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**DOCTORAL THESIS**

**PROTECTION OF INTERESTS  
OF THE INTERNATIONAL COMMUNITY  
IN THE LAW OF STATE RESPONSIBILITY**

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## LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
ARIO	Articles on Responsibility of International Organizations
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
BYIL	British Yearbook of International Law
CIA	Central Intelligence Agency
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
UN GA	United Nations General Assembly
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
IO	International Organization
ITLS	International Tribunal for the Law of the Sea
NGO	Non-governmental Organization
NJIL	Nordic Journal of International Law
OECD	Organisation for Economic Co-operation and Development
RdC	Recueil des Cours de l'Academie de Droit International
UN SC	United Nations Security Council
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	Convention on the Law of the Sea
UNTS	United Nations Treaty Series
US	United States of America
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization
WWI	World War One
WWII	World War Two

## INTRODUCTION

As Russian soldiers in unmarked uniforms took control over strategic locations of the Crimea in March 2014 the world stared in disbelief. It had somehow seemed that since 1990ties with the triumph of liberal democracy and capitalism Francis Fukuyama's prophesy of the "end of history" had come to be and all of the major world powers had embraced the same outlook.<sup>1</sup> The power game was to be played by having a superior economy and channelling interests through international institutions. Interconnectedness of economies was supposed to guarantee that annexing foreign territory was the stuff of the unsophisticated past. The so called international community was supposed to guard observance of its most fundamental tenets. As it turned out, all of these assumptions were mistaken, at least as far as Russia is concerned. However, recent events in Crimea and ongoing violence in Eastern Ukraine highlight more than a set of faulty perceptions which had become widely accepted since the end of the Cold War. More importantly, these events demonstrate one of the striking shortcomings of the international law as a legal system.

That shortcoming is in the fact that international law provides for a multitude of legal interests, which could be regarded as "community interests" or interests that are common to all states and are shared by all states (such as international peace and security, protection of global environmental commons or universally accepted human rights<sup>2</sup>), but there are remarkably few legal mechanisms in international law that are designed to protect these interests.<sup>3</sup> In other words, there seems to be a sharp contrast between abundant substantive content of international rules providing for shared interests and very modest legal means to enforce those interests. As a result, these vital interests that protect common values and seek to secure common aims of the international community largely remain unattained.

At the heart of the above noted absence of mechanisms for protection of shared communitarian interests is the very structure of the public international law. As will be discussed

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<sup>1</sup> In 1989 Francis Fukuyama famously argued that humanity had reached „the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.” See Fukuyama F., Bloom A. *The End of History? The National Interest*, Vol. 16, 1989, p. 3.

<sup>2</sup> Cassese has noted that: „in the current framework of the international community, three sets of values underpin the overarching system of inter-State relations: peace, human rights and self-determination”, see Cassese A. *Exinjura ius oritur: Are We Moving towards International Legitimacy of Forcible Humanitarian Countermeasures in the World Community? European Journal of International Law*, Vol. 10, 1998, p. 23.

<sup>3</sup> It must be noted that preservation of international peace and security may be regarded as an exceptional category among other interests of the international community, as protection of these interests is safeguarded by a wide competence of the UN Security Council under the UN Charter. However, as absence of any meaningful institutionalized responses to Russia's annexation of Crimea and subsequent aggression in Eastern Ukraine demonstrates, the above proposition on insufficiency of legal means to protect community interests remains valid, even with regard to this particularly protected category of communitarian interests.

latter on in this study, there is remarkably little “publicness” in public international law.<sup>4</sup> The structure of international obligations and the accompanying enforcement mechanisms are primarily based on private law notions. The very system of public international law, even after the UN Charter, hinges on state consent. There is very little subordination in the international legal order, and states generally act quite like private contractors in domestic legal systems, picking and choosing which obligations they want to take up – a horizontal system among equals. Moreover, breaches of international law, even when they harm not only the injured state, but also interests of the whole international community, result primarily in legal relationship between the injured state and the state that performed the breach. Despite the doctrinal prominence of obligations *erga omnes*<sup>5</sup>, actual examples of a meaningful application of the concept in context of state responsibility remain limited.<sup>6</sup> As Simma famously noted: “[v]iewed realistically, the world of obligations *erga omnes* is still the world of “ought” rather than of the “is””.<sup>7</sup> Likewise, although the UN Charter provides for the competence of the Security Council to adopt both forcible and non-forcible measures<sup>8</sup>, in practice, due to Council’s frequent inability to act, self-help of the injured state remains the primary response to the wrongful act. The validity of the so called sanctions (also known as countermeasures of general interest or solidarity measures<sup>9</sup>) in particular when adopted outside the UN Security Council, (again as the conflict in Ukraine demonstrates<sup>10</sup>) remain highly controversial.<sup>11</sup> Thus the wrongdoing state will rarely find itself answering for a breach to the

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<sup>4</sup> See Chapter 2, p. 38.

<sup>5</sup> For notable studies of the concept see: Tams C. *Enforcing Obligations Erga Omnes in International Law*. Cambridge: Cambridge University Press, 2005; Ragazzi M. *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press, 1997; Crawford J. Multilateral Rights and Obligations in International Law. In: *Recueil des Cours*, 319, 2006, p. 325.

<sup>6</sup> Among judgments that not only acknowledge existence of obligations *erga omnes*, but also conceive a legal relationship between the wrongdoer and the community of states, which allows invocation of responsibility by a concerned member of that community see: ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, I.C.J. Reports 2012, p. 422; *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Judgment of March 31, 2014 available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4> [viewed September 8, 2014].

<sup>7</sup> Simma B. Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *Erga Omnes*? In: *The Future of International Law Enforcement. New Scenarios – New Law?* (Delbruck ed.), Kiel: Duncker&Humblot, 1993, p. 125.

<sup>8</sup> See Articles 41 and 42 of the UN Charter. For an example of a regional attempt at collective arrangements see Articles 8, 17 and 20 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), September 2, 1947, 21 UNTS, 77.

<sup>9</sup> Koskeniemi M. Solidarity Measures: State Responsibility as a New International Order? *British Yearbook of International Law*, 2002, Vol. 2, 1, p. 337.

<sup>10</sup> By September 2014 the US and the EU (and a number of other states such as Canada, Norway, Switzerland, Australia and Japan) have implemented economic sanctions against Russia.

<sup>11</sup> See Alland D. Countermeasures of General Interest. *European Journal of International Law*, Vol.13, 2002, p. 1239; Dawidowicz M. Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council. In: *British Yearbook of International Law*, 2006. p. 333. Specifically on trade restrictions see Damrosch L. Enforcing International Law Through Non-Forcible Measures, *Recueil des Cours*, 269 (1997), p. 9.

whole *public* i.e., the community of states. It is much more likely that the only state entitled and willing to invoke responsibility will be the injured state.

However, it must also be noted that international law is not entirely void of elements of *publicness*. Although public international law is essentially based on the private law paradigm (i.e., obligations are owed in strict correlation to subjective rights), as will be discussed latter on in this study, it increasingly displays an element, which is at the core of public law – a relationship between an individual state and the community of states as a whole. This relationship between an individual state and the community is evidenced by recognition of *erga omnes* obligations, peremptory norms and the supremacy of the UN Charter obligations over other bilateral and multilateral treaties. These and other developments present a shift away from the “classical” – bilateralism and subjective rights based international law. Such evolution of international law towards the public law paradigm (i.e., conceiving obligations towards the community of states as a whole) inevitably creates friction with legal concepts founded on bilateralism and the private law model. Thus one of the main challenges for contemporary international law is to reconcile legal concepts designed to protect community interests and those intended to protect individualistic interests of states; to find balance between public interest norms and concepts such as state consent and sovereignty - in other words - a balance between private and public law paradigms.

This study focuses on legal mechanisms for protection of community interests where one would expect to find them – in the rules on international responsibility of states. A seminal point in the story of development of the law of state responsibility was 2001 when the International Law Commission (the ILC) formally concluded its work on the epic project of codifying (and progressively developing) the law of state responsibility.<sup>12</sup> The ILC has been engaged with the topic of international responsibility for most of its working life<sup>13</sup> – responsibility of states was one of the 25 fundamental topics initially suggested by Hersch Lauterpacht in 1949 to be taken on by the Commission.<sup>14</sup> Since those early post-war years international law has undergone significant transformation.<sup>15</sup> Arguably the most important among the many developments, has been the above noted paradigm shift from bilateralism to multilateralism and accordingly to community interests.<sup>16</sup> The law of state responsibility, although in a very limited way, has likewise been transformed in the

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<sup>12</sup> For the most recent and comprehensive overview of the law of state responsibility see Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013.

<sup>13</sup> The ILC was created by the UN General Assembly in 1947 with the objective of “promotion of the progressive development of international law and its codification”, see UN General Assembly Resolution 174(II) adopted on November 21, 1947, U.N. Doc. A/519.

<sup>14</sup> Lauterpacht H. *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, UN Doc A/CN.4/1/Rev.1 (1949).

<sup>15</sup> See Friedmann W. *The Changing Structure of International Law*. London: Stevens, 1964, p. 10.

<sup>16</sup> See Fastenrath U., et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*. Oxford: Oxford University Press, 2011.



second part of the 20<sup>th</sup> century reflecting trends in theory of general international law. However, the progressive development in the theory of international responsibility, particularly in terms of conceiving a relationship between the wrongdoing state and the whole community of states, as we shall see later on in this study, reached its highest point around 1960ties to 1970ties and from then onwards became somewhat stagnant. The ILC's 2001 Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility")<sup>17</sup> came to reflect something of a middle point between lofty aspirations of post-WWII years and a general absence of enthusiasm for significant innovations in 1990ties when the notion of "international crimes" was dropped from the Articles on State Responsibility.

Thus the ILC's Articles on State Responsibility encapsulated the law in a form that was essentially still based on the private law paradigm. While the Articles on State Responsibility in principle recognize invocation of responsibility to protect community interests (whenever an *erga omnes* obligation is breached), in fact, when it comes down to bringing a claim, *erga omnes* obligations are conceived as series of individual relationships between the wrongdoer and another individual state. Most importantly there are no institutional arrangements<sup>18</sup> and no invocation on behalf of the international community. Likewise, the ILC opted to give up the idea that breaches ought to be divided into ordinary breaches and "international crimes" – in case of which any state would be regarded as injured and therefore entitled to invoke responsibility. Finally, the ILC also decided not to tackle the crucial question of multilateral countermeasures and punitive measures, again leaving out important issues that would have facilitated multilateralism. Consequently, the result of the ILC's work, in terms of protecting community interests, seems less than satisfactory.

The ILC's work did not, however, result in a landmark treaty akin to the Vienna Convention on the Law of Treaties<sup>19</sup>, as could have been expected, but rather in a resolution adopted by the

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<sup>17</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (A/56/10) (Articles on State Responsibility or ASR), *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 26. A closely related topic covered by the ILC is its work on the Articles on the Responsibility of International Organizations, see *Draft Articles on the Responsibility of International Organizations*, 2011 (A/66/10), *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two (ARIO). Since there is limited practice on the responsibility of international organizations, many of the articles in the ARIO are indeed instances of the ILC developing new norms. However, as the ARIO are predominantly modelled on the basis of Articles on State Responsibility most of the conceptual choices as to the content of the rules were made before the ILC began to work on the ARIO. For discussion of some substantive innovations in the ARIO see Nollkaemper A., Nadeski N. Responsibility of international organizations 'in connection with acts of states', SHARES Research Paper 08 (2012), finalized April 2012, available: [sharesproject.nl](http://sharesproject.nl) [viewed August 26, 2014].

<sup>18</sup> Proposals for institutional arrangements, such as mandatory adjudication, made by Special Rapporteur Arangio-Ruiz were widely criticized and generally dismissed as unrealistic. See Arangio-Ruiz G., Fifth report on state responsibility, A/CN.4/453 and Add.1-3, *Yearbook of the International Law Commission*, 1993, Vol. II, p. 1.

<sup>19</sup> Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331.

General Assembly, which merely “noted” the adoption of the Articles by the ILC.<sup>20</sup> Since then, another 20 years have passed and certain notable developments in international law have occurred. International courts and tribunals are as many (and as busy) as ever.<sup>21</sup> There is much talk of constitutionalization, fragmentation and deformalization of international law.<sup>22</sup> Also there are positive signs of obligations towards the international community as a whole having a very real impact on litigation outcomes. Such recent International Court of Justice (ICJ) cases as *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*<sup>23</sup> and *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*<sup>24</sup> demonstrate that a right to invoke responsibility to protect community interests (rather than individual interests of the claimant) is becoming an accepted norm. Considering that the Articles on State Responsibility fixed the responsibility rules more than two decades ago, one may wonder whether and how these developments in international law cohabit with state responsibility rules. These trends reflect the already noted dichotomy between the public law and the private law paradigms. However, within this study, they are considered specifically in relation to state responsibility rules as codified by the ILC and concern purposely developments of the past two decades, therefore, hopefully providing novel insights.

### **Aim and structure of the thesis**

Considering the above described issues, the aim of this study is to establish whether the normative shift towards multilateralism and community interests in substantive international law has been accompanied by a similar shift towards communitarianism in the law of state responsibility. The central claim of this dissertation is that in the second half of the 20<sup>th</sup> century, when substantive international law partially reoriented towards community interests, the trend was not accompanied by a similar reorientation in responsibility rules, which have remained based on

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<sup>20</sup> UN General Assembly, Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly, 28 January 2002, A/RES/56/83, available at: <http://www.refworld.org/docid/3da44ad10.html> [viewed August 15, 2014]. Interestingly in the resolution the General Assembly only stated that it “takes note of the articles”, thus avoiding any express approval or disapproval of the particular contents of the Articles on State Responsibility.

<sup>21</sup> It may be noted that generally (but not universally) international courts and tribunals seem to adhere to the wisdom of the ILC’s Articles. For rare instances of alternative approaches to attribution of conduct see ECtHR judgment *El-Masri v Macedonia*, 39630/09, 13 December 2012, para.206. Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621> [viewed September 28, 2014]; International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Dusko Tadić*, Appeals Chamber, Case No. IT-94A-A, Appeals Chamber, 15 July 1999, 38 ILM 1581 (1999).

<sup>22</sup> Koskeniemi M. The Fate of Public International Law: Between Technique and Politics. *Modern Law Review*, Vol. 70, 2007, p. 1.

<sup>23</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, judgment of July 20, 2012, I.C.J. Reports 2012 p. 422.

<sup>24</sup> ICJ: *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Judgment of March 31, 2014, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4> [viewed August 8, 2014].

bilateralism and subjective rights paradigm. The ILC, despite an obvious intention to provide responsibility mechanisms to protect community interests, was unable to depart from the private law paradigm. This disparity between substantive law and responsibility mechanisms contributes to non-enforcement of international rules with communitarian objectives.

To substantiate the above proposition, the study will enquire into a number of research questions, structuring the following chapters around those questions. The first two chapters form a background necessary for the subsequent analysis of communitarian elements in responsibility rules. Thus the study begins by exploring the meaning of the concept of international community and whether there is any social or legal reality behind it (Chapter 1). The Chapter proceeds with a general appraisal of the state of international law on the basis of approach provided by Friedman, namely, by enquiring whether international law may be regarded as a law of cooperation and thus indicating existence of shared values and interests and thereby pointing to a community. Or rather, is international law still predominantly a law of coexistence, thereby indicating absence of a community. In Chapter 2 the study considers signs of the so called “public law paradigm” (elements characteristic to public law, primarily a legal relationships not only between individual states, but between individual states and the whole community) in international law generally. The analysis suggests that developments in general international law are mainly normative in nature i.e., the introduction of public interest norms and recognition of community interests in multilateral treaties are not accompanied by novel enforcement mechanisms, thus revealing a stark contrast between a wealth of obligations which pursue communitarian objectives and virtual absence of communitarian mechanisms for their enforcement.

In Chapter 3 the study turns specifically to historical development of state responsibility rules. In particular it enquires how communitarian elements have evolved – whether responsibility rules conceive a legal relationship not only between the injured state and the state that has performed the breach, but also between the wrongdoing state and the community of states as a whole. After a brief overview of doctrinal origins and 19<sup>th</sup> to early 20<sup>th</sup> century developments, it will focus particularly on the work of the ILC and how it attempted to introduce multilateralism into state responsibility rules in the second half of the 20<sup>th</sup> century. Chapter 4 continues the historical narrative of the previous chapter, but is dedicated particularly to discussion of the concept of international crimes of states. As the concept of state crimes plays a pivotal role in the evolution of protection of community interests (and is also somewhat lengthy), it has been singled out from the rest of the discussion of history and elaborated in a separate chapter.

Having traced the historical evolution of the protection of community interests in the law of state responsibility, in Chapter 5 the study finally turns to the present state of this branch of international law. It proceeds with assessment of four distinct elements in the Articles on State

Responsibility which were designed to protect interests of the international community. These elements are: 1) the so called objective nature of state responsibility, i.e., an idea that state incurs international responsibility regardless whether the breach has caused injury to any state; 2) invocation of responsibility by a state other than the injured; 3) serious breaches of peremptory norms; and 4) countermeasures of general interest also referred to as solidarity measures. The final Chapter examines some of the trends in international law that have manifested in the decade following the adoption of the Articles on State Responsibility, such as constitutionalization and fragmentation. In particular the study will enquire whether responsibility rules, which were codified and sometimes progressively developed by the ILC considerably earlier than the discussed trends, adequately reflect these developments.

### Existing research

Despite the fact that there is a vast amount of excellent scholarship on the law of state responsibility<sup>25</sup>, on the concept of international community<sup>26</sup> and on multilateralism<sup>27</sup> as separate topics in their own right, there is very little research that brings these areas together and is specifically dedicated to protection of community interests in state responsibility law.<sup>28</sup> Likewise notable recent studies on *jus cogens* and on obligations *erga omnes*, such as *Peremptory Norms in International Law* by Orakhelashvili<sup>29</sup> and *Enforcing Obligations Erga Omnes in International Law* by Tams<sup>30</sup>, although providing extensive theoretical analysis of content and effects of these concepts, do not place these concepts specifically in the context of state responsibility rules as codified by the ILC. Proukaki's *The Problem of Enforcement of International Law*<sup>31</sup>, similarly to this work, is concerned with the inadequacy of multilateralism in the contemporary law of state

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<sup>25</sup> For recent comprehensive studies of the topic see: Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013; and Crawford J., Pellet A., Olleson S. (eds.), *The Law of International Responsibility*. Oxford: Oxford University Press, 2010.

<sup>26</sup> Keith K., Bilateralism and Community in Treaty Law and Practice – of Warriors, Workers, and (Hook-)Worms. In: Fastenrath U., et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*. Oxford: Oxford University Press, 2011, p. 753. Abi-Saab G. Whither the International Community? *European Journal of International Law*, Vol. 9 (1998). p. 252.

<sup>27</sup> Fastenrath U., et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* Oxford: Oxford University Press, 2011; for an account on all trends signalling 'verticalization' of international law see Capaldo G.Z. *The Pillars of Global Law*. Aldershot: Ashgate Publishing, 2008.

<sup>28</sup> See Crawford J. Responsibility for Breaches of Communitarian Norms: An appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts. In: Fastenrath U., et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* Oxford: Oxford University Press, 2011, p. 224; Dupuy, P.M. A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility. *European Journal of International Law*, Vol. 13. No.5, 2002, p. 1053.

<sup>29</sup> Orakhelashvili A. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2006.

<sup>30</sup> Tams C. *Enforcing Obligations Erga Omnes in International Law*. Cambridge: Cambridge University Press, 2005.

<sup>31</sup> Proukaki E. *The Problem of Enforcement of International Law. Countermeasures, the non-injured state and the idea of International Community*. New York: Routledge, 2010.

responsibility. However, Proukaki's research is focused exclusively on countermeasures by non-injured states, and it is primarily directed towards proving that countermeasures of general interest have become an accepted customary rule. Thus Proukaki's work significantly differs in scope from the present study, which rather than investigating a single legal mechanism, is concerned with the broader phenomena of evolution of multilateralism in the law of state responsibility. The works that exist on the topic are rather limited in scope and therefore do not do full justice to the complexity of the topic.<sup>32</sup> The peculiarity of this research is that it adopts an approach based on historical enquiry into development of multilateralism in the law of state responsibility. The historical approach to the narrative questions the commonly held perception that international law is ever steadily evolving from a primitive to a refined legal system. The historical analysis of state responsibility law demonstrates that when such a refinement is taking place, it is by no means a simplistic story of a constant linear evolution over the second half of the 20<sup>th</sup> century. It is rather an ongoing chronicle of relentless waves of doctrinal enthusiasm spurred by social realities of ever more interdependent world painstakingly and slowly eroding rock-solid bilateralism endorsing state practice. In a short term it may even appear that a step forward is just as well followed by two steps back (e.g., consider the discarding of the notion of state crimes and the accompanying regime of aggravated responsibility in mid 1990ties).

### **Methodology and delimitations**

The methodology of this dissertation is determined by the fact that the topic of the study requires analysis of two interrelated aspects of international law: history (including history of theory) and theory in terms of enquiry into *lex ferenda*, i.e., what the theory ought to be. Therefore firstly, the study employs a historical approach to the research. With historical approach the enquiry traces the development of the public law paradigm in the law of state responsibility beginning with Roman law origins up to the present, in which the ILC's Articles on State Responsibility are the definitive feature of the state responsibility law of the early 21<sup>st</sup> century. Within this approach an analysis into the history of theory of the law of state responsibility is conducted with a focus on how and when trends towards multilateralism emerged, in particular in the work of the ILC. The evolution in the theory of the law of state responsibility is considered in the larger context of historic development of international law as a legal system. This enquiry into the evolution of multilateralism primarily is structured as a history of writings of international lawyers who conceptualize and criticize state practice of their time. Pronouncements of international courts and

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<sup>32</sup> Spinedi M. From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Law of Treaties and the Law of State Responsibility. *European Journal of International Law*, Vol. 13, No.5, 2002, p. 1100; Dupuy, P.M. Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of 'Obligations Owed to International Community as a Whole'. *European Journal of International Law*, Vol. 23 No.4, 2012, p. 1061.

tribunals add to the discussion, but only to a limited extent as precedents on invocation of responsibility or countermeasures to protect community interests remain very limited. To adopt Koskenniemi's classification of historical narratives<sup>33</sup> into narratives centred on: 1) a particular historic epoch; 2) development of a particular legal concept during various epochs i.e., conceptual history; 3) notable personalities within particular epochs and their contribution to international law, this research adopts the second modality. Although historical origins of the law of state responsibility are briefly considered, the discussion is centred predominantly on the second part of the 20<sup>th</sup> century when the ILC's work on state responsibility dominated the landscape of the topic.

However, within this research the presentation of historical development of the public law paradigm in the law of state responsibility is not an end in itself. The historical approach to the research is employed only as means to provide context for analysis of problems of the present law of state responsibility. Central to those problems is a marked disparity between responsibility rules (which generally are based on bilateralism and subjective rights) and substantive norms (or primary norms to use the ILC's terminology) of modern international law, many of which seek to protect various community interests and therefore may not be adequately protected by mechanisms designed to protect individual interests. For this analysis a problem driven approach is applied. Thus the research employs a combination of historical and a problem driven approaches.

Once the historical narrative is accomplished, culminating with assessment of mechanisms for protection of community interests in the ILC's 2001 Articles on State Responsibility, the study turns to questions of theory of *lex ferenda* or what the law ought to be. Particular importance is given to widely recognized trends that are presently manifesting in international law, such as constitutionalization and fragmentation, and how these trends impact the law of state responsibility. In this section the study attempts to avoid teleological generalizations while at the same time providing an assessment of what secondary rules are required to match primary rules which establish community objectives.

Within the above described framework of the historical and problem driven approaches the research specifically employs methodology of comparative, historical, inductive and deductive analysis. The comparative method is used to consider invocation of state responsibility in general international law and in specific specialized fields such as the EU law. The historical analysis, as already mentioned, is the primary method of the first four chapters. Inductive and deductive analysis of legal concepts and legal phenomena in state practice, in judgments of international courts and in opinions of legal scholars are used throughout the research.

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<sup>33</sup> Koskenniemi M. A History of International Law Histories. In: Fassbender B., Peters A., (eds.), *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 943.

As for delimitations, it must first be noted that the particular issues raised in this research (e.g., invocation of responsibility by non-injured states, countermeasures of general interest etc.) deal with enforcement of international law which as such may take many avenues. All measures that are in the focus of this research, despite their progressive traits, belong to the horizontal or decentralized interstate level of enforcement. Therefore the analysis will not address enforcement of international law through national judiciaries – a topic that has come to prominence in the recent years.<sup>34</sup> Inclusion of enforcement through national courts would considerably widen the scope of the research and would steer the topic away from the issue of development of state responsibility rules as measures for interstate enforcement of international law. Similarly the research will not address issues of state responsibility in the context of the UN Security Council measures. Although Security Council measures may be regarded as a model case of multilateral enforcement of state responsibility, they merit a separate discussion which inevitably gravitates towards abundantly argued issue of veto rights of permanent members and the Security Council reform.<sup>35</sup> This discussion in contrast attempts to pursue a distinct approach and is limited to what could be labelled as decentralized interstate multilateralism.

A further delimitation concerns the distinction between primary rules (those that provide substantive obligations) and secondary rules, i.e., “the general rules governing the international responsibility of states”<sup>36</sup>. Primary rules that provide for communitarian interests – be it Article 1 of the UN Charter (pronouncing the paramount aim of the UN “to maintain international peace and security”<sup>37</sup>), human rights<sup>38</sup> and disarmament treaties<sup>39</sup> or treaties on protection of global commons<sup>40</sup> - are not in the focus of this research. These primary rules only serve as a background for analysis of secondary rules. Although closely related to the topic, substantive primary rules providing for communitarian interests for this study are important only as substantiation of necessity for responsibility mechanisms in the secondary rules. Therefore the subsequent analysis

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<sup>34</sup> See Nollkaemper A. *National Courts and the International Rule of Law*. Oxford: Oxford University Press, 2011.

<sup>35</sup> For an overview of issues See Gowlland-Debbas V. Security Council Enforcement Action and Issues of State Responsibility. *International and Comparative Law Quarterly* Vol. 43.01 (1994), p. 55.

<sup>36</sup> Ago R., The First report on State responsibility, A/CN.4/217 and Add.1, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 125. p. 139.

<sup>37</sup> Article 1 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>38</sup> Most obvious examples of treaties providing for communitarian objectives in the field of human rights would be: Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS Vol. 78, p. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Vol. 1465, p. 85; International Covenant on Civil and Political Rights, 16 December 1966, UNTS Vol. 999, p. 171.

<sup>39</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992, UNTS Vol. 1974, p. 45.

<sup>40</sup> Antarctic Treaty, 1 December 1959, UNTS Vol. 402 p. 71; Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, UNTS Vol. 1513 p. 293; United Nations Convention on the Law of the Sea, 10 December 1982, UNTS Vol. 1833 p. 3.

will be concerned primarily with the secondary rules i.e., rules on international responsibility of states.

In addition, the research is primarily concerned with state responsibility under general international law. Thus state responsibility rules under *lex specialis* of the EU law, the ECHR law, the WTO law and other specialized fields are addressed only occasionally for purposes of comparison with state responsibility rules of general international law. Elements of multilateralism in responsibility rules of specialized fields are as varied as the fields that employ them. Therefore comprehensive analysis of specialized fields would notably expand the scope of the research, diverting the focus away from responsibility rules under *lex generalis* which is the main object of this work.

Furthermore, the reader is cautioned not to mix protection of community interests in terms of availability of legal concepts with the reality of frequent breaches that are not followed up by any legal responses. The issue of frequent non-invocation of responsibility is fundamentally a political issue and therefore outside the ambit of this research. There is however, undeniably also a close interplay between international law and politics, as law, being the “gentle civilizer”<sup>41</sup>, may motivate the political will to run in concord with the law. It is therefore the very mission of the law to offer legal concepts that would facilitate the political will. However, it is not the purpose of this research to enquire into non-legal considerations why states opt not to invoke responsibility.

In addition, it must be noted that the topic of protection of community interests in the law of state responsibility has much to do with debate over what the law is and what it ought to be. International law obviously is developing, and it may be argued that it develops faster than the society that it regulates. Thus the topic touches into a fundamental policy question whether any developments in law should always be preceded by actual developments in society.<sup>42</sup> On the one hand, an argument may be made that a good law ought to reflect genuine social reality, rather than build paper tigers. On the other hand, one may equally argue that law should be used as a tool to develop society. The evolution of the European Union with functioning single market and common policies across the spectrum of human activity is a marked example of a society that develops through law.<sup>43</sup> Irrespective of many shortcomings of the EU, hardly such level of integration could

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<sup>41</sup> See Koskeniemi M. *The Gentle Civilizer of Nations: The Rise and Fall of International Law*. Cambridge: Cambridge University Press, 2001.

<sup>42</sup> For reflections on this theme see: Lauterpacht H. *The Development of International Law by the International Court*. Cambridge: Cambridge University Press, 1982; Tams C., Sloan J. (eds.), *The Development of International Law by the International Court of Justice*. Oxford: Oxford University Press, 2013.

<sup>43</sup> See Garrett G. The Politics of Legal Integration in the European Union. *International Organization*, Vol. 49, 1995, p. 171.



have taken place without law driven reforms.<sup>44</sup> The flip side of law running ahead of the society is a risk that society may not accept the law (again the EU provides an example with popular discontent about overcomplicated policies and rule by unaccountable bureaucracy). If that happens, the lawmaker is discredited and law's authority decreases.

The analysis in this study attempts to avoid extremes of both above mentioned views on law as means of societal development. However, as arguments for and against progressive development of international law gradually unfold, the position taken by this thesis rather tilts towards supporting progressive development of international law. Law obviously must reflect social reality. But that requirement in no way implies that the law may not attempt to find solutions to society's problems. Also a mandate to engage in progressive development may be implicit in objectives that the society has clearly and willingly agreed to. The present day international community has abundantly postulated its objectives with regard to international peace, human rights and other shared interests. Why then to deny development of legal constructs that would facilitate these agreed objectives? Likewise, one may wonder whether the present bilateralism-rooted international law does indeed reflect contemporary social reality? As noted by Allott, modern international law remains:

“an international system which was, and is, post-feudal society set in amber. Undemocratized. Unsocialized. Capable only of generating so-called *international relations*, in which so-called *states* act in the name of so-called *national interests*, through the exercise of so-called *power*, carrying out so-called *foreign policy* conducted by means of *diplomacy*, punctuated by medieval entertainments called *wars* or, in the miserable modern euphemism, *armed conflict*. This is the essence of the social process of the international non-society.”<sup>45</sup>

If there is a trace of truth in this assessment, it may well be the case that international law without a degree of progressive development may remain “doomed to be what it has been – marginal, residual and intermittent.”<sup>46</sup> At the same time, it must be noted this research has not been carried out with a blunt intention to negate virtues and important achievements of modern international law. On the contrary, it is hoped that the following chapters will reveal an appraisal of international law – a law which despite its many shortcomings nonetheless represents valuable collective experience accumulated through generations of mankind and still holds vast untapped potential.

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<sup>44</sup> See Pierson P. The Path to European Integration. A Historical Institutional Analysis. *Comparative Political Studies* Vol. 29.2, 1996, p. 123.

<sup>45</sup> Allott P. *International Law and International Revolution: Reconceiving the World*. Hull: Hull University Press, 1989. p. 10.

<sup>46</sup> Allott P. *Eunomia: New Order for a New World*. Oxford: Oxford University Press. 2001, p. 104.

# 1. THE IDEA OF THE INTERNATIONAL COMMUNITY

To enquire into the topic of this research, namely, how interests of the international community are protected in the law of state responsibility, it is necessary to deal with some preliminary points. First of these is to establish the meaning of the concept of international community and whether there is any social or legal reality behind it. In order to investigate these questions the present chapter begins by a brief comparison of the most common uses of the term “international community” in contemporary legal discourse. It then proceeds to a comparative overview of opinions of scholars on classification of international systems (e.g., as international system, society, community, etc.). In particular the *Anarchical Society*<sup>47</sup> of Hadley Bull is taken as a point of reference for the discussion. Then the chapter outlines how major traditions of international scholarship (i.e., realists, internationalists and universalists) view the possibility of the international community. Finally, the chapter proceeds to a general appraisal of the state of international law on the basis of approach provided by Friedman i.e., by enquiring whether international law may be regarded as a law of cooperation - thus indicating existence of shared values and interests, and thereby pointing to a community. Or rather, is international law still a law of coexistence, thereby indicating absence of a community.

## 1.1. What is a community?

In western philosophical thought the concept of community was first theoreticised by German sociologist Ferdinand Tönnies in 1887. In his famous work “*Gemeinschaft und Gesellschaft*” Tönnies proposed a distinction between community or *Gemeinschaft* - a small group that is characterised by a sense of togetherness and interdependence, such as a family or neighbourhood, and between society or *Gesellschaft* - a larger group with a lesser perception of interconnectedness, such as a state.<sup>48</sup> For Tönnies members of a *community* are well aware of the common interest of the group and see themselves as means to secure those interests. On the other hand members of a *society* are rather preoccupied with their individual interests and see the social group only as means for achieving their individual goals.<sup>49</sup>

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<sup>47</sup> See Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977.

<sup>48</sup> See Tönnies F. *Community and Society*. Devon: David & Charles, 2011.

<sup>49</sup> *Ibid.*, p. 69.

Of course, ideas on forms of human unity, such as those proposed by Tönnies, are not exclusively a product of Western philosophy and run considerably further back than late 19<sup>th</sup> century. Most creation myths suppose a profound oneness and interconnectedness of all human beings (or indeed all beings).<sup>50</sup> The same principle of social and moral unity is apparent in major monotheistic religions, such as Judaism, perceiving all humans as children of the Creator and thus being part of one family. The idea of oneness of human society, which ought to manifest also in political and legal terms, appears prominently in works of Stoic philosophers.<sup>51</sup> In medieval Europe the idea surfaces in perception of *Respublica Christiania* – a sense of a community of Christian states united by one faith, common values and a need to defend against common enemies. Interestingly enough, ideological unity of this early European “community” based on unity of values and purposes, although appearing within a setting of relatively undeveloped and unsophisticated interstate relations, arguably presents an example of an international system that resembles a community much more than the sovereignty dominated international system that came about after the Westphalian Peace Treaties of 1648.<sup>52</sup>

The concept of international community (or rather society as *societas gentium*) first enters legal discourse in the period between fifteenth to seventeenth centuries in writings of such scholars as Vitoria, Svarez, Gentili and Grotius.<sup>53</sup> However, by the beginning of the 21<sup>st</sup> century the use of the term has become all pervasive - statesmen make appeals to the international community or claim to speak on its behalf, international conferences seek to protect its interests, the ICC Statute proclaims Court’s jurisdiction over crimes which are “of concern to the international community as a whole”<sup>54</sup>, and even the UN Security Council occasionally calls on the “international community”<sup>55</sup>. The International Court of Justice has likewise taken on the vocabulary: in *Legality of Nuclear Weapons*<sup>56</sup>, *Tehran Hostages*<sup>57</sup> and the *Barcelona Traction*<sup>58</sup>, in all of these the Court

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<sup>50</sup> See Leeming D. *Creation Myths*. Oxford: Oxford University Press, 1994.

<sup>51</sup> See Aurelius M. *Meditations*, transl., by Hard R. Herfordshire: Wordsworth, 1997.

<sup>52</sup> The so called Peace of Westphalia, which ended the Thirty Years War in the Holy Roman Empire and also a war between the Dutch Republic and the Kingdom of Spain, consists of three treaties: two Treaties of Münster of 30 January and 24 October 1648, and the Treaty of Osnabrück 24 October 1648, available at: [http://germanhistorydocs.ghi-dc.org/docpage.cfm?docpage\\_id=4540](http://germanhistorydocs.ghi-dc.org/docpage.cfm?docpage_id=4540) [viewed 28 August 2014].

<sup>53</sup> Although scholars like Grotius spoke of *societas gentium* already in the 17<sup>th</sup> century, hardly the term can be applied to the 17<sup>th</sup> century world at large. As Abi-Saab notes in this regard: “Yet this universal community, embracing all humanity, was only a theoretical construct or explanation, a mental image, perceived as a philosophical proposition or a distant horizon, rather than as an existent reality”, see Abi-Saab G. Whither the International Community? *European Journal of International Law*, Vol. 9 (1998), p. 250.

<sup>54</sup> Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998), Article 5.

<sup>55</sup> UN Security Council resolution 1973 (2011) On the situation in the Libyan Arab Jamahiriya, 17 March 2011, S/RES/1973(2011), available at: [www.refworld.org/docid/4d885fc2.html](http://www.refworld.org/docid/4d885fc2.html) [viewed 28 September 2014].

<sup>56</sup> ICJ: *Legality of the Treat or Use of Nuclear Weapons*, advisory opinion, I.C.J. Reports 1996, p. 226.

<sup>57</sup> ICJ: *United States Diplomatic and Consular Staff in Tehran (USA v Iran)*, Judgment, I.C.J. Reports 1980, p. 3.

refers to the “international community”. The term also found its way into the Vienna Convention on the Law of Treaties<sup>59</sup> as well as into the ILC’s 2001 Articles on State Responsibility.<sup>60</sup>

However, as has been observed elsewhere: “invoking the international community is a lot easier than defining it.”<sup>61</sup> Indeed, the term has become so widely used that its meaning is presupposed to be self-evident. But what does “international community” really refer to? One of the most predominant uses of the term in political, scholarly and judicial discourse seems to refer to the sum of predominant actors on international stage – states, international organizations and to lesser extent also other actors, such as international NGOs. Thus “international community” is merely a convenient collective reference to all those who possess varied degrees legal “personality” on international stage. An important facet of this international community has much to do with articulation of international public opinion.<sup>62</sup> The difficulty with such an understanding of the concept is that it hardly fits into the substantive meaning of the notion “community”. As will be explored later on, a community (in both its sociological meaning and as discussed in legal scholarship) is about an advanced degree of interconnectedness, recognition and actual protection of shared interests and values. One may argue that such a level of interconnectedness and shared interests is present among states of one region in certain specific cases (like the EU), or among NGOs in a specific field (like human rights), or even among all states, but only within a specific area of interests (like peace and security). But an argument that the same applies to the whole multitude of international actors across the whole spectrum of human activity seems questionable.<sup>63</sup>

Another frequent use of “international community” in contemporary discourse implies exclusively the community of states. This meaning of the concept appears specifically in both Vienna Conventions on the Law of Treaties. Article 53 of both conventions, when defining a peremptory norm, explains that it is a norm that is recognized by the international community of *States* as a whole. This use of the term is present also in many of prominent accounts of

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<sup>58</sup> ICJ: *Barcelona Traction, Light and Power Company, (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 32, para.33.

<sup>59</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331.

<sup>60</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (A/56/10) (ASR), Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 26.

<sup>61</sup> Govers A. The Two Powers. *Foreign Policy* Vol. 132, 2002, p. 32.

<sup>62</sup> The concept of international public opinion in itself is somewhat problematic. In absence of a genuine international public, the so called *international public opinion* is articulated by those that claim to be representatives of national publics – governments, groupings of those governments and also international NGOs. The problematic element is that these representatives may not necessarily voice the genuine opinion of national publics. The British military venture in Iraq of 2003 provides a fitting example of governmental policy in stark dissonance to public opinion.

<sup>63</sup> Among sceptics of the „international community” see de Visscher C. *Theory and Reality in Public International Law*. Princeton: Princeton University Press, 1968, p. 94. de Visscher notes: „It is therefore pure illusion to expect from the mere arrangement of inter-State relations the establishment of a community order; this can find a solid foundation only in the development of the true international spirit of men.”

international law of the late 20<sup>th</sup> century. For example, in the 9<sup>th</sup> edition of Oppenheim's International Law, Jennings and Watts, when discussing universal nature of international law, note that irrespective of differences between states in their political systems or ideologies, international law does not make "any distinctions in the membership of the international community."<sup>64</sup> Such use of "international community", implying a community of states, certainly has some validity in a sense that it refers to a relatively small group, thus fitting the sociological meaning of the concept. The designation "community of states" perhaps was even more fitting in 1945 when that community was made up of only about 51 members. However, as will be explored latter in this chapter, the size of a group by itself does not merit a label of a community, if essential characteristics of high degree of interdependence and shared interests are absent.<sup>65</sup>

## 1.2. Degrees of communitarianism

Definitions of international community are many and as most definitions present a fruitful ground for disagreement.<sup>66</sup> Does international community mean community of states only (as VCLT and writings of Jennings and Watts suggest) or perhaps it refers to a community of all humanity as such? Does it also imply a certain degree of interconnectedness or some other criteria of communitarianism; if so, what are those criteria and where the threshold for qualifying as a community stands? Among the multitude of scholarly opinions, it is probably writings of Headley Bull that stand out as defining the modern debate on the above issues. In his *Anarchical Society* Bull suggests to distinguish four levels of international interconnectedness, those being: "international system", "international society", "international order" and "world order".<sup>67</sup>

Bull's "international system" designates the least developed mode of communitarianism. It emerges "when two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave – at least in some measure – as parts of a

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<sup>64</sup> Jennings R., Watts A. *Oppenheim's International Law: Peace*. Vol. 1, 9<sup>th</sup> edition. Oxford: Oxford University Press, 1992, p. 87.

<sup>65</sup> It must be noted that other more specific uses of the term "international community" appear in scholarly discourse of the „universalist" or „Kantian" strand. Many of these authors argue that international community refers not only to generally recognized subjects of international law, such as states and international organizations, but encompass the whole humanity, with individual as the genuine subject of the international community. See Allott P. Reconstituting Humanity – New International Law, *European Journal of International Law*, Vol. 2, 1992, p. 219. Cassese A. *The Human Dimension of International Law. Selected Papers*. Oxford: Oxford University Press, 2008.

<sup>66</sup> For instance Tomas Franck in his *Fairness in International Law and Institutions* defines community as a "social system of continuing interaction and transaction" and "an ongoing, structured relationship between a set of actors" which at the same time is a "conscious system of reciprocity" with "shared moral imperatives and values". See Franck. T. *Fairness in International Law and Institutions*. Oxford: Clarendon Press, 1995. p. 10.

<sup>67</sup> See Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977.

whole.”<sup>68</sup> This mode of interrelation is to be distinguished from one in which states are fairly unaware of each others conduct and contacts are rudimentary and only occasional. Thus, for instance, Roman Republic of around 4<sup>th</sup> century B.C., probably formed something akin to an “international system” with Carthage and Greek city states.<sup>69</sup> Whereas Rome during the same historic period could not be said to form an “international system” with Chinese or Mayan states.

If relations in “international system” intensify (due to trade or other individualistic interests) then “international society” comes about. For Bull “international society” designates “a group of states, conscious of certain common interests and common values” which is “bound by common set of rules in their relations with one another, and share in the workings of common institutions.”<sup>70</sup> Greek city states of 4<sup>th</sup> century B.C., could somewhat qualify as a regional “international society” as those states had a network of lively relationships of trade, treaties, war alliances and even methods of dispute adjudication.<sup>71</sup> On the other hand Greeks had very little of what could be labelled as common institutions, thus arguably they rather fitted the category of an “international system”. The Westphalian system of international relations, as it existed from 17<sup>th</sup> century onwards, is probably a better example of Bull’s “international society” – European states of that epoch indeed had common interests and values, adhered to certain rules in their relations and established common institutions. It was a society in which the predominant norm was non-interference and international law mostly comprised of rules on what one state does not do to other states. Bull’s “international society” also roughly fits with the meaning of *Gesellschaft* proposed by Tönnies - members of international society are aware of their common interests, however, their individualistic agendas tend to prevail – common rules exist, but they may remain declaratory, common institutions are still undeveloped.

If, however, awareness of common interests develops and states recognize their importance not only in words but in deeds, then an “international order” emerges. “International order” means “a patten or disposition of international activity that sustains those goals of the society of states that are elementary, primary or universal.”<sup>72</sup> For Bull those goals would include preservation of peace, keeping promises and limiting violence. In “international order” the commitment of individual states to common interests becomes actual rather than declaratory and states actively engage in protection of those interests. Arguably the present condition of international relations comes close to Bull’s description of an “international order” as states (with occasional exceptions) seem to share such goals as preservation of international peace and performance of international obligations and

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<sup>68</sup> Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977. p. 9.

<sup>69</sup> See Phillipson C. *The International Law and Custom of Ancient Greece and Rome*. London: MacMillan, 1911.

<sup>70</sup> Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977, p. 13.

<sup>71</sup> See Bederman D. *International Law in Antiquity*. Cambridge: Cambridge University Press, 2001; Rostovtsev M. *International Relations in the Ancient World*. In: *The History and Nature of International Relations*, Walsh E. ed. New York: MacMillan, 1922.

<sup>72</sup> Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977, p. 15.

are ready to actually exert themselves to attain these goals through cooperation in international organizations, by establishing international courts to settle disputes or by applying countermeasures of general interest. On the other hand, it seems questionable whether states do indeed sustain their common goals, or rather they tend to pursue their individualistic interests. For instance, inaction of the UN Security Council in situations, which clearly constitute threats to international peace and security, casts some doubt whether such a system merits being labelled as “international order” as the primary goal of international peace will be left unattained due to Security Council’s permanent member’s preference towards individual interest. Bull’s “international order” already resembles Tönnies *Gemeinschaft*, although it is more limited, as participants of Bull’s “international order” still have only some shared interests, whereas *Gemeinschaft* presupposes a deeper sense of togetherness and interdependence.

The final and the most advanced modality of communitarianism for Bull is “world order”. It takes place when elementary or primary goals of social life are sustained not only on interstate level, but on level of mankind as a whole in “the great society of all mankind”<sup>73</sup>. The relationship here shifts from inter-state level to a system that is made up of individual human beings, who pursue the common good of the mankind directly without the medium of states (although states may continue to exist). Here Bull’s view flows into the larger current of Kantian universalism on which much of modern legal scholarship travels (especially that of constitutionalist strand). Have we already arrived at “the great society of all mankind”? Some authors argue that we are certainly on the way<sup>74</sup>; perhaps indeed we are, but so far most of us are simply failing to recognize it.

To sum up Bull’s classification, international relationships make a gradual transformation – from no relationship to an “international system” which develops into “international society” which in turn may advance to “international order” and eventually culminate as “world order” made up of individual human beings rather than states. Classifying historical systems and the present day condition of international arena in accordance with categories provided by Bull is bound to be very subjective. Where one observer would see international system, another one would perceive international society. Moreover, there have been other influential authors proposing similar, but slightly varied views on classification of the international system.<sup>75</sup> Also sociological terms “community” and “society” suggested by Tönnie’s, although lacking in technical detail when compared to Bull’s classification, perhaps intuitively offer more insights than a robust definition.

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<sup>73</sup> Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977, p. 19.

<sup>74</sup> See Buzan B. *From International to World Society? English School Theory and the Social Structure of Globalisation*. Cambridge: Cambridge University Press, 2004.

<sup>75</sup> See Heeren, A.H.L. *A Manual of the History of the Political System of Europe and its Colonies: from its formation at the close of the fifteenth century, to its re-establishment upon the fall of Napoleon*. London: Henry G.Bohn, 1846.

Therefore it seems unnecessary to further dwell the above classification. The important point for this study that can be derived from writings of Bull and others is that recognition of common interests and common values are the defining elements in determining the degree of communitarianism. The differences in intensity of these common interests and values and how well they are actually protected will accordingly determine how the social reality is classified. The more shared interests are recognized and protected, the more a system deserves to be regarded as a community.

So what is the present degree of communitarianism? It seems uncontroversial to suggest that states and other actors on international stage are aware of common interests - such as international peace, preservation and management of global commons and dealing with challenges that by their nature may not be adequately addressed by efforts of individual states, such as climate change. Likewise, there is also a near universal acceptance of a limited set of values, most notably evidenced by recognition of peremptory norms. These are signs that signal communitarianism. But are these enough to constitute a community? It seems equally uncontroversial to suggest that the collective security system often fails to function; that global commons are rapidly being degraded; and that efforts to deal with climate change are anything but successful. Putting these observations in the context of the above discussion, suggests that at best we have a dysfunctional international society rather than a community. If international relations theorists have got it right, then in actual state practice individualist interests are often likely to take precedence over common interests, just like individuals in Tönnie's *Gesellschaft* care more about their own affairs than about the affairs of the state that they make up.

However, there are also good reasons to refer to the sum of international actors as the international community. Firstly, it is probably better to consider that we have an international community that is failing to protect common interests, than to think that we have an international society in which precedence of individualist interests is an accepted norm. Language may have a powerful influence on perceptions and indeed may steer opinions towards a genuine international community. Secondly, there is a considerable amount of discourse, including judicial, as well as the already mentioned provisions of the VCLT and the Articles on State Responsibility that use the term "international community". Therefore, for the purpose of consistency with the mainstream discourse, it is suggested that from this point onwards, we will settle on "international community" bearing in mind, however, that the present reality of international relations does not fully warrant the use of this term, but is rather an aspiration.



### 1.3. “International community” for realists, internationalists and universalists

Opinions on whether states recognize their common interests (and accordingly that there is something akin to an international community) are inevitably influenced by philosophical outlooks that one holds about the reality of international relations. The whole multitude of scholarly opinions on this point has been categorized into three basic traditions or schools of philosophic thought.<sup>76</sup> It is worth outlining these traditions as time and again they will come into play in the subsequent discussion on existence (or non-existence) of shared values and goals of the international community.

The first tradition is that of “realists”. For this tradition international relations are all about pursuit of national interest above all else - a struggle for power - straight and simple. International system is a kind of jungle where powerful states do as they wish while “the weak suffer what they must”<sup>77</sup>. Hans Morgenthau presents an example of a “realist” outlook: “International politics, like all politics is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim.”<sup>78</sup> This ceaseless struggle forces states to do whatever they can to maximize their power at the expense of other competing states.<sup>79</sup> Thus international cooperation, according to realists, will take place only as far as it serves self-interest to maximize power. International rules in such a system are only a smoke screen that may be used to subject weaker states or to be violated when a violation would grant a competitive advantage. The true province of law, for realists, is to deal with inconsequential, uncontroversial mundane technicalities – the stuff about which one feels cool and dispassionate. All matters of genuine importance are the province of politics.

On the level of state rhetoric realism has been out of fashion since the advent of the United Nations Charter and states generally tend to justify their actions on the basis of international law.<sup>80</sup> In scholarly discourse the realist tradition somewhat fell from grace right after the Second World War, just as its leading proponents of 1930ties, such as Morgenthau, had fallen from favour of their more liberally minded (and competing) colleagues.<sup>81</sup> However, with the beginning of the Cold War

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<sup>76</sup> Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977, p. 23.

<sup>77</sup> Thucydides, *The History of the Peloponnesian War* (Smith W. transl.). London: Jones&Co, 1831. Book V, Chapter 17.

<sup>78</sup> Morgenthau H. *Politics Among Nations, 5th ed.* New York: Knopf. 1978, p. 29.

<sup>79</sup> Morgenthau H. Positivism, Functionalism, and International Law, *American Journal of International Law*, Vol. 34, 1940, p. 260.

<sup>80</sup> Even at the height of its hegemony, the United States still attempted to attire its military venture in Iraq in 2003 as legitimate, claiming existence of weapons of mass destruction to obtain authorising Security Council resolution. See Gray, C. From Unity to Polarization: International Law and the Use of Force Against Iraq. *European Journal of International Law*, Vol. 13.1, 2002, p. 1.

<sup>81</sup> Criticism of realist approach centres on rigidity of assumptions on which the realist theory is based. Namely, that states are identical in their perceptions of international life, regardless whether they are democracies or dictatorships,

“realist” international scholars came back to prominence, emerging under the international relations rather than international law banner.<sup>82</sup> On the level of state practice, however, occasionally there seems to be very good evidence of workings of a realist outlook. Whenever that happens, marked inconsistency in state rhetoric and conduct becomes apparent. Such inconsistency outlines a dilemma of an applied realism – on the one hand, states (since their paramount interest is to preserve themselves) will go to great length to emphasize importance of territorial integrity, non-intervention and sacrosanctity of sovereignty. While on the other hand, realist policy in actual application does not respect these principles in the least (or any principles for that matter) and will disregard them the moment when that seems to grant an advantage.

A poignant example of this dilemma might now be causing intellectual struggles for Russian legal scholars post Crimean annexation. All along they have strongly argued against a right of external self-determination (except for peoples of former colonies), claiming that sovereignty and territorial integrity prevail.<sup>83</sup> 2014 Russian annexation of the Crimea on the basis of an alleged exercise of self-determination by Crimeans, which Russia regards as lawful, requires the exact opposite – that self-determination prevails over sovereignty and territorial integrity. However, from a realist theory point of view, this inconsistency of arguments only confirms the realist thesis - that rules are nothing but means to be used in the struggle for power. The inconsistency of argument occurs only because on the level of rhetoric Russia claims not to have a realist outlook, whereas in fact it does. Thus for realists “taking rights seriously” is to miss the point of international relations. The only shared value cherished by all members of a realist system is the survival of the state system itself. Therefore for realists, talk of the international community, if anything, is nonsense that may only hide an imperial or some other project.

The second tradition is “internationalist” or “Grotian”. As opposed to “realists”, “Grotians” believe that states, rather than being immersed in perpetual strife for power, also pursue common interests and goals. Bull further divides “Grotians” into two subgroups, which may be labelled as “Vattelians” and “neo-Grotians”.<sup>84</sup> “Vattelians” hold a view that although international co-operation does occur, the system as a whole is still dominated by individualistic interests of states. Common interests exist only to an extent that they are necessary to maintain stability for states to pursue their individual interests. For “Vattelians” states do participate in international organizations, however, those organizations remain a vehicle for channelling and accommodating agendas based on national

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and that strife among states is perpetually at a level that states are continuously readying for war. Both of these propositions seem open to doubt.

<sup>82</sup> See Wolfers A. *Discord and Collaboration: Essays on International Politics*. Baltimore: Johns Hopkins University Press, 1962.

<sup>83</sup> Лукашук И. *Международное право, Общая часть*. Москва: Волтерс Клувер, 2001. 280 с.; Ковалев, А.А., Черниченко С.В., (ред.) *Международное право, 3-е изд.* Москва: Проспект, 2008. 58 с.

<sup>84</sup> Bull H. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977, p. 310.

interest. Bilateralism remains the rule, and order is the core value of the system. The Westphalian system is a clear embodiment of the “Vattelian” outlook. Thus the whole pre-Charter classical international law of sovereign equality of nation states fits this conception of an international system.

The second sub-group of “Grotians” are the so-called “neo-Grotians”. This view of international relations places emphasis on communitarianism and recognition of common interests. The way to achieve these interests, according to “neo-Grotians”, is by cooperating in common institutions.<sup>85</sup> The international system and international law are perceived as being on their way to becoming a genuine community regulated by international legal order. Bilateralism and unlimited sovereignty eventually are to give way to multilateralism and solidarity. Much of the post-Charter international law, in particular such projects as gradual construction of the international community, have been inspired by “neo-Grotianism”. Some of the most prominent international law scholars of the 20<sup>th</sup> century, such as Friedmann, Lauterpacht and many others are adherents to this conception of inter-state relations.

The final tradition that may be identified is “universalist” or “Kantian”. For this strand of thought international system, although formally comprises of states, in fact is made up of community of mankind. States merely serve as means to organize international cooperation. Particular emphasis is placed on direct forms of representation (such as via NGOs) and on individuals as true subjects of the international system. It is not uncommon for Kantians to argue for fundamental reinvention of the idea of the international system, for conservative idealist revolution, and even to do away (at least philosophically) with states “those random by-products of the chaos of history, artificial amalgams of lands and tribes [...] [and with governments] some of them no better than criminal conspiracies.”<sup>86</sup> Justice and human rights are paramount values of this outlook. Many of the modern international “constitutionalist” scholars are adherents of this school of thought. The possibility of the international community for these scholars is their project - to introduce a new idea of the international community, a community of the whole humanity, which sees rule of law as an inherent part of itself. It is noteworthy that affection for Kantian themes is not limited to scholars only. Dissenting opinions of such judges of the International Court of Justice as Álvarez (in *South West Africa*<sup>87</sup>), Weeramantry (in *Legality of the Treat or Use of Nuclear Weapons*<sup>88</sup>) and Cançado

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<sup>85</sup> Zimmern A. *Spiritual Values in World Affairs*. Oxford: Clarendon Press, 1939.

<sup>86</sup> Allott P. The Idealist’s Dilemma: Re-Imagining International Society. Published on June 9, 2014. Available at: <http://www.ejiltalk.org/the-idealists-dilemma-re-imagining-international-society/> [viewed September 15, 2014].

<sup>87</sup> See dissenting opinion of Judge Alvarez in *International Status of South West Africa*. In particular Álvarez notes: „This society consists not only of States, groups and even associations of States, but also of other international entities. It has an existence and a personality distinct from those of its members. It has its own purposes”. *International Status of South West Africa*, Advisory Opinion, dissenting opinion Judge Alvarez in [1950] I.C.J. Reports p. 175.

Trindade (in *Questions Relating to the Obligation to Prosecute or Extradite*<sup>89</sup>) all seem to resonate with Kantian themes.<sup>90</sup>

Why are these theoretical outlooks important? It has been argued that whether we are conscious of theory or not, perceptions we form and choices we make on their basis in fact constitute a theory. As noted by Allott: “people speak theory in everything they say and do, every day of their lives, even if they don’t know what the theory is, or where it came from.”<sup>91</sup> Becoming aware of a theory shines a light on assumptions made about the phenomena we encounter. Knowing the theory identifies its elements with focused clarity and makes one realize connections and causes. Therefore theoreticizing may be a beneficial exercise. However, being aware of a theory also seems to work the other way around. A theory may easily become an intellectual identity of “I’m a realist”. Such taking up of an intellectual identity inadvertently conditions perceptions of legal phenomena, which in turn lead to automated judgments and loss of the quality of investigation and insight. Therefore it seems best to employ the above outlined theories, but only in a way that is open: if one feels strongly universalist, perhaps it would be useful to acknowledge some truth of what realists are saying. If one feels strongly “legal”, despising indeterminacy of political argument, it may be a good idea to read more on international relations. As Koskenniemi has observed on usefulness and at the same time limitations of theoretical approaches: “[r]esearch serves practice by producing critical reflection and self-awareness in acting lawyers. But it fails to provide answers to problems on which practising lawyers are requested to give advice.”<sup>92</sup>

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<sup>88</sup> ICJ: *Legality of the Treat or Use of Nuclear Weapons* advisory opinion [1996] I.C.J. Reports p. 226. Weeramantry observes that: “The Charter's very first words are "We, the peoples of the United Nations" - thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view. In the matter before the Court, the peoples of the world have a vital interest, and global public opinion has an important influence on the development of the principles of public international law.” See Judge Weeramantry dissenting opinion, p. 190.

<sup>89</sup> ICJ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Merits, [2012] I.C.J. Reports. 422. Cançado Trindade notes: “The consolidation of *erga omnes* obligations of protection, ensuing from the imperative norms of international law, in my understanding overcomes the pattern erected in the past upon the autonomy of the will of the State, which can no longer be invoked or pursued in view of the existence of norms of *jus cogens*. These latter transcend the law of treaties, and encompass nowadays the domain of State responsibility. Those obligations, in their turn, clearly transcend the individual consent of States, heralding the advent of the international legal order of our times, committed to the prevalence of superior common values, in the ongoing construction of the international law for humankind.” See Judge Cançado Trindade dissenting opinion, para.71, p. 441.

<sup>90</sup> For a detailed discussion of universalist approaches in the practice of the ICJ see Gordon G. Innate Cosmopolitan Dialectics at the ICJ: Changing Perceptions of International Community, the Role of the Court, and the Legacy of Judge Álvarez. *Leiden Journal of International Law*, Vol. 27, 2014, p. 309.

<sup>91</sup> Allott P. *The Idealist’s Dilemma: Re-Imagining International Society*. Published on June 9, 2014. Available at: <http://www.ejiltalk.org/the-idealists-dilemma-re-imagining-international-society/> [viewed September 15, 2014].

<sup>92</sup> Koskenniemi M. *New Approaches to International Law*. In: *New Approaches to International Law – A Bibliography*. Kennedy D., Tennant C., (eds.), *Harvard International Law Journal*, Vol. 35, No.2, 1994. p. 427.

#### **1.4. The law of coexistence and the law of cooperation**

Another way to enquire into existence of international community is by investigating characteristics of the law that regulates it. If the law aims only to safeguard coexistence of states - that might be a good indication that states do not share common interests and values and hence do not form a community. If, however, rules provide for cooperation – that is probably a sign that some sense of common objectives and values does exist and thus something akin to a community is present. In other words, by assessing the law one can assess also the state of the community that the law governs. The more the law leans towards cooperation, the more likely it is that a community exists.

##### ***1.4.1. The law of coexistence***

Two key concepts relevant for this approach - “law of coexistence” and “law of cooperation” - were first coined by Wolfgang Friedmann<sup>93</sup> in mid 1960ties. According to Friedmann, the classical international law, as it materialized after the Peace of Westphalia<sup>94</sup> of 1648, was a law of coexistence. This law emerged as a result of lengthy wars of religion which in turn were earlier triggered by reformation and a resultant schism in Christianity. The political result of the wars of religion was that the power of the Pope and the Emperor of the Holy Roman Empire disintegrated, leaving every prince free to choose his or her religious allegiances. To secure this freedom of choice the law had to provide an appropriate legal principle. Thus the Westphalian system established independence or sovereignty from any higher authority, be it Pope, Emperor or anyone, as the core principle of this new system. However, to sustain this independence, it was necessary that each prince besides recognizing his own independence also recognizes the independence of others princes, regardless of their religion or power. In other words, princes of Westphalian system had to treat each other as formally equal. Thus the principle of equality had to be introduced as the second foundational principle. By recognizing complementarity of these two principles the Westphalian system established what has been known as the cornerstone of the law of coexistence – the principle of sovereign equality.<sup>95</sup>

The curious peculiarity of the Westphalian peace treaties was that they in fact cemented foundations for the law of coexistence, while in principle engaging in the “first attempt at international organization of peace”.<sup>96</sup> The treaties provided for a commitment to abstain from engaging in wars for religious considerations. Importantly, the treaties obliged all parties to

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<sup>93</sup> See Friedmann W. *The Changing Structure of International Law*. New York: Columbia University Press, 1964.

<sup>94</sup> Treaties of Münster of 30 January and 24 October 1648, and the Treaty of Osnabrück 24 October 1648.

<sup>95</sup> Article 2 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Both principles – sovereignty and equality are complimentary in their nature, as sovereignty without equality inevitably leads to domination and empire and thus fundamentally changes the system.

<sup>96</sup> Nussbaum A. *A Concise History of the Law of Nations*. London: Macmillan, 1962, p. 117.

collectively enforce the commitments. Thus the Treaty of Münster provided that: “all Partys in this Transaction shall be oblig'd to defend and protect all and every Article of this Peace against any one, without distinction of Religion”.<sup>97</sup> The treaties also provided for an obligation to settle disputes amicably. If the parties failed to resolve the dispute within a period of three years then “all and every one of those concern'd in this Transaction shall be oblig'd to join the injur'd Party, and assist him with Counsel and Force to repel the Injury”.<sup>98</sup> These were considerable innovations for the 17th century international system, which in principle attempted to bring about cooperation. However, paradoxically, by introducing sovereign equality, the Westphalian system in effect terminated the foundations of the *Respublica Christiania* – a commonwealth of Christian states, which throughout middle ages shred a sense of unity in one faith and represented a community at least in terms of shared values and defence objectives.

The essential aim of the law of coexistence is to provide a minimum of order in the system that is defined by ceaseless rivalry of states. It is a law the purpose of which is to keep subjects apart, rather than bring them together. It aspires only to prevent states from crushing the very system in which they operate, and the only shared interest is to preserve the rules that allow the system to function. Consequently, obligations in such a system are all about delimiting sovereign jurisdictions and abstaining from intervention in jurisdictions of other states. As to enforcement, the classical law of coexistence relies exclusively on self-regulation and, if that fails, on self-help of the injured. Why such a peculiar and obviously deficient approach to enforcement? The reason may again be found in historical context of Westphalian system: the key purpose of states was to rid themselves of the authority of Pope. As Abi-Saab notes:

“Above all they did not want to see a new superior authority established over them, whatever it may be. The new structure of international law was thus assigned a precise and limited task: to establish a new key to the allocation of power in the international context, to legitimate and sanction the sovereignty of states, without encroaching on it. That was the real function imparted to the new legal system by its creators-subjects. In relation to its subjects, the states, this legal system necessarily has a weak and barely constraining structure and hold, strictly proportioned to its limited task.”<sup>99</sup>

As a result, the law coexistence is not ambitious with regard to aims that it pursues and the role that it plays in inter-state relations. The positive side is that due to not aiming too high the law of coexistence can be said to achieve its purpose – that of bringing a minimum of order and

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<sup>97</sup> Article CXXIII of the Treaty of Münster of 24 October 1648, available at [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp) [viewed September 19, 2014].

<sup>98</sup> Article CXXIV of the Treaty of Münster of 24 October 1648, available at [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp) [viewed September 19, 2014].

<sup>99</sup> Abi-Saab G. Whither the International Community? *European Journal of International Law* Vol. 9 (1998). p. 252.

legitimizing sovereignty. Also from a realist or “Hobbesian” point of view, it is the only “realistic” law that can govern a system where gaining of power at the expense of other players is the ultimate reward. On the negative side, one may wonder what is the point of having a law if it does not address the fundamental needs of the group that it governs? Some of the most primary aims of the present international system (such as maintenance of international peace and security) by their very nature can not be adequately addresses by the law of coexistence. To maintain international peace and security sovereign equality by itself is not enough; cooperation and indeed certain interference with sovereignty of states that do not respect sovereignty of others are obviously also needed. Thus the law of coexistence, although very much relevant for international system of 17<sup>th</sup> century, which sought to free itself from overarching power of the Pope, is very insufficient for international relations in which states have other shared aims besides cementing of their sovereignty.

#### ***1.4.2. The law of cooperation***

The law of cooperation, on the other hand, is quite different in several regards. Firstly, the fundamental aim of the law of cooperation is considerably more ambitious than that of the law of coexistence. If the law of coexistence only seeks to safeguard sovereignty and a minimum of international order, the law of cooperation aims to proactively accomplish shared goals (e.g., to facilitate international transport or maintain international macroeconomic stability). These goals are again determined by the historical context. With the advent of industrial revolution in late 18<sup>th</sup> century states found that their economies were no longer limited to their own territories – new means of production required resources from other states, domestic economies became increasingly internationalized and that in turn required cooperation on areas such as communications and transport. With intensification of international relations the list of areas of cooperation steadily grew and also grew the number of international organizations founded to accomplish shared goals.<sup>100</sup> After the First World War a sense that cooperation is needed to prevent another war was starkly evident, so much so, that that the first universal international organization – the League of Nations was established with an objective of collectively keeping peace. This no longer was cooperation in specific technical fields, but rather an attempt to reorganize international relations around a shared central purpose of preventing war.

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<sup>100</sup> First international organizations were river commissions (such as Rhine (1815), Elbe (1821), Po (1849) and Danube (1856) established to manage transport on international rivers. Other early international organizations include International Telegraphic Union (1865); Universal Postal Union (1874); International Union of Railway Freight Transportation (1890); Metric Union (1875); International Copyright Union (1886), see Reinalda B. *Routledge History of International Organizations: From 1815 to the Present Day*. New York: Routledge, 2009.

The scale of devastation of the Second World War gave an even more powerful impetus to come together to ensure that never again humanity is drawn into such savage insanity.<sup>101</sup> The UN Charter brought the law of cooperation centre-stage. If we examine purposes of the United Nations enshrined in Article 1 of the Charter, we find that they all are in essence calling for the law of cooperation approach. The paramount aim of the UN system “to maintain international peace and security” by means of taking effective collective measures, has all the hallmarks of this approach. It specifically calls for cooperation to reach a shared goal and for action (rather than abstention) to remove threats to peace and to suppress aggression. Other purposes listed in Article 1 “to develop friendly relations among nations”, “to achieve international cooperation in solving international problems” and “to be a centre for harmonizing the actions of nations” are all likewise expressions of community interests and values which the UN members pledge to pursue and which can not be attained by unilateral efforts of lone competing sovereigns.

A further difference of the law of cooperation concerns understanding and application of the principle of equality. In the law of coexistence equality of states (along with sovereignty) are paramount and all pervasive - states big or small, rich or poor enjoy the same immunities, the same voting rights in institutions and generally are regarded as formally equal in all of their rights and obligations. In the law of cooperation equality plays a rather different role. Since the law of cooperation is concerned with achieving common goals, obligations will usually provide for certain proactive conduct. In other words, the law of cooperation provides for positive obligations, whereas the law of coexistence is dominated by negative obligations – obligations to abstain from certain conduct that interferes with sovereignty of other states. Being proactive i.e., imposing an obligation to actually do something, obligations of the law of cooperation thus have much to do with actual capabilities of states. Obviously military, economic and other capabilities of the United States and those of Latvia are very different. In the law of cooperation these differences are realistically acknowledged and reflected in obligations. Most notable examples of such differentiation may be found in environmental law in which the principle of common but differentiated responsibility has been widely acknowledged.<sup>102</sup> The same principle in a legally binding form was one of the key

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<sup>101</sup> „War is sweet to those who have not tried it” writes Erasmus in 1515 in his *Adages*, he is startled by the fact that man “a peaceful creature, whom nature made for peace and loving-kindness (the only one, indeed, whom she intended for the safety of all) should rush with such savage insanity, with much mad commotion, to mutual slaughter”, See Erasmus D., *The Adages of Erasmus*. In: Erasmus on His Times: A shortened version of the Adages of the Erasmus, Philip M., transl., Cambridge: Cambridge University Press, 1967, p. 108.

<sup>102</sup> Principle 7 of Rio Declaration provides: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." Rio Declaration on Environment and Development. June 13, 1992. UN Doc. A/CONF.151/26 (Vol. I); 31 ILM 874 (1992).



elements of the Kyoto Protocol to the Climate Change Convention<sup>103</sup> where only countries listed in Annex I (developed countries and countries with economy in transition) had quantified emissions reduction obligations, while developing countries had no such obligations.<sup>104</sup> Thus in the law of cooperation equality between states in all matters is no longer the norm – states are still equal in a sense that they all may participate, however, their actual rights and obligations may differ.

Another important peculiarity of the law of cooperation is that it heavily relies on institutions. Rules of coexistence, which for the most part call for abstention from actions that interfere in domains of other sovereigns, by their very nature, require no coordination. States need no institutional arrangements to be able to respect immunities of foreign diplomats or to abstain from fishing in territorial waters of their neighbours. The law of cooperation, on the contrary, since it aspires to accomplish complex tasks, necessitates division of responsibilities and therefore calls for supervision and coordination. As a result, all the law of cooperation mechanisms are to smaller or greater extent accompanied by institutions. If the task is relatively simple, such as overseeing implementation of a treaty that deals with a specific narrow issue, then a small secretariat filing country reports is sufficient. If the task is more ambitious, such as functioning of single market in goods, labour, services and capital, then a complex web of supranational institutions would be necessary (e.g., as the one facilitating the workings of the European Union). In short - the more complex the task, the more elaborate the institutions.

#### ***1.4.3. A rhetoric community of sovereigns?***

Having outlined characteristics of both the law of coexistence and the law of cooperation, we come to the substantive question: which of these approaches presently dominates international law (and by inference – whether we have an international community or rather coexisting, competing sovereigns)? As we already saw in earlier analysis classical international law, as it emerged after the Peace of Westphalia, was in essence a law of coexistence. The corresponding philosophical outlook that supports the law of coexistence approach is “Vatellian”. Thus classical international law is far from a model in which states work for the good of common goals, but rather pursue individualist interests without much actual regard for benefits that may result from cooperation.

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<sup>103</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1997, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).

<sup>104</sup> Similarly polluter pays principle may be seen as manifestation of differentiated responsibility, see Article 3 of the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area. April 9, 1992. 1507 UNTS 167.

However, the law of cooperation has been gradually growing – starting from 19<sup>th</sup> century in specialized fields such as transport and communications and steadily creeping into ever new areas of human activity.<sup>105</sup> This gradual expansion continued also in 20<sup>th</sup> century till the adoption of the UN Charter, which attempted to drastically reshape the landscape of international law.<sup>106</sup> All the purposes of the UN listed in Article 1, as we saw earlier, call for multilateral cooperation for the good of shared goals. Also most of the principles enumerated in Article 2 (apart from the first one), such as peaceful settlement of disputes (Article 2(3)), provision of assistance to the UN (Article 2(5)) and in particular Article 2 (6) obliging the UN to ensure that also non-members comply with these principles, all seem to belong to the law of cooperation approach. Even more importantly, the overall scheme of the Charter (considering the preamble which defines the essential aspiration of the organization – “to save succeeding generations from the scourge of war”; also rules aimed at pacific settlement of disputes via cooperation in chapter VI and extensive powers of the Security Council under chapter VII), all demonstrate that the UN Charter is constructed around the paramount common interest – safeguarding of international peace. A system that aims to reach a shared goal and provides for institutions endowed with powers to reach that goal, are a strong indication that the system, at least partly, is based on the law of cooperation.

Whether the above findings are enough to claim that the Charter indeed fundamentally transformed international law from the law of coexistence to the law of cooperation is another question. As we turn from Purposes of Article 1 to Principles of Article 2, a somewhat different view emerges. The first among Article 2 principles is that “the Organization is based on the principle of sovereign equality”. Thus, although heralding a new era for international law, the Charter also proclaims both principles which are at the heart of the law of coexistence (sovereignty and equality) as the foundational principles of the Charter system. Likewise, the institutional mechanisms to achieve the lofty goals of cooperation are overwhelmingly absent from the Charter. Principal organs of the UN, apart from the Security Council and the International Court of Justice, are in their essence forums for inter-state deliberations. Also the Charter itself does not provide for substantive rules in any of the areas where it aspires to promote cooperation – be it in economics, human rights or culture. The principal organs, apart from the Secretariat, are not supranational. Thus, as well demonstrated by the selectiveness in the practice of the Security Council, UN organs most often will function as means by which states pursue individualistic interests, rather than the interest of the whole international community. Therefore, the law of cooperation seems strong

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<sup>105</sup> International treaties and corresponding international organizations emerged in areas such as public health (The International Office of Public Health, now World Health Organization, was established in 1903) and agriculture (International Institute for Agriculture, now The Food and Agriculture Organization, established in 1905).

<sup>106</sup> Fassbender B. The United Nations Charter as the Constitution of the International Community, *Columbia Journal of Transnational Law*, 1998, Vol. 36, p. 529.

predominantly on the level of legal rhetoric, rather than on the level of actual institutions and policies.

However, the above analysis has a few exceptions. The most notable among those is in the field of international peace and security. Here the Charter provides not only for a shared goal, but also an institution with actual powers. It also provides for substantive norms – although defined in very general terms, the prohibition of use of force, the exception of self-defence, and the powers of the Security Council under Chapter VII provide a minimalistic framework which nonetheless, if accompanied by political will, may be fully operational in safeguarding the shared interest of maintaining international peace and security. In limited ways also other UN organs occasionally act in accordance with the law of cooperation approach as organs of a genuine community. The UN General Assembly may perform (and occasionally it does) a very important function of collective legitimation.<sup>107</sup> The General Assembly may adopt resolutions on any matter thus expressing the viewpoint of the whole community of states, as in the recent example of condemnation of Russia's annexation of Crimea.<sup>108</sup> Although legally non-binding, political weight of collective legitimation (and thus also impact on state conduct) may be considerable.

From the sketchy outline above, we may conclude that international law is a mix of the law of coexistence and the law of cooperation. Accordingly, following the earlier proposed thesis that the more the law leans towards cooperation the more likely it is that a community exists, we may conclude that international law displays signs of communitarianism while at the same time holding on to sovereign equality as a foundational block of the international legal order. Therefore, it is suggested that at present we are left with a “rhetoric community of sovereigns”, rather than an actual community.

## 1.5. Conclusions

The concept of the international community is vague and therefore open to various interpretations. Even more importantly, the concept has much to do with power and legitimacy and thus is inevitably susceptible to abuse. Its ambiguous content may thus be of more service to political rhetoric than to courts of law. Likewise, having an idea of an international community in itself may not necessarily be an outright positive development. Whenever a reference to the international community is made (if, for instance, force is used on its behalf) a question arises – whose community is it? Who may speak and act on its behalf? Who dictates the terms on which this

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<sup>107</sup> Claude I. Collective Legitimation as a Political Function of the United Nations. *International Organization*, Vol. 20. 1966, p. 367.

<sup>108</sup> UN General Assembly, Resolution on Territorial Integrity of Ukraine, March 27, 2014. UN Doc. A/68/L.39.

community operates? Is it truly an *international* community (on guard of supranational interests) or rather an imperial project clothing power in a mantle of legitimacy?

The present day scholarly discourse on the international community (at least most of it) runs on an assumption that the present international system is indeed a community as it is defined in sociological terms and in classifications of international affairs such as those offered by Bull. Within this meaning the concept of the international community refers to a relationship in which members of a group recognize goals and values that are not merely in their own individualistic interests, but rather benefit the whole group and are therefore shared by the whole group. Also these shared interests are of such nature that they can be well accomplished only if most of the members of the group are genuinely concerned with protection of the shared interest. Thus “community” first and foremost denotes a sense of unity, togetherness and interdependence - a structure in which fundamental shared interests are recognized as standing above individualistic interests.

However, even a brief overview of fundamental tenets of international law (e.g., the UN Charter) indicate that such labelling of the current international system has more to do with an aspiration to have a community, rather than actual existence of an interdependent group which is aware of common values and shared goals and actually engages in their realisation. That being said, it must also be acknowledged that forms of communitarianism are also very much present, although they may not be of universal membership or encompassing all fields of inter-state activity. Thus there seems to be some sense of a community at least with regard to maintenance of international peace and security. There also seem to be regional arrangements, such as the EU, that would genuinely merit a label of a community. It is therefore suggested that it is more appropriate to talk about multiple communities existing within the international system, e.g., a community of peace and security, a community of international trade or a regional community of human rights. It is a system of multiple parallel and occasionally overlapping communities on different subject matters. A statement that states presently form an international community which continuously encompasses all aspects of inter-state relations indeed would be an exaggeration, as many areas of international relations are dominated by individualistic rather than common interests. Whereas on other subject matters, such as climate change, preservation of peace or management of global commons, all actors will, at least to a certain extent, recognize their shared interest in protecting interests of the whole group (although they may not necessarily act in accordance with those interests).

Therefore, it is suggested that the universal international community on all subject matters of international life is a rhetorical community only - an aspiration that may nonetheless facilitate evolution of a genuine all-encompassing international community. This designation, however, does not make shared interests and common objectives of states any less real. Although the present day international “community” in sociological terms provided by Tönnies is more of a *society* than a

*community*, the term may still be used to refer to the sum of states - partly for the value of perceptions that the term evokes and partly for the sake of consistency with the majority of international law scholarship.

## 2. THE INTERNATIONAL COMMUNITY AND THE PUBLIC LAW PARADIGM IN GENERAL INTERNATIONAL LAW

Before we engage the core question of this research - how interests of the international community are protected in the law of state responsibility, another preliminary point must be addressed. That point is to enquire whether and how protection of community interests is accommodated in general theory of international law. To do that we will look for signs of the so called “public law paradigm” in general international law, i.e., elements characteristic to public law signalling existence of legal relationships not only between individual states, but between individual states and the whole international community. As opposed to subsequent chapters, which are focused specifically on the law of state responsibility, this Chapter outlines such elements of *publicness* as peremptory norms, obligations *erga omnes* and the role of state consent in international law-making.

This enquiry into the public law paradigm leads us to questions about the very nature of international law: is international law fundamentally a series of consent based bilateral relations? Or is international law a public order of some sort, reflective of the interests of the international community.<sup>109</sup> The traditional view holds that public international law (despite the “*public*” in its title) is based on the private law model.<sup>110</sup> The same conclusion was reached by Hersch Lauterpacht in his famous 1925 doctoral dissertation in which he concluded that international law “belongs to the genus of private law.”<sup>111</sup> There is no subordination in the international law system and states generally act quite like private contractors in domestic legal systems, picking and choosing which obligations they want to take up<sup>112</sup> – a horizontal system among equals without delegation of power to any higher authority.

However, international law is not a static structure and has undergone (and arguably continues to undergo) considerable developments.<sup>113</sup> The hey-day of bilateralism and unlimited

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<sup>109</sup> See Simma B. From Bilateralism to Community Interest in International Law, 250 *Recueil des Cours de l'Academie de Droit International*, (1994 VI), p. 217. Simma defines international community as a ‘more socially conscious legal order’ which reflects not only the specific interests of individual states, but increasingly also community interests.

<sup>110</sup> Holland T. *Studies in International Law*. Oxford: Henry Frowde, 1898, p. 152.

<sup>111</sup> Lauterpacht H. *Private Law Sources and Analogies of International Law*. London, Longman Publishing, 1927, p. 81.

<sup>112</sup> It must be noted that international law is not entirely void of elements of *publicness*. As will be discussed latter on this Chapter there are certain public interest norms as well as special competences of the UN Security Council under the UN Charter which although in limited ways, nonetheless, introduce elements characteristic to public law.

<sup>113</sup> For elaboration on the development trends see Chapter 6, p. 134.

sovereignty is slowly but consistently receding into the past.<sup>114</sup> As Simma has pointed out: “international law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings. In so doing, it begins to display more and more features which do not fit into the “civilist”, bilateralist structure of the traditional law. In other words, it is on its way to being a true public international law.”<sup>115</sup>

Before embarking on the analysis whether and to what extent international law generally and the law of state responsibility in particular displays elements of the public law paradigm, it is useful to define more specifically what exactly is meant by the public law paradigm and what are elements characteristic to it? The purpose of public law is to protect interests of the community as a whole i.e., the interests of the public, rather than individual interests of members of that public. To achieve that aim, public law creates institutions and confers on them powers to enforce rules that protect the common good on individual members. Thus the basic mechanism by which public law seeks to secure community interests is by establishing legal relationship between individual members and the community as a whole. Therefore the simplest definition of public law (within domestic legal orders) is that it is a law that regulates relations between individuals and the community as such.<sup>116</sup> The most pertinent characteristic of public law is that it is vertical (rather than horizontal) in nature due to powers to enforce law that the state wields over individuals. Judging by these criteria, public international law is anything but public.<sup>117</sup>

However, as observed by Simma and as will be explored latter on in this chapter, international law is not entirely void of elements characteristic to public law. There are modalities of relations between an individual state and the community of states as a whole, namely, the so called obligations *erga omnes*<sup>118</sup>; there are also the peremptory norms accepted by the entire community of states, which individual states are obliged to comply with<sup>119</sup>; and there is the Article 103 of the UN Charter spelling out the supremacy of Charter obligations over any other treaty obligations of UN members and the UN Security Council with powers to adopt binding resolutions.

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<sup>114</sup> See Friedmann W. *The Changing Structure of International Law*. London: Stevens, 1964, p. 10.

<sup>115</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, no.2, 2009, p. 268. For elaboration of this ‘classic’ understanding of universality see Jennings R. Universal International Law in a Multicultural World. In: Bos M., Brownlie I., (eds.), *Liber Amicorum for the Rt. Hon. Lord Wilberforce*. Oxford: Oxford University Press, 1987, p. 40.

<sup>116</sup> Weblay L., Samuels H. *Public Law, Text, Cases and Materials*, 2nd ed. Oxford: Oxford University Press, 2012, p. 4.

<sup>117</sup> The reason for ‘public’ being in the title is that it is a law between *publics* i.e., states.

<sup>118</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, judgment of July 20, 2012, I.C.J. Reports 2012 p. 422; *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 32.

<sup>119</sup> Cassese A. *International Law*, 2nd ed. Oxford: Oxford University Press, 2005, pp. 13–21; Byers M. Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules, 66 *Nordic Journal of International Law* (1997) p. 211.

These elements of publicness, as frail as they may be, nonetheless demonstrate that international law indeed may be perceived as possessing a degree of public relationships between individual states and the community of states (although a very uncentralized one). It is this core understanding of publicness that is meant under the concept of the “public law paradigm” and will be employed in the assessment of international law generally and responsibility rules in particular.

Nonetheless, it must be pointed out that there are also other conceivable layers of *publicness*. For instance public law may imply application of public law principles. As has been noted elsewhere: “the publicness approach proposes that international law be conceptualized as a law between “public entities” (primarily, but not limited to, States), these public entities being subject to public law and thus to basic public law principles, including legality, rationality, proportionality, rule of law, and fundamental rights, as well as to an additional quality of “publicness” inherent in law, one that is difficult to define but nevertheless crucial.”<sup>120</sup> Waldron, trying to pin down this elusive sense of publicness, has concluded that it has to do with a change in perception of law. Thus he remarks that the public character of law is to be found in the fact that law presents itself not just as a set of commands by the powerful or a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public, that ordinary people can in some sense appropriate it as their own.<sup>121</sup> Whereas Kingsbury and Donaldson point out that to be public law, international law need not abandon the concept of state and perceive international law as global public law with direct participation of individuals.<sup>122</sup>

Likewise, the notion of the public law paradigm in the context of this research does not imply Kantian themes on perpetual peace<sup>123</sup> – the focus is much more limited. As fascinating as these ideas may be, to investigate their validity with regard to the law of international responsibility

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<sup>120</sup> Kingsbury B., Donaldson M. From Bilateralism to Publicness in International Law. In: *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*. Oxford: Oxford University Press, 2011 p. 83. See also Kingsbury B., International Law as Inter-Public Law. In: Richardson H., Williams M. (eds.), *Nomos XLIX: Moral Universalism and Pluralism*. New York: New York University Press, 2009, p. 167.

<sup>121</sup> Waldron J. Can there Be a Democratic Jurisprudence? *Emory Law Journal*, Vol. 58, 2009. p. 675. Waldron also emphasizes that “laws must purport to stand in the name of the whole society, and address matters of concern to the society as such, rather than just matters of personal or specific concern to individuals or groups who formulate the laws”, *ibid*.

<sup>122</sup> The authors emphasize that „In global institutions, much of the process of law-making is far removed from any processes analogous to democracy, and there do not exist clearly defined publics other than those of each State (assuming a universal community of all individuals is set aside as not being operationalizable or even a reality for most purposes). While it is impossible to identify a public for many public entities operating at the global level in the way that it may be possible to point to a body of citizens or constituents within a State, it is neither desirable nor possible to abandon the notion of a concrete polity. Broad public law principles, particularly rule of law and fundamental rights, depend for their meaningful operationalization on the specific contextual features of the way law is made, and on the existence of a particular, determinate group of individuals constituting the public in whose name the law stands.” See Kingsbury B., Donaldson M. From Bilateralism to Publicness in International Law. In: *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*. Oxford: Oxford University Press, 2011 p. 84.

<sup>123</sup> See Kant, I. *Perpetual Peace: A Philosophical Sketch*. Cambridge: Cambridge University Press, 1970.



would bring the discussion well beyond the ambit of this thesis. Therefore for the purposes of this research the inquiry into elements of *publicness* of international law will be limited to the essential element of public law – whether responsibility rules display a sense of relationship between individual states and the international community as a whole i.e., whether there is something akin to public order.<sup>124</sup>

## 2.1. Public interest norms

Seminal importance in development of the international community is played by changes in the structure of international obligations. Besides the traditional private law type obligations between states, increasingly there seems to be acknowledgment of obligations owed to the whole international community.<sup>125</sup> Thus recently in the 2012 *Belgium v. Senegal* judgment<sup>126</sup> concerning Senegal's obligations under the Convention Against Torture<sup>127</sup> to prosecute or extradite the former Chadian President Hissène Habré, the International Court of Justice once again observed that there are the so called obligations *erga omnes partes* meaning that “each State party has an interest in compliance with them in any given case.”<sup>128</sup> Also the ICJ slightly adjusted the wording compared to its famous pronouncement in *Barcelona Traction*<sup>129</sup> and concluded that:

“The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may

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<sup>124</sup> Likewise the discussion of whether international law is really law will be left out; as the ILC concluded in its report on fragmentation: “*international law is a legal system*”, see International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the International Law Commission on its 56th session, GAOR, 59th Sess., Suppl. No. 10 (A/59/10 (2004)).

<sup>125</sup> See Ragazzi M. *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press, 1997. Tams C. *Enforcing Obligations Erga Omnes in International Law*. Cambridge: Cambridge University Press, 2005. Crawford J. ‘Multilateral Rights and Obligations in International Law’, 319 *Recueil des Cours*, 2006, p. 325.

<sup>126</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, judgment of July 20, 2012, I.C.J. Reports 2012 p. 422.

<sup>127</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS, Vol. 1465, p. 85.

<sup>128</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, I.C.J. Reports 2012, para. 68.

<sup>129</sup> ICJ: *Barcelona Traction, Light and Power Company, (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 32, para. 33. In *Barcelona Traction* the court referred to “legal interest” of states other than injured states in an attempt to distinguish “legal” interest of these states from “actual” or “individual” interests of injured states. The use of this term “legal interest” has been criticised as unhelpful since both the injured states (Article 42 of ASR) and states other than injured states (Article 48 of ASR) have a ‘legal interest’, see ILC ASR Commentary p. 319. Whereas in *Belgium v Senegal* the ICJ referred simply to “common interest”.

invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.”<sup>130</sup>

Thus the ICJ clearly acknowledges existence of obligations that are owed to all other states parties and to the international community as a whole.<sup>131</sup> Even more so, the distinction of this specific category of obligations is made meaningful by allowing invocation of responsibility by any state in cases where these *erga omnes* obligations are breached. The ILC confirms this right to bring claims for protection of public interests in Article 48 of the Articles on State Responsibility.

However, the right to invoke responsibility to protect community interests must not be confused with a right to institute proceedings in any given international court or tribunal. The acceptance of *erga omnes* obligations has led to a discussion whether international law as a result has also accepted (and to what extent) *actio popularis* - the concept referring to a right of any member of the international community to take legal action in vindication of a public interest.<sup>132</sup> Although states other than the injured state are entitled to invoke responsibility if *erga omnes* obligations are breached, the claimant must still satisfy the jurisdictional rules of the court or tribunal at which the proceedings are brought. Thus existence of obligations *erga omnes* does not imply existence of *actio popularis* regardless of the relevant jurisdictional rules.<sup>133</sup> As the ICJ has held in the *East Timor case* “[t]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things.”<sup>134</sup> The ICJ reached a similar conclusion also more recently in the *Armed Activities in the Territory of the Congo* where it held that the fact that *erga omnes*

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<sup>130</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, I.C.J. Reports 2012, para. 69. For an alternative approach to consequences of *erga omnes* obligations see Inter-American Court of Human Rights, Judgment of 22.09.2006, para. 132: “The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory”.

<sup>131</sup> There is no exhaustive list of obligations towards international community as a whole, however, according to the ICJ prohibition of aggression, genocide, racial discrimination as well as obligation to respect self-determination of peoples belong to this list, see: *Barcelona Traction, Light and Power Company, (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 32, para. 34; ICJ: *Case Concerning East Timor (Portugal v. Australia)*, judgment of 30 June 1995, I.C.J. Reports 1995, p. 102, para. 29.

<sup>132</sup> Brownlie I. *Principles of Public International Law, 7th edition*. Oxford: Oxford University Press, 2008, p. 470; Ragazzi M. *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press, 1997. p. 210.

<sup>133</sup> Ragazzi *ibid.*, p. 212.

<sup>134</sup> ICJ: *Case Concerning East Timor (Portugal v. Australia)*, judgment of 30 June 1995, para. 29, p. 102.

obligations are at issue cannot in itself constitute an exception to the principle that Court's jurisdiction always depends on the consent of the parties.<sup>135</sup> Therefore it seems the better view that at the present stage of development international courts do not afford their jurisdiction solely on the basis of protection of public interest, if there is no other jurisdictional ground for the court to take up the claim.<sup>136</sup>

However, a number of international treaties combine the right to invoke responsibility with jurisdictional clauses, thus in effect allowing *actio popularis* for protection of public interest among states parties. Article 33 of the European Convention on Human Rights<sup>137</sup>, Article 44 of the American Convention on Human Rights<sup>138</sup>, as well as Article 41 of the International Covenant on Civil and Political Rights<sup>139</sup> are among such treaties.<sup>140</sup> Similarly, Article 22 of the Torture Convention<sup>141</sup> and Article 9 of the Genocide Convention<sup>142</sup> in effect provide for *actio popularis*.

Another indication of a shift towards public law elements is evidenced by recognition of the so called peremptory norms or norms *jus cogens*.<sup>143</sup> Just like with *erga omnes* obligations the purpose of *jus cogens* norms is to protect some of the most fundamental interests of the

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<sup>135</sup> ICJ: *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, para. 125. The ICJ specifically noted that: „the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties [...]”

<sup>136</sup> Ragazzi M. *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press, 1997. p. 212. In *South West Africa* case the ICJ stated that international law does not recognize ‘equivalent of an *actio popularis*’ or ‘right resident in any member of a community to take legal action in vindication of a public interest’, see ICJ: *South West Africa*, second phase, judgment, I.C.J. Reports 1966, p. 47.

<sup>137</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, 213, UNTS 221. See ECtHR application no. 3321/67 *Denmark v Greece*, application no. 3322/67 *Norway v Greece*, application no. 3323/67 *Sweden v Greece*, application no. 3344/67 *Netherlands v Greece*, *Yearbook of the European Convention on Human Rights*, Vol. 12, 1969-II, p. 1.

<sup>138</sup> American Convention on Human Rights, 21 November 1969, 1144 UNTS 123.

<sup>139</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

<sup>140</sup> An argument may be made that obligations *erga omnes* that protect fundamental human rights are indivisible and cannot be regarded as a sum of bilateral obligations, see Ragazzi M. *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press, 1997, p. 213. For arguments in favour of *actio popularis* in environmental law see Sands P. *Principles of International Environmental Law*. Cambridge: Cambridge University Press, 2012. p. 150.

<sup>141</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Vol. 1465, p. 85.

<sup>142</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS Vol. 78, p. 277.

<sup>143</sup> Among the multitude of publications on the topic see: Orakhelashvili A. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2006; Hannikainen L. *Peremptory norms (jus cogens) in international law: Historical development, criteria, present status*. Lakimiesliiton kustannus, 1988; de Hoogh A. The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective, *41 Austrian Journal of Public International Law* (1991) p. 183. Tomuschat C. International Law Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law’, 281 *Recueil des Cours* (1999) p. 81. Verdross A. Jus Dispositivum and Jus Cogens in International Law, *American Journal of International Law*, 1966, 60 p. 55.

international community.<sup>144</sup> Although both share a common purpose - the concepts are not identical as they have different functions and consequences. The core (uncontested) function of *jus cogens* norms is to preclude validity of any treaty that would breach existing peremptory norms.<sup>145</sup> Whether *jus cogens* norms introduce a general hierarchy of norms and override also any other customary rules, in particular rules on state immunity, remains a contested topic<sup>146</sup> as demonstrated by the ECtHR in the *Al-Adsani v. The United Kingdom*<sup>147</sup>). Whereas obligations *erga omnes* specifically affect invocation, allowing invocation of responsibility by states other than the injured state.<sup>148</sup> Together these concepts guard the fundamental values of the international community and could be regarded as public interest norms in international law.<sup>149</sup> Indeed, over time the two concepts have come much closer together and some authors argue that they have actually merged into a “unified concept of an international “community interest” or international “public” law”.”<sup>150</sup> Thus Paulus argues that:

“At least on paper, *jus cogens* and obligations *erga omnes* have indeed merged into a unified concept of an international “community interest” or international “public” law – even if their scope may not be completely identical.” [...] “What began as a category with relatively clear effect – nullification of treaties contrary to it – but unclear scope, ended in the reverse: unclear consequences, but a much clearer view of which rules had achieved *jus cogens* status (prohibitions of aggression, of slavery, genocide, racial discrimination,

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<sup>144</sup> Tomuschat C. Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes – Concluding Observations. In: Tomuschat C., Thouvenin J., (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes*. Leiden: Nijhoff, 2006, p. 425.

<sup>145</sup> See Art. 53 and Art. 64 of the Vienna Convention on the Law of treaties, May 23, 1969, 1155 UNTS 331. The ILC has noted that: “[t]he view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain” see *Yearbook of International Law Commission*, 1966, II, p. 247.

<sup>146</sup> See Salcedo C. Reflections on the Existence of a Hierarchy of Norms in International Law, *European Journal of International Law* 8, 1997 p. 588; for a critical view see Aust H. *Complicity and the Law of State Responsibility*. Cambridge: Cambridge University Press, 2011, p. 38.

<sup>147</sup> In *Al-Adsani* the majority of the Grand Chamber of the ECtHR concluded that the *jus cogens* norm prohibiting torture does not preclude application of rules on sovereign immunity. The dissenting judges (Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto and Vajić) however emphasized that: “the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.” See the European Court of Human Rights: *Al-Adsani v. The United Kingdom*, 35763/97, judgment of 21 November 2001, 2001-XI ECtHR 79, 111-112.

<sup>148</sup> Article 48 of the ASR.

<sup>149</sup> See Byers M. Conceptualising the relationship Between Jus Cogens and Erga Omnes Rules. *Nordic Journal of International Law*, 66, 1997, p. 211.

<sup>150</sup> See Paulus A. *Jus Cogens in a Time of Hegemony and Fragmentation*, *Nordic Journal of International Law*, 74, 2005, p. 317.

apartheid, torture, as well as the basic rules of international humanitarian law and self-determination, borrowing from both *jus cogens* and *erga omnes*-related case law and statements). Thus, there seems to be no recognizable difference any more between obligations *erga omnes* and *jus cogens*— so much so that the Commission could simply exchange the concepts with hardly any – and if so, only theoretical – opposition.”<sup>151</sup>

A further indication of public law elements in international law is Article 103 of the UN Charter.<sup>152</sup> The Article provides that Charter obligations prevail over any other treaty obligations, thus in effect establishing a hierarchy amongst international treaties.<sup>153</sup> A quality of Article 103 that is characteristic of public law paradigm is that states are no longer free to apply whatever treaties they have agreed upon, if these treaties conflict with the UN Charter. Thus Article 103 seems to acknowledge that obligations of the Charter serve community interests which prevail over other treaties between states. Furthermore, it may be argued that even the Charter remains subject to the superior values of the international community protected by *jus cogens*.<sup>154</sup>

These trends towards publicness and multilateralism have been accompanied by what could be labelled as *moralization* of international law.<sup>155</sup> As Kingsbury and Donaldson have recently pointed out “structural changes occurred in tandem with expansion in the reach of international law into more and more areas of State policy and human life and activities; and were accompanied by a transformation of the moral stance of international law, from an order that permitted governments to cause or tolerate human suffering that would not be accepted within their

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<sup>151</sup> *Ibid.*, p. 316.

<sup>152</sup> Article 103 of the UN Charter reads: „In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>153</sup> Bernhardt R. Article 103. In: Simma B. (ed.), *The Charter of the United Nations. A Commentary*. Third edition. Oxford: Oxford University Press, 2013, p. 1295.

<sup>154</sup> Article 103 raises interesting questions with regard to the relationship between the Charter and *jus cogens* norms. It has been observed that “Article 103 is however a mere conflict rule for the relationship between different treaty regimes. It does not nullify treaties contrary to Charter law. The effect of *jus cogens*, on the contrary, consists in the nullification of contrary law, be it customary or treaty law. It thus appears that even the law of the Charter – and the Security Council or the General Assembly – may not violate *jus cogens*.” See Paulus A. *Jus Cogens in a Time of Hegemony and Fragmentation*, *Nordic Journal of International Law* 74, 2005, p. 317.

Similarly Elihu Lauterpacht has noted that “The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.” See ICJ: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 8 April 1993, Provisional Measures, Sep. Op. Lauterpacht, I.C.J. Reports 1993, p. 440, para. 100.

<sup>155</sup> Nollkaemper A., Jacobs D. Shared Responsibility in International Law: A Concept Paper, ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 ([www.sharesproject.nl](http://www.sharesproject.nl)).

own societies to one centrally concerned with human wellbeing.”<sup>156</sup> It follows from this argument that it is the protection of shared interests of all mankind that is the core reason for states to organize into an international community. These interests (such as maintenance of international peace and security, protection of global environment and human rights) go beyond individual interests of states and “correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind.”<sup>157</sup>

The important question is whether and how these moral aspirations to protect the common interests of all (regardless whether we call it moralization or constitutionalization or by any other name) may be achieved through a legal system that has been designed to suit the individual interests of states. Indeed the modern international law is essentially based on foundations of concepts such as sovereignty and state consent which came into being in the “classical” international law of the 17<sup>th</sup> century, leaving present generations with legal architecture that may be inadequate for modern globalized problems. As noted elsewhere: “the objective of achieving the common good has been pursued through legal tools that were not, at their origins, elaborated for that purpose and are better suited to the protection of individual interests.”<sup>158</sup> One only ought to notice the ongoing difficulty for states even to adopt (and even more so to enforce) urgently needed rules to combat climate change or introduce at least a minimal sustainability to high seas fisheries to understand this point.

Another indication of evolution of international law towards *publicness* is evidenced by the emergence of international criminal law. Although drafted in terms of a relationship between the international community and individuals (rather than between the international community and states) this branch of international law clearly testifies to existence of international public order. As famously noted in the Nürnberg principles “Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”<sup>159</sup>

To sum up, although public international law is essentially based on the private law paradigm, it increasingly displays an element which is at the heart of public law – a relationship between individual state and the community of states as a whole. This relationship between an individual state and community is evidenced by recognition of *erga omnes* obligations, peremptory norms, supremacy of the UN Charter obligations over other bilateral or multilateral treaties, and

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<sup>156</sup> Kingsbury B., Donaldson M. From Bilateralism to Publicness in International Law. In: *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford: Oxford University Press, 2011. p. 81.

<sup>157</sup> Simma B., From Bilateralism to Community Interest in International Law, *Recueil des cours*, 250, (1994), p. 217.

<sup>158</sup> Villalpando S. The Legal Dimension of the International Community: How Community Interests are Protected in International Law. *European Journal of International Law* 21.2, 2010, p. 410.

<sup>159</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. 1950, Principle II, 5 UN GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950); 1950 ILC Yearbook p. 374.

finally by recognition of international criminal responsibility of individuals. These developments present a shift away from the “classical” international law which, as we saw earlier, is based on the private law paradigm. Such evolution of international law towards a public law paradigm inevitably creates friction with legal concepts founded on bilateralism and the private law model. Therefore the main challenge for a meaningful introduction of the public law paradigm into international law is to reconcile legal concepts designed to protect community interests and individualistic interests of states; to find balance between public interest norms and concepts such as state consent and sovereignty - in other words - a balance between private and public law paradigms.

## 2.2. Balancing community interests and individual interests of states

Although public interest norms are generally acknowledged their actual impact in disputes remains limited. This is mainly due to tensions between public interest norms and norms which are raw expressions of sovereignty and bilateralism based legal system, such as customary rules on immunities. These tensions may be observed in a number of ICJ cases. For instance in the *Arrest Warrant*<sup>160</sup> the ICJ had to resolve a question whether community interest to prosecute a person accused of violating *jus cogens* norms provides an exception to the rule on immunity of acting ministers of foreign affairs. The Court considered that there are no exceptions to the immunity.<sup>161</sup> Likewise, in the 2012 *Jurisdictional Immunities of the State (Germany v. Italy)* confronted with a question whether sovereign immunity applies also to civil claims in foreign courts brought by victims of war crimes, the Court upheld the sovereign immunity.<sup>162</sup>

Similar tensions may be observed also in the *Legality of Nuclear Weapons advisory opinion*.<sup>163</sup> In this case the ICJ on the one hand concluded that the threat or use of nuclear weapons would be contrary to the principles and rules of humanitarian law most of which are fundamental to

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<sup>160</sup> ICJ: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3. The Court concluded that: „the issue against Abdulaye Yerodia Ndobasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.”

<sup>161</sup> The *Arrest Warrant* judgment has been criticized in many quarters, also in the ILC, which noted that: “the position of the International Court of Justice in the *Arrest Warrant* case ran against the general trend towards the condemnation of certain crimes by the international community as a whole [ ...] and that the Commission should not hesitate to either depart from that precedent or to pursue the matter as part of progressive development”. See Report of the International Law Commission on the Work of its Sixtieth Session (2008), UN Doc A/63/10, Ch IX ‘Protection of Persons in the Event of Disasters’ para. 296.

<sup>162</sup> ICJ: *Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening)*, judgment, I.C.J. Reports 2012, p. 99.

<sup>163</sup> ICJ: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] I.C.J. Reports 226.

the respect of the human person and elementary considerations of humanity.<sup>164</sup> On the other hand, the Court felt that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.<sup>165</sup> Thus, when faced with a collision between community interest (to protect “elementary considerations of humanity”) and individual interest of self-defence by all means available (if necessary by nuclear weapons), the Court stopped short of preferring the community interest.

As already noted, most obviously these tensions have manifested with regard to community interest in prosecution of international crimes and individual interest of states to preserve immunities (both sovereign and of high ranking officials). Attempts to protect community interests have taken various forms such as exceptions to immunity if *jus cogens* rules are breached (as in *Arrest Warrant*); by granting jurisdiction to international criminal courts and tribunals (International Criminal Court is the prime example as the Court can prosecute even acting heads of state of states non-parties to the Rome Statute<sup>166</sup> if the UN Security Council has referred the case to the ICC); and by recognizing the right of states to prosecute certain international crimes on the basis of universal jurisdiction.<sup>167</sup>

In none of these cases, however, states have attempted to argue for an absolute preference to community interests over established, sovereignty based rules. All of these instances of interference with individualistic interests of states have been constructed as narrow exceptions to the general rule. Thus in *Arrest Warrant* Belgium did not argue that immunity of acting minister of foreign affairs from foreign criminal jurisdiction does not exist, but rather suggested that there is a specific exception to this immunity in cases where *jus cogens* norms have been breached. Similarly with regard to universal jurisdiction, states that apply it generally do so only if other states that could invoke more widely recognized jurisdictional principles (such as territorial or nationality principles) have failed to institute proceedings. Likewise, the jurisdiction of ICC is only complimentary and comes into operation only when the sovereignty based jurisdictional principles have not been invoked.

In search of balance between community interests and individual interests of states some authors have suggested that: “whenever community interests are protected under international law and are considered to be fundamental to the system, the general trend shall be towards their

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<sup>164</sup> Ibid., paras.79, 96, 105.

<sup>165</sup> Ibid.

<sup>166</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

<sup>167</sup> See Reydam L. *Universal Jurisdiction: International and Municipal Legal Perspectives*. Oxford: Oxford University Press, 2004; Macedo S, (ed), *Universal Jurisdiction: National Courts And the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press, 2006.



prevalence over competing individual interests in those cases in which the continued preservation of the latter may undermine the common good. [...] The norms and obligations aimed at protecting individual interests cannot therefore remain intact and a compromise should be found to ensure that the community interest is achieved, even at the sacrifice of the personal sphere of individual states whenever (and only when) this is needed.”<sup>168</sup> Such proposals are likely to encounter opposition when applied in particular disputes. To resolve a collision between competing interests it is first necessary to determine whether a particular interest is a community interest or not. It is simple enough in cases where a state employs a legal mechanism which is by definition designed to protect community interests (such as invocation of responsibility by a state other than the injured state in accordance with Article 48 of Articles on State Responsibility). However, it is more problematic if sovereignty based legal concepts (such as immunity of ministers of foreign affairs) are perceived as a general interests of the whole international community, namely, to preclude interference with the work of high ranking officials and to ensure smooth functioning of interstate relations. As several ICJ judges remarked in a separate opinion in the *Arrest Warrant* case, both the immunity of a minister of foreign affairs and the need to secure functioning of interstate relations are highly valued community interests:

“[o]n the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community.”<sup>169</sup>

If smooth functioning of inter-state relations is a community interest (and prosecution of the minister of foreign affairs would hamper it), then what is needed, is to balance between several competing community interests. International law may not have ample precedents particularly on balancing of interests in unhampered inter-state relations and prosecution of international crimes. However, the task need not be perceived as some unmatched perplexity beyond the abilities of law. Indeed, balancing of competing interests is the very function of law. If the superiority of a particular

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<sup>168</sup> Villalpando S. The Legal Dimension of the International Community: How Community Interests are Protected in International Law. *European Journal of International Law* 21.2, 2010, p. 415.

<sup>169</sup> ICJ: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 85, para. 75. Also the ILC has noted that sovereign equality and stability of international relations: “were not merely abstract considerations, but they reflected substantive legal values, such as the protection of weak States against discrimination by stronger States, the need to safeguard human rights, both of persons suspected of having committed a crime and of persons who could be affected by the possible disruption of inter-State relations, and finally, in extreme cases, even the need to respect the rules of the use of force.” See Report of the International Law Commission on the Work of its Sixtieth Session (2008), UN Doc A/63/10, Ch IX (‘Protection of Persons in the Event of Disasters’), para. 297.

interest is not enshrined in the law itself, then it is up to lawyers to balance these interests, employing their time-tested toolbox of legal methodology. Such balancing takes place on everyday basis in both national and international courts. There is no reason why also the ICJ should not engage in such an exercise, as it might produce outcomes that are far more palatable than the ICJ's abrupt preference for immunity.

Similarly, such balancing of interests also ought to take place when interests of the international community meet individualistic interests of states. It is suggested here that in situations of such tensions between competing interests (and legal norms embodying them) a principle akin to the principle of proportionality may be employed. The purpose of the proportionality principle, as it is known in public law of most domestic legal systems as well as in specialized fields of international law (such as the EU law and human rights), is precisely to find balance between private and public interests or competing public interests. In its most commonly accepted version the proportionality principle requires that a particular limitation of an individual right is both suitable and necessary for the achievement of the public good.<sup>170</sup> Thus essentially the proportionality principle requires three elements: the limitation of an individual right must pursue some legitimate public good; the limitation of the individual right must be suitable for the achievement of that public good; and finally, the limitation must be necessary, meaning that there are no other less infringing ways to secure the protection of the public good.<sup>171</sup>

On the facts of the *Arrest Warrant* case, prosecution of DR Congo's minister of foreign affairs, Mr. Yerodia, for crimes against humanity certainly could be regarded a legitimate public good, as the prohibition of these crimes has the status of a peremptory norm. Likewise, his prosecution by Belgium would also be suitable for the achievement of the public good. The more difficult question is whether prosecution of Mr. Yerodia by Belgium was also necessary in the sense that his prosecution was not possible by other means which would not violate DR Congo's right to immunity of its highest officials under customary law. It is precisely at this point that the ICJ would have had to engage in a detailed analysis of the balance between public interest of the international community to combat impunity and ensure observance of *jus cogens* norms and the DR Congo's customary rights. The ICJ would have to consider all the other possibilities to prosecute Mr. Yerodia such as: a) prosecution by DR Congo's courts; b) DR Congo agreeing to waive the immunity; or c) Mr. Yerodia being tried at some international court or tribunal (such as ICC to which immunity would not apply). If prosecution was realistically possible under any of these options, then Belgium's unilateral attempt, which indeed violated the DR Congo's customary rights,

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<sup>170</sup> ECJ: C-285/98 *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-00069; C-331/88 *Fedesa* [1990] ECR I-4023.

<sup>171</sup> ECJ: C-58/08 *The Queen, on application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999.

could be regarded as an unnecessary infringement. It is submitted here, that such an elementary application of the proportionality principle would provide an appropriate balancing of community interests and individual interests of states (and probably also would have resulted in a much more balanced and substantiated decision in the *Arrest Warrant case*).

### 2.3 The changing role of state consent

Besides the above discussed public interest norms central to the debate on emergence of some form of public order in the international community is reconsideration of the content and role of state sovereignty<sup>172</sup> and the related concept of state consent. In particular the question whether a treaty can create obligations also for states that are not parties to the treaty has been a subject of considerable controversy in the contemporary international law.<sup>173</sup> On the one hand states keenly support the principles of sovereignty and independence and thus also the consensual nature of international law.<sup>174</sup> On the other hand, as already noted earlier, the current day world with its global problems requires some form of reconsideration of the role of the state consent in the international law-making.

It seems to be a generally accepted opinion that a treaty does not create either obligations or rights for a state without its consent (*pacta tertiis nec nocent nec prosunt*). This rule is embodied in Article 34 of the VCLT, and it has been applied by the International Court of Justice as expressing international custom.<sup>175</sup> Moreover, Article 38 (1) (a) of the ICJ Statute provides that the Court in deciding disputes applies “international conventions, whether general or particular, establishing rules expressly recognised by contesting states”. Such wording implies that the Court can not apply to a dispute any international agreements to which litigating states are not parties and thus essentially confirms the *pacta tertiis* rule. However, two categories of exceptions to the *pacta tertiis* are generally accepted. The first category comprises of cases where the provisions of a treaty

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<sup>172</sup> Peters A. Humanity as the A and  $\Omega$  of Sovereignty, *European Journal of International Law* 20, no. 3 (2009), p. 513. For a more elaborate analysis of changes in the concept of state sovereignty (in particular in the context of constitutionalization of international law) see Chapter 6.

<sup>173</sup> See Proelss A. Treaties Providing for Obligations of Third States. In: *Vienna Convention on the Law of Treaties: A Commentary*, Dörr O., Schmalenbach K., (eds.), Heidelberg: Springer, 2012, p. 645; D'Amato A., Treaties as a Source of General Rules of International Law. *Harvard International Law Journal* Vol. 3, 1962, p. 1.

<sup>174</sup> The ILC has noted that there appears to be almost universal agreement upon such a general rule, which is based not only on the general concept of the law of contract, but also on the sovereignty and independence of states, see *Yearbook of the International Law Commission* (1966), ii, p. 226.

<sup>175</sup> ICJ: *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports 1959, p. 127; *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554.

have entered into customary law.<sup>176</sup> The second category refers to cases when treaty provides for lawful sanctions for violations of law, which are to be imposed on an aggressor state.<sup>177</sup> Nevertheless, a number of scholars argue that besides these two categories of exceptions the *pacta tertiis* rule is subject also to other exceptions.

### 2.3.1. Limitations to the *pacta tertiis* rule – Article 2(6) of the UN Charter

The discussion on the possible limitations to the *pacta tertiis* rule already for more than fifty years is focused on Article 2(6) of the UN Charter as a principal example of a treaty provision establishing obligations of non-parties. Article 2 (6) provides that the Organisation shall ensure that states, which are not members of the UN, act in accordance with principles enumerated in Article 2 of the Charter so far as may be necessary for the maintenance of international peace and security. This rule seems to provide an exception to the generally recognized position that states may not incur obligations otherwise than through their own consent and thus Article 2(6) arguably attempts to create a form of public order at least as far as threats to international peace and security are concerned.

Several authors claim that Article 2(6) is a particular legal expression of the comprehensive authority of the principles laid down in the UN Charter and, as such, takes precedence over the principle of non-interference in the domestic affairs of other states, which is referred to in Article 2(7), if the maintenance of international peace and security is in jeopardy.<sup>178</sup> The supporters of this view include Kelsen,<sup>179</sup> Jennings<sup>180</sup> and Brownlie.<sup>181</sup> Thus Kelsen believed that Article 2(6) creates binding obligations on non-parties because the Security Council can apply sanctions to members and non-members alike. According to Kelsen: “if the Charter attaches a sanction to certain behaviour of non-members, it establishes a true obligation of non-members to observe a contrary behaviour.”<sup>182</sup>

Similarly, also Brownlie argued that Article 2(6) imposes obligations on non-members. According to him the exception rests on the special character of the UN as an organisation concerned primarily with the maintenance of international peace and security in the world and

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<sup>176</sup> ICJ: *North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 3, 41 ILR p. 29. See Shaw M. *International Law*, 4<sup>th</sup> edition. Cambridge: Cambridge University Press, 1997, p. 652.

<sup>177</sup> Brownlie I. *Principles of Public International Law*, 5<sup>th</sup> edition. Oxford: Oxford University Press, 1998, p. 628.

<sup>178</sup> Simma B. (ed), *The Charter of the United Nations. A Commentary*, 2<sup>nd</sup> edition. Oxford: Oxford University Press, 2002, p. 141.

<sup>179</sup> Kelsen H. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*. London: Stevens & Sons, 1950, p. 106; also McNair A. *Law of Treaties*. Oxford: Clarendon Press, 1961 p. 216.

<sup>180</sup> Dissenting opinion of Judge R.Y. Jennings in the *Nicaragua* case, 1986 I.C.J. Reports 531-532.

<sup>181</sup> Brownlie, *supra* 177, p. 692.

<sup>182</sup> Kelsen, *supra* 179, p. 216.

including in its membership the great powers as well as the vast majority of states. Brownlie maintained that whilst third states are not in principle bound by the constituent treaty of an international organisation, the possession of legal personality by an organisation may give rise to certain obligations on the part of non-member states under general international law.<sup>183</sup>

The legislative history of Article 2(6) reveals that some states indeed supported the view that principles of the Charter should be binding on non-members.<sup>184</sup> However, subsequent practice of application of Article 2(6) by the Security Council suggests that the provision is not an exception to the *pacta tertiis* rule. The Security Council usually only appeals or urges non-members to comply with its resolutions,<sup>185</sup> rather than requires it as a matter of legal obligation. The non-members themselves in the past have emphasised that they comply with Security Council resolutions out of their own free will and not because of a sense of legal obligation.<sup>186</sup> Most commentators also support this view and maintain that Article 2(6) as a norm of treaty law can not create obligations for non-members.<sup>187</sup>

However, irrespective of which point of view could ultimately be regarded as the better one, it is clear from the arguments of Kelsen and Brownlie that the alleged limitation to the *pacta tertiis* is based on the exceptional nature of the UN Charter and the powers of the UN as an international organisation. Therefore even if Article 2(6) would be an exception to the *pacta tertiis*, it is doubtful if a more general principle applicable outside the context of the UN could be deduced on the basis of the example of Article 2(6). A further limitation of Article 2(6) is that it aims to limit the importance of state consent only with regard to situations that are concerned with threats to international peace and security. In its practice the UN Security Council has acknowledged that situations which do not involve inter-state use of force may nonetheless be regarded as involving threats to international peace and security. For instance the SC has stated that genocide (Resolutions 918 (1994) and 925 (1994) with regard to events in Rwanda), the so called ethnic cleansing (Resolutions 757 (1992), 787 (1992), 820 (1993) with regard to events in Bosnia and Herzegovina), apartheid (Resolution 216 (1965) with regard to Southern Rhodesia and Resolution 418 (1977) with regard to South Africa), terrorism (Resolutions 731 (1992), 748 (1992) on the Lockerbie bombing), piracy (Resolution 1838 (2008) with regard to Somali pirates), breach of the right to self-

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<sup>183</sup> Brownlie, *supra* 177, p. 691.

<sup>184</sup> E.g., Belgium, see Simma, *supra* 178, p. 142.

<sup>185</sup> For example SC Res. 388 (1976), SC Res. 409 (1977), with regard to Southern Rhodesia.

<sup>186</sup> SC Res. 661 (1990) on Iraq's invasion of Kuwait, SC Res. 784 (1992) on sanctions against Libya, SC Res. 757 (1992) on sanctions against Yugoslavia, SC Res. 1132 (1997) on sanctions against Sierra Leone and SC Res. 1265 (1999) on sanctions against Taliban government of Afghanistan; Switzerland stated that it has autonomously decided to take part in the sanctions, see Simma, *supra* 178, p. 143.

<sup>187</sup> Simma is of the opinion that 2(6) is not capable of obliging third states as a matter of treaty law. However, he believes that the Charter makes the behaviour of non-member states in situations where international peace is in jeopardy a matter of general concern of all members of UN., also see Shaw *supra* 176, p. 652.

determination (Resolutions 232 (1966) and 253 (1968) on Rhodesia) all pose threats to international peace and security. Although “threats to peace and security” is a broadly interpreted concept, which is constantly evolving and expanding,<sup>188</sup> it is likely that some situations which concern interests of the whole international community (such as depletion of ozone layer and other instances of threats to global environment) will not fall within the ambit of threat to international peace and security. A further reason why the example of Article 2(6) of the UN Charter is only of limited importance is that the list of non-members of the UN grows increasingly short, presently containing only states whose statehood is contested and the Holy See.

### ***2.3.2. Limitations to the pacta tertiis rule - global and objective regimes***

A further alleged exception to the *pacta tertiis* rule, which has been suggested by scholars and finds some support in state practice, is that of global and objective regimes.<sup>189</sup> At the core of the doctrine of global regimes is the realisation of the fact that many of the problems that are facing the present day world require participation of all states. The obvious way to secure global participation is to have a universally binding normative regulation. The notion of global regime in essence proposes that treaties with large number of participants on issues, which are of common interests to all mankind, are binding on all states, even those which are not parties.

The impetus for the doctrine of global regimes was provided by the negotiation of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>190</sup> The Convention provided that international seabed area is the common heritage of mankind and that no state or natural, or legal person shall claim, acquire or exercise rights with respect to the minerals of international seabed, except in accordance with the Convention. Such provision was eagerly supported by a large majority of states, which had no technology to engage in any actual exploration or mining of the deep seabed. These states wished that the few developed states, which potentially could engage in deep seabed mining, would be precluded from doing so in unregulated manner. Consequently, many states made statements to the effect that the particular provisions of the UNCLOS are universally binding<sup>191</sup> and thus create obligations also for states which are not parties to the UNCLOS. Similar statements were made also by the Preparatory Commission for the International Sea-Bed Authority

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<sup>188</sup> Talmon S. The Security Council as World Legislature, *American Journal of International Law*, January 2005, p. 175.

<sup>189</sup> Salerno F. The Relevance of Consent in the Conclusion of Treaties Establishing Objective Regimes. In: *The Law of Treaties Beyond the Vienna Convention*, Cannizzaro E., ed., Oxford: Oxford University Press, 2011, p. 236.

<sup>190</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 3; 21 ILM 1261 (1982).

<sup>191</sup> The statement of representative of Peru on behalf of group of 77 states, 22 UNCLOS III; statements of representatives of Trinidad and Tobago 17 UNCLOS III; Cameroon 16 UNCLOS III; Chile 67 UNCLOS III.

and for the International Tribunal for the Law of the Sea.<sup>192</sup> The Commission stated that “the only regime for exploration and exploitation of the Area and its resources is that established by the UNCLOS.”<sup>193</sup> Subsequently exploitation of the international seabed area outside the framework of the UNCLOS regime was declared to be wholly illegal.<sup>194</sup>

However, it is evident from state practice that at its current stage of development international law does not recognise majority law-making treaties.<sup>195</sup> The above mentioned claims with regard to the UNCLOS constitute one of the rare exceptions when states have claimed that certain treaty provisions have a universal application.<sup>196</sup> Even with regard to the UNCLOS representatives of several states made statements to the effect that majority decisions would not create any obligations on dissenting states.<sup>197</sup> Among these states also the US claimed that “neither the Conference nor the states indicating an intention to become parties to the convention have been granted global legislative powers.”<sup>198</sup>

The other doctrine, which advocates an exception to the *pacta tertiis* rule, is the doctrine of objective regimes. Judge McNair has described the notion of objective regime in his separate opinion in the *South-West Africa* case: "From time to time it happens that a group of great powers, or a large number of states both great and small, assume a power to create by a multiparty treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence."<sup>199</sup> McNair essentially argues that certain treaties due to the special authority of a group of states parties or the permanent nature of the rights created by the treaty have *erga omnes* effect.<sup>200</sup> In substantiating his assertion McNair brings examples of the Treaty on Permanent Neutrality of Switzerland of 1815 and other 19th century treaties on territorial issues concluded by the European states. Moreover, McNair finds support to the existence of treaties that create *erga omnes* effects in the famous ICJ pronouncement in the *Reparation for Injuries* case.<sup>201</sup> In his opinion the Court clearly refers to the special authority of fifty states to create an entity with objective legal personality, which has to be respected by all states.

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<sup>192</sup> UN Doc. LOS/PCN/72, 2 (1985).

<sup>193</sup> Ibid.

<sup>194</sup> 1986 Declaration, UN Doc. LOS/PCN/78 (1986) In: Danilenko G. *Lawmaking in the International Community*. Dordrecht: Nijhoff Publishers, 1993, p. 66.

<sup>195</sup> For an overview see Danilenko G. *Lawmaking in the International Community*. Dordrecht: Nijhoff Publishers, 1993, p. 67.

<sup>196</sup> Similar statements, however, only by a few states have been made with regard to Antarctic Treaty.

<sup>197</sup> Statements of representatives of Bahamas and Thailand, see Danilenko, *supra* 195, p. 68.

<sup>198</sup> Statement of US delegation: 17, UNCLOS III.

<sup>199</sup> ICJ: *South-West Africa* case, 1950 I.C.J. Reports 153.

<sup>200</sup> McNair A. *Treaties Producing Effects "Erga Omnes"*. Milan: Scritti Tomaso Perassi, 1957, p. 21.

<sup>201</sup> ICJ: *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports, 1949, p. 174.

The notion of special authority of a group of states seems doubtful when considered in the light of principles of sovereignty and equality of states, especially since in a horizontal legal order states themselves proclaim to be the ones with the special authority. The more recent writings on this topic attempt to circumvent this problem by emphasising the need for acquiescence of other states to the competence of the particularly interested states as a basis on which non-parties to the particular regime could incur obligations.<sup>202</sup> However, even if the acquiescence would authorise the particularly interested states, the question remains whether such treaties produce any effects also on the objecting states. In this regard Reuter notes that no “objective situation” or “status” is opposable *per se*, and that only recognition by other states makes it so.<sup>203</sup> Such position certainly corresponds with the opinion that it is highly questionable whether under current international law a group of “particularly interested states” is able to create obligations for third states.<sup>204</sup> Since these opinions also correspond with the contents of Article 35 of the VCLT, they seem to be better justified than McNair’s notion of special authority of a particular group of states.

However, the doctrine of objective regimes appears to be more persuasive when considered from the perspective of special nature of the rights established by treaties which create regimes that could be described as objective or based on a status. These would be treaties that create certain objectively existing situations, such as treaties on boundaries or constitutive treaties of international organisation. Matters concerning status of territories and legal subjects in any legal system must enjoy a certain degree of stability. A minimum precondition for such stability is that the status can be invoked against all other subjects of the legal system. This is particularly so in the case of the international community where stability of territorial arrangements is closely bound with the maintenance of peace. The 1978 Vienna Convention on the Succession of States in Respect of Treaties<sup>205</sup> provides further support for the opinion that treaties on territorial matters indeed could be regarded as an exceptional category of treaties, as Article 11 and Article 12 of the Convention establish a special regime for succession of treaties on boundaries and other territorial regimes.

The 1959 Antarctic Treaty<sup>206</sup> is often referred to as the most evident example of a treaty establishing an objective regime which imposes obligations on all states.<sup>207</sup> The special status of the treaty is argued on both of the above mentioned grounds. Firstly, it has been created by 12 initial states parties, 8 of which could be regarded as particularly interested states, as they had made claims

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<sup>202</sup> Danilenko, *supra* 195, p. 62.

<sup>203</sup> Reuter P. *Introduction to the Law of Treaties*. London: Kegan Paul, 1995, p. 125.

<sup>204</sup> Danilenko, *supra* 195, p. 62.

<sup>205</sup> 1978 Vienna Convention on the Succession of States in Respect of Treaties, August 23, 1978, 17 ILM 1488 (1978).

<sup>206</sup> The Antarctic Treaty, Washington, December 1, 1959, 402 UNTS 71 / 19 ILM 860 (1980).

<sup>207</sup> Vicuna O. *Antarctic Mineral Exploitation. The Emerging Legal Framework*. Cambridge: Cambridge University Press, 1988, p. 430; Birnie P. The Antarctic Regime and Third states. In: Wolfrum R., (ed) *Antarctic Challenge II*. Berlin: Duncker&Humbolt, 1986, p. 239.



to sovereignty over parts of Antarctica prior to the conclusion of the treaty. Secondly, the treaty directly concerns the territorial status of the Antarctica. One of the key provisions of the treaty is that existing sovereignty claims are put into a state of suspense and that no new claims shall be asserted.

The proposition that the Antarctic Treaty creates an objective regime is open to the above mentioned criticisms.<sup>208</sup> In a horizontal legal order there is no objective way to determine which states have the special authority to introduce an objective regime. As a result, states themselves proclaim to be the particularly interested ones, which is likely to result in competing claims. Moreover, the analogy with municipal legal systems in which a title or a status of a person is recognised by all other subjects of the legal system, is not entirely valid in international law. The reason why title or status is acknowledged in municipal system is that the title or the status are registered by some recognised authority. There seems to be no such authority in the international community. Moreover, the idea that a few states impose obligations on the rest of the international community, which are also likely to be in the interest of these few states rather than the international community, seems to be contrary to the principles of sovereignty and equality of states.

Furthermore, it seems to be rather clear that contemporary international law does not recognise the existence of objective regimes. Documentation of the ILC's work during the preparation of the VCLT reveals that a proposal to include a special provision on objective regimes was rejected. ILC noted that "as the theory of treaties creating objective regimes was controversial and its acceptability to the states somewhat doubtful, the Commission concluded that to recognise that such treaties create special legal effects for non-parties would be premature at the present state of development of international relations."<sup>209</sup> The period of time after codification of *pacta tertiis* rule in the VCLT has provided no evidence that states can incur obligations from international treaties otherwise than by their express consent.<sup>210</sup> As evident from the above discussion, the doctrines of global and objective regimes yet find no persuasive support. Therefore it can be concluded that the only valid exceptions to the *pacta tertiis* rule remain those of treaty acquiring a status of international custom and lawful sanctions on aggressor state.

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<sup>208</sup> For a detailed discussion on why Antarctic Treaty does not create objective regime see Simma B., The Antarctic Treaty as a Treaty providing for an "Objective Regime", *Cornell International Law Journal*, 1986, 19, p. 189.

<sup>209</sup> Waldock H. Third report on the Law of Treaties, (1964), UN Doc. A/CN.4/167 and Add.1-3 in 1964 *Yearbook of the International Law Commission*, Vol. II, p. 185.

<sup>210</sup> See Salerno F. The Relevance of Consent in the Conclusion of Treaties Establishing Objective Regimes. In: *The Law of Treaties Beyond the Vienna Convention*, Cannizzaro E., ed., Oxford: Oxford University Press, 2011, p. 236.

## 2.4. Conclusions

The analysis of this chapter - the emergence of public interest norms, their collision with individual interests of states and finally the allegedly changing role of state consent - points to several conclusions. First and foremost, it is obvious that international law is developing some elements characteristic to public law. General recognition of existence of community interests and application of the so-called public interest norms by international as well as domestic courts are a clear indication of this trend. However, as can be observed from the above discussion, these developments remain rather limited in scope. Although public interest norms are recognized and applied by international courts, there is no evidence of a fundamental shift towards favouring public interests above individualistic interests. As evidenced by such recent cases as *Arrest Warrant (Congo v. Belgium)*, *Jurisdictional Immunities of the State (Germany v. Italy)* as well as by the ECtHR's *Al-Adsani v. The United Kingdom*, when faced with a choice between community interests and individualistic interests of states, international courts still tend to prefer well established, state sovereignty inspired concepts, which manifest the Vattelian international law values, even if the protection of these values comes at a cost of public interests. Partly this tendency, at least as far as the ICJ is concerned, may be explained by the fact that the ICJ without compulsory jurisdiction in essence remains more of an arbitration tribunal rather than a court. As such it has to be most considerate towards its clients – the litigating states. To judge the validity of this proposition one only needs to consider the notable difference in tone between the ICJ's inter-state contentious cases (which firmly tend to prefer sovereignty based rules) and advisory opinions (in which the ICJ feels more inclined to express its communitarian sentiments).

The conclusion as to the role of community interests is somewhat different in the case of certain specialised fields. The EU law and to a lesser extent the ECHR system, provide examples of how the public law paradigm and accordingly community interests may be reconciled with individualistic interests of states. Within the EU law the public law paradigm is effectuated by means of institutionalized infringement proceedings and invocation of state responsibility not only by other states but also by individuals.<sup>211</sup> Likewise, recognition of direct effect of the EU law and individuals as subjects of the legal system<sup>212</sup>, as well as their right to institute judicial review proceedings<sup>213</sup>, are all hallmarks of a legal system that provides avenues for protection of communitarian interests.

Just as public interest norms are employed only as narrowly construed exceptions, similarly, the role of state consent has not really undergone any meaningful transformation in the

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<sup>211</sup> ECJ: case C-479/93 *Andrea Francovich v Italian Republic*. [1995] ECR I-03843.

<sup>212</sup> ECJ: case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1.

<sup>213</sup> ECJ: Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union*. [2002] ECR I-06677.

post-Charter era. Thus attempts to introduce public order notions in international law (whether done by academics, by international courts or by governments) have not resulted in reinvention of the structure of international law, but rather in some modest exceptions to the sovereignty based rules.

Finally, the above discussion indicates that the limited scope of actual developments towards public law paradigm contrasts with developments in legal theory as advocated by international law scholars. In the scholarly discussion on transformation of international law (from sovereignty and bilateralism to a community and multilateralism based system) several key concepts keep surfacing. First and foremost, there is the idea that self-interest driven states have come to realize the need for an international community. Thus even relatively moderate authors like Brownlie have employed concepts such as “system of multilateral public order”<sup>214</sup>. The critics point out that this academic project (to talk about the international community as if it already exists and to talk so persistently that everyone becomes convinced that it does exist) is grounded in nothing but moral aspirations. They say that the downside of inventing legal concepts that are not present in actual state practice is that it blurs the distinction between law and morals, thus diminishing authority of legal rules.<sup>215</sup>

These views certainly have some merit as they caution progressive development of law to be moderate. However, criticism of the shift to multilateralism and the public law paradigm as being an ivory tower academic project redirects attention away from the actuality that ideas of the international community and multilateralism are well present in positive international law. Public interest norms are a clear manifestation of that presence. The increased recognition of interdependence - be it with regard to global environment, economy or security - is the true driving force behind transformation of international law. The academic project is merely to point out the social reality and argue for an appropriate change in law.

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<sup>214</sup> Brownlie I. *Principles of International Law*, 6th ed., Oxford: Oxford University Press, 2003, p. 485.

<sup>215</sup> Petman J. Panglossian Views into the New World Order. 13 *Finnish Yearbook of International Law*, 2002, p. 336; Klabbers J. The Scope of International Law: *erga omnes* obligations and the turn to morality, in Tpmäki M. (ed.), *Liber Amicorum Bengt Broms*, Helsinki, 1999 p. 171.

### **3. HISTORICAL DEVELOPMENT OF PROTECTION OF COMMUNITY INTERESTS IN THE LAW OF STATE RESPONSIBILITY**

After the above overview of the role of community interests in international law generally, we now turn specifically to protection of these interests in the law of international responsibility of states. The enquiry continues the conceptual approach started in the previous chapter – protection of community interests is assessed on the basis of whether the law of state responsibility displays elements characteristic to public law, i.e., the public law paradigm in which responsibility rules provide for a legal relationship not only between the injured state and the state that has performed the breach, but also between the wrongdoing state and the community of states as a whole. This enquiry leads us to question theory foundations of the law of state responsibility - is state responsibility based on approaches characteristic to private law - with invocation of responsibility only by the injured and thus bilateralism as the prevalent mode of relations? Or is it rather based on public law model - where breach results in illegality and the whole community of states in some form or another may pursue invocation of responsibility thereby placing greater emphasis on multilateralism. As will be explored latter on in this chapter, historically state responsibility has been predominantly based on the private law and bilateralism model. As noted by Aust: “[m]ore than any other domain of international law, state responsibility is traditionally characterised by its orientation towards reciprocity and bilateralism.”<sup>216</sup>

This question whether state responsibility is based on private or public law paradigm is not merely of theoretical interest. In practical terms the distinction between private/public law paradigm determines who will be entitled to invoke responsibility. In the private law model it is generally only the injured that may invoke responsibility. This approach is exposed to considerable shortcomings. There may be various reasons for the injured state to be reluctant to invoke responsibility - it may be a weaker state that is dependant on maintaining good relations with a more powerful state; or the injured state may abstain from invoking responsibility due to other reasons of internal or international politics. As a result, the breach of international law may go unchallenged and thereby harm not only the interests of the injured state, but the rule of law in the international community as a whole. On the other hand, the public law paradigm, as explained later on in this chapter, does not consider a breach as an issue exclusively between the injured state and

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<sup>216</sup> Aust H. *Complicity and the Law of State Responsibility*. Cambridge: Cambridge University Press, 2011, p. 13.

the state that has performed the breach. Other states, international organizations (or indeed individuals) may be involved in the response to the unlawful conduct by either directly invoking the responsibility of the wrongdoer or applying other legal mechanisms such as collective countermeasures.

This chapter focuses specifically on the historical development of the public law paradigm in the law of state responsibility. It begins with the origins of the law of state responsibility that can be found in ancient Roman law. It then turns to writings of scholars of 17<sup>th</sup> to 19<sup>th</sup> centuries when natural law inspired multilateralism was gradually ousted by positivism, which tended to see international responsibility of states as a strictly bilateral matter. The chapter then touches upon the re-emergence of the public law paradigm in the early 20<sup>th</sup> century. The second part of the chapter is dedicated to the period from the 1940ties to the present, when the topic was taken up by the International Law Commission.

### **3.1. Historical development prior to the ILC**

#### ***3.1.1. Roman law origins***

The history of the law of international responsibility is rather short - at best we can trace it to writings of Grotius and Vattel. However, the intellectual roots in which state responsibility rules are grounded run considerably further back. The doctrinal origins of these rules may be traced back to Roman law.<sup>217</sup> In particular Roman rules on extra-contractual liability (also known as delictual liability in continental Europe or tort liability in common law countries) and civil law actions such as *restitutio in integrum*<sup>218</sup> have served as analogies for the better part of state responsibility rules. Since these Roman rules seem to belong to the genus of private law, one ought to conclude that it is the private law that has inspired most of the doctrine behind state responsibility rules.<sup>219</sup>

Interestingly however, Roman rules on extra-contractual liability (despite nominally belonging to private law) also display strong public law features. Roman rules on delicts<sup>220</sup> aimed

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<sup>217</sup> For essays exploring links between modern public international law and Roman law see: Kingsbury B., Straumann B. *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Oxford: Oxford University Press, 2010.

<sup>218</sup> In Latin „to return to the previous condition”.

<sup>219</sup> See Sabahi B. *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*. Oxford: Oxford University Press, 2011. p. 13.

<sup>220</sup> As in most primitive legal systems early Roman law (in particular prior to the adoption of the Twelve tablets in 450 BC) relied on vengeance and self-help as the basic means for enforcing rights (and thus invoking the responsibility of the wrongdoer). The customary law provided no strict prescription of the damage that could be inflicted on the wrongdoer. ‘Eye for an eye’ was the basic rule that at once served as reparation to the injured and as a deterrent to prevent future violations. Only in *Lex Aquilia* from 287 BC specific actions were provided for specific types of wrongs. See Mousourakis G. *The Historical and Institutional Context of Roman law*. Surrey: Ashgate, 2003. p. 184.

not only to compensate the injured party, but also to penalise the wrongdoer. Thus in a case of wrongful damage to property,<sup>221</sup> the injured party was entitled to a compensation amounting to the highest value which the damaged property had in last 30 days prior to the occurrence of the damage.<sup>222</sup> From the perspective of modern civil law this rule makes little sense – the wrongdoer has to compensate the entire value of the thing in question regardless of what was the actual damage that the owner suffered.<sup>223</sup> This rule, however, makes perfect sense if we consider that early Roman law made no clear distinction between private and public law. The public law function of deterring wrongful action and insuring observance of law was served by what was essentially a private law claim. As a result, private law claims took up elements that were penal and therefore public in their nature.

A further remarkable feature of Roman law, relevant for tracing intellectual roots of state responsibility doctrines, is that Roman private law in certain cases allowed for *actio popularis* – claims in general interest, where claimant did not have to prove any individual interest in instituting proceedings. For instance, such claims could be brought in cases of damage caused by something being thrown out of or fallen off from a building that has hit and injured another person. As any member of the public could potentially be injured by such conduct, the claim could be brought not only by the injured but by any person.<sup>224</sup>

Another arguably separate source from which state responsibility concepts may have developed are ancient international law rules on treatment of aliens and the associated right of reprisals.<sup>225</sup> This proposition, however, may be challenged, as one may argue that these ancient rules on treatment of aliens and the right to use reprisals<sup>226</sup> also resulted from private law analogies that statesmen first observed in their domestic private law systems, thus leading us back to private law notions as the only origin of modern state responsibility rules. Although reprisals seem to belong squarely to the sphere of international law, the parallels with primitive domestic legal orders

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<sup>221</sup> A specific claim resulting from a wrongful damage to property (*damnum iniuria datum*) appears already in the Twelve tablets which were adopted as early as 450 BC. The tablets included such claims as *actio de pastu* (when somebody's cattle grazed on cultivated land of another person without the owner's consent); or *actio de arboribus succisis* (when somebody cut a tree belonging to another person).

<sup>222</sup> *Lex Aquilia* 287 BC, Chapter 3. For an overview of various interpretations on what the *Lex Aquilia* says on the amount of damages see Borkowski A. *Textbook on Roman Law*, 2nd edition. London: Blackstone Press Limited, 1997, p. 330.

<sup>223</sup> Borkowski A. *Textbook on Roman Law*, 2nd edition. London: Blackstone Press Limited, 1997, p. 325.

<sup>224</sup> See The Digest of Justinian, iv, 3. 5. 13, Sands T. *The Institutes of Justinian*. New Jersey: The Law Book Exchange, 2007, p. 425.

<sup>225</sup> See Spiegel H. Origin and Development of Denial of Justice, *American Journal of International Law* (1938) Vol. 32, p. 63. Sabahi B. *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*. Oxford: Oxford University Press, 2011. p. 8. Also see Bederman D. *International Law in Antiquity*. Cambridge: Cambridge University Press, 2001.

<sup>226</sup> Kelsen H. *Principles of International Law*. New Jersey: The Lawbook Exchange, 2003, (1959 reprint), p. 23.

(like Roman law prior to the *Lex Aquilia* in 287 BC) in which privately enforced “eye for an eye” was the norm, are equally evident. Thus again the enquiry leads one back to domestic private law as the doctrinal origin of state responsibility rules.

### **2.1.2. From Grotius to Anzilotti**

Constructing international responsibility solely in accordance with the private law paradigm has obvious disadvantages (especially if our idea of private law is entirely void of public law elements such as those present in Roman law). First and foremost, the private law paradigm is primarily concerned with the interests of the injured. The protection of legality (or the rule of law in the broadest sense of the term) is not the objective of private law. For the private law paradigm protection of the rule of law is at best a by-product of protection of individual interest. In developed domestic legal systems this limitation of private law is not a problem since there is also public law to guard the public interest. This, however, (both historically and now) has not been so for international law. The same private law responsibility mechanisms have to secure both the interests of the injured and the public interest of observance of the rule of law. Unsurprisingly, without mechanisms, which are specifically designed to protect public interests, these interests have remained largely unprotected.

International lawyers as early as Grotius, being aware of this gap in protection of public interests, were endeavouring to argue for a right to bring claims for protection of public interest. Thus Grotius in 1646 wrote in his “On the Law of War and Peace”:

“[K]ings and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly effect them, but excessively violate the law of nature or of nations in regard to any persons whatsoever.”<sup>227</sup>

By the right of other subjects of international law to “demand punishments” of the wrongdoer even when they are not themselves injured, Grotius seems to endorse the public law paradigm and multilateralism as indispensable parts of international law. However, in the following centuries natural law inspired multilateralism advocated by Grotius gradually gave way to strict bilateralism, supported by positivist legal thinkers.

The first great scholar to embrace strictly bilateral (and thus also a private law oriented) conception of state responsibility was Vattel. Writing about a hundred years after Grotius in 1758 he argued strongly against the practice of reprisals for protection of third country nationals. For

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<sup>227</sup> See Grotius H. *De Jure Belli ac Pacis*, Oxford: Oxford University Press, 1925, Book II, Vol. II Chapter 20, sec. 40, p. 503.

Vattel any state that engaged in such reprisals was assuming a role of a judge in relations between another sovereign state and a third country nationals – a right that it was not entitled to claim.<sup>228</sup> Vattel's views (most likely motivated by the fact that the right to reprisals was often abused) fitted nicely with positivist notions of unlimited sovereignty that became predominant in 19<sup>th</sup> century. According to the prevailing opinion of the time, state responsibility was strictly a matter between the injured state and the state that had committed the breach.<sup>229</sup>

The most notable proponent of bilateralist paradigm of 19<sup>th</sup> century was Italian Dionisio Anzilotti. According to Anzilotti international responsibility of a state may result only from a violation of a subjective right of another state (and not from a violation of a general interest of the community of states). Thus for Anzilotti the core of state responsibility is the right of the injured state to claim reparation. Any other relationship between the wrongdoer and the whole community of states was “unknown to international law and repugnant to it”<sup>230</sup>. To understand why Anzilotti was so insistent on cropping the potential for enforcement of state responsibility one must remember that 19<sup>th</sup> century legal thought was cantered around positivism and state sovereignty. For a legal positivist a system which provided for rights, but had no meaningful mechanism to enforce them was not real law. So to make international law a “real” law, Anzilotti discarded all the elements of state responsibility doctrine which were controversial (such as reprisals in general interest). Likewise, adherence to state sovereignty required that explicit state consent be recognized as the only source of legal obligations. Therefore multilateralist public law concepts such as claims in general interest in the law of state responsibility had to be left out as states usually protested whenever states other than the injured state attempted to refer to the vocabulary of state responsibility.

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<sup>228</sup> Vattel E. *Le droit des gens ou principes de la loi naturelle*, Vol. 1, 1758. para. 348, Washington: Carnegie Institution of Washington, 1916.

<sup>229</sup> Anzilotti D. *Cours de droit international, Premier volume*, Paris, Sirey, 1929, p. 468. The public order based multilateralist view, however, had its adherents also in the 19<sup>th</sup> century. For instance Hall writes in 1895: “International law being unprovided with the support of an organized authority, the work of police must be done by such members of the community of nations as are able to perform it.” Hall W. *A Treatise on International Law*, 2nd ed. Oxford: Clarendon Press, 1884, p. 54.

Other authors who supported the bilateralist perspective on state responsibility include: de Martens F. *Traite de droit international*, translated by Leo A. Paris, Marescquaine, 1883, Vol. 1, p. 562. Heffter A. *Le droit international public de l'Europe, 3rd ed.*, translated by Bergson J. Berlin: Schroeder, 1857, p. 204.

<sup>230</sup> Anzilotti D. *Cours de droit international, Premier volume*, Paris, Sirey, 1929, p. 468. Curiously, Anzilotti and other positivists, although proclaiming bilateralism as the only valid mode for invocation of state responsibility, at the same time were zealous opponents against the use of private law analogies in international law, see Lauterpacht H. *Private Law Sources and Analogies of International Law*. London: Longman Publishing, 1927, p. 7.



### 2.1.3. Re-emergence of the public law paradigm

Despite prevalence of the bilateralist approach, the public law paradigm did not entirely disappear from the debate even in the 19<sup>th</sup> century.<sup>231</sup> By early 20<sup>th</sup> century there were prominent lawyers who attempted to advocate introduction of public law elements into the law of international responsibility. Thus in 1915 Elihu Root wrote:

“Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. [...] International law violated with impunity must soon cease to exist and every state has a direct interest in preventing those violations which if permitted to continue would destroy the law. [...] There must be a change in theory, and violations of the law of such character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation.”<sup>232</sup>

Also other American authors took on a visionary outlook spurred perhaps by the ongoing raging of the First World War in Europe. Thus Peaslee notes in 1916:

“[I]t seems probable from present indications and the natural necessities of the situation that international law will ultimately provide for some method of central control over acts of nations of a quasi-criminal nature, and that individual nations will find it to their mutual interest to surrender some of what are at present deemed their sovereign rights, in the interest of the welfare and order of the community of nations. [...] The tendency will be to delegate the duties both of enforcing civil rights and of controlling quasi-criminal acts to authorized officials and to preserve “self-help” so far and only as it proves an orderly auxiliary.”<sup>233</sup>

From these passages it becomes clear that some international lawyers in early 20<sup>th</sup> century unequivocally called for introduction of public law elements into the law of international responsibility. This in principle was nothing new – as already noted, Grotius did much the same. What was different this time was that the theory on state responsibility had by then considerably

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<sup>231</sup> In 1872 influential Swiss lawyer Bluntschli notes: „Wenn die Verletzung des Völkerrechts gemeingefährlich ist, so ist nicht allein der verletzte Staat, sondern es sind die übrigen Staaten, welche das Völkerrecht zu schützen die Macht haben, veranlasst, dagegen zu wirken und für die Herstellung und Sicherung der Rechtsordnung einzustehen.” See Bluntschli J. *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, Nordlingen, Beck, 1872, p. 259.

<sup>232</sup> Root E. The Outlook for International Law, *American Journal of International Law*, 1916, Vol. 10, No.1, p. 7.

<sup>233</sup> Peaslee A. The Sanction of International Law, *American Journal of International Law*, 1916, Vol. 10, No. 2, p. 335. Also Jessup suggests that breaches against peace of international community must be treated as a ‘violation of the right of every nation’ and that accordingly all states are affected by such a breach, see Jessup P. *A Modern Law of Nations: An Introduction*, New York: Macmillan, 1948, p. 11.

evolved. Interestingly this evolution was mainly due to the technical brilliance and attention to detail of positivist scholars such as Anzilotti, who added considerable refinement to the structures of the doctrine. This refinement of theory allowed lawyers like Root and Peaslee to argue subtler points, such as distinction in modality of invocation (invocation by the injured state or by states other than the injured) on the basis of the content of obligation (that every state must be regarded as injured if the obligation breached threatens peace and order of the international community). Also the tragedy of the war made it easier to challenge the orthodoxy of the established doctrine (a trend that may also be observed during and after the Second World War). Thus even ideas as “radical” Peaslee’s suggestion to institutionalize enforcement of responsibility could be brought to the table and given serious consideration.

After the First World War the natural law inspired multilateralist views of the international community were gaining ground. A prime example of this trend was the 1919 Versailles Treaty and its Covenant of the League of Nations.<sup>234</sup> Article 11 of the Covenant declared any war or threat of war to be a concern to the whole League and that the League “shall take any action that may be deemed wise and effectual to safeguard the peace of nations”<sup>235</sup>. It would be a vast exaggeration to claim that by this frail (and as it turned out, rather ineffective) mechanism states had given up Anzilotti’s conception of state responsibility as a strictly bilateral matter. As fascinating as this development was, it belonged to a treaty rather than to general international law. Thus in practical terms it did little to oust breach of subjective rights as the only valid ground for invocation of responsibility. However, what this development did was to signal an emergence of alternative outlook of how interstate relations could be organized – an outlook that was premised on multilateralism rather than strict adherence to the private law paradigm.

A further example of this multilateralist outlook was the 1924 Geneva Protocol for the Pacific Settlement of International Disputes<sup>236</sup>. Its preamble stated that war of aggression constitutes an international crime which violates solidarity of the members of the international community. Although the Protocol never entered into force, reference to state crime is of marked importance as the concept of crime arguably implies existence of public order and some form of accountability before community as a whole.

The same trend manifested also in theory which started to move away from a strictly bilateral subjective-rights attitudes and began to place more emphasis on the objective character of international law. These were no longer lone voices, but rather leading figures of the scholarship. These trends, however, were not followed by a fundamental shift of state responsibility paradigm

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<sup>234</sup> Covenant of the League of Nations, 29 April 1919, Paris, [1919] UKTS 4.

<sup>235</sup> Article 11 of the Covenant of the League of Nations, 29 April 1919, Paris, [1919] UKTS 4.

<sup>236</sup> League of Nations, Protocol for the Pacific Settlement of International Disputes, 2 October 1924, available at: <http://www.refworld.org/docid/40421a204.html> [viewed 16 March 2014].

from private law and subjective rights conception to public law and illegality in which a breach would create a legal relationship between the wrongdoer and community as a whole. Although a rather optimistic time for international law (as international lawyers in an atmosphere of great expectations were preparing for 1930 Hague codification conference) the impetus for conceptual rethink of state responsibility rules was still too weak.

Attitudes, however, began to change by 1930s with Hersch Lauterpacht challenging the commonly-held positivist view that states (being sovereign) may not be subject to punishment. In two of his seminal works - the 1927 "*Private Law Sources and Analogies of International Law*" (which was a version of his 1925 doctoral thesis) and in the 1933 "*The Function of Law in the International Community*" Lauterpacht strongly criticized sovereignist and positivist conceptions of international law. The essential thesis of Lauterpacht was that international law (although with some temporary deficiencies) is just like any other law. As such international law must be a "complete system" based on a logically consistent theory. Unlimited sovereignty and positivism, according to Lauterpacht, lack this consistency. Lauterpacht asks - if will of the state is the ultimate source of law, then what is the source of the rule proclaiming this supremacy of state's will? To avoid being caught up in endlessly circular argument, one must assume that some fundamental norm (such as *pacta sunt servanda*) is based in something other than the will of the state.<sup>237</sup>

Lauterpacht refers to many instances where international law is based on domestic law analogies. Acquisition of territory by states, for instance, is based on rules much the same as those for acquiring private property in domestic legal systems.<sup>238</sup> Treaties are governed by rules that are very similar to rules governing private contracts.<sup>239</sup> Rules on responsibility (domestic responsibility for delicts and state responsibility in international law) share the same basic structures (for example, preconditions of responsibility are: breach of an obligation, damage and causal link between the breach and the damage, as well as justifications such as *force majeure*). Thus Lauterpacht argued that analogy is an indispensable part of any complete system of law, including international law. This in turn requires that analogies between domestic and international law must be extended also to modes of responsibility that states may incur.<sup>240</sup> For him to limit state responsibility only to a duty of reparation between the wrongdoer and the injured and to deny a criminal law type of consequence would be illogical, unjust and contrary to existing practice.<sup>241</sup> Thus Lauterpacht perceived state responsibility also in terms of multilateral obligations between the wrongdoer and

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<sup>237</sup> Lauterpacht H. *The Function of Law in the International Community*. Oxford: Oxford University Press, 2011, p. 416.

<sup>238</sup> Lauterpacht H. *Private Law Sources and Analogies of International Law*. London: Longman Publishing, 1927, pp. 91-104.

<sup>239</sup> *Ibid.*, p. 155-202.

<sup>240</sup> Lauterpacht H. *Règles générales du droit de la paix*, 62 *Recueil des Cours* (1937-IV) pp. 391-397.

<sup>241</sup> Lauterpacht H. *ibid.*, p. 99.

the international community. Lauterpacht's scholarly brilliance as well as his visionary outlook on development of international law left a lasting impression on legal thinking of the 20<sup>th</sup> century and indeed his writings remain among some of the most cited sources even up to the present day. His influence has been particularly notable in the work of the International Law Commission, as the Commission played a key role in the development of rules on protection of community interests in the law of international responsibility.

### **3.2. The Public law paradigm in the ILC's work on international responsibility.**

The story of the ILC begins with a rather upbeat note.<sup>242</sup> International lawyer in late 1940s is a sort of a hero on the ruins of the Second World War. It's the international lawyer who brings to justice both Nazi and Japanese war criminals (better some than none at all); and it's the international lawyer who proposes a new system for managing the world's nations with a promise of human rights, dignity and "equal rights of men and women and of nations large and small"<sup>243</sup>. Natural law is no longer a bad word, whereas positivism and unlimited sovereignty of states are on a defence. In this climate some of the most highly regarded international lawyers like Hersh Lauterpacht are blunt radicals (judging by today's standards) seriously proposing the creation of world government with powers of international legislation.<sup>244</sup> Indeed, late 1940s were a remarkable time for international law.

#### **3.2.1. The work of Garcia Amador**

It is in this atmosphere that the ILC started its work on international responsibility of states. By 1949 when the topic was formally selected for codification<sup>245</sup>, it already had a considerable background.<sup>246</sup> However as noted by Ago due to "exceptional difficulties inherent in the subject, the

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<sup>242</sup> The ILC was created by the UN General Assembly in 1947 with the objective of 'promotion of the progressive development of international law and its codification', see UN General Assembly Resolution 174(II) adopted on November 21, 1947, U.N. Doc. A/519.

<sup>243</sup> Preamble to the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>244</sup> See Koskenniemi M. Hersh Lauterpacht (1897-1960). In: *Jurists Uprooted: German-Speaking Emigre Lawyers in Twentieth-Century Britain*, Beatson J. et al. (eds.), Oxford: Oxford University Press, 2004, p. 601.

<sup>245</sup> ILC Report to the General Assembly on the Work of the First Session, UN Doc. A/925, *Yearbook of the International Law Commission*, 1949, p. 227. Available: <http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm> [viewed June 26, 2014].

<sup>246</sup> Attempts to codify law of state responsibility were made as early as 1889 by the International Conference of American States. Also various private bodies (American Institute of International Law in 1925, International Law Association of Japan in 1926, Institute of International Law in 1927, Harvard Law School in 1929, German International Law Society in 1930) as well as League of Nations and the 1930 Hague Conference all had attempted to make some sense of the topic; for a detailed discussion see: Ago R., First Report on State Responsibility, UN Doc.

uncertainties with which it has always been fraught, and the divergences of opinion and interests in the matter, previous codification efforts have not proved successful, their resumption having been postponed until a more propitious moment.”<sup>247</sup> In 1955 a Cuban member of the ILC – Garcia Amador was appointed as the first special rapporteur on state responsibility and the ILC actually began its work on the topic.

Amador’s first report was as brave as radical.<sup>248</sup> He starts by expounding his views on what it is that the ILC is called upon to do.<sup>249</sup> Amador makes an argument that with the Second World War international law has undergone a profound transformation and in these new circumstances ILC’s task is not merely to compile outdated rules and doctrines. He seems to suggest that the task of the ILC is to propose rules that are suitable to the changing paradigm of international society. In other words, its purpose is to propose rules not as they were (or are) but rather as they ought to be.

Several of his groundbreaking proposals must be mentioned. Firstly, he envisaged that the duty to make reparation is by far not the only consequence of a breach. Responsibility would also entail criminal law type consequences of sanctions or punishment.<sup>250</sup> Secondly, invocation of responsibility would not depend only on states; also individuals would be entitled to make international claims.<sup>251</sup> Thirdly, the rules to be codified and developed would concern only responsibility of states for damage caused to the person or property aliens.<sup>252</sup> It would provide not only for principles governing the law of responsibility (attribution, invocation, etc.), but would also codify substantive obligations of states.<sup>253</sup>

Unsurprisingly Amador’s proposals were met with harsh criticism. States as well as fellow ILC members were not keen on the idea that individuals would be recognized as subjects of international law entitled to bring international claims.<sup>254</sup> There was scepticism about Amador’s

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A/CN.4/217, *Yearbook of the International Law Commission*, 1969, p. 225. Available: <http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm> [viewed June 26, 2014].

<sup>247</sup> Ibid., p. 126.

<sup>248</sup> Amador G. Report on State Responsibility, UN Doc. A/CN.4/96, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 173. Available: <http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm> [viewed June 26, 2014].

<sup>249</sup> Amador refers to writings of Jessup noting ‘the growing tendency to accept the individual as a subject of international rights and obligations, and the increasing acknowledgement of a community interest in breaches of the law’ see Jessup P, Responsibility of States for Injuries to Individuals, *Columbia Law Review*, Vol. XLVI (November, 1946), p. 904.

<sup>250</sup> Amador, *supra* 248, p. 182.

<sup>251</sup> Diplomatic protection was to have only a subsidiary role, see Amador *supra* 248, p. 197 and 215.

<sup>252</sup> Thus the project as envisaged by Amador would have a rather specific scope – it would be centred on the protection of human rights and fundamental freedoms of individuals and in particular foreigners who find themselves wronged in a foreign country. See Amador, *supra* 248, p. 199.

<sup>253</sup> Ibid.

<sup>254</sup> *Yearbook of the International Law Commission*, 1956, Vol. I, p. 228-251. Available: <http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm> [viewed June 26, 2014].

insistence that state responsibility would result specifically from breaches of fundamental human rights.<sup>255</sup> Also Amador's approach to limit the project to responsibility for injuries caused to foreigners was controversial as socialist states saw it as part of a capitalist agenda.<sup>256</sup> Many were unhappy that the project did not deal with responsibility in a way that would include breaches of other areas of international law, such as law of treaties. After the initial feedback, the special rapporteur softened his stance considerably.<sup>257</sup> However, his proposals were still considered to be radical and beyond the ILC's mandate. The Commission opted to ignore Amador's subsequent reports on a pretext that it was busy with other issues.<sup>258</sup>

### ***3.2.2. Roberto Ago and an attempted shift to public order***

In 1963 when Amador's membership of the ILC ended Roberto Ago of Italy was appointed as special rapporteur on state responsibility. There were several lessons that he could learn from Amador's experience. The ILC was not a forum to discuss reinvention of international law based on public law model. It was clear that the predominant view on what the ILC is supposed to do under its mandate to "progressively develop" international law was considerably narrower than what Amador had attempted. It was also clear that to succeed with the project it was necessary to stay away from issues which were perceived as being markedly in the interests of either one of the cold war blocks. Given the highly unsympathetic welcome that Amador's ideas had received, Ago opted to start from a clean slate.

Ago presented his first report to the ILC in 1969.<sup>259</sup> He devised two skilful solutions to the problems that had stalled Amador's progress. First, he proposed that the ILC would deal only with "the general rules governing the international responsibility of states."<sup>260</sup> Ago labelled these as secondary rules - rules that provide for general conditions under which the state is considered responsible and legal consequences which flow from responsibility. Thus Ago steered away from having to deal with substantive international obligations – the primary rules, which were bound to be notoriously hard to agree on. The advantage of secondary rules is that they are wonderfully

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<sup>255</sup> In 1956 human rights treaties were far from universally proliferated; constructing state responsibility on the basis of human rights would attempt to bring human rights into general international law through the back door.

<sup>256</sup> Nationals of capitalist countries were investing and travelling far and wide and therefore capitalist countries were keenly interested in protecting their nationals and their economic interests.

<sup>257</sup> Amador G. Second Report by F. V. Garcia, Yearbook of the International Law Commission, 1957, Vol. II, p. 104.

<sup>258</sup> International Law Commission, Report of the Commission to the General Assembly, A/7610/REV.1, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 229.

<sup>259</sup> Ago R. Special Rapporteur, First report on State responsibility, A/CN.4/217 and Add.1, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 125.

<sup>260</sup> *Ibid.*, p. 139.

neutral (for the most part). They would apply to any breach of international law, whatever the content of a particular obligation. Thus the ILC would avoid proposing rules that would be markedly in favour of any of the cold war antagonists.

The second skilful solution of Ago was the idea that injury is not a requirement of responsibility. In other words the responsibility would be objective – it is not necessary that any particular state suffers some detriment for the wrongdoer to incur responsibility. The very fact of breach is considered detrimental to the system of international law and therefore results in responsibility. The consequence of giving up injury as a requirement of responsibility is that the wrongdoer incurs responsibility (with resulting duty of continued performance, cessation, non-repetition and reparation) even if no state has invoked it. This small nuance is of great significance for the public law paradigm, as it shifts (at least conceptually) the law of international responsibility from a bilateral relation between the wrongdoer and the wronged towards a system based on public order.<sup>261</sup>

The skilfulness of Ago was that he managed to introduce this fundamental paradigm shift in a way that hardly anyone minded. There were no objections from the ILC members and only France and Argentina voiced some objections.<sup>262</sup> It is possible that governments perceived the question as a doctrinal detail – hardly anything that could threaten national (or government) interests, something that officials tend to protect vigorously. Had Ago come out in his report announcing a new dawn for international society and calling on states to embrace public order, it is likely that the response would have been similar to that which was given to his predecessor. Ago clearly was mindful of how important perceptions are.

Introduction of public order into international law was not attempted solely by Ago. As already elaborated earlier, International lawyers as early as Grotius were endeavouring to do this.<sup>263</sup> However, with the creation of the ILC, the international legal system obtained an influential specialized institution, which rather frankly pursued an agenda of introducing public law fundamentals into the law of state responsibility. Lauterpacht, being the ILC's special rapporteur on

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<sup>261</sup> See Nollkaemper A. Constitutionalization and the Unity of the Law of International Responsibility. *Indiana Journal of Global Legal Studies* Vol. 16, 2 (Summer 2009), p. 546. Nollkaemper points out that this approach: “may redress one of the largest weaknesses of the traditional law of international responsibility [...]: the fact that the absence of invocation (for political or other reasons) rendered the law of responsibility non-operational regarding acts that upset the international legal order”.

<sup>262</sup> France, fully aware of implications of giving up injury as a precondition of responsibility, noted that ‘draft article 1 is not acceptable because it reflects the intention to set up a kind of “international public order” and to defend objective legality, instead of safeguarding the subjective rights of the State, which we see as the purpose of international responsibility’, see ILC, ‘Comments and Observations Received from Governments’, A/CN.4/488, available: <http://untreaty.un.org/ilc/sessions/50/50docs.htm> [viewed June 26, 2014].

<sup>263</sup> Grotius H. *De Jure Belli ac Pacis*, Oxford: Oxford University press, 1925, Book II, Vol. II Chapter 20, sec. 40, p. 503.

the law of treaties, proposed that a treaty be void if it violates “such overriding principles of international law which may be regarded as constituting principles of international public policy”<sup>264</sup>. These overriding principles were later labelled as *jus cogens* and were retained by subsequent law of treaties rapporteurs Fitzmaurice<sup>265</sup> and Waldock<sup>266</sup> and eventually found their way into Vienna Convention on the Law of Treaties. As Spinedi notes “the same people were dealing with codification of the law of treaties and of state responsibility”<sup>267</sup>. Hence the proposal to give up injury as a precondition of responsibility and thus to perceive responsibility in terms of multilateral obligations was part of a larger attempt by the ILC to introduce public law notions into international law. Given that sovereignist views were generally prevailing prior to the Second World War, these proposals indeed may be regarded as progressive development of international law.

However, discarding injury as a condition of responsibility was not the only idea that signalled a shift to public law elements. Likewise, Ago proposed to introduce the notion of international crimes of state.<sup>268</sup> This no longer was perceived as a nitty-gritty doctrinal issue. This type of strong language was bound to alarm governments. And it did. The ILC subsequently conceded to disapproving positions of states and the term “crime” disappeared from the Articles on State Responsibility. It did however retain the notion that there are breaches which concern the whole international community. The ILC dropped the strong language – instead of international crimes, this category was labelled as serious breaches. And more importantly, nearly all practically relevant consequences that would distinguish serious breaches from all other breaches were removed (with the exception of Article 48 providing for invocation of responsibility by a state other than an injured state and vague obligations of Article 41<sup>269</sup>). Considering the fact that the 2001 Articles on State Responsibility were adopted more than 30 years since *jus cogens* entered the mainstream of international legal thought, the ILC may not, in terms of developing the law, claim any great success on this issue.

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<sup>264</sup> Lauterpacht H., Special Rapporteur, A/CN.4/63, *Yearbook of the International Law Commission*, 1953, Vol. II, p. 154.

<sup>265</sup> Fitzmaurice G. Special Rapporteur, Third report on law of treaties, A/CN.4/115, *Yearbook of the International Law Commission*, 1958, Vol. II, p. 20.

<sup>266</sup> Waldock H. Special Rapporteur, Second report on the law of treaties, A/CN.4/156 and Add.1-3, *Yearbook of the International Law Commission*, 1963, Vol. II, p. 36.

<sup>267</sup> Spinedi M. From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Law of Treaties and the Law of State Responsibility. *European Journal of International Law*, 2002, Vol. 13, No.5, p. 1100.

<sup>268</sup> See Weiler J. et al. (eds.) *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Berlin: De Gruyter, 1989.

<sup>269</sup> Paulus A. Jus Cogens in a Time of Hegemony and Fragmentation, *Nordic Journal of International Law* Vol. 74, 2005, p. 315.



The conceptual foundations laid by Ago were retained by subsequent rapporteurs - Riphagen (1980-1986), Arangio-Ruiz (1986-1996) and Crawford (1997-2001) and eventually also found their way also into Draft Articles on the Responsibility of International Organizations (ARIO)<sup>270</sup>. These rapporteurs did however come up with novelties of their own that could be regarded as progressive development. In particular Arangio-Ruiz proposed mandatory conciliation procedures for all disputes involving state responsibility as well as mandatory arbitration for disputes involving countermeasures.<sup>271</sup> States generally disapproved of these ideas and they were dropped. Crawford, whose foremost achievement is that he managed to persuade everyone to agree at least on something, also must be credited with rescuing (at least partially) the distinction between delicts and crimes (now termed serious breaches of peremptory norms). Also he somewhat salvaged the right to claim responsibility for protection of public interest - what is currently Article 48 in the Articles on State Responsibility allows invocation of responsibility by a state other than the injured state, if the obligation breached is owed to the international community as a whole.

### ***3.2.3. The function of the ILC - is it supposed to promote the public law paradigm?***

After examining the historical accomplishments of the ILC in the field, let us now turn to more theoretical considerations and in light of the foregoing discussion enquire: what is the proper function of the ILC? The obvious answer seems to be “the progressive development and codification of international law”. But what does it really mean? Has the ILC progressively developed and codified law of international responsibility? An explanation of the meaning of these terms may be found in Article 15 of the ILC’s Statute.<sup>272</sup> Although the conceptual difference between codification and progressive development appears obvious, scholars and in particular ILC members have maintained that in practice the two are hard to separate.<sup>273</sup> In 1947 Jennings concludes that “codification properly conceived is itself a method for the progressive development

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<sup>270</sup> International Law Commission, Draft Articles on the Responsibility of International Organizations, adopted at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 87). *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two.

<sup>271</sup> Arangio-Ruiz G. Special Rapporteur, Fifth report on state responsibility , A/CN.4/453 and Add.1-3, *Yearbook of the International Law Commission*, 1993, Vol. II, p. 1.

<sup>272</sup> Statute of the International Law Commission, Art.15: ‘In the following articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine’.

<sup>273</sup> Brigs H. *The International Law Commission*. Ithaca: Cornell University Press, 1965, p. 129; Liang Y. The General Assembly and the Progressive Development and Codification of International Law, *American Journal of International Law*, Vol. 42, 1948, p. 66.

of the law.”<sup>274</sup> Current day ILC members seem to conceive the matter along the same lines. Pellet notes that all topics imply an aspect of progressive development, since customary rules always comprise some elements of uncertainty.<sup>275</sup> He concludes that: “pure codification constantly interferes with progressive development; there is certainly no clear threshold.”<sup>276</sup>

Having concluded that distinction between “progressive development” and “codification” is hard (and perhaps not even necessary) to draw, we come back to the initial question of the ILC’s function. In particular, regardless whether we call it progressive development or codification, is the ILC supposed to develop new law at all and to promote the public law paradigm? Here opinions differ starkly. For Jennings codification “does not necessarily imply a process which leaves the main substance of the law unchanged.”<sup>277</sup> Similarly, when describing the task of a drafter of a multilateral treaty (which is the task of the ILC) he concludes that “existing customary law [...] falls into its proper place as valuable raw material for the construction of his [drafter’s] edifice; but he need not regard his draft as being necessarily a statement of what the law is, but can and should regard it as a statement of what the law ought to be.”<sup>278</sup> Likewise, as we saw earlier, creation of new law was very much something that Garcia Amador in his capacity as a special rapporteur had in mind.<sup>279</sup> Similarly, the whole push by the ILC to introduce public order ideas, such as *jus cogens*, international crimes and obligations *erga omnes* all border closely with the creation of new law.<sup>280</sup>

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<sup>274</sup> Jennings R. The Progressive Development of International Law and Its Codification, 24 *British Yearbook of International Law* (1947), p. 301.

<sup>275</sup> Pellet A. Between Codification and Progressive Development of the Law: Some Reflections from the ILC, *International law forum* 6(1) Leiden, 2004, p. 16. Jennings makes a similar observation: ‘After being reduced to written form the rule is almost bound to take on a rather different colour. The change of source from custom to treaty may seem to be purely formal and adjectival, but it has inevitable repercussions on substance’ see Jennings R. *supra* 274, p. 305.

<sup>276</sup> *Ibid.*

<sup>277</sup> Jennings R. The Progressive Development of International Law and Its Codification, 24 *British Yearbook of International Law* (1947), p. 301.

<sup>278</sup> Similarly Rosenne notes with regard to the early years of the General Assembly that it ‘was to take in hand the complete refashioning of the classic notions of customary international law with the general objective of making the law more effective as an instrument for assisting in the maintenance of international peace’. See Rosenne S. The Role of the International Law Commission, 64 *American Society of International Law Procedure* 1970, p. 26.

<sup>279</sup> Amador notes: ‘A pure or strict codification of the legal principles which have traditionally governed the various cases of responsibility would not accomplish at all satisfactorily what is invariably the object of a request for codification’, see Amador *supra* 248, p. 176.

<sup>280</sup> Consider the opinion of Lauterpacht, who states that ‘whenever the absence of an agreed rule is due to a divergence of interest, the function of codification is, in a distant sense, no less political than that of legislation generally’ see Lauterpacht H. Codification and Development of International Law. In: *International Law, Collected Papers*, 2. *The Law of Peace*, Elihu Laurepacht ed., Cambridge: Cambridge University Press, 1975, p. 280.

Modern opinions take a rather different outlook. For instance, Pellet is most critical about “utopian”, “unrealistic”, “moralist” and “absurd” approach to progressive development, which in his opinion, although intellectually attractive is practically impossible.<sup>281</sup> For Pellet the ILC:

“cannot change the whole system of the law of nations. Its duty is to try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic. [...]. Commission is (or should be) concerned with collecting and analysing precedents [...] and doctrinal views, assembling them with a view to ascertaining evidence of practice generally accepted as being the law and to deduce the existence of new trends, and elaborating drafts with concern for reasonableness, consistency and acceptability”.<sup>282</sup>

Whatever it may be that Pellet perceives as reasonable, the interesting point is that his opinion comes remarkably close to what Jennings in 1947 referred to as “narrow or pessimistic” school of thought, which would “confine the art of codification” to restating existing rules of customary law.<sup>283</sup> Tomuschat, along somewhat similar lines as Pellet, observes the fact that “states accept only balanced solutions which reflect the practices as they are observed in day-to-day transactions” and emphasizes that the ILC’s texts must be such that states would find them acceptable.<sup>284</sup> One can not help but to remember Lauterpacht’s reflection that one of the main problems of international law is the low level of ambition in the doctrine.<sup>285</sup>

However, lack of ambition of ILC members is hardly the reason for the decline in *progressiveness* of the ILC. As we saw earlier, all of the special rapporteurs on state responsibility (including those after Ago) at least to some extent made genuine attempts to develop the law. Likewise, the doctrine, although generally considerably more conservative now than in 1940s to 1960s, has proposed new ideas.<sup>286</sup> The real reasons behind the change of heart in the ILC lie rather

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<sup>281</sup> Pellet A. Between Codification and Progressive Development of the Law: Some Reflections from the ILC, *International law forum* 6(1) Leiden, 2004, p. 17.

<sup>282</sup> *Ibid.*

<sup>283</sup> See Jennings R. *supra* 274, p. 304; The scholars of this strand held that codification essentially means writing down of existing rules of law. In their view codification may include some changes to the existing law, but only if these are minor and insignificant. see Baker P. Codification of International Law. In: *British Yearbook of International Law* (1924), 5, p. 38.

<sup>284</sup> Tomuschat C. The International Law Commission – An Outdated Institution? *German Yearbook of International Law*, 2006, Vol. 49, p. 77.

<sup>285</sup> Lauterpacht H. Spinoza and International Law. *British Yearbook of International Law* (1927) 8, p. 89.

<sup>286</sup> Consider: Allott P. State Responsibility and the Unmaking of International Law, Vol.29 *Harvard International Law Journal*, 1988, p. 1; Koskenniemi M. Solidarity Measures: State Responsibility as a New International Order? *British Yearbook of International Law*, 2002, Vol. 2, 1, p. 337; Nollkaemper A. Constitutionalization and the Unity of the Law of International Responsibility. *Indiana Journal of Global Legal Studies* Vol. 16, 2 (Summer 2009), p. 535.

in the wider developments of the international community that have taken place in the second half of the 20<sup>th</sup> century and especially after 1990s.

To understand what is the proper function of the ILC and what it ought to be in future, one needs to enquire what are these wider developments in international community. To say that the ILC should have more progressive development is a statement that may be disconnected from the reality of actual needs; a statement which assumes that more international law is good and necessary in itself.<sup>287</sup> It may be more appropriate to ask what is the useful purpose that the ILC can serve under present conditions? A purpose that is adequate to what is actually happening.

In the early days of the United Nations there was a broad agreement that general rules need to be codified and perhaps new ones developed. During and after decolonization there was another practical necessity - to create confidence in newly independent countries that international law (in the development of which they had no part) is not merely a tool of ex-colonial powers. There was an obvious need to have the new states to sign up to the codifying treaties, or else, it was feared the very fabric of international law would have undergone an unpredictable transformation.

These necessities are no longer relevant. Much of the general international law is already codified. Newly established countries have (although reluctantly) embraced the system. The initial work plan of the ILC is largely accomplished.<sup>288</sup> However, there are new winds blowing that may provide the ILC an opportunity to prove its worth. As Koskenniemi has pointed out, international law is experiencing certain trends, such as deformalization, fragmentation and empire.<sup>289</sup> In the world of deformalization of international law, which in essence means prevalence of procedural standards, soft law and non-compliance procedures over strict binding rules and legal dispute settlement, the ILC in its present form (being a specialist in formulating legal rules) would find itself mostly out of work. In the world of fragmentation of international law the general international law expert would be equally redundant. Finally, for the empire (which tends to hold its views as an uncontestable truth) law has value only to the extent that it serves the empire's purpose. In the world where the empire's hegemony is not absolute and where law serves common rather than the empire's purpose, the empire often disregards such law altogether (US "war on terrorism"

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<sup>287</sup> Koskenniemi M. International Legislation Today: Limits and Possibilities, *Wisconsin International Law Journal* 2005, Vol. 23 No.1, p. 64.

<sup>288</sup> International Law Commission, *The Work of the International Law Commission, 7th ed.*, 2007, UN Publications No. E.07.V.9), see Analytical Guide to the Work of the International Law Commission, Available: <http://www.un.org/law/ilc/index.htm> [viewed June 26, 2014].

<sup>289</sup> Koskenniemi M. International Legislation Today: Limits and Possibilities, *Wisconsin International Law Journal* 2005, Vol. 23 No.1, p. 78.

being an example)<sup>290</sup>. Thus empire has little need for the ILC, unless it can have the ILC working exclusively for the empire.

Another important trend manifesting in international law is that of constitutionalization.<sup>291</sup> This implies a gradual emergence of public order of some sort as well as organization of political activity and workable means to enforce the law.<sup>292</sup> This seems a true realm of general international law – precisely what the ILC is good at. However, the peculiarity of constitutionalization as it is manifesting presently is that it is not taking a form of one grand constitutional treaty (a kind of new charter of international society), but rather it is happening through developments in specific fields of international law, like human rights and trade law. Thus constitutionalization circumvents general international law, again leaving the ILC on the periphery of new developments.

If the ILC is to play a meaningful role it must adopt to the conditions that it finds itself in. The fundamental need for the development of international law advocated by Lauterpacht in order for the international society to come out of its present “presocietal” phase (with its basic misconception that states rather than peoples of the world are the true subjects of international law)<sup>293</sup> is as relevant as ever. At the same time it is also obvious that states have very little appetite for binding general international law treaties (deformalization and fragmentation at work) that could further this high-minded objective.<sup>294</sup> In these circumstances two options seem available for the ILC. First, it can adapt to fragmentation by taking on topics of various specialized fields. The disadvantage of this option is that specialist bodies in these fields would probably not welcome such an intrusion (not to mention that the ILC members themselves are not specialists of specialized fields). If, however, the ILC would be able to find some mode of cooperation with the specialist bodies it could lend them the tremendous weight of its authority. The second option is for the ILC simply to tread along as it has treaded for the past 50 years gradually turning from a visionary into a technocrat legal adviser.

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<sup>290</sup> On US hegemony see Byers M., Nolte G., (eds.), *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, 2003.

<sup>291</sup> Peters A. Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, *Leiden Journal of International Law*, 2006, 19, p. 579.

<sup>292</sup> See Klabbbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009.

<sup>293</sup> Allott P. State Responsibility and the Unmaking of International Law, Vol. 29 *Harvard International Law Journal*, 1988, p. 26; Lauterpacht H. *The Function of Law in the International Community*, Oxford: Oxford University Press, 2011 (first edition 1933), p. 407.

<sup>294</sup> The ILC has adjusted to this reality by completing its work with adoption of ‘Articles’ of which the General Assembly simply ‘takes note’. For implications of this practice with regard to state responsibility see Caron D. The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, *American Journal of International Law*, 2002, 86, p. 862.

### 3.3. Conclusions

The law of state responsibility throughout its historical development has been predominantly based on the private law (consequently also on bilateralism and subjective rights) paradigm. Roman law has played a seminal importance in development of modern state responsibility doctrines. Although itself Roman law had very few rules on topics of international law (diplomatic law, law of treaties and rudimentary rules on how wars are to be fought), it was abundant with refined private law notions. These private law notions served as a basis for most legal developments in continental Europe – including also the development of international law. Legal scholars throughout medieval ages, renaissance and up till the 20<sup>th</sup> century borrowed freely from Roman private law; unsurprisingly the influence of Roman law coupled together with 19<sup>th</sup> century positivist tendency to reinforce sovereignty above all else, led to a view that state responsibility ought to be perceived as a bilateral matter between the injured state and the state that has performed the breach.

Therefore similarly to early Roman law, international law makes no distinction between criminal responsibility (based on the public law paradigm with the characteristic objectives of punishing and deterring future breaches) and responsibility for delicts (based on the private law paradigm where the primary objective is to grant remedy to the injured). Recognizing deficiencies of employing responsibility rules based only on the private law paradigm, already from 17<sup>th</sup> century there have been notable calls for introduction of public law elements (primarily a legal relationship between the community of states and the responsible state as well as a punitive element in the consequences of responsibility) into the law of international responsibility. From Grotius to Lauterpacht international lawyers have persuasively argued that strict bilateralism in state responsibility is a faulty idea that lacks logic consistency and results in ineffectiveness of international law. In early 20<sup>th</sup> century and in particular after the First World War influential international lawyers called for a rethink of the bilateralist conception of state responsibility rules i.e., that only the injured state is entitled to claim responsibility. Among these lawyers Hersch Lauterpacht was the most prominent – his writings setting a tone in favour of distinction between ordinary breaches and breaches that concern the whole community of states, thus paving way for multilateralism as an indispensable part of the law of state responsibility.

However, these calls have been mainly in the works of scholars and there has been very little follow up in the actual state practice. Indeed, it is only after the Second World War that the multilateralism inspired notions entered the mainstream of international legal thinking. During the post war years the ILC sought to introduce expressions of public order into the general international law by proposing the concept of peremptory norms. Initially it might have seemed as a modest concession to multilateralism – their effects limited to invalidating treaties contrary to peremptory

norms. Yet the brilliant Special Rapporteurs of the law of treaties (Lauterpacht, Fitzmaurice and Waldock) in all likelihood were well aware that introduction of peremptory norms in the law of treaties would resonate far and wide into the international legal system and would only start a gradual process or reorienting international law from bilateralism to community interests. In the law of state responsibility the idea of norms from which no derogation is permitted echoed as recognition of international crimes of states. However, the ILC's work on the topic was cumbersome and dragged on well beyond 1960ties when the post-war political climate was still favourable for introduction of significant innovations. By the time the ILC had finally accomplished its epic work, states, including major powers, such as the US, were no longer interested in advancing protection of community interests in general international law.

Nonetheless some public law inspired notions found their way into the Articles on State Responsibility. Among these notions three ideas are most prominent: first, that injury is not a requirement of responsibility; second, that in a case of a breach of obligations *erga omnes* any state may invoke responsibility; third, that some violations are more serious than others and therefore merit more aggravated consequences. Although these developments do not signal a radical remaking of international law along the public law paradigm, they are nonetheless crucial as they represent a definite shift away from exclusively bilateralist outlook. Thus the agenda of neo-Grotian internationalists in the ILC has achieved at least a limited success.

## 4. RISE AND DEMISE OF THE CONCEPT OF STATE CRIMES

One of Ago's proposals is of particularly marked importance for the discussion on the protection of interests of the international community, and therefore it merits special consideration. That proposal was to distinguish two basic modalities of international responsibility: one which would apply to all "ordinary" breaches of international law; while the second type of responsibility would apply only to grave breaches such as genocide and war crimes, which harm not only the directly injured state, but the whole international community.<sup>295</sup> The first category was labelled as "delicts", while the exceptionally grave breaches were initially referred to as "state crimes" or "international crimes". This chapter continues the discussion of historic development of the public law paradigm in the law of state responsibility started in Chapters 2 and 3. However, as the discussion of the concept of state crimes plays a pivotal role in the evolution of protection of community interests (and it is also somewhat lengthy) it has been singled out from the rest of the discussion of history and elaborated in a separate chapter.

### 4.1. Does international law distinguish between delicts and crimes?

The idea of distinguishing between ordinary breaches and exceptionally grave breaches was proposed by Ago already in 1939.<sup>296</sup> This proposal raised a fundamental question - is it proper to treat all breaches of international law in the same manner? Should a breach of bilateral investment treaty be treated in the same way as genocide or war crimes? In accordance with the classical view, i.e., in the period prior to the Second World War, it was considered that the law of state responsibility "provided for a single regime of responsibility applying to all internationally wrongful acts of the State, whatever the content of the obligations breached by such acts."<sup>297</sup> This view was challenged already in the period between the World Wars.<sup>298</sup> However, immediately after

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<sup>295</sup> It must be noted that a distinction between "merely wrongful" acts and "punishable acts" was made already by Garcia-Amador, however, his actual draft articles did not address the issue as they were focused exclusively on responsibility for injuries to aliens. See Amador G. Report on State Responsibility, UN Doc. A/CN.4/96, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 173.

<sup>296</sup> International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 1996, Supplement No.10, UN Doc. A/51/10, p. 131.

<sup>297</sup> Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, *Yearbook of the ILC 1976*, Vol. II (Part One), para. 80.

<sup>298</sup> Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, *Yearbook of the ILC 1976*, Vol. II (Part One), para. 80.



the Second World War the momentum was right for a conceptual change in the structure of international law aimed at ensuring that humanity would never again engage in destruction on such a scale. As a part of this momentum such rules as prohibition of use of force and of genocide came to be generally recognized as rules that stand apart from all other rules and concern the whole of the international community. Accordingly, a conviction emerged that the importance of the values that these rules protected required a separate modality of state responsibility.<sup>299</sup> Thus after 1945 it became a rather popular opinion that there are two general categories of obligations, and that therefore there ought to be two separate modalities of responsibility. The first category comprised obligations, which were of fundamental importance for the whole community of states, such as obligation not to engage in aggression or genocide. The second category consisted of all other obligations, which generally were not concern of all states and by and large were of lesser importance. As this distinction between delicts and crimes is the prime example of attempts to integrate public law elements into international law, it requires a more detailed analysis – firstly, whether international law has historically supported such a distinction.

#### ***4.1.1. Recognition of state crimes in legal doctrine***

As already explored in Chapter 3, in the 19<sup>th</sup> century state responsibility in international law was mainly based on a bilateral model of relations between the injured and the responsible state. Likewise, the responsibility model was unitary – there was no distinction between regimes of responsibility on the basis of the content of the obligation breached (i.e., there was no distinction between international crimes or ordinary, less grave breaches). However, in the legal doctrine there were scholars who argued that in cases of serious breaches, such as breach of peace, the injured state may be entitled not only to claim reparation, but also to punish the aggressor.<sup>300</sup> Similarly, Hall notes in 1884 that: "[w]hen a State grossly and patently violates international law in a matter of serious importance, it is competent to any State or to the body of States, to hinder the wrongdoing from being accomplished, or to punish the wrong-doer."<sup>301</sup> However, authors of this period did not

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<sup>299</sup> Thus Ago states that 'there has gradually arisen a conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach "like any other", that it necessarily represents an internationally wrongful act which is far more serious, an infraction which must be differently described and must therefore be subject to a different regime of responsibility', see Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, Yearbook of the ILC 1976, Vol. II (Part One), para. 97.

<sup>300</sup> Bluntschli J. *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*. Nordlingen: Beck, 1872, p. 259.

<sup>301</sup> Hall W. *A Treatise on International Law*, 2nd ed. Oxford: Clarendon Press, 1884, p. 54.

argue for a differentiation between types of breaches and did not divide them into classes of serious and less serious breaches.<sup>302</sup>

The first author who explicitly examined the question whether international law distinguished between separate categories of wrongful acts was Hersch Lauterpacht. In 1945, when revising the 6<sup>th</sup> edition of the Oppenheim's International Law, he pointed out that the concept of international delinquency ranges from ordinary breaches of treaty obligations that involve no more than pecuniary compensation, to violations that amount to criminal acts.<sup>303</sup> If ordinary breaches, according to Lauterpacht, result in the right of the injured state to claim reparation, then serious breaches ("by reason of their gravity, their ruthlessness, and their contempt of human life"<sup>304</sup>) result in the right to employ coercive measures, such as sanctions, reprisals or measures under chapter VII on the UN Charter.<sup>305</sup> Around the same time as Lauterpacht, one of the most prominent Soviet lawyers – Levin - made a similar claim that in contemporary international law it is necessary to make a distinction between ordinary breaches "нарушение" and crimes "преступление". The category of crimes, according to Levin, was a class of its own, as these threatened the foundations of international legal order.<sup>306</sup> Some ten years subsequent to Levin's publication another big name in the Soviet scholarship - Tunkin made an analogous claim and specified that the distinct category of the most serious breaches would include acts that threaten international peace.<sup>307</sup>

Subsequent authors during the cold war years (from socialist as well as from capitalist countries) maintained the same underlying proposition that aggression stood apart from all other breaches and entailed more serious consequences for the responsible state.<sup>308</sup> These consequences would include the right of the injured state to violate the rights of the state that engaged in aggression (including the right to use force against the aggressor) and the right of other states to assist the injured state (again including the use of armed force).<sup>309</sup> Other authors, such as Verzijl, maintained that not only aggression, but also other breaches such as crimes against humanity and

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<sup>302</sup> For a thorough analysis of the doctrine prior to 1976 see Fifth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, Yearbook of the ILC 1976, Vol. II (Part One), para. 130.

<sup>303</sup> Lauterpacht H. *Oppenheim's International Law, 6th ed.* London: Longmans, 1947, p. 321.

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*, p. 322.

<sup>306</sup> Левин Д.Б. Проблема ответственности в науке международного права. *Известия Академии Наук СССР*. Но. 2, 1946; see also Johnson D. The Draft Code of Offences Against the Peace and Security of Mankind, *International and Comparative Law Quarterly*, Vol. 4, No. 3, July, 1955, p. 461.

<sup>307</sup> Tunkin G. *Theory of International Law*, 1962. available at <http://books.google.lv/books?id=CuW4sEd-I0sC&printsec=frontcover&dq=tunkin+international+law&hl=en&sa=X&ei=zWleUszQEaq64ATw4IBo&ved=0CDAQuwUwAA#v=onepage&q=tunkin%20international%20law&f=false> [viewed August 28, 2014].

<sup>308</sup> Higgins R. *The Development of International Law Through the Political Organs of the United Nations*. Oxford: Oxford University Press, 1963, p. 199. Моджорян Л.А. *Ответственность в современном международном праве*, Советский ежегодник международного права 1970, Москва: Наука, 1972, с. 143.

<sup>309</sup> Bowett D. Collective Self-defence Under the Charter of the United Nations. *The British Year Book of International Law*, 1955-56, London: 1957 p. 130.

war crimes are included in the category of “international crimes” and entitle the international community to apply sanctions.<sup>310</sup> Some authors went a step further and suggested that any violation of *jus cogens* rules would belong to this category, thereby bringing also violations of prohibitions of piracy and slavery as well as violations of the right to self-determination within the ambit of “international crimes”.<sup>311</sup>

#### ***4.1.2. Recognition of state crimes in state practice.***

Post war state practice provides considerable evidence that supports the idea that states differentiate between categories of breaches and modalities of responsibility that apply to each category. For instance, the UN Charter provides for several norms that apply to situations where fundamental community interests are threatened, which clearly go beyond the traditional bilateralist conception of state responsibility. The Charter also provides for remedies that impose obligations on the responsible state that are in essence punitive and therefore do not fit into the traditional “reparations only” outlook. First of all, the Security Council under chapter VII of the UN Charter may take “preventive or enforcement measures” to “restore international peace and security”, which are binding on the member states. Moreover, Articles 5 and 6 of the UN Charter provide for possibility of suspending a Member “against which preventive or enforcement action has been taken by the Security Council” from “the exercise of the rights and privileges of membership”. Whereas Article 6 allows expelling a UN member which has persistently violated the Charter.

These are all examples of the Charter allowing application of measures, which in their nature do not fit in with the concepts of strict Anzilottian bilateralism and go beyond the traditional rule that responsibility results only in a duty to make reparation. Moreover, the system envisaged by the Charter could be described as possessing a certain degree of public order, as the measures that may be taken against the responsible state are rather punitive than seeking to ensure reparation.

Similarly, state practice also indicates that fundamental values of the international community are not limited only to prohibition of aggression.<sup>312</sup> In the 1960ties the UN General

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<sup>310</sup> Verzijl J. *International Law in Historical Perspective*. Leiden: Sijthoff, 1973, p. 741.

<sup>311</sup> Brownlie I. *Principles of Public International Law*, 2nd ed. Oxford: Clarendon Press, 1973, p. 415.

<sup>312</sup> Examination of conventions such as Genocide convention and Apartheid convention shows that these crimes are not placed on equal footing with the crime of aggression, as there are no concrete measures envisaged similar to those applicable in the case of aggression. However, there are also considerable similarities. The Genocide convention does not provide for any particular measures, it merely stipulates that ‘Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide’. On the other hand the Apartheid convention provides for specific measures ‘The States Parties ... undertake to accept and carry out in accordance with the Charter of the United Nations the decisions taken by the Security Council aimed at the prevention, suppression and punishment of the crime

Assembly adopted a stream of resolutions in which it stated that the apartheid system maintained in South Africa constituted a threat to international peace and security (classifying conduct as a “threat to peace” allows the Security Council to apply the coercive measures).<sup>313</sup> In latter decades the practice of the Security Council, particularly after 1990s, indicates that “threat to peace” is a constantly evolving and expanding concept.<sup>314</sup> Within the last fifteen years the understanding of the “threat to peace” has considerably broadened, from a narrow concept of threat or the use of armed force, to a wider notion applicable to all situations that may lead to the use of armed force. Thus proliferation of weapons of mass destruction, international terrorism, use of mercenaries, emergency situations and violent disintegration of states all have been considered as constituting threats to peace.<sup>315</sup> In confirmation of such approach the president of the Security Council has stated that “the non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”<sup>316</sup> Thus, it is possible to conclude that the Charter provides for a system in which certain fundamental community interests, are recognized as more important than other obligations. To make this distinction meaningful the Charter also provides for a possibility to apply specific measures that do not fit into the traditional “reparation only” conception of international responsibility and allows application of remedies which seek to protect the community interest.

Likewise, statements from representatives of states already in 1960ties indicate that states recognize that certain breaches are more serious than others and that therefore these breaches must entail more serious legal consequences.<sup>317</sup> Thus, for instance, representatives of some states at the General Assembly’s sixth committee explicitly stated that it is necessary to elaborate special rules of responsibility that would be applicable to the particularly serious breaches.<sup>318</sup> However, it must

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of apartheid, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations with a view to achieving the purposes of the Convention’.

<sup>313</sup> See resolutions 1598 (XV) of 1961, 1663 (XVI) of 1961, 1761 (XVII) of 1962, 1881 (XVIII) of 1963, 2054 (XX) of 1965.

<sup>314</sup> Talmon S. The Security Council as World Legislature, *American Journal of International Law*, January 2005, p. 175.

<sup>315</sup> *Ibid.*

<sup>316</sup> UN Doc. S/PV.3046 (1992).

<sup>317</sup> Official Records of the General Assembly, Fifteenth Session, Sixth Committee, 653rd meeting, paras. 10 and 18; Sixteenth Session, Sixth Committee, 726th meeting, para. 22; 729th meeting, para. 1; Seventeenth Session, Sixth Committee, 745th meeting, para. 49; Eighteenth Session, Sixth Committee, 784th meeting, para. 14).

<sup>318</sup> See statement made by the representative of the USSR, Seventeenth Session, Sixth Committee, 738th meeting, para. 9. Similarly representative of Iraq stated that: “One question to be considered in particular was that of the establishment of categories of offences whose seriousness would be determined by reference to the importance of the neglected obligation: thus, offences against the security or territorial integrity of States could constitute the category of international crimes. Further, in the event of the violation of an obligation to the international community as a whole, the concept of collective responsibility might be invoked: the violation of such an obligation created a nexus not only

be noted that like nowadays, also during the cold war years, the opinions of states on this issue were diverging.

#### ***4.1.3. Recognition of state crimes by international courts***

One possible drawback in the argument that post-war international law recognizes distinction between ordinary breaches and international crimes is that there are no judicial decisions that would support such a claim.<sup>319</sup> Ago in this regard concludes that even in those decisions in which punitive damages are applied and therefore something akin to criminal responsibility could be inferred “the choice between different types of reparation has never been made on the basis of the content of the obligation breached.”<sup>320</sup> However, he goes on to assert that such absence of judicial practice that distinguishes between “crimes” and “simple breaches” does not necessarily imply that states may not be subjected to any form of responsibility other than the classical duty to make reparation. To explain absence of judgments that acknowledge distinction between ordinary breaches and international crimes Ago argues that international tribunals only adjudicate the questions that states put before them. Generally, states do not authorise international courts and tribunals to determine whether other states may apply sanctions to them. As punitive measures that would be characteristic of criminal responsibility usually take the form of sanctions, it is only consequential that international courts have had no opportunity to address such matters. The fact remains, however, that judgments of international courts provide no evidence for distinguishing international crimes of states as a separate category of breaches. Thus, although there is some support from states to the idea of departing from the unitary model of responsibility (and the above discussed UN Charter norms support these assertions), it is similarly clear that this support is far from being unanimous and irrefutable.

“Criminal” responsibility and thus also a more public law paradigm oriented approach may be inferred not only on the basis of what type of obligation is breached, but also on the basis of *who* is entitled to invoke it. In the classical Anzillottian bilateral relationship between the wrongdoer and the injured it is only the directly injured state that is entitled to invoke responsibility. The “criminal” responsibility on the other hand, at least in the form as it is known in domestic legal orders, implies

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with the State directly injured but also with the whole international community.” See statement of the representative of Iraq at the Twenty-ninth Session of the Sixth Committee, 1486th meeting, para. 57.

<sup>319</sup> Ago has observed that ‘international judicial decisions cannot be viewed as endorsing the theories of those who distinguish between two different categories of internationally wrongful acts on the basis of the content of the obligation breached’, see Yearbook of the ILC 1976, Vol. II (Part One), para. 80.

<sup>320</sup> Yearbook of the ILC 1976, Vol. II (Part One), para. 82.

a relationship between the wrongdoer and the whole community.<sup>321</sup> In 1976 when Ago's fifth report on state responsibility was written essentially the only authority which clearly supported a view that a state could have obligations towards the whole community of states was the famous passage from the ICJ in the *Barcelona Traction* case:

“In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising via-a-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 importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.”<sup>322</sup>

In this passage the ICJ points out two basic types of obligations: obligations that concern all states, such as obligation not to engage in aggression and genocide; and all other obligations which are premised on a bilateral model. From this distinction made by the ICJ Ago concludes that accordingly also acts that breach these obligations ought to be differentiated. The first category (labelled by Ago as “crimes”) are such that every member of the international community is in principle interested in their suppression. In case of such breaches every state is entitled to invoke responsibility even if that state is not directly injured by the act in question.<sup>323</sup> The other category labelled as “delicts” comprises of breaches which are of concern only to the directly injured state and only that state is entitled to invoke responsibility. This distinction made in the *Barcelona Traction* has been and still remains one of the strongest arguments in favour of recognition of twofold regime of state responsibility.

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<sup>321</sup> See Deigh J., Dolinko D., (eds.), *The Oxford Handbook of Philosophy of Criminal Law*. Oxford: Oxford University Press, 2011.

<sup>322</sup> ICJ: *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 32, para. 33.

<sup>323</sup> Specifically Ago notes that the ‘International Court of Justice seems to have implicitly recognized the need for a distinction between two categories of internationally wrongful acts of the State, depending on the obligation breached, and also seems to have recognized the logical consequences of that distinction as regards the regime of international responsibility’ see Yearbook of the ILC 1976, Vol. II (Part One), para. 90.

The conceptual rethink of the structure of international obligations expressed in the *Barcelona Traction* is of a rather recent origin. To appreciate the importance of this pronouncement one only ought to look at the positions expressed by states some 40 years earlier, for instance, opinions of states at the Hague codification conference of 1930. These opinions overwhelmingly confirm the unitary model of state responsibility, as at that period states made no distinction with regard to the consequences of the breach depending on the content of the obligation.<sup>324</sup> As noted earlier in Chapter 2, since *Barcelona Traction* the ICJ has acknowledged existence of obligations towards the international community as a whole on a number of occasions.<sup>325</sup> However, it has discussed the concept of *erga omnes* obligations only in terms of invocation or responsibility by states that are not directly injured or have only “legal interest” in observance of the particular norm, without implying existence of two separate responsibility regimes. Thus, it seems to be an overstatement to suggest that international judicial practice has come to recognize a distinction of two regimes of responsibility of states on the basis of the content of the breached norm.

#### 4.2. International crimes in the Articles on State Responsibility

Judging the overall attitude of states to be positively disposed towards his ideas, Ago chose to press ahead with his proposal that breaches ought to be distinguished into two basic categories: international crimes and delicts. The proposal was embodied in the Article 19 of the Draft Articles<sup>326</sup> adopted by the Commission at the first reading in 1996.<sup>327</sup> However, in 1998 the ILC

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<sup>324</sup> See Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, Yearbook of the ILC 1976, Vol. II (Part One), para. 96.

<sup>325</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, judgment of July 20, 2012, I.C.J. Reports 2012 p. 422; ICJ: *Case Concerning East Timor (Portugal v. Australia)*, judgment of 30 June 1995, I.C.J. Reports 1995, p. 102, para. 29; *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, para. 125.

<sup>326</sup> For discussion of the Article 19 see Bowett D. Crimes of State and the 1996 Report of the International Law Commission on State Responsibility, *European Journal of International Law* Vol. 9 1998 p. 163; Rosenne S. State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility. *New York University Journal of International Law and Politics* Vol. 30, Fall 1997-Winter 1998, p. 145; Tomuschat C. International Crimes by States: An Endangered Species? In: Wellens K., (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy*. Hague: Kluwer Law International, 1998, p. 253; Rosenstock R. An International Criminal Responsibility of States? In: *ILC, International Law on the Eve of the Twenty-First Century— Views from the International Law Commission*, New York: United Nations, 1997, p. 265.

<sup>327</sup> Article 19 entitled ‘International crimes and international delicts’ provided that:

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 the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole constitutes an international crime.*

once again reconsidered the matter. Although majority of states were in favour of the concept of international crimes, several powerful states including the US, the UK and France pressed for deletion of the concept.<sup>328</sup> These differences of opinions surfaced also among the ILC members, and therefore, due to inability to agree on the conceptual merits of distinguishing between delicts and crimes, the ILC opted to temporarily lay aside Article 19.

When Crawford became the special rapporteur on state responsibility in 1997 one of his most significant proposals was to do away with article 19 and the concept of international crimes. According to Crawford, the main problem with the concept was that there was no state practice that would indicate that states accept existence of international crimes as a separate category of breaches. Another, a more minor reason, was the notion of “international crimes” was something that traditionally applied to international responsibility of individuals rather than states.

Instead Crawford suggested applying unitary model of responsibility to all types of breaches. Regardless whether there was a breach of a bilateral investment treaty or genocide the same basic responsibility model would apply. Crawford, however, did not intend to entirely discard all public law paradigm inspired notions and retained the idea that some basic rules require special protection. He envisaged that the same objectives that Ago intended to reach by the notion of “international crimes” could still be achieved by employing the concepts of *jus cogens* and obligations *erga omnes*. His idea was that the wrongdoer would be subject to an aggravated form of responsibility not because the unlawful conduct constituted an international crime, but because the conduct breached a *jus cogens* norm. In principle this idea is very similar to what Brownlie proposed back in 1960ties i.e., that all breaches of *jus cogens* would be regarded as international crimes. The Crawford’s version at a first glance differs only conceptually – the category of “international crimes” is discarded, however, in all practical terms the special responsibility regime applies to all breaches of *jus cogens*, just as Brownlie had proposed.

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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 for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with

paragraph 2 constitutes an international delict. See Draft Articles adopted by the International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 1996, Supplement No.10, UN Doc. A/51/10, p. 131.

<sup>328</sup> See Comments and Observations of Governments A/CN.4/515 (2001).



The important question with regard to Crawford's proposal is whether and how that proposal differs from the "international crimes" approach advocated by Ago? For one thing, the alarming language (i.e., the word "crime") was dropped. Even if the category of "breaches of peremptory norms" would be materially identical to "international crimes", labelling something as a "crime" carries a heavily loaded perception conditioned by domestic legal systems (evoking associations of worst possible behaviour, trial, punishment and prison) – a psychological effect which is not to be underestimated.

However, more importantly – is international crime the same as a breach of a *jus cogens* norm? The ILC has contended that these concepts are not identical. Pellet argues that the concepts are in essence the same.<sup>329</sup> If we consider the conduct prohibited by norms that are presently regarded by the mainstream legal thought as peremptory (prohibition of genocide, aggression, use of force, apartheid, racial discrimination, war crimes and crimes against humanity, violation of the right to self-determination), we find that these very norms would also be regarded as international crimes by Ago. However, Ago also regarded other breaches (such as wide scale degradation of natural environment and violation of rules on conservation of common heritage of mankind) as international crimes. But this is not to suggest that both categories are substantively different – there are also scholars nowadays who advocate that massive pollution of environment is (or ought to be) prohibited by a peremptory norm.<sup>330</sup> Also generally scholars have attempted to bring together the theory on the concepts of *jus cogens*, obligations *erga omnes* and international crimes underlining that all these concepts essentially serve to protect the key values of the international community.<sup>331</sup> Therefore, it seems that categories of breaches of peremptory norms and international crimes are indeed very closely related. As both categories are open ended (whatever the community of states

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<sup>329</sup> Pellet notes that: 'just like peremptory norms, crimes are to be considered extremely rare in the present state of the world; the international community does exist, but solidarities on which this community is based are still very limited. And this means that obligations 'essential for the protection of fundamental interests' are also unavoidably very limited, both in number and scope' see Pellet, A. Can a State Commit a Crime? Definitely, Yes! *European Journal of International Law*, 1999, Vol. 10 No. 2, p. 430.

<sup>330</sup> See Uhlmann, E., „State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms". *Georgetown International Environmental Law Review*, Vol. 11, 1998, p. 101; Berat, L. Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law. *Boston University International Law Journal* Vol. 11, 1993, p. 327.

<sup>331</sup> See de Hoogh A. *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*. Hague: Kluwer Law International, 1996; Tams C. *Enforcing Obligations Erga Omnes*. Cambridge: Cambridge University Press, 2005; Tomuschat C. International Law Ensuring the Survival of Mankind on the Eve of a New Century. *General Course on Public International Law. 281 Recueil des Cours (1999)* pp. 81–88; Byers M. Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', *Nordic Journal of International Law* Vol. 66, 1997, p. 211; de Hoogh A. The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective', *Austrian Journal of Public International Law* Vol. 41 1991, p. 183; Weiler J., *et al.* (eds.), *International Crimes of State: A Critical Analysis of the ILC's draft Article 19 in State Responsibility*, Berlin: de Gruyter, 1989.

recognizes as peremptory norm or a crime becomes that) without an exhaustive list of prohibited conduct they will always be subject to disagreement. However, substantively both categories seem to be reserved for norms that are most essential to the whole of the international community and in that sense they indeed converge.

Yet, the real crux of the matter is in the issue of consequences that flow from either violation of peremptory norms or international crimes. A central piece of Ago's design was that in cases of international crimes all states were regarded as injured (Article 40 of the 1996 Draft Articles). As injured states all states were entitled to employ countermeasures (Article 47 of the 1996 Draft Articles). This sweeping entitlement to use countermeasures was accompanied by a further condition that invocation of responsibility in cases of international crimes is not subject to normally applicable limitations, i.e., that restitution could be claimed even if it resulted in a disproportionate burden on the culprit and even if it threatened economic stability, political independence or would impair dignity of the responsible state (Article 52 of the 1996 Draft Articles).

Crawford, on the other hand, substituted the idea that international crime causes injury to all other states, by Article 48, which allows invocation by non-injured states. The main difference between Ago's "legally" injured states and Crawford's "states other than the injured" is in the scope of rights afforded to both groups – the list being somewhat shorter for the second group. Crawford attempted to make it up to the non-injured states by applying some of the special consequences that were attached to international crimes also to breaches of peremptory norms<sup>332</sup>, i.e., Articles 40 and 41 in the 2001 Articles on State Responsibility. However, these special consequences, as further discussed in Chapter 5.3 are vague and therefore predictably rather weak. Thus, although the concepts of international crimes and serious breaches of peremptory norms are conceptually very similar, Crawford's innovations may be regarded as a concession to states that objected to a fully fledged recognition of international crimes of states.

### **4.3. Can states be criminally responsible?**

A question directly related to the issue of distinction between delicts and crimes is whether states in principle may be held *criminally* responsible. This has been one of the most controversial topics in the debate over international crimes of states. Much of the disagreement boils down to diverging perceptions of what the notion of criminality implies. A very common perception of the

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<sup>332</sup> See Crawford J. Responsibility for Breaches of Communitarian Norms: An appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts. In: Fastenrath U., et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* Oxford: Oxford University Press, 2011, p. 224.

concept of “state crimes” or “international criminal responsibility of states” is that it must be understood similarly as in domestic legal orders. First and foremost attribute of criminal responsibility in domestic legal orders is a penal element.<sup>333</sup> Is such an element known to international law? This question goes to the roots of the doctrine on international responsibility, as it enquires what are the consequences of a breach of international law? For Anzilotti, as already discussed earlier in Chapter 3, the only consequence of a breach was the duty of the responsible state to make reparation (this obligation was owed exclusively to the injured state). Anzilotti saw no room for any kind of multilateralism in state responsibility and certainly no penal elements. A contrary view was expounded by Kelsen. Kelsen’s chief thesis – that law is a coercive order that functions because violations of law are punished by sanctions – required that to be real law, international law must provide for sanctions.<sup>334</sup> Therefore in Kelsen’s view a breach of international law resulted in a rights of the injured state to apply coercive sanctions towards the responsible state. A third view, which was expounded by Lauterpacht, held that a breach of international law results in both – a duty to make reparation as well as a right to apply sanctions.<sup>335</sup>

At the time of Ago as the special rapporteur, the ILC seemed to believe that it is quite acceptable to discuss international law in terms of penal elements. Thus Ago suggests that the term “sanction” may be used to “describe a measure which, although not necessarily involving the use of force, is characterized – at least in part – by the fact that the purpose is to inflict punishment.”<sup>336</sup> Crawford has suggested that he in principle agrees that there may be a regime of penal responsibility of states.<sup>337</sup> However, in his first report he goes to some length to make a point that international law, as it is at present, does not provide for penal elements.<sup>338</sup> Responses from states, on the other hand, indicate that while states have considerable objections to the idea that they could be *criminally* liable, they generally support a suggestion that response to exceptionally grave breaches may include penal aspects, rather than only the reparation of the injury to the specifically affected state.

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<sup>333</sup> See Deigh J., Dolinko D., (eds.), *The Oxford Handbook of Philosophy of Criminal Law*. Oxford: Oxford University Press, 2011.

<sup>334</sup> Kelsen H. *Principles of International Law*, New York: Holt, Rhinehart&Winston, 1996, p. 22.

<sup>335</sup> Lauterpacht H. *Oppenheim’s International Law, 8th ed.* London: Longmans, 1955, p. 352.

<sup>336</sup> Report of the ILC on the Work of its Twenty-Fifth Session, A/CN.4/272, 1973 Yearbook of the ILC Vol. 2, p. 175.

<sup>337</sup> First Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/490/Add.2, paras. 89–92.

<sup>338</sup> In particular Crawford refers to the Inter-American Court of Human Rights which in *Velásquez Rodríguez v. Honduras* concluded that international law at the present time does not provide for punitive damages. The Court concluded that ‘Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time’. See IACHR Series C, No. 7 (1989), p. 52; ILR Vol. 95, pp. 315-316.

If penal elements do exist in the law of state responsibility, they would be somehow expressed in particular legal concepts. Two such concepts need to be considered. First, the UN Security Council may adopt sanctions. The UN Charter itself makes no mention of sanctions, but provides for powers of the Security Council to take “measures” in accordance with the Chapter VII of the Charter. These Security Council’s “measures” in legal scholarship and in the political discourse are often referred to as sanctions – a term which is used in context of criminal law generally, as well as, for instance, by Kelsen, to designate a coercive element in a legal system that compels the responsible entity to observe the law.<sup>339</sup> This ambiguity of terminology is confusing and makes one wonder whether Security Council “sanctions” would fit Kelsen’s understanding of “sanctions” and more importantly whether this concept implies a penal element?

As far as Kelsen is concerned, his “sanctions” indeed seem to imply a penal element. Although his writings make it clear that the core feature of “sanction” is not the penal element, but rather the coercive element – there must be something that the injured or the community may do to coerce the responsible entity to observe law. The Security Council’s sanctions on the other hand seem to lack a penal element as they by definition are directed towards restoring peace and security rather than punishing. This is particularly evident in Article 39 of the UN Charter which states that the purpose of the Security Council “measures” is to “maintain or restore international peace and security” and makes no direct or implicit mention of punishment.<sup>340</sup> Such a reading of Article 39 is confirmed also in scholarly works including Simma’s commentary to the UN Charter.<sup>341</sup>

The second concept through which penal element might come into the law of state responsibility is the concept of countermeasures.<sup>342</sup> By means of countermeasures the injured state is entitled to take measures against the responsible state which would otherwise be contrary to international obligations of the injured state.<sup>343</sup> Such a legal construct is typical for self-help based legal systems that lack public order and enforcement mechanisms at community level. The injury inflicted on the responsible state may serve both as punishment and as means to coerce it to observe the law. However, as the Articles on State Responsibility make it clear in Article 49 the purpose of

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<sup>339</sup> Kelsen H. *Principles of International Law*. New York: Holt, Rhinehart&Winston, 1996, p. 22.

<sup>340</sup> Article 39 of the UN Charter provides: “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>341</sup> See Simma B. (ed.) *The Charter of the United Nations: A Commentary, second edition*. Oxford: Oxford University Press, 2002; see also Österdahl I. *Threat to the Peace. The Interpretation by the Security Council of Article 39 in the UN Charter*. Upsala: Iustus, 1998.

<sup>342</sup> For detailed discussion of countermeasures see Elagab O. *The Legality of Non-Forcible Counter-Measures in International Law*. Oxford: Clarendon Press, 1988.

<sup>343</sup> Thus countermeasures act as a form of circumstance that precludes wrongfulness. Article 22 of the ASR provides: “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.”

countermeasures is only to induce the responsible state to comply with its obligations, rather than to punish. In his commentary to the Articles on State Responsibility Crawford emphasizes this point more than once, by pointing out that countermeasures: “are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment – they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two states.”<sup>344</sup> Whether Crawford’s opinion on the matter (which, him being the final special rapporteur on state responsibility, is inevitably also reflected in the text of Articles on State Responsibility) is the correct one, may be debatable. In practice the line between measures “inducing compliance” and “punishing” may be very thin. Indeed “punishment” itself is likely to be imposed with a preventive motivation i.e., with a view of inducing future compliance. However, Crawford’s view seems to be the better one, considering the risks associated with countermeasures such as escalation of conflict and political abuse. An open recognition of a punitive element in countermeasures could only aggravate these risks.

The above conclusion is also reflected the Part Two of the Articles on State Responsibility dealing with legal consequences of an internationally wrongful act. The Articles state that internationally wrongful act results in obligations of continued performance (Article 29), cessation and non-repetition (Article 30) and reparation (Article 31) which may take the form of restitution, compensation or satisfaction. Thus the Articles on State Responsibility make no explicit or implicit reference to any punitive elements in the law of state responsibility (whether such a state of affairs is conducive for the public order and the rule of law is a matter to which the analysis will return at the end of this chapter).

However, as becomes clear from Ago’s fifth report, his intention when he proposed the introduction of the notion of *state crimes* was not to suggest a modality of responsibility similar to that of criminal responsibility of individuals as it is known in domestic law (with punishment as the central element).<sup>345</sup> The purpose, according to Ago, was simply to differentiate between breaches of

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<sup>344</sup> See Crawford J. *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002.

<sup>345</sup> In the 1976 commentary Ago notes that he sees little point in extending to international law the specific legal categories of internal law. However, he also notes that ‘Having said that, we hasten to add that, in our view, it would be a mistake to assimilate the right or duty accorded to certain States to punish individuals who have committed such crimes to the “special form” of international responsibility applicable to the State in such cases’ see ILC Yearbook 1976, Vol. 2. part 2, para. 101. Ago continues by pointing out that: ‘[I]logically we also exclude the possibility of deducing any kind of “criminal” international responsibility of the State from the existence of this right or duty to punish an individual-organ who has committed certain “crimes”. Without going into an essentially theoretical dispute, it seems clear to us that it would not be justifiable in any case to refer to a “criminal” responsibility of the State with regard to the applicability of penalties to certain State organs, whether in one country or another. The assertion of the existence of a “criminal” international responsibility of the State might possibly be justified in cases in which the form of international responsibility applicable to the State itself would result in “punitive” action for purely punitive purposes. Even in such cases, however, some are of the view that “criminal” international responsibility of the State is

fundamental norms and ordinary breaches and to reflect this difference in the applicable responsibility regime. Thus whether breaches of fundamental norms are labelled as “crimes” or by any other name is immaterial. As Ago himself has noted “we are interested not so much in determining whether the responsibility incurred by a State by reason of the breach of specific obligations does or does not entail "criminal" international responsibility as in determining whether such responsibility is or is not "different" from that deriving from the breach of other international obligations of the State.”<sup>346</sup>

This admission in principle takes out all the steam from the debate whether a state can be *criminally* liable. However, words obviously evoke perceptions. Whether we believe Ago or not that his intention was simply to differentiate between two kinds of breaches, the word *criminal* carries a strong connotation with worst kind of behaviour. It is indeed difficult to accept that this choice of terminology was not deliberately aimed to attach an additional emotional load to the consequences of a breach.

A related point which merits attention is what the actual practice is with regard to the concept of international crimes of states. The term “international crime” came into use early in the first half of the 20th century. Thus already in 1923 a draft of the Treaty of Mutual Assistance, prepared under the auspices of the League of Nations, a war of aggression was designated as an “international crime”<sup>347</sup>. However, generally, international law, as far as it is expressed in the judgments of international courts and tribunals and in treaties makes very little reference to “state crimes”, but rather discusses international criminality mainly in terms of criminal responsibility of individuals.<sup>348</sup> The Genocide convention<sup>349</sup> may be regarded as an exception, as it specifically provides for state responsibility for the crime of genocide. However, the Genocide convention does not in any way indicate that this type of state responsibility would be anyhow different from the traditional mode of state responsibility.<sup>350</sup> In state rhetoric, on the other hand, the vocabulary of

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precluded, since the concept of criminal international responsibility is for them necessarily linked to the existence of an international criminal jurisdiction, an idea which they refuse even to consider. Be that as it may, we see no point in extending to international law the specific legal categories of internal law.”

<sup>346</sup> Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, Yearbook of the ILC 1976, Vol. II (Part One), para. 101.

<sup>347</sup> Official Journal of the League of Nations, Fourth Year, No. 12 (December 1923), p. 1521.

<sup>348</sup> Thus the Nürnberg Tribunal has held that ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’ see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, Vol. 22, p. 53. 466 (1948).

<sup>349</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations Treaty Series, Vol. 78, p. 277.

<sup>350</sup> At the time of the adoption of the Genocide convention Sir Gerald Fitzmaurice as one of the drafters of the Convention stated that ‘the responsibility [mentioned in the Article 9 of the Convention] was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal

“international crime” is occasionally used. In particular the trend to refer to aggression, genocide, apartheid as international crimes was prevalent when the ILC adopted the Articles on State Responsibility in the first reading.<sup>351</sup> Considering this context, the ILC specifically addressed this issue in the commentary to the Article 19, emphasizing that:

“in adopting the designation ‘international crime’, the Commission intends only to refer to ‘crimes’ of the State, to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression ‘international crime’ as used in this article and similar expressions, such as ‘crime under international law’, ‘war crime’, ‘crime against peace’, ‘crime against humanity’, etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes.”<sup>352</sup>

Crawford has noted that such a choice of terminology raises a question – “why a term was adopted which had immediately to be distinguished from ordinary uses of that term in international law?”<sup>353</sup> He emphasizes that since mid 1970ties the concept “international crime” has been mainly used to refer to crimes committed by individuals which are of international concern, thus increasing the terminological confusion.<sup>354</sup> From the perspective of the public law paradigm, it is not so important whether breaches of fundamental norms are labelled as “international crimes” or by any other name, since in international law there is no fixed content attached to the concept of “international crime”. Nevertheless, the terminology is not entirely immaterial. As can be observed from the very strong reactions of states towards the use of the concept of “international crime” such a terminology evokes perceptions which states seem to be unwilling to associate with their conduct. States are willing to accept that they may be responsible for a “serious breach” of *jus cogens*, but are shrugging if someone proposes that they may be responsible for a *crime*.

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responsibility’ Official Records of the General Assembly, Sixth Committee, Summary Records, 21 September-10 December 1948, p. 440.

<sup>351</sup> Yearbook of the ILC 1976, Vol. II (Part Two), commentary to article 19, para.12. The ILC specifically notes that ‘in the general opinion, some of these acts genuinely constitute ‘international crimes’, that is to say, international wrongs which are more serious than others and which, as such, should entail more severe legal consequences. This does not, of course, mean that all these crimes are equal – in other words, that they attain the same degree of seriousness and necessarily entail all the more severe consequences incurred, for example, by the supreme international crime, namely, a war of aggression’.

<sup>352</sup> Yearbook of the ILC (1976, II, Part 2), para. 59.

<sup>353</sup> First Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/490/Add.2, para.74.

<sup>354</sup> *Ibid.*

#### 4.4. Should a distinction between delicts and crimes be recognized?

A question whether international law recognizes a distinction between delicts and crimes is one that belongs to the age old debates on *lex lata* and *lex ferenda*. In the arguments of supporters of the notion of international crimes the discussion of evidence of existing law (which as explored above is somewhat patchy) inevitably turns to a policy argument - even if it is not an existing law, the international community would be better off if such a distinction would be recognized.

Ago, when presenting the draft Article 19 in 1976 made a case in favour of distinguishing two regimes of responsibility on the basis of one quintessential point – that the international community recognizes that certain obligations are more important than others.<sup>355</sup> Accordingly, breaches of these important obligations also ought to result in a more aggravated form of responsibility. This recognition of the fundamental value of certain norms, according to Ago, finds expression in various forms. First and foremost, the existence of obligations that states regard as particularly important is evidenced by existence of norms *jus cogens* from which no derogation is possible. Similarly, the acceptance that certain obligations are owed to the international community as a whole give expression to the same underlying idea that these obligations are more important than others.<sup>356</sup> In Ago's opinion this distinction is meaningless, if it is not reflected also in responsibility rules.<sup>357</sup> Thus Ago assumes that, if states differentiate between important obligations and ordinary obligations, they must recognize that violations of different obligations also require different responsibility regimes. It is hard to object to this proposition. Obviously, a distinction is not made only for the sake of distinction – logic consistency requires, that an element may not be inserted without a follow-up to make that element a part of the whole. As Lauterpacht famously observed, international law is a complete system, and as such it must be based on logically consistent theory.<sup>358</sup>

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<sup>355</sup> Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, *Yearbook of the ILC* 1976, Vol. II (Part One), para. 99.

<sup>356</sup> The same idea finds expression in state's duty to prosecute individuals who have committed particularly grave breaches such as genocide; and in the UN Charter which provides for special consequences to certain breaches, such as violation of the prohibition of the use of force. Similarly as with *jus cogens* norms existence of these norms demonstrates the exceptional importance that international community attaches to performance of these obligations.

<sup>357</sup> Thus Ago notes 'it would seem contradictory if the same consequences continued to be applied to the breach of obligations arising out of the rules defined as "imperative" and the breach of obligations arising out of rules from which derogation through particular agreements is permitted. Similarly, it would seem contradictory if in the case of the breach of a rule so important to the entire international community that it is described as "imperative", the relationship of responsibility were still established solely between the State which committed the breach and the State directly injured thereby', see Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, *Yearbook of the ILC* 1976, Vol. II (Part One), para. 99.

<sup>358</sup> Lauterpacht H, *Règles générales du droit de la paix*, 62 *Recueil des Cours* (1937-IV) p. 350. Lauterpacht also argues that non recognition of a criminal law type of responsibility would be manifestly unjust as individuals hiding behind a label of state would acquire immunity to perform criminal acts for which they would be prosecuted if they would



The difficulty with this argument, however, is that logically sound or not, consistent or not, states may have wished to recognize *jus cogens* norms and obligations *erga omnes*, but have been unwilling to recognize two separate regimes of responsibility. In other words the law “as it is” (*lex lata*) is not matching with the law “as it ought to be” (*lex ferenda*). Crawford points to this in his first report:

“What can be said is that the developments outlined above confirm the view that within the field of general international law there is some hierarchy of norms, and that the importance of at least a few basic substantive norms is recognized as involving a difference not merely of degree but of kind. Such a difference would be expected to have its consequences in the field of State responsibility. On the other hand it does not follow from this conclusion that the difference in the character of certain norms would produce two distinct regimes of responsibility, still less that these should be expressed in terms of a distinction between “international crimes” and “international delicts.”<sup>359</sup>

On some level one could certainly agree with Crawford who points to the obvious fact that even if international law makes a distinction between classes of obligations that is not the same as distinguishing two regimes of responsibility. The deficiency of Crawford’s argument, however, is that he does not address the point of logic consistency of the legal system raised by Ago and Lauterpacht (that distinction between obligations logically requires distinction of applicable responsibility regimes). Crawford simply avoids this point.

Another argument of supporters of Article 19, which mirrors the argument made by Ago, is that with the establishment of the UN in 1945 a fundamental shift occurred in the normative structure of international law - certain common values such as protection of international peace and security were recognized as standing above individual interests of states. The Charter (so the argument goes) attempts to protect these values with norms and institutional mechanisms that are unprecedented (such as the powers of the Security Council under Chapter VII). The recognition of *jus cogens* and the corresponding acceptance of hierarchy of norms are subsequent developments that only manifest the same intent to protect shared higher values of the community of states. Thus Article 19 merely expresses the same trend in the field of state responsibility.

Subsequently other authors joined Ago’s cause. Thus Pellet argued that it is “obvious, evident, necessary, and indeed indispensable”<sup>360</sup> that the consequences deriving from a breach of

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perform these acts as private individuals. See Lauterpacht H, *Règles générales du droit de la paix*, 62 *Recueil des Cours* (1937-IV) p. 350.

<sup>359</sup> See First Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/490/Add.2, para. 71.

<sup>360</sup> Pellet, A. Can a State Commit a Crime? Definitely, Yes! *European Journal of International Law*, 1999, Vol. 10 No. 2, p. 426. Ago makes a similar argument in his 5<sup>th</sup> report on State Responsibility published in 1976 stating that ‘it is

bilateral treaty on some mundane subject ought to be differentiated from war crimes. Why so? Because delicts only breach particular rights of one or several states. Thus the harm that is inflicted by a delict remains rather limited in scope. Breaches that threaten peace and security on the other hand, harm the whole international community. As observance of fundamental norms is a necessary precondition for existence of the international community, accordingly, breaches of such norms are of concern to all the international community. In his 5th report Ago emphasized that:

“It is in the interest of all States that these rules should be respected by all States. The juridical system of the community of States cannot tolerate free derogation from these rules through particular agreements; it has made many of these rules into rules of *jus cogens*. It is improbable that this juridical system can tolerate a situation in which a breach of the obligations imposed on States by at least some of these rules is regarded as a wrongful act no different from the rest and is treated accordingly.”<sup>361</sup>

Establishment of international public order may well have been on the minds of the drafters of the Charter. It is no secret that Hersch Lauterpacht who happened to be advising the British representatives to the San Francisco conference, was very much supportive of the idea of making use of the post-war momentum to introduce significant changes in the structure of international law. However, even if the drafters of the Charter would indeed subscribe to introduction of a more advanced form of international public order, it is far from evident that states share the same enthusiasm some fifty years latter. Yet, was it necessary to reject the notion of state crimes altogether? As has been noted, it would have been better to distinguish between the imperfect text of Article 19 and the concept that it embodied.<sup>362</sup>

#### **4.5. Defining international crimes**

A further criticism of the notion of international crimes as envisaged by Ago has been addressed to the blurry definition of the concept. Article 19 of the Draft Articles on State Responsibility, which was dropped after the second reading, provided the following definition of an

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unthinkable that States could have believed that such a breach unhesitatingly qualified as a "crime", would entail only the consequences which normally followed from internationally wrongful acts that were much less serious, namely the right of the injured party to require the offender to make reparation for the damage sustained.' see Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, Yearbook of the ILC 1976, Vol. II (Part One), para. 96.

<sup>361</sup> Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/291 and Add.1 and 2, Yearbook of the ILC 1976, Vol. II (Part One), para. 149.

<sup>362</sup> Abi-Saab G. The uses of article 19. *European Journal of International Law* Vol. 10.2, 1999. p. 339.

“international crime”: “[a]n internationally wrongful act which results from the breach by a State of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime.”

This definition points out two elements which differentiate international crimes from other ordinary breaches. First, the obligation that is breached is essential for the protection of fundamental interests of the international community. Second, the whole of the international community recognizes such a breach to be a crime. The definition is obviously somewhat ambitious. Firstly, it takes it for granted that there is such a thing as an international community. Then it presupposes that the international community recognizes certain breaches as crimes. Although use of such concepts as “international community” and “international crime” has become commonplace, they surface mainly in the academic debate and occasionally in political discourse. These concepts are not established as strictly legal categories.

Another criticism of the definition contained in draft Article 19 was that it was circular – a crime is something that the whole community of states recognizes as a crime.<sup>363</sup> To rebuttal this argument one might point out that also the definition of peremptory norms in Article 53 of the VCLT is similarly circular<sup>364</sup>, yet it is generally accepted. Similarly, like the definition of peremptory norms in the VCLT (a peremptory norm is such a norm that is recognized as peremptory), the definition of international crime may be lacking in explanatory value, however, it is fully operational for all practical purposes. It must also be pointed out that the definition of international crime, as it was adopted by the Commission in the draft Article 19, was narrower and at the same time more generalized compared to what Ago originally proposed.<sup>365</sup> Anyhow, it is a peculiarity of definitions that they may be endlessly criticized, especially if they are made by others. A better view seems to be that suggested by Abi-Saab who invites to distinguish between the merits of the concept of international crimes and its perhaps imperfect formulation.<sup>366</sup>

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<sup>363</sup> Jørgensen N. *The Responsibility of States for International Crimes*. Oxford: Oxford University Press, 2000, p. 52.

<sup>364</sup> Article 53 of the VCLT ‘Treaties conflicting with a peremptory norm of general international law (“jus cogens”) provides: ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, Vol. 1155, p. 331.

<sup>365</sup> Jørgensen N., *The Responsibility of States for International Crimes*, Oxford: Oxford University Press, 2000, p. 52.

<sup>366</sup> Abi-Saab notes that ‘While the ‘text’ is, admittedly, not a shining example of limpidity and precision, one should keep in mind, in criticizing its drafting imperfections, that these criticisms do not necessarily attach to the ‘concept’ which it endeavours, perhaps inadequately, to express’, see Abi-Saab G. The uses of article 19. *European Journal of International Law* Vol. 10.2, 1999. p. 339.

Turning to the concept itself, for critics of the “international crime” the core argument was that the notion would be utterly subjective.<sup>367</sup> In absence of a list of crimes each state would be free to assert a subjective position. This would result in divergent views and a chaos that would be detrimental for international law. This argument may hardly be substantiated. As has been noted, international law has successfully functioned with concepts that are even more subjective and vague, such as the concept of international custom.<sup>368</sup> Certainly any state may suggest that a particular rule constitutes a custom. This subjectivity, however, has not prevented international courts and tribunals from determining and successfully applying customary rules. Similar objections against “subjectivity” and “politization” were also voiced with regard to determination of which norms qualify as *jus cogens*.<sup>369</sup> The Vienna Convention on the Law of Treaties famously leaves it up to the “international community of States as a whole” to determine which norms have the status of *jus cogens* and which do not.<sup>370</sup> Thus as one observer notes “[the] most important norms are based on the most uncertain norm-creating mechanism.”<sup>371</sup> True, however, as developments subsequent to the adoption of VCLT have demonstrated, states (with the peculiar exception of France) as well as international courts have had little difficulty in determining the list of *jus cogens* norms.<sup>372</sup> Therefore, if the international community is able to agree on what constitutes international custom, and is likewise capable to deal with an even more challenging question of which customary rules possess the quality of *jus cogens*, there seems to be no reason to doubt that it would indeed be able to determine what conduct constitutes an international crime.<sup>373</sup>

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<sup>367</sup> Rosenstock, An International Criminal Responsibility of States?, *ILC, International Law on the Eve of the Twenty-First Century— Views from the International Law Commission*, 1997, p. 265.

<sup>368</sup> Pellet, A. Can a State Commit a Crime? Definitely, Yes! *European Journal of International Law*, 1999, Vol. 10 No. 2, p. 428.

<sup>369</sup> See Weil P. Towards Relative Normativity in International Law? *American Journal of International Law* Vol. 77, 1989, p. 416.

<sup>370</sup> VCLT Article 53.

<sup>371</sup> Paulus A, Jus Cogens in a Time of Hegemony and Fragmentation, *Nordic Journal of International Law*, Vol.74, 2005, p. 325.

<sup>372</sup> It seems to be generally agreed that prohibition of genocide, crimes against humanity, war crimes and aggression, as well as the principle of self-determination constitute norms *jus cogens*. See I. Brownlie, *Principles of International Law*, 6th ed., Oxford: Oxford University Press, 2003, p. 489; Sinclair I. *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester: Manchester University Press, 1984, p. 222. However, it must also be noted that the International Court of Justice has demonstrated considerable unwillingness to directly refer to preemptory norms instead referring to ‘intransgressible principles of international customary law’ see *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion, I.C.J. Reports 1996, p. 258, para. 83. The ICJ has been much more willing to employ the concept of *erga omnes*, see *Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)*, 5 February 1970, I.C.J. Reports 1970, p. 32, para. 34; *East Timor (Portugal v. Australia)*, 30 June 1995, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, 43 ILM (2004) p. 1053, para. 157. *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Preliminary Objections, I.C.J. Reports 1996, p. 616, para. 31.

<sup>373</sup> Pellet, A. Can a State Commit a Crime? Definitely, Yes! *European Journal of International Law*, 1999, Vol. 10 No. 2, p. 428.

#### 4.6. Legal consequences resulting from international crimes.

It must be noted that Ago's initial idea to distinguish between two types of breaches on the basis of the content of the obligation ("ordinary breaches" and "international crimes") was intended to be reflected also in the applicable responsibility regime. Thus Ago noted in his 1976 report:

"[w]e should already be aware that in making a distinction between internationally wrongful acts on the basis of the degree of importance of the content of the obligation breached we shall necessarily be obliged subsequently to draw a distinction also between the regimes of responsibility to be applied. We have already emphasized that the distinction in question is a "normative" distinction: it has no place in our draft unless it leads to a difference in the consequences entailed respectively by certain more serious offences and by other breaches of international obligations."<sup>374</sup>

Ago concludes that such breaches as use of force, colonial domination, genocide, apartheid, endangering the conservation of common heritage of mankind would all constitute international crimes. In his 1976 Report Ago argued that the main distinctive consequence of international crimes is that the injured state (and also other states) are entitled to apply sanctions. This contrasts with the ordinary breaches which result only in the duty to make reparation.

Therefore, after having established the need to differentiate between ordinary breaches and international crimes, the key practical question emerges - what is the actual responsibility regime (in terms of rights and obligations) that applies to international crimes? And even more importantly for the purposes of this study – whether the envisaged responsibility regime for international crimes reflects fundamentals of the public law paradigm (namely, whether there is a legal relationship between the responsible state and the community; whether there are punitive elements; whether there are enforcement mechanisms implemented on behalf of the community)?

Even prior to the adoption of the "serious breaches" approach advocated by Crawford, when the ILC still used the concept of "international crimes", it was suggested that the consequences of an international crime are so mild that the distinction between delicts and crimes makes little sense.<sup>375</sup> Crawford in his first report noted "the marked contrast between the gravity of an international crime of a State, as expressed in Article 19, on the one hand, and the rather limited

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<sup>374</sup> Yearbook of the ILC 1976, Vol. II (Part One), para. 146.

<sup>375</sup> Tomuschat C. International Crimes by States: An Endangered Species? In: Wellens K., (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Hague: Kluwer Law International, 1998, p. 255.

consequences drawn from such a crime in Articles 51 to 53, on the other.”<sup>376</sup> The 1996 Draft Articles (which still contained the “international crimes” approach), in addition of a right of every state to employ countermeasures, provided that in cases of international crimes restitution could be claimed from the responsible state even if it resulted in a disproportionate burden on the culprit and even if it threatened economic stability, political independence or would impair dignity of the responsible state (Article 52 of the 1996 Draft Articles). Whereas other states in a case of international crime were under obligation: a) not to recognize the situation created by the crime; b) not to render aid or assistance to the responsible state that would maintain the created situation; c) to cooperate with other states in the application of the measures designed to eliminate the consequences of the crime (Article 53 of the 1996 draft).

Although the above mentioned obligations that were intended to apply to international crimes aggravate the responsibility compared to a situation of other “ordinary” breaches, these consequences are indeed very limited. The obligation to provide restitution will often be materially impossible (for instance, if nationals of the injured state have been killed) and therefore there will be no option but to resort to compensation and possibly satisfaction. As for obligations incumbent on other states (to cooperate, not to recognize the unlawful situation, not to render aid), in practical terms these may often be of minor significance. The obligation not to recognize an unlawful situation is anyhow a rule of customary law.<sup>377</sup> Moreover, the breach of these obligations itself will be an “ordinary” breach rather than an “international crime” and therefore, invocation will depend only on the injured state.

Another problem with obligations of third states with regard to international crimes is that authoritative determination whether certain conduct constituted a crime or not may be unavailable or come only after a considerable period of time. While such a determination (by an international court or by the UN Security Council) has not been made, third states that are supporting commission of an international crime may argue that the specific breach is not a crime or that they were unaware of the fact that international crime is committed. Supply of weapons to a government that uses these weapons to perform crimes against humanity (such as Russian supplies of weaponry

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<sup>376</sup> First Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/490/Add.2, para.43. Similarly Crawford notes that: ‘[t]here is a [...] contrast between the strong procedural guarantee associated with countermeasures under article 48 and part three, and the complete absence of procedural guarantees associated with international crimes’. See The First Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/490/Add.2.

<sup>377</sup> ICJ: *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, I.C.J. Reports 1971, p. 16.

to Syrian government from 2012 onwards) is a likely scenario that illustrates the limited value of Article 53 obligations which in effect produce no meaningful results.<sup>378</sup>

In the 2001 version of the Draft Articles (when the “international crimes” approach was substituted by the “serious breaches” approach) the consequences of a “serious breach” were even further slimmed down. Initially Crawford had proposed an idea of aggravated damages, i.e., that in calculation of damages the gravity of the breach would be taken into account.<sup>379</sup> By this proposal Crawford aimed to retain at least some punitive element that would apply to “serious breaches”. The proposal, however, proved controversial and was subsequently dropped from the Articles. Yet another limitation on the consequences of the “serious breaches of peremptory norms” was that these breaches had to be “serious”. It is insufficient that a *jus cogens* norm is breached for the special consequences to apply – the breach has to involve gross or systematic failure to perform the obligation.<sup>380</sup> Finally, from obligations of third states the already mentioned obligations to cooperate, not to recognize or render aid were left in the final version of the 2001 Articles on State Responsibility.

Compared to what was originally envisaged by Ago (at least conceptually, as Ago never proposed the actual text of Articles that now make up Part III): no punitive measures were retained in the final version of the 2001 Articles. The obligations of third states were also kept at a minimum, limited to the three obligations: that of cooperation to bring the breach to an end (Article 41, para. 1); the obligation of non-recognition of the unlawful situation (Article 41, para. 2); and the obligations not to render aid or assistance in maintaining the unlawful situation (Article 41, para. 2).<sup>381</sup> Finally, also the added perceptual weight that was achieved by the concept of “international crime” was unattained by the 2001 Articles.

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<sup>378</sup> Russia may argue that Syrian government does not engage in crimes against humanity or that in the absence of an authoritative pronouncement by an international court or the UN Security Council, it was not aware of the fact that crimes against humanity are committed.

<sup>379</sup> Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc 2000, A/CN.4/507/Add.4, para. 407.

<sup>380</sup> 2001 ASR Article 40 (2).

<sup>381</sup> See Paulus A. *Jus Cogens* in a Time of Hegemony and Fragmentation, *Nordic Journal of International Law* Vol. 74, 2005, p. 315. Similarly Paulus notes that: “Before the ILC produced this statement [Article 41], there was no indication that the effect of *jus cogens* was to create obligations for third States. To the contrary, the impact of *jus cogens* was to void any contrary agreement, not to produce additional obligations for other parties. This was however the impact of obligations *erga omnes*, the *omnes* being the States composing the international community. The real reason for the change, as indicated by Special Rapporteur Crawford, was however the greater acceptance of the term *jus cogens* among States. What the Commission tried thus to do was to sell its development of the law as codification of existing *jus cogens*-categories.”

A further criticism of the consequences attached to “serious breaches” as adopted in the 2001 Articles on State Responsibility is voiced by Cassese.<sup>382</sup> When considering Articles 41, 48 and 54 of the 2001 Articles in context, Cassese points out that in terms of consequences of breaches the ILC in effect distinguishes three types of obligations: 1) ordinary or “contractual” obligations; 2) obligations *erga omnes*; and 3) obligations under peremptory norms. Breaches of each type of obligations result in a different set of rights and obligations of third states. In case of a breach of a ‘contractual’ obligation third states are not entitled to interfere in the relationship between the injured and the responsible state. Breaches of *erga omnes* obligations entitle third states to: a) claim cessation of the wrongful act and assurance of non-repetition; b) claim from the responsible state performance of obligation of reparation for the benefit of the injured state (Article 42); c) to take lawful measures against the responsible state to ensure cessation and reparation (Article 54). Finally, breaches of peremptory norms produce the same entitlements as breaches of *erga omnes* obligations and on top of that impose the three obligations named in Article 41 (to cooperate, not to recognize as lawful the situation created by the serious breach and not to render aid). According to Cassese, such a distinction between breaches of obligations *erga omnes* and obligations under peremptory norms is contrary to state practice, unnecessary and likely to cause confusion. Cassese convincingly argues that both categories - obligations *erga omnes* and obligations under peremptory norms in fact coincide:

“[t]o contend that an obligation *erga omnes* may be derogated from would amount to denying its very nature as an obligation designed to protect fundamental values, the respect for which is an interest of the whole international community. It would amount to admitting that two or more states, by concluding an agreement, would be allowed legitimately to infringe on an interest shared by the whole international community. Both the notion of *erga omnes* and that of *jus cogens* aim at the same result, that is to prevent states from freely disposing of, and disregarding, values safeguarded by international customary rules.”<sup>383</sup>

Consequently Cassese suggests that as both concepts have the same essential purpose - that of protecting fundamental values of the international community, third states (those not directly injured by the breach) ought to have the same rights and obligations with regard to the responsible state, regardless whether that state has breached an *erga omnes* obligation or a peremptory norm.<sup>384</sup> Cassese’s argument and his suggestion indeed seem well founded. A minor criticisms, which,

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<sup>382</sup> Cassese A. The Character of the Violated Obligation. In: *The Law of International Responsibility*, Crawford et al. (eds.), Oxford: Oxford University Press, 2010, p. 415.

<sup>383</sup> *Ibid.*, p. 418.

<sup>384</sup> *Ibid.*, p. 420.



however, does not obliterate the merit of his substantive argument, is that distinction in consequences between breaches of obligations *erga omnes* and obligations under peremptory norms is justified with regard to a subgroup of obligations *erga omnes* i.e., obligations *erga omnes partes*. Article 48(1)(a) of the 2001 Articles on State Responsibility deals with obligations *erga omnes partes*, which will be owed to all other states parties of a particular treaty. These obligations are not necessarily of a peremptory character and, therefore, do not threaten fundamental interests of the international community. Hence the distinction in consequences, which need not be as serious as those applying to breaches of peremptory norms.

To eliminate the unnecessary distinction between obligations *erga omnes* and peremptory norms, Articles ought to address specifically invocation of responsibility for breaches of peremptory norms, particularly emphasizing that these obligations are owed to the international community as a whole and entitle any state to invoke responsibility. This may be done by either redrafting the present Article 48 and Articles 40 - 41. In addition, consequences of responsibility for breaches of obligations *erga omnes partes* ought to be treated separately from obligations “owed to the international Community as a whole”. Breaches of obligations *erga omnes partes* ought to result in consequences that are currently provided in Article 48(2).

However, the question most relevant for the purposes of this study is what consequences would be required in accordance with the public law paradigm approach? It is suggested that protection of community interests requires introduction of invocation of responsibility on behalf the community of states. Such a legal relationship between the responsible state and the community as a whole could take two forms. First and the most “public” form would be where responsibility is invoked on behalf of the community by an entity which has been explicitly granted such powers by the community. Such a development requires setting up of new institutional arrangements as well as procedures for their functioning. Also to function effectively, such a “public prosecutor” obviously needs to be impartial as well as endowed with real authority. Closest analogy of this type of invocation may be found in the European Union law where European Commission is entitled to initiate infringement proceedings against the EU member states on behalf of the community in accordance with Article 258 TFEU.<sup>385</sup> At the present stage of development of the international community, when delegation of power from sovereign states is very limited and rather an exception than a norm, it is difficult to see such a model of invocation on behalf of the international community functioning in near future. Flat rejection of Arangio-Ruiz’s proposals on mandatory

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<sup>385</sup> Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, Official Journal of the European Union, C 115/47, of 9 May 2008.

conciliation procedures and arbitration for disputes involving countermeasures<sup>386</sup> provide an example of how states would have treated any institutionalization of international “public prosecutor”.

The second form of “public” involvement in the process of invocation would be where any member of the community is entitled to invoke responsibility on behalf of the community. Again an example of this type of invocation is already present in the EU law – Article 259 of the TFEU allows any member state to initiate proceedings for the violation of the EU Law against any other member state of the Union. This option appears to be considerably more workable with the present setup of the international community. Indeed such a scheme is embodied in Article 48 of the 2001 Articles on State Responsibility. The downside of this second option is that it remains half bilateralist in a sense that responsibility is invoked by a certain member of the community against another member. Such a model of invocation somewhat loses the moral authority that a genuine public prosecutor enjoys, as it might always be argued that invocation is on behalf of the community only in name, while actually the invoking state is pursuing its own interests.<sup>387</sup>

Another disadvantage of this option is that states may be unwilling to take on the trouble of invoking responsibility of another state and thus to perform a kind of public service, in particular if the invoking state does not directly gain anything from such “policing” of other members of the international community. As the experience of the EU shows, states are highly unwilling to engage each other in international litigation – in fact in around 60 years that *member state v. member state* infringement proceedings have been available in the EU, states have made use of this possibility only on three occasions.<sup>388</sup> This unwillingness among the EU states to initiate proceedings against other states, however, may not be an entirely adequate example due to peculiarities of the institutional setup of the EU. States often feel they don’t need to take on the role of a “public prosecutor” as that role is successfully performed by the European Commission.

In addition to invocation on behalf of the international community, also a punitive aspect to the consequences of an internationally wrongful act, if the act in question violates a peremptory norm, must be contemplated. Violations of peremptory norms tend to be more harmful to the international community than ordinary breaches, as they undermine community’s fundamental interests and thus endanger its functioning. Therefore, as Ago and others have argued, logic

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<sup>386</sup> Arangio-Ruiz G. Special Rapporteur, Fifth report on state responsibility , A/CN.4/453 and Add.1-3, *Yearbook of the International Law Commission*, 1993, Vol. II, p. 1.

<sup>387</sup> Here an analogy may be drawn with international criminal responsibility of individuals: states that employ universal jurisdiction to prosecute individuals for international crimes are often suspected of abusing the concept. However, if prosecution is conducted in the International Criminal Court the argument of acting on behalf of international community appears more convincing.

<sup>388</sup> The cases in which member states have instituted proceedings against other member states are 148/78 *France v. UK*, [1979] ECR 2923, C-388/95 *Belgium v. Spain* [2000] ECR. I-03123; and C-145/04 *Spain v. UK*, [2006] ECR I-7917.

consistency requires to differentiate crimes (or breaches of peremptory norms to employ the vocabulary of the 2001 Articles on State Responsibility) from other breaches also in terms of the applicable consequences. Punitive or other aggravated form of responsibility provides members of the community with an additional motivation not to engage in the respective conduct, thereby protecting the essential interests of the whole community. Therefore whenever the discussion on state responsibility will be reopened, it is essential to return to consideration of the additional consequences that were included in Article 52 of the 1996 Draft of the Articles on State Responsibility.

Moreover, an argument may be put forward that not only “international crimes” ought to entail punitive elements (in addition to the duty to make reparation), but also other breaches. Such breaches are those which are continuous, systematic and likely to be repeated in future (for instance if domestic law or governmental practices are contrary to international law). Examples of this type of violations would be the United States breaches of the Vienna Convention on Consular Relations<sup>389</sup> – the United States systematically breached the Vienna Convention with regard to nationals or various states, with Paraguay, Germany and Mexico instituting proceedings in the International Court of Justice (respectively in the *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.)*<sup>390</sup>, *LaGrand (Germany v. United States of America)*<sup>391</sup> and *Avena and Other Mexican Nationals (Mexico v. United States of America)*<sup>392</sup>. The fact that the violations of the Vienna Convention on Consular Relations were systematically continued even after the ICJ established that they constituted internationally wrongful acts shows that states may lack motivation to discontinue breaches. Similarly, states may choose to pay compensation rather than discontinue domestic measures that are contrary to international law. A possibility of a penal element in addition to the established duty to make reparation would add to the perception of public condemnation of wrongfulness of the respective conduct and thus provide an additional incentive for states to comply with their international obligations.

#### **4.8. Conclusions**

Scholars, states and international courts all seem to agree that there are two general categories of international obligations. The first category includes obligations which are of

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<sup>389</sup> Vienna Convention on Consular Relations, April 24, 1963, 596 UNTS 261.

<sup>390</sup> ICJ: *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)* Order of 10 November 1998, I. C. J. Reports 1998, p. 426.

<sup>391</sup> ICJ: *LaGrand (Germany v. United States of America)*, Judgment I.C.J. Reports 2001, p. 466.

<sup>392</sup> ICJ: *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12.

fundamental importance for the whole international community, such as obligation not to engage in aggression or genocide. The second category is comprised of all other obligations which generally are of lesser importance and therefore concern only the injured state. This distinction becomes meaningless if breaches of both categories of obligations result in the same legal consequences. Therefore, as Ago, Lauterpacht, Tunkin and many others have argued, logic consistency requires to differentiate breaches of fundamentally important obligations from other breaches also in terms of the applicable responsibility regime.

The ILC's throughout its work on state responsibility attempted to accommodate this conclusion. However, to appease opposition to the concept of international crimes, the ILC sought to substitute "international crimes" with the concept of "serious breaches of peremptory norms". This policy choice in itself may even be a welcome development as it reconciles doctrines on peremptory norms and obligations *erga omnes* and avoids introduction of a new concept of state crimes which significantly overlaps or even is identical to peremptory norms. A minor unwelcome side effect of such a choice is that the perception connotation of the word "crime" is not made use of. However, a problem of considerable importance with regard to the ILC's shift towards "serious breaches" approach is that it continuously reduced the consequences attached to "serious breaches". Thus the ILC dropped the idea that all states would be regarded as injured, if a serious breach of a peremptory norm is committed. Likewise, the ILC gave up on the idea that all states have a right to apply countermeasures and claim restitution even if it resulted in a disproportionate burden on the responsible state and even if it threatened economic stability, political independence or would impair dignity of the responsible state (Article 52 of the 1996 Draft Articles).

These developments lead one to question a very common perception of international law - that it is gradually developing from a somewhat primitive and archaic condition to a legal system with all the proper hallmarks of the rule of law. Thus slowly but surely international law is supposed to evolve from unwritten custom to treaties, from co-existence to cooperation, from unlimited sovereignty to an international community. However, after reviewing rise and demise of the concept of international crimes, one starts to doubt applicability of this perception to the field of state responsibility.

In fact the momentum for introduction of international crimes with meaningful consequences in terms of rights and obligation of the international community towards the responsible state was present only up until late eighties. Since then many states and in particular leading powers started to lose appetite for introduction of the concept. The interest went away completely with beginning of nineties as both the developed and the developing states had little interest in such developments. Why? The likely reason is that developed countries were no longer threatened by the socialist block and therefore felt it to be an improbable scenario that they would

require normative protection against aggression, war crimes and the like. Also developed countries found it far more appealing to pursue their agendas through export of liberal economic policies and through international economic institutions rather than by brute force. As a result, also the developing countries felt less threatened and willingly joined these policies, thus landing the world in an unprecedentedly hegemonious system in which everyone (with rare exceptions such as North Korea) seemed to be more or less on the same side. If, however, occasionally the powerful have to bring any disobedient state to heel, then obviously they are even less interested in any kind of meaningful system of responsibility for international crimes. Thus the concept of international crimes of states in the post-Cold War era made little appeal to anyone.

## 5. PROTECTION OF COMMUNITY INTERESTS IN THE ARTICLES ON STATE RESPONSIBILITY

Having traced the historical evolution of the protection of community interests in the law of state responsibility, we now turn to the present state of this branch of international law. A seminal point in the story of development of the law of state responsibility was 2001 when the ILC formally concluded its work on this epic project that lasted for more than five decades. The work did not, however, result in a landmark treaty akin to the VCLT, as could have been expected, but rather in a General Assembly resolution which merely “noted” the adoption of the Articles by the ILC.<sup>393</sup> This might seem like a petty conclusion to a monumental project. However, authors, especially those involved in the ILC’s work, like Crawford, have since argued that having “Articles” is in fact better for progressive development of state responsibility than having a proper treaty.<sup>394</sup> Their key argument is that negotiating a treaty on the basis of the Articles would in fact reopen the debate that was concluded with much difficulty. Issues like state crimes, countermeasures of general interest and other contentious topics would again cause disagreement.<sup>395</sup> This in turn might result in a treaty which, in terms of community interests, is even weaker than the present Articles. Another feared possibility is that the treaty would be reluctantly ratified and perhaps would not even enter into force – a scenario that would greatly diminish the authority of the Articles.<sup>396</sup>

These indeed seem to be valid arguments. The weight of the authority of the ILC’s legally non-binding Articles on State Responsibility has been impressive. International as well as national courts, governments and scholars have willingly embraced the ILC’s work on state responsibility as an accurate reflection of existing law. This of course is not to say that the approval is unanimous. Some courts, for instance ECtHR in *El-Masri v. Macedonia* have tried approaches that thread entirely novel paths that dissonate with the ILC’s conclusions. In that particular case, the ECtHR found that Mr.El-Masri’s abuse conducted by the CIA agents at Skopje Airport was attributable to Macedonia because the abuse was “carried out in the presence of officials of the respondent State

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<sup>393</sup> UN General Assembly, Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly, 28 January 2002, A/RES/56/83, available at: <http://www.refworld.org/docid/3da44ad10.html> [viewed August 15, 2014]. Interestingly the General Assembly even avoided expressing any opinion on the articles but only said that it “takes note of the articles”, thus avoiding any express approval or disapproval of the articles.

<sup>394</sup> Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013, p. 42.

<sup>395</sup> See Caron D. The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, *American Journal of International Law*, 2002, 86, p. 862.

<sup>396</sup> The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations provides an example of such ‘failed’ treaty, see Gaja G. ‘New’ Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary. *British Yearbook of International Law* Vol. 58.1, 1988, p. 253.

and within its jurisdiction.”<sup>397</sup> From that the ECtHR concluded that: “the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.”<sup>398</sup> Such interpretation considerably lowers attribution requirements compared to those included in the Articles on State Responsibility. The CIA agents clearly were not placed at the disposal of Macedonian authorities (Article 6 of Articles on State Responsibility), therefore, under the Articles their acts would be attributed only to the United States and not to Macedonia. Essentially, the Court attributed the wrongful conduct of the CIA agents to Macedonia, simply because Macedonia had consented to allow CIA rendition operations in Macedonia and Macedonian officials were present at the airport. Thus the Court held Macedonia responsible in a situation in which Articles on State Responsibility, if applied by another court, such as the ICJ, in all probability would not find Macedonia responsible.

However, regardless of incidental bypassing of the ILC’s Articles, it seems uncontentious to suggest that they are at the focal point of the law of state responsibility as it presently stands. Therefore the present analysis of protection of community interests in the law of state responsibility will be premised on the ILC’s 2001 Articles on State Responsibility.

This chapter will proceed with assessment of four distinct elements in the Articles on State Responsibility which to greater or lesser extent were designed to protect interests of the international community. These elements are: 1) the so called objective nature of state responsibility, i.e., an idea that state incurs international responsibility regardless of the fact whether the breach has caused injury to any state; 2) invocation of responsibility by a state other than an injured; 3) serious breaches of peremptory norms; and 4) countermeasures of general interest also referred to as solidarity measures.

## **5.1. Objective responsibility**

As already discussed in Chapter 3, traditional law of state responsibility is premised on the private law paradigm – a modality of legal relationship which is established exclusively between a state that performs a breach of international law and another state that is injured by that breach. In the private law paradigm responsibility is a bilateral matter between the wrongdoer and the injured - one that is based on reciprocity of individual rights and obligations. In this paradigm for a state to incur international responsibility, there must be an injury to subjective rights of another state and the injured state needs to invoke international responsibility of the state that performed the

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<sup>397</sup> European Court of Human Rights, judgment of 13 December 2012, *El-Masri v. Macedonia*, para. 206. Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621> [viewed September 28, 2014].

<sup>398</sup> *Ibid.*

breach.<sup>399</sup> This traditional law of state responsibility is reflected in the famous *Reparation for Injuries* advisory opinion where the ICJ observed that: “only the party to whom an international obligation is due can bring a claim in respect of its breach.”<sup>400</sup> The core purpose of this traditional approach is to protect subjective rights of states. Protection of the rule of law or objective legality only come as by-products of protection of subjective rights.

The ILC in the Articles on State Responsibility does away with this time tested approach. In Articles 1 and 2 it defines conditions for state responsibility. For a state to incur international responsibility it must perform a breach of an obligation and that breach must be attributable to the state. As becomes clear from the Commentary to Article 2 there are no further requirements.<sup>401</sup> Thus the ILC purposefully does not mention injury as a condition for responsibility. The ILC explains that breach and attribution are the only necessary conditions of responsibility and that “there is no exception to the principle stated in article 2.”<sup>402</sup> The ILC reconfirms this point in commentary to Article 31 when it discusses reparation. It notes that: “the general obligation of reparation arises automatically upon the commission of the internationally wrongful act and is not, as such, contingent upon a demand or protest by any state, even if the form which the reparation should take in the circumstances may depend on the response of the injured State or States.”<sup>403</sup>

This approach has been sometimes referred to as “objective responsibility”.<sup>404</sup> It is “objective” in a sense that the state that performs the breach is responsible irrespective of whether any other state or other international actor is injured by the breach. The logic is that the breach itself is considered harmful to the international community which has a general interest in observance of law. It is in this sense that responsibility becomes “objective” or automatic, even if it does not cause injury or is not invoked by anyone. The consequences of discarding injury as a requirement of responsibility are fundamental. Although it may appear as an insubstantial doctrinal detail, discarding the requirement of injury reorientates the law of state responsibility away from the

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<sup>399</sup> See Stern B. A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury. In: Ragazzi M. (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*. Leiden: Nijhoff, 2005. p. 193.

<sup>400</sup> ICJ: *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, I.C.J. Reports, 1949, p. 174, pp. 181-182.

<sup>401</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 36. para. 9, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [viewed 2014, July 14].

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*, p. 91. para. 4.

<sup>404</sup> Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013, p. 60; Nollkaemper A. Constitutionalization and the Unity of the Law of International Responsibility, *Indiana Journal of Global Legal Studies* Vol. 16, 2 (Summer 2009), p. 546.



private law paradigm towards protection of community interests.<sup>405</sup> As a result of this shift, the emphasis of the law of state responsibility is no longer placed exclusively on protection of individual rights of the injured state. Recognition of responsibility without injury acknowledges the interest of the whole international community in observance of international public order. As Pellet has pointed out:

“a ‘reconceptualisation’ of the very notion of international responsibility, which, by the elimination of injury as a condition for its existence, finds itself ‘objectivised’, in the sense that, from a purely inter-state approach we have passed to a more ‘communitarian’ or ‘societal’ vision: responsibility exists in and of itself, independently of its effects.”<sup>406</sup>

Apart from conceptual importance, giving up injury as a condition for responsibility has also other more specific consequences. If responsibility automatically results from a breach (as Articles 1 and 2 stipulate), that implies that commission of a breach also automatically results in consequences of a breach: duty of continued performance, cessation, non-repetition and reparation - even if the injured state has not invoked the responsibility. This again constitutes a significant development towards protection of community interests. The fact that the responsible state is automatically under duty of cessation, non-repetition and reparation places an additional onus on the responsible state. If the obligation breached is owed to the international community as a whole, then performance of these new obligations (i.e., secondary obligations which result from the breach) may be demanded not only by the directly injured state but by any member of the international community. Thus the responsible state finds itself having new legal obligations on top of the breached primary obligations. For instance, a state that performs an act of aggression towards another state, in accordance with the Articles on State Responsibility, is automatically under an obligation to cease the breach and to provide reparation. The objective nature of responsibility means that the responsible state incurs these secondary obligations regardless whether the directly injured state invokes the responsibility. Existence of these secondary obligations is given meaning by allowing the possibility for other states to claim responsibility from the wrongdoing state, not because they are injured, but because they protect an interest of the whole international community in preservation of international peace and security. Thus objective nature of responsibility is a conceptual foundation that justifies invocation of responsibility by states that have not been directly injured and allows them to invoke responsibility with a purpose to protect community interests.

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<sup>405</sup> See Stern B. The Elements of an Internationally Wrongful Act. In: *The Law of International Responsibility*, Crawford J., Pellet A., Olleson S. (eds.), Oxford: Oxford University Press, 2010. p. 193.

<sup>406</sup> Pellet A. Remarques sur une révolution inachevée - Le projet de la C.D.I. sur la responsabilité des États. *Annuaire français de droit international* 1996, p. 4.

## 5.2. Invocation of state responsibility to protect community interests

Invocation of state responsibility is a direct and obvious way to protect international legal interests.<sup>407</sup> Shared interests of the whole international community are no exception. Whether it is international peace and security, protection of global environmental commons (such as the high seas, International Seabed Area, ozone layer or global climate)<sup>408</sup>, prosecution of perpetrators of genocide or protection of universally recognized human rights – all of these community interests need legal protection which may be enforced by means of invoking state responsibility. Invocation of state responsibility is relatively straightforward in cases where one state breaches an obligation that is owed to another state. The injured state<sup>409</sup> may invoke responsibility of the responsible state and institute proceedings in a court or tribunal (if there is one with an appropriate jurisdiction). This modality of legal relationship is based on the private law paradigm, where the injured state protects its own rights, similarly to a private contractor enforcing a contract against a defaulting contractual partner. As we saw from the analysis of the previous chapters, this private law paradigm dominated the law of state responsibility right up to 1950ties when the topic was taken up by the ILC. In the Articles on State Responsibility this private law inspired modality of legal relationship is reflected in Article 42 which allows invocation of responsibility by the injured state i.e., the state whose rights have been breached.

To spell out the details, Article 42 distinguishes three cases in which a state will be considered as injured (and therefore entitled to invoke responsibility).<sup>410</sup> First is the already

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<sup>407</sup> See Weiss E. Invoking State Responsibility in the Twenty-First Century. *American Journal of International Law* Vol. 96 (2002), p. 798.

<sup>408</sup> These interests are protected respectively by the United Nations Convention on the Law of the Sea, December 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982); Convention for the Protection of the Ozone Layer, March 22, 1985, 1513 UNTS 323; 26 ILM 1529 (1987); United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107; 31 ILM 849 (1992).

<sup>409</sup> In legal literature the term „injury” is often employed as a synonym to “damage”. Both terms may refer to material as well as moral harm that is caused by a breach of a legal norm. However “injury” is often employed in a broader sense which includes also the so called “legal injury” i.e., harm that arises from the very fact that a legal norm has been breached. An example of “legal injury” would be a case where one state violates a peremptory norm such as prohibition of use of force. The state against which the force is used will be injured in the sense of Article 42 of the Articles on State Responsibility, whereas all other states of the international community will suffer only “legal injury” because a norm that is fundamental for the whole international community has been violated. See Stern B. A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury. In: Ragazzi M. (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*. Leiden: Nijhoff, 2005. p. 194. The ILC in the Articles on State Responsibility used the term “injury” and therefore, for the sake of avoiding inconsistency, also in this work the term “injury” will be used.

<sup>410</sup> Note that discussion of injury is without prejudice to the earlier conclusion on the ‘objective’ nature of state responsibility, i.e., that injury is not a precondition of responsibility. That conclusion is still valid. However, the issue of

mentioned situation where a breached obligation is owed to another state individually. For example, if a state breaches a bilateral treaty, the other state will be entitled to invoke responsibility as the injured state. Secondly, a state may invoke responsibility as the injured state, if the breached obligation is owed to a group of states or even the whole international community, and the particular state is specially affected. For example, if a state party to the 1972 London Dumping Convention<sup>411</sup> discharges oil from an oil platform in contravention of the Convention, it will breach an obligation owed to all other states parties. However, only the state at whose shores the oil will be washed up will be regarded as specially affected and therefore entitled to invoke responsibility as the injured state.

The third instance when a state will be regarded as injured, is when the so called interdependent obligations are breached. These are “all or nothing” obligations – their observance makes sense only if all other parties equally observe them. A classic example of an interdependent obligation is Article 4 of the 1959 Antarctic treaty under which all states parties undertake an obligation not to make sovereignty claims over the unclaimed territories of the Antarctica.<sup>412</sup> If any state party would make such claims all other states parties would be regarded as injured in accordance with Article 42 and thus entitled to invoke responsibility.

However, invocation of responsibility becomes rather more problematic if the breach does not result in injury to any particular state, but nonetheless breaches a norm that protects interests of the international community as a whole. Existence of such obligations – obligations *erga omnes*, since they were first pronounced by the ICJ in its *Barcelona traction* judgment seem to have become undisputed. As the ICJ noted already in *Barcelona traction*: “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection”<sup>413</sup>. For instance, if Syria commits war crimes and crimes against humanity against its own people, or Japan violates international rules on whaling, or North Korea does not comply with a binding decision of an international organ such as the UN Security Council – in all of these cases there will be no one particular state whose individual rights are violated by these breaches of international law. However, these violations are obviously harmful to common interests of the international community as a whole. In these cases invocation of responsibility by the injured state, as it is

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injured state has importance in determining who is entitled to invoke responsibility and what may be claimed. Only the injured state may demand compensation for itself and to resort to countermeasures.

<sup>411</sup> Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, December 29, 1972, 1046 UNTS 120, 11 ILM 1294 (1972).

<sup>412</sup> Antarctic Treaty, Washington, December 1, 1959, 402 UNTS 71 / 19 ILM 860 (1980).

<sup>413</sup> ICJ: *Barcelona Traction, Light and Power Company, (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, p. 32, para. 33. Note that in the more recent *Belgium v. Senegal* judgment the ICJ referred not to *legal interest*, but simply to “common interest”. See ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, I.C.J. Reports 2012, para. 68.

formulated in Article 42, will not be of any avail in protection of community interests, as there will be no injured state. As a result, obligations which are of fundamental importance to the international community (e.g., to protect international peace and security, environment of the high seas or human rights) would remain purely declaratory, because their breach would not entitle any other state to bring an international claim.

Likewise the interests of the international community may be adversely affected when an obligation owed to the international community as a whole is breached and there is an injured state, but the injured state does not invoke responsibility. There may be a number of scenarios where the injured state is either unwilling or unable to invoke responsibility. First of all, there may be cases when the injured state does not invoke responsibility for political, economic or other reasons. The injured state might issue a protest or condemnation but would stop short of actually invoking responsibility. Secondly, the injured state may be unable to invoke responsibility due to lack of international court of tribunal which would have jurisdiction over the dispute. In these cases a breach would occur, but it would not be followed by any legal consequences. This again is detrimental to the rule of law and the whole legal system as such, as any breach that is not followed by invocation of responsibility reduces the authority of law which is an important community interest in its own right. Therefore it is imperative that the legal system provides mechanisms by which not only individual interests of states are protected, but also wider interests of the whole international community. To achieve this, it is necessary that the right to invoke responsibility is not limited only to the injured state.

### ***5.2.1. Invocation by a state other than an injured***

In the Articles on State Responsibility a mechanism which allows invocation of responsibility also by non-injured states is embodied in Article 48. The Article provides that whenever an obligation, that is owed to a group of states or to the international community as a whole is infringed, not only the injured state, but any state is entitled to invoke responsibility of the state that performed the breach. As the ILC points out in the commentary to Article 48, a state invoking responsibility in accordance with this article “is acting not in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which obligation is owed, or indeed as a member of the international community as a whole.”<sup>414</sup> This right of invocation is particularly important with regard to peremptory norms, such as prohibition of

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<sup>414</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 126. para. 1, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [viewed 2014, July 14].

aggression, prohibition of genocide or protection of the fundamental human rights, which embody the most essential interests and values of the international community. As all obligations under peremptory norms are owed to the international community as a whole<sup>415</sup>, any state in principle may invoke responsibility of the wrongdoing state.

Judicial practice of claims by non-injured states is rather limited. The ILC in its Commentary is able to point only to two historic precedents - *S.S. Wimbledon*<sup>416</sup> from the Permanent Court of International Justice and the *South West Africa* cases<sup>417</sup> from the ICJ. In 2012 the ICJ delivered a judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*<sup>418</sup> which could be added to this list. In that case Belgium claimed that Senegal has an obligation to extradite former Chadian President under the 1984 Torture Convention. More specifically, Belgium argued that it is entitled to claim extradition as a specially interested state amongst other states parties, because it had previously instituted criminal proceedings and made the extradition request. In other words it regarded itself as the injured state by Senegal's breach of the Torture Convention in accordance with article 42 of the Articles on State Responsibility. The ICJ acknowledged Belgium's right to claim extradition, but instead of regarding it as injured within the meaning of Article 42, it found that the obligation to extradite under the Torture Convention was an obligation *erga omnes partes* and that Belgium, being party to the Convention, was entitled to bring a claim for protection of collective interest.<sup>419</sup> The Court did not refer to Article 48 of the Articles on State Responsibility, but the essence of the rule that it applied clearly mirrors the norm included in that Article.

The *Armed Activities on the Territory of the Congo (DRC v Uganda)* is another ICJ case in which invocation by a state other than the injured was at issue. The Court dismissed the second claim of Uganda in relation to abuse of unidentified persons by DRC soldiers at the Ndjili International Airport, since it could not establish whether they were Ugandan nationals (and therefore Uganda could not exercise diplomatic protection). However, the issue was addressed in some detail in the separate opinion of judge Simma. In particular Simma argued that the Court ought have considered the claim not on the grounds of diplomatic protection (as Uganda argued),

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<sup>415</sup> See Abi-Saab G. The Uses of Article 19. *European Journal of International Law*, Vol. 10, 1999, p. 339.

<sup>416</sup> Permanent Court of International Justice: *S.S. "Wimbledon"*, 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30.

<sup>417</sup> ICJ: *South West Africa*, Preliminary Objections, I.C.J. Reports 1962, p. 319; *South West Africa*, Second Phase, Judgment I.C.J. Reports 1966, p. 6. In the Commentary to the Articles on State Responsibility, the ILC specifically points out that with Article 48 it intended to depart from the faulty conclusions established by the ICJ in the *South West Africa* cases.

<sup>418</sup> ICJ: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, judgment of July 20, 2012, I.C.J. Reports 2012.

<sup>419</sup> *Ibid.*, para. 69.

but as one brought in accordance with Article 48 of the Articles on State Responsibility, i.e., as a claim for protection of community interests.<sup>420</sup>

More recently, in 2014, the ICJ rendered another judgement in which it recognized the right of non-injured states to invoke responsibility. The *Whaling in the Antarctic (Australia v. Japan)* case<sup>421</sup> presents a model example of invocation of responsibility for protection of community interests. In this case Australia brought a claim against Japan for violation of the International Convention for the Regulation of Whaling.<sup>422</sup> At the core of the dispute was Article 8 of the Whaling Convention which allows killing of whales for scientific purposes. Australia claimed that Japan misuses this provision to disguise commercial whaling and thereby breaches several provisions of the Convention. The Court agreed with all claims put forward by Australia. Importantly, Japan's obligations under the Whaling Convention were *erga omnes partes* i.e., owed all other states parties to the Convention, including Australia. Although Australia was not specially affected by the breach (it therefore would not qualify as the injured state in accordance with Article 42) Japan did not even argue that Australia as non-injured state has no right to claim cessation of Japan's alleged breach. Thus the judgment seems to demonstrate that the ICJ as well as the states involved in the dispute accepted the validity of the rules contained in Article 48 and regarded them as a reflection of the existing state of customary law.

These developments are significant as at the time of the adoption of the Articles on State Responsibility the ILC itself admitted that Article 48 involves “a measure of progressive development”, thus acknowledging that it may lack the quality of a customary rule.<sup>423</sup> The above judgments provide good grounds for an argument that the right of non-injured states to claim responsibility for protection of community interests (where *erga omnes* or *erga omnes partes* obligations are breached) has acquired the status of customary a rule. The broader importance of Article 48 being accepted as custom is that it opens a much wider possibility to bring claims for protection of community interests. If any member of the international community is entitled to bring a claim, that substantially raises the likelihood that there would be a legal response to a particular breach and the eventual dispute would be adjudicated.

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<sup>420</sup> ICJ: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168. Separate opinion of judge Simma, available at : <http://www.icj-cij.org/docket/files/116/10467.pdf> [viewed August 8, 2014].

<sup>421</sup> ICJ: *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* Judgment of March 31, 2014 available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=4> [viewed August 8, 2014].

<sup>422</sup> International Convention for the Regulation of Whaling, December 2, 1946, 161 UNTS 72.

<sup>423</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 127. para. 12, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [viewed 2014, July 14].

### 5.2.2. *The concept of “a state other than an injured”*

The right to invoke responsibility for protection of community interests in Article 48 is defined as belonging to a “state other than an injured”. The choice of this particular terminology merits some attention. The ILC refrained from labelling states entitled to invoke responsibility under Article 48 as “interested states” or states having a “legal interest” or states that have suffered a “legal injury”. Instead the ILC refers simply to “a state other than an injured state”. The reason for this specific choice of terminology lies in the fact that the ILC refused to distinguish between various types of injuries. The ILC did not distinguish between actual material and moral injury (e.g., an injury to a state against which armed force has been used) and the so called “legal injury” (injury that results from the fact that an important interest of the whole international community has been violated even if the “legally injured” state has suffered no material or moral harm). The doctrinal validity of such designation has been criticized by some scholars.<sup>424</sup> For instance, Stern argues that the ILC did not go far enough in support of communitarian approach. She claims that the ILC would have done better if it had explicitly recognized the concept of “legal injury” and would regard all states as “legally injured” when an obligation owed to the whole international community has been breached. Instead, according to Stern, the ILC chose to have a very restrictive understanding of injury – only material or moral injury. At the same time, in order to protect community interests, the ILC had to introduce a new concept of “a state other than an injured” which is entitled to invoke limited forms of responsibility if an *erga omnes* obligation is breached. Stern claims, first of all, that such an approach is logically inconsistent as violations of peremptory norms cause a “legal injury” to the whole international community. Why would otherwise members of the international community have a claim, if they are not injured? In criticism of the ILC’s approach Stern points out that:

“It is at the least curious that some states may invoke the responsibility of another State even if they are not injured. If a State is the beneficiary of an obligation which is violated, it is difficult to see why it should not be considered to be an injured state. It is well established – and the ICJ has clearly confirmed – that, in a case of an international obligation towards international community as a whole, all States have a legal interest in ensuring that there is compliance. [footnote to *Barcelona traction* omitted] In other words,

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<sup>424</sup> Dupuy, P.M. Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of ‘Obligations Owed to International Community as a Whole’. *European Journal Of International Law* Vol. 23 No. 4, 2012, p. 1061; Kolliopoulos A. *La Commission d’indemnisation des Nations Unies et le droit de la responsabilité internationale*. Paris: LGDJ, 2001, p. 287.

it seems that all States able to invoke international responsibility should be considered to be injured States; if that is not the case, what is the justification for the fact that they may have a cause of action against the author of the internationally wrongful act?”<sup>425</sup>

It must be noted that also some ILC members seem to share this view. For instance, Gaja has noted that the terminology used in Articles on State Responsibility with respect to injured states may be regarded as “questionable”. He specifically points out that the term “injured state” could also be used with regard to states entitled to invoke responsibility under Article 48, as they are also affected by the breach.<sup>426</sup>

The second criticism voiced against the concept of “a state other than an injured” lies in the fact that the ILC introduced this concept specifically to accommodate countermeasures into the overall scheme of the Articles on State Responsibility.<sup>427</sup> Countermeasures are a very powerful tool, which may be abused in particular by dominant states. Countermeasures may also lead to escalation of conflict rather than promote a settlement. However, in a legal system, such as international law, in which centralized enforcement mechanisms in effect are almost absent, the ILC felt that there are not many realistic alternatives to countermeasures (also states readily invoke countermeasures in their practice).<sup>428</sup> It therefore opted to include countermeasures into the Articles on State Responsibility.<sup>429</sup> The ILC, however, did not go as far as introducing “countermeasures of general interest” i.e., countermeasures that may be invoked by any member of the international community to protect community interests.<sup>430</sup> Such countermeasures are very contentious as on the one hand they provide much needed means to enforce community interests.<sup>431</sup> But on the other hand, they may potentially provide legal justification for abuse as states may apply countermeasures for political or economic gain, which in turn may destabilize the whole system of international law. The ILC therefore settled on the idea that only the injured states may apply countermeasures, while all

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<sup>425</sup> Stern B. The Elements of an Internationally Wrongful Act. In: *The Law of International Responsibility*, Crawford J., Pellet A., Olleson S. (eds.), Oxford: Oxford University Press, 2010. p. 196.

<sup>426</sup> Gaja, G. States Having an Interest in Compliance with the Obligation Breached. In: *The Law of International Responsibility*, Crawford J., Pellet A., Olleson S. (eds.), Oxford: Oxford University Press, 2010. p. 957.

<sup>427</sup> Stern B. The Elements of an Internationally Wrongful Act. In: *The Law of International Responsibility*, Crawford J., Pellet A., Olleson S. (eds.), Oxford: Oxford University Press, 2010. p. 200.

<sup>428</sup> See Dawidowicz M. Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council. *British Yearbook of International Law*, 2006, p. 333.

<sup>429</sup> See Articles 22 and 49-54 of the Articles on State Responsibility.

<sup>430</sup> See Alland D. Countermeasures of General Interest. *European Journal of International Law*, Vol. 13, 2002, p. 1221.

<sup>431</sup> For a position supportive of the countermeasures of general interest see Proukaki E. *The Problem of Enforcement of International Law. Countermeasures, the non-injured state and the idea of International Community*. New York: Routledge, 2010.



other members of the international community may only employ “lawful measures” which by definition rules out countermeasures.<sup>432</sup>

If resorting to countermeasures is a right vested in injured states, the ILC could not regard all states as injured whenever an *erga omnes* obligation is breached as that would lead to acceptance of countermeasures of general interest and risks of politically motivated abuse. The ILC therefore came up with the category of “a state other than an injured” which may invoke responsibility of the wrongdoing state, but would not be entitled to employ countermeasures. The ILC thus solved the problem of not allowing countermeasures to be used too widely. But along the way it had to give up the logic of the idea that invocation belongs only to the injured – which is at the root of Stern’s criticism.<sup>433</sup>

These arguments are indeed well founded. However, the outcome - the actual entitlement of states other than directly injured to invoke responsibility for protection of community interests in the Articles on State Responsibility in effect remain the same. The only difference, if Stern’s approach would be adopted, would be that a “a state other than an injured” would be labelled as “legally injured”, which in turn would require the ILC to redefine its terminology with regard to countermeasures. Interestingly enough, Crawford’s opinion resonates with the idea that a distinction is necessary between states that are directly injured and states which, although are not directly injured nonetheless have interests in compliance. Specifically Crawford points out that: “We cannot make progress in developing the idea of a public international law (rather than a private spectre of international law) unless we distinguish between the primary beneficiaries, the right holders, and those states with a legal interest in compliance.”<sup>434</sup> The ILC opted to articulate this distinction in terms of “injured state” and “a state other than an injured”. An alternative, which would follow the logic that a right to bring a claim is based on fact that the claimant suffered an injury (be it direct or only “legal injury”), does indeed make sense in terms of doctrinal consistency. However, this would require redefining Article 49, providing that only materially injured states (and not legally injured states) are entitled to resort to countermeasures.

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<sup>432</sup> See Article 54 of the Articles on State Responsibility.

<sup>433</sup> See Stern B. A Plea for “Reconstruction” of International Responsibility Based on the Notion of Legal Injury. In: Ragazzi M. (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*. Leiden: Nijhoff, 2005. p. 195.

<sup>434</sup> Crawford, J. Responsibility to the International Community as a Whole. *Indiana Journal of Global Legal Studies*, Vol. 8. Issue 2, p. 320.

### 5.2.3. *What a non-injured state may claim?*

Another important point with regard to “a state other than an injured” concerns the content of the responsibility claims that such a state is entitled to make. By definition such a state itself is not injured as a result of the breach. The claim that it brings is for the protection of the collective interest (for instance of states parties to a certain treaty) or for the protection of the interests of the whole international community. Since it has not suffered injury, it may primarily claim only cessation of the wrongful act as well as assurances and guaranties of non repetition. However, Article 48 of the Articles on State Responsibility allows a state other than an injured also to claim reparation in the interest of the injured state or other beneficiaries of the obligation. This again is a mark of public law paradigm inspired approach as the rationale for such a claim would be protection of public interest. A state other than an injured would in effect act as a private attorney general seeking to protect another state or other beneficiaries (e.g., individuals or peoples) that were injured as a result of the breach. It thereby would also seek to protect collective interests of other states parties, other actors or interests of the whole international community.<sup>435</sup>

This type of claim for reparation by a state other than an injured is particularly necessary in situations where there is a breach, but the injury is caused not to any particular state but to shared interests of the international community. For instance, if harm is caused to global environmental commons, such as the high seas, there obviously would be a need for reparation in the form of restitution (e.g., cleaning up the polluted area of the high seas). If Article 48 would not allow for invocation of responsibility by non-injured states or would limit such a claim only to cessation of the breach (which exists anyway on the basis of the primary obligation itself) an important international obligation would remain purely theoretical. The obligation not to pollute would exist, but its breach would not entitle any other state to demand clean-up as an expression of restitution. The interest that the primary obligation protects in effect would remain unprotected. The same holds true for breaches of human rights if the state that performs the breach mistreats its own nationals. Again no other state would be injured as a result of such a breach. In absence of a system of individual claims by injured individuals akin to that provided by the European Convention of Human Rights, obligations under human rights treaties would remain declaratory, as there would be no one entitled to claim compensation. Therefore invocation of responsibility by a state other than an injured and its entitlement to claim reparation is an essential component of the primary obligations which protect shared interests of the international community.

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<sup>435</sup> For discussion of “private attorney general” see Rubenstein W. On what a Private Attorney General Is – and Why it Matters, *Vanderbilt Law Review*, Vol. 57, No. 6, November 2004, p. 2129.

#### 5.2.4. *Collective and individual action*

Another provision that is of relevance to invocation of responsibility to protect interests of the international community is Article 59. This Article makes a general note that the Articles are without prejudice to the Charter of the United Nations. The aim of this provision is to address cases in which UN organs, most likely the UN Security Council, would make resolutions pertaining to state responsibility e.g., which would require a state to cease a wrongful act or provide reparation or make other pronouncements.<sup>436</sup> As the ILC commentary to Article 59 explains, this article simply provides that the Articles cannot effect the Charter obligations.<sup>437</sup> In other words, the Charter obligations would take precedence over any conflicting rules contained in the Articles on State Responsibility. In principle this means that the UN Security Council may impose obligations that are not based on Articles on State Responsibility. In absence of judicial review over measures of the Security Council<sup>438</sup> it may disregard even those Articles that mirror customary rules. Although objectionable from the perspective of systemic consistency of law, from the perspective of protection of community interests, precedence of the Charter over Articles on State Responsibility is more likely to be a positive. Absence of enforcement mechanisms is one of the great weaknesses of international law. The UN Security Council, despite its considerable shortcoming of political bias, remains a rare institutional mechanism, which offers realistic possibilities of enforcement of community interests. The limiting factor here remains the scope of the Security Council's mandate, namely issues of international peace and security.

However, the Articles also emphasize that *any* state other than the injured may invoke responsibility if the conditions of Article 48 are met. This specific choice of wording seems to indicate that responsibility for protection of community interests need not be invoked collectively, but rather any state other than an injured may also individually invoke responsibility. The ILC's commentary on Article 48 is silent on this point. However, a contrary interpretation (that claims for protection of community interests may be brought only collectively) would significantly reduce actual possibility of applying Article 48. Moreover, such a reading of Article 48 would require further elaboration of procedural aspects of how such claims are to be brought. This in turn would

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<sup>436</sup> See ICJ: *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, judgment, I.C.J. Reports 1998, p. 115.

<sup>437</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 143, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [viewed 2014, July 14].

<sup>438</sup> See Akande D. The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations? *International and Comparative Law Quarterly* Vol. 46(02), 1997. p. 309.

require the ILC to engage with institutional aspects of admissibility of claims the details of which are in *lex specialis* of each particular court or tribunal.

At the same time it must be noted that collective invocation of responsibility remains a field that must be developed if the law of state responsibility is to evolve beyond its present archaic state. One of the criticisms of the invocation of responsibility to protect community interests has been that states would possibly engage in a kind of vigilantism or invoke responsibility of other states purely for political gain.<sup>439</sup> Collective claims would at least partly mitigate this possible risk. Invocation of responsibility jointly by multiple claimants would by itself indicate that the claim seeks to protect wider interests rather than individual interests of one particular state. Procedural rules of most international courts and tribunals presently do not allow for such collective invocation of responsibility. For instance in accordance with Rules of the ICJ, if several states want to institute proceedings they have to bring separate claims which the Court may decide to join.<sup>440</sup>

### **5.2.5. Requirement of nationality of claims**

Having clarified when the non-injured states may claim responsibility and under what circumstances, we now turn to more problematic aspects of invocation of state responsibility for protection of community interests. Article 48 ends with paragraph 3 which states that the requirements for invocation of responsibility by the injured state elaborated in Articles 43-45 (notice of claim; nationality of claim; exhaustion of local remedies, waiver) apply also to claims brought by a state other than an injured. Thus the literal meaning of paragraph 3 seems to suggest that also claims by non-injured states for protection of community interests need to satisfy invocation requirements of Articles 43-45 – including the requirement of nationality of claims. The ILC's commentary on the provision is brief and simply restates that provision - that claims under Article 48 need to satisfy conditions of admissibility of claims which include nationality of claims and exhaustion of local remedies.

The customary nature of the requirement of nationality of claims as such is undisputed.<sup>441</sup> The ILC's Articles on Diplomatic Protection restate this customary rule in Article 3: the state

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<sup>439</sup> See McCaffrey S. *Lex Lata* or the Continuum of State Responsibility. In: Weiler J. *et al.* (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Berlin: De Gruyter, 1989, p. 244.

<sup>440</sup> See Article 47 of the Rules of the International Court of Justice, April 14, 1978, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> [viewed August 10, 2014].

<sup>441</sup> Permanent Court of International Justice: *Mavrommatis Palestine Concessions (Greece v. U.K.)* P.C.I.J. Reports, 1924, Series A, No. 2, p. 12. Among other cases of diplomatic protection see: *La Grand (Germany v. United States of America)* I.C.J. Reports 2001, p. 466; *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* I.C.J. Reports, 2004, p. 12.

entitled to exercise diplomatic protection is the state of nationality.<sup>442</sup> In other words, only the state of nationality of the injured person is entitled to bring international claims to address the injury sustained by its national. However, when applied to claims for protection of community interests requirement of nationality of claims is puzzling to say the least. The very idea of Article 48 of the Articles on State Responsibility is that *any* state party to a treaty or indeed any member of the international community may institute proceedings when *erga omnes partes* or *erga omnes* obligations are breached. Moreover, the claimant state under Article 48 seeks to protect collective interests. Linking such a claim to requirement of nationality, which by definition points to individual interest to protect nationals, makes little sense.

For instance, obligations under human rights treaties are owed to all other states parties and their aim is to protect collective interest, namely, human rights. Application of requirement of nationality of claims would mean that a state is entitled to invoke responsibility only when one of its nationals has been mistreated. Such a state would no longer act as a concerned member of the international community. It would invoke responsibility as an injured state which is specially affected by the breach, i.e., in accordance with Article 42. Thus the requirement of nationality of claims, if applied to claims by states other than the injured, in effect deprives these states of any possibility to invoke responsibility.

So how is the requirement of nationality of claims to be reconciled with the very purpose of Article 48? So far very few opinions have been expressed on the matter.<sup>443</sup> Among these probably the most prominent is the one expressed by Simma who touched upon the issue in his separate opinion in the *Armed Activities on the Territory of the Congo (DRC v Uganda)*. When discussing the right of Uganda to institute proceedings in a situation where it could not establish that the abused individuals were Ugandan nationals, he notes:

“regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right — indeed the duty — to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party’s international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard.

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<sup>442</sup> International Law Commission, Draft articles on Diplomatic Protection (2006) Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), available at: [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf) [viewed on August 10, 2014].

<sup>443</sup> See Scobbie, I. The Invocation of Responsibility for the Breach of ‘Obligations under Peremptory norms of General international Law’. *European Journal of International Law*, Vol. 13, No. 5, 2002, p. 1201; Vermeer-Künzli, A. A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*. *International and Comparative Law Quarterly* Vol. 56, No. 03, 2007, p. 553.

As to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well. The International Law Commission's 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State."<sup>444</sup>

Thus Simma clearly supports the view that Uganda in principle is entitled to claim responsibility for violations of human rights, even if the injured individuals were not Ugandan nationals. Even more so, Simma specifically refers to the right of a state other than an injured in the Articles on State Responsibility, i.e., Article 48. Similar opinion has been expressed also by Gaja who notes that: "the requirement of 'nationality of claims' does not apply when a State other than the injured State is entitled to invoke responsibility. The first State asserts a collective interest, and this is hardly reconcilable with the application of a requirement derived from nationality."<sup>445</sup> Considering the logical fallacy that would result from an interpretation that a state, which brings a claim to protect collective interest is entitled to do so only with regard to injuries to its own nationals (and thus in effect is unable to bring claims to protect collective interests), it is suggested that Article 48 is to be interpreted in such a way that nationality of claims requirement does not apply to claims by non-injured states.

### **5.3. Serious breaches of peremptory norms**

A further way how the Articles on State Responsibility attempt to foster protection of interests of the international community is by providing for special consequences for serious breaches of obligations under peremptory norms. The ILC long intended to discern between ordinary breaches and international crimes. However, the proposals of the 1996 draft Articles with Article 19 on international crimes as one of the central norms did not meet with approval of states. As a result, the ILC consented to give up the idea of international crimes. A faint reflection of that

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<sup>444</sup> ICJ: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168. Separate opinion of judge Simma, available at : <http://www.icj-cij.org/docket/files/116/10467.pdf> [viewed August 8, 2014].

<sup>445</sup> See Gaja G. States Having an Interest in Compliance with the Obligation Breached. In: *The Law of International Responsibility*, Crawford J., Pellet A., Olleson S. (eds.), Oxford: Oxford University Press, 2010. p. 963.

idea, however, survived in a form of serious breaches under peremptory norms (Articles 40 and 41 in the 2001 Articles on State Responsibility).

The importance of peremptory norms is reflected in the fact that special consequences are attached to serious breaches of these norms. These consequences are laid out in Article 41 of the Articles on State Responsibility. Interestingly enough, these consequences do not take form of special or aggravated obligations of the responsible state and do not provide for any punitive elements.<sup>446</sup> Instead Article 41 is formulated in terms of obligations of other states. These obligations are three: obligation of cooperation to bring the breach to an end (Article 41, para.1); the obligation of non-recognition of the unlawful situation (Article 41, para.2); and the obligations not to render aid or assistance in maintaining the unlawful situation (Article 41, para.2). Since the adoption of the Articles on State Responsibility the ICJ has made some use of these provisions. In the *Wall* advisory opinion the ICJ formulated obligations in terms very similar to those contained in Article 41.<sup>447</sup> More recently in the *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* the ICJ explicitly referred to the Article 41 and obligations of non-assistance and non-recognition.<sup>448</sup>

However, compared to what the ILC had envisaged as consequences of international crimes in earlier versions of the Articles (in particular that every state would be regarded as injured) the final version of Article 41 in terms of protection of community interests seems somewhat half-hearted.<sup>449</sup> As Paulus has noted:

“Unfortunately, there is not much to these consequences: the duty not to contribute to violations of international law is not limited to *jus cogens*, but extends to all obligations stemming from general international law (see Article 16 of the draft articles). The recognition of a consequence of such a violation may well be regarded as a contribution to the violation and is thus already outlawed by Article 16 for the violation of

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<sup>446</sup> For analysis whether present international law recognizes any specific obligations that apply to serious breaches of peremptory norms see Tams C. Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State? *European Journal of International Law*, Vol. 13, No.5, 2002, p. 1161.

<sup>447</sup> In the *Wall* advisory opinion the ICJ formulated Israel’s obligations in terms very similar to Article 41, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 9, 2004, Advisory Opinion, 43 ILM (2004) p. 1053.

<sup>448</sup> ICJ: *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment, 3 February 2012, I.C.J. Reports 2012, p. 99, para. 93.

<sup>449</sup> For discussion of shortcomings of Article 41 obligations see Jørgensen N. *The Responsibility of States for International Crimes*. Oxford: Oxford University Press, 2000, p. 697; also Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013, p. 386.

“ordinary” rules. The only additional legal effect, apparently, is the duty of cooperation – a duty which is quite indeterminate and therefore weak.”<sup>450</sup>

In addition a further limitation on the consequences of breaches of peremptory norms was adopted in the final version of the Articles. Namely, that these breaches have to be “serious”. Thus it is insufficient that a *jus cogens* norm is breached for the special consequences to apply – the breach has to involve gross or systematic failure to perform the obligation.<sup>451</sup> This specific requirement is contentious and it seems to have no basis in state practice or in scholarly opinions. Peremptory norms embody the most fundamental values of the international community. It is difficult to imagine a situation where genocide, crimes against humanity or apartheid could be considered as “not serious”. The primary norms prohibiting these actions already presuppose severe gravity and systemic quality of the conduct. The reason for inclusion of this additional criteria very likely has more to do with pleasing anxious state representatives and securing their support for the Articles than with codification of existing custom or indeed, progressive development. As a result, the consequences of serious breaches of peremptory norms as defined in Article 41 are a far cry from what the ILC initially intended. These consequences, as the *Wall* advisory opinion demonstrates,<sup>452</sup> do have a potential to contribute to protection of community interests since they acknowledge distinction between ordinary breaches and breaches that concern fundamental interests of the international community. However, it must also be acknowledged, that this contribution is a very modest one.

#### **5.4. Countermeasures of general interest**

The last notion that deals with protection of interests of the international community in the Articles on State Responsibility is the notion of countermeasures of general interest. In the 1996 draft of the Articles countermeasures of general interest (also known as countermeasures by non-injured states or collective countermeasures) played an important role in the ILC’s design for protection to community interests. In accordance with 1996 version of the Articles, if an international crime had been committed, all states were regarded as injured.<sup>453</sup> Consequently, as

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<sup>450</sup> Paulus A. Jus Cogens in a Time of Hegemony and Fragmentation, *Nordic Journal of International Law*, Vol. 74, 2005, p. 315.

<sup>451</sup> 2001 Articles on State Responsibility, Article 40 (2). The Commentary to the article indicates that such factors as intent to violate the respective norm and scope of damage, including number of victims, are factors to be taken into account in determining whether the breach is “serious”. See Commentary to article 40, para. 8.

<sup>452</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, 43 ILM (2004) p. 1053.

<sup>453</sup> See Article 40 of the Draft Articles adopted by the International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 1996, Supplement No.10, UN Doc. A/51/10, at 131.



countermeasures are defined in terms of a right of an injured state, all states (being injured) were entitled to resort to countermeasures, whenever an international crime had been committed. As already noted, in the 2001 version of the Articles, the notion of international crimes was dropped. As a result, only the directly injured states retained the right to resort to countermeasures. However, in the final version of 2001 Articles in chapter II on countermeasures the ILC nonetheless included Article 54 with an ambivalent statement that all other states (those not directly injured) may resort to *lawful* measures to ensure cessation of the wrongful act.

Whether this means that also non-injured states may resort to countermeasures when an *erga omnes* obligation has been breached remains a contested topic. In the commentary to Article 54 the ILC after examining state practice on countermeasures of general interest concludes that the practice remains “limited and rather embryonic”.<sup>454</sup> From that the ILC goes on to conclude that “the current state of international law on countermeasures taken in the general or collective interest is uncertain” and that therefore “at present there appears to be no clearly recognized entitlement [...] to take countermeasures in the collective interest.”<sup>455</sup> On the basis of this conclusion the ILC felt that it would be best neither to approve, nor disapprove the existence of a customary rule allowing countermeasures by a state other than an injured. Therefore Article 54 speaks only of *lawful measures* taken by other states (known also as retorsions – acts that are unfriendly, but not wrongful). Such wording seems to exclude countermeasures, which by definition are wrongful, but excused, as they are a response to a previous wrongful act of another state.<sup>456</sup> Thus the ILC for the time being opted to leave the matter unresolved.

The ILC’s handling of this issue has been criticized.<sup>457</sup> Some authors argue that state practice on countermeasures of general interest is neither limited, nor embryonic.<sup>458</sup> For instance Proukaki points to about thirty examples of countermeasures by non-injured states (in contrast, the ILC’s commentary mentions only eight instances).<sup>459</sup> Whereas Alland rightly points out that with regard to other norms codified in the Articles the ILC has arrived to a conclusion that a customary rule exists on a basis of even fewer examples of state practice.<sup>460</sup> More recent state practice continues to provide examples of states using countermeasures in response to breaches of

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<sup>454</sup> See Commentary to Article 40 of the Articles on State Responsibility, para. 8.

<sup>455</sup> *Ibid.*

<sup>456</sup> For discussion of the difference between precluding wrongfulness or responsibility see Lowe V. Precluding Wrongfulness or Responsibility: A Plea for Excuses. *European Journal of International Law*, Vol. 10.2, 1999, p. 405.

<sup>457</sup> See Proukaki E. *The Problem of Enforcement of International Law*. New York: Rotledge, 2010.

<sup>458</sup> See Dawidowicz M. Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council. *British Yearbook of International Law*, 2006, p. 333; see also de Guttry A. Some Recent Cases of Unilateral Countermeasures and the Problem of Their lawfulness in International Law. *Irish Yearbook of International Law*, Vol. 7 (1986-1987), p. 169.

<sup>459</sup> Proukaki E. *The Problem of Enforcement of International Law*. Abingdon: Rotledge, 2010.

<sup>460</sup> Alland D. Countermeasures of General Interest. *European Journal of International Law*, Vol.13, 2002, p. 1239.

communitarian norms. Asset freezes imposed by the EU and the US on top Belarusian officials, including President Lukashenko<sup>461</sup>, EU's measures against Zimbabwe<sup>462</sup> as well as measures by the EU, the Arab League and various states against Syria<sup>463</sup> and Iran<sup>464</sup> are among the notable examples. Similarly recent sanctions by the US, the EU and other G7 states against Russia in response to annexation of Crimea and instigation of unrest in eastern Ukraine only add to this list, indicating that states regard themselves as entitled to resort to countermeasures of general interest.

However, equally important for the ILC's decision to leave out countermeasures of general interest from the Articles on State Responsibility seem to be policy considerations. To put it simply, countermeasures as such (even when taken by an injured state) are widely regarded as crude and dangerous. They are manifestations of primitiveness of international law, "mechanisms of private justice that find their *raison d'être* in the failure of institutions"<sup>465</sup> which offer no better solution than eye for an eye as the basic principle for settling disputes. In absence of institutional mechanisms for determining whether a breach of an *erga omnes* obligation has been committed, decision whether to resort to countermeasures is left for self-assessment of each state leading to "decentralized policing of an international *ordre public*".<sup>466</sup> This in turn makes countermeasures very susceptible to abuse by powerful states. Likewise, countermeasures may also lead to escalation of conflict rather than promote a settlement.

In light of the above concerns the ILC had a very difficult choice to make. On the one hand, there is the subjectivism of self-assessment, risk of abuse and escalation of conflict. On the other hand it clearly seems unacceptable that a state would breach a peremptory norm and there would be no legal response from the international community. Given the difficulty that either of the choices would pose, the ILC opted simply not to make the choice. It must also be pointed out that Crawford in his capacity as the Special Rapporteur suggested inclusion of countermeasures of general interest in two specific circumstances: when a directly injured state has invited another state to apply such countermeasures and when a serious breach has been committed and there is no

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<sup>461</sup> Council Implementing Regulation (EU) No 1054/2013 of 29 October 2013 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus. Official Journal of the European Union, 30.10.2013, L 288/1. US President's executive order of 19 June 2006.

<sup>462</sup> Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe. Official Journal of the European Union, 24.2.2004, L 55/1.

<sup>463</sup> Council Regulation (EU) No 697/2013 of 22 July 2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria. Official Journal of the European Union, 23.7.2013, L 198/28.

<sup>464</sup> Council Implementing Regulation, (EU) No 206/2013 of 11 March 2013 implementing Article 12(1) of Regulation (EU) No 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran. Official Journal of the European Union, 12.3.2013, L 68/9.

<sup>465</sup> Alland D. Countermeasures of General Interest. *European Journal of International Law*, Vol. 13, 2002, p. 1239.

<sup>466</sup> *Ibid.*, p. 1223.

injured state.<sup>467</sup> Crawford's proposal was provisionally adopted on a second reading, but was dropped due to objections from states.<sup>468</sup>

## 5.5. Conclusions

Having reviewed those elements of the Articles on State Responsibility which were intended to advance the cause of protection of interests of the international community several conclusions seem to be pertinent. An overall observation that may be made is that the ILC despite an obvious intention to provide mechanisms to protect community interests was unable to depart from bilateralist paradigm and private law notions. In other words, although the ILC aimed to introduce multilateralism into the law of state responsibility it did so by using bilateral private law constructs. In principle the relationship between the wrongdoer and the international community in the Articles on State Responsibility is accepted by recognition of obligations that the wrongdoer owes to the international community as a whole. However, for purposes of invocation, these *erga omnes* obligations actually are split into series of individual relationships between the wrongdoer and another individual state. Most importantly there is no invocation on behalf of the international community. Rather each concerned member of the community is meant to act as a private attorney general.

Another general reflection on the outcome of the ILC's work is that it suffered considerably from tension between what the original designs of Ago and other Special Rapporteurs envisaged and what governments were willing to accept. Adding and dropping elements to a design when construction is already underway is likely to spoil any structure. Removing the concept of international crimes was tantamount to dropping the central pillar – props were needed here and there to keep the structure standing. No wonder that some elements were no longer coherent.

That being said, it must also be acknowledged that the ILC has made limited but nonetheless very important advances in transforming the law of state responsibility from bilateralism towards communitarianism. Firstly, it introduced the idea of “objective responsibility” - an indispensable requirement for all other communitarian notions that found their way into the Articles. This simple solution to omit injury as a precondition for responsibility seems complete and without a flaw, a concept which radiates the quiet elegance of not having something. It serves

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<sup>467</sup> See International Law Commission, Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, UN Doc 2000, A/CN.4/507/Add.4, para. 417.

<sup>468</sup> For comparison of all three versions of articles on countermeasures of general interest see: Crawford J. State Responsibility, The General Part. Cambridge: Cambridge University Press, 2013, p. 704.

as a doctrinal cornerstone which opens the way for other notions based on the public law paradigm, such as invocation by a state other than an injured.

Secondly, the ILC articulated an indispensable follow-up to the *Barcelona Traction* pronouncement in which the ICJ acknowledged that some obligations are owed to the whole international community. If obligations are owed to the whole community, then members of that community ought to have a right to invoke responsibility for breaches of such obligations, even if they are not directly injured. Invocation of state responsibility by a state other than an injured established in Article 48 of the Articles on State Responsibility acknowledges existence of such a right. Importantly, the right to invoke responsibility by non-injured states significantly widens possibilities to bring claims for protection of community interests.

As for the specific consequences applicable to serious breaches of peremptory norms (Article 41), it is overall a positive that the ILC attempted to salvage at least something from the notion of international crimes. If not much else, Article 41 at least acknowledges distinction between ordinary breaches and breaches that concern fundamental interests of the international community. However, it must also be recognized, that in terms of actual consequences the distinction is barely noticeable. From three obligations mentioned in Article 41 which apply to serious breaches, two (obligation not to recognize the situation created by the breach and not to render aid) exist already on the basis of the primary obligations irrespective whether Article 41 mentions them or not. The only added value of the Article 41 is the obligation on other states to cooperate to bring to an end any serious breach. On the one hand this obligation to cooperate in principle reinforces multilateralism and the public law paradigm. But on the other hand the obligation is so general that one may doubt whether it has any practical relevance. Certainly states shall cooperate, especially within institutional frameworks such as the UN, but what if they don't? Are states in breach of this obligation to cooperate if the UN Security Council is blocked by a veto? If so, which states are responsible and who would be entitled to invoke responsibility? In absence of state practice and judicial precedents that would spell out the details, the obligation of cooperation for the time being remains somewhat shallow.

Having such unspecific and arguably weak consequences for serious breaches of peremptory norms is unfortunate for at least two reasons. First reason is that the tremendous intellectual energy that went into elaboration of the concept of international crimes failed to come to fruition that would leave a notable mark on state behaviour. With that failure a direly needed recognition that community interests and values require protection by means of effective legal mechanisms has been indefinitely postponed; the movement of international law "from sovereignty

to obligation”<sup>469</sup> has been delayed. Second reason is that weak consequences for breaches of peremptory norms have a detrimental impact on authority of these norms. If consequences for breaches of peremptory norms are essentially no different from consequences of minor ordinary breaches, then what is the point in distinguishing peremptory norms? Not providing for meaningful consequences that would apply to serious breaches in effect deprives peremptory norms of their meaning. In this sense Allott might not have exaggerated when he noted that the ILC with Articles on State Responsibility has left a long term destructive effect on international law.<sup>470</sup>

As for assessment of countermeasures of general interest, a helpful starting point is that states do in practice have recourse to such countermeasures. Recent state practice, such as sanctions against Belarus, Zimbabwe, Syria, Iran and sanctions in response to Russia’s annexation of Crimea and instigation of unrest in Eastern Ukraine demonstrate that states regard countermeasures of general interest as lawful responses to breaches of communitarian norms. Despite their considerable shortcomings it is difficult to see how the present international community with its frequently defunct international institutions (the UN Security Council that is often blocked by a veto and the General Assembly that is habitually reluctant to exercise its powers to recommend measures under Article 10 of the Charter) could fare without countermeasures of general interest. As crude and risky as they are, countermeasures of general interest often are the only viable means of enforcement. Unless a fundamental reconstruction of international law takes place with movement from sovereignty to obligation and institutions with actual enforcement powers, countermeasures of general interest are a necessary part of the puzzle of enforcement of international law.

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<sup>469</sup> Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013, p. 307.

<sup>470</sup> Allott P. *State Responsibility and Unmaking of International Law*. *Harvard International Law Journal*, Vol. 29, 1988, p. 2.

## 6. CONSTITUTIONALIZATION AND FRAGMENTATION AND THEIR IMPACT ON THE LAW OF STATE RESPONSIBILITY

In this chapter the study explores some of the recently prominent trends in international law, such as constitutionalization and fragmentation, and enquires how these trends relate to the law of state responsibility as codified by the ILC. After examining the basics of constitutionalization and fragmentation respectively, we will consider whether responsibility rules, which were codified and sometimes progressively developed by the ILC considerably earlier than the discussed trends, adequately reflect these trends. Likewise we will enquire how the trend towards constitutionalization of international law impacts the balance between public and private law paradigms in the law of state responsibility?

### 6.1. Basics of constitutionalization of international law

The topic of constitutionalization of international law has been one of the favourites of international law scholars in the past two decades, and, as a result, a great deal has been said about it.<sup>471</sup> There have been many attempts to define constitutionalization and unsurprisingly such abundance of opinions has led to a controversy as to the very meaning of the concept.<sup>472</sup> However, in its very core constitutionalization of international law seems to refer to an academic and political agenda that advocates for the introduction of constitutionalist principles in international law.<sup>473</sup> As

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<sup>471</sup> For a sample of literature see Allott P. *Eunomia: New Order for a New World*. Oxford: Oxford University Press, 1990; Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009; Bodansky D. Is there an International Environmental Constitution? *Indiana Journal of Global Legal Studies* Vol. 16, 2009, p. 565; Bogdandy A., Dann P., Goldmann M. Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities. *German Law Journal* Vol. 9, 2008, p. 1375; Cass D. *Constitutionalization of the World Trade Organization*. Oxford: Oxford University Press, 2005; Craig P. Constitutions, Constitutionalism, and the European Union. *European Law Journal* Vol. 7, 2001, p. 125; Farrall J. *United Nations Sanctions and the Rule of Law*. Cambridge: Cambridge University Press, 2007; Koskenniemi M. Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization. *Theoretical Inquiries in Law* Vol. 8, 2007, p. 9; Koskenniemi M. The Fate of Public International Law: Between Technique and Politics. *Modern Law Review*, Vol. 70, 2007, p. 1; Walker N. The Idea of Constitutional Pluralism. *Modern Law Review* Vol. 65, 2002, p. 317; Weiler J., Wind M., (eds.), *European Constitutionalism Beyond the State*. Cambridge: Cambridge University Press 2003.

<sup>472</sup> Some scholars, for instance Bodansky, have questioned whether it is at all helpful to use a term which is so vague and controversial. See Bodansky D, Is There an International Environmental Constitution?, *Indiana Journal of Global Legal Studies* Vol. 16, 2009, p. 565.

<sup>473</sup> Peters A. The Merits of Global Constitutionalism. *Indiana Journal of Global Legal Studies* Vol. 16, 2009, p. 398; see also Peters A., Armingeon K., Introduction - Global Constitutionalism from an Interdisciplinary Perspective,

Peters has pointed out, constitutionalization comes about as a result of “deliberate creation of constitutional elements in the international legal order by political and judicial actors, bolstered by academic discourse [...]”<sup>474</sup> These constitutional elements, that international courts, organizations, scholars and sometimes states attempt to introduce, are a broad category as there is no strict definition what elements are constitutional. What seems to be clear is that constitutional elements have much to do with an agreement on core principles that the society agrees to live by. But is there such an agreement on common values of the international community?

A regular response would be that the common values of the international community are reflected in *jus cogens* norms which impose obligations with an *erga omnes* quality. Similarly, Article 103 of the UN Charter makes a good candidate for embodiment of an agreement on a common imperative (namely, that the UN Charter obligations and principles prevail over other international treaties). Likewise, one may argue that sovereign equality of states was and still remains the backbone of the international legal system and therefore deserves a place among the imperative values of the international community. All of these elements imply existence of an agreement on the common good of the international community – recognition that these elements are important in order to protect common values and a basic framework constructed on the basis of those values.

By recognizing existence of shared values constitutionalism challenges the traditional view in which the international sphere is compounded of sovereign states and organizations created by them and in itself has no inherent qualities, apart from those bestowed on it by states - as Allot has pointed out “a sort of constitutional wasteland or Empty Quarter”<sup>475</sup>. Constitutionalism on the contrary suggests that international legal order has inherent qualities originating in common values that international society has agreed upon. In this basic meaning (namely, that constitutionalism relies on understanding of the common good) the concept is very close to the idea of public order.

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*Indiana Journal of Global Legal Studies* Vol. 16, 2009, p. 385. The essence of constitutionalization is to discern the tendency that is manifesting within the international community and on the basis of that to suggest what should be changed in the present law. There is, however, an inherent uncertainty in such an approach - to know which are the missing elements, one has to have an idea of how a complete constitutional system looks like. The question then arises where to look for an example? National constitutional systems might not serve well due to fundamental differences in national and international systems. A more workable approach seems to be to define essential elements of a constitutional system (rule of law; legitimacy; responsibility, judicial review, democracy) and then to consider how these elements might be introduced into international legal system.

<sup>474</sup> Peters A. The Merits of Global Constitutionalism, *Indiana Journal of Global Legal Studies* Vol. 16, 2009, p. 398.

<sup>475</sup> Allott P. *The Health of Nations. Society and Law Beyond the State*. Cambridge: Cambridge University Press, 2002, p. 379; Allott P. Intergovernmental Societies and the Idea of Constitutionalism. In: *The Legitimacy of International Organizations*, Jean-Marc Coicaud & Veijo Heiskanen (eds.), 2001.

Apart from an agreement on common values, constitutionalism also implies an agreement on the fundamental principles of how international society is to be governed.<sup>476</sup> As Klabbers has noted:

“[a] constitutional order has to do with the empowerment of political institutions and with control of these same institutions, by creating fundamental rights for citizens and a system by which courts and other institutions can keep each other in check. A constitutional order, in other words, is one which helps create public authorities, but at the same time limits the power of public authorities and sets out proper procedures for the institutions of governance to follow. Thus constitutions typically will have rules on how laws ought to be made, how disputes ought to be settled, and which institutions shall exist, and will also have rules on the sort of basic values (typically cast in the form of fundamental rights ) that no official action may encroach upon.”<sup>477</sup>

This is a broad category of issues many of which are highly problematic in international law: absence of majority law-making even on issues crucial for survival of the international community (a state may not be bound to observe international obligations if it does not wish to accept these obligations); absence of courts with mandatory jurisdiction (all existing international courts derive their jurisdiction directly or indirectly from consent of states); absence of judicial control over the rudimentary enforcement mechanisms (such as UN Security Council measures under Chapter VII). All of these deficiencies of international law demonstrate a stark dichotomy between the public law paradigm (which ought to govern international law if it is to perform its function as law i.e., to deliver genuine fairness and effectiveness) and between the present reality of sovereignty based legal system.

The constitutionalization project is also closely linked to the phenomena of fragmentation of international law i.e., a tendency of various specialized fields of international law (such as human rights, trade law, environmental law etc.,) to develop on their own resulting in possible collisions between them. Indeed constitutionalization may be seen as a response to fragmentation<sup>478</sup> – an attempt to create a common framework within general international law that would allow

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<sup>476</sup> As has been noted constitutional order means that: “[p]ower is prescribed and procedures are prescribed.” See William A. *Constitutions and Constitutionalism*. Princeton: Princeton University Press, 1963, p. 13.

<sup>477</sup> Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 9.

<sup>478</sup> Koskenniemi M., The Fate of Public International Law: Between Technique and Politics. *Modern Law Review*, Vol. 70, 2007, p. 15; As Klabbers has noted: “Constitutionalization responds to fragmentation by somehow promising the unity of the global order. Confronted with fragmentation and the concomitant chaos of overlapping and competing regimes, constitutionalization carries a promise that there is some system to the madness after all; there is something which helps keep the system together”, see Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 18.



flourishing of specialized fields and resolve collisions (for instance conflicts of jurisdiction between specialized international courts).<sup>479</sup>

But is constitutionalization really the answer to fragmentation, if each specialized field sees its values and objectives (protection of human rights as opposed to protection of free trade which in turn may be opposed to protection of environment) as the most important ones. Is it possible to agree on the core values that are shared by all specialized fields of international law at least on an abstractly philosophical level? Is there a meta-value of the legal system without which other values become meaningless? Without such a meta-value the whole project of constitutionalizing international law arguably becomes hollow as it lacks a core purpose. It is submitted that such a core purpose indeed may be found in the same place as most other liberal legal ideas, namely, in Kantian philosophy – implying not only Kant himself, but also most modern liberal legal scholars who in different vocabularies and guises advocate for constitutionalization of international law.

Although many modern Kantianism inclined scholars do not start their analysis at a level of lofty philosophical concepts, it is nonetheless possible to trace the protection of human dignity (in the widest sense of this concept) as being the meta-value of the international legal system. If we accept the existence of a meta-value of the international legal system, it may be helpful in interpreting the fragmented specialized fields, as whatever the collisions in any given case, the interpreter of legal norms has his or her eyes on the overall purpose of protecting the meta-value. Thus, constitutionalization of international law, despite controversies at the level of views and opinions on details, is indeed one that has sound philosophical foundations and in principle may be employed as a teleological tool to overcome fragmentation.

Besides setting basic values and principles constitutionalism also has a more elusive and subjective (perhaps psychological) aspect which is nonetheless crucial. As has been pointed out “[c]onstitutionalism [...] signifies not so much a social or political process, but rather an attitude, a frame of mind.”<sup>480</sup> Similarly, constitutionalization may not be purely formal – to be genuine it must be politically legitimate, it must reflect actual will of constituents of the legal system (a somewhat complicated question in international law since states ultimately are not the real subjects of

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<sup>479</sup> For an illustration of such collisions see *Mox Plant* cases adjudicated by the European Court of Justice, the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration. ECJ: case C-459/03 *Commission v Ireland*, [2006] ECR I-4635.; International Tribunal for the Law of The Sea, *MOX Plant Case, Ireland v United Kingdom*, Order, Request for Provisional Measures, ITLOS Case No 10, 3rd December 2001, 41 ILM 405, (2001), 413; Permanent Court of Arbitration, *MOX Plant Case, (Ireland v United Kingdom)*, ILM Vol. 42, No. 5 (September 2003), p. 1187. See also Cardwell J., Duncan F., Who Decides? The ECJ's Judgment on Jurisdiction in the MOX Plant. *Journal of Environmental Law* 19.1 (2007) p. 121; Shany Y. The first MOX Plant award: the need to harmonize competing environmental regimes and dispute settlement procedures. *Leiden Journal of International Law* Vol. 17, No.4, 2004. p. 815.

<sup>480</sup> Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 10.

international law, while the ultimately real subjects – human beings – often take very little interest in all things international).

It also has been noted that constitutionalism merely boils down to using a constitutionalist vocabulary.<sup>481</sup> One may then enquire - why is it better than other vocabularies? Koskenniemi makes a point that institutions of constitutionalism (first and foremost the courts) are in themselves no better than institutions of economics, socialism or religion. Thus Koskenniemi suggests that constitutionalism in itself is a political project, no better than any other political project. This approach essentially questions whether there is something inherently good about law? Obviously law provides a framework in which to manage the society's activities. But so do other frameworks – economic, social and religious. What is inherently useful (or perhaps good) about law is that society agrees that law is to govern interrelation of all the other frameworks of that society.<sup>482</sup> Having been elevated to a status of a superior framework, the law offers a possibility to resolve conflicts between other frameworks of that society. Therefore it is true that constitutionalization is a political project just like any other, however, if recognized as a framework that governs all other frameworks, it offers predictability and means to reconcile conflicting preferences.

### ***6.1.1. How constitutionalization of international law may come about?***

Is constitutionalization a process that happens by itself as various actors respond to issues around them? Or is it a premeditated effort, an agenda purposefully pursued in a top-down manner? A formal constitution in a form of grand treaty adopted by majority of states seems a very unlikely scenario. States find it difficult to agree on far more mundane, less complicated and less relevant topics even when these are taken one at a time. Similarly, it is unlikely that any of the existing treaties could tender for the title of the constitution of the international community. The UN Charter would be a possible candidate.<sup>483</sup> However, the Charter is rather limited in scope and primarily centered on maintenance of international peace and security as well as institutional setup of the UN. It does not deal with substantive human rights and it is difficult to envisage a constitution which omits this issue. Likewise, it is difficult to envisage how one would go about resolving such cases

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<sup>481</sup> Koskenniemi M. The Fate of Public International Law: Between Technique and Politics. *Modern Law Review*, Vol. 70, 2007, p. 15.

<sup>482</sup> Aristotle praising the benefits of law famously remarked that „it is more proper that law should govern than any one of the citizens” see Aristotle. *Politics, A treatise of Government*. Reprint of 1912 edition, Auckland: Floating Press, 2009, p. 172.

<sup>483</sup> See Fassbender B., The United Nations Charter as the Constitution of the International Community. *Columbia Journal of Transnational Law*, 1998, Vol. 36, p. 529.

as 1998 *Beef Hormones case* of the Appellate Body of the WTO<sup>484</sup> (deciding whether precautionary principle – being part of environmental law, had any place in WTO law) on the basis of the UN Charter. Therefore, if constitutional elements do materialize in international law, they are likely to come only in specific sectors (e.g., in *Loizidou v Turkey* the ECtHR has stated that the ECHR is a “constitutional instrument of the European public order.”<sup>485</sup> As noted elsewhere “global constitution will be a patchwork quilt, and will most likely be identified rather than written in any meaningful sense: a material rather than formal constitution.”<sup>486</sup>

A material constitution in absence of a formal one seems to be a trend that has already materialized within the EU.<sup>487</sup> Although a formal EU constitution in a form of Constitutional treaty was rejected by referendums in France and Netherlands in 2005, scholars have maintained that in fact the EU has entered a stage of constitutionalization long before any formal constitution was elaborated.<sup>488</sup> The process of EU’s constitutionalization was initiated and subsequently rigorously advanced by the European Court of Justice, which developed some of its hallmark doctrines such as direct effect,<sup>489</sup> supremacy,<sup>490</sup> state responsibility for breach of EU law<sup>491</sup> and implied powers.<sup>492</sup> Thus, constitutionalist doctrines could in principle be introduced and advanced by international courts.

However, as Klabbers has suggested, such a model of introduction of constitutionalism (as exemplified by judicial activism of the ECJ) could hardly be replicated on a global scale for the simple reason that no international court (not even the International Court of Justice) is able to exert influence even remotely comparable to that of the ECJ.<sup>493</sup> For one thing, the ICJ’s jurisdiction still lacks compulsory character. Perhaps with an objective of making sure that states continue to refer disputes to the Court, the ICJ generally tends to see international law as a horizontal legal system

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<sup>484</sup> Appellate Body of the WTO, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, 123.

<sup>485</sup> European Court of Human Rights, *Loizidou v Turkey*, 1995 Series A 310, para. 75.

<sup>486</sup> Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 23.

<sup>487</sup> See Scott A., Bankowski Z. *The European Union and its Order: The Legal Theory of European Integration*, Oxford: Blackwell, 2000; Weiler H., Wind M., (eds.), *European Constitutionalism Beyond the State*. Cambridge: Cambridge University Press, 2003.

<sup>488</sup> Stein E., *Lawyers, Judges, and the Making of a Transnational Constitution*, *American Journal of International Law*, 1981, Vol.75, p. 1.

<sup>489</sup> ECJ: 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1.

<sup>490</sup> ECJ: 6/64 *Costa v ENEL* [1964] ECR 585 (6/64).

<sup>491</sup> Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECR 1991, I-05357.

<sup>492</sup> ECJ: 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

<sup>493</sup> Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 23.

based on consent of states.<sup>494</sup> Thus rather than being an activist court, the ICJ is renowned for staunch orthodoxy (consider how it expressly recognized existence of peremptory norms only some 40 years after the notion was included in the VCLT). Hence at present it is difficult to envisage that the ICJ would suddenly take up judicial activism on a scale comparable to the ECJ. Other international courts, as already noted, could (and in fact they do) champion constitutionalist notions. However, constitutionalism through judicial bodies of specialized fields leads law into fragmentation, which again leads us back to the need for resolution of conflicts between specialized fields – a function of constitutionalization of general international law. This function may be accomplished only by a court of general jurisdiction and one that is superior to other international courts, i.e., the ICJ.

Perhaps another even more fundamental reason that differentiates the ECJ from ICJ and precludes replication of the former's success, is that the EU member states regardless of their opposition to particular doctrines with constitutional implications (such as supremacy of EU Law) at all times remain loyal to the overall project and specific aspects of the EU integration, such as the common market. The creative activism of the ECJ at times has been far from popular among the EU's member states. In fact many of the ECJ's fundamental doctrines encountered fierce opposition from member states up to the point where, for instance, the Federal Constitutional Court of Germany directly questioned the lawfulness of the ECJ's judgments.<sup>495</sup> However, regardless of their discontent, EU member states have really come to question their commitment to the overall project itself.

Is there such a common project that most members of the international community would subscribe to? Peremptory norms are a likely candidate that could attract an overall support. Humanitarian and diplomatic law are also likely to be generally acknowledged. However, the difference of the international community (compared to the EU) is that individual members seem to have very limited motivation in protecting common interests whenever those collide with their own individualistic interests. For instance, although there is a common commitment throughout the international community to prosecute acts of genocide, when it comes to actual prosecution even the five permanent members of the Security Council find it difficult to agree whether particular acts constitute genocide.<sup>496</sup> Thus absence of clear motivation to pursue a common objective prevents states from supporting even minimal constitutionalist policies. This lack of political will is inevitably reflected in the judgments of global international courts such as the ICJ, indeed making courts an unlikely avenue for introduction of constitutional notions into general international law.

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<sup>494</sup> For a recent study on ICJ's approach to judicial function see Hernandez G. *The International Court of Justice and the Judicial Function*. Oxford: Oxford University Press, 2013.

<sup>495</sup> BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*.

<sup>496</sup> UN Security Council Resolution 1564 (2004) on Darfur.

### ***6.1.2. Pluralist constitutionalization***

If we look at the examples of constitutional trends in the practice of international courts and tribunals, we will observe that mostly all instances have taken place in regional or sectoral context (within EU, ECHR or the WTO systems). There is very little that could be regarded as truly *global* constitutionalization, i.e., constitutionalist ideas and vocabulary that would pertain to the universally applicable general international law. If some principles are developed within the EU, other principles in the ECHR and yet other principles within the WTO system, this sounds rather like fragmentation. If various international organizations on the basis of their constituent treaties (which may pursue markedly different values and goals) develop different constitutionalist ideas - how can such a process be regarded as a constitutionalization (considering that constitutionalization implies an agreement on universally applicable core values)?

The answer offered by constitutionalists is that this process is still constitutionalization, but a pluralist constitutionalization.<sup>497</sup> In pluralist constitutionalization constitutional ideas are indeed developed in specific regional organizations or in global organizations which deal only with specific area of international law, such as the WTO law. However, these various constitutional regimes do not preclude each other. Even more so, the same constitutionalist ideas may be found in various constitutional regimes, thus providing a basis for truly universal constitutionalization. If constitution is not embodied in a single instrument there may remain uncertainty as to what rules have been recognized as bearing constitutional status. The response from the legal doctrine has been that constitutionalization may be pluralist also regarding sources.<sup>498</sup> The idea with pluralist constitutionalism is that informal constitution is founded on common values that are shared by the whole international society, such as some of fundamental human rights. Scholars supporting this version of constitutionalism suggest that an additional expression of state consent to endorse the particular rules as constitutional is simply unnecessary, since these rules anyway express universally accepted values.<sup>499</sup>

A criticism that may be directed towards the notion of pluralist constitutionalization is that, although various constitutional regimes do not preclude each other and may develop in parallel, as the theory suggests, they may nonetheless also collide. As each competing constitutional regime struggles for prevalence of its values, it is questionable whether this struggle may be regarded as

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<sup>497</sup> For instance Peters notes that: "A "moderate" constitutionalist reading in no way implies a uniform, coherent world constitution, and certainly does not imply a world state. The idea is not to create a global, centralized government, but to constitutionalize global, polyarchic, and multilevel governance." See Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 346.

<sup>498</sup> Tomuschat C., *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *Recueil des Cours*, 1999, 281, p. 9.

<sup>499</sup> Charney J., *Universal International Law*, *American Journal of International Law*, 1993, Vol. 87, p. 529.

being an international constitution. However, what the struggle does is that it provides a forum for discerning and assessing competing values – a practice which is indispensable in the process of understanding which values are to be regarded as constitutional.

### ***6.1.3. Constitutionalization and global administrative law***

Another strand of ideas presented in the contemporary debate that attempt to deal with much the same issues as constitutionalism is the so called global administrative law. With Kingsbury as the most vocal proponent of this strand<sup>500</sup>, the global administrative law approach places emphasis on administrative principles to bring coherence to international law, rather than on universally accepted values (as constitutionalists do). Thus the global administrative law approach is relatively much more down to earth as it avoids the uncertainties and loftiness that constitutionalism inevitably invokes. Instead global administrative law resorts to procedural aspects and technical detail of administrative principles. Partly the global administrative law approach resembles what Koskenniemi advocated as culture of procedural formalism<sup>501</sup> – an attempt to rein in holders of power not by persuading them about merits of virtuous conduct, but rather by persuading them to adopt certain procedural rules that would quietly steer actors away from abuse of the power that they hold.

One of the key criticisms of the global administrative law approach has been that it avoids a fundamental question of where do the global administrative principles derive their validity from? Several responses are offered to this question. Esty suggests that it is not really important whether the underlying rules are legally binding or not – the important point is that the principles are applied.<sup>502</sup> Bogdandy offers to turn to constitutive documents of various international organizations

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<sup>500</sup> See Kingsbury B., Krisch N., Stewart R. The Emergence of Global Administrative Law. *Law and Contemporary Problems*, Vol. 68, 2005 No. 3& 4. Among the many works on the topic see: Giacinto C. Beyond the State: The Europeanization and Globalization of Procedural Administrative Law, *European Public Law* Vol. 9, 2003, p. 563; Slaughter A.-M. *A New World Order*. Princeton: Princeton University Press, 2004; Slaughter A.-M. Global Government Networks, Global Information Agencies, and Disaggregated Democracy, *Michigan Journal of International Law*, Vol. 24, 2003 p. 1041; Shapiro M. Administrative Law Unbounded: Reflections on Government and Governance, *Indiana Journal of Global Legal Studies*, Vol. 8, 2001 p. 369; Bodansky D. The Legitimacy of Global Governance: A Coming Challenge for International Environmental Law? *American Journal of International Law*, Vol. 93, 1999, p. 596; Durant R., Fiorino D., O'Leary R. (eds.), *Environmental Governance Reconsidered: Challenges, Choices and Opportunities*, Cambridge: MIT Press, 2004.

<sup>501</sup> Koskenniemi M. *The Gentle Civilizer of Nations: The Rise and Fall of International Law*. Cambridge: Cambridge University Press, 2001.

<sup>502</sup> Esty D. Good Governance at the Supranational Scale: Globalizing Administrative Law, *Yale Law Journal*, 2006, Vol. 115, p. 1490.

and look at legal procedures and administrative principles contained therein – principles that are shared among many organizations would be the contenders for the status of global administrative law.<sup>503</sup>

#### **6.1.4. Constitutionalization and universality**

Scholars have sometimes described the above discussed phenomena in terms of universality of international law (rather than constitutionalization). For instance Simma distinguishes three different understandings (or “levels”) of universality of international law.<sup>504</sup> The first “classic” understanding of universality of international law means that “there exists on the global scale an international law which is valid for and binding on all states.”<sup>505</sup> Within this meaning universality of international law implies universal validity. The second understanding of universality implies that international law is a unified, organized and coherent system. The third understanding of universality is the one that is most relevant in the context of constitutionalization – it refers to a view articulated by “universalist” tradition of international legal thinking. As noted by Simma:

“A universalist approach to international law [...] expresses the conviction that it is possible, desirable, indeed urgently necessary (and for many, a process already under way), to establish a public order on a global scale, a common legal order for mankind as a whole.”<sup>506</sup>

A sense of this type of universality may be glimpsed from the Court of First Instance (CFI) *Yusuf* and *Kadi I* cases where the CFI held that the UN Security Council is bound to respect *jus cogens* norms.<sup>507</sup> Thus the CFI based its judgment on a premise of fundamental sense of unity of all international law – law that projects fundamental human rights above all other values.<sup>508</sup> Again Simma expresses this point by noting that universality of international law implies:

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<sup>503</sup> Bogdandy A. General Principles of International Public Authority: Sketching a Research Field, *German Law Journal*, Vol. 9, 2008, p. 1909; Bogdandy A., Dann P., Goldmann M., Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, *German Law Journal* Vol. 9, 2008, p. 1375.

<sup>504</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 267.

<sup>505</sup> *Ibid.* For elaboration of this ‘classic’ understanding of universality see Jennings R. Universal International Law in a Multicultural World. In: Bos M. and Brownlie I. (eds.), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (1987).

<sup>506</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No.2, 2009, p. 267. See Bogdandy A., Delavalle S. Universalism and Particularism as Paradigms of International Law. *International Law and Justice Working Paper* 2008/3.

<sup>507</sup> General Court: Case T-85/09, *Kadi v. Commission*, [2010] ECR II-5177.

<sup>508</sup> As Klabbers has noted “No matter that the CFI got parts of its decision wrong; what matters, some might say, is that it tried; what matters is that, overall, the CFI suggested that no one is above the law; what matters is that the CFI

“The expansion of international law beyond the inter-state sphere, particularly by endowing individuals with international personality, establishing a hierarchy of norms, a value-oriented approach, a certain “verticalization” of international law, de-emphasizing consent in law-making, introducing international criminal law, by the existence of institutions and procedures for the enforcement of collective interests at the international level – ultimately, the emergence of an international community, perceived as a legal community.”<sup>509</sup>

These very same elements are often used as descriptions of constitutionalization. Thus both universality and constitutionalization of international law are indeed very similar if not identical concepts.

### ***6.1.5. Criticism of constitutionalization***

Being a vastly popular topic and one which is embedded with certain vagueness, constitutionalization has attracted considerable criticism. This section will provide only a sample of various objections to the concept that have been raised without any pretence to afford an exhaustive overview. Firstly, scholars have questioned the very need to employ the concept of constitutionalization. For instance Bodansky has enquired what are the actual descriptive and normative claims resulting from constitutionalism?<sup>510</sup> Why not talk directly about limitations on state sovereignty, judicial review, majority law-making and binding jurisdiction of international courts – why cloak these developments under a cover of constitutionalization? Similarly, Simma has questioned the need to introduce the idea of constitutionalization on top of already existing notion of universality of international law.<sup>511</sup> These authors suggest that one can discuss elements of

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suggested that there is some legal space hovering over all political activities, containing some untouchable norms which themselves originate in the hearts and minds not of selfish states, but of humanity itself”. In: Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 2. Tomuschat has referred to universality as to a ‘comprehensive blueprint for social life’, see Tomuschat C. “International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law”, 281 *Recueil des Cours* (1999) 63.

<sup>509</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No.2, 2009, p. 268. See Mosler H. The International Society as a Legal Community. 140 *Recueil des Cours* (1974 IV) 1, pp. 11-12.

<sup>510</sup> Bodansky D, Is There an International Environmental Constitution? *Indiana Journal of Global Legal Studies*, Vol. 16, 2009, p. 565.

<sup>511</sup> Simma has noted that ‘[o]ne can adhere to such a universalist approach without necessarily subscribing to the view that contemporary international law is undergoing a process of ‘constitutionalization’. See Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No.2, 2009, p. 268.



constitutionalization straightaway without introducing the vague notion of constitutionalization - using such an unclear concept may be more confusing than helpful.

Constitutionalists respond that the value of the constitutionalist approach lies in its comprehensive nature, namely, that the different features of the constitutionalism are not merely additive, but that the whole is more than the sum of its parts.<sup>512</sup> It seems like a good enough argument since introduction of an overarching concept heavily laden with perceptions of public order and rule of law may indeed produce certain side effects which were not initially intended. In the case of constitutionalization the side effect is that constitutionalist outlook invites adding of those constitutionalist elements which are missing from international law. Constitutional agenda might have begun with core issues of recognizing some inevitable limitations on sovereignty (e.g., invalidity of treaties that conflict with peremptory norms) but, since constitutionalization is recognized as actually happening, it invites consideration of other elements characteristic of constitutional orders such as judicial review (for instance, reviewing measures of the Security Council) and democracy (the so called democratic deficit in the exercise of powers of international organizations or equal representation of interests of nationals of various states).

A related criticism is that the very term “constitution” is inappropriate in the context of international law, since it invokes associations with domestic constitutions and thereby invites inadequately high expectations. Constitutionalism then attempts to profit from these positive associations and elevate the status of international law and perceive it as more developed than it really is. A related argument which exposes fictionality of international constitutionalism is that national constitutions are achieved by real life sacrifices and struggles, whereas international constitutionalism only has the facade invented by international lawyers.<sup>513</sup>

Both of these arguments, if elevated to a more abstract level, assume that there is the reality of international law and a constitutionalist agenda which attempts to “sell” ideas which do not exist in the “real” international law. A response to these arguments may be that law as a phenomena exists within the realm of ideas. Therefore, just like any practice that states believe to be law actually becomes law, an idea that international law is based on certain constitutional principles in fact makes it a constitutional system. In other words, if we perceive international law as constitutional order, it becomes a constitutional order. Whether particular ideas of what the law is crystallize as a result of lengthy violent struggles is not that important; the important point is that an idea of what the law is becomes generally accepted. It may be accepted as a result of “real life sacrifices and struggles”, but it may just as well be accepted as a result of seeing that it really makes

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<sup>512</sup> Peters A. The Merits of Global Constitutionalism, *Indiana Journal of Global Legal Studies*, Vol. 16 2009 p. 403.

<sup>513</sup> Anderson B. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 1991.

sense e.g., to enforce universally binding measures to avert climate change, even if some states do not consent to these measures.

A further criticism is that introduction of constitutionalist agenda in essence is a political project, which intentionally seeks to benefit from legal undertones. The critics distrust the “promise of the end of politics”<sup>514</sup> and rather see the process as “constitutional conceits”<sup>515</sup>. Constitutionalization proposes what should be the imperative values, so in that sense it certainly is concerned with a political choice. At the same time the conceptual point of constitutionalism is to place law somehow above the politics. Response from constitutionalists is that law and politics are not meant to exclude each other, rather they are complementary systems. Law is a product of politics, while at the same time law determines the formal rules by which the politics are played. Politics get legalized and law politicized.<sup>516</sup> The introduction of legal and even constitutional principles contributes to the stability of expectations, legal certainty, and equal treatment of the relevant actors.<sup>517</sup> Constitutionalization, it is argued, is a juridical alternative to moralizing on the one hand, and to power politics on the other.<sup>518</sup>

Another criticism is that there is no political will to bring about constitutionalism, and that there are no mechanisms to enforce a meaningful constitutional order. Therefore, as the argument goes, international constitutionalization is idealistic and is bound to remain only symbolic. This view asserts that states pursue nothing but their national interests; that even projects like human rights protection and international cooperation in various UN bodies are agreed to with an intention in some way or another to further national interest. In response constitutionalists argue that, although it indeed is mainly an academic project (thus admitting that political will may be lacking), they nonetheless emphasize that academic exercises also shape our view of law and thus also supposedly influence the exercise of power. For instance it has been noted that:

“[t]hus global constitutionalism as an academic agenda should follow the middle path between merely dignifying the *status quo* and hanging on to academic pipe dreams. In order to gain acceptance in the political realm, global constitutionalists might highlight the current situation of global interdependence. With such state of affairs, national and global public interests tend to converge more and, increasingly, national interests and

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<sup>514</sup> Klabbers J. Constitutionalism Lite, *International Organizations Law Review*, 31, 1, 2004.

<sup>515</sup> Dunoff J. Constitutional Conceits: The WTO’s “Constitution” and the Discipline of International Law, *European Journal of International Law* Vol. 17, 2006, p. 647.

<sup>516</sup> Loughlin M. *Sword and Scales: An Examination of the Relationship Between Law and Politics*. Portland: Hart 2000. p. 209.

<sup>517</sup> Peters A., The Merits of Global Constitutionalism, 16 *Indiana Journal of Global Legal Studies* (2009) p. 407.

<sup>518</sup> *Ibid.*, p. 409.

universal idealism are not necessarily in opposition. Therefore, global constitutionalism, at least in the long run, may even further national economic and political interests [...].<sup>519</sup>

Furthermore, there is the possibility that the project of constitutionalization with limitations on state sovereignty and increase of the power of international organizations would be used to further interests of certain groups (like multinational companies) at the expense of other groups, such as workers and developing countries.<sup>520</sup> On this point constitutionalist scholars suggest that constitutionalization needs to be accompanied by a sense of responsibility, which admittedly is very difficult to capture in legal rules.<sup>521</sup> The trouble with a response to such a criticism is that it concerns specific implications of constitutionalist agenda – a topic which requires reorientation from conceptual to detailed. As most of constitutionalist discourse is at a rather high level of abstraction, it struggles with a concrete prescription for ensuring accountability on international level.<sup>522</sup>

A number of related criticisms directed towards the project of constitutionalization of international law are concerned with its questionable legitimacy.<sup>523</sup> First, it has been argued that there is no global demos and therefore there can be no institutions that may exercise constituent power.<sup>524</sup> Likewise, it has been suggested that constitutionalism is created by lawyers and courts and as such it lacks legitimacy and results in a kind of juristocracy.<sup>525</sup> Yet another criticism is that constitutionalization is predominantly a European project, which claims to speak on behalf of the whole humanity, which may not be willing to accept the European viewpoint on values as a “paramount ethic of the global community”<sup>526</sup>. Constitutionalist response to these criticisms has been varied and need not be repeated here; for the purpose of this study the important point is rather to note the multitude of issues in the constitutionalist debate.

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<sup>519</sup> Peters A., The Merits of Global Constitutionalism, *Indiana Journal of Global Legal Studies*, Vol. 16 2009 p. 403.

<sup>520</sup> See Barnett M., Finnemore M. The Politics, Power, and Pathologies of International Organizations. *International Organization*, 1999, Vol. 53, No. 04 p. 699; Alvarez, J. *International Organizations as Law-Makers*. Oxford: Oxford University Press, 2005.

<sup>521</sup> Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009, p. 31.

<sup>522</sup> For a general discussion of the problem see Barnett, M., Finnemore M. *Rules for the World: International Organizations in Global Politics*. Ithaca: Cornell University Press, 2004.

<sup>523</sup> See Bodansky D. The Legitimacy of International Governance: a Coming Challenge for International Environmental Law? *American Journal of International Law*, 1999, p. 596.

<sup>524</sup> Loughlin M., Walker N. (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 2007.

<sup>525</sup> See Hirschl R. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press, 2009.

<sup>526</sup> Johnson D. World Constitutionalism in the Theory of International Law. In: *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Hague: Martinus Nijhoff Publishers, 2005, p. 3.

## 6.2. Constitutionalization and sovereignty

One of the key aspects in the process of constitutionalization is the change in the role that is played in international law by the concept of state sovereignty. State sovereignty has been the cornerstone of post Westphalian international law system and therefore its current erosion (or perhaps evolution) in the context of constitutionalization merits particular attention. It has been suggested that the basic characteristics of modern states are four: a) permanent impersonal institutions; b) agreement on authority that decides; c) sovereignty of the state; d) that the authority that decides receives loyalty of its subjects.<sup>527</sup> Among these, the most essential characteristic of a modern state has been that of sovereignty. Being independent externally and internally a classical sovereign state as elaborated by Hobbes in *Leviathan* has no authority above it and wields total power over its territory and all its subjects within that territory.<sup>528</sup> Positivist scholars of 19<sup>th</sup> and 20<sup>th</sup> centuries took this definition to an extreme and interpreted it as meaning that the sovereign is in fact above the law and is not bound by it. In 1922 Carl Schmitt, a fervent proponent of this view, famously observed that: “he who decides on the state of emergency [when application of law may be suspended] is sovereign”.<sup>529</sup> Thus for Schmitt sovereignty was a concept that remained outside the legal system - the sovereign could decide when the law stopped operating.<sup>530</sup> This view was even more aggravated by the idea propagated by some positivists that international law was not real law as it did not foresee sanctions.<sup>531</sup> As a result, the sovereign (even of the worst kind, such as in Nazi Germany) could rule supremely and essentially disregard international law.

Another strand of thought, propagated most notably by Alfred Verdross, postulated that sovereignty was a concept that operated within the legal system.<sup>532</sup> In the context of international law sovereignty merely implied that states are independent from other states, but remain subject to the rules of international law. Presently this view has become the generally accepted standard.<sup>533</sup> To express this vision of sovereignty modern international law proclaims sovereign equality among

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<sup>527</sup> Strayer J. *On the Medieval Origins of the Modern State*. Princeton: Princeton University Press 1970, p. 9.

<sup>528</sup> Hobbes T. *Leviathan*, New York: Oxford University Press, 1996.

<sup>529</sup> Schmitt C. *Politische Theologie : vier Kapitel zur Lehre von der Souveränität*. München: Ducker&Humbolt, 1922. s.5.

<sup>530</sup> *Ibid.*

<sup>531</sup> See Hegel F. *Elements of the Philosophy of Right*. Cambridge: Cambridge University Press, 1991.

<sup>532</sup> Verdross A. *Die verfassung der Volkerrechtsgemeinschaft*. Wien: Springer, 1926.

<sup>533</sup> The ILC report on fragmentation of international law which starts by stating that international law is a legal system, see: The International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682.

states as the defining feature of the international community.<sup>534</sup> States whether large or small, prosperous or poor, powerful or weak - all are in theory equal.<sup>535</sup> On this basis, as noted by Koskenniemi, the sphere of state's liberty is delimited by spheres of liberty of other states: "[b]ut the delimitations of freedoms in this way requires that we do not rely on the self-definition of the members of their liberties. In other words, a State's sphere of liberty must be capable of determination from a perspective which is external to it."<sup>536</sup> This resonates with modern constitutionalist outlook which holds that sovereignty is certainly not above the international law, but rather is contained within and defined by international law.<sup>537</sup>

However, the community of these sovereign equals, at least up till the second half of the 20<sup>th</sup> century, may hardly be regarded as community in any real sense of this word. Each state pursued its own individualistic interests and any unification for a common purpose generally was *ad hoc*, such as military alliances. As Cassese puts it, the international community in most of the modern era has been a "cluster of entities, separate and unconnected, which have been compelled by historic reasons to somehow live together in an uneasy cohabitation."<sup>538</sup> The rules that this community used for mutual interaction regulated only the barest essentials of coexistence such as law of treaties, exchange of diplomats and use of force. Most importantly, this international community had no methods for enforcement of the law apart from self-help of the injured state. Consequently, force could be used on any occasion to defend actual or perceived rights, including intervention to protect rights of other states. Unsurprisingly such a community has been beset by constant wars and therefore, at least with regard to legitimized violence, was no different from pre-Westphalian international societies.<sup>539</sup>

Then starting with late 18<sup>th</sup> century several ideas gained prominence within states that left an impact also on the perception of what the international community ought to be like and how sovereignty ought to be exercised. First, the French revolution introduced the notions of *liberté, égalité, fraternité*<sup>540</sup>. These concepts introduced as guiding principles of public life within France had inevitable repercussions on the French outlook (and that of other states) on many international

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<sup>534</sup> UN Charter, Article 2.

<sup>535</sup> See Vattel E. *The Law of Nations, or Principles of the Law of Nature*. London: n/a 1797.

<sup>536</sup> Koskenniemi M. *From Apology to Utopia: the Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2005, p. 193.

<sup>537</sup> Fassbender B., *Sovereignty and Constitutionalism in International Law*. In: *Sovereignty in Transition*. Walker N., (ed.) Oxford: Hart Publishing, 2003, p. 115.

<sup>538</sup> Cassese A. *States: Rise and Decline of the Primary Subjects of International Community*. In: *The Oxford Handbook of the History of International Law*, Fassbender B., Peters A., (eds.), Oxford: Oxford University Press, 2012, p. 51.

<sup>539</sup> Rostovtsev M. *International Relations in the Ancient World*. In: *The History and Nature of International Relations*, Walsh E. ed. New York: MacMillan, 1922, p. 35.

<sup>540</sup> See Censer J., Hunt L. *Liberty, Equality and Fraternity, Exploring the French Revolution*. Pennsylvania: Pennsylvania State University Press, 2004.

maters and manifested as doctrines proclaiming equality of states, prohibition of slavery, non-intervention in domestic affairs of other states and outlawing of aggression.<sup>541</sup> Another important idea that came around by late 19<sup>th</sup> century was that of a nation state. The core of this doctrine was a conviction that the best way to organize a state is to build it on the basis of a single nation. The implication on the international community was that nations that were scattered among several states ought to unite into a single state (for instance Italy and Germany), whereas states uniting several nations (such as Ottoman Empire) ought to split up.

One more important doctrine that impacted the international community and limited the confines of sovereignty was the doctrine of self-determination of peoples. It was voiced by the US president Wilson at the end of the First World War and also by communist thinkers such as Lenin.<sup>542</sup> It had a significant impact on decolonization and the resulting increase in the number of states, and still continues to be one of the core principles of modern public international law.<sup>543</sup> The development of the above mentioned ideas impacted the makeup of the international community, although, there was still very little of community as international law remained a law of coexistence rather than of cooperation.

There have been several attempts to set up more advanced forms of cooperation in the international community, which potentially could have impacted the notion of state sovereignty, but all of these (in particular prior to the second half of the 20<sup>th</sup> century) have had only a very limited success. The starkly unsuccessful attempts include collective security systems designed by the 1648 Treaty of Münster (that was a part of the so called Westphalian Peace Treaties), the 1815 Treaty of Paris, establishing the Holy Alliance by Austria, Russia and Prussia, and the 1919 League of Nations. The Treaty of Münster, as already noted in the first Chapter, attempted to constrain the rights of states to resort to war by prohibiting war for religious causes, providing for collective enforcement of obligations and a three year settlement period before force may be used. However, these specific mechanisms were never used by states.<sup>544</sup> A much more lasting legacy of the Westphalian Peace was the notion of sovereign equality, which in effect removed rather than imposed limitations on the use of force.

After the Congress of Vienna, the so called Concert of Europe consisting of Austria, Russia, Prussia and latter also France attempted to resolve conflicts by diplomatic negotiations rather than

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<sup>541</sup> See Cassese A. *The Diffusion of Revolutionary Ideas and the Evolution of International Law*. In: *Human Dimension of International Law: Selected Papers*, Oxford: Oxford University Press, 2008. p. 72.

<sup>542</sup> See Cassese A. *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge: Cambridge University Press, 1995.

<sup>543</sup> Among the ICJ cases dealing with self-determination see: *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 [2004] I.C.J. Reports 131, para.109; see also White, R. *Self-Determination: Time for a Re-Assessment*, *Netherlands International Law Review*, Vol. 28, 1981, p. 149.

<sup>544</sup> O'Connell M.E. *Peace and War*. In: In: Fassbender B., Peters A., (eds.), *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, p. 278.

by war. Actually these states appropriated a right to intervene in conflicts, in particular to suppress any revolutionary movements. Whether this collective security system enhanced or limited sovereignty is a contestable matter, particularly because most of these movements were popular and democratic. Finally the League of Nations must be added to the above list. Although institutionally more advanced than previous attempts at collective security, it failed similarly to its predecessors, as it also lacked institutional mechanisms to enforce limitations on states and strongly depended on the good will of its members.

The latest version of a collective security on a global scale is that established by the UN Charter. Its functioning has been considerably more successful than that of the League of Nations, as besides declaratory ideals it also reflects realities of power (even if somewhat outdated) in the form of veto rights of the permanent members of the Security Council. With the adoption of the UN Charter two important developments have taken place, which directly pertain to the scope of state sovereignty. First, the international community recognized the prohibition of the use of force. This crucial norm besides its other function of limiting violence is also directly aimed at safeguarding state sovereignty – it gives an additional normative protection to the concept of sovereignty as it prohibits the most common means by which sovereignty is violated. General acceptance of the peremptory character of the prohibition of the use of force is probably the single most important element in limiting sovereign rights and establishing basis for constitutionalization of international law.

The second development that has taken place since the adoption of the Charter and which leaves a notable impact on the concept of sovereignty is the widespread recognition of human rights. Human rights limit what states may do within their territory and with their nationals. Some of those rights have acquired peremptory character. As a result of these developments, according to Tomuschat: “States live, as from their birth, within a legal framework of a limited number of basic rules which determines their basic rights and obligations with or without their will [...]. One may call this framework, from which every State receives its legal entitlement to be respected as a sovereign entity, the constitution of international society or, preferably, the constitution of the international community [...]”<sup>545</sup> These developments have led authors to suggest that international law does not only protect sovereignty, but also prescribes the limits of sovereignty.<sup>546</sup>

In scholarly discourse the concept of sovereignty has attracted considerable criticisms, as it is regarded as the key element which is employed to resist attempts at developing the international community based on public order. It is sovereignty that allows states not to agree to any meaningful

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<sup>545</sup> Tomuschat C. *Obligations Arising for States Without or Against Their Will*. Hague: Martinus Nijhoff, 1993, p. 211.

<sup>546</sup> Fassbender B., *Sovereignty and Constitutionalism in International Law*. In: *Sovereignty in Transition*. Walker N., (ed.) Oxford: Hart Publishing, 2003, p. 115.

regime to address the urgency of climate change,<sup>547</sup> state sovereignty precludes other states from aiding civilians caught up in civil wars and being attacked by their own government;<sup>548</sup> and it is sovereignty that allows states to exhaust their natural resources up to a point where environment has been utterly degraded.<sup>549</sup> That being said, it must be added, that the debate also is not limited to simplistic condemnation of an orthodox legal concept. As already noted, sovereignty as a foundational element of international legal order plays a pivotal role in deterring hegemony. Moreover, to follow the indeterminacy argument advocated by Koskenniemi, where one would see sovereignty as the problem and community as a solution, someone else may see community as a disguise for empire and thus sovereignty as a solution.<sup>550</sup>

Nevertheless, regardless of indeterminacy, there are merits of sovereignty that are likely to be acknowledged even by the staunchest of constitutionalists. The idea of a sovereign state has been the core concept which has made it possible for the present international community to come into existence and perform indispensable functions. Although there are many shortcomings that may be attributed to sovereign states, they do ensure some sense of legal order within their territories, they limit violence by establishing monopoly on the use of force, they also assume some responsibility for the actions of their nations (when their conduct is attributable to the state). Likewise on the basis of sovereignty states have created a system within which they can interact with each other in a predictable way, to adopt rules, to adjudicate disputes and at least to attempt to limit grossest forms of violence. And last but not least, the concept of sovereignty is the key normative safeguard against abuse of smaller states by hegemonic powers; whereas international constitutionalism may easily be employed for sidelining fundamental principles of international law with a purpose of furthering hegemonic agendas.

However, regardless of its pros and cons, the concept of state sovereignty seems to be losing its position as a foundational norm of international law. As noted by Peters:

“States are not ends in themselves, but are composite entities whose justification lies in the fulfilment of public functions needed for human beings to live together in peace and security. When human needs are taken as a starting point, the focus shifts from states’ rights to states’ obligations vis-a-vis natural persons, and a state that does not discharge these duties has its sovereignty suspended.”<sup>551</sup>

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<sup>547</sup> See Biermann F., Dingwerth, K. Global Environmental Change and the Nation State. *Global Environmental Politics*, Vol. 4, No. 1, 2004, p. 1.

<sup>548</sup> See Hoffmann J., Nollkaemper A., and Swerissen I., (eds.), *Responsibility to Protect: From Principle to Practice*. Amsterdam: Amsterdam University Press, 2012.

<sup>549</sup> See Eckersley R. *The Green State: Rethinking Democracy and Sovereignty*. MIT Press, 2004.

<sup>550</sup> Koskenniemi M. The Politics of International Law, *European Journal of International Law*, Vol. 1 No.1., 1999, p. 1.

<sup>551</sup> Peters A. The Merits of Global Constitutionalism, 16 *Indiana Journal of Global Legal Studies* (2009), p. 398.



This process that has been termed as “humanizing of sovereignty” is the central element in the transformation of international law from a system centred on states to a system primarily centred on individuals.<sup>552</sup> Throughout the 20<sup>th</sup> century states have gradually been losing their previously unchallenged authority as the sole subjects of the international community. In particular in the last 50 years since the end of the Second World War international intergovernmental organisations have slowly but surely established their presence in the international community. Although international organisations are created by states concluding a respective international treaty (and therefore in principle could be dismantled by an amendment or denunciation of the constitutive treaty) international organizations tend to amalgamate more authority over time. Thus, due to disagreements between states and officials with loyalty towards the organization rather than towards particular states, international organizations are often able to dominate over individual member states. This trend may be observed in a number of successful international organizations such as the Council of Europe, The European Union, the World Bank and International Monetary Fund.

### ***6.2.1. Limitations of sovereignty through international organizations***

Fundamental to the development of the international community has been the cooperation of states within international organisations. The times when international organisations merely provided a place of discussion and decision making for states seem to belong to the pre-UN era. The current day international organisations, supported by their own administrative structures and surrounded by a vast myriad of non-governmental organizations (NGOs) and interest groups are by themselves important participants of international legal order, capable of shaping the behaviour of states.

Considering that many of the problems of the current day world have outgrown the national boundaries<sup>553</sup> and, therefore, require international regulation, the role of international organisations is only likely to increase. The possible future reforms of international organisations, influenced by what David Kennedy has called the “new age internationalism”<sup>554</sup>, can be expected to introduce

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<sup>552</sup> *Ibid.*, p. 399.

<sup>553</sup> See Schermers H., Blokker N. *International Institutional Law*. Leiden: Martinus Nijhoff, 1980. p. 27.

<sup>554</sup> Kennedy D. *A New World Order: Yesterday, Today and Tomorrow, Transnational Law & Contemporary Problems*, fall, 1994, p. 329. Kennedy argues that new generation of internationalists in NGO’s and civil service of governments and international organizations are likely to bring reforms to international organizations. He suggests that the reforms will result in increase in the role of international interest groups (human rights movement, women’s movement, environmental movement) as well as in increase in the role of multinational commercial enterprises and corresponding decrease in the role of states.

significant changes to the present understanding of state sovereignty and to propose endorsing international organisations with powers to legislate for the international community. However, regulation of the behaviour of states by means of international organisations is directly linked to the fundamental question of whether state consent should remain the sole basis of all international law? Or whether the international community has reached a stage at which at least a limited form of international public order could limit the all-pervasive applicability of the requirement of state consent? Developments in the Security Council over the last decade provide evidence that states might have started to turn a corner in their traditional sensitivity towards any limitations of state sovereignty and consensual nature of international obligations.

Thus on September 28, 2001 the Security Council in response to the attacks of September 11 adopted Resolution 1373 on measures to combat international terrorism.<sup>555</sup> The peculiarity of this resolution is that its provisions seem to be of legislative nature. Instead of providing for specific sanctions aimed at particular states or persons,<sup>556</sup> the resolution provides for obligations formulated in general and abstract manner without geographical or time limitations. Szasz has noted that due to these peculiarities “a significant portion of the resolution can be said to establish new binding rules of international law – rather than mere commands relating to particular situation.”<sup>557</sup> Although with the Resolution 1373 the Security Council rather explicitly assumed a competence of a legislator, the reaction of states towards this groundbreaking development was surprisingly welcoming.<sup>558</sup> This most likely was due to the feelings of condemnation of the attacks of September 11, and also due to the fact that states in general had no objections to the substantive contents of the resolution. However, the fact that such a resolution was adopted in the first place, establishes a very important precedent to which the Security Council may return at some latter point in time.

A more recent example of legislation by the Security Council is the Resolution 1540 (2004).<sup>559</sup> The resolution provided for a number of measures with regard to the non-proliferation of weapons of mass destruction and imposed an obligation of states to adopt “appropriate laws and regulations” to implement these measures. Unlike with the Resolution 1373 (2001), this resolution raised objections of several states against the “increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its

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<sup>555</sup> UN Security Council Resolution 1371 (September 28, 2001) on the situation in The former Yugoslav Republic of Macedonia, 40 ILM 1278 (2001).

<sup>556</sup> Examples of traditional Chapter VII resolutions are, for instance, SC Resolution 748 (1992) imposing sanctions on Libya or SC Resolution 1267 (1999) imposing sanctions on the Taliban government of Afghanistan.

<sup>557</sup> Szasz P. The Security Council Starts Legislating, 96, *American Journal of International Law*, Vol. 96, 2002, p. 902.

<sup>558</sup> For a brief survey of responses see Talmon S. The Security Council as World Legislature, *American Journal of International Law*, January 2005, p. 175; and also Lavallo R. A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004), *Netherlands International Law Review*, 2004, p. 416.

<sup>559</sup> UN Security Council Resolution 1540 (April 28, 2004) 43 ILM 1237 (2004).

resolutions binding on all states.”<sup>560</sup> However, despite these criticisms no state refused to comply with the resolution.<sup>561</sup>

Both of these precedents as well as the overall approving reactions of states indicate that the Security Council could indeed be assuming some legislative functions. It certainly seems that these precedents were not singular exceptions, but rather heralded an emergence of a new category of international obligations. The President of the Council in April 2004 boldly confirmed this by noting that the adoption of the legislative resolutions constituted “the first major step towards having the Security Council legislate for the rest of the United Nations’ membership.”<sup>562</sup>

However, it must be noted that powers of the Security Council to impose obligations is clearly limited by the UN Charter. The Council can impose binding obligations (as opposed to recommendations) only when it has determined existence of a threat to peace under Chapter VII of the Charter. “Threat to peace”, as already noted, is an evolving and expanding concept, which has come to include proliferation of weapons of mass destruction, international terrorism, use of mercenaries, emergency situations and violent disintegration of states.<sup>563</sup> Szasz has suggested that “massive assaults on international environment” could also be perceived as threats to peace.<sup>564</sup> Such a wide formulation of “threat to peace” suggests that the Council could develop a practice of adopting Chapter VII resolutions to regulate a very broad range of issues. In the words of one commentator “taking initiatives along such lines the Council might, conceivably, become the world’s all-purpose legislature.”<sup>565</sup>

However, regardless of what the Security Council is to become in the decades ahead, at least within the nearest future it is unlikely to function as an all-purpose legislator. First of all, the Council can successfully legislate only as far as the legislation reflects the general will of the states. If the Council adopts a resolution, which is disregarded by a majority of states, it is difficult to see how it could attain any enforcement. Secondly, the reactions of states to the adoption of Resolution 1540 (2004) indicates that the Council’s legislation should only be employed as an emergency

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<sup>560</sup> The concerns were raised by India, Cuba, Mexico, Nepal and Namibia, see UN Doc. S.PV.4950.

<sup>561</sup> Lavallo R. A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004), *Netherlands International Law Review*, 2004, p. 428.

<sup>562</sup> Press Conference of the president of the Security Council April 2, 2004, at: [www.un.org/news/briefings/docs/2004/pleugerpc.DOC.htm](http://www.un.org/news/briefings/docs/2004/pleugerpc.DOC.htm) [viewed September 15, 2014].

<sup>563</sup> Talmon S. The Security Council as World Legislature, *American Journal of International Law*, January 2005, p. 175.

<sup>564</sup> Szasz P. The Security Council Starts Legislating, 96, *American Journal of International Law* (2002), p. 902; also Szasz P. Restructuring the International Organizational Framework. In: Weiss E. (ed) *Environmental Change and International Law: New Challenges and Dimensions*. Tokyo: United Nations University Press, 1992, p. 360; also Harper K. Does the United Nations Security Council Have the Competence to Act as a Court and Legislature? 27 *New York University Journal of International Law and Politics*, Vol. 27, 1994, p. 126.

<sup>565</sup> Lavallo R. A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004), *Netherlands International Law Review*, 2004, p. 428.

method for cases when regulation is urgently needed and the traditional ways of creating rules of international law take too long. Finally, there are a number of issues concerned with the question whether the Security Council with its untransparent negotiation process and the restrictive rules on participation of specially affected states is the most appropriate organ of the UN to legislate international law.

Another body that possibly could assume increased legislative powers and thereby decrease the role of state sovereignty and promote shared interests of the international community is the UN General Assembly. As the ICJ noted in the *1996 Advisory Opinion on the Legality of Nuclear Weapons*<sup>566</sup> the General Assembly resolutions can have normative value as they provide evidence for establishing the existence of a rule or the emergence of *opinio juris*. Likewise in the *Nicaragua case* the Court held that the effect of consent to the text of Assembly resolution may be understood as an acceptance of the validity of the rules declared by the resolution.<sup>567</sup> Moreover, an argument can be made that in cases where a formal undertaking is made by members to comply with a resolution, the application of the principle of estoppel leads to a conclusion that they are bound by the resolution, regardless of its originally non-binding character.<sup>568</sup>

Consequently, as Sands notes “there appears to be no reason to exclude the possibility that the position taken by a member of an international organisation through its vote in favour of a recommendation could subsequently be opposed to that state as an expression of its legal position regarding the subject-matter dealt with in the institutional act – assuming of course that the latter has used normative, as opposed to purely recommendatory, terms.”<sup>569</sup> Resolutions of the General Assembly on large scale driftnets demonstrate the above described effects. On December 22, 1989 Assembly adopted Resolution 44/225, which called for moratorium on large scale driftnets by June 30, 1992. In 1990 and 1991 it adopted Resolutions 45/197 and 46/215 respectively, both of which reaffirmed the initial resolution and called for its full implementation. Commentators have expressed views that due to these resolutions the prohibiting on the use of large scale driftnets has acquired the status of a customary norm.<sup>570</sup>

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<sup>566</sup> ICJ: *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports, 1996, p. 254.

<sup>567</sup> ICJ: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports. 1986, p. 100.

<sup>568</sup> Sands P., Klein P. *Bowett's Law of International Institutions*, fifth edition. London: Sweet & Maxwell, 2001, p. 288. Similarly the role of voting in the process of custom formation has been described by Tunkin: “in voting for resolution, states express their approval of certain rules of conduct embodied in the resolution.” See: Tunkin G., *The Role of Resolutions of International Organizations in Creating Norms of International Law*. In: Butler (ed), *International Law and the International System*, Dordrecht: Nijhoff, 1987, p. 6.

<sup>568</sup> *Ibid.*, p. 289.

<sup>569</sup> *Ibid.*, p. 289.

<sup>570</sup> Hewison G. *The Legally Binding Nature of the Moratorium on Large-Scale High Seas Driftnet Fishing*, *Journal of Maritime Law and Commerce*, Vol. 25, No. 4, October, 1994.

Whether it may be the Security Council or the General Assembly, the above discussed trends indicate that understanding of sovereignty is undergoing erosion or certain evolution. Possible limitations to sovereignty that may only be envisaged on the global level are in fact already operational at some regional organizations. The most marked example of sovereignty limitations and indeed transfer of sovereignty from states to an international organization is that of the European Union.<sup>571</sup> The ECJ in its pivotal judgment *Van Gend&Loos* famously observed that the European Community created by the 1957 Rome treaty<sup>572</sup> “constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.”<sup>573</sup>

Presently, some 56 years later, the Treaty on the Functioning of the European Union<sup>574</sup> (TFEU) in Article 3 spells out that the Union’s institutions have exclusive competence with regard to customs union, monetary and commercial policies, marine resources, fisheries and competition. The EU is endowed with the Commission which monitors observation of the EU law and if necessary institutes infringement proceedings against non-compliant member states in the ECJ. The jurisdiction of the ECJ is compulsory and infringement proceedings may result not only in lump sum to compensate the damage caused by the breach but simultaneously also in penalty payment.<sup>575</sup> The ECJ has explicitly recognized that the infringement proceedings against member states perform a public law function of ensuring general and uniform observance of the EU law.<sup>576</sup> Thus the EU provides an example of a rather developed public law paradigm approach with multiple layers of legal relationships between the community and the responsible state. A breach of the EU law may result in invocation of responsibility: 1) by the injured state; 2) by any other state that is concerned by the breach; 3) by the Commission on behalf of the EU; and 4) by injured individuals in national courts of the member states. In some of these actions applicants may claim punitive measures (in the form of penalty payments), while all of the above claims are subject to compulsory jurisdiction of either the EU or national courts. The example of the EU demonstrates that limitations of sovereignty in law-making may be supplemented by further limitations of sovereignty with regard to enforcement of law. The EU states are not only bound by legislation which in many aspects is

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<sup>571</sup> See Tsagourias N., (ed.), *Transnational Constitutionalism, Internatioal and European Perspectives*, Cambridge: Cambridge University Press, 2007.

<sup>572</sup> Treaty Establishing European Economic Community, signed 25 March 1957, 298 U.N.T.S. 11.

<sup>573</sup> ECJ: case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1.

<sup>574</sup> Treaty on the Functioning of the European Union, 13 December 2007, Official Journal of the European Union, C 115/47, of 9 May 2008.

<sup>575</sup> ECJ: C-304/02 *Commission v France*, [2005] ECR I-6263.

<sup>576</sup> ECJ: 28/67 *Molkerei-Zentrale Westfalen v hauptzollamt Paderborn* [1968] ECR 143.

majority lawmaking, but also they have no option to opt out from adjudication and enforcement. The resultant legal system is one that provides for an elaborate public order and is strictly based on the rule of law.

### ***6.2.2. Sovereignty and individuals as international actors***

Besides states and international organizations several other actors have been recognized in international law as being members or at least semi-members of the international community. Among these are colonial peoples with a right to external self-determination, peoples that have a right to internal self-determination, national liberation movements, non-governmental organizations<sup>577</sup> and most importantly individuals as bearers of fundamental rights and international criminal responsibility. All of these actors in pursuit of their agendas actively encroach on state sovereignty and to some extent compete with states for political and legal authority.<sup>578</sup>

Among these actors the most prominent role has been played by individuals. This development has predominantly taken place within the broader process of recognition of human rights. Scholars adhering to constitutionalist perspectives, however, make a further argument that the ultimate international subjects are individuals rather than states.<sup>579</sup> Accordingly, also the ultimate normative source of international law, as suggested by constitutionalist scholars, is humanity and not sovereignty.<sup>580</sup> Such an approach does away with the present mainstream opinion that only states (being the exclusive creators of international law) deserve to be regarded as the only real subjects of international law. This approach is not fundamentally new as scholars in 1930ties made somewhat similar arguments.<sup>581</sup> Thus Lauterpacht famously noted that: “individual is the ultimate unit of all law, international and municipal.”<sup>582</sup>

What is new in the contemporary debate is that modern day constitutionalists argue that since individuals are in ultimate terms the real subjects of international law, they ought to have

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<sup>577</sup> As noted by Boyle and Chinkin NGOs are no longer contented with their traditional role of monitoring state behaviour, rather they increasingly demand a seat at the table; see Boyle A., Chinkin C. *The Making of International Law*, Oxford: Oxford University Press, 2007, p. 225.

<sup>578</sup> See Klabbers J. (I Can't Get No) Recognition: Subjects Doctrine and Emergence of Non-State Actors. In: Petman J., Klabbers J., (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*. Leiden: Martinus Nijhoff, 2003, p. 351.

<sup>579</sup> Werner W. The never-Ending Closure: Constitutionalism and International Law. In: Tsagourias N., (ed.), *Transnational Constitutionalism, International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 339.

<sup>580</sup> See Meron T. *Humanization of International Law*, Leiden: Martinus Nijhoff, 2006.

<sup>581</sup> Scelle G. *Precis de Droit des Gens, Principes et Systematique*, Vol 1, Paris: Sirey, 1932. p. 42.

<sup>582</sup> Lauterpacht H. The Grotian Tradition of International Law, *British Yearbook of International Law*, Vol. 23, 1946, p. 27.

attributes characteristic of legal subjects, i.e., rights to bring claims and in some form also take up obligations or even make law.<sup>583</sup> For instance Peters suggests that the role of individuals in international society has changed to an extent that individuals “have in legal terms become active legal subjects and in political terms transnational citizens.”<sup>584</sup> She finds evidence for this in the fact that individuals (mainly through NGO’s) enjoy certain rights of participation in international legal process (for example, participation rights provided in a soft-law form in the World Bank safeguard policies to persons affected by the projects financed by the World Bank)<sup>585</sup> and notes that participatory rights “are at least on the halfway point between merely having rights and making law, and blur the line between law-producers and bystanders.”<sup>586</sup>

Another way how individuals participate (although indirectly) in the law-making process is by initiating claims in international courts. Individual claims, as demonstrated by the ECJ, may provide a very fertile ground for developing law through adjudication. The most notable example, apart from the EU law, allowing claims by individuals is the system set up by the European Convention of Human Rights and Fundamental freedoms. However, there are several other such systems both at regional level (Inter-American Human Rights Court), as well as mechanisms at global level (such as the mechanisms under ICCPR and the International Centre for the Settlement of Investment Disputes (ICSID) under the 1964 Washington Convention<sup>587</sup>). All of these mechanisms leave a dent on the notion of sovereignty as states besides having to observe their primary obligations under applicable treaties, are subject to jurisdiction of judicial bodies in which the line between interpreting and making rules at times may become very thin. As noted by Bogdandy, the decisions of international judicial institutions increasingly: “have effects beyond individual disputes. They exceed the confines of concrete cases and bear on the general legal structures. The practice of international adjudication creates and shifts actors’ normative expectations and as such develops legal normativity.”<sup>588</sup> This phenomena is accompanied by a

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<sup>583</sup> It must be noted that such arguments are not entirely absent also from the debate in 1930ties-1950ties, when such scholars as Garcia Amador were proposing to accept rights of individuals to invoke state responsibility, see Chapter 3.2.1. p. 68.

<sup>584</sup> Peters A. Membership in the Global Constitutional Community. In: Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 160.

<sup>585</sup> World Bank Operational Policy 4.12 ‘Involuntary Resettlement’, January 2001 available at <http://web.worldbank.org/> [viewed on July 23, 2014].

<sup>586</sup> Peters A. Membership in the Global Constitutional Community. In: Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 160.

<sup>587</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington 1964, 575 UNTS 159.

<sup>588</sup> Von Bogdandy A., Venzke I. *Beyond Dispute: International Judicial Institutions as Lawmakers*. Berlin: Springer 2012. p. 3.

frequent trend amongst states themselves to treat judicial decisions as primary sources of international law.<sup>589</sup>

However, constitutionalist scholars also raise a conceptual objection to the idea that the above discussed procedural powers (to bring international claims and somewhat participate in law-making) are the right criteria for determining subjects of international law. They object to the classical notion, famously expounded by Kelsen, that individuals are only semi-subjects of international law to the extent that they possess particular international procedural rights independently of states.<sup>590</sup> Constitutionalists dismiss this view as overly positivist, in which the only valid criteria for defining law is existence of sanctions and enforcement mechanisms. According to constitutionalists, availability of sanctions is not an indispensable element as long as there is some form of remedy available – individuals under general international law may not be entitled to bring international claims freely, however, they have other venues to protect their rights – for instance to bring claims in domestic courts or to employ other remedies such as compliance and complaints mechanisms under various international treaties.<sup>591</sup> The mechanism under Aarhus Convention on Environmental information<sup>592</sup> (with its compliance Committee which reviews complaints submitted by individuals as well as by NGOs) provides an example of such an alternative remedy.

A side effect of the elevation of the status of individuals and the correlative erosion of state sovereignty is demonstrated by the principle of responsibility to protect.<sup>593</sup> Although *responsibility* in name, this concept stands apart from all other responsibility norms (the so called secondary rules that become operational only when a primary rule is breached). Responsibility to protect in contrast is a primary rule. The idea behind the notion of responsibility to protect is that sovereignty is coupled with certain obligations, specifically - to protect people in its territory from mass atrocities.

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<sup>589</sup> See Hernandez G. *The International Court of Justice and the Judicial Function*. Oxford: Oxford University Press, 2013, p. 156.

<sup>590</sup> Kelsen H. *Principles of International Law*, 2nd ed., New York: Holt, Rinehart & Winston, 1967, p. 234.

<sup>591</sup> Thus Peters notes that: “to tie the existence of substantial individual rights and the individual’s legal personality on the availability of procedural remedies against states is particularly inappropriate in the realm of international law, where states are not subject to the compulsory jurisdiction of an international court”, see Peters A. Membership in the Global Constitutional Community. In: Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 162.

<sup>592</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 UNTS 447.

<sup>593</sup> See Hoffmann J., Nollkaemper A., and Swerissen I., (eds.), *Responsibility to Protect: From Principle to Practice*. Amsterdam: Amsterdam University Press, 2012; Thakur R. *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*. Cambridge: Cambridge University Press, 2006; Badescu C. *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights*. London: Routledge, 2010; Pattinson J. *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* Oxford: Oxford University Press, 2010.



If a state fails to perform this obligation other states have an obligation to intervene and insure that gross atrocities are not committed.<sup>594</sup>

The development of the responsibility to protect doctrine is fascinating from the constitutionalist perspective as it shifts some of the basic assumptions of the sovereignty based international law. The starting point of the analysis in application of the responsibility to protect is whether inhabitants of a particular state are in need of protection from mass atrocities. Such an approach marks a distinct departure from the outlook of traditional international law, which is premised on the *Lotus* principle - states may act as they please as long as the conduct does not violate explicit prohibition contained in international law.<sup>595</sup> The responsibility to protect reorients the focus from state's rights and freedom of action to a general obligation towards its population as well as towards the international community. Secondly, the responsibility to protect may be conceptualized as a form of a social contract between a state and its population. The sovereignty of a state holds only as long as the state performs its essential function to avert mass atrocities. If it fails to perform this obligation, its sovereignty is suspended and the international community is entitled and indeed under obligation to step in and stop the atrocities.

### **6.3. Constitutionalization and state responsibility**

What effect the above discussed constitutionalization and the phenomena of erosion of state sovereignty has or ought to have on the rules of state responsibility? The first and very obvious consequence of the erosion of state sovereignty is that more often conduct on international stage is performed by actors other than states (predominantly international organizations but increasingly also transnational corporations).<sup>596</sup> Accordingly, these actors are also more likely to be involved in breaches of international law. Thus NATO may unlawfully bomb some third country, the Security Council may adopt resolutions that violate individual human rights, the EU may breach the WTO rules, garments factory in a developing country may violate fundamental human rights or private security company may breach humanitarian law. In all of these cases state responsibility may not be the primary mode of international responsibility. They may be adjudicated as cases of responsibility of international organizations or responsibility of private law companies in national courts.

However, leaving state responsibility out altogether and instead addressing possible claims solely on the basis of responsibility of international organizations or transnational companies may

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<sup>594</sup> UN General Assembly: „2005 Summit Outcome”, A/60/L.1, 20 Sept. 2005, paras. 138–40. The principle has also been affirmed in Security Council resolutions 1674 (2006) and 1894 (2009).

<sup>595</sup> The Permanent Court of International Justice: *S.S. Lotus (France v Turkey)*, 1927 PCIJ (ser. A) No. 10.

<sup>596</sup> See generally Klabbers J., Wallendahl A., (eds.), *Research Handbook on the Law of International Organizations*. Edward Elgar Publishing, 2011.

create a gap in legal protection of the injured. It would also possibly allow states, which had procured or at least were complicit in the breach, to avoid responsibility. To reflect the reality of transfer of powers to actors other than states, international law must provide mechanisms for responsibility of those actors. However, international law must also ensure that states themselves do not evade responsibility by acting through other actors. The problem of states hiding behind international organizations is particularly pertinent due to lack of international litigation mechanisms in which claims against international organization may be brought.<sup>597</sup> An additional layer of issues arises with regard to joint responsibility of states and organizations.<sup>598</sup>

### ***6.3.1. State responsibility and international organizations***

The ILC's Articles on Responsibility of International Organizations (ARIO)<sup>599</sup> attempt to address some of the above issues. The Articles provide not only for responsibility of organizations (including in connection with acts of states), but also for responsibility of states in connection with the conduct of international organizations.<sup>600</sup> Specifically Articles 58-60 of ARIO provide that a state performs an internationally wrongful when it aids, assists, controls, directs and coerces an organization to perform an internationally wrongful act.<sup>601</sup> In addition ARIO provide for Article 61 which attempts to catch cases where states would circumvent their obligations by causing an organization to perform a breach.<sup>602</sup>

Also provisions on attribution of conduct play a central role in determining whether a state is responsible for its conduct when it acts within a framework of an international organization, for instance, in a UN peacekeeping operation. Judicial practice on this issue remains limited with the ECtHR providing most of existing precedents. The principal rule suggested by the ILC in Article 7 of ARIO is that of "effective control". In accordance with this provision the conduct of an organ of a state that is placed at the disposal of an international organization is considered to be an act of the

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<sup>597</sup> Young A. Deconstructing International Organization Immunity. *Georgetown Journal of international Law*, Vol. 44, 2012, p. 311. Ryngaert C., Buchanan H., Member State Responsibility for the Acts of International Organizations. *Utrecht Law Review*, Vol. 7, 2011. p. 131.

<sup>598</sup> Nollkaemper A., Jaobs D. Shared Responsibility in International Law: A Conceptual Framework. *Michigan Journal of International Law*, Vol. 34, 2013, pp. 359-438; Ahlborn C. To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States. Amsterdam Law School Research Paper 2013-73 (2013), ACIL 2013-26, available at [www.sharesproject.nl](http://www.sharesproject.nl) [viewed September 5, 2014].

<sup>599</sup> Draft Articles on the Responsibility of International Organizations, 2011 (A/66/10), *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two.

<sup>600</sup> See Nollkaemper A., Nadeski N. Responsibility of international organizations 'in connection with acts of states', SHARES Research Paper 08 (2012), finalized April 2012, available: [sharesproject.nl](http://sharesproject.nl) [viewed August 26, 2014].

<sup>601</sup> These provisions are modelled on similar articles in the Articles on State Responsibility (Articles 16-18).

<sup>602</sup> Such a rule has been developed by the ECtHR in such cases as *Waite and Kennedy v Germany* see European Court of Human Rights, 1999, 118 ILR, p. 121.

organization only if the organization exercises effective control over that conduct. As the effective control test is rather hard to satisfy, the provision tilts in favour of having states rather than organizations responsible. From the constitutionalist perspective the provision is a welcome development as it ensures a greater possibility for injured individuals to attain remedy, which may be altogether absent if conduct is attributed to an organization, such as the UN. The controversial *Behrami and Saramati* judgment of the ECtHR illustrate this point.<sup>603</sup> The ECtHR found that the contested conduct was attributable to the UN for the reason that the UN had “ultimate authority and control” over the conduct. As the result the Court did not have jurisdiction and the injured individuals had no possibilities of judicial redress. If, however, the Court would have applied ILC’s “effective control” test it would have found that the UN had no such control over French, German and Norwegian troops during their deployment for the UN missions and consequently that the conduct was attributable to the respective states. After a barrage of criticisms<sup>604</sup> in subsequent *Al-Jedda* decision the ECtHR explicitly acknowledge ILC’s “effective control” test as the valid measure for determining attribution.<sup>605</sup> However, it also managed to refer to its earlier “ultimate authority” approach, thus leaving the question unresolved as to what in its opinion is the right approach.

Another problem with the responsibility of international organizations is that member states may have varied amount of rights in the organization and accordingly some member states may have greater influence over the organization. A manifest example is the UN where the permanent members of the Security Council wield not only much greater *de facto* political power but also formal power in the form of veto rights. Similarly, realities of economic might, size of territory, population and other indicators of power are given formal acknowledgment in the internal rules of other organizations, such as the European Union. Still in other organizations where formally the voting rights are equal often take important decisions informally (for instance WTO) effectively sidelining smaller states.

Considering this *de facto* inequality, a question arises whether such disparities are reflected in the rules governing the responsibility of organizations. The short answer is “no”. The ILC’s Articles on Responsibility of International Organizations do not deal with allocation of

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<sup>603</sup> European Court of Human Rights: *Behrami v. France*, 71412/01; *Saramati v. France, Germany and Norway*, 78166/01, 133 ILR, 2007, p. 1.

<sup>604</sup> Bell C., Reassessing Multiple Attribution: the International Law Commission and the *Behrami and Saramati* Decision, *New York University Journal of International Law and Politics*, Vol. 42, 2010, p. 501; Larsen K., Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test, *European Journal of International Law*, Vol. 19, 2008, p. 521; Papić T., As Bad as It Gets: The European Court of Human Rights *Behrami and Saramati* Decision and General International Law, *International and Comparative Law Quarterly*, Vol. 58, 2009, p. 283.

<sup>605</sup> European Court of Human Rights: *Al-Jedda v. United Kingdom*, 27021/08, July 7, 2011.

responsibility within the organization leaving it to the *lex specialis* of the organization itself.<sup>606</sup> The seeming injustice stemming from the fact that general responsibility rules do not attend to the finer details of allocation is somewhat reduced by the fact that in most cases the powerful states will also have more to lose than small states if the organization is held responsible, for one thing, they are likely to be contributing more to the budget of the organization from which the eventual compensations would be paid.

Furthermore, there are several elements of constitutionalist outlook that may in principle be contemplated with regard to responsibility of international organizations. One such element is to widen the scope of entities that are entitled to invoke responsibility of international organizations. The EU provides a good example of how this may be done: in the *Van Gend & Loos* judgement the ECJ famously proclaimed that not only states but also individuals are subjects on the legal system.<sup>607</sup> Article 340 of what is now the Treaty on the Functioning of the European Union gives substance to this idea by providing that the EU institutions have both contractual and non-contractual liability, which as interpreted by the ECJ may be invoked by injured individuals or companies.<sup>608</sup> On the level of general international law such a right may be contemplated only as a distant *lex ferenda*. Even in fields that are relatively more developed than general international law (such as the WTO law) invocation of responsibility by individuals is far from being accepted. Thus WTO Panel deliberately contrasted the WTO law to the EU law and stated that “WTO did not create a new legal order the subjects of which comprise both contracting parties or members and their nationals.”<sup>609</sup>

Another indispensable principle from a constitutionalist perspective (besides the rights of individuals to invoke responsibility of international organizations) would be judicial review of acts of organizations. In some respects judicial review performs a function similar to claims of responsibility - both judicial review and claims of responsibility may catch violations of law. The peculiarity of judicial review, however, is that it may result in proclaiming an act in question null and void, thus automatically rectifying the legal position of any number of affected individuals. Presently it is only the EU that places such an advanced form of constitutionalism inspired mechanisms at disposal of individuals. Although the ECJ has been greatly criticized for its

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<sup>606</sup> See Article 64 of the Draft Articles on the Responsibility of International Organizations, 2011 (A/66/10), *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two.

<sup>607</sup> ECJ: 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1.

<sup>608</sup> General Court: T-250/02 *Autosalone Ispra v EAEC* [2005] ECR II 5227 p. 42; T-113/96 *Edouard Dubois v Council and Commission* [1998] ECR II-125 p. 41; Case T-137/07 *Portela v Commission* [2008] ECR II-00329; See Aalto P. *Public Liability in EU Law Brasserie, Bergaderm and Beyond*, Oxford: Hart Publishing, 2011.

<sup>609</sup> WTO Panel, US – Section 301-310 of the Trade Act of 1974, WT.DS152/R decision of January 27, 2000, para. 7.73.

restrictive approach to *locus standi* of individuals willing to challenge legality of EU's acts,<sup>610</sup> the fact remains that no other international organization has anything that would even remotely resemble judicial review mechanisms accepted within the EU. In other international organizations such possibilities are considered only as a matter of *lex ferenda*.<sup>611</sup>

### **6.3.2. State responsibility and international standing of individuals**

Increasing prominence of individuals as direct holders of international rights, as already noted, is an important part of the constitutionalist agenda. To make those rights meaningful international law ought to provide for mechanisms of their enforcement. Unsurprisingly, constitutionalist scholars argue that state responsibility “should move further beyond a purely inter-state responsibility.”<sup>612</sup> Primarily this would mean that international conventions that establish obligations of states to provide effective remedies in cases where rights of individuals are breached (a typical obligation included in many human rights treaties), would be interpreted as providing obligations owed directly to effected individuals. Such an elevation of individual's role would be a clear indication of a shift towards the public law paradigm, as it endorses the most progressive modality of invocation of state responsibility. In this scenario invocation of responsibility is entrusted directly to the effected individuals who are likely to have strong motivation to vindicate their rights and to pursue their claim, upholding legality as a by-product of protection of their individual interests.

To suggest that a right of individuals to directly claim state responsibility would be accepted as a matter of general law of state responsibility seems like an unrealistic proposal (states have amply demonstrated that they are not willing to accept even far less courageous propositions – consider the above discussed rejection of the notion of state crimes). Such trends are currently present only in specific sectoral treaties like the ECHR and the Aarhus Convention<sup>613</sup> among states that are more willing to promote international standing of their nationals. It seems paradoxical that states being a legal fiction conjured for the purpose of management and representation would be unwilling to accept remedies established for the benefit of their own nationals.

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<sup>610</sup> See Schwarze J. The Legal Protection of the Individual against Regulations in European Union Law. *European public law* Vol. 10.2 (2004), p. 285; Arnulf A. Private Applicants and the Action for Annulment under Article 173 of the EC Treaty. *Common Market Law Review* Vol. 32.1 (1995), p. 7.

<sup>611</sup> For suggestions on the possible accountability mechanisms see Wellens K. *Remedies against International Organizations*. Cambridge: Cambridge University Press, 2004, p. 255.

<sup>612</sup> Peters A. Membership in the Global Constitutional Community. In: Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 171.

<sup>613</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 28 June 1998, 2161 UNTS 447.

Similarly, the constitutionalist outlook invites us to consider a closely related topic – whether the requirement of nationality of claims which severely limits possibilities to protect injured individuals ought to be reconsidered.<sup>614</sup> The requirement of nationality of claims, famously pronounced by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions* case, is widely recognized as a customary rule.<sup>615</sup> Its essence is that the state entitled to exercise diplomatic protection is the state of nationality.<sup>616</sup> As already noted earlier, there seem to be good reasons why the requirement of nationality of claims is inappropriate with regard to claims for protection of community interests under Article 48 of the Articles on State Responsibility, including claims for protection of fundamental human rights. The very purpose of Article 48 is to ensure that *any* state party to a treaty or indeed any member of the international community may institute proceedings when *erga omnes* obligations are breached. Human rights norms that have customary nature and impose obligations *erga omnes* apply regardless of nationality of the injured. Why then only the state of nationality may bring international claims? The age old rationale that injury to nationals is an injury to the state is anyway a fiction, which does not outweigh the interest of the community of states as a whole to enforce protection of human rights.

Another related issue that international constitutionalism seems to question is whether states have a duty to exercise diplomatic protection (as opposed to the traditional view that diplomatic protection is a right). Special Rapporteur on diplomatic protection Dugard had proposed that states had duty to exercise diplomatic protection in certain cases. Those would be cases when a serious breach of a peremptory norm has occurred and the injured individual, after being unable to bring the case before national or international courts, requests the state to bring an international claim.<sup>617</sup> The ILC dismissed this proposal, noting that international law does not recognise such an obligation. From the constitutionalist perspective recognition of state's obligation to exercise diplomatic protection would be a very welcome development, as it would contribute to protection of human rights and thus facilitate one of the core objectives of constitutionalization.<sup>618</sup>

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<sup>614</sup> Amerasinghe C. *Diplomatic Protection*. Oxford: Oxford University Press, 2008, p. 73.

<sup>615</sup> Permanent Court of International Justice: *Mavrommatis Palestine Concessions (Greece v U.K.)* P.C.I.J. Reports, 1924, Series A, No. 2, p. 12. ICJ: *La Grand (Germany v United States of America)* I.C.J. Reports 2001, p. 466; *Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)* I.C.J. Reports, 2004, p. 12.

<sup>616</sup> The ILC's Articles on Diplomatic Protection restate this customary rule in Article 3, see International Law Commission, Draft Articles on Diplomatic Protection (2006) Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), available at: [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf) [viewed on August 10, 2014].

<sup>617</sup> First Report of the Special Rapporteur Dugard, Yearbook of the International Law Commission, 2000/II(1), p. 220.

<sup>618</sup> For discussion of the topic see Dugard J. Diplomatic Protection and Human Rights: the Draft Articles of the International Law Commission. *Australian Yearbook of International Law*, Vol. 24, No. 75, 2005, p. 80.

### ***6.4.3. Transnational corporations and state responsibility.***

With the advent of globalization (primarily globalization's economic aspects of free trade, free movement of capital and in particular foreign investment) some companies have become global players with assets and business operations all over the world. Some of these companies (most often referred to as transnational corporations or multinational corporations<sup>619</sup>) have higher profits than annual budgets of smaller states.<sup>620</sup> Transnational corporations have wide-ranging interests the world over and inevitably attempt to influence national and international policies to suit these interests. Smaller or poorer states in particular may find it hard to deal with the economic might of transnationals and thus may succumb to their pressure (the same would be true also with larger states with poorly established rule of law). This phenomena is further aggravated by the tendency to privatize functions that have historically been in the domain of states<sup>621</sup> (consider the role of private military companies in Iraq and Afghanistan wars). As state functions are transferred to private law entities, it is important that the transfer does not serve as means to evade responsibility. Therefore it is imperative that transnational corporations may be held responsible also at an international level where NGOs or other states would intervene and where at least somewhat impartial judicial forum would be available.

The first practical step necessary to facilitate responsibility of transnational corporations at an international level is to recognize their international legal personality. Some scholars argue that transnational corporations already possess an international legal personality.<sup>622</sup> However, there is no international law (hard law as opposed to soft law) that would impose international obligations on transnational corporations. As for soft law, there are several documents, most importantly the OECD's "Guidelines on Multinational Enterprises"<sup>623</sup>; and "Norms of the Responsibilities of

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<sup>619</sup> On definition of multinational corporations (enterprises) see OECD Guidelines on Multinational Enterprises. These guidelines state that multinational enterprise is a term applicable to "companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed." OECD Guidelines on Multinational Enterprises of November 8, 2000, DAF/IME(2000)20, para. 3.

<sup>620</sup> See Gary M., Roberts K., and Gray S. Factors Influencing Voluntary Annual Report Disclosures by US, UK and Continental European Multinational Corporations. *Journal of International Business Studies*, 1995, p. 555.

<sup>621</sup> See Singer P. *Corporate Warriors: the Rise of the Privatized Military Industry*, Ithaca: Cornell University Press, 2003.

<sup>622</sup> See Herdegen M. *Internationales Wirtschaftsrecht*, 3<sup>rd</sup> ed. Munchen: Beck 2002, p. 234.

<sup>623</sup> OECD Guidelines on Multinational Enterprises of November 8, 2000, DAF/IME(2000)20.

Transnational Corporations and Other Business Enterprises” by the UN Sub-Commission on the Promotion and Protection of Human Rights.<sup>624</sup>

The present ILC work on international responsibility (Articles on State Responsibility and the ARIO) does not deal with responsibility of transnational corporations. The reasons for not addressing issues pertaining to transnational corporations (and thus not reflecting the reality of their rise) are several. First and foremost, the existing ILC codifications are concerned with other subject matters, namely responsibility of states and of international organizations. As these topics are complicated enough on their own, it is understandable that the ILC did not wish to overburden their drafts with additional controversial issues. Within the Articles on State Responsibility and ARIO transnational corporations are not even mentioned, apart from the commentary to the Articles on State Responsibility where the ILC envisages cases where conduct of transnational corporations may be attributed to states. Seemingly insignificant, however, the possibility of attribution of corporation’s acts to states (by means of Article 5 of the Articles on State Responsibility) provides an avenue whereby corporation’s unlawful conduct may be reviewed in international litigation.

One of the most significant proposals with regard to the responsibility of transnational corporations has been to consider that transnational corporations would be regarded as direct addressees of human rights treaties. This is a somewhat radical proposal, as human rights treaties (at least judging by the ordinary meaning of their texts) are addressed only to states themselves. Such an approach also risks triggering an unwelcome attitude from states where states may feel relieved of their human rights obligations, since corporations are responsible. Thus admission of responsibility of transnational corporations risks shifting the burden from states to transnational corporations.

A development that would be welcome from constitutionalist perspective is recognition of corporate criminal responsibility. At this point international law does not provide for corporate criminal responsibility, as the whole body of international criminal law addresses only responsibility of individuals.<sup>625</sup> There are no precedents of prosecutions of corporations at any international court or tribunal.<sup>626</sup> As in national legal orders the debate on corporate criminal responsibility canters around problems in determining the subjective aspect of crimes i.e., whether and how the intent may be established. Jorgensen has suggested that the notion of corporate crime may be used as a “general principle of law” and thus brought into international law even without

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<sup>624</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises, UN Doc E/CN.4Sub.2/2003//12/Rev.2 (2003) of August 13, 2003.

<sup>625</sup> Clapham A. Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups. *Journal of International Criminal Justice* Vol. 6.5, 2008, p. 899.

<sup>626</sup> Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013, p. 81.



specific developments in positive law.<sup>627</sup> Even if true, (which is questionable as there seems to be no universally and uniformly accepted notion of criminal responsibility of corporations in national legal systems) the recognition of principle itself is still a long way off from international prosecution of corporate entities.

#### **6.4. Basics of fragmentation of international law.**

Another phenomenon that has attracted considerable attention in recent years is the phenomena of fragmentation of international law.<sup>628</sup> The concept has to do with specialization and technicality of specific fields of international law. The problem at the root of the fragmentation is that each field, for instance human rights, trade law, environmental law, criminal law or the EU law, (and institutions of that field) tends to see itself as more relevant than other fields (and institutions). For example, when a human rights lawyer is dealing with a case that involves aspects of both human rights and, for example, trade law, he or she will tend to see the human rights aspect as the more important one. Similarly, when the European Court of Justice is engaged with a particular issue, such as the law of the sea and the EU law proper, it will likewise prefer its own perspective and regard the case as an EU law case.<sup>629</sup> As has been noted with regard to fragmentation:

“[i]ts connotations are clearly negative: something is splitting up, falling apart, or worse: bombs or ammunition can be designed to fragment and thus become even more destructive. In international legal parlance, the term has gained such prominence out of the fear that international law might lose its universal applicability, as well as its unity and coherence, through the expansion and diversification of its subject-matters, through the development of new fields in the law that go their own way, and that legal security might thereby suffer.”<sup>630</sup>

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<sup>627</sup> Jørgensen N. *The Responsibility of States for International Crimes*. Oxford: Oxford University Press, 2000, p. 52.

<sup>628</sup> See Young M., (ed.), *Regime Interaction in International Law: Facing Fragmentation*. Cambridge: Cambridge University Press, 2012; Hafner G. Pros and Cons Ensuing from Fragmentation of International Law. *Michigan Journal of International Law*, Vol. 25, 2003, p. 849; Koskenniemi M., Päivi L. Fragmentation of International Law? Postmodern Anxieties. *Leiden Journal of International Law*, Vol. 15 No. 3, 2002, p. 553.

<sup>629</sup> See Shany Y. The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures, *Leiden Journal of International Law*, Vol. 17, 4, 2004, p. 815.

<sup>630</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No.2, 2009, p. 270.

Fragmentation reflects the fact that there is, in the words of the ILC, no “single legislative will behind international law”<sup>631</sup>. The result is that specialists of each field pursue agendas of their own field (without much consideration for the larger picture) and when this has been going on for some time international law ends up being split into separate and possibly conflicting regimes. When it comes to a particular dispute, a question arises - which regime to apply? As Koskenniemi has noted, the choice of the frame will determine the decision, but for determining the frame there is no meta-regime, directive or rule<sup>632</sup>. Thus “in a world of plural regimes, political conflict is waged on the description and re-description of aspects of the world so as to make them fall under the jurisdiction of particular institutions.”<sup>633</sup> As a result, various fields compete for institutional supremacy. They do that by disguising essentially political choice as to which field must prevail, by technical re-description of the issue in their particular specialist language. Koskenniemi’s main objection to such an approach seems to be that legal experts rub on themselves a little of stardust that emanates from the grand word “law”, even when in reality they will be making political choices. However, such an approach is hardly objectionable as long as the law embodies values of the international community. If the law does embody the values and preferences of the community, a legal expert will not resolve the issue in accordance with a free roaming discretion but will decide in accordance with the values embodied in the rules. But here we come full circle back to the problem of collision of values and a question arises whether the international community has identified its meta-values?

On an apparent level fragmentation is occurring due to substantive increase in a number of law-making treaties that address the same issues from different perspectives. On a deeper level it has been suggested that fragmentation is a result of a “transposition of functional differentiations of governance from the national to the international plane.”<sup>634</sup> On national level these differentiations are unlikely to cause considerable difficulties as the vertical structure of governance, constitution and possibly also a constitutional court will resolve any differences and make an authoritative pronouncement which field and accordingly which values are to prevail. International law on the other hand, lacking these elements of centralization, is unable to settle such conflicts. Although general international law, as observed by Schachter: “serves as a highway between otherwise isolated villages of international trade law, international human rights law, international

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<sup>631</sup> The International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682, at para. 491.

<sup>632</sup> Koskenniemi M. The Fate of Public International Law: Between Technique and Politics. *The Modern Law Review* Vol. 70 No.1, 2007, p. 6.

<sup>633</sup> *Ibid.*, p. 7.

<sup>634</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 270.

humanitarian law, international criminal and other branches of international law”,<sup>635</sup> it is unable to provide a definite resolution as long as there is absence of hierarchy of international institutions.

Fragmentation is also closely related to constitutionalization. Fragmentation demonstrates the need for constitutionalization. However, constitutionalization may also appear as a disguised attempt to dominate and thus provoke a counter reaction that it was initially intended to overcome.<sup>636</sup> Fragmentation is, after all, the result of a conscious challenge to the unacceptable features of that general law and the powers of the institutions that apply it.<sup>637</sup> It is the specialized fields which often are more refined and coherent than the general international law and which provide blueprints for possible developments at universal level. Indeed, it is in these systems that the more progressive innovations of international law occur. Examples of such progressive developments include special rules on reservations to human rights treaties and methods developed in environmental law for carrying along the unwilling states with framework conventions with separate binding protocols.

The problem of fragmentation is aggravated by the fact that special regimes are barely subjected to political control. Within each specialized field the dominant role in terms of shaping the policy is played by legal experts. Whether that is a desirable state of affairs is a contestable issue. Rule by legal experts was precisely what internationalists of the first half of the 20<sup>th</sup> century envisaged. Is it better to be ruled by experts, than by politicians? The answer suggested here is that it depends on the moral quality of those legal experts. The assumption underlying the view that legalization must be generally viewed as a positive holds as long as the law itself reflects moral values and, therefore, a legal expert (guided by law and values enshrined in that law) is likely to make better policy choices.

Fragmentation has an additional layer, if we consider that norms can emerge from distinct normative orders - a process that has been labelled as normative pluralisation. The idea behind normative pluralisation is that rules that prescribe behaviour may come not only from legal norms but also from moral norms, cultural norms as well as from internal norms of organized entities, such as internal norms of Catholic Church. These normative orders may clash among themselves, most typically when cultural norms come into conflict with criminal law (for instance honour killings may be perceived as culturally acceptable but certainly they violate national criminal law). Likewise, internal norms of Catholic Church may preclude clergy from adequately reporting cases of sexual abuse and thus obstruct application of criminal law. In international law the normative

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<sup>635</sup> See Schachter O. *International Law in Theory and Practice*, Hague: Martinus Nijhoff, 1991, p. 1.

<sup>636</sup> Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009, p. 3.

<sup>637</sup> Koskeniemi M. The Fate of Public International Law: Between Technique and Politics. *The Modern Law Review* Vol. 70 No. 1, 2007, p. 19.

pluralisation may play out as conflicts between “soft law” and binding treaty law or customary law. In principle such a collision poses no problem, as it must be resolved in favour of “hard law”. The difficulty in practice, however, is that soft law covers ever waster areas and in such fields as environmental law is the preferred modality of regulation. The new elaborate specialised rules which emerge from such regulation may easily come to nought the moment they collide with any, however trivial, hard law rule, thus obliterating all efforts that went into elaboration of the new regulation.

#### ***6.4.1. Is fragmentation really a problem?***

Although fragmentation presents the above mentioned challenges, mostly it is not regarded as spelling out the end of international law. This is due to the fact hat international law has several mechanisms that allow it to respond to cases of conflicting specialised regimes. Firstly, the starting point is to identify who can do something about fragmentation in an attempt to resolve the conflict? Obviously all the principal actors who shape rules of international law, such as states, international organizations, international courts as well as national courts, all of these (and first and foremost states) must see that the system is consistent and coherent. Among the institutional actors the International Law Commission and the International Court of Justice are the ones that ought to provide most input to harmonize international law, as both are well suited for such a task as well as closely related in terms of the scope of their mandates.

The ILC has taken up the topic of fragmentation and in 2006 it delivered a much cited report - Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission.<sup>638</sup> In that report its principal author Marti Koskenniemi suggests several methods for resolving conflicts between various fields of international law. The first method suggested by the ILC is to apply hierarchy of norms. The idea of *jus cogens* is now firmly established and all the major international courts have recognized it.<sup>639</sup> However, the practical effect of the concept in some cases has

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<sup>638</sup> International Law Commission. Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682.

<sup>639</sup> Concerning practice of international courts on *jus cogens* Simma has noted: “in rather surprising contrast, it was not until 2006, i.e., no fewer than 36 years after the *Barcelona Traction* judgment, and 26 years after the blessing of the concept by the entering into force of the Vienna Convention on the Law of Treaties with its Articles 53 and 64, that the ICJ could finally bring itself to issue an authoritative pronouncement. This was eight years after the ICTY had first explicitly mentioned *jus cogens* in its *Furundžija* judgment of 1998, five years after the European Court of Human Rights had done so in *Al-Adsani*, and three years after the Inter-American Court of Human Rights had followed suit.

remained problematic. For instance in *Al-Adsani*<sup>640</sup> the ECtHR found that, although prohibition of torture was a *jus cogens* norm, the Court could not disregard rules on state immunity. It must be noted that six judges dissented and argued that “under general international law the rules on state immunity could no longer render a claim against a foreign state inadmissible in national courts where the claim was based on the peremptory prohibition of torture.”<sup>641</sup> Also other cases, for instance, *Congo v. Rwanda*<sup>642</sup> display a similar trend - although the ICJ generally recognizes *jus cogens* norms, it does not give preference to these norms when they require the Court to set aside some long established rules, such as the rule on state consent as a requirement to Court’s jurisdiction.<sup>643</sup> An additional example of the possibility to apply certain hierarchy of norms is provided in Article 103 of the UN Charter. The article has been made use of in *Lockerbie cases*<sup>644</sup> by the ICJ and also by the ECJ in the *Kadi*.<sup>645</sup> In *Kadi* the ECJ only formally paid respects to the Article 103, while in effect the Court ignored it and went on to proclaim the prevalence of the EU law fundamental rights over the Charter obligations.

A further method for dealing with collisions between fragmented fields is to interpret rules so as to avoid any conflict. Methods of interpretation are well established in Article 31 of the VCLT, which provides that legal rules should be interpreted in the context with any other relevant rules of international law applicable in the relations between the parties. This general propositions certainly makes sense, as any lawyer is familiar with systemic interpretation as one of the basic methods for establishing the actual content of legal norms. However, what does this method of interpretation really require once we get down to an actual situation is less clear. Article 31(3)(c) of the VCLT in particular provides that when interpreting a treaty, one considers “any relevant rules of international law applicable in the relations between the parties”. In *Al-Adsani* the ECtHR explained

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Better late than never, in its *Congo v. Rwanda* judgment of 2006, the Court affirmed both that this category of norms was part of international law and that the prohibition of genocide belonged to it. A year later, the Court restated its recognition of *jus cogens* in the Genocide case.” See Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 272.

<sup>640</sup> European Court of Human Rights: *Al-Adsani v. United Kingdom*, App. no. 35763/97, Judgment of 21 Nov. 2001, at para. 61.

<sup>641</sup> European Court of Human Rights: *Al-Adsani v. United Kingdom*, Joint Dissenting Opinion of Rozakis and Caflisch, joined by Wildhaber, Costa, Cabral Barreto and Vajić, at para. 3.

<sup>642</sup> ICJ: *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Congo v Rwanda*), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, at para. 67.

<sup>643</sup> See Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma in *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6.

<sup>644</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports (1992), p. 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)* Provisional Measures, Order of 14 April 1992, I.C.J. Reports (1992), p. 114.

<sup>645</sup> General Court: Case T-85/09, *Kadi v. Commission*, [2010] ECR II-5177.

that, “any relevant rules of international law” refers to the recognized sources of international law.<sup>646</sup>

A question, however, arises - does “parties” means only those states that are parties to the dispute in question or *parties to the treaty* which is being interpreted? The difference in the outcome depending on which of these two interpretations is employed is likely to be considerable. Especially in cases of interpretation of global multilateral treaties the “parties to the treaty” approach will result in proliferation of widely accepted international obligations, even if states involved in the dispute had no intention to become bound by these obligations. In fact such an interpretation of the VCLT provides a quiet way to shift towards majority legislating for the whole community of states. Although such a reading of Article 31(3)(c) of the VCLT would advance systemic coherence, so far apart from scholars, it has gained very little support. For instance, the WTO panel when faced with this issue had more trust in the traditional concepts of sovereignty and consent: “[i]ndeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.”<sup>647</sup>

As well founded as it may seem, such a restrictive interpretation of the word “parties” in effect precludes other multilateral treaties from being used in interpretation, since given the multitude of international treaties we seldom find a situation where both states in the dispute are also both parties to all the substantively applicable treaties. The ILC has concluded that the restrictive interpretation of the word “parties”: “makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31(3)(c) would be allowed.”<sup>648</sup> On the other hand broad interpretation of the Article 31 of the VCLT sits uneasily with the principle of state consent (which as we saw earlier in Chapter 2 is still one of the foundational blocks of international law). Thus the systemic interpretation might be helpful, but it is by no means a definitive solution to the problem of fragmentation. It is, however, a method that is readily available and can be used in interpretation. Whether Article 31 may be used for systemic interpretation in the broad way indicated above, itself is a question of interpretation of the VCLT. Here the subsequent practice is of importance, and, for instance, the ICJ has

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<sup>646</sup> European Court of Human Rights, *Al-Adsani v. United Kingdom*, App. no. 35763/97, Judgment of 21 Nov. 2001, para. 55.

<sup>647</sup> WTO, Panel Report, *EC-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, 29 Sept. 2006, para. 7.68.

<sup>648</sup> See International Law Commission. *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682, para. 450.

demonstrated that it is willing to use systemic interpretation in a number of cases, although not in a broad sense suggested above.<sup>649</sup>

## 6.5. Fragmentation and judicialization

The concept of judicialization refers to proliferation of international courts and tribunals, which has been one of the hallmarks in development of international law.<sup>650</sup> Not only has the number of international courts grown considerably, but also the number of cases before each court has been slowly but steadily growing. Such previously unattended institutions as the International Tribunal for the Law of the Sea and the international Criminal Court find their work load gradually increasing. While other international courts, in particular those that are open to claims by individuals such as the ECtHR and the ECJ are struggling to deal with a vast numbers of proceedings.

Judicialization may be seen as a sign of constitutionalization and also as a phenomena that substantiates introduction on constitutionalism. Proliferation of international courts obviously poses a challenge to systemic coherence of international law. Constitutionalism promises to deal with such a challenge as it aspires to impose hierarchy between conflicting regimes and their institutions. Judicialization may also be considered as a manifestation of fragmentation, as increasing number of international courts give preference to values of their filed of specialization. The ECtHR may prefer protection of human rights over general international law; WTO bodies may prefer trade law over environmental law; or the ECJ may prefer the EU law over the UN Charter obligations, thus leading to fragmentation as a result of judicialization.

The core question in the judicialization and fragmentation debate enquires who has the supreme authority to interpret (and thus also inevitably shape) rules of general international law? Universal courts, such as the ICJ, probably feel that it is their proper function. Various specialized courts and tribunals on the other hand are entrusted (at least explicitly) to interpret only the specific treaties which create the specialized system in question. However, since these specialized courts are dealing with real-life disputes which present them with mixture of issues from various fields (rather

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<sup>649</sup> In the *Oil platforms* case the ICJ employed Art. 31 of the VCLT and interpreted the specific bilateral treaty between the USA and Iran in light of general international law. See ICJ: *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 Nov. 2003, [2003] I.C.J. Reports 161, para.41; in *Djibouti v France* the Court applied Article 31(3) (c) of the VCLT to interpret a treaty between both parties in the context of another bilateral treaty between the two states, see ICJ: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177.

<sup>650</sup> See Romano C., *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, *The New York University Journal of International Law and Politics*, Vol. 31, 1998, p. 709.

than sanitized hypothetical questions belonging exclusively e.g., to human rights or the law of the sea), these specialized courts inevitably find themselves dealing also with other specialized areas and with general international law.

Each court is likely to have specific preferences, which will colour their view of the general international law. A well known example is the disagreement between the ICJ and the ICTY on the meaning of the word “control” in the Article 8 of the ILC’s Articles on State Responsibility.<sup>651</sup> When in *Bosnian Genocide* case the ICJ had a chance to revisit its much criticized *Nicaragua* decision, it attempted to play down the impact of ICTY’s pronouncements by suggesting that they must be read only in the limited context of ICTY’s jurisdiction (the involvement of Serbia via paramilitary groups under its control meant that the conflict was international rather than internal and thus allowed the ICTY to fully apply international humanitarian law). Antonio Cassese who was on the ICTY’s bench openly stated that his intention with the *Tadic* judgment was indeed to depart from the ICJ’s strict reading of “control” which allowed states to engage in atrocities of the worst kind with total impunity.

International courts have similarly disagreed on other issues. Another perhaps less well known example of diverging interpretations is Article 36 (1) (b) of the Vienna Convention on Consular relations which provides for a right of a detained foreigner to contact his or her consulate and to be notified of this right. The Inter-American Human rights Court in its 1999 advisory opinion explicitly stated that this right is “part of the body of international human rights law.”<sup>652</sup> The ICJ in the *Avena* judgment concluded the exact opposite - that neither the text nor the object and purpose of the Vienna Convention support the conclusion that the rights contained in Article 36 (1) (b) are to be classified as human rights.<sup>653</sup>

### ***6.5.1. Parallel proceedings.***

A practical consequence of fragmentation of international law is that the same issue may be brought to different international courts (with each court likely to have its own preferences). A notable example that illustrates parallel proceedings is the *Mox Plant*. In this case proceedings over the same dispute between Ireland and UK (concerning potential pollution of the Irish Sea by the UK

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<sup>651</sup> Cassese A. The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 18 *European Journal of International Law* Vol. 18, 2007 p. 649.

<sup>652</sup> Inter-American Court of Human Rights: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 Oct. 1999, para. 141.

<sup>653</sup> ICJ: *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] I.C.J. Reports 12, para. 124.



based nuclear facility) were started in Hamburg ITLOS<sup>654</sup> as well as in the tribunal under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)<sup>655</sup> and subsequently also in the European Court of Justice<sup>656</sup>. The parties to a dispute refer to an international court which they believe will be a more favourable forum for their side of the argument. A somewhat different example of parallel proceedings are cases initiated by Georgia against Russia over the war between the two states in the summer of 2008. Georgia brought proceedings in both the ICJ, claiming a breach of the Convention on the Elimination of All Forms of Racial Discrimination<sup>657</sup>, and in the ECtHR. As opposed to previous example, these cases were not instances of each party picking a more favourable forum, but rather a situation in which the injured party attempts to engage all the mechanisms that it finds available.

The clash between jurisdictions of these courts (and the respective specialized fields of international law) has generated considerable excitement amongst commentators.<sup>658</sup> However, as Simma points out, regardless whether one sees the process as emergence of a self-organizing system of international courts or an “uncoordinated mess of diverse mechanisms” the proliferation of international courts and tribunals has not resulted in any notable problems for consistency of international law.<sup>659</sup> Courts generally attempt to reconcile their views and often refer to judgments of each other. One notable exception to this intellectual cooperation is the ICJ, which generally refuses to rely on authority of other international courts. It is not that the ICJ dislikes relying on the authority of others (it makes plenty of references to arbitral awards delivered prior to ICJ’s creation and to the Permanent Court of International Justice). Perhaps it is rather that the ICJ finds no other considerate way of stating that it is the highest international law authority.

There are also methods available for dealing with parallel proceedings. Such generally recognized procedural principles as *lis alibi pendens* (the court does not exercise jurisdiction if the same parties are before another court with the same dispute) and *res judicata* (the court does not exercise jurisdiction if the same dispute has already been decided)<sup>660</sup> offer a solution. Another

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<sup>654</sup> International Tribunal for the Law of The Sea: *MOX Plant Case, Ireland v United Kingdom*, Order, Request for Provisional Measures, ITLOS Case No 10, 3rd December 2001, 41 ILM 405, (2001), 413.

<sup>655</sup> Convention on the Protection of the Marine Environment of the North-East Atlantic, 22 September, 1992, 2354 UNTS 67.

<sup>656</sup> ECJ: case C-459/03 *Commission v Ireland*, [2006] ECR I-4635.

<sup>657</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, Vol. 660, p. 195.

<sup>658</sup> See Shany Y. *The Competing Jurisdictions of International Courts and Tribunals*. Oxford: Oxford University Press, 2003. Boyle A. *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*. *International and Comparative Law Quarterly*, Vol. 46 No. 1, 1997, p. 37.

<sup>659</sup> Simma B. *Universality of International Law from the Perspective of a Practitioner*. *European Journal of International Law*, Vol. 20, No.2, 2009, p. 283.

<sup>660</sup> Reinisch A. *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to avoid Conflicting Dispute Settlement Outcomes*, *Law & Practice of Int’l Courts and Tribunals* Vol. 3 (2004) 37, p. 48.

possible option is the principle of comity, which was employed by the ITLOS in the *Mox Plant* case.<sup>661</sup>

At present it is undeniable that various international courts are not structured in anything that resembles a coherent system. Indeed international courts occasionally even emphasize uniqueness of their respective treaty system that stands apart from other specialized fields and general international law. Thus in *Tadic* the ICTY explicitly stated that the ECHR creates a “self contained system”<sup>662</sup>. In *Kadi I* the ECJ also clearly made a point that it is an “autonomous legal system”, an idea which the Court used to disregard prevalence of the UN Charter obligations over the EU law.<sup>663</sup> Can international law remain a coherent system given the tendency to split into diverse specialized fields each with particular values and interpretation methods? One certainly can take an alarmist view that international law is descending into chaos. However the present process may as well be viewed as a process of formation of an international court system.<sup>664</sup>

### **6.5.2. Hierarchy of international courts**

A seemingly obvious way to address the issue of divergent interpretations of international law between different courts would be to introduce some kind of hierarchy amongst them. Several ideas have been expressed by authors as to what form such hierarchy of international courts could take. Thus it has been suggested that the ICJ could assume the role of an appellate body for other international courts; or it could function as a constitutional court of the international community.<sup>665</sup> Other suggestions propose that the ICJ could give something akin to preliminary rulings in questions of general international law.<sup>666</sup>

If the ICJ would assume any of the above roles it is likely that its superior position would anyhow create tensions with other subordinate courts. The criticisms of the ICJ are well known, in particular the already mentioned historically orthodox stance on *jus cogens*, non-recognition of

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<sup>661</sup> The Court referred to „considerations of mutual respect and comity which should prevail between judicial institutions”, see Arbitral Tribunal Constituted Pursuant to Art.287, and Art.1 of Annex VII, of UNCLOS in the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, at para. 28.

<sup>662</sup> International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, IT-94-1-AR72, 2 Oct. 1995, para. 11.

<sup>663</sup> ECJ: case C-402/05 P and C-415/05, P., *Kadi and Al Barakat International Foundation v. Council and Commission* [2008] ECR I-6351.

<sup>664</sup> Slaughter A. A Global Community of Courts. *Harvard International Law Journal*, Vol. 44, 2003 p. 191.

<sup>665</sup> Charney J. Is International Law Threatened by Multiple International Tribunals , 271 *Recueil des Cours* (1998) 101, p. 130.

<sup>666</sup> Guillaume G. The Future of International Judicial Institutions, *International and Comparative Law Quarterly*, Vol. 44 No. 4, 1995, p. 848.

consular rights as human rights and restrictive interpretation of “effective control” test in rules of attribution of state conduct are only a few examples from a rather long list. The ICJ may be perceived by some as a “guarantor of the unity of international law”<sup>667</sup>, whereas by others it may be perceived as a “guardian of the ancient regime”<sup>668</sup>. If the ICJ is to take orthodox positions also in the future, other more progressively inclined courts would tend to do all they can to avoid their case going to the ICJ.

On the other hand the idea of hierarchy is an appealing one as it does offer solutions to the fragmentation of international judicial plane. Simma suggests that the ICJ should indeed be regarded as the highest authority, at least on matters of general international law. However, he also adds that “international courts are entitled to respect for their interpretation of those areas of international law over which they have been given jurisdiction.”<sup>669</sup> The idea seems appealing as it gives impression that collisions between various international courts could be resolved by giving supremacy to interpretation of the specialist. To follow through with this argument - all international courts should heed the views of the ICC on criminal law; the ITLOS on the law of the sea; WTO bodies on trade, and the ICJ on general international law. As appealing as it seems, this suggestion runs into the problem of how to know whether a case is about “law of the sea” or “trade”, or “environment” or perhaps it is all “EU law”. As *Mox Plant* starkly illustrates, defining the dispute (as “law of the sea” or “EU law”) will also determine the competent court. Given that the parties and the courts are free to define their disputes as they please and that most disputes may easily be cast as belonging to several specialized areas and will inevitably involve aspects of general law, it is difficult to see how “respect for interpretation of the specialist” could be helpful in resolving conflicting outlooks.

## 6.6. Fragmentation and state responsibility

An obvious result of fragmentation is that specialized fields, such as human rights law under the ECtHR, trade law under the WTO system and the EU law, each have developed also *lex specialis* responsibility rules. In each of these systems certain elements of the general responsibility law are maintained as reflected in Articles on State Responsibility, such as those pertaining to basic premises of what constitutes an internationally wrongful act, attribution and circumstances

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<sup>667</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 286.

<sup>668</sup> Bogdandy A. Constitutionalism in International Law: Comment on a Proposal from Germany, 47 *Harvard J Int'l L* (2006 – 2007) p. 226.

<sup>669</sup> Simma B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 287.

precluding wrongfulness. However, on issues of content and implementation of responsibility, the specialized fields show considerable variations compared to the general rules as elaborated by the ILC. Thus the ECHR allows invocation of state responsibility by individuals, while the WTO system allows claims by states other than the injured state even when the obligation breached is not an obligation *erga omnes* (which is the requirement included in the Article 48 of the Articles on State Responsibility). Another example of a *lex specialis* responsibility rule is Article 41 of the ECHR, which provides for “just satisfaction” as a special modality of reparation.

The fragmentation of responsibility rules in itself presents no considerable problems as long as it is clear which of the specialized regimes apply - ECHR rules for ECtHR cases, EU Law for the ECJ and the WTO law for WTO dispute resolution mechanism. However, difficulties may arise when competing claims are put forward as to the applicable regime and claims are brought in different forums. The ILC’s Articles on State Responsibility addressed this issue in very general terms by the *lex specialis* clause contained in Article 55. The clause simply provides that Articles do not apply to the extent that the question is covered by special rules, i.e., in a conflict between *lex specialis* and *lex generalis* special rules are to be applied. Thus the Articles on State Responsibility attempt to resolve collisions only between special regimes and general rules, but not between competing special regimes. And even in the question of *specialis v. generalis* the clause of Article 55 does not resolve all issues. For instance, most international treaties are silent on the right to take countermeasures. Does that mean that parties intended to have treaty regimes in which countermeasures are not applicable? Or the general rules of the ILC’s Articles, including countermeasures, were expected to fill the unregulated gaps? Crawford seems to concur with Simma and Pulkowski, who argue that the principle of effective interpretation of treaties, which stems from the duty to interpret provisions in the light of treaty’s object and purpose, requires adoption of interpretation that best gives effect to the norm in question.<sup>670</sup> In other words, one ought to assess whether a fallback on general rules, including countermeasures, is expedient to serve the purposes of the regime.<sup>671</sup>

Recourse to the principle of effective interpretation of treaties does not however resolve collisions of competing *lex specialis*. To some extent the already mentioned generally recognized procedural principles - *lis alibi pendens* and *res judicata* may be employed to resolve collisions.<sup>672</sup> Another possible option is the principle of comity, which was employed by the ITLOS in the *Mox*

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<sup>670</sup> Simma B., Pulkowski D. Of Planets and the Universe: Self-Contained Regimes in International Law. *European Journal of International Law*, Vol. 17 No. 3, 2006, p. 508.

<sup>671</sup> Crawford J. *State Responsibility, The General Part*. Cambridge: Cambridge University Press, 2013, p. 105.

<sup>672</sup> Reinisch A. The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to avoid Conflicting Dispute Settlement Outcomes, *Law & Practice of International Courts and Tribunals* Vol. 3, No. 1, 2004, p. 48.

*Plant* case.<sup>673</sup> However, these principles will come into play only within the context of parallel proceedings. They will not resolve collision of specialized regimes reviewed before one particular court. The decision on which specialized responsibility rules are to apply will again revolve around preferences of the competent court, which is likely to apply special rules of its particular constitutive document.

The earlier mentioned subcategory of fragmentation, when states move away from legally binding law and rather employ non-binding or open-ended provisions, poses a particular challenge for application of the law of state responsibility. An example of this trend of deformalization is the ILC's Draft articles on the Law of Transboundary Aquifers<sup>674</sup>, which provides for the principle "equitable and reasonable utilization" with only a barest minimum of hints as to what that principle implies.<sup>675</sup> Also the 1997 UN Convention on Non-navigational uses of international water-courses provides for a similarly vague "equitable and sustainable use". Can such general concepts be filled with precise legal content? If we look at domestic analogies, domestic courts, in particular constitutional courts, often employ such concepts and develop practice that imbues them with particular meaning. On the other hand, use of such provisions in treaties means that: "to agree to a treaty is to agree on a continued negotiation."<sup>676</sup> Use of such non-binding and open-ended provisions may often render the law of international responsibility altogether inapplicable. In accordance with the foundational premise responsibility arises from an internationally wrongful act.<sup>677</sup> In deformed international law the wrongful act may not occur in the first place and, therefore, would not entail responsibility. The unwanted behaviour in a deformed legal relationship may at best lead to non-compliance procedure, which merely invites the non-complying state to comply.

## 6.7. Conclusions

Considering that the public law paradigm includes the same elements that form part the constitutionalist agenda (in the context of international responsibility - invocation of responsibility

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<sup>673</sup> The Court referred to „considerations of mutual respect and comity which should prevail between judicial institutions”, see Arbitral Tribunal Constituted Pursuant to Art.287, and Art.1 of Annex VII, of UNCLOS in the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, para. 28.

<sup>674</sup> International Law Commission, Draft articles on the Law of Transboundary Aquifers, *Yearbook of the International Law Commission*, 2008, Vol. II, Part Two.

<sup>675</sup> *Ibid.*, Article 4.

<sup>676</sup> Koskeniemi M. The Fate of Public International Law: Between Technique and Politics. *Modern Law Review*, Vol. 70, 2007, p. 11.

<sup>677</sup> Article 1 of the Articles on State Responsibility.

by or on behalf of the community or other institutionalised responses), it would be unjustified to argue that there is constitutionalization happening and therefore the public law paradigm must be introduced into the law of state responsibility. Introduction of the public law paradigm *is* the objective (or at least one of the objectives) of constitutionalization. It is indeed one of the core purposes of the constitutionalization project. Similarly, the decline in the importance of the concept of sovereignty is not brought about by constitutionalization. This decline is rather due to actual changes in social actuality in which many of the centres of human activity - scientific, commercial, artistic or academic - are no longer delineated on the basis of allegiances to particular states. Thus, decline of sovereignty, rather than being the *caused by* constitutionalism, signals an urgent need for constitutionalization. In contrast, fragmentation is a process that is actually occurring and it is generally due to developments in specialized fields, as specialized regimes attempt to find more suitable solutions to unsatisfactory aspects of the general responsibility law. At the same time *lex specialis* of the specialized regimes possibly demonstrates a way forward for the *lex generalis* state responsibility rules.

To conclude, a few following reflections seem pertinent. It is no secret that international law as a legal system, when compared to functioning national legal systems, seems to be considerably flawed. Although, as famously noted by Henkin, “most nations observe international law most of the time”<sup>678</sup> the rule of law at international level remains patchy at best. Reasons for this poor condition may be conceptualized on many levels. However, one reason stands as a background to all others. It is what Allott has referred to as having inherited from history “a world order that is a fundamental world disorder”<sup>679</sup>. What he refers to is the world order comprising of states and governments, dominated by national and international bureaucracies that mostly do not represent the people they govern. Indeed, many national bureaucracies (about a third of them) are outright authoritarian.<sup>680</sup> International bureaucracies are no better – pursuing self-defined “rationalist” policies they often have no political accountability whatsoever.<sup>681</sup> Another actor on international stage – transnational corporations – are concerned with profit above all other considerations and therefore poke both groups of bureaucrats to guide them into their favoured direction. This is a vast generalization, nonetheless, one is tempted to suggest that generally this is the crew that steers the global ship without much regard to where the passengers i.e., the peoples of the world want to travel.

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<sup>678</sup> Henkin L. *How Nations Behave: law and foreign policy*, 2nd ed. New York: Columbia University Press, 1979, p. 79.

<sup>679</sup> Allott P. *The Idealist's Dilemma: Re-Imagining International Society*. Published on June 9, 2014. Available at: <http://www.ejiltalk.org/the-idealists-dilemma-re-imagining-international-society/> [viewed September 16, 2014].

<sup>680</sup> Kekic L. The Economist Intelligence Unit's index of democracy. *The Economist*, (2007). p. 21.

<sup>681</sup> Slaughter A. The Accountability of Government Networks. *Indiana Journal of Global Legal Studies*, 2001, p. 347.

The root cause of this pitiful condition of international law may have much to do with our inability to re-imagine international society which would finally actualize “the moral and political unity of the human race”.<sup>682</sup> It seems that we simply have very few ideas which re-conceive the global order. Can social reality change before humanity has conceived such a change? The core concepts of the existing philosophy of international law are states and national interests. Sovereign states, in terms of social actuality, are increasingly losing their centrality in many areas of human endeavours. National interests, as a rule, are interests of economic, political and bureaucratic elites. The same, of course, holds true of national societies. However, in international society, the situation is aggravated by the fact these players are exclusively the only players. If in national systems (at least those of democratic variety) the average citizen does have at least some channels of influence on social life (through civil society, private litigation or voting), then on international level these avenues are virtually absent. This constitutes, as Allott has pointed out:

“an international system which was, and is, post-feudal society set in amber. Undemocratized. Unsocialized. Capable only of generating so-called *international relations*, in which so-called *states* act in the name of so-called *national interests*, through the exercise of so-called *power*, carrying out so-called *foreign policy* conducted by means of *diplomacy*, punctuated by medieval entertainments called *wars* or, in the miserable modern euphemism, *armed conflict*. This is the essence of the social process of the international non-society.”<sup>683</sup>

This state of international law presents a stark contrast with many national jurisdictions which although not ideal, embody a considerably higher standard of democratic representation and rule of law. The difference in standards of rule of law, even between a regional system, such as the European Union law (which itself is criticized for democratic deficit) and general international law, as evidenced by *Kadi* cases, is considerable. It is therefore unsurprising that the unwritten agenda of many international lawyers, including those in the International Law Commission, for years has been to introduce elements into international law that would raise the rule of law standard of public international law. In other words, the agenda has been to make international law in which democratic, liberal and rule of law based states may live in. In the last two decades this agenda has predominantly featured under the title of “constitutionalization” of international law.

Constitutionalism requires agreement on shared fundamental values. It seems uncontentious to suggest that fundamental values of the international community (at least the barest minimum of

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<sup>682</sup> Suárez F. *On Laws and God the Lawgiver* (1612 Williams G.L., (trans.). Oxford: Clarendon Press, 1944., book II, chapter 19.9 p. 348.

<sup>683</sup> Allott P. *International Law and International Revolution: Reconceiving the World*. Hull: Hull University Press, 1989. p. 10.

them) are reflected in peremptory norms. However, for this agreement on values to be meaningful it must be accompanied by mechanisms that would allow the community to enforce the agreement. The law of state responsibility is the central pillar in the enforcement structure of international law. It is therefore the law of state responsibility that must provide for adequate means to enforce the community's agreed values. Nevertheless, the tremendous advances in substantive norms of international law that have been achieved in the past seventy years, in particular in such areas as human rights, trade law, environmental law and other areas have not been matched by developments in the law of state responsibility. The law of state responsibility remains firmly rooted in archaic pre-Charter international law – one that is based on private law rather than public law paradigm. As such it is geared predominantly for protection of private (individual) interests of states, rather than for protection of common interests. In any legal system private interests are taken care of by those holding them. It is public interest (i.e., community interest) that require special facilitation either by empowering public institutions or individual actors to take up the protection of a public cause. Unless such mechanisms are provided, common interests will be ignored for individual gains – a situation which is all too familiar in the present day international community.

As the historical overview of the ILC's work demonstrates, the ILC had a number of rather brave and ambitious ideas on various means to protect community interests. Thus Special Rapporteurs proposed: to allow invocation of state responsibility by individuals as a default rule of general international law (Amador); to recognize a separate category of "international crimes" commission of which would make all other states injured (Ago); to incorporate the UN Charter rules on Security Council sanctions into the Articles on State Responsibility as means to respond to international crimes (Ago and Riphagen); to provide for special obligations of the Security Council and the General Assembly with regard to international crimes (Arangio-Ruiz); and to recognize determination of existence of an international crime as a matter of mandatory jurisdiction of the ICJ (Arangio-Ruiz). Besides these significant innovations, there have also been a number of lower key proposals, such as to provide for state's duty to exercise diplomatic protection in cases when a serious breach of a peremptory norm has occurred. However, none of this was met with general approval of states. The only considerable public law paradigm based notion that seemed palatable to states was invocation of responsibility by non-injured states (presently Article 48).

Thus ILC's achievements in protection of community interests in law of state responsibility in retrospect seem less than satisfying. However, it is pertinent to note the story of protection of community interests has not come to a definitive conclusion. For the time being, it seems that states are not willing to press ahead with adoption of a treaty on state responsibility and thus to reopen discussion on many of contentious topics concluded with much difficulty. The General Assembly



has considered what to do with the Articles on State Responsibility in 2004<sup>684</sup>, 2007<sup>685</sup>, 2010<sup>686</sup> and in 2013<sup>687</sup>, every time opting to postpone a definite decision. In 2013 the Sixth Committee of the General Assembly created a Working Group in order to examine feasibility of a convention or other appropriate action. After noting three possible options: 1) to negotiate a convention; 2) to adopt the ILC Articles by the General Assembly in the form of a declaration or resolution; or 3) to do nothing, the Working Group recommended that the General Assembly yet again postpone a decision and return to the question in 2016.<sup>688</sup>

Nevertheless, as the relentless flow of international life continues to unfold this unwillingness of states eventually may change. If and when that happens and states return to contemplation of means to protect community interests, the ILC's rejected proposals in all likelihood will serve as a most useful starting point. Without a meaningful transformation of the law of state responsibility, that would actualize mechanisms for enforcement of international law in accordance with the public law paradigm (conceiving a legal relationship between a state and the international community as a whole), international law "is doomed to be what it has been – marginal, residual and intermittent"<sup>689</sup>.

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<sup>684</sup> UN General Assembly Resolution 59/35, 16 December 2004.

<sup>685</sup> UN General Assembly Resolution 62/61, 6 December 2007.

<sup>686</sup> UN General Assembly Resolution 65/19, 6 December 2010.

<sup>687</sup> UN General Assembly Resolution 56/83, 15 November 2013.

<sup>688</sup> Draft resolution A/C.6/68/L.19, 15 November 2013.

<sup>689</sup> P. Allott, *Eunomia: New Order for a New World*. Oxford: Oxford University Press. 2001, p. 104.

## 7. CONCLUSIONS

1. The concept of the international community is not defined in positive law. Its uses in political, legislative, judicial and scholarly discourses are varied and vague. As the concept is intricately related to power and legitimacy, it is inevitably susceptible to abuse. Likewise, it is more appropriate to discuss the international community in terms of multiple communities existing within the international system, e.g., a community of international peace and security, a community of international trade or a regional community of human rights. A global international community encompassing all areas of inter-state activity is rather only a rhetorical community - an aspiration that may nonetheless facilitate evolution of a genuine all-encompassing international community. The use of the concept is nevertheless to be encouraged on all levels of discourse including judicial and legislative, as it facilitates recognition of shared interests, which in turn is a precondition for agreement on mechanisms for protection of those interests.

2. Although existence of public interest norms in general international law is widely recognized by states, international organizations and even by international courts, so far these norms have had only a very limited impact on enforcement of international law. When faced with collision between sovereignty and state consent based rules (such as rules on immunities) and norms aimed at protecting community interests, international courts and the ICJ particularly, tend to give preference to the time tested values of the bilateralist international law, even if the protection of these values comes at a cost of ignoring community interests. Thus developments in general international law are mainly normative in nature i.e., the introduction of public interest norms and recognition of community interests in multilateral treaties are not accompanied by novel enforcement mechanisms. Thus there is a stark contrast between multitude of obligations which pursue communitarian objectives and virtual absence of communitarian mechanisms of enforcement. As long as enforcement mechanisms designed for protection of community interests have not been developed and become an accepted norm, the results that communitarian norms are able to deliver are bound to remain very limited.

3. Certain specialised fields, such as the EU law and to lesser extent also the ECHR system, illustrate that with presence of political will a variety of legal mechanisms may be successfully employed to enforce communitarian interests. These regional systems demonstrate that an indispensable step in actualizing protection of community interests is to widen the possibilities of

judicial enforcement. Both the EU and the ECHR systems provide for mandatory jurisdiction of the respective courts and for inter-state *actio popularis* for enforcement of communitarian norms. In addition to that the EU law provides for institutionalized infringement proceedings and invocation of state responsibility not only by other states but also by individuals in national courts. These measures are accompanied by recognition of individuals as subjects of the legal system and by acknowledgement of the direct effect of the EU law, which substantively increases possibilities of enforcement through national judiciaries. Although analogies with specialised fields and regional systems due to significant differences in their constitutive principles must be treated with caution, they do provide realistic blueprints for reconstruction of responsibility mechanisms of general international law.

4. The theory of the law of state responsibility historically has been based on bilateralism and subjective rights i.e., on the private law paradigm where the right to invoke responsibility belongs exclusively to the injured state. Such doctrinal foundations of the state responsibility law owe much to Roman private law which for centuries has served as a fertile ground for cultivating analogies by legal scholars of all creeds, including international law scholars. Existence of a breach of subjective rights as the only ground for invocation of state responsibility was further endorsed by the 19<sup>th</sup> century positivism, which was acutely averse to multilateralist notions of any kind and in particular against claims for protection of communitarian interests. However, notable international lawyers from Grotius to Lauterpacht have been pointing out considerable shortcomings of the strict bilateralism. In particular after the First World War a momentum was gathering for a rethink of the bilateralist conception of state responsibility rules i.e., that only the injured state is entitled to claim responsibility. After the Second World War the political climate was ripe for the public law inspired multilateralist notions to enter the mainstream of international legal thought.

5. During the post-war years the ILC, which was dominated by like-minded internationalists such as Lauterpacht, Fitzmaurice and Waldock, under the mandate of “progressive development and codification” embarked on a project of discretely introducing public law elements into general international law. If international law is to be regarded as the “gentle civilizer of nations”, then the ILC saw itself as the gentle civilizer of that international law. Two key areas of this project were areas most fundamental to general international law – the law of treaties and the law of state responsibility. In both of these the ILC aspired to introduce the public law paradigm based concepts, most notably - the concept of peremptory norms - which was essential for recognition that a minimalistic form of public order functions also in the community of states. In the law of treaties recognition of peremptory norms meant that states are no longer free to agree on whatever they

please, if such an agreement is contrary to the most fundamental norms recognized by the whole community of states. In the law of state responsibility violation of these fundamental norms was to result in criminal responsibility of states – a notion thoroughly inspired by the public law paradigm. The ILC was somewhat successful with the law of treaties, as provisions on peremptory norms found their way into the VCLT. However, it was less so with international crimes of states, as by late 1990ties states seemed to have lost appetite for notable innovations in general international law.

6. The ILC throughout its work on state responsibility attempted to accommodate a theory that international law distinguishes two general categories of obligations – international crimes and delicts - and that each category required a separate regime of responsibility. However, from mid 1990ties to appease opposition to the concept of international crimes, the ILC sought to substitute “international crimes” with the concept of “serious breaches of peremptory norms”. Even more important than change in terminology, the ILC continuously reduced the consequences attached to “serious breaches”. Thus the ILC gave up the idea that all states would be regarded as injured if a serious breach of a peremptory norm is committed. Likewise, the ILC relinquished the notions that consequences of serious breaches may include a punitive element, that all states have a right to apply countermeasures and claim restitution even if it resulted in a disproportionate burden on the responsible state or threatened economic stability, political independence or impaired dignity of the responsible state.

7. The historical assessment demonstrates that in the second half of the 20<sup>th</sup> century when substantive international law reoriented towards community interests, the trend was not accompanied by a similar reorientation in responsibility rules. The ILC, despite an obvious intention to provide responsibility mechanisms to protect community interests, was unable to depart from the private law paradigm and bilateralist concepts. In other words, although the ILC aimed to introduce multilateralism into the law of state responsibility, it did so by using bilateralist private law constructs. In principle the legal relationship between a state in breach of its obligations and the international community in the Articles on State Responsibility is acknowledged by recognition of obligations owed to the international community as a whole. However, for purposes of invocation, these *erga omnes* obligations actually are split into series of individual relationships between the wrongdoer and another individual state. Most importantly, there is no invocation on behalf of the international community. Rather each concerned member of the community is meant to act as a private attorney general. This disparity between substantive law and responsibility mechanisms contributes to non-enforcement of international rules with communitarian objectives.

8. However, in the present international community the possibility of centralized enforcement on behalf of the community in all likelihood is not a prospect of immediate future. Therefore the ILC rightly focused on mechanisms of decentralized enforcement. Thus the ILC was able to make limited, but nonetheless important advances in reorienting the law of state responsibility from bilateralism towards communitarianism. These advances include: recognition of the notion of “objective responsibility” i.e., omission of injury as a precondition for responsibility; invocation of responsibility by non-injured states and specific consequences applicable to serious breaches of peremptory norms. These accomplishments may be viewed critically, as they are half-hearted, slimed and cropped survivors of the ILC’s initial designs for introduction of the public law paradigm. However, all of these notions, despite criticisms that may be directed towards them, widen possibilities to bring claims for protection of community interests and thus reinforce multilateralism and the public law paradigm.

9. Countermeasures of general interest, in spite of risk of political abuse, escalation of conflict and doctrinal primitiveness (signalling an absence of public order based on institutionalized mechanisms), in practice may be the only viable means of enforcement of communitarian norms. As the countermeasures of general interest are likely to remain an indispensable part of enforcement of international law, the position taken by the ILC of neither allowing nor prohibiting them is not helpful. A better approach would be to recognize their lawfulness, but to provide stringent criteria for their use. Elaboration of such criteria would have a restrictive effect on the use of countermeasures of general interest. These criteria must apply to both substantive and procedural elements of countermeasures. Among substantive requirements - countermeasures of general interest ought to be limited to breaches of peremptory norms. Likewise they must be subject to conditions currently applicable to countermeasures by injured states under Articles 49-51 and 53 of the Articles on State Responsibility. Among procedural elements, a helpful and stabilizing requirement would be that in all cases when there is an injured state, countermeasures of general interest may be taken only at the request of the injured state. In any scenario, in order to limit possibilities of politically motivated abuse, it would be beneficial to prohibit entirely unilateral countermeasures of general interest by non-injured states.

10. The development of the law of state responsibility has by no means come to a definite conclusion. Although presently most states show no particular interest in negotiating a convention on the basis of the Articles on State Responsibility, the 2001 Articles merely present a station on a larger evolutionary journey of international law. With ever growing global interdependence the direction of that journey inevitably must be towards some form of public order and protection of

communitarian interests. However the historical review of the present study reveals that if anything the evolution of the law of state responsibility is painstakingly slow. Thus recognition of a right of non-injured states to invoke responsibility for breaches of obligations owed to the international community as a whole - which is the key hallmark of communitarianism in the 2001 Articles - took the ILC half a century to arrive at, from early 1950 when the ILC first conceived obligations *erga omnes*. It was only in 2012 when in *Belgium v Senegal* the first genuinely *erga omnes (partes)* claim was successfully adjudicated before the ICJ. In absence of a radical overhaul of the international system, the next station in the law's development is likely to be a continued expansion of decentralized enforcement mechanisms. Among these the most necessary would be recognition and elaboration of countermeasures of general interest and strengthening of consequences applicable to breaches of peremptory norms (e.g., to regard all states as injured when a peremptory norm has been breached).

11. Finally, the historical review of the ILC's work on state responsibility demonstrates that the change of heart at the ILC, which brought considerable concessions to the detriment of the public law paradigm, roughly coincided with the end of the Cold War. Those momentous events of late 1980ties and early 1990ties ended the bipolar world order and brought an unprecedented hegemony of the US. With that hegemony the US attitude towards important international law projects (from International Criminal Court to Kyoto Protocol on Climate Change) has been nothing short of appalling. The ILC's work on state responsibility was no exception - the US was one of the principal opponents to the notion of "state crimes". However, as the US hegemony becomes increasingly tested and the post-cold war *status quo* of 1990ties begins to crumble, states, including the US, may reassess their views on responsibility rules in accordance with their current and projected interests. States that would be losing in the geopolitical game may seek to compensate geopolitical power by power of legal rules - they may well become interested in addressing aggression and similar breaches by providing novel communitarian mechanisms for responding to them. Likewise, as the balance of power shifts, increased uncertainties are likely to lead to new search for stability within the international community. It is possible that such a search once again may turn towards international law, which provides at least some measure of stability in the ever shifting reality of interstate relations. The ILC's concept of state crimes or its latter version - serious breaches of peremptory norms - may still come to prominence with meaningful consequences attached to breaches of norms that protect fundamental values of the whole international community.

## 8. ANNOTATIONS

### ANOTĀCIJA PROMOCIJAS DARBAM „STARPTAUTISKĀS KOPIENAS INTEREŠU AIZSARDZĪBA VALSTS ATBILDĪBAS TIESĪBĀS”

Starptautiskās tiesībās pēdējo 70 gadu laikā ir ievērojami attīstījušās, paredzot regulējumu virknei tiesisko interešu, kuras ir vērstas nevis tikai uz atsevišķu valstu individuālo interešu aizsardzību, bet gan uz visas starptautiskās kopienas kopīgo interešu nodrošināšanu. Šīs, tā saucamās ‘kopienas intereses’, piemēram, starptautiskā miera un drošības nodrošināšana, globālās vides aizsardzība vai cilvēktiesības, ir plaši aizsargātas starptautisko tiesību materiāltiesiskajās normās. Tomēr valstu starptautiskās atbildības tiesībās ir ārkārtīgi maz mehānismu, kuri būtu paredzēti vai piemēroti šo interešu aizsardzībai. Ņemot vērā šādu atšķirību starp plašo materiāltiesisko regulējumu un nepilnīgajiem šī regulējuma aizsardzības mehānismiem, pētījums pievēršas jautājumam, vai straujo attīstību kopīgo interešu normatīvajā aizsardzībā ir pavadījusi līdzīga attīstība valsts atbildības tiesībās. Pētījumā tiek argumentēts, ka 20.gadsimta otrajā pusē notikušo starptautisko tiesību daļēju pārorientāciju uz kopienas interesēm materiāltiesiskajās normās, nepavadīja līdzīga pārorientācija valsts atbildības tiesībās, kuras vēl arvien pamatā ir balstītas uz divpusējām attiecībām starp valsti, kura veic starptautisko tiesību pārkāpumu un cietušo valsti. Starptautisko tiesību komisija, neskatoties uz nodomu piedāvāt kopienas interešu aizsardzības mehānismus, savos ieteikumos nespēja atteikties no privāttiesiskā attiecību modeli balstītiem tiesību institūtiem. Šāda nesaderība starp materiāltiesiskajām normām un atbildības mehānismiem veicina uz starptautiskās kopienas interešu aizsardzību vēsto normu pārkāpumus un neļauj valstīm pilnvērtīgi aizsargāt materiāltiesiskajās normās paredzētās starptautiskās kopienas intereses.

**ANNOTATION**  
**TO THE DOCTORAL THESIS**  
**„PROTECTION OF INTERESTS OF THE INTERNATIONAL COMMUNITY**  
**IN THE LAW OF STATE RESPONSIBILITY”**

International law has notably evolved within the last 70 years providing for protection of a multitude of legal interests, which could be regarded as ‘community interests’ or interests that are shared by all states (such as international peace and security, protection of global environmental commons or universally accepted human rights). However, there are remarkably few legal mechanisms in international law that are designed to protect those interests. In other words, there seems to be a sharp contrast between abundant substantive content of international rules providing for shared interests and very modest legal means to enforce those interests. Considering this disparity, the aim of this thesis is to establish whether the normative shift towards multilateralism and community interests in substantive international law has been accompanied by a similar shift towards communitarianism in the law of state responsibility. The central claim of this dissertation is that in the second half of the 20th century, when substantive international law partially reoriented towards community interests, the trend was not accompanied by a similar reorientation in responsibility rules, which have remained based on bilateralism and private law paradigm. The International Law Commission, despite an intention to provide responsibility mechanisms to protect community interests, was unable to depart from the private law paradigm and private law concepts. This disparity between substantive law and responsibility mechanisms contributes to non-enforcement of international rules with communitarian objectives.



**ZUSAMMENFASSUNG DER DOKTORARBEIT**  
**„DER SCHUTZ VON GEMEINSCHAFTSINTERESSEN IM RECHT DER**  
**STAATENVERANTWORTLICHKEIT“**

Das Völkerrecht hat sich insbesondere in den vergangenen 70 Jahren fortentwickelt und umfasst auch den Schutz zahlreicher Bereiche, die man aufgrund des Interesses der Allgemeinheit auch als „Gemeinschaftsinteressen“ bezeichnen mag. Zu nennen sind hier bspw. die Bereiche des (internationalen) Schutzes des Friedens, der Sicherheit, der Umwelt und der natürlichen Lebensräume sowie auch die als universal geltenden Menschenrechte. Dessen ungeachtet fällt auf, dass das Völkerrecht nur wenige Rechtsinstrumente bereitstellt, die diese Interessen effektiv schützen. Es zeigt sich also ein starker Kontrast zwischen den umfassenden materiellen Regeln des Völkerrechts bzgl dieser Gemeinschaftsinteressen und den äußerst bescheidenen Möglichkeiten, diese Rechte durchzusetzen. Das Ziel dieser Arbeit ist es, die vor diesem Hintergrund angesprochenen Aspekte dahingehend zu untersuchen, ob es parallel zur Entwicklung zum Multilateralismus und zu Gemeinschaftsinteressen auch eine Entwicklung im Rechts der Staatenverantwortung gibt. Die zentrale Aussage der Arbeit ist, dass es in der zweiten Hälfte des 20. Jahrhunderts, als sich eine Entwicklung hin zu Gemeinschaftsinteressen vollzog, keine entsprechende Entwicklung im völkerrechtlichen Haftungsregime gab, welches im Gegenteil, noch immer auf Bilateralismus und einem „Privatrechtsansatz“ gründet. Obgleich die Völkerrechtskommission die Absicht hatte, einen entsprechenden Mechanismus für die Staatenverantwortlichkeit zu schaffen, konnte sie eine Abkehr von dem bilateralen Ansatz nicht bewirken. Die Arbeit kommt schließlich zu dem Ergebnis, dass der Gegensatz zwischen materiellem Recht und fehlender Staatenverantwortlichkeit zur mangelnden Durchsetzbarkeit der Gemeinschaftsinteressen im Völkerrecht beiträgt.

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