this issue, there was no common view among the ILC members. For example, Gaja said some 20 years ago that 'it would be hard to maintain that the existence of a judicial remedy is an element of the concept of a peremptory norm according to the Vienna Convention', and that 'beyond the Convention, there is clearly no prospect of the judicial guarantee ever becoming an element of the concept of peremptory norm'.<sup>47</sup> In contrast, some years later, Simma claimed that there was a structural link between the two concepts, although it was mitigated in the final version of the Vienna Convention on the Law of Treaties.<sup>48</sup> Even more categorical was the statement by Rosenstock, who, with reference to the Vienna Convention's system on nullity of treaties, maintained that 'the acceptance of the notion of *jus cogens* was conditioned on ... express acceptance of a role for the International Court of Justice'.<sup>49</sup> For a time, some ILC members had suggested a solution along the lines of Article 66 of the Vienna Convention.<sup>50</sup> Even that solution

<sup>44</sup> The richness of doctrinal theories is illustrated by way of example by the Italian international legal literature. The first theory might still be upheld by the majority; cf. F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (1983), at 120; the second has been recently proposed by Forlati, 'Azioni dinanzi alla Corte internazionale di giustizia rispetto a violazioni di obblighi erga omnes', 84 *Rivista di diritto internazionale* (2001) 69, at 102; the third is advanced by Picone, *supra* note 9, at 104 *et seq.*; the fourth found early support by G. Sperduti, *L'individuo nel diritto internazionale* (1950), at 100.

<sup>45</sup> Cf. Coffman, 'Obligations *Erga Omnes* and Absent Third States', in 38 *German Yearbook of International Law* (1996) 285, at 286. See Simma, *supra* note 12, at 299, who refers to a 'partial procedural dismantling'. Similarly, see Simma, *supra* note 12, at 318.

<sup>46</sup> Similarly, see Simma, *supra* note 12, at 318.

<sup>47</sup> Gaja, 'Jus Cogens beyond the Vienna Convention', 172 *RdC* (1981-III) 271, at 285.

<sup>48</sup> Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. Dinstejn and M. Taborj (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 825, at 838, n. 68.

<sup>49</sup> Rosenstock, 'An International Criminal Responsibility of States?', in ILC, *International Law on the Eve of the Twenty-first Century — Views from the International Law Commission* (1997) 265, at 272.

<sup>50</sup> See the discussion reported in *ILC Yearbook* (1996), vol. I, at 188 *et seq.* Cf. Pellet, 'Vive le crime! Remarques sur le degré de l'illicite en droit international', in ILC, *supra* note 49, at 295; Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999) 425, at 429.

would have been too limited in our context, because Article 66 only deals with the determination of the existence of a particular peremptory norm, but not with the determination of the consequences of this finding on the respective rights and obligations of the parties, and, moreover, this route to the ICJ is open only to parties to a treaty.<sup>51</sup> The eventual decision of the ILC to set aside the whole third part of the Draft dealing with settlement of disputes and to charge the General Assembly with deciding on its desirability<sup>52</sup> is indeed understandable in general, but is unfortunate as far as the issue under consideration here is concerned.

The second aspect which should be addressed is even more complex and politically sensitive than the first one, and deals with the possible use of force to bring the breach to an end. The issue was not openly discussed in the ILC, but was clearly present in the minds of its members, as is evident from the discussion of the merits of Article 54(2) on third states' countermeasures,<sup>53</sup> and, in any event, it was squarely addressed in the written observations of the Austrian Government.<sup>54</sup> The ILC's unease is perfectly understandable. Of course, one could confine oneself to the clear negative words of the ICJ in the *Nicaragua* decision,<sup>55</sup> but one may then wonder whether that reference would be sufficient to codify the matter in such a fast-changing time as the present, in which states, on the one hand, have actually set in motion an impressive practice of armed countermeasures, but, on the other hand, are still reluctant to admit it. The preferred course is rather to deliver on a case by case basis more or less ingenious explanations in order to make such actions appear compatible with international law canons, but at the price of obfuscating their true meaning and of distorting the very essence of the concepts they are purportedly thought to comply with. That was already the case of the 1999 attacks by 10 NATO states on Serbia, which was generally presented as humanitarian intervention. More significantly, the recent attacks on Afghanistan were labelled as self-defence, it being not at all clear whether the intent was to equate the attack of a terrorist group to an armed attack within the meaning of Article 51 of the UN Charter, or rather to equate the position of a state which harbours a terrorist organization to that of a state which commits an armed attack.<sup>56</sup>

<sup>51</sup> This is the prevailing view, on the ground of Article 65(1); cf. Gaja, *supra* note 47, at 283.

<sup>52</sup> Cf. ILC Report, *supra* note 1, para. 73. On this, see Crawford, Peel and Olleson, *supra* note 28, at 966 *et seq.*

<sup>53</sup> Cf. ILC Report, *supra* note 1, at para. 54.

<sup>54</sup> Cf. UN doc. A/CN4/515, at 57: "There is some doubt as to whether . . . actions "to bring the breach to an end" are only permitted within the limits of countermeasures. If not, the difficult problem of what has been called "humanitarian intervention" might have to be faced in this context."

<sup>55</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports (1986) 12, at 127, para. 249: "While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot produce any entitlement to take collective countermeasures involving the use of force."

<sup>56</sup> I cannot dwell on this issue in the present context, but it is patent that both interpretations raise insurmountable difficulties under present international law. Indeed, in order to make the conduct of the terrorist group directly attributable to the state, one should prove that either the state gave instructions or directed or controlled the group (cf. ILC Draft Article 8), or that the state later endorsed the actions as its own (ILC Draft Article 11). The preambles to SC Res. 1368 of 12 September 2001 and to SC Res. 1373

A tentative, plausible alternative would be to assess, and possibly justify, the violation of the territorial integrity of a state as a means to stop a genocidal policy or as incidental to the fight against terrorists, because of the state's violation of the obligation under peremptory norms of international law not to commit or permit the commission of genocide or to harbour and aid terrorist organizations. Of course, this interpretation poses serious problems for the UN system and rules. Yet it is possible to find an answer, which is not that far from Riphagen's insight into the *collective* reactions to an international crime as 'comparable to a measure of collective self-defence'.<sup>57</sup> The reference here is to the view<sup>58</sup> according to which the prohibition of the use of force in Article 2(4) of the UN Charter was conceived in principle only to deal with reciprocal relations between states. Under this perspective, the right of *collective* self-defence embodied in Article 51 is technically speaking not so much an exception to Article 2(4), i.e. aggression, as the autonomous regulation of the only crime known at the time of the Charter's adoption, and therefore the only crime for which a need for a specific regime arose. The violation of other peremptory norms was neither envisaged nor regulated in the Charter, and therefore the reactions of states acting *uti universi* for the protection of fundamental interests of the international community as a whole could have found their regulation only later through the development of international customary norms external to the UN system.

This position has its merits, but, if we accept it, the need for mechanisms of cooperation between the 'law-enforcing' states becomes even more pressing,<sup>59</sup> lest the risk of abuse, further destabilization and eventually the disruption of the whole international legal system should prevail.

### 3 Article 48: Invocation of Responsibility by a State other than an Injured State, or the Constraints of Bilateralism

Article 48 deals with the invocation of responsibility by a state other than the injured state. Under Article 48(1)(b), the obligation violated 'is owed to the international

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of 28 September 2001 mention the right of legitimate defence, but they leave open the question of against whom and for what reason. On this, see Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001) 993, for whom the conditions of self-defence, i.e. its target, timing, duration and admissible means 'become fuzzy' (*ibid.*, at 997).

<sup>57</sup> Cf. *ILC Yearbook* (1985), vol. II, Part One, at 14, para. 9.

<sup>58</sup> Cf. Picone, *supra* note 5, at 538.

<sup>59</sup> Specifically with regard to forcible humanitarian countermeasures, see Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23, who enumerates among other strict conditions the fact that the decision to use force must be taken by 'a group of States (not a single hegemonic Power nor such a Power with the support of a client State or an ally) with the support or at least the non-opposition of the majority of Member States of the UN' (*ibid.*, at 27). Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*', in 10 *EJIL* (1999) 791, further emphasizes that the forcible intervention in Kosovo 'was not taken by one state but by a group of states acting unanimously within the framework of an intergovernmental organization' (*ibid.*, at 794).

community as a whole'. Article 48(2) specifies what remedies such a state may claim, and Article 48(3) deals with procedural aspects. The question arises whether the same rights and the same obligations apply to the invocation of serious breaches of peremptory norms of international law. Whereas no doubt exists about the applicability of Article 48(2), some problems arise with regard to the obligations recalled in Article 48(3), namely, notice of the claim (Article 43), admissibility of the claim (Article 44) and loss of the right to invoke responsibility (Article 45). As we shall see, whereas the applicability of Article 43 could give rise to some difficulties in practice, the reference to Articles 44 and 45 is more problematic with regard to a serious breach of a peremptory norm of international law, because it appears in contradiction to the scope and content of Article 41.

### **A Notice of the Claim**

On the one hand, the broad formulation of Article 43 means in principle that every single state may trigger the mechanism to invoke the responsibility of the state which has committed a serious breach of a peremptory norm, which brings the risk of conflicting claims. On the other hand, as the ILC said in its commentary, the specific course of action required in the notice is not binding on the responsible state,<sup>60</sup> and this must be all the more true in cases of multiple notices with conflicting claims. For example, if State A requests the extradition of an individual from State X in order to prosecute her and State B requests the extradition of the same individual in order to surrender her to the International Criminal Court, State X would be free to comply with the first or the second claim.<sup>61</sup>

Here again we are confronted with the problem, which has already been touched upon, of the coordination mechanisms between the *omnes* states, especially where there is also a directly injured state. That state too has obligations with regard to its claims, such as an obligation not to condone the conduct of the responsible state or the priority of restitution versus compensation, but it is not clear to what extent the choices of the victim state may determine the choices of the *omnes* states.

### **B Admissibility of the Claim**

The reference in Article 48(3) to Article 44 is perplexing, because one cannot see how it applies to subparagraph (a) of Article 44 on the nationality of claims. Whatever the scope of 'any applicable rule' with regard to the nationality of claims, in the case under discussion of an invocation of responsibility by a state other than the injured state, the nationality of claims rule should not apply by definition.<sup>62</sup> The text of Article 48(3)

<sup>60</sup> ILC Report, *supra* note 1, commentary to Article 43, para. 5.

<sup>61</sup> This follows *a fortiori* from Article 90 of the ICC Statute, where the freedom of choice of the requested state is granted also with regard to a request for surrender from the ICC itself.

<sup>62</sup> Cf. Scobbie, "The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"", 13 *EJIL* (2002) 1201, who, after review of the current ILC's work on diplomatic protection, reaches the conclusion that 'the project as it stands demonstrates conflict with the state responsibility project. Its content, moreover, does not augur well for the admissibility of the invocation of responsibility on behalf of non-national beneficiaries.'

therefore lacks a necessary *mutatis mutandis* clause, which is only introduced in the commentary.<sup>63</sup>

However, with regard to subparagraph (b) of Article 44, on the exhaustion of local remedies, one may doubt the pertinence of the reference made by Article 48. If one keeps in mind the generally recognized *jus cogens* rules, such as the prohibition of aggression, genocide, slavery, racial discrimination, opposition to self-determination, torture and breaches of fundamental humanitarian rules,<sup>64</sup> and that the violation must be serious, then it is difficult to see how the local remedies of the responsible state might ever be considered 'available and effective' as required by Article 44(b). Moreover, it is the ILC itself which, in the commentary to Article 40, reminds us that, in the case of 'systematic breaches', the local remedies rule does not apply.<sup>65</sup>

From a systematic reading of the relevant norms of the Draft, it is apparent that the local remedies rule, though it cannot apply to serious breaches of peremptory norms, still applies under certain circumstances to violations of an obligation owed to the international community as a whole, as would be the case, for example, with regard to acts of torture which were not sufficiently systematic. This may be correct for the case of torture,<sup>66</sup> but to state it in general terms, as the ILC did, introduces an element of differentiation between the regime of violations of peremptory norms and the regime of violations of *erga omnes* obligations, which would lead to conceptual as well as practical uncertainties.<sup>67</sup>

### C Loss of the Right to Invoke Responsibility

Similar perplexity arises from the applicability of Article 45 to cases of serious breaches of obligations under peremptory norms. Article 45 establishes the loss of the right to invoke responsibility either through a valid renunciation (subparagraph (a)), or else through a valid acquiescence which leads to the extinction of the right (subparagraph (b)). The commentary to Article 45 specifies that the position of the non-directly injured state under Article 48 is distinct from that of the injured state, in the sense that, while a valid renunciation on the part of the latter has the effect of precluding every further claim, that result cannot be reached by renunciation by a single state under Article 48.<sup>68</sup> Apart from this rather obvious remark, one might also

<sup>63</sup> ILC Report, *supra* note 1, commentary to Article 48, para. 14.

<sup>64</sup> *Ibid.*, commentary to Article 40, para. 5.

<sup>65</sup> *Ibid.*, at para. 7.

<sup>66</sup> But see *Prosecutor v. Furundzija*, IT-95-17/1 T 10, para. 153 (1998), where the ICTY stated that the prohibition of torture *as such* 'has evolved into a peremptory norm of *jus cogens*'.

<sup>67</sup> As for instance with regard to genocide, for which crime the quantitative dimension (i.e. destruction of a group in whole or in part) belongs to the mental and not to the material element. Furthermore, it would be difficult to reconcile the exhaustion of local remedies for redress and compensation of the victims of genocide with the principle of universal jurisdiction. On these issues, see W. Schabas, *Genocide in International Law* (2000) 158 and 345 *et seq.*, who maintains that universal jurisdiction remains somewhat controversial not only because of Article VI of the 1948 Genocide Convention, but also in the light of subsequent developments.

<sup>68</sup> ILC Report, *supra* note 1, commentary to Article 45, para. 1.

ask whether a state not directly injured by a serious breach of a peremptory norm (or for that matter by the violation of an obligation owed to the international community as a whole) might renounce its right to invoke responsibility either expressly or through acquiescence. One could answer in the negative, by pointing to the requirement that a waiver in this regard must be valid, but this is not so self-evident.

As for the first alternative, that of express renunciation, it is quite clear that it cannot have any place in cases of serious breaches of international peremptory norms. Without going as far as to maintain a positive obligation to actively pursue the claim,<sup>69</sup> it is clear that, as much as it is not possible for a state to condone through consent the wrongfulness of conduct contrary to international peremptory norms (Article 20 in conjunction with Article 26), so consent given *ex post facto* through a decision to waive the right to invoke the responsibility of the wrongdoing state would also be ineffective. The commentary to Article 45 enunciates this principle with regard to the directly injured state with the remark that 'such a breach engages the interest of the international community as a whole'.<sup>70</sup> *A fortiori* the decision of any single not directly injured state is also irrelevant.

As for the second alternative, that of implicit waiver, the analysis is more complex. In the commentary to Article 45, the ILC rightly points to the fact that the relevant circumstances of any given case must be evaluated in a flexible manner, taking into consideration not only the injury that the responsible state could suffer because of a belated claim (for instance, for the collection of evidence), but the importance of the obligations involved as well.<sup>71</sup> If we apply this balanced approach to serious breaches of peremptory norms, the latter aspect should always prevail and hence it should always be impossible to acquiesce validly. Another strong argument against the possibility of a valid acquiescence is contained in Article 41. Although the obligations not to render aid or assistance are negative ones, and although what we are discussing here is the loss to claim a right, it is true that the state which acquiesces in the renunciation of a right objectively reinforces the position of the wrongdoer. Moreover, Article 41 establishes the obligation to cooperate to bring the breach to an end, and again a state which acquiesces plainly evades this obligation.

Therefore, by way of interpretation, one may safely conclude that Articles 44 and 45 do not apply in the case of an invocation of a serious breach of an obligation under peremptory norms. But then the question might be asked why that has not been plainly stated in the text of the Articles. This observation reinforces the impression that, on the whole, the distinction between serious breaches of an obligation under a peremptory norm and the violation of an obligation owed to the international community has not been satisfactorily and fully developed by the ILC and thus is more

<sup>69</sup> In this sense, arguing from Article 1 common to the four 1949 Geneva conventions on humanitarian law and the obligation contained therein to 'ensure the respect', see Barile, 'Obligaciones erga omnes e individui nel diritto internazionale umanitario', 68 *Rivista di diritto internazionale* (1985) 5, at 15.

<sup>70</sup> ILC Report, *supra* note 1, commentary to Article 45, para. 4.

<sup>71</sup> *Ibid.*, at para. 11.

disadvantageous than advantageous for the clarification of concepts and their implementation.

## 4 Conclusions

Apart from some incongruities in the relationship between Part Two, Chapter III, and Part Three, Chapter I, it is difficult to see what different and better solutions the ILC could have arrived at. Indeed, notwithstanding its compromises and lack of stamina, the ILC's final Draft is probably the most reasonable and feasible product of a codification effort that is possible in the turbulent and confused state of development in which international law finds itself at present, torn as it is between the ideal aspirations of '*communitarisme*' and the frustrating realities of bilateralism.