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Nollkaemper, A.

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Systemic Effects of International Responsibility for International Crimes

André Nollkaemper*¹

I. Introduction

The dominant response of the international community to international crimes, to the extent that this has been channelled through the law of international responsibility, has been to allocate responsibility to individuals. Its symbol is the prosecution of individual perpetrators through international criminal courts and domestic courts, that many regard as the most significant manifestation of the core values that unite the international community. The dominance of the individualistic response to international crimes can be traced to the Nuremberg Tribunal that held that “[c]rimes 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.”²

* André Nollkaemper is Professor of Public International Law at the faculty of Law of the University of Amsterdam. He is member of the Advisory Commission on Public International Law of the Netherlands and the Standing Committee of Experts in International Refugee and Criminal Law and of-counsel at Bohler, Franken Koppen Wijngaarden advocaten in Amsterdam.

1. The present article expands on ideas contained in the authors’ introductory and concluding chapters in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* (André Nollkaemper & Harmen van der Wilt eds., 2009).
2. *INTERNATIONAL MILITARY TRIBUNAL NUREMBERG*, 22 *THE TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG*, 14 NOV 1945 – 1 OCT 1946, p. 447 (1947)(emphasis added). This was not the first time that the focus had shifted from the collective to the individual. In article 227 of the Versailles Treaty, the Allied and Associated Powers “publicly arraign[ed] Wilhelm II of

The individualistic approach to responsibility for international crimes is based on the idea that collective action is the product of individual action and that if we are to change collective action, we have to get to the individual level.³ Hersch Lauterpacht wrote in this context that “there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.”⁴

However, in most situations in which the international community takes an interest in the prosecution of international crimes, the role of the individual perpetrators can only be understood and explained by considering the role of states, that to a large extent cause such crimes to happen. The involvement of states in international crimes does not necessarily mean that the state *commits* an international crime—a concept that continues to be absent from positive international law. But there is a wide variety of ways in which a wrongful act by the state can involve international crimes, for instance, when the state fails to prevent the commission of international crimes, or when it fails to punish individual perpetrators.⁵ As will be developed in section 2 of this article, the involvement of states in the commission of international crimes adds a systemic element that largely is beyond the scope of the law of individual responsibility.

The question then arises whether the law of state responsibility is better positioned to address systemic causes of international crimes. To what extent are its principles and procedures attuned to the systemic context and causes of international crimes?

Hohenzollern, formerly German emperor, for a supreme offence against international morality and the sanctity of treaties,” and article 2228 obliged Germany to extradite her officials responsible for war crimes on request of any Allied Power in order to be judged by their military tribunals. However, eventually only 8 persons, not including the former emperor, were sentenced. Gattini notes that “[t]he times were obviously not yet ready to separate, for conceptual as much as for practical purposes, the responsibility of the State from that of individuals.” Andrea Gattini, *A Historical Perspective: From Collective to Individual Responsibility and Back*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 104.

3. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 67 (2000).
4. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 40 (Archon Books 1968) (1950). For a further discussion of the reasons for the shift to the individual, see Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 69.
5. Each of these three possibilities was present in the ICJ’s Judgment in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1996 I.C.J. 595 (Feb. 26 2007) [hereinafter Genocide Case].

The problem addressed in this article can be illustrated by the allocation of responsibility for the international crimes allegedly committed in the past few years in Darfur. The Prosecutor of the ICC concluded that these crimes were part of a larger organizational context:

The information gathered points to an ongoing pattern of crimes committed with the mobilization of the whole state apparatus. The coordination of different bureaucracies, ranging from the military to the public information domains, suggest the existence of a plan approved and managed by GoS authorities at the highest level.⁶

The Prosecutor responded to this involvement of the state apparatus by indicting president Omar al-Bashir.⁷ The request for an arrest warrant states that Omar al-Bashir “committed crimes through members of the state apparatus, the army and the Militia/Janjaweed.”⁸ While this suggested that Omar al-Bashir used the organization, rather than the other way around, there is a strong argument, developed below,⁹ that the organizational context in itself can be a causal factor. If so, the question presents itself whether and how the law of state responsibility can deal with this organizational context.

The question of state responsibility for international crimes has become a fertile terrain for international legal studies, in particular following the Judgment of the ICJ in the Genocide Case.¹⁰ However, the scholarly attention for this topic remains

6. Int'l Crim. Ct., Office of the Prosecutor, *Seventh Report of the Office of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593*, ¶ 98 (2005).
7. See Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Application for Warrant of Arrest under Art. 58, (July 14, 2008), available at www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf.
8. *Id.*
9. *Infra* § 2.
10. See, e.g., STATE RESPONSIBILITY AND THE INDIVIDUAL, XXXIV THESAURUS ACROASIMUM (Kalliopi K. Koufa ed., Sakkoulas Publications 2006); Mark Gibney, *Genocide and State Responsibility*, 7 HUM. RIGHTS L. REV. 760, 760-773 (2007); Marko Milanovic, *State Responsibility for Genocide: A Follow-up*, 18 EUR. J. OF INT'L L. 669, 669-694 (2007); NINA JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES (2003); Alain Pellet, *Can a State Commit a Crime? Definitely Yes!*, 10 EUR. J. OF INT'L L. 425, 425-44 (1999); Antônio Augusto Cançado Trindade, *Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: the Crime of State Revisited*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 253-269 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005); BEATRICE BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES (2009).

very modest compared to the research conducted on individual responsibility, and many fundamental questions remain open.

The article consists of the following parts. I first will expand on the proposition that most international crimes are characterised by their systemic causes and context. In section 3, I will discuss the ways in which the law of individual responsibility have been adjusted to cope with the systemic context of international crimes. In section 4, I will focus on the ways in which the law of state responsibility may connect to the systemic context of international crimes. In section 5, I examine the role of the Security Council in addressing, in terms that are related to the law of state responsibility, the systemic causes of international crimes. In section 6, I will draw some conclusions.

II. The Systemic Nature of International Crimes

The term system criminality was coined by B.V.A. Röling, who used the concept to refer to a situation where “governments order crimes to be committed, or encourage the commitment, or favour and permit or tolerate the committing of crimes.”¹¹ He argued that the commission of war crimes “serves the system, and is caused by the system.”¹² In this article I will build on this definition of Röling, and define system criminality as a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes.¹³

Most international crimes are part of system criminality. Notable examples of situations of system criminality after the Second World War include the ‘dirty war’ in Argentina in the 1970s and 1980s;¹⁴ the atrocities committed during the Balkan Wars of the early 1990s, in which states and organized armed groups played a dominant role;¹⁵ and the crimes committed during the ongoing armed conflicts in

11. Bert V. A. Röling, *The Significance of the Laws of War*, in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON UN LAW AND ON THE LAW OF ARMED CONFLICT (Dott. A. Giuffrè Editore 1975).

12. *Id.*

13. The definition is closely related to Kelman’s concept of crimes of obedience. See Herbert C. Kelman, *The Policy Context of International Crimes*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 26.

14. MARK OSIEL, MASS ATROCITY, EXTRAORDINARY EVIL AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR (2001).

15. ARNE J. VETLESEN, EVIL AND HUMAN AGENCY: UNDERSTANDING COLLECTIVE EVILDOING (2005).

the Darfur area in Sudan.¹⁶ The practice of torture by the United States after 9/11 falls squarely in this category.¹⁷

The systemic nature of international crimes is recognized in the definitions of international crimes.¹⁸ That certainly is true for crimes of genocide¹⁹ and crimes against humanity.²⁰ Although a Trial Chamber of the ICTY deemed the case of the *lone génocidaire* theoretically possible,²¹ genocide as such does not seem possible without the involvement of a larger collectivity.²² The situation for war crimes is slightly different in that, compared to genocide and crimes against humanity, these are more likely to be committed as individual acts. However, war distinguishes itself from individual ordinary crimes by its organized nature, and more often than not war crimes will have the systemic element as required by the definition of system criminality. Note also that the ICC statute provides that the Court has jurisdiction over such crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”²³ The systematic

16. United Nations, Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004* (Jan. 25, 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.
17. JANE MAYER, *THE DARK SIDE* (2008).
18. Otto Triffterer, *Prosecution of States for Crimes of State*, 67 *REVUE INTERNATIONALE DE DROIT PENAL* 346 (1966); Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (separate opinion of Judge Al-Khasawneh), available at <http://www.icj-cij.org/docket/files/121/8140.pdf> (noting that such acts “are definitionally State acts.”). This last remark should be qualified to encompass other organized groups that may oppose the state. See also Jann Kleffner, *Accountability of Non-state Actors for System Crimes*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW*, *supra* note 1, at 238.
19. Rome Statute of the International Criminal Court art. 6, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute]. During the negotiations of the Genocide Convention, the United Kingdom took the position that the Convention should be directed at states and not individuals, as it was impossible to blame any particular individual for actions for which whole governments or states are responsible. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 419 (Cambridge University Press 2000). Also Denmark considered that in cases of genocide or aggression, the responsibility cannot be limited to the individual acting on behalf of the state. *Id.* at 442.
20. Rome Statute, *supra* note 19, art. 7 (defining crimes against humanity as acts “when committed as part of a widespread or systematic attack directed against any civilian population.”).
21. Prosecutor v. Jelicic, Case No. IT-95-10-T, Judgment, ¶¶ 100-101 (Dec. 14, 1999).
22. See, e.g., Harmen van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction. Reflections on the van Anraat Case*, 2 *J. INT’L CRIM. JUST.* 242 (2006) (“[I]t would be simply preposterous for an individual to boast that by his actions alone he could achieve the goal of destroying a whole group. In the normal situation, the perpetrator of genocide may at the most feel confident that his conduct might contribute to the concerted action of annihilating the group.”).
23. Rome Statute, *supra* note 19, art. 8(1).

nature of crimes is particularly clear for aggression. Though not (yet) within the jurisdiction of the ICC, it is generally accepted that persons can only commit aggression if they order or participate actively in the planning, preparation, initiation or waging of aggression by a state.²⁴ Finally, also torture is characterized as an official act. Though acts of torture of course can be committed by state officials against official policy (and as such not be part of system criminality as defined in this chapter), there would seem to be many cases where torture indeed has a systematic character and is condoned and perhaps supported by the policy of an organization, exemplified by the events in *Abu Ghraib*.²⁵

The state is the prime form of a collective entity that is involved in system criminality. Röling indeed confined his analysis of system criminality to states.²⁶ However, states are not the only form of such collectivities. They also may include organized armed groups²⁷ or (ruling) political parties, as in the case of Nazi Germany or the Communist Party of China during the Cultural Revolution.²⁸ In Rwanda, the genocide was in part caused by collective groups such as the *Interahamwe* and the newspaper *Kangura*. The International Criminal Tribunal for Rwanda (ICTR) found in the *Nahimana* case: “Through fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.”²⁹ In particular cases, crimes may be committed or caused by a small group of individuals that constitute the leadership of collectivity. Tomuschat notes that mostly the commission of crimes by a state “means that a people has fallen pray to a criminal leadership.”³⁰

24. Preparatory Commission for the International Criminal Court, Discussion Paper Proposed by the Coordinator, PCNICC/2002/WCGA/RT.1/Rev.1 (Apr. 1, 2002); see also Daniel N. Nsereko, *Aggression under the Rome Statute of the International Criminal Court*, 71 NORDIC J. INT'L L. 497, 518 (2002).
25. THE ABU GHRAIB INVESTIGATIONS, THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ (Steven Strasser ed., Public Affairs 2004); see also Kelman, *supra* note 13, at 30.
26. Röling, *supra* note 11.
27. Kleffner, *supra* note 18.
28. VETLESEN, *supra* note 15, at 44–45 (discussing the impact of the Nazi party on the German state and highlighting that the explanatory variable for the holocaust was to be found at the level of the party rather than of the state).
29. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgment and sentence, ¶ 950 (Dec. 3 2003); See Nina Jørgensen, *Criminality of Organizations under International Law*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 219.
30. CHRISTIAN TOMUSCHAT, INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 290 (1999).

States, as collective entities, may contribute in several ways to the commission of international crimes. In situations where state authorities consider that the security of the state is under severe threat or fear they may lose power,³¹ when they have a powerful apparatus at their disposal charged with protecting the security of the state, and when they have identified groups that are defined as enemies of the state, collective entities themselves can turn into actors that commit or further the commission of international crimes.³² This was what happened, for instance, in relation to the criminal acts orchestrated or supported by Belgrade during the Balkan wars³³ and also what happened during the Bush administration in response to the war on terror.³⁴

In many situations, international crimes will be ‘systematic’ in the sense that they are part of a plan or policy, that often will remain in place, even if an individual author of a criminal act is removed.³⁵ It is such a plan or policy that often will underlie, induce and explain widespread authorization of acts of violence and that lead will lead to a rule governed practice that results in routinized violence.³⁶ In particular cases the policy may be reflected in legislation, for instance laws or regulations that allow for the practice of torture or systematic discrimination of minorities; however, that is not a necessary feature.³⁷

A collective entity also may contribute to international crimes climate by doing little else than sitting still and acquiescing, by systematically not acting when individuals commit international crimes which further the objectives of the state.³⁸

31. Hannah Arendt noted that “loss of power becomes a temptation to substitute violence for power,” HANNAH ARENDT, *ON VIOLENCE* 54 (1969). She also wrote “that every decrease in power is an open invitation to violence—if only because those who hold power and feel it slipping from their hands, be they the government or...the governed, have always found it difficult to resist the temptation to substitute violence for it.” *Id.* at 87.
32. Kelman, *supra* note 13, at 34-35.
33. VETLESEN, *supra* note 15, at 178.
34. See generally MAYER, *supra* note 17 (discussing this issue comprehensively).
35. But see Rome Statute, *supra* note 19, art. 8(1), which uses such qualifications to limit the jurisdiction of the ICC in regard to international crimes.
36. Kelman, *supra* note 13, at 26-27; ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 21 (1989); VETLESEN, *supra* note 15, at 16. See also OSIEL, *supra* note 14, at 64.
37. MAYER, *supra* note 17, at 7-8 (discussing the legalization of torture by the US).
38. Christenson notes: “benign neglect of State may serve many subjective political purposes. Indeed, through loose reins government inaction can function as easily as a conscious part of the prudent exercise of power,” Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT’L L. 312, 316 (1991). See also José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 367 (1999) (noting that international lawyers characterize offenses in Rwanda regions “as crimes of states, because such offenses, either by definition or because of their scale or scope, tend to require the connivance or at least acquiescence of governmental authority.”).

States also may provide the material conditions needed for the commission of international crimes. Furthermore, states may provide aid and assistance to individual authors of crimes, for instance by providing training, weapons, or funding.³⁹ This may create the conditions for a continued pattern of crimes, even when individual perpetrators are removed.

Perhaps the most important mechanism by which collectivities contribute to international crimes is through their influence on the normative climate. Röling noted that the characteristic feature of system criminality is that it corresponds with the “prevailing climate in the system.”⁴⁰ Punch points to processes of neutralization and rationalization that may influence individual behaviour.⁴¹ Thus, a crucial aspect of system criminality is that individual crimes are not, as is commonly the case for domestic crimes, contrary to a norm; rather they are in conformity with norms that result from collective processes.⁴² The normative climate may be fostered by widespread authorization of acts of violence and the routinization of violence by rule governed practice. It may also be induced more directly through incitement and propaganda, dehumanisation of victims of violence by indoctrination, and other policies directed at changing the normative climate.

As long as such fundamental processes are in play, responses that only are focussed on a limited number of individual perpetrators may not always be effective. One individual simply may be replaced by someone else. Individual perpetrators who have been the subject of criminal proceedings at the ICTY, ICTR, ICC or domestic courts, often were small cogs in larger systems that may be

39. That may make it appropriate to label the involvement of the system in terms of complicity. See CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 139 (1993). The international law of responsibility would not in technical terms recognize such involvement as aid or assistance in the sense of Article 16 of the draft articles on State Responsibility; that only applies between states. See *Genocide Case*, *supra* note 5, ¶ 420. However, in the specific case of genocide, where the Court found that a state can act in breach of the principle of complicity as that applies to individual responsibility, this may be different. *Id.*
40. Röling, *supra* note 11, at 138.
41. Maurice Punch, *Why organizations kill and get away with it: the failure of law to cope with crime in organizations*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 54.
42. Immi Tallgren, *The Sense and Sensibility of International Criminal Law*, 13 EUR. J. INT’L L. 561, 575 (2002). See also Kelman, *supra* note 13, at 26. It should be noted that this generally involves a two way process: acts of criminality use a climate for justification and at the same time contribute to that climate. See WELLS, *supra* note 39, at 125-26. See also George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L. J. 1499, 1541 (2002) (implying the above when he refers to how the “climate of moral degeneracy” produced by the “collective” contributes to the crime).

beyond the reach of individual responsibility. Similarly, it may be thought doubtful whether holding Saddam Hussein individually responsible in, say 1991, would have made much of a difference, as the party and government could have continued to support crimes that were committed later.⁴³

In regard to the international crimes committed in Darfur, for instance, the Prosecutor of the ICC initially indicted two individuals who he thought were responsible for international crimes.⁴⁴ But it was hard to believe that Ahmad Muhammed Harun, former Minister of State for the Interior of the Government of Sudan, on his own committed or was responsible for the crimes that were been committed in Sudan or even for the crimes in respect to which he was charged.⁴⁵ It is equally hard to believe that Ali Muhammed Ali Adb-Al-Rahman, a leader of the *Janjaweed*, indicted by the ICC, on his own caused the various crimes that have been attributed to the *Janjaweed*.⁴⁶ As indicated above, after his recognition in his 2008 report to the Security Council the Prosecutor of the ICC that these two individuals were part of a much larger organizational context,⁴⁷ the Prosecutor indicted Omar al-Bashir. But the question is whether this is sufficient to address the involvement of ‘the whole state apparatus’ to which the Prosecutor referred.

Targeting responses to system criminality at individual authors of crimes is only a partial solution that does not always take away the need for addressing the larger entities of which individuals are a part. If the goal is termination of the crimes and prevention of their recurrence, individual responsibility is unlikely to do the job.

Individual authors of international crimes then often are part of a context in which a variety of actors participate, and that are properly dealt with at the level of the state, or other entity, as such.⁴⁸ Hannah Arendt wrote on the acts of Eichmann:

43. See also Gattini, *supra* note 2, at 120 (noting with regard to smart sanctions that “[f]or all their laudable concern for the plight of the innocent and suffering population under a totalitarian regime, the supporters of smart sanctions forget that [more often than not,] a totalitarian regime cannot be reduced to a handful of leading personalities, but rather it rests upon a complex network of relations involving large sectors of the society.”).

44. See also ICC Press Release, The Prosecutor of the ICC Opens Investigation in Darfur, ICC-OTP-0606-104 (June 6, 2005).

45. See Prosecutor v. Harun & Abd-Al-Rahman, Case No. ICC-02/05-01/07-01, Decision on the Prosecution Application under Article 58(7) of the Statute (Apr. 27, 2007).

46. *Id.*

47. See *Seventh Report of the Office of the Prosecutor*, *supra* note 6, ¶ 98.

48. See IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, pt. 1, 130 (1983); Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, in *Le droit international au service de la paix, de la justice et du développement* 35 (Mélanges Michel Virally ed., Pedone, 1991).

“crimes of this kind were, and could only be, committed under a criminal law and by a criminal state.”⁴⁹ Tallgren writes that “instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a state or, more loosely, in accordance with the political objectives of a state or other entity.”⁵⁰ Fletcher exposes what he calls a “romantic view of history and personality” in which the individual’s behaviour is motivated by, and can only be understood in reference to, larger communities of nation, state or tribe.⁵¹ The emphasis on individual responsibility “obscures a basic truth” about war crimes that these are “deeds that by their very nature are committed by groups and typically against individuals and members of groups.”⁵²

Thus, the basis of the dogma of individual responsibility that “[c]rimes 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”⁵³ is doubtful. Jennings rightly noted that the words of the Nuremberg Tribunal are “net and high sounding but dangerous, not to say dishonest, half-truth[s]” that have “a considerable currency with the great and the good, who have been willing to deceive themselves into believing that this aphorism represented the essence of wisdom.”⁵⁴

It may be argued that focussing our attention on systemic causes has one major drawback, as it may result in collective responsibility of the state and/or population. It may confront innocent individual members of that collectivity with

49. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 240 (1963); Karl Jaspers, Who Should Have Tried Eichmann, 4 J. INT’L CRIM. JUST. 853 (2006); WELLS, *supra* note 39, at 135 (noting that many proceed from the belief that “in general, corporate criminal acts are not the result of the isolated activity of a single employee, but arise ‘from the complex interactions of many agents in a bureaucratic setting.’”).
50. Tallgren, *supra* note 42, at 575.
51. GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM (2002).
52. George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002); Laurel E. Fletcher & Harvey M. Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 24 HUM. RTS. Q. 573, 618 (2002); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 570-571 (2005).
53. THE TRIAL OF MAJOR WAR CRIMINALS, *supra* note 2, at 447 (emphasis added).
54. Robert Jennings, *The Pinochet Extradition Case in the English Courts*, in GEORGE ABI-SAAB, THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 693 (L. Boisson de Chazournes and V. Gowlland-Debbas eds., Martinus Nijhoff 2001).

the consequences of criminal acts of a few.⁵⁵ This is a standard critique on traditional (say, pre-World War II) international law.⁵⁶ Collective responsibility would be primitive and immoral in view of its effects on innocent members of a collectivity.⁵⁷ Scharf and Williams note that “the first function of justice is to expose the individuals responsible for atrocities and to avoid assigning guilt to an entire people.”⁵⁸ Cassese writes: “Collective responsibility is no longer acceptable.”⁵⁹ Resorting to collective responsibility would thus be a step back to the primitive collective responsibility from which the international legal order has just liberated itself.

Several responses can be offered. First, as indicated above, in many instances of international crimes, dealing only with individuals will fail to remove the cause of the atrocities. If the international community is to address that cause there may not be an alternative for some form of collective responsibility. Indeed, in particular situations, responses targeted at the level of the collective are justified because a large part of the population or ‘members’ of a group in fact were co-responsible for failing to prevent, for instance, the rise of a political party or a leader who led the

55. SHANE DARCY, *COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW*, xvi (2007); VETLESEN, *supra* note 15, at 158; *cf.*, UNOG Press Release, ‘Human Rights Council, Human Rights Council Holds Special Session on Human Rights Situation on Occupied Arab Territories’, Un Doc. HR/HRC/06/031E (July 5, 2006) available at http://www.unog.ch/80257631003154D9/%28httpNewsByYear_en%29/80257631003154D9C12571A2004F2783?OpenDocument (last visited March 4, 2010); Presentation by John Dugard, Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories on the effects of the sanctions against Hamas on the Palestinian people (noting that that it was not the Hamas Government that was being punished as a result of the sanctions, but the Palestinian people), available at http://www.hic-mena.org/documents/Dugard%205_06_07.pdf (last visited Mar. 4, 2010).
56. *See, e.g.*, Francesco Parisi & Giuseppe Dari-Mattiacci, *The Rise and Fall of Communal Liability in Ancient Law*, 24 INT’L REV. L. & ECON. 489 (2004); Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 351-360 (2003); *See generally* GREGORY F. MELLEMA, *COLLECTIVE RESPONSIBILITY*, ch.4 (1997).
57. HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES*, 97-98 (1942); *See also* Sanford Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFF. 244, 246 (1973) (stating that “[n]o sanction can be directed at an organization—whether the method chosen if a fine or dissolution—without also affecting at least some of the individuals with ties to the entity.”).
58. Michael P. Scharf & Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE W. RES. J. INT’L LAW 161, 170 (2003); MICHAEL IGNATIEFF, *THE WARRIOR’S HONOUR* 170 (Penguin 1999).
59. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 136 (2003).

collective into the criminal acts.⁶⁰ In some cases, a substantial part of the group indeed was involved in the crimes, as was the case in Rwanda during the genocide in the early 1990s⁶¹ and in Nazi-Germany.⁶²

Second, collective sanctions do not necessarily have effects for all members of the collectivity.⁶³ While in theory it may be true that sanctions imposed on a collectivity affect members of that collectivity, in the practice of international reparations that certainly does not seem to be the case in any substantial way. Darcy notes that “for citizens who are the constituent members of a State, the impact upon them of any consequences of state responsibility is usually negligible.”⁶⁴ The Ethiopia-Eritrea Claims Commission recognized the effects of reparation for the population of the responsible state was a relevant factor to take into account in determining levels of reparation⁶⁵ and rejected, partly on this ground, claims for substantial moral damages.⁶⁶

60. Int'l. L. Comm'n [ILC], *Fifth Report on State Responsibility*, ¶ 266, U.N. Doc. A/CN.4/453 and Add. 1-3 (May 12 & 28, June 8 & 24, 1993) (prepared by Gaetano Arangio-Ruiz, Special Rapporteur).
61. See Alvarez, *supra* note 38, at 467–68 (noting that “[w]hen one percent of a country’s population is under arrest for such offences, amid credible charges that millions were involved in atrocities, an attempt to dissemble on the scope of likely complicity is likely to fail.”); Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1311 (2005) (reviewing FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (Phillipe Sands, ed., Cambridge University Press 2003); Compare HERMANN MANNHEIM, GROUP PROBLEMS IN CRIME AND PUNISHMENT 44 (1955) (distinguishing “various connections between individual and collective responsibility” and singling out “collective responsibility for mass crime,” in which the larger group is held responsible “for crime committed by some considerable section of its members.”).
62. Gattini, *supra* note 2, at 108 (noting that “[i]t is true that under the Nazi dictatorship and during the war the vast majority of Germans personally committed no crime, but it is somehow too self-indulgent, not to say self-absolving, to maintain that for that reason they could not collectively be held morally nor legally responsible.”).
63. TOMUSCHAT, *supra* note 30, at 293.
64. DARCY, *supra* note 55, at xvii; see, e.g., International Crisis Group, *After Mecca: Engaging Hamas*, MIDDLE EAST REPORT 62, Feb. 28, 2007, <http://www.crisisgroup.org/home/index.cfm?id=4677> (discussing effects of the sanctions on Hamas).
65. Eri. v. Eth., Eri.-Eth. Claims Comm’n, Final Award: Eritrea’s Damages Claims, ¶ 21 (Perm. Ct. Arb. 2009) (noting that “[h]uge awards of compensation by their nature would require large diversions of national resources from the paying country—and its citizens needing health care, education and other public services—to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations.”).
66. *Id.* ¶ 61 (stating that “[t]he Commission has great reservations regarding Ethiopia’s moral damages claims. These claims seek billions of dollars, amounts wholly disproportionate to

Third, as regards the objection that collective responsibility would (re-)introduce the notion of collective guilt in international law, it can be noted that responses targeted at the level of the system, in any case if these do not entail criminal responses, need not carry the connotation of collective guilt. They can be of a fundamentally different nature than individual criminal responsibility to which the idea of guilt is inherent.⁶⁷ As noted by Michael Walzer, the distribution of costs over a population that may result from state responsibility for international crimes is not the distribution of guilt.⁶⁸

Finally, it has been said that the focus on systems may have destabilizing effects.⁶⁹ For instance, it might undermine efforts of newly formed democracies or governments to stabilize a society after a period of reconstruction. The punishment of the German State (and society) in Versailles may be blamed for the breakdown of the European order in the 1930s and 1940s.⁷⁰ The effects of the isolation of Hamas in Palestine may be a modern case in point,⁷¹ as is the adverse effects of ‘de-Baathification’ on the stabilization and development of Iraq.⁷² Larry Cata Backer argues that for this reason individual responsibility indeed often prevails: the

Eritrea’s limited economic capacity. They realistically could not be paid, or could be paid only at unacceptable cost to Eritrea’s population for years to come. Large per capita awards of moral damages may be logical and appropriate in some contexts involving significant injuries to an individual or to identifiable members of small groups. The concept cannot reasonably be expanded to situations involving claimed moral injury to whole populations of large areas.”).

67. Thomas Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another*, 6 WASH. U. GLOBAL STUD. L. REV. 567, 570 (2007).

68. MICHAEL WALZER, *JUST AND UNJUST WARS*, 297 (1977).

69. Mark Osiel, *Why Prosecute? Critics of Criminal Punishment for Mass Atrocity*, 22 HUM. RTS Q. 120 (2000); see, e.g., Eric Schmitt, *The Struggle for Iraq: Reconstruction; U.S. Generals Fault Ban on Hussein’s Party*, N.Y. TIMES, Apr. 21, 2004, at A11 (citing a US general, who stated that the “de-Baathification” policy had caused many Sunnis to feel “disenfranchised” from the emerging Iraqi government which had created a destabilizing effect).

70. Simpson, *supra* note 4, at 80.

71. Nathan J. Brown, *The Peace Process Has No Clothes - The Decay of the Palestinian and the International Response*, in CARNEGIE ENDOWMENT WEB COMMENTARY: MIDDLE EAST PROGRAM, <http://www.carnegieendowment.org/files/BrownCommentaryjune072.pdf> (last visited July 3, 2008); See generally, United Nations Seminar on Assistance to the Palestinian People, Doha, Feb. 5-6, 2007, available at <http://unispal.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/9b020962bbde8ee2852572f8005f11f3!OpenDocument>.

72. See, e.g., Walid Phares & RG Rabil, *De-Baathification Went too Far*, HISTORY NEWS NETWORK, <http://hnn.us/articles/4624.html>.

individual is sacrificed so that the group can continue.⁷³ This may explain the one-dimensional (because mainly focused on individuals) international responses to the crimes committed by Serbian agents or by groups and individuals that acted with the support of Serbia—the international community had a prime interest to let the state of Serbia continue and re-establish itself quickly as a stable political entity.

This objection needs to be taken seriously. However, it will have to be balanced against the objectives of responsibility in relation to system criminality: is stability more valuable than incapacitating a regime that is responsible for mass atrocities? One will have to take into account that while responses to system criminality may delegitimize regimes, they do not necessarily incapacitate them.

III. Systemic Effects of Individual Responsibility

At first sight, individual responsibility may seem ill-suited for dealing with systemic causes of international crimes. By definition it is based on individual action and individual intent. Indeed, the very nature of system criminality obliterates the piecemeal approach of criminal law. Criminal law is not capable of capturing the complex mechanisms and relations of organizations which engage in mass crimes. The mere removal of individual perpetrators from the scene, if even they would be in a leadership position, would not necessarily make a difference in regard to the systemic conditions of international crimes.

Nonetheless, the law of individual responsibility offers several leads for addressing problems of system criminality. In assessing the weight thereof, it may be necessary to distinguish between situations where the conflict in which the crimes were committed was terminated, and situations where they are ongoing. Most prosecutions of international crimes fall in the former category, and individual perpetrators were prosecuted after the situation in which the crimes were committed had been terminated. The prosecution of Milosevic, Saddam Hussein and the defendants in the ICTR and the Khmer Rouge Tribunals are cases in point. The possible impacts of individual responsibility on systemic effects may be quite different in cases of prosecution of individual perpetrators in ongoing crimes, as was contemplated in regard to Darfur and the Gaza.⁷⁴

73. Larry Catá Backer, *The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT'L L. REV. 509 (2003).

74. See U.N. Human Rights Council [UNHRC], United Nations Fact Finding Mission on the Gaza Conflict, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶ 1766, UN Doc A/HRC/12/48 (2009).

It has been suggested that enforcing individual responsibility may have a deterrent effect.⁷⁵ Although the assumptions underlying such deterrence are shaky, both for future individual perpetrators⁷⁶ and for collectivities,⁷⁷ there is some evidence that under certain conditions, prosecution may result in norm internationalization.⁷⁸ In view of the strong supportive effect of the normative climate on situations of system criminality, this may have a transformative effect on the normative climate and thereby undermine some of the conditions that facilitate systemic forms of criminality.

Individual responsibility also in a more direct way may affect systemic conditions underlying international crimes. The international criminal law paradigm of individual responsibility has widened its scope and has increasingly attempted to address the collective nature of international crimes.⁷⁹

In particular cases, leaders may use the organization of a state or other collective entity to create the conditions for system criminality. This may be qualified under art. 25(3)(a) of the ICC statute, providing for responsibility for a person who “[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.” This is one of the grounds of the indictment of Bashir. The arrest warrant notes that he “committed crimes through members of the state apparatus, the army and the Militia/Janjaweed.” These crimes thus were a form of indirect perpetration or perpetration by means.⁸⁰ If and to the extent that the systemic conditions indeed are the result of intentional acts of leaders, prosecuting such leaders may remove (part of) such conditions.

75. Trindade, *supra* note 10, at 266.

76. Tallgren, *supra* note 42, at 575; *see also* MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 169-170 (2007) (referring to long-standing criminological research, Drumbl notes that the very low chance that offenders are ever accused adversely affects the assumed effectiveness of deterrence theory).

77. Drumbl, *supra* note 52, at 589.

78. *See generally* Vijay M. Padmanabhan, Norm *Internalization through Trials for Violations of International Law: Four Conditions for Success and their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT’L L. (forthcoming Sept. 2009), available at <http://ssrn.com/abstract=1477075> (discussing four necessary, but not necessarily sufficient, conditions for the success of norm internalization in the community of the defendant: consistency, selectivity, accessibility, and integration).

79. Andrew Clapham, *Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 62 (Philippe Sands ed., Cambridge University Press 2003); Drumbl, *supra* note 52, at 540-41; BONAFÈ, *supra* note 10, at 172.

80. Omar Hassan Ahmad Al Bashir, *supra* note 7, at 1.

A second approach that somehow may address systemic causes is the doctrine of superior responsibility.⁸¹ Individuals who transgress fundamental norms of international law often will not act on their own initiative and for their own cause, but will carry out plans of other, higher placed individuals. This may, under the doctrines of superior or command responsibility, result in prosecutions of higher ranked officials that supplement the prosecution of the lower ranked official; or may lead to a decision not to prosecute such lower ranked officials.⁸²

The concept of superior responsibility conveys the idea that legal and moral standards in situations of armed conflict will only be observed if soldiers are subject to responsible command. Military commanders can be held accountable if they fail to prevent or repress violations of international humanitarian law by their subordinates. This legal construction recognizes that military structures and organizations may be conducive to system criminality and so not only those who physically commit the crimes, but also those in the higher echelons who have the power and authority to prevent those crimes should be held responsible.

Of course, this doctrine remains firmly planted in the individual paradigm. It assumes that the problem can be solved by individual responsibility, which contradicts the very idea of system criminality. However, if the doctrine is used to address the leadership of a state or other collectivity, there may exist a link between the system level and individual responsibility. A climate of permissiveness for abuses, or a pattern of orders to conduct torture may be broken by removing the leaders who instructed or tolerated crimes. It must be added, though, that only in very rare situations is individual responsibility allocated to the true leadership. More often than not, both in international tribunals and domestic courts, the buck stops at mid-level in the bureaucracy, *Abu Ghraib* being a case in point. There, prosecutions were directed at lower officials but they all eventually failed.⁸³

81. Rome Statute, *supra* note 19, art. 28.

82. *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 724 (Aug. 2, 2001); *see generally* Kai Ambos, Command Responsibility and Organisationsherrschaft: ways of attributing international crimes to the 'most responsible,' in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 127.

83. *See, e.g.*, Ben Nuckols, *Military prosecution in Abu Ghraib scandal ends*, THE BOSTON GLOBE, Jan. 11, 2008, available at www.boston.com/news/nation/articles/2008/01/11/military_prosecution_in_abu_ghraib_scandal_ends/.

A third form of individual responsibility that is attuned to situations of system criminality, is the Joint Criminal Enterprise (JCE) doctrine.⁸⁴ This combines elements of concepts like conspiracy, complicity and participation in a criminal organization. In view of the rather broad application of the doctrine in the recent case law of the ICTY, the concept does reach beyond the level of the individual and can connect to collectivities in which individuals participated.⁸⁵

The indictment of Charles Taylor before the Special Court for Sierra Leone shows clear dimensions of the systematic nature of the international crimes he is charged with:

The Accused committed the crimes alleged in the Amended Indictment in the sense of being a co-perpetrator of those crimes, in that, while not physically perpetrating the crimes, the Accused shared the intent to commit the crimes and participated in the common plan, design or purpose which amounted to or involved commission of those crimes. The alleged crimes, amounting to or involved within the common plan, design or purpose, were either intended by the Accused, or were a reasonably foreseeable consequence of the common plan design or purpose.⁸⁶

Likewise, Slobodan Milosevic was accused of participating in three very large joint criminal enterprises. The Trial Chamber found at the conclusion of the prosecution case that a reasonable trier of fact could be satisfied beyond reasonable doubt that Milosevic was a participant in a joint criminal enterprise that included the Bosnian Serb leadership, and that he shared with its participants the aim and intention to destroy a part of the Bosnian Muslims as a group,⁸⁷ notably because “[t]he Accused was the dominant political figure in Serbia and he had profound influence over the Bosnian Serb political and military authorities.”⁸⁸

In the ICTR case of *Rwamakuba*, and in reference to the post-Second World War cases, the Appeals Chamber held that “liability for participation in a criminal

84. Rome Statute, *supra* note 19, art. 25.

85. *See generally*, Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 158. Osiel argues that the ICTY’s preference for JCE might be influenced by the Prosecutor’s desire to achieve the conviction of as many suspects as possible; Osiel, *supra* note 69, at 1812–1821.

86. Prosecutor v. Charles Ghankay Taylor, Case No. SCSL–2003–01–PT, Second Amended Indictment (May 29, 2007).

87. Prosecutor v. Slobodan Milosevic, Case No. IT–02–54–T, Decision on Motion for Judgment of Acquittal, ¶ 288 (June 16, 2004).

88. *Id.* ¶ 257.

plan is as wide as the plan itself, even if the plan amounts to a “nation wide government-organized system of cruelty and injustice.”⁸⁹

JCE, like superior responsibility, remains grounded on the principles of individual responsibility. It has been said that JCE is difficult to reconcile with principles of individual responsibility. Indeed, the doctrine displays the fundamental tension between the law of individual responsibility and the notion of systemic crimes.⁹⁰ However, it is to be recalled that the collectivities that are engaged in system criminality may involve smaller groups or, as noted by Tomuschat, a criminal leadership of an entity like a state.⁹¹ In such cases, JCE may be able to provide a basis for prosecution of all or the main persons involved in such a criminal leadership. Removing that leadership may in such a case remove a cause of system criminality. Gattini rightly notes that the concept of JCE, with its somewhat more liberal evidentiary standards, is particularly suitable to tackle mass atrocities, which are as a rule the result of a complex network of connivances.⁹²

There is a fourth option within the paradigm of the law of individual responsibility that would to some extent address the agency problem. This is to hold the organization as such criminally responsible. This approach was used in Nuremberg as an indirect approach to individual responsibility. In essence, the Nuremberg Tribunal could declare an indicted group or organization to be criminal, which would mean that in subsequent proceedings the criminal nature of the group or organization could not be challenged.⁹³ The Tribunal advanced as the definition of a criminal group or organization that there must be “a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.”⁹⁴ After Nuremberg, however, statutes of international criminal courts have not chosen this approach, though arguably this approach could have helped to address the collective nature of crimes, without relying unduly on the JCE doctrine.⁹⁵

89. Prosecutor v. André Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 25 (July 23, 2004).

90. See also Van der Wilt, *supra* note 85, at 158.

91. TOMUSCHAT, *supra* note 30, at 290.

92. Gattini, *supra* note 2 at 121.

93. Charter of the International Military Tribunal at Nuremberg art. 10, Aug. 8, 1945, 82 U.N.T.S. 279.

94. Judgment of the International Military Tribunal: The Accused Organizations (IMT Judgment) (Sept. 30 and Oct. 1, 1946), available at <http://avalon.law.yale.edu/imt/judorg.asp>.

95. Jørgensen, *supra* note 29.

In sum, despite its individualistic approach, the law of individual responsibility may in particular situations be relevant to particular situations of system criminality and indeed weaken the conditions under which criminality can be of a systemic nature when regimes are dominated by a small leadership and their removal on the basis of the principle of perpetration by means (assuming that the organization is in the hands of that leadership) may undermine the systemic conditions for international crimes. In situations of small criminal regimes, the doctrine of JCE may capture part of that regime, in particular higher leaders. In these respects, the law of individual responsibility to some extent has been able to solve the agency gap.

It needs to be recalled that with the exception of the state, there is no true alternative for individual responsibility and that in respect to international crimes committed by armed groups, rebel movements etc., the law of individual responsibility remains, at least within the paradigm of responsibility, the only option.⁹⁶ Moreover, even though the state can be subject to international responsibility, the consequences, compared to those for individuals, are relatively powerless and fall short of punishment. The ICTY noted in the Blaskic case that “. . . under international law States could not be subject to sanctions akin to those provided for in national criminal justice systems.”⁹⁷

There is one final aspect to consider. Prosecution of individual state organs can be seen as a sanction against the state itself.⁹⁸ It is to be recalled that in the traditional law of international responsibility, individuals (and their fault) were invisible behind the state. Indeed, traditionally, orders to prosecute individuals as a form of satisfaction have been considered as undue interference in the internal affairs of states.⁹⁹ In modern international law, individuals whose acts caused the

96. Compare Kleffner, *supra* note 18.

97. Prosecutor v. Tihomir Blaskic, Case No. IT-95-14, 14 March 1997, Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, para 25; see also Simpson, *supra* note 4, at 74.

98. Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1085, 1091 (Antonia Cassese et al. eds., 2002) (noting that “the promoters of the various international criminal courts undoubtedly intended, by punishing individuals, also to punish the actions of the State to which the acts may be attributed”); See also Trindade, *supra* note 10, at 265.

99. Draft Code of Crimes Against the Peace and Security of Mankind: Document A/CN.4/448 and Add.1, Comments and observations received from Governments, in [1993] 2:1 Y.B. INT’L L. COMM’N 59, 76-81, U.N. Doc A/CN.4/SER.A/1993/Add.1 (Part 1). In the commentary to the draft articles, it was noted that this provision “covered a domestic concern regarding disciplinary action against officials which should not be covered in the

responsibility of the state are no longer “hidden,” but are themselves subjects of international responsibility. The loss of control of the state over the immunity of its officials, in particular those at the higher level, in itself is a sanction that affects the state. Dupuy notes that “the promoters of the various international criminal courts undoubtedly intended, by punishing individuals, also to punish the actions of the State to which the acts may be attributed.”¹⁰⁰ Though the effect of that sanction in itself on the systemic conditions of international crimes remains speculative, this principle does allow us to cross the bridge from the responsibility of individual leaders to the level at which crimes frequently are caused—that of the state.

IV. Systemic Effects of State Responsibility

4.1 Types of involvement of states in international crimes

States can be involved in the commission of international crimes, and thus responsible for their occurrence in several ways. The two ways that are most directly relevant to systemic nature of international crimes are, first, the commission of crimes itself, and second, the use of non-state actors to commit international crimes and/or the failure to prevent such international crimes.

First, states can be directly responsible for acts that, at the individual level, are qualified as international crimes. This will be so when the prohibition of the international crime is binding on the state in question, the acts of individual perpetrators can be attributed to the state, and these acts amount to a breach of the prohibition of the crime as it is binding on the state. It is to be taken into account here that the norms that prohibit certain acts by the state are not necessarily the same as those applying to individuals—but in substance they apply to and proscribe the same acts.¹⁰¹ This is true, for instance, for aggression,¹⁰² genocide,¹⁰³ crimes against humanity,¹⁰⁴ torture,¹⁰⁵ and terrorism.¹⁰⁶

draft articles.” Int’l L. Comm’n. [ILC], Report of the International Law Commission on the work of its fifty-first session (1999), ¶ 72, U.N. Doc. A/CN.4/504, (Feb. 8, 2000), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/279/60/PDF/N0027960.pdf?OpenElement>.

100. Dupuy, *supra* note 98, at 1091; *See also* Triffterer, *supra* note 18, at 346 (noting that the crimes within the jurisdiction of the ad hoc tribunals are “typically committed at least partly by persons who act as government representations on behalf of the state or with the silent toleration or even active support of the state” and that a judgment of individual criminal responsibility in many cases “implies an obiter dictum” about the engagement of the state itself in these crimes).

101. *See generally* BONAFÈ, *supra* note 10, at 23-31.

102. Individual responsibility was recognized in the Charter of the International Military Tribunal of Nuremberg art. 4, Aug. 8, 1945, 82 U.N.T.S. 279. While the ICC (temporarily) excludes aggression from the jurisdiction of the International Criminal Court, *see* Rome Statute, *supra* note 19, art. 5 (1998), this does not necessarily affect individual responsibility. For state responsibility see Military and Paramilitary Activities Case (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 3314 (XXIX), 29th Sess., 2319th plen. mtg., U.N. Doc A/RES/36/103 (Dec. 14, 1974). *See also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (2001).
103. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, No. 1021 [hereinafter Genocide Convention]; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, para. 2, May 25, 1993, 32 I.L.M. 1192 [hereinafter I.C.T.Y. Statute]; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 art. 2, ¶ 2, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter I.C.T.R. Statute]; Rome Statute, *supra* note 19, art.27. The ICJ indicated already in its 1996 judgment that state responsibility can not only arise for failure to prevent or punish individuals committing genocide, but also for an act of genocide perpetrated by the state itself. *See* Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, 1996 I.C.J. 595, ¶ 32 (July 11). For the argument that the norms are not the same, *see* Paola Gaeta, *On What Conditions can a State be held Responsible for Genocide?*, 18 E.J.I.L. 631-648 (2007).
104. For individual responsibility *see, e.g.*, Rome Statute, *supra* note 19, art. 7. State responsibility for crimes of humanity is expressly recognized for the crime of apartheid. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid arts. 1, 2, Nov. 30, 1975, 1015 U.N.T.S. 243 (entered into force July 18, 1976). A Greek Court has held that violations of art. 46 of the Fourth Hague Convention of 1907 could be qualified as crimes against humanity. *See* Prefecture of Voiotia v. Federal Republic of Germany, Greek Court of Cassation, May 4, 2000, *reported in* 3 Y.B. INT'L HUMANITARIAN L. 511, 514-515 (2000). Otherwise, acts for which individuals could be charged with crimes against humanity could in any case be considered in terms of state responsibility for (gross) violations of human rights.
105. "Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers." Prosecutor v. Furundzija, Case No. IT-95/17/1, Judgment, ¶ 142 (Dec. 10, 1998).
106. Individuals can be held responsible for terrorism under, *e.g.*, the 2000 International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, 54th Sess., U.N. Doc. A/RES/54/109 (Feb. 25, 2000), and the 1998 International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, 52nd Sess., U.N. Doc. A/RES/52/164 (Jan. 9, 1998). In his dissenting opinion in the Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie case, President Schwebel suggested that the Montreal Convention "may be interpreted to imply that the Convention does not apply to allegations against persons accused of destroying an aircraft who are claimed, as in the instant case, to be acting as agents of a contracting State." Questions of Interpretation and Application of 1971 Montreal Convention arising from Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J.

Second, to the extent that acts of individual authors of international crimes are not attributable to a state, that state may nonetheless incur responsibility if it actively supports, perhaps even relies on, such actors to achieve aims of state policy.¹⁰⁷ In the alternative, a state may fail to act to prevent such non-attributable acts.¹⁰⁸ This latter aspect is also the legal core of the principle of responsibility to protect.¹⁰⁹

The distinction between these two categories may in particular cases be thin. Acts of omission often are not simply the result of impotence or lack of unawareness of the threats to which a state should respond, but can equally be active forms of policy. Christenson notes: "Though obligatory concerted action may be demanded by an international norm or directive, benign neglect of State may serve many subjective political purposes. Indeed, through loose reins government inaction can function as easily as a conscious part of the prudent exercise of power."¹¹⁰ Moreover, when conditions of knowledge, foreseeability, intent and causation are satisfied, responsibility based on failure to control or prevent may come close to attribution for purposes of state responsibility.¹¹¹

9, 64 (Feb. 27) (dissenting opinion of President Schwebel). However, his wording is cautious and Judge Schwebel subsequently proceeded on the assumption that the Convention does apply to persons allegedly State agents who are accused of destroying an aircraft. *Id.* Judge Bedjaoui noted that the words "any person" in art.1 of the Montreal Convention mean that "the Convention applies very broadly to 'any' person, whether that person acts on his own account or on behalf of any organization or on the instructions of a State." Questions of Interpretation and Application of 1971 Montreal Convention arising from Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J 114, 147 (Apr. 14) (dissenting opinion of Judge Bedjaoui). As to state responsibility, see generally L. Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISR. Y.B. ON HUM. RTS. 233 (1989), and Sompon Sucharitkul, *Terrorism as an International Crime: Questions of Responsibility and Complicity*, 19 ISR. Y.B. ON HUM. RTS. 247, 252 (1989).

107. *Military and Paramilitary Activities (Nicar. v. U.S.)*, *supra* note 102, ¶¶ 110, 115.

108. See Genocide Convention, *supra* note 103, art. 1; see also Alvarez, *supra* note 38, at 367 (noting that "international lawyers characterize offenses in [Rwanda] as crimes of states, because such offenses, either by definition or because of their scale or scope, tend to require the connivance or at least acquiescence of governmental authority.").

109. See The Secretary-General, Implementing the Responsibility to Protect: Report of the Secretary-General, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009); see also Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007).

110. Christenson, *supra* note 38, at 316 (citing 1 WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 464-71, *reprinted in* 1 THE FOUNDERS' CONSTITUTION at 3, 5 (Philip B Kurland & Ralph Lerner eds., 1987). Note, though, that important differences exist in the required proof for a wrongful act: responsibility is based on some form of fault rather than objective responsibility. *Id.* Christenson, *supra* note 38, at 321-322, 362; Abraham D. Sofaer, *Terrorism, the Law and the National Self-Defence*, 126 MIL. L. REV 89, 102-104 (1989).

In either case, the state can be involved in the commission of international crimes in a way that will trigger an internationally wrongful act and that thereby opens the door to application of the principles of reparation.

4.2 The role of state responsibility in regard to international crimes

At this point, it has to be recognized that the law of international responsibility has only a relatively minor role to play in regards to system criminality. The international legal order has at its disposal a variety of “tools” to address causes and effects of system criminality, including such instruments as military intervention, economic sanctions, political pressure by states or international organizations, development aid, etcetera.¹¹²

These generally can have significant effects on the wrongdoing state in question and may go a long way towards addressing the systemic conditions of international crimes. Eventually, one way or another, such conditions were removed in Nazi-Germany, Cambodia and Iraq. The way in which the international community, even if often too late, may crack down on states involved in system criminality may well be compared with criminal responses to individuals. Simpson rightly notes that narrow definitions of criminal law (requiring criminal courts or incarceration (*Blaskic*) need to be modified when we contemplate the way in which certain states are stigmatised and punished by international society.¹¹³

However, the fact of the matter is that in the toolbox for responding to state involvement in international crimes, state responsibility is only one of those tools, and certainly not the most important. Many states, including the United States, have taken the position that the proper responses of the international community towards cases of system criminality are to be left to political organs, rather than to the domain of international responsibility.¹¹⁴ *This also explains the demise of the concept of “state crimes,”*¹¹⁵ *as well as more generally the virtual non-use of state responsibility in situations of system criminality.* The law of responsibility was not

112. W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75 (1996).

113. Simpson, *supra* note 4, at 78 (footnote call number omitted).

114. Int'l L. Comm'n [ILC], *State Responsibility: Comments and Observations received from Governments*, 53, U.N. Doc. A/CN.4/515 (Mar. 19, 2001); *see also* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 247 (2002).

115. *See, e.g.*, Eric Wyler, *From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law'*, 13 EUR. J. INT'L L. 1147 (2002).

a major factor in, for instance, dismantling the apartheid regime in South Africa, or the regimes of Pol Pot, Slobodan Milosevic or Saddam Hussein. *Several scholars, including Jennings and Koskeniemmi, have pointed out that in this area international law may be better served by political processes than by formal responsibility.*¹¹⁶

There is a noticeable difference between the domestic level and the international level. While domestically responsibility (notably individual criminal responsibility) is seen as the harshest intervention, this certainly is not true at the international level (though it may be true for an individual target).¹¹⁷ Other means target the state much more directly, e.g. sanctions and military intervention.¹¹⁸

The *Genocide Case* before the ICJ was a rare exception to the predominantly political responses to the role of organized entities cases of system criminality.¹¹⁹ The fact that, largely due to the jurisdictional limitations, neither the ICJ nor any other court was able to identify a collectivity that was responsible for the genocide illustrates the shortcomings of the law of international responsibility in dealing with such entities in system crimes and the need for rethinking of the connection between international law and system criminality.¹²⁰

Despite the relatively modest role of international responsibility in relation to system crimes, it is submitted that state responsibility may play a distinct and potentially significant role in the responses of the international community to situations of system criminality. Three considerations are relevant here. First, the law of international responsibility may at least in theory serve each of the aims that international law in general may aspire to in regards to situations of system criminality: termination and prevention of recurrence.¹²¹

Second, in view of the overwhelming dominance of political responses to situations of system criminality, that only to a relatively limited extent has been

116. See Robert Jennings, *International Law Reform and Progressive Development*, in LIBER AMICORUM: PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY 325, 328 (G Hafner et al. eds., 1998); Martti Koskeniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 BRIT. Y.B. INT'L L. 337 (2002).

117. Tallgren, *supra* note 42, at 589.

118. *Id.*

119. See *Genocide Case*, *supra* note 5.

120. See, e.g., Gaeta, *supra* note 103; Claus Kreß, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT'L L. 619 (2007); Christian Tomuschat, *Reparation in Cases of Genocide*, 5 J. INT'L CRIM. JUST. 905 (2007); Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. INT'L CRIM. JUST. 889 (2007).

121. See Simpson, *supra* note 4, at 74; Reisman, *supra* note 112.

subjected to and embedded in legal procedures and safeguards,¹²² the law of international responsibility can bring an important rule of law quality to the legal responses to situations of system criminality.¹²³

Third, in assessing the role that state responsibility has played, or can play, in regard to systemic occurrences of international crimes, we should take a broad look at the type of practices that may be influenced by the law of responsibility. There is no need to confine us to claims before international courts and tribunals. The principles play a distinct role in peace treaties by which the legal consequences of war have been determined and the provisions of which often go to the heart of the systematic causes of international crimes,¹²⁴ as well as in the practice of political organs.¹²⁵

The fact that the law of state responsibility largely, though not exclusively, functions retrospectively—after the moment where the injury has been caused, does not necessarily limit the potential relevance of this body of law. In situations of continuing violations principles of responsibility may both have backward looking and forward looking effects. Even if the crimes in question may belong to the past, the conditions that helped them come about (such as a particular piece of discriminating legislation) may still exist, creating the possibility of re-emergence of criminality.

It follows that the individual and state responsibility can fulfil complementary roles. Trindade observes that the current “compartmentalized conception of international responsibility—of States and individuals—leads . . . to the eradication of impunity in only a partial way.”¹²⁶ Recognizing the possibility that individual and state responsibility are both applicable, the ICJ referred in the *Genocide Case* to a ‘duality of responsibility.’¹²⁷

Turning the substance of the principles of reparation of the international responsibility, it seems clear that while many and perhaps all of the principles of

122. Nigel D. White, *Responses of political organs to crimes by states*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 314.

123. IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS 79-80 (M Nijhoff Publishers 1988).

124. Gattini, *supra* note 2, at 108-109 (discussing the provisions of the Potsdam Declaration of Aug. 2 1945).

125. *See infra* § 5.

126. Trindade, *supra* note 10 at 259.

127. *Genocide Case*, *supra* note 5, ¶ 173; *See also* Franck, *supra* note 67, at 573 (noting that “genocide is a hydra-headed monster. It warrants a multifaceted response. The heralded advent of individual liability should not cloud our understanding of the continued importance of state responsibility.”); BONAFÈ, *supra* note 10, at 43, 221.

reparation are fully applicable to situations of system criminality, not all of them specifically deal with the systemic conditions of such crimes.

For instance, the principles of cessation and continued performance are as relevant for system criminality as they are for ordinary wrongful acts. However, they do not touch upon systemic nature, and the mere fact that a state would return to performance of the obligation not to torture, would in itself not have any consequences towards the continued existence of the conditions that facilitated the act of torture in the first place (such as permissive legislation, moral climate etcetera).

Likewise, also the normal reparatory functions of remedying damage¹²⁸ is clearly relevant for cases of system criminality. In the *Application of the Genocide Convention* case, involving facts that arguably could be characterised in terms of system criminality, Bosnia and Herzegovina claimed ‘normal’ restitution and compensation.¹²⁹ Also, in the Lockerbie incident the injured states confined themselves to demanding that the Government of Libya must “surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials” and “pay appropriate compensation,” even though it generally was assumed that the highest organs of the state were involved the Lockerbie bombing.¹³⁰ The fact that the injured state(s), or the international community, may wish to move beyond normal reparation by invoking (also) aggravated responsibility, does not exclude ‘normal’ reparation. However, there is little in the principles of compensation that is specifically relevant for systematic conditions of international crimes. Significantly, international law continues to reject punitive damages. The Inter-American Court of Human rights stated in the *Velasquez-Rodriguez* case that the idea of awarding damages to deter or to serve as an example “is not applicable in international law.”¹³¹

128. See CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 28 (1987); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 234-236 (1953).

129. See *Genocide Case*, *supra* note 5, ¶¶ 14, 462 (Feb. 26), (eventually the Court rejected the claim for compensation).

130. Letter dated 20 December 1991 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary General, UN Doc. S/23308 (Dec. 31, 1991), incorporated in S.C. Res. 731, U.N. Doc S/Res/731 (Jan. 21, 1992), and S.C. Res. 748, U.N. Doc S/Res/748 (Mar. 31, 1992). See *Velasquez Rodriguez Case*, 1989 Inter-Am. Ct. H.R. (Ser. C) No. 7, at 38 (July 21, 1989); see also *Eri. v. Eth.*, *supra* note 65, ¶26. See also Andreas Zimmermann & Michael Teichmann, *State Responsibility for International Crimes*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW*, *supra* note 1 at 298.

For two other forms of reparation, the law of state responsibility may have a somewhat more direct effect on systemic conditions of international crimes, however: punishment and guarantees of non-repetition.

4.3 Punishment as form of reparation

Punishment of individuals, that, as indicated in section 3 above, may in certain conditions have an effect on the systemic conditions of international crimes, in itself can be part of the obligations of states and a legal consequence of wrongful acts. The obligation of states to punish individuals, also if they are state officials, is primarily governed by primary rules. Most of the acts that entail individual responsibility imply for the state the obligation to prosecute. This is the case for obligations in relation to torture,¹³² war crimes¹³³ and genocide.¹³⁴ This can also be based on obligations under human rights treaties; illustrative is the practice of the Inter-American Court on Human Rights that in its practice since *El Amparo v. Venezuela*¹³⁵ and *Velásquez-Rodríguez*, has ordered the state to initiate criminal investigations into the murders and, if appropriate, punish the responsible parties.¹³⁶

The obligation to punish responsible individuals can also be construed as a form of reparation due by the state to which the act can be attributed. Article 45(2)(d) of the 1996 ILC draft articles provided that the injured state is entitled to satisfaction that may consist, in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, of disciplinary action against, or punishment of, those responsible.¹³⁷

132. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 4-7, G.A. Res. 39/46, Annex, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987); *see, e.g.*, *Godínez Cruz v. Honduras*, 1989 Inter-Am. Ct.H.R. (ser. C) No. 5, ¶¶ 184–185 (Jan. 20, 1989) (This obligation is also based on human rights law, stating that the obligation to punish was part of the “legal duty to take reasonable steps to prevent human rights violations.”).
133. Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T.S. 3516, 75 U.N.T.S. 287.
134. Convention on the Prevention and Punishment of the Crime of Genocide arts. 4-6, Dec. 9, 1948, 102 Stat. 3405, 78 U.N.T.S. 277.
135. *See El Amparo v. Venezuela*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28, ¶¶ 62-62 (Sept. 14, 1996).
136. *See generally* Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 351-419 (2007).
137. This is not included in the final articles of the ILC, but is understood to be covered by the words ‘or another appropriate modality’ in art. 37(2). *See* Peter Tomka, *International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International*

The ILC did not appear to have considered in this context acts that were criminalized by international law and that would result in individual responsibility. Also the few cases that have arisen in state practice, such as the *Aerial Incident Case*¹³⁸ and the *Rainbow Warrior Case*, did not involve acts that entailed individual culpability under international law.¹³⁹ This also is true for the practice of human rights courts.¹⁴⁰ However, punishment as form of satisfaction would appear to apply *a fortiori* to acts that can be attributed to individuals.¹⁴¹

4.4 Guarantees of non-repetition

Of particular relevance are guarantees of non-repetition. The obligation to offer a guarantee of non-repetition in cases of a violation of any primary rule of

Law (Prevention of Transboundary Harm from Hazardous Activities), Statement of the Chairman of the Drafting Committee, at the 53rd session of the ILC (1996), http://untreaty.un.org/ilc/sessions/53/english/dc_liab.pdf; see also JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 233 (2002).

138. Following the shooting down of an Israeli plane by Bulgarian agents, Israel asked the Court to take note "of the failure of the Government of Bulgaria to implement its undertaking to identify and punish the culpable persons." *Aerial Incident of 27 July 1955 (Isr. v. Bulg.)*, 1959 I.C.J. 127 (Mar. 5).
139. The UN Secretary General ordered the detention of the two responsible French Service agents as part of the reparation due to New Zealand. *Rainbow Warrior (N.Z. v. Fr.)* 74 I.L.R. 271, 272 (1987). Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations, see 8 WHITEMAN DIGEST 742-743 (1967) and in the case of the killing of two United States officers in Tehran, 80:1 REVUE GENERALE DE DROIT INT'L PUBLIC 257 (1894).
140. See, e.g., *Clemente Teherán et al. v. Colombia*, 1998 Inter-Am. Ct. H.R. (ser. E) No. 2 (June 19, 1998), calling on Columbia to "investigate the acts denounced which gave rise to these measures, for the purpose of obtaining effective results that would lead to the discovery and punishment of those responsible." See also *Godínez Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 31 (July 21, 1989). In some cases the distinction between a remedy and a continued obligation is not drawn sharply. In the *Godínez Cruz Case*, *id.* at No. 5, ¶¶ 184-185, the Court stated that the obligation to punish was part of the "legal duty to take reasonable steps to prevent human rights violations." See also the *Giraldo Cardona Case (Giraldo Cardona v. Peru)*, 1999 Inter-Am. Ct. H.R. (ser. E) No. 7 (Sept. 30, 1999); *Blake v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, ¶¶ 63-65 (Jan. 22, 1999).
141. See Shabtai Rosenne, *State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 N.Y.U. J. INT'L L. & POL. 45 (1998), for Austria commenting on the first draft of the ILC Articles, in that art. 45(2)(d) should better reflect the growing number of international obligations to prosecute or extradite individuals. See Int'l L. Comm'n [ILC], *State Responsibility: Comments and observations received from Governments*, 111, UN Doc. A/CN.4/488 (Mar. 25, 1998); see also BONAFE, *supra* note 10, at 234.

international law is by now generally accepted.¹⁴² The International Court of Justice, in the *LaGrand*,¹⁴³ *Avena*¹⁴⁴ and *DRC v. Uganda* cases,¹⁴⁵ took note of the respective request for such a guarantee by the applicant and has acknowledged in each of these cases that the responsible state had, in one way or another, already given such guarantee. The possibility to request a guarantee of non-repetition is not dependent on the commission of international crimes.¹⁴⁶ Indeed, both *LaGrand* and *Avena* did deal with 'simple' violations of international law certainly not amounting to 'international crimes'.¹⁴⁷ The ILC included the obligation is contained in art. 30 of the ILC draft articles on state responsibility, *i.e.* in the general part of Part Two and not in Chapter III thereof, dealing with serious breaches of peremptory norms.¹⁴⁸

However, the guarantee of non-repetition may have particular relevance in case of international crimes. The 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' list a number of forms of guarantees of non-repetition that are particularly relevant.¹⁴⁹ These include:

- (a) Ensuring effective civilian control of military and security forces;

- 142. Giuseppe Palmisano, *Les garanties de non-répétition entre codification et réalisation juridictionnelle du droit: À Propos de l'affaire LaGrand*, 106:4 REVUE GENERALE DE DROIT INT'L PUBLIC 753, 758 (2002); Zimmermann & Teichmann, *supra* note 130, at 299-301.
- 143. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 513 (Sept. 16).
- 144. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. 69 (Feb. 5).
- 145. *Armed Activities on the Territory of the Congo (De. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, para. 257 (Dec. 19), available at www.icj-cij.org/docket/files/116/10455.pdf.
- 146. See Elisabeth Lambert-Abdelgawad, *La spécificité des réparations pour crimes internationaux*, in *THE FUNDAMENTAL RULES OF INT'L LEGAL ORDER* 179 (Christian Tomuschat et al. eds., 2006).
- 147. This is also confirmed by the fact that such obligation is contained in art. 30 of the ILC draft articles on state responsibility, *i.e.* in the general part of Part Two and not in Chapter III thereof, dealing with serious breaches of peremptory norms. See *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its Fifty-third session (2001), (extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), ch.IV.E.1).
- 148. Zimmermann & Teichmann, *supra* note 130, at 300-301.
- 149. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, Annex., U.N. GAOR, 60th Sess., U.N. DOC.A/RES/60/147 (Dec. 16, 2005), available at www2.ohchr.org/english/law/remedy.htm.

- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The Inter-American Court of Human Rights has been particularly effective in applying these principles through a series of specific orders that seek to provide guarantees of non-repetition.¹⁵⁰ In a growing number of cases, the Court has ordered changes to national legislation and domestic policies. In *Castillo-Petruzzi v. Peru*,¹⁵¹ the Court held that “domestic laws that place civilians under the jurisdiction of the military are a violation of the principles of the American Convention”; consequently, it ordered Peru “to adopt the appropriate measures to amend those laws.”¹⁵² In *Olmedo-Bustos v. Chile*,¹⁵³ it required Chile to amend its national constitution in order to prohibit prior censorship and, ultimately, to allow for the exhibition of the movie *The Last Temptation of Christ*.¹⁵⁴ While the latter case does not deal with system criminality, it does illustrate the power of the Court to address systemic conditions of wrongful acts. Also in *Moiwana Community v. Suriname*, that certainly qualifies as a case involving international crimes, the

150. See generally Antkowiak, *supra* note 136, at 351–419.

151. *Castillo-Petruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. D) No. 52 (May 30, 1999).

152. *Id.* ¶ 222.

153. *The Last Temptation of Christ Case (Olmedo-Bustos v. Chile)*, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 73 (Feb. 5, 2001).

154. *Id.* ¶¶ 97–98.

Court addressed measures aimed at avoiding the repetition of human rights violations such as “public acts or works that seek, *inter alia*, to commemorate and dignify victims, as well as to avoid the repetition of human rights violations”.¹⁵⁵

It has been argued that instances of state crimes should lead to an obligation of the responsible state to change its domestic constitutional structure. De Hoogh argues that the state responsible for international crimes will “be under an obligation to change its government, to change its constitution to the extent necessary, and to hold free elections so as to prevent the recurrence of criminal acts”.¹⁵⁶ This might be seen as a particularly intrusive form of guarantees of non-repetition. However, while in particular cases such domestic changes indeed would undermine and perhaps remove causes of international crimes, due to a lack of state practice it cannot be argued that they are required under international law as a consequence of previously committed state crimes.¹⁵⁷

History has shown a wide variety of other options to respond to situations of system criminality that in more or less direct forms seek to prevent repetition, including. Other responses may include coercion to secure the fulfilment of the obligation and restoration of rights,¹⁵⁸ *debellatio* of a state that started a war of aggression or a genocide, occupation of its territory by UN administration or otherwise, or imposed measures of arms control.¹⁵⁹ State practice provides limited but unequivocal support for these responses, for instance in respect of administration of Germany and Japan after the Second World War and the economic sanctions imposed on Yugoslavia and Iraq. At present it cannot be said that such consequences are part of the customary law of state responsibility. However, article 41(3) of the ILC Articles provides that the articles’ consequences

155. *Moiwana Village Case (Moiwana Community v. Suriname)*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 191 (June 15, 2005) (note that the actual orders of the Court in this case resemble more satisfaction than guarantees of non-repetition).

156. ANDRE DE HOOGH, *OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES* 195, 197 (Kluwer Law International 1996).

157. Zimmermann & Teichmann, *supra* note 130, at 301-302.

158. This was the definition of ‘sanctions’ by the ILC in its early consideration of the concept of crimes. See Document A/9010/Rev.1: Report of the International Law Commission on the work of its twenty-fifth session (7 May-13 July 1973), [1973] 2 Y.B. INT’L L. COMM’N 175, ¶ 5 of the commentary to art. 1, U.N. Doc A/9010/Rev.1 (1973).

159. *Fifth Report on State Responsibility*, *supra* note 60, ¶ 88; See also Bernhard Graefrath & Manfred Mohr, *Legal Consequences of an Act of Aggression: the Case of Iraqi Invasion and Occupation of Kuwait*, 43 AUSTRIAN JOURNAL OF PUBLIC INTERNATIONAL LAW 127–128 (1992); PIETER N. DROST, *THE CRIME OF STATE* 296–297 (1959).

are without prejudice to further consequences that a serious breach of peremptory norms may entail under international law.¹⁶⁰

4.5 Implementation

In particular as regards to guarantees of non-repetition, international law thus may provide for a variety of responses that may undermine the conditions of systemic criminality. The major weakness of international law then is not so much the existence and contents of such legal consequences, as the relatively weak structures for implementation.

In situations of system criminality, we are per definition concerned with crimes that threaten the fundamental values of the international community.¹⁶¹ In principle, the legal responses to such crimes also are largely influenced by the involvement of the international community. This is illustrated by the fact that a large number of states has brought such crimes within the jurisdiction of the International Criminal Court and that, when involving the responsibility of a state, the ILC thought it proper to subject them to a separate Chapter on serious breaches of peremptory norms of international law. Article 40 of the ILC articles characterizes this aggravated responsibility by the fact that it flows from “a serious breach by a State of an obligation arising under a peremptory norm of general international law.”¹⁶² The underlying characteristic, also expressed in the definition of ‘serious’ in terms of ‘systematic’ in article 40(2), mostly will be that the acts that led to the breach of international law were part of a systematic policy of the state.

It follows from the fact that international crimes affect core foundations of the international community that the effectuation of responsibility is in the final analysis thus not in the hands of individual states. The responsibility can be ‘pulled’ by the international community.¹⁶³ In regard to state responsibility, this

160. Int’l L. Comm’n [ILC], Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, art.59, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc> [hereinafter Articles on State Responsibility] (stating that the draft articles are without prejudice to the Charter of the United Nations).

161. Pellet, *supra* note 10, at 65-66.

162. Articles on State Responsibility, *supra* note 160, art. 40.

163. Responsibility of individuals or collectives against the international community of course can co-exist with responsibilities in or towards particular states. In criminal law, it co-exists with responsibility of individuals in states that have jurisdiction over the crimes. In the law of state responsibility, it coexists with responsibility towards the injured state(s).

follows from the fact that in the ILC Articles on State Responsibility injured states are not, as is the case in regard to ‘normal breaches’ allowed to waive a claim that they may have against a responsible state¹⁶⁴ as well as the rights of non-injured states.¹⁶⁵ In regard to individual responsibility this follows from the doctrines of complementarity in the ICC statute¹⁶⁶ and primacy in the ICTY and the ICTR statutes.¹⁶⁷ However, compared to the procedures that may be applied to enforce the law of individual responsibility, through the variety of ad hoc and permanent international and internationalized tribunals, the implementation of the law of state responsibility faces major weaknesses.

The very systemic nature of the involvement of states in international crimes that causes these very crimes to occur also causes structural limitations in the ability of the international legal order to enforce the law of state responsibility against these states. The implementation of the law of state responsibility “cannot rise above the implications of sovereignty, which is the dominant conceptual structure of international law.”¹⁶⁸ The sovereignty of states in certain respects underlies both the possibility of system criminality committed by a state and the power of the remedial mechanisms provided by the law state responsibility.

The system of state responsibility largely relies on decentralised enforcement, by relying on invocation by injured¹⁶⁹ or interested¹⁷⁰ states. The latter possibility is particularly relevant, as it permits States other than the injured State to invoke the responsibility of another where “the obligation breached is owed to the international community as a whole,” which by definition will be the case in situations of system criminality. These states may invoke the responsibility of another to call it to stop the acts that result in international crimes, but precisely in situations of system criminality, that is unlikely to offer a solution. System criminality frequently occurs in time of crisis when a government thinks its legitimacy is being challenged or that the state is under threat.¹⁷¹ In these

164. Articles on State Responsibility, *supra* note 160, arts. 20, 45; *see also* Pellet, *supra* note 10, at 70.

165. Articles on State Responsibility, *supra* note 160, art. 48.

166. *E.g.*, Rome Statute *supra* note 19, art. 17 (Although the principle protects sovereignty and jurisdiction of states parties, it also allows for the ICC to pull the case if national prosecution does not satisfy the criteria set forth in the Rome Statute).

167. I.C.T.Y. Statute, *supra* note 103, art. 7 § 2; I.C.T.R. Statute, *supra* note 103, art. 8 § 2.

168. Iain Scobbie, *Assumptions and Presuppositions: State Responsibility for System Crimes*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 1, at 296.

169. Articles on State Responsibility, *supra* note 160, art. 42.

170. *Id.* art. 48.

171. *See, e.g.*, Kelman, *supra* note 13, at 34; Scobbie, *supra* note 168, at 296-297.

circumstances, “invoking the responsibility of that State might simply be an exercise in talking to the profoundly deaf.”¹⁷²

The same structural features of the international legal order that limit the chances that a state against which a claim of responsibility is invoked will change its policies, also at a more technical level may restrict the possibilities that a claim is brought in the first place. While the law of state responsibility contains certain innovative features that cater to the interests of the international community, such as article 48, in other respects it remains embedded in and characterised by traditional sovereignty-based concepts.

One example is the relationship between the regime under article 48 and the law of diplomatic protection.¹⁷³ Article 48(3) expressly makes the invocation of responsibility by an interested state subject to the same requirements as invocation by an injured state, which are contained in articles 43-45. Article 44(a) provides that a state may not invoke the responsibility of another if “the claim is not brought in accordance with any applicable rule relating to the nationality of claims.”¹⁷⁴ This is hard to reconcile with the Commission’s claim, made in the commentary to its Draft Articles on Diplomatic Protection, that the invocation of responsibility by an interested state under article 48(1)(b) is not subject to the conditions set out in article 44, including the nationality of claims rule.¹⁷⁵

The 2006 Draft Articles on Diplomatic Protection are predicated on the link of nationality and thus preclude the protection of non-nationals. This ensures that the “communitarian promise” of article 48(1)(b) remains largely ineffective. This conclusion is supported by draft article 8 on the protection of refugees.¹⁷⁶ Scobbie

172. Scobbie, *supra* note 168, at 297.

173. *See Id.* at 290-293; *see also* A. Vermeer Kunzli, *A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes*, 56 I.C.L.Q. 553 (2007).

174. *See* Commentary to Article 44, [2001] 2 Y.B. Int’l L. 128, ¶2, note 722, A/CN.4/SER.A/2001/Add.1.

175. Report of the International Law Commission to the General Assembly, 61 U.N. GAOR Supp. (No. 10) at 87, ¶ 2, n. 245, U.N. Doc. A/61/10 (2006); compare E. Milano, *Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?*, 35 N.Y.I.L. 103-108 (2004).

176. 1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

rightly asks “[i]f a State cannot seek remedies for non-nationals established within its territory for injuries caused by their national State, how can it seek the ‘performance of the obligation of reparation’ for those with whom it lacks all connection? How could it establish that it was acting in their interest?”¹⁷⁷

The ILC recognized that the normal principles for implementation would not in all cases be adequate to achieve the necessary systemic effects. Article 41 provides for an obligation to cooperate to bring to an end serious breaches of peremptory norms, for a prohibition of recognition of a situation created by such breaches, and for a prohibition to render aid or assistance in maintaining that situation. Both obligations, usually implemented in the framework of international organizations, may exert some pressure on states that are involved in systematic criminality, but at the same time yet have to prove their strengths.¹⁷⁸

The situation is essentially different, however, in cases where human rights courts, with compulsory jurisdiction, have been empowered to address systemic causes of wrongful acts, in particular in the European Court of Human Rights¹⁷⁹ and the Inter-American Court of Human Rights,¹⁸⁰ and it is indeed in such cases that the principles of reparation, notably the various forms of guarantees of non-repetition, acquire most power to undermine the conditions for system criminality.

V. Implementation through the Security Council

While the law of state responsibility thus has some normative potential for dealing with the systemic causes of international crimes, it also is clear that the practical effect is limited by the legal power of courts to give effect to the law. In these situations a dominant role will be played by political organs, at regional and global levels. Indeed, as indicated above, states have preferred to keep the

Draft Articles on Diplomatic Protection, art. 8, U.N. GAOR, 61st Sess., Supp. (No. 10), U.N. Doc A/61/10 (2002).

177. Scobbie, *supra* note 168.

178. See Stefan Talmon, *The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 101-125 (Christian Tomuschat & Jean-Mark Thouvenin eds., Nijhoff 2006).

179. Particularly noteworthy is the practice of the Court in regards to the so-called pilot case, see Luzius Wildhaber, *Pilot Judgments in Cases of Structural or Systemic Problems on the National Level*, in *THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS* 69-75 (Rüdiger Wolfrum & Ulrike Deutsch eds., Springer 2009).

180. See *infra* text accompanying notes 148-53.

consequences of state involvement in international crimes to such political organs, rather than to the law of state responsibility and to the power of international courts. Key among such political organs of course is the Security Council. Indeed, the international community has channelled most of their responses to situations such as the crisis in Darfur through the Council.¹⁸¹

Although states may have considered the political organs as a preferred alternative to the (implementation of) the law of international responsibility, strict dichotomies are not warranted. Though initial proposals for explicit references to the Council in the work of the ILC were rejected,¹⁸² the Council has a distinct role in regard to the law of state responsibility. Indeed, the Council provides the best solution given the decentralized nature of the international legal system, which otherwise is rather powerless to respond to the category of international crimes.¹⁸³ The Council can act in a complementary way, both in regard to individual responsibility by triggering the jurisdiction of the ICC,¹⁸⁴ and in regard to the involvement of states in international crimes.

The fact that the Security Council acts within the legal context of the Charter also means that the Council cannot separate itself from the established body of secondary rules, for instance on matters of attribution. Indeed, against the overwhelming dominance of political responses to situations of system criminality, that only to a relatively limited extent has been subjected to and embedded in legal procedures and safeguards,¹⁸⁵ the law of international responsibility can bring an important rule of law quality to the legal responses to situations of system criminality.¹⁸⁶

Multilateral responses, including those by the Security Council, to breaches of international law may well be construed in terms of allocation and implementation

181. See Clapham, *supra* note 79, at 922–923.

182. See also Gaetano Arangio-Ruiz, *On the Security Council's "Law-Making,"* 83 RIVISTA DI DIRITTO INTERNAZIONALE 747, 753 (2000).

183. Roberto Ago, *Eighth Report on State Responsibility: The International Wrongful Act of the State, Source of International Responsibility (continued)*, in [1979] 2 Y.B. Int'l L. Comm'n 43-44, U.N. Doc. A/CN.4/318; see also the discussion of Article 30, Countermeasures in Respect of an Internationally Wrongful Act, in Report of the International Law Commission on the work of its Thirty-first session, 34 U.N. GAOR Supp. (No. 10) at 118-119, U.N. Doc. A/34/10 (1979); Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55, 71 (1994).

184. Rome Statute, *supra* note 19, art. 16.

185. White, *supra* note 122.

186. BROWNIE, *supra* note 123, at 79–80.

of responsibility.¹⁸⁷ Responses by the Council to situations of system criminality can be seen as a measures being taken on behalf of the injured state (perhaps also peoples and groups within states) in matters which affect the interests of the international community as a whole.¹⁸⁸

Moreover, there is a direct, though not necessary, link between its mandate to restore and maintain the peace, the removal of causes of system criminality, and the principles of state responsibility. Although determinations of a threat to the peace do not depend on prior determinations of a wrong,¹⁸⁹ the Council often combines determinations of a threat to the peace with determination of a breach of an obligation. Such findings provide the basis for legal sanctions that are not very dissimilar from consequences of state responsibility.¹⁹⁰

On many occasions the Council has made determinations of illegality in situations of system criminality.¹⁹¹ For instance, in Resolution 1574 (Sudan), it condemned all violations of human rights and international humanitarian law by all parties.¹⁹² In Resolution 1865 (Ivory Coast), it condemned all violations of international humanitarian law.¹⁹³ In Resolution 1572 (Ivory Coast), it condemned the air strikes committed by the national armed forces of Côte d'Ivoire (FANCI), stating that these "constitute flagrant violations of the ceasefire agreement of 3 May 2003."¹⁹⁴ In addition, on many occasions the Security Council has determined breaches of resolutions itself. For instance, in Resolution 1591 (Sudan), the Council deplored "that the Government of Sudan and rebel forces and all other

187. See ROSALYN HIGGINS, PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT 181–84 (1994). A similar broad conception is adopted by Triffterer, *supra* note 18, at 343 (referring to the sanctions imposed or authorized by the Security Council as one example of 'prosecution' of states for crimes of state); See also MATTHIAS HERDEGEN, BEFUGNISSE DES UN-SICHERHEITSRATES: AUFGEKLÄRTER ABSOLUTISMUS IM VÖLKERRECHT [POWERS OF THE UN SECURITY COUNCIL: ENLIGHTENED ABSOLUTISM IN INTERNATIONAL LAW] 20 (C.F. Müller, Heidelberg, 1998)(stating that "[i]n der Regel wird eine Friedensbedrohung durch die schwerwiegende Verletzung von Völkerrechtspflichten begründet."); Bernhard Graefrath, *International Crimes – A Specific Regime of International Responsibility of States and its Legal Consequences*, in INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 161–64. (Joseph H. H. Weiler et al. eds., De Gruyter 1988).

188. Gowlland-Debbas, *supra* note 183.

189. Karel Wellens, *The UN Security Council and the New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SECURITY L. 15, 50 (2003) (U.K.).

190. Jean-Marc Sorel, *L'élargissement de la notion de menace contre la paix*, in LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIES, COLLOQUE DE RENNES 3, 3–57 (1995) (Fr.).

191. *Id.* at 63–64.

192. S.C. Res. 1574, U.N. Doc. S/RES/1574 (Nov. 19, 2004).

193. S.C. Res. 1865, U.N. Doc. S/RES/1865 (Oct. 13, 2009).

194. S.C. Res. 1572, ¶1, U.N. Doc. S/RES/1572 (Nov. 15, 2004).

armed groups in Darfur have failed to comply fully with their commitments and the demands of the Council referred to in resolutions 1556 (2004), 1564 (2004), and 1574 (2004).”¹⁹⁵

In such cases, there exists indeed a close relationship between the fundamental norms of the Charter (Art. 39), and determinations of the occurrence of systematic international crimes.¹⁹⁶ The condemned acts at the same time constituted a violation of preemptory norms of international law and international crimes, as well as a threat to the peace.

As to the consequences of determinations of international crimes involving wrongful acts by states, the Council commonly calls for cessation of the violations of international law, conforming to the prime consequences of an internationally wrongful act.¹⁹⁷ Moreover, the Council has at its possession several options attuned to the nature of system criminality. The Council can provide for the nullity or invalidity of laws that provide conditions of international crimes.¹⁹⁸ Such resolutions do not create invalidity at domestic level, but do entail legal consequences.¹⁹⁹ The Council also can call for collective non-recognition that may put pressure on states and undermine the systemic base of international crimes.

Of particular importance in addressing situations of system criminality are measures aimed at demobilization and reintegration of members of armed forces;²⁰⁰ the unification and restructuring of defence and security forces;²⁰¹ military training, including in the area of human rights, international humanitarian law, child protection and the prevention of gender-based violence;²⁰² developing capacities of police forces to act in accordance with international standards; and strengthening the judicial system.²⁰³ Such measures bear a distinct resemblance to what the *Basic Principles* envisaged under the heading guarantees of non-repetition.

In Resolution 1572 (Ivory Coast), the Council demanded that the Ivorian authorities stop all radio and television broadcasting inciting hatred, intolerance

195. S.C. Res. 1591, ¶1, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

196. Gowlland-Debbas, *supra* note 183, at 66.

197. *See, e.g.*, S.C. Res. 1828, ¶ 11, U.N. Doc. S/RES/1828 (July 31, 2008).

198. S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965).

199. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

200. *E.g.*, S.C. Res. 1856, ¶ i, U.N. Doc. S/RES/1856 (Dec. 22, 2008).

201. S.C. Res. 1865, *supra* note 193.

202. *See supra* note 141.

203. S.C. Res. 1756, at 5, U.N. Doc. S/RES/1756 (May 15, 2007).

and violence, and requested UNOCI to strengthen its monitoring role in this regard.²⁰⁴

On many occasions, the Council aimed to remove means of support, and in that respect undermine the systemic causes of international crimes, for instance in regard to arms, assistance, advice or training related to military activities.²⁰⁵ Also highly relevant are sanctions aimed at freezing financial assets.²⁰⁶ While such measures often are linked to individuals, they can drain the financial resources of the collectivity.²⁰⁷

The political procedures to which implementation of aggravated state responsibility commonly is subjected have obvious limitations and problems. Determinations of breaches of international law by the Council do not amount to judicial determinations. The Council is a political organ that is used, or not used, for political reasons, and whose procedure is not attuned to legal determinations. It also has, for instance, no proper rules on production of evidence, equality of arms etc.—which cause a continued disconcerting discrepancy between the enforcement of individual responsibility and the enforcement of state responsibility.

But then again, much of the application of principles of state responsibility is outside the courts anyway and in that respect also lacks impartiality. In that respect, the Council while leaving much desired, is not worse than the normal situation of unilateral countermeasures responding to unilateral determinations of international wrongs. Indeed, much of the practice of the Council can be seen as a form of institutional countermeasures that to some extent overcomes the limitations of unilateral countermeasures, in particular collective (but not institutionalized) countermeasures.²⁰⁸ Moreover, if the Council in the operative paragraphs of a resolution determines the violation of a peremptory norm of international law,²⁰⁹ such a finding at least is a *prima facie* assessment of

204. See S.C. Res. 1572, *supra* note 194.

205. S.C. Res. 1857, U.N. Doc. S/RES/1857 (Dec. 22, 2008); S.C. Res. 1572, *supra* note 194.

206. S.C. Res. 1857, *supra* note 205; S.C. Res. 1591, *supra* note 195, at 4; S.C. Res. 1572, *supra* note 194, at 3.

207. See Osiel, *supra* note 69, at 1842–1848 (recommending financial drainage of such organizations as highly effective, while less stigmatizing).

208. Gowlland-Debbas, *supra* note 183, at 73. There is one drawback: whereas unilateral countermeasures always may be subject to a subsequent review and determination for being based on an incorrect assessment of an international wrong, that is not so in the case of the Council. *Id.* at 74. Also note that not in all cases did this involve a failure to conform to the requirements towards a target state as in other cases. *Id.* at 77.

209. The determination of a threat to the peace under article 39 in itself has no binding effect outside that context. See Jochen A. Frowein, *Legal Consequences for International Law Enforcement in Case of Security Council Inaction*, in *THE FUTURE OF INTERNATIONAL*

illegality,²¹⁰ that could trigger the secondary obligations under the law of state responsibility.

VI. Conclusion

The law of individual responsibility and the law of collective responsibility are largely complementary. The major challenge is to combine both approaches within an integrated analytical framework in which the disadvantages of one approach are offset by the advantages of the other and *vice versa*.

Individual responsibility may in certain cases have effects on the systemic conditions of international crimes, in particular where international crimes are committed or induced by a limited number of persons who constitute the leadership of a small group. However, the very nature of system criminality obliterates the piecemeal approach of criminal law. Criminal law is not capable of capturing the complex mechanisms and relations of organizations which engage in mass crimes. It provides a distorted and fragmented picture of reality in which the blame rests on a few individuals who, understandably, resent their being sacrificed as scapegoats.

State responsibility epitomizes a more holistic approach which recognizes the responsibility of the wider periphery of bystanders who, though not directly involved, create the breeding ground for mass atrocity. However, its effects are significantly limited as a result of the weak framework for implementation. While a change in the general principles of the law of state responsibility governing implementation is unlikely, more may be expected from the role of human rights courts, on the one hand, and a strengthened rule of law quality of the activities of political organs, notably the Security Council in regard to system criminality.²¹¹

The power of international criminal justice to better respond to the situations of mass atrocities that have inspired its evolution, will largely depend on its ability to transcend individuality and to integrate individual and collective responsibility in a complementary framework that matches the dynamics that cause international crimes to happen in the first place.

LAW ENFORCEMENT. NEW SCENARIOS, NEW LAW? 610 (J. Delbrück ed., Duncker & Humblot, 1993).

210. Wellens, *supra* note 189, at 51–52.

211. Simon Chesterman, *The UN Security Council and the Rule of Law* (NYU School of Law, Public Law Research Paper No. 08-57, 2008), available at <http://ssrn.com/abstract=1279849>.