
Back to the Future of a Multilateral Dimension of the Law of State Responsibility for Breaches of ‘Obligations Owed to the International Community as a Whole’

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Abstract

The ILC Draft on State Responsibility is incomplete. It does not provide the states with any indication as to the acts and measures that so called ‘non injured states’ are allowed to take in reaction to the violation by a state of its obligations towards the International Community as a whole. This article comes back on the previous state practice in Kosovo (as compared to the Syrian crisis in 2012) and takes advantage of the comments made at that time by Antonio Cassese for reviewing Cassese’s proposals and formulating tentative conclusions as to the content and legal regime of these potential measures.

1 An Uncompleted Project

In its Draft Project on the Law of State Responsibility, the ILC largely reoriented its vision of this fundamental field of international law by trying, mainly on the basis of the reports of Roberto Ago and then James Crawford, to take into account the multilateral dimension of obligations together with the legal consequences attached to their

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violation.¹ The ILC was able to develop and clarify a number of important rules while at the same time leaving some questions unanswered and even raising new ones. One such rule relates to the issue of the right of an injured state to take countermeasures in a situation in which a guilty state has breached an obligation it owes to the international community as a whole and refuses to fulfil that obligation.

*A Conditioning the Taking of Countermeasures, but for Whom?*²

Article 52 of the ILC's Draft lays down a number of procedural conditions relating to the resort to countermeasures by the injured state, which in turn must call on the responsible state to comply with its obligations and – in the absence of a positive answer on the latter's part – notify the responsible state of its intention to take such measures aimed at obtaining the fulfilment of the obligations in question, the obligation to repair the damage caused being at the core of them. Furthermore, countermeasures should not be taken, or, if already decided, they should be suspended if the responsible state has put an end to its wrongful conduct and the dispute is already before a competent court.

That said, countermeasures primarily deal with the reaction of an *individual* injured state, even in cases when the obligation breached by the responsible state has a multi-lateral or even a universal scope.³ It is true that Article 42 of the Draft, the formulation of which is far from being a masterpiece of clarity, also deals with violations of collective obligations, i.e., obligations that apply between more than two states 'and whose performance in the given case is not owed to one State individually, but to a group of States or the international community as a whole'.⁴ Indeed, outside the hypothesis under which, in a given situation, a state is specially affected by the breach of an obligation owed to a group of states (covered by Article 42(b)(i)), Article 42(b)(ii) deals with a special category of obligations 'of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations';⁵ a situation concerning what may be termed a violation of an 'interdependent obligation'. Nevertheless, as evidenced by the comments provided by the last Special Rapporteur on state responsibility, James Crawford, the rather cumbersome formulation of Article 42, which by its reference to 'the international community as a whole' gives the troublesome impression of an

¹ See the articles published in *EJIL* in the framework of the Symposium aimed at 'Assessing the work of the International Law Commission on State Responsibility': 13 *EJIL* (2003) 1053–1256, in particular the opening contribution, Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', at 1053, to be compared with Gattini, 'A Return Ticket to 'Communitarism'', at 1181.

² See Lesaffre, 'Countermeasures', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility*, (2010), at 469.

³ See J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002), at 297–300.

⁴ *Ibid.*, at 259; Gaja, 'The Concept of an Injured State', in Crawford, Pellet, and Olleson (eds), *supra* note 2, at 941.

⁵ *Ibid.*, at 259.

overlap with the situations covered by Article 48, remains in keeping with the idea of focusing on the 'injured State' perceived on an individual basis whatever the nature of the obligation breached.

B 'Non-injured States' under Article 48: an Inappropriate Concept

The true multilateral dimension of the international responsibility of a state appears to be fundamentally covered not under Article 42, but also under Article 48.⁶ The title of this provision is awkward for the purpose of legal analysis. It is entitled 'invocation of responsibility by a State *other than an injured State*', another demonstration of the fact that the ILC, until the very completion of its work, could not rid itself of the idea that an 'injured State' was basically an individual state directly affected by the wrongdoing of another; a persistent idea inherited from the time when the responsibility of states was viewed solely from a bilateral perspective between the guilty and the victim states, and prior to the affirmation of the existence of community interests. It makes little sense to say that '*non-injured States*' have a right of action against another state. If they are not injured, what is the legal ground for them legitimately (and legally) to take remedial action? Rather, more accurately, they are not affected in their individual and subjective interest, contrary to the 'injured State' in the sense of Article 42(1), but in their *objective* interest to have respected those obligations that are of essential importance for the international community. The legal basis for their action against the responsible state lies merely in their belonging to the international community. They may act on an *actio popularis* basis. Speaking of initiatives taken by so-called 'non-injured States' runs against the fundamental principle according to which when there is no legal interest infringed there is no right of action ('*pas d'intérêt, pas d'action*'), simply because nobody possesses the legal quality (or, more narrowly, in procedural terms, the *locus standi*) for taking any initiative in defence of an absent interest. A more suitable turn of phrase could have been found, the best one most probably being a distinction between 'objectively' and 'subjectively' injured states, or, at least, to speak of states being either 'directly' or 'indirectly' injured.⁷ Whatever the case may be, the serious terminological and theoretical deficiencies of the Draft are most likely due to the input of states that discussed earlier versions of the ILC project within the context of the Sixth Commission of the UN General Assembly.⁸

This contributes to maintaining one of the main weaknesses of the ILC Draft. After having eliminated (for quite understandable reasons of legal policy) the concept of 'crime of State' from its last version, substituted by the notion of 'breach of an obligation owed to the international community as a whole', the draft does not provide a comprehensive and substantial legal regime for the responsibility of one state *vis-à-vis* another state, whether they belong to a specific group or simply to the international

⁶ *Ibid.*, at 276–280.

⁷ For further developments see Dupuy, 'Le fait générateur de la responsabilité internationale des Etats', 188 *RCADI* (1984-V) 9 and by the same author, *supra* note 1, at 1060 ff.

⁸ See Gaja, 'States having an Interest in Compliance with the Obligation Breached', in Crawford, Pellet, and Olleson (eds), *supra* note 2, at 957.

community as a whole. Systematically, it says very little about the so-called ‘non-injured States’ referred to in Article 48 *vis-à-vis* the responsible state. In particular, it does not indicate what kinds of measures they are legally authorized to decide and implement against the responsible state.

As a matter of fact, the formulation of Article 49, which deals with the ‘object and limits of countermeasures’, specifically reserves the right to take such measures to ‘the injured State’ in the limited, individual, and narrow sense earlier provided for by Article 42. This leads to the conclusion that the states allegedly said to be ‘non-injured’ under the title of Article 48 cannot take the type of ‘countermeasures’ dealt with by Article 52 in reaction to a breach of an obligation towards a group of states or towards the international community as a whole. Article 48 provides that these ‘third’ states may claim for the cessation of the internationally wrongful act, and for assurances and guarantees of non-repetition, or performance of the obligation of reparation only in the interest of the injured state or ‘of the beneficiaries of the obligation breached’.⁹ In addition, Article 41(2) provides that the ‘serious’ breach by a state of an obligation arising under a peremptory norm of general international law entails for all other states within the international community an obligation *not* to recognize a situation created by this breach,¹⁰ as well as an obligation of non-assistance to the responsible state.¹¹ The distinction established by the ILC Draft between the rights of the ‘injured’ state and those of the others in the face of a breach of a community obligation can be criticized as it does not reflect the actual practice of states in a number of concrete cases. In particular, during the 1980s, when confronted by an illegal use of force to invade the territory of a third state, states not directly injured nevertheless took true countermeasures in the sense of classical reprisals and did not limit themselves to asking for the cessation of the wrongful act or the non-recognition of the situation created. The same can be said for reactions to other serious breaches of community obligations.¹²

Even if this care in establishing new progressive developments in the law may be understood in order to avoid any anarchic and uncontrolled unilateral reactions, the fact is that the restrictive provisions of Articles 41 and 48 are by themselves insufficient to establish a full and complete regime of responsibility for the breach of *erga omnes* obligations of a peremptory nature. This leads to the conclusion that, on the basis of the Articles analysed above, the international legal order is left in the 21st century with a situation in which the existence of a multilateral dimension of the law of state responsibility is affirmed without at the same time providing states with a clear indication of what would be the content of this responsibility and, in particular,

⁹ This last formulation remains quite ambiguous. Strictly speaking, any so-called ‘State other than an injured State’ falls under this designation. Why was it not made more precise?

¹⁰ See Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’, in Crawford, Pellet, and Olleson (eds), *supra* note 2, at 677.

¹¹ See Joergenzon, ‘The Obligation of Non-Assistance to the Responsible State’, in *ibid.*, at 687.

¹² See Cassese, ‘The Character of the Violated Obligation’, in *ibid.*, at 417. For illustrations see Dupuy, ‘Observations sur la pratique récente des sanctions de l’illicite’, [1983] *RGDIP* 505 ff.

what would be the measures to be taken and how they should be implemented. The reason for this lies in the fact that the codifiers, starting with Ago and continuing with the majority of states that discussed the progressive series of drafts within the Sixth Committee, remained more or less as if they were rocked by a dream: the dream of an institutional – though unattainable – integration of the notion of an 'international community'; an integration which, instead of leaving the invocation of community interests and values to the individual initiative of its members, would empower an organ provided with the universal legitimacy necessary to act in its name.

2 Comparing the (1999) Kosovo Precedent to the (2011) Libyan and (2012) Syrian Ones

It is of course quite risky to venture into a description of what could possibly happen in the decades to come in terms of the affirmation and development of the legal regime of state responsibility for breaches of peremptory norms of international law, that is, norms the violation of which infringes the interests of each and every member state of the international community.

At this stage, it seems necessary to review what truly is at stake with the question of how to develop and consolidate a viable legal regime for state responsibility for breaches of 'obligations owed to the international community as a whole'. There appear to be three major concerns: first, to try to avoid the very principle of specific and aggravated responsibility for this type of serious breach becoming obsolete, a development which, if realized, would jeopardize the very survival of respect for peremptory norms of international law by states, if not also the legal significance of any reference to 'the international community as a whole'; secondly, to ensure that any legal regime of this kind would not be used in an anarchic way by individual states (or by a group of states acting collectively) to take measures outside any international control with the risk of turning the argument of defence of a community interest into a convenient alibi for the realization of very specific political strategies; thirdly, and additionally, to strive to define with as much precision as possible cumulative legal criteria for enabling recourse for states to take countermeasures as a reaction to the violation of peremptory and *erga omnes* obligations.¹³

Keeping in mind these three concerns, one may reflect upon a past experience which could recur in the future if circumstances allow, and which may be viewed as a kind of precedent, with all the legal consequences attached to it. This experience was provided by the way in which the Western Allies, grouped under the umbrella of NATO, took the initiative to have recourse to air strikes in order to stop the blatant violation by what was at that time the Federal Republic of Yugoslavia (FRY) of its humanitarian

¹³ As is known, all peremptory norms of international law are *erga omnes* ones, but the reverse is not true. Some authors nevertheless take another view and consider that *erga omnes* obligations and obligations deriving from *jus cogens* norms not only overlap but indeed coincide. See Cassese, *supra* note 12, at 416–418.

obligations towards the ethnic Albanians in Kosovo. In March 1998, acting under Chapter VII, the Security Council adopted resolution 1160 (1998) in which the FRY and the Kosovar Albanians were called upon to reach a political solution by means of negotiation. At the same time, an arms embargo was imposed on both sides. On the ground, the situation nevertheless rapidly worsened and the Yugoslav army used force without any discrimination and any sense of proportionality, causing important civilian casualties as well as the massive displacement of innocent populations and a massive flow of refugees into neighbouring countries. The situation continued to deteriorate. As a consequence, on 23 September 1998, the Security Council adopted a new resolution, resolution 1199, again on the basis of Chapter VII of the UN Charter, in which it declared that what happened in Kosovo constituted a ‘threat to peace and security in the region’. The Council urged the parties to apply a cease-fire as well as to take urgent steps to improve the humanitarian situation and enter into negotiations with international involvement. The resolution also contemplated the possibility of taking additional measures in the event that the two sides, starting with the FRY, refused to comply with the binding requests of resolutions 1160 and 1199. The following weeks demonstrated, in particular due to the attitude adopted by Russia, that the Security Council would not be in a position to adopt these new measures which would have logically comprised authorization to have recourse to force in order to address the growing threats to international peace, in particular in relation to the massive flow of refugees across the border. Although nothing in the terms of the aforementioned resolutions made it legally possible, this was the context in which, absent any authorization given to the UN member states to have recourse to such steps, the NATO countries nevertheless decided to take military action if the FRY did not comply with the UNSC resolutions. In an attempt to legitimize this initiative, the NATO Secretary-General based this decision on violations by the FRY of the two UNSC resolutions, the continuation of the humanitarian crisis, and the assessment that the UNSC was unable in the near future to adopt any new resolution. He concluded ‘that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force’.¹⁴ A few month later, after the adoption of another resolution by the UNSC, the terms of which nevertheless did not contain an authorization for UN member states to have recourse to force, the NATO Allies, in the face of the further deterioration of the humanitarian situation on the ground and the refusal of the FRY to abide by the injunctions contained in the Security Council’s resolutions, decided to have recourse to a comprehensive series of air strikes.

The situation which has developed in Syria since mid-March 2011 is in clear contrast to the way in which the Allied western countries acted in Kosovo 12 years before. What the two crises have in common is the paralysis of the Security Council due to the vetoes of Russia and China and, as a consequence, the impossibility for that organ

¹⁴ Letter from SG Solana, addressed to the permanent representatives in the North Atlantic Council, 9 Oct. 1998.

to avoid the repeated perpetration of numerous crimes against humanity following massive human rights violations. In the case of Syria, these crimes have nevertheless been noted by several international bodies including the Human Rights Council,¹⁵ and have been committed by Syrian security forces as well as by semi-public militias of so-called 'chabihās' armed and encouraged by the Syrian government to terrorize the Syrian population in a context of tribal and inter-religious rivalry which led to a most bloody civil war.

Contrary to what happened in the Kosovo case, confronted with the Russian veto all western permanent members of the Security Council, including the United States, France, and the United Kingdom, united in maintaining a strict reading of the UN Charter which led them to conclude that, in the absence of any authorization provided by that organ to the member states of the UN to have recourse to force, even in the case of continuous and repeated breaches of basic human rights and the perpetration of crimes against humanity, these countries could not intervene militarily. It is not necessarily cynical to note that this common position is most probably to be explained more by geo-political factors, due to the presence in the same region of countries like Iran, Iraq, Lebanon, and Israël, all of which are interconnected in a complex network of antagonistic interests and high tensions, rather than by strict respect for the international rule of law.

Whatever the case may be, in legal terms, state practice is to be taken for what it actually is: it is to be ascertained, in particular after the NATO intervention authorized a year before in Libya by UNSC Resolution 1973 that, absent any Security Council adoption of measures including authorization to have recourse to force in order to address the growing threats to international peace and the evident worsening of the breach of community interests through the commission of crimes against humanity, no state, acting individually or collectively, considers itself to be in a position to trigger any military intervention aimed at protecting the civilian population. No country has, in particular, even alluded to the legal options possibly provided by a dynamic interpretation of the rule formulated by the ILC in Article 48 of its 2001 Draft on the law of State responsibility.

This silence is all the more striking if put into perspective with the famous but still uncertain commitment to respect and promote the 'responsibility to protect' the population against 'war crimes, ethnic cleansing, and crimes against humanity', as adopted by the UN member states at paragraphs 138 and 139 of the Outcome Document of the 2005 World Summit, even if it is to be recalled that paragraph 139 states that the action of the international community through the United Nations must remain in accordance with the provisions of the Charter, including Chapter VII.¹⁶

¹⁵ See in particular the denunciation of Syria's conduct by the High Commissioner of Human Rights, Navi Pillay, addressing the 20th Session of the Human Rights Council on 18 June 2012; see also the declaration of Under-Secretary-General for Humanitarian Affairs, Valerie Amos, on 29 July 2012.

¹⁶ See in particular Société française pour le droit international, *Colloque de Nanterre, La responsabilité de protéger* (2008).

3 A Debate

The contrast between action *outside* the UN and *inside* or under its aegis (as experienced in Libya in 2011) prompts one to review the terms of a most interesting debate which took place in *EJIL* after the Allied intervention in Kosovo in 1999 between Professor Bruno Simma, at that time not yet a judge at the International Court of Justice, and Professor Antonio Cassese, who already had the privileged experience of having been the first President of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the person behind the efficacy of that judicial organ.¹⁷

According to the former of these two scholars, taking into consideration the fact that the Alliance ‘had made every effort to get as close to legality as possible’ by linking its efforts to the Council resolutions which existed, ‘only a thin red line separates NATO’s action on Kosovo from international legality’.¹⁸ Nevertheless Bruno Simma warned against the ‘boomerang effect’ which could result from such breaches of the Charter even if ‘this danger can at least be reduced by indicating the concrete circumstances that led to a decision ad hoc being destined remain singular’.¹⁹

For his part, Professor Cassese, while sharing the view that the use of force by NATO countries against the FRY was contrary to the UN Charter since NATO had acted without any authorization of the Security Council, nevertheless disagreed with Simma when the latter considered that this resort to illegality should not set any precedent and remain as an isolated exception if one wanted to avoid the risk of creating a destructive impact on the Charter. Taking advantage of the fact 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’,²⁰ Cassese reflected upon the strategic, geopolitical, and ideological context in which the NATO countries had taken their decision, while mainly insisting on the analysis of the justifications given by them for such military action:

Their main justification has been that the authorities of FRY had carried out massacres and other gross breaches of human rights as well as mass expulsions of thousands of their citizens belonging to a particular ethnic group, and that this humanitarian catastrophe would most likely destabilize neighbouring countries such as Albania, Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia, thus constituting a threat to the peace and stability of the region.²¹

The same author continued by asking:

[F]aced with such an enormous human-made tragedy and given the inaction of the UN Security Council due to the refusal of Russia and China to countenance any expulsions, should

¹⁷ Both published articles in 10 *EJIL* (1998): Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, at 1; Cassese, ‘*Exinjura ius oritur*: Are We Moving towards International Legitimacy of Forcible Humanitarian Countermeasures in the World Community?’, at 23; see also Cassese, *supra* note 12, at 415–420.

¹⁸ Simma, *supra* note 17, at 22.

¹⁹ *Ibid.*

²⁰ Cassese, *supra* note 17, at 24.

²¹ *Ibid.*, at 25.

one sit idly by and watch thousands of human beings being slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law proves incapable of remedying such a situation?

His answer is that 'from an ethic viewpoint resort to armed force was justified' even if manifestly contrary to current international law.²² That said, with a view to overtaking the present state of the law and adopting a kind of a *de lege ferenda* approach, Cassese was careful to foresee an evolution 'based on ... nascent trends in the world community', making it legally possible in the future in the event of Security Council inaction for states to take collective action aimed at avoiding new humanitarian catastrophes by defining in a cumulative and rather restrictive way the conditions under which such action would become not only legitimate but even legal. Gross and egregious breaches of human rights 'involving loss of life of hundreds or thousands of innocent people; amounting to crime against humanity', resulting from anarchy in a sovereign state where the central authorities would evidently be utterly unable to put an end to those crimes, while 'the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members', all peaceful avenues to achieve a solution based on negotiation having been explored and unsuccessfully exhausted, are the cumulative conditions set out in Cassese's constructive approach.

4 Concluding Remarks

Two remarks, it seems, can be made by way of a commentary on the stimulating proposals of the former President of the ICTY in this respect, which in no way contradict his approach, but rather simply try to see how to make use of those proposals for the purposes of presenting the states with a possible legal regime of responsibility for breach of peremptory norms of international law.

First, it should not be forgotten that the aim of this kind of unilateral collective substitution of action was not in 1999, and would necessarily have to be in the future, to implement an international regime of responsibility for crimes, however they were or could be qualified. Rather, this action was a way of addressing the paralysis of the Security Council so that it did not lead to the continuation or aggravation of a humanitarian catastrophe. One is here on the same ground as the general position taken with respect to all action taken by the Security Council. These actions are not primarily aimed at judging or condemning a state declared responsible before it implements its obligations of reparation. Rather, UNSC initiatives are legally taken in accordance with the Charter with a view to re-establishing a situation so that it no longer constitutes a threat to peace by the very fact of its incompatibility with the international rule of law. Within the framework of the law of the UN Charter, the Security Council has as its function the maintenance of international peace and the taking of necessary measures when the peace is threaten or breached. The UNSC is neither a prosecutor

²² *Ibid.*

nor a judge, even if the measures which it is able to order are taken as a response to the commission of a wrongful act constituting a danger for the international community as a whole.

That said, Cassese is right in emphasizing that the legal ground for action in substitution of those which the Security Council would have been able to take in the face of the situation prevailing in Kosovo in 1998 and 1999 if it had not been paralysed by the veto should be understood with reference to the nascent trends in the world community with regard to the protection of human rights, the respect of cardinal principles of humanitarian law, and respect for the rights of people, the violation of which constitutes precisely a breach of obligations 'owed to the international community as a whole'. In other words, one should distinguish between the difference of aims and the identity of underlying bases in an analysis of the relationship between action of the type undertaken by the NATO countries in Kosovo and any future regime of responsibility in this field.

Furthermore, as far as the respective aims are concerned, there may be a partial overlap between the two, inasmuch as both are (also) taken in order to achieve the cessation of wrong-doing.

The second observation is that the Kosovo experience dealt with the ultimate level of reaction conceivable for members of the international community acting without authorization from the Security Council, i.e., *recourse to force*. Other measures are of course possible which would not constitute an exception to the customary international law rule established on the basis of Article 2(4) of the UN Charter, namely the prohibition of force which falls under the classical concept of 'reprisals', today repackaged under the less precise notion of 'countermeasures', the intrinsic illegality of which is invalidated by the very fact that they respond to the previous commission by another state of a wrongful act.

These two observations should be borne in mind when envisaging the main features of a potential regime of state responsibility for breaches of peremptory obligations owed to the international community. Based on all the considerations evoked above, including the three concerns expressed in relation to the search for a viable scenario, three remarks are warranted:

1. Any reaction from the states 'objectively' or 'indirectly' injured by a breach of an obligation towards the international community should be reserved for only those situations in which the Security Council is unable to take any efficient measures due to the persistent use of the veto by one or more permanent members.

This of course is premised on a general assumption that any breach of this type of obligation may be interpreted as constituting at least a 'threat to the peace', enabling the UNSC to take action. This assumption may be understood on the basis that that organ is, by virtue of the Charter, the one that best represents 'the international community as a whole'. In other words, the Security Council is, as a question of priority, the one organ that would have as its task: (a) the qualifying of the wrongful act, and (b) either the decision on the measures to be taken by UN member states, and/or the authorization of them to take such measures.

2. If the breach of any such obligation does not constitute the object of a procedure for the peaceful settlement of dispute, either upon the unilateral initiative of the responsible state itself or upon the initiative of that same state and another state (or states) acting individually or collectively, by way of negotiation, mediation, conciliation, or judicial means, the member states of the international community will be able to invoke the responsibility of the state that they deem responsible. They will also be able, under the conditions recalled above, to take countermeasures against that State aimed at obtaining (a) the cessation of the internationally wrongful act, and assurances and guarantees of non-repetition; and (b) the performance of the obligation of reparation in the interest of the injured state and of all the beneficiaries of the obligation breached.
3. Any such counter-measure must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. It does not exclude recourse to force, but such recourse is limited exclusively to the case in which the persistent wrongful conduct of the responsible state would lead to a situation seriously affecting human rights, the rights of a people, and/or of civilian populations, involving the loss of life of hundreds or thousands of innocent people and amounting to a crime against humanity.

In contrast with the provisions of the current Article 48, the main but, it seems, fundamental difference of the regime proposed above is that it attempts to fill the gap between the mere *invocation* of responsibility by any member of the international community – as is already envisaged by the ILC in Article 48 – and the actual *taking* of measures or 'counter-measures' listed currently in Article 52, the use of which is reserved for the time being to the individually injured state(s) as defined in Article 42, with the negative consequence that the responsibility for breach of obligations towards the international community as a whole is for now restricted to a 'right of invocation' without any indication of the measures that the states invoking the responsibility may take in order to have this responsibility effectively implemented, if not always enforced.

As seen above, it is in particular on the basis of state practice developed by at least a part of the international community of states in the Kosovo crisis that one might consider such a scenario as plausibly feasible in the future, taking due account, on the one hand, of the substantial developments that the law is confronted with and, on the other hand, the organic limits still affecting the United Nations, with no real hope that any specific development in this respect may be realistically expected, as dramatically illustrated by the cruel lack of efficiency of the again paralysed Security Council in the face of the continuous trail of crimes against humanity committed in Syria.