CONCURRENCE BETWEEN INDIVIDUAL RESPONSIBILITY AND STATE RESPONSIBILITY IN INTERNATIONAL LAW

ANDRÉ NOLLKAEMPER*

This article explores the consequences of the expansion of the domain of individual responsibility for the law of state responsibility. It is induced by a number of recent cases in which state responsibility claims were accompanied by prosecutions of individuals whose acts led to the responsibility of the state. An example is the parallel attribution of (alleged) acts of genocide in the former Yugoslavia between 1991 and 1995 to Yugoslavia and to Slobodan Milosević.

Concurrence between state responsibility and individual responsibility can be relevant from a practical perspective. For instance, findings pertaining to individual responsibility may influence subsequent determinations on state responsibility. Concurrence also is relevant from a theoretical perspective. It raises the question of whether the principles of state responsibility in case of concurrence differ from 'ordinary' cases of state responsibility. This question leads to the grand themes of the unity of state responsibility, the transparency of the state and the ('criminal', 'civil', or *sui generis*) nature of state responsibility.

The legal consequences of concurrence between individual and state responsibility are in large part a matter for primary obligations. For instance, obligation to prosecute individuals suspected of international crimes can directly link the obligations and responsibilities of the state and those of the individual. However, concurrence can manifest itself also in what now are considered the secondary rules of state responsibility, for instance in the sphere of attribution and remedies.

The consequences of the individualisation of international responsibility for the law on state responsibility have not been addressed by the recent restatements of the law of individual responsibility[1] and the law of state responsibility.[2] And while there is a large body of literature on the problem of

* Professor of Public International Law and Director of the Amsterdam Center for International Law, University of Amsterdam. The author thanks Catherina Brölmann, Jann Kleffner, Erika de Wet, and Liesbeth Zegveld for their comments on earlier drafts and Marija Davidovic and Maurits Filet for their research assistance.

[1] Art 25(4) Statute on the International Criminal Court, Rome, 17 July 1998 (hereafter ICC Statute) states: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law', UN Doc A/CONF.183/9.

[2] Art 58 ILC Articles on responsibility of States for internationally wrongful acts (hereafter ILC Articles) states: '[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' The ILC articles are contained in the Annex of UN Doc A/Res/56/83 of 28 Jan 2002.

[*ICLQ* vol 52, July 2003 pp 615–640]

'state crimes' which inevitably emerges in cases of concurrent responsibility, this literature generally does not address the distinct problems pertaining to the influence of individual responsibility on state responsibility.[3]

This article explores certain legal issues that may arise in case of concurrence between state responsibility and individual responsibility. By way of background, Section I describes the development from exclusive state responsibility to concurrent responsibility. The article then considers the argument that in certain cases individual responsibility should be of an exclusive nature (Section II); the functions of state responsibility next to individual responsibility (Section III); certain practical connections between individual and state responsibility (Section IV) and the influence of individual responsibility on the principles of the law on state responsibility (Section V). The article does not address the other side of the coin: the influence of state responsibility on individual responsibility (for instance, the relevance of findings on state responsibility for sentencing of individuals).

I. THE EMERGENCE OF CONCURRENCE BETWEEN INDIVIDUAL AND STATE RESPONSIBILITY

Traditionally, international law attributes acts of individuals who act as state organs exclusively to the state. Although in factual terms states act through individuals,[4] in legal terms state responsibility is born not out of an act of an individual but out of an act of the state.[5] State responsibility neither depends on nor implies the legal responsibility of individuals. The irrelevance of indi-

[3] Specific literature on this aspect is only now emerging: eg, PM Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 1085–1100; H Fox, 'The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to States', in Nisuke Ando et al, *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002) 147; Marina Spinedi, 'State Responsibility *v* Individual Responsibility for International Crimes: *Tertium Non Datu*', 13 *EJIL* (2002) 895; A Bos, 'Crimes of State: In Need of Legal Rules', in G Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) 221; S Rosenne, 'State Responsibility and International Crimes: Further Reflections on Art 19 of the Draft Articles on State Responsibility', 30 *NYU Journal of International Law and Politics* (1997–8), 145; id, 'War Crimes and State Responsibility', 24 *Israel Yearbook on Human Rights* (1995) 63, M Evans, 'International Wrongs and National Jurisdiction', in Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart, 1998) 173; O Triffterer, 'Prosecution of States for Crimes of State', 67 *Revue Internationale de Droit Penal* (1996) 341; *v* Degan, 'Responsibility of states and individuals for international crimes', in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World. Essays in Memory of Li Haopei* (London: Routledge, 2001), 202.

[4] The Permanent Court of International Justice stated: 'States can act only by and through their agents and representatives', *Case of Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion, PCIJ Series B, No 6, 22.

[5] D Anzilotti, *Cours de droit international* (Paris: Recueil Sirey, 1929), transl, by Gilbert Gidel, 503; PM Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States', 3 *EJIL* (1992) 139, at 141–2 (herafter Dupuy, *Anzilotti*).

vidual responsibility can be illustrated by the judgment of the European Court of Human Rights in *Selmouni v France*. In considering the responsibility of France for an act of torture by an individual police officer, the Court noted that the issue of guilt of the French police officials for the alleged acts of torture is a matter for the jurisdiction of the French courts and that '[w]hatever the outcome of the domestic proceedings, the police officers' conviction or acquittal does not absolve the respondent State from its responsibility under the Convention.'[6] While this statement concerned the outcome of a domestic trial, it supports the broader principle that state responsibility under international law is separated from the legal responsibility of the individual.[7] Responsibility of individuals is a matter of national, not international law. In this respect, the dualities between state and individual and between international law and national law are mutually supportive.[8]

The duality between state and individual is reflected in several key principles of the law of state responsibility. The principles governing breach and attribution are indifferent to the subjective conduct of the author of the act. The conduct of the state as a legal person is assessed against an objective standard.[9] Fault may be determined by national law, but in principle does not enter the international legal sphere.[10] The individual also is invisible in the principles governing remedies. Remedies fall on the state, not on individuals whose acts triggered state responsibility. Sanctions on individuals are left to national law. This is one of the reasons why the ILC was reluctant to provide for orders to prosecute individuals as a form of satisfaction.[11]

The invisibility of the individual in the traditional law of state responsibility did have a drawback. Shielding the individual from responsibility undermined

[6] *Selmouni v France*, ECHR Reports V (1999) 29 EHRR 403, para 87 (emphasis added).

[7] The principle also was recognised by the British Ambassador in Washington in the *Mac Leod-case*. He noted that the destruction of the Caroline 'was a public act of persons in her Majesty's service, obeying the order of their superior Authorities. The act, therefore, according to the usages of nations, can only be the subject of discussion between the Two National Governments: it cannot justly be made the ground of legal proceedings in the United States against the individuals concerned'. (Reported in Moore, II A Digest of International Law, 409 et seq; reproduced in Mac Nair, 2 *International Law Opinions*, Cambridge: Cambridge University Press, 1956, 224).

[8] See for discussion of the views of Anzilotti on the isolation of international law as an autonomous entity in relation to national law: Dupuy, *Anzilotti*, op cit, 143 and G Gaja, *Positivism and Dualism in Dionisio Anzilotti*, 1 *EJIL* (1992) 123, at 134. See for the relationship between the dichotomy state-individual, on the one hand, and international law–national law, on the other: H Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940–41* (Cambridge: Harvard University Press, 1942), 96; and P Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard International Law Journal* (1988) 1, at 14.

[9] C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' 281 *Recueil des Cours* (1999) 9, at 281–2.

[10] G 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* (1991) 25, at 26. Arrangio-Ruiz notes that the main theories excluding fault from the elements of an international delinquency were proposed by dualist writers as Triepel, Anzilotti, and Kelsen.

[11] See section V.D below.

the efficacy of international law. Lauterpacht wrote: 'there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.'[12] Philip Allott said: 'the moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails.'[13] These considerations have been given some effect. A large number of criminal law treaties, prosecutions of individuals in national and international courts and the establishment of the International Criminal Court have taken individuals away from behind the shield of the state. International law leaves it no longer to the national legal order to determine which individuals are subjected to obligations and responsibilities and confronts individuals now directly with legal consequences of their acts.[14] This holds also if the individuals act as state agents.[15]

The result is that a limited number of acts can lead both to state responsibility and individual responsibility. These acts include planning, preparing, or ordering wars of aggression,[16] genocide,[17] crimes against humanity,[18] killings

[12] H Lauterpacht, *International Law and Human Rights* (reprint 1968) (Hamden: Archon Books, 1950) 40.

[13] Allott, op cit, 14.

[14] As of yet, the individualisation of responsibility takes the form of international criminal responsibility. However, there is no principled reason why it could not also manifest itself in international civil responsibility; see Lauterpacht, op cit, 41–2; C Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Right Harms', in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) 45.

[15] Although the fact that an individual acted as organ of the state may shield that individual from prosecution, it does not take away the responsibility; see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 Feb 2002, para 60.

[16] Individual responsibility was recognised in Art IV of the Charter of the International Military Tribunal of Nuremberg, 82 UNTS 279. While the ICC (temporarily) excludes aggression from the jurisdiction of the International Criminal Court (Art 5 ICC Statute), this does not necessarily affect individual responsibility. For state responsibility see *Military and Paramilitary Activities* Case, ICJ Reports (1986), 101; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA Res 3314 (XXIX), (1974), UN Doc A/RES/36/103. See also Y Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2001) 98.

[17] Convention on the Prevention and Punishment of the Crime of Genocide, UNTS, vol 78, No 1021 (1951) 277; Art 7 (2) ICTY Statute, 32 ILM (1993) 1192; Art 6 (2) ICTR Statute 33 ILM (1994) 1602; Art 27 ICC Statute. The ICJ indicated 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. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) para 32.

[18] See for individual responsibility, eg, Art 7 ICC Statute. State responsibility for crimes against humanity is expressly recognised for the crime of apartheid: see International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Art 1 and 2. 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, 4 May 2000, reported in 3 *Yearbook of International Humanitarian Law* (2000) 511, at 514–15. 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.

of protected persons in armed conflict,[19] terrorism,[20] and torture.[21] These acts can be attributed twice: both to the state and the individual. State practice provides no support for the proposition that, in cases where responsibility has been allocated to an individual, there can be no room for attribution to the state. After the Second World War, both Germany and Japan were declared liable, even though the political and military leaders were prosecuted for individual crimes.[22] The fact that four individuals, who were assumed to be agents of Libya, were held responsible for bomb attacks in a bar in Berlin in 1986[23] did not discourage the suggestion that Germany should claim compensation from the state of Libya.[24] The prosecution and conviction of the individual responsible for the Lockerbie bombing, considered to be an agent of Libya,[25] did not preclude subsequent claims against Libya for compensation by the United

[19] Such acts can be qualified as grave breaches under Art 146 Geneva Convention [IV]. Also, such acts could be considered as breaches of the prohibition of states to murder protected persons under Art 32 of the same Convention.

[20] Individuals can be held responsible for terrorism under, eg, the 1999 International Convention for the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109, 39 ILM (2000) 568 and the 1997 International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164, 37 ILM (1998) 751. In his Dissenting Opinion in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie case (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections. Judgment*, ICJ Reports (1998) 9, 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' (at 64). However, his wording is cautious and Judge Schwebel proceeded on the assumption that the Convention does apply to persons allegedly State agents who are accused of destroying an aircraft. 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 organisation or on the instructions of a State', *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie case (Libyan Arab Jamahiriya v United Kingdom), Provisional Measures, Order of 14 April 1992*, ICJ Reports (1992) 3, *Diss op*, at 37, para 10. As to state responsibility: L Condorelli, 'The imputability to states of acts of international terrorism', 19 *Israel Yearbook on Human Rights* (1989) 233. S Sucharitkul, 'Terrorism as an international crime: questions of responsibility and complicity', 19 *Israel Yearbook on Human Rights* (1989) 252.

[21] In *Prosecutor v Furundzija*, Judgment of 10 Dec 1998, IT-95/17/1, para 142, the ICTY said: '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.'

[22] Dupuy, op cit, 1086.

[23] In November 2001 a German court convicted four individuals, see <http://www.labelle-trial.de/mainmid/verdict_main_en.htm>. The German court was 'convinced that the Libyan state bears a considerable co-responsibility at least' for the bomb attack, as 'agents of the Libyan secret service played a leading role in planning it'.

[24] Foreign Minister Joschka Fischer's officials pointed out that 'das Ministerium erst loslegen koenne, wenn ein rechtskraeftiges Urteil da sei. Aus diesem Grunde passierte in dem Fall auch seit der muendlichen Urteilsverkuendung im November vergangenen Jahren nichts.' See 'Berliner Richter belasten Gaddafis regiume', at <http://www.spiegel.de/politik/deutschland/0,1518,228970,00.htm> last visited on 14 April 2003.

[25] The Scottish Court in the Netherlands acquitted one suspect and convicted Abdel Basset al-Megrahi. Scottish High Court of Justiciary at Camp Zeist (The Netherlands), *Her Majesty's Advocate v Al Megrahi* (31 Jan 2001), 40 ILM 582. The conviction was confirmed on appeal on 14 Mar 2002.

Kingdom and the United States.[26] The effectuation of responsibility of individual agents of Yugoslavia for acts during the armed conflict between 1991 and 1995 in the ICTY and national courts did not preclude claims by Bosnia-Herzegovina and Croatia in the ICJ. It does not appear that in any of these cases the states against which claims were made invoked the argument that these acts could not be attributed to the state since they already had been attributed to individual agents.

Several authorities have recognised the non-exclusive nature of individual and state responsibility. In *Prosecutor v Furundzija*, the ICTY said: '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.'[27] In its judgment on Preliminary Objections in the *Application of the Genocide Convention* case, the ICJ said with respect to Article IX of the Genocide Convention:

> the reference in Article IX to the responsibility of a State for genocide or for any of the other acts enumerated in Article III does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.[28]

The possibility of double attribution is also recognised in the law on war crimes.[29] Both in its work on the Draft Code of Crimes and on State Responsibility, the ILC has taken the position that responsibility of individual state organs does not exclude state responsibility.[30]

For these reasons, individual responsibility does not necessarily result in the atomisation of the state, a situation feared by Sir Gerald Fitzmaurice.

> It is only by treating the State as one indivisible entity, and the discharge of the

[26] After the conviction of Abdel Basset al-Megrahi, who was said to be a member of the Libyan secret service, the United States and the United Kingdom made renewed calls on Libya to provide compensation. See *The Guardian* (London), 15 Mar 2002, 4.

[27] Judgment of 10 Dec 1998, 38 ILM 317 (1999), para 142.

[28] *Application of the Genocide Convention* case, Preliminary Objections, para 32.

[29] Art 29 Geneva Convention [IV] provides that 'The party to the conflict, in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, *irrespective of any individual responsibility which may be incurred*' (emphasis added). See generally on state responsibility for war crimes: F Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', 40 *ICLQ* (1991) 827; Rosenne, 'War Crimes and State Responsibility', op cit.

[30] In its commentary to former Art 19, the ILC said that individual responsibility 'certainly does not exhaust the prosecution of the international responsibility incumbent upon the state for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs' and that 'the state may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime' (Report of the International Law Commission on the work of its forty-eighth session (Doc A/51/10), General Assembly Official Records Fifty-First Sess, Suppl No 10, 30). It also stated that 'the criminal responsibility of individuals does not eliminate the international responsibility of States for the acts committed by persons acting as organs or agents of the State' (Report of the International Law Commission on the work of its thirty-sixth session (Doc A/39/10), YILC (1984), II, Part Two, 11, para 32).

> international obligations concerned as being incumbent on that entity as such, and not merely on particular individuals or organs, that the supremacy of international law can be assured—the atomization of the personality of State is necessarily fatal to this.[31]

Individual responsibility does not necessarily mean that the state is atomised and that the state could negate its own responsibility by having responsibility shifted towards individual state organs—state responsibility can exist next to individual responsibility.

II. THE CASE FOR EXCLUSIVE INDIVIDUAL RESPONSIBILITY

Although technically individual responsibility does not exclude state responsibility, occasionally it has been suggested that for reasons of legal policy, individual responsibility should be of an exclusive nature. The Nuremberg Tribunal stated that since crimes against international law are committed by men, not by abstract entities, '*only* by punishing individuals who commit such crimes can the provisions of international law be enforced'.[32] Judges Vereshchetin and Shi en Oda considered in their individual Opinions in the *Application of the Genocide Convention* case whether the fact that the Genocide Convention envisages individual responsibility may imply that there is no room for state responsibility.[33] They wrote:

> The determination of the international community to bring individual perpetrators of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action. We share the view expressed by Britain's Chief Prosecutor at Nuremberg, Hartley Shawcross, in a recent article in which he declared that 'There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs' (*International Herald Tribune*, 23 May 1996, 8). Therefore, in our view, it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings.[34]

The argument need not be rejected offhand. If a breach of fundamental rules of international law is brought about by a small group of leaders of a state, against the apparent wishes of the population, and these leaders have been taken from

[31] G Fitzmaurice, 'The General Principles of International Law—Considered from the Standpoint of the Rule of Law', 92 *Recueil des Cours* (1957) 1, at 88. See also WE Beckett, 'Les Questions d'Intérêt Général au Point de Vue Juridique dans la Jurisprudence de la Cour Permanente de Justice Internationale', 39 *Recueil des Cours* (1934) 131, at 155.

[32] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 447. But see Bos, op cit, 225–6, noting that it was intended to exclude criminal liability of legal persons.

[33] Joint declaration of Judge Shi and Judge Vereshchetin ICJ Rep 1996, 631; Declaration of Judge Oda, ibid, 625.

[34] Ibid, 632.

behind the veil of the state and held individually responsible, the question can be asked whether it is still useful to strive for separate responsibility of the state. Removal of the leadership of a state may be sufficient,[35] would spare the innocent (parts of the) population and thus would prevent primitive collective responsibility.[36] However, for reasons considered below, in many factual situations there may be good reasons not to allocate responsibility exclusively to individuals.

III. FUNCTIONS OF STATE RESPONSIBILITY IN CASES OF CONCURRENCE

The functions of state responsibility in regard to acts that are also subjected to individual responsibility can be divided into two categories: reparatory functions and systemic functions. Which function in any particular case will be appropriate and may be pursued by states or the international community depends largely on the circumstances of the case.

A. Reparatory Functions

Mostly concurrent state responsibility will serve the normal reparatory functions of state responsibility: remedying damage caused to injured states or other persons.[37] This situation may be compared to a civil law attachment to individual criminal responsibility—a construction also known in national legal systems.[38] Depending on the circumstances of the case, reparation may entail cessation, compensation, restitution (return of looted objects, release of illegally detained individuals), or satisfaction. The fact that the individual agent is prosecuted or convicted separately need not affect any of these functions.

To confine state responsibility to its reparatory functions is clearly appropriate when state responsibility springs from acts which, although they may lead to individual responsibility, constitute relatively minor transgressions of international law. Examples are isolated killings of protected persons in armed conflict by soldiers of low ranks in breach of official rules and orders, terrorist acts by lower members of the secret service in violation of laws and orders of their state and torture by lower police officials in violation of laws and orders of their state. Each of these acts can both be attributed to the individuals concerned and to the state. However, it does not seem useful to say that in

[35] Tomuschat, op cit, 290.

[36] Kelsen, op cit, 97–8; Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), 6–8; D Cooper, 'Collective responsibility, "moral luck", and reconciliation', in A Jokic (ed), *War Crimes and Collective Wrongdoing* (Malden: Blackwell, 2001), 205.

[37] C Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987) 28; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens and Sons, 1953), 234–6.

[38] See, eg, in the Netherlands, Supreme Court, 25 Nov 1927, NJ 1928, 364.

[39] Triffterer, op cit, 342–3.

such cases the state as a whole is 'criminally responsible' and that remedies should be of a criminal law nature or be targeted at the 'system' of the state.[39] Because the system of the state as a whole cannot be said to be part of the individual criminal act, there is no need to transcend the normal reparatory functions of state responsibility, as may be the case with respect to aggravated responsibility (Section III.B below).

The 2001 ILC Articles recognise this situation. Article 40 creates a special regime for responsibility that is entailed by 'a serious breach by a State of an obligation arising under a peremptory norm of general international law'. Technically, a war crime or act of torture by a lower official may also be qualified as a violation of peremptory norms of international law. However, the threshold 'serious' in Article 40 serves precisely to exclude breaches that are not 'gross' or 'systematic'. The acts therefore would fall under the normal reparatory scheme of the law of state responsibility.

In some cases individual responsibility is subjected to a threshold of gravity. This holds for instance for grave breaches under the Fourth Geneva Convention or for the jurisdictional provisions of the ICC Statute that limit the jurisdiction in respect of war crimes to war crimes 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[40] If individual crimes satisfy these thresholds, in particular those of the ICC Statute, they may also satisfy the threshold of Article 40 ILC Articles. However, the thresholds are not necessarily identical. In any case, not all cases of individual responsibility are subjected to these thresholds, and one thus can envisage acts leading to individual responsibility, yet not amounting to serious breaches of peremptory norms in terms of Article 40.[41]

The reparatory functions of state responsibility are not limited to 'trivial' breaches of international law. In cases where acts do have a systematic character, and may qualify as serious breaches of *ius cogens* in terms of Article 40, the normal reparatory counterparts to individual responsibility may be appropriate. In the *Application of the Genocide Convention* case, involving facts that could easily satisfy the criteria of Article 40 of the ILC Articles, Bosnia and Herzegovina claimed 'normal' restitution and compensation.[42] Likewise, 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 in the Lockerbie bombing.[43] In these cases the injured state(s), or the international community, may wish to move beyond normal reparation by invoking (also) aggravated responsibility. However, that does not exclude 'normal' reparation.

[40] Art 8 ICC Statute.
[41] Bos, op cit, 236.
[42] *Application of the Genocide Convention* case. Preliminary Objections, para 14.
[43] UN Doc. A/46/827; S/23308 (1991), Ann.

B. Systemic Functions

The term 'systemic functions' is used here to refer to functions of state responsibility in regard of aggravated responsibility as provided for in Article 40 of the ILC Articles. Article 40 characterises 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'. 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 seems that the majority of cases in which the international community is concerned with individual responsibility will be part of a systematic policy of the state. For instance, in the cases of Germany and Japan after the Second World War, Cambodia after the Khmer Rouge regime and Yugoslavia after the armed conflict of 1991–5, the individual transgressions of international law could not be separated from the acts of the state.[44] In particular in cases of aggression, [45] genocide,[46] and crimes against humanity,[47] it will mostly be impossible to separate the individual from the state. This may also be true for torture if carried out as an extensive practice of state officials.[48] In particular cases, not only the larger state structures but also the population may be involved.[49]

Hannah Arendt wrote on the acts of Eichmann: 'crimes of this kind were, and could only be, committed under a criminal law and by a criminal state.'[50] In international relations theory it is well accepted that reductionistic explanations of international relations that confine themselves to analyses of acts of individuals, may provide an incomplete understanding of the acts of states.[51]

[44] Crawford notes: 'It is a characteristic of the worst crimes of the period since 1930 that they have been committed within and with the assistance of State structures', 4th report, UN Doc A/CN.4/490/Add 3 (1998), para 89. Also: Dupuy, op cit, 1092; Triffterer, op cit, 346.

[45] See, eg, the Consolidated text of proposals on the crime of aggression discussed in the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2001/L 3/Rev 1, Annex III of 11 Oct 2001.

[46] This was expressed by some states in 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. W Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 419. Also Denmark considered that in cases of genocide or aggression, the responsibility cannot be limited to the individual acting on behalf of the state, ibid, at 442.

[47] Cf the definition of 'crimes against humanity' in Art 7 ICC Statute.

[48] *Prosecutor v Furundzija*, op cit, para 142.

[49] Arangio-Ruiz, 5th Report, UN Doc A/CN 4/453/Add 3 (1993), para 158; Bos, loc cit, 237.

[50] Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (New York: the Viking Press, 1963), 240. See also Allott, op cit, 15; Triffterer, op cit, 346; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 Feb 2002, Diss op of Judge Al-Khasawneh (noting that such acts 'are definitionally State acts' (para 6)) 1. This last remark may overstate the issue, as also other organised groups, that may oppose the state, may provide for the necessary systemic context.

[51] KN Waltz, *Man, the State and War. A Theoretical Analysis* (New York: Columbia University Press, 1959) ch 4–5 and id, *Theory of International Politics* (New York: Columbia University Press, 1979). Note that Waltz adds as a third explanatory level the system of interna-

For these reasons, the basis of the dogma of individual responsibility that 'Crimes against international law are committed by men, not by abstract entities, and *only* by punishing individuals who commit such crimes can the provisions of international law be enforced'[52] is doubtful at best.[53] The word 'only' simplifies the relationship between individual and state. Indeed, it may be more important for the enforcement of 'the provisions of international law' to address states, rather than to confine legal responses to single individuals who carry out a state policy.

The systematic nature of the breaches needs to have consequences for the type of responses to that responsibility. These may need to address systemic causes, rather than merely repairing damage. Many have referred to the functions of aggravated state responsibility in terms of their criminal law nature.[54] The term is controversial and is better left aside as long as structures and procedures to implement criminal state responsibility are non-existent.[55] Concurrence between individual criminal responsibility and state responsibility thus does not necessarily (and certainly not as a matter of positive law) involve criminal state responsibility. It is clear though, that as a matter of legal policy the consequences of aggravated responsibility which supplement individual responsibility may need to go beyond reparation. In their most extreme form, they may resemble the functions of punishment of individuals: to end the transgression of fundamental norms of international law, to remove the threat to international society and to prevent repetition. It would be odd were the international community to consider that a president of a state should have to be imprisoned for many years, whilst leaving in place the structures that made possible and facilitated his acts.

The precise contents of the responses will depend on the circumstances of the case. When the acts are due primarily to a relatively small group or leadership of a state, sanctions may be targeted to that group, for instance by seeking to remove that leadership.[56] Other responses may include coercion to

tional relations between states and more in particular the anarchy that characterises that system. Obviously, this level is not easily addressed by the principles of international responsibility. See A Nollkaemper, 'On the Effectiveness of International Rules', 27 *Acta Politica* (1992) 49.

[52] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 447.

[53] See for a strongly worded statement to the same effect, R Jennings, 'The Pinochet Extradition Case in the English Courts', in L Boisson de Chazournes and V Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality. Liber Amicorum George Abi-Saab* (The Hague: Nijhoff, 2001), 677, at 693, referring to the words of the Nuremberg Tribunal cited above as a 'net and high sounding but dangerous, not to say dishonest, half-truth' that has '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] Dupuy, op cit, 1089, referring to 'double crimes'. See for a discussion of the terminology, A Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?', 32 *Netherlands Yearbook of International Law* (2001) 58–60.

[55] James Crawford, 'Revising the Draft Articles on State Reponsibility', 10 *EJIL* (1999) 443.

[56] Tomuschat, op cit, 290.

secure the fulfilment of the obligation and restoration of rights,[57] *deballatio* 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.[58] State practice provides limited but unequivocal support for these responses, for instance in respect of the administrations of Germany and Japan after the Second World War and the economic sanctions imposed on Yugoslavia and Iraq.

The ILC Articles on state responsibility are not irrelevant to these forms of aggravated responsibility. The general objective of state responsibility (restoring the situation that existed, both materially and legally between the states involved in the responsibility relationship) also may support such systemic objectives. The ILC recognised that the normal principles concerning reparation would not in all cases be adequate to achieve the necessary systemic effects. The consequences provided for in respect to serious breaches of peremptory norms in Article 41 go some way to providing a legal basis for what may be needed by providing 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. However, the ILC recognised that these steps might not go far enough. Article 41(3) provides that these consequences are without prejudice to further consequences that a serious breach of peremptory norms may entail under international law.[59]

States have preferred to keep the responses to serious breaches of peremptory norms of international law outside the law of state responsibility as formulated by the ILC. Illustrative is the position of the United States that 'the responsibility for dealing with violations of international obligations that the [ILC] interprets as rising to the level of 'serious breaches' is better left to the Security Council rather than to the law of State responsibility'.[60] However, the fact that practice will develop outside the law covered by the ILC Articles does not mean that it is not properly considered in terms of state responsibility. Both unilateral[61] and multilateral responses, including those by the Security

[57] This was the definition of 'sanctions' by the ILC in its early consideration of the concept of crimes; see Yearbook ILC 1973, Vol II, 175, para 5 of the commentary to Art 1.

[58] Arangio-Ruiz, Fifth Report, op cit, para 88. See also B Graefrath and M Mohr, 'Legal Consequences of an Act of Aggression: the Case of Iraqi Invasion and Occupation of Kuwait', 43 *Austrian Journal of Public International Law* (1992) 127–8; PN Drost, *The Crime of State*, I (Leyden: Sythoff, 1959), 296–7.

[59] Also, Art 59 states that the Articles are without prejudice to the Charter of the United Nations.

[60] Comments United States, in UN Doc. A/CN.4/515 (2001) 53. See also Crawford, *The International Law Commission's Articles on State Responsibility*, op cit, commentary to Art 40, para 9.

[61] See B Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff Publishers, 1993) 176, noting that self-help is the normal reaction to an internationally wrongful act. This includes use of force legitimised under Art 51 UN Charter and countermeasures. See also Kelsen, op cit, 32 ff.

Council,[62] to breaches of international law may well be construed in terms of allocation and implementation of responsibility. Conceptually also these responses thus can be part of a concurrence of individual and state responsibility.

It need not be detailed here that the implementation of aggravated responsibility is not satisfactorily regulated by international law and that much work needs to be done to bring them under proper legal control.[63] The ILC recognised that the legal regime governing the consequences of serious breaches of peremptory norms of international law is in a state of development.[64] This unsatisfactory state of affairs is set in a new light by the development of procedures for individual responsibility that respond to exactly the same acts. Both individual state responsibility and aggravated state responsibility are consequences of breaches of fundamental norms of concern to the international community. Yet a disconcerting difference exists in the contents of these forms of responsibility and the procedures the international community has in its possession for their implementation. The relative sophistication of the law on individual responsibility makes one acutely aware of the lack of proper legal procedure in the multilateral responses to state responsibility.[65]

IV. CONNECTIONS BETWEEN THE IMPLEMENTATION OF INDIVIDUAL AND STATE RESPONSIBILITY

The above implies that in particular cases international responsibility can be effectuated at the same time against an individual and against the state—either through implementation of 'ordinary' or 'aggravated' responsibility. These tracks of individual and state responsibility can be connected. The linkages can be illustrated by the concurrence of individual and state responsibility in the Lockerbie incident. At the time when the Libyan suspects were indicted in Scotland, the United Kingdom and the United States already had pressed for formal responsibility of and compensation by the state, declaring that the

[62] See R Higgins, *Problems and Process, International Law and How We Use It* (Oxford: Clarendon Press, 1994) 181–4. A similar broad conception is adopted by Triffterer, op cit, 343 (referring to the sanctions imposed or authorised by the Security Council as one example of 'prosecution' of states for crimes of state). See also M Herdegen, *Befügnisse des UN-Sicherheitsrates: afgeklärter Absolutismus im Völkerrecht* (Heidelberg: Müller, 1998) 20 (stating that 'In der Regel wird eine Friedensbedrohung durch die schwerwiegende Verletzung von Völkerrechtspflichten begründet'); B Graefrath, International Crimes—A Specific Regime of International Responsibility of States and its Legal Consequences, in: JHH Weiler, A Cassese and M Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's draft Article 19 on State Responsibility* (Berlin/New York: Walter de Gruyter, 1988), 164.

[63] B Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Yoram Dinstein (ed.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Dordrecht: Nijhoff, 1989) 821, at 844; Pellet, 'The New Draft Articles', op cit, 72–9.

[64] Crawford, *The International Law Commission's Articles on State Responsibility*, op cit, commentary to Art 41, para 14.

[65] *Lockerbie* case, Provisional measures, Dissenting Opinion of Judge Bedjaoui, ICJ Reports (1992) 33–49.

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'.[66] Judge Shahabuddeen noted:

> Since the ground on which the United Kingdom made its demand for payment of compensation was that Libya had engaged international responsibility for the crimes allegedly committed by its two accused nationals, the making of the demand for payment 'promptly and in full' constituted a public and widely publicized announcement by the Respondent State of a prior determination by it, as a State, that the two accused were in fact guilty of the offences charged . . . the Solicitor General for Scotland affirmed to the Court that 'their guilt or innocence will be determined not by the Lord Advocate nor by the United Kingdom . . . '. True, in the sense that guilt is for the courts; but it is nevertheless clear that guilt has already been determined 'by the United Kingdom' as a State.[67]

Eventually, the findings of individual responsibility in connection to the Lockerbie bombing supported subsequent claims of state responsibility.[68] On the other hand, if the Scottish Court sitting in the Netherlands would have found that the individuals who were indicted were not remotely related to the bombing, the factual basis for the claim of the responsibility of the state of Libya would have fallen away. It is difficult to envisage that a court charged with determining state responsibility would in a subsequent proceeding find evidence of individual involvement that a court charged with determining individual responsibility would have missed. While the former court could make its own factual determinations under a more liberal standard of proof, the handling of evidence and witnesses in an interstate case is much less attuned to making such factual determinations. Assuming that the court exculpating the individuals is considered impartial, an international court can be expected to defer to such findings.

Any weight that in an interstate procedure on state responsibility may be given to prior factual or legal findings on individual responsibility is not contingent on a formal legal effect of such findings. No hierarchical relationship between international courts exists in the sense that a court charged with determining state responsibility should follow a court that has made determinations on individual responsibility.[69] Rather, it is a matter of deference to findings made by a tribunal authorised and equipped to do so. It is not uncommon for a body charged with determining matters of state responsibility to attach weight to findings of fact, or mixed fact and law, made by other international bodies. For instance, in the *Corfu Channel* case, the ICJ said of the

[66] Above, n 43.

[67] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, *Order of 14 April 1992*, ICJ Reports (1992) 3, Separate Opinion of Judge Shahabuddeen, at 31.

[68] Above, n 26.

[69] See generally J Charney, 'Is international law threatened by multiple international tribunals?', 271 *Recueil des cours* (1998) 356–63.

report of the committee of experts it has established: 'The Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information.'[70] Similarly, it would seem that weight could be given to factual determinations made by international courts charged with determining individual responsibility.

That weight will vary with the institution that has made these determinations. Differences may have to be made between the different phases of criminal proceedings, such as indictments, review and confirmation of indictments,[71] interlocutory appeals, and judgments. Also, distinctions may need to be drawn between judgments of decisions by a trial chamber and judgment by an appeals chamber. There are no hard and fast rules on the weight of such determinations. In general, however, findings by each of those may carry substantial weight.

A distinction also will need to be drawn between decisions of international courts and decisions of national courts. Findings of national courts may be considered with more circumspection and in considering the weight to be attached to their decisions, the circumstances in which such findings were made, in particular the impartiality of the court, will be relevant. However, in particular cases, international courts charged with state responsibility may treat findings by national courts with deference.[72] The ECHR stated in *McCann v United Kingdom*:

> While accepting that the Convention institutions are not in any formal sense bound by the decisions of the inquest jury, the Government submitted that the verdicts were of central importance to any subsequent examination of the deaths of the deceased. Accordingly, the Court should give substantial weight to the verdicts of the jury in the absence of any indication that those verdicts were perverse or ones which no reasonable tribunal of fact could have reached. In this connection, the jury was uniquely well placed to assess the circumstances surrounding the shootings. The members of the jury heard and saw each of the seventy-nine witnesses giving evidence, including extensive cross-examination. With that benefit they were able to assess the credibility and probative value of the witnesses' testimony. The Government pointed out that the jury also heard the submissions of the various parties, including those of the lawyers representing the deceased.[73]

[70] ICJ Reports (1949) 4, at 21.

[71] For example, in the Review of the Indictment of Karadzic and Mladic, Judge Riad found that, *prima facie* the facts presented in the indictment disclose 'above all, the commission of genocide'. ICTY, Trial Chamber, Review of the Indictment, *The Prosecutor v Radovan Karadzic & Ratko Mladic*, Case No. IT-95-18-I, 16 Nov 1995.

[72] *Schenk v Switzerland*, series A No 140 (1988) 13 EHRR 242. See also DJ Harris, M O'Boyle, and C Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths, 1995), 680.

[73] *McCann v UK*, series A No 324 (1996) 21 EHRR 97, para 165.

The renewed claims after the convictions by national courts of Libyan nationals for the *La Belle* and *Lockerbie* bombings indicate that the fact that these judgments were made by national rather than international courts did not undermine their credibility and value. In both cases, the convictions were followed by repeated claims for compensation against the state.[74] Obviously, if judgments to the contrary had been made by Libyan courts, a similar reliance on national judicial decisions would have been unlikely.[75]

If a court or tribunal were to find that no factual basis exists for individual responsibility, this need not preclude a finding of state responsibility. The standard of proof in interstate proceedings is different and generally lower than the standard applying in cases of individual responsibility. It is based on the balance of evidence submitted by both parties rather than on the 'beyond a reasonable doubt' threshold and therefore generally will be lower than the standard of proof that applies in matters of individual responsibility.[76]

However, when state responsibility concerns such serious matters as allegations of responsibility for genocide or terrorism, an international court arguably should translate the seriousness of the allegations into a more stringent standard of proof.[77] Holding a state responsible for genocide or crimes against humanity, and certainly the adoption of measures that aim to remove the source of these crimes, should not be based on unrebutted statements of fact by an injured state. There must be a difference between the standard of proof required for showing a minor injury to a foreign investor and a claim of genocide, in particular if such violations of peremptory norms are reflected in different remedies. This would argue for a synergy in procedural standards for individual and aggravated state responsibility. There appears to exist little practice on this point. Indeed, human rights courts show a contrary practice as

[74] Above n 24 and n 26.

[75] SC Res. 748 (1992), calling on Libya to comply with the request of the United States and the United Kingdom to extradite the suspects might be said to be based on the assumption that an impartial trial by the national courts of Libya was unlikely.

[76] For determining individual responsibility in the ICC, the standard is proof 'beyond a reasonable doubt'; see Art 66(3) ICC Statute. For proof required for establishing state responsibility, no uniform standard exists, but in principle the standard will be lower than in cases on individual responsibility. See D Sandifer, *Evidence before International Tribunals*, rev edn (Charlottesville: University Press of Virginia, 1975) 127. For the ICJ, see S Rosenne, *The Law and Practice of the International Court, 1920–1966*, 3rd edn (The Hague: Nijhoff, 1997) 1089–90. For the IACHR: T Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court', in *Fact-Finding Before International Tribunals* (New York: Ardsley-on-Hudson, 1992) 270–271 and D L Shelton, 'Judicial Review of State Action by International Courts', 12 *Fordham International Law Journal* (1989) 384–7; for the Human Rights Committee: D McGoldrick, *The Human Rights Committee: its Role in the Development of the International Covenant of Civil and Political Rights* (Oxford: Clarendon Press, 1994), 150 (standard of proof: 'balance of probabilities' rather than 'beyond reasonable doubt').

[77] Judge Shahabuddeen stated that 'the standard of proof varies with the character of the particular issue of fact'; and that 'a higher than ordinary standard may . . . be required in the case of a charge of "exceptional gravity against a State".' *Qatar v Bahrain* (Jurisdiction and Admissibility), ICJ Reports (1995) 63, Diss op Judge Shahabuddeen, referring to *Corfu Channel*, Merits, Judgment, ICJ Reports (1949), 17.

they use the seriousness of the allegations as a criterion to liberalise the standard of proof in favour of the applicant rather than of the defendant state.[78]

The connections between implementation of individual and state responsibility become particularly undeveloped if one turns to the connections between judicial procedures for individual responsibility and the political procedures to which implementation of aggravated state responsibility commonly is subjected. Matters of standard of proof and evidence, and thus also the relevance of parallel proceedings against individuals, are underdeveloped in the Security Council and other multilateral frameworks. The gap between the procedures applying to individuals and states is disconcerting and hides the possible relevance of findings on individual responsibility for state responsibility.

V. CONSEQUENCES FOR THE PRINCIPLES OF STATE RESPONSIBILITY

With the emergence of concurrent responsibility, the development of international law of state responsibility takes a dialectical turn. Individualisation of responsibility, in itself a reaction to the monolithic and sometimes powerless principles of state responsibility, influences the nature and contents of the pre-existing law on state responsibility.

However, it would not be correct to say that it is the emergence of individual responsibility that induces changes in the principles of state responsibility. The true causal variable is the emergence of a hierarchy of norms in international law and more in particular the recognition of a limited number of norms that are of fundamental importance for the international community.[79] The emergence of this category of norms underlies both the individualisation of responsibility and the disruption of the unity of state responsibility. Articles 40 and 41, and in particular also the forward-looking Article 41(3), recognise as much. The main features of the concurrence of individual and state responsibility, notably the (semi-)transparency of the state, the role of the international community in defining and implementing responsibility and the potentially systematic consequences of state responsibility can indeed only be understood as a function of the recognition of a category of peremptory norms in international law and their *erga omnes* character.

[78] *See Velazques-Rodriquez* case, para 129 (noting that the Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory and that 'This requires the Court to apply a standard of proof which considers the seriousness of the charge'). See further IACHR, *Raquel Martí de Mejía v Perú*, Case 10.970, Report No. 5/96, Inter-Am CHR, OEA/Ser.L/V/II.91 Doc 7, at 157 (1996) (noting that while the ICJ must seek to preserve the interests of the parties in dispute, within the sphere of the American Convention, Art 42 of its Regulations (pertaining to the weight to be attached to submission to which governments have not responded, 'must be interpreted in light of the basic purpose of the Convention, ie protection of human rights').

[79] Generally: I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerpen: Intersentia, 2001).

With the recognition of a set of fundamental norms recognised by the international community and the related emergence of individual responsibility, the traditional dualities between state and individual that characterise the law of state responsibility cannot be upheld in their strict form. The increasing transparency makes it possible to revisit some of the classic principles of state responsibility.[80] The influence of individual responsibility on the principles and implementation of state responsibility is discussed under four headings: attribution, fault, defences, and remedies.

A. Attribution

The traditional law of state responsibility makes no distinction between attribution of acts of heads of state or other high officials, on the one hand, and attribution of acts of lower ranking officials, on the other. Acts of all state organs are attributed to the state.[81] The question must be considered whether nonetheless a distinction is to be drawn between these categories in cases of concurrence between state and individual.

The answer to this question appears to depend primarily on whether one accepts a separation between ordinary and aggravated state responsibility and, if so, whether the consequences of that aggravated responsibility can take the drastic consequences that sometimes are described as criminal sanctions.[82] If so, it might be argued that it would not be justified to hold a state 'criminally' responsible, with all the related consequences, for an isolated act of torture by a lower police official in violation of laws and orders of the state. Attribution of course would be possible in the scheme of normal responsibility, but not in the scheme of aggravated responsibility. On the other hand, there would be less reason to object to attribution of a criminal act of the head of state to the state and to implement the resulting aggravated responsibility. It has indeed been suggested that given the potential more far-reaching consequences of a finding of aggravated responsibility, such distinctions might be appropriate.[83] A criminal act by a head of state would then imply 'criminal' responsibility of the state, whereas an act of a lower official would only lead to ordinary state responsibility. The matter may be further complicated if the high official, whose acts in principle could be directly attributed to the state, is held respon-

[80] A Pellet, 'Can a State Commit a Crime? Definitively, Yes!', 10 *EJIL* (1999) 432; id, The New Draft Articles, op cit, 77.

[81] Art 4(1) ILC Articles.

[82] See section IIIB.

[83] Triffterer, op cit, 342–3, distinguishes between cases where at high level decisions are taken that lead the state to violate international law, on the one hand, and cases where individual state organs with limited power to act on behalf of the state commit such crimes, for instance by not applying certain regulations, on the other. In the ILC it was noted: 'to use the legal fiction of attribution to make a state liable to compensate for damage caused by its officials is one thing, while casting the shadow of a crime over the population was another', *Yb ILC* (1995), Vol I, Part Two, 48–9.

sible under the principles of command responsibility and is thus responsible for acts of another person.[84] Is it proper to attribute that criminal responsibility to the state?[85]

Another construction is possible. If one does not assume a strict separation between ordinary state responsibility and aggravated responsibility but rather a united concept with possibly differentiation in the sphere of reparation, one could take the position that all acts are attributed to the state, but that only the acts of the higher officials justify the consequences attached to aggravated responsibility. The matter is then not so much a problem of attribution as of the consequences of serious breaches of international law. This appears to be the approach that is consistent with the approach of the ILC Articles. While the ILC did recognise that the law in respect of serious breaches of peremptory norms of international law was in need of further development, it envisaged that development only in regard to the consequences of these breaches. If in the future a separate regime for aggravated responsibility would emerge, it may be appropriate to revisit this matter.

B. Fault

One of the distinguishing features of the law of individual responsibility and the law of state responsibility is that, while the mental state of the author of the act is critical in the determination of individual responsibility, it generally is either irrelevant or manifests itself in a different, objectified, form in the determination of state responsibility. For instance, for the qualification of killings of protected persons as grave breaches under Article 146 of the 4th 1949 Geneva Convention, it needs to be proven that such acts were committed wilfully. In contrast, for the responsibility of a state under Article 32 of this Convention no such intent needs to be established. Similarly, a finding that there is no psychological intent in an act that was qualified as a terrorist attack does not preclude state responsibility for failure to exercise due diligence to prevent the attacks.[86]

In cases of concurrent responsibility, the question is to be considered whether the individual fault that is inherent in individual responsibility would not be more directly relevant for the responsibility of the state. The answer to this question of course primarily depends on the applicable primary norms. Some norms that may trigger concurrent state responsibility incorporate an element of fault. The *Genocide* case is an example. However, it appears that

[84] Art 28 ICC Statute.

[85] The issue is raised by Fox, op cit, 161–2.

[86] K Zemanek, 'Schuld- und Erfolgshaftung im Entwurf der Völkerrechtskommission über Staatsverantwortlichkeit', in: *Festschift für R. Bindschedler* (1980) 322; R Pisillo-Mazzeschi, 'The due diligence rule and the nature of the international responsibility of states', in 35 *German Yearbook of International Law* (1992), 9.

intent is an inherent element of aggravated responsibility—whatever the contents of the primary norms.[87]

In principle the fault of the state is not necessarily the same as the fault of the individual and generally it will be more objectified.[88] But does that difference still exist if, first, the determination of the responsibility of the state would largely depend on the responsibility and thus on the intent of a few officials, and, secondly, the consequences of state responsibility are not confined to reparation but assume quasi-criminal law features? It might be said that the intent of a state is directly contingent on the intent of, for instance, the head of state,[89] and that his or her intent can directly be attributed to the state. For instance, a finding by the ICTY in the *Milosevic* case that intent to commit genocide existed, would be directly relevant to a determination of 'state intent' to be made by the ICJ in the *Application of the Genocide Convention* case. On the other hand, if an alleged case of state responsibility for genocide would hinge primarily on the role of a head of state, a finding that intent of that person could not be proven would not be irrelevant for a subsequent determination on the intent of the state of which the head of state is the personification. It may not be obvious that if no individual intent is found, the state is still assumed to have had the intention to commit genocide and can be confronted with drastic measures that seek objectives comparable to those of individual responsibility, would it have been determined, would have served. Individual fault thus may transgress into the domain of state responsibility.[90]

The reasons underlying the traditional resistance against giving fault a place in the law on state responsibility are indeed qualified in case of concurrent responsibility. The normal international law of state responsibility is not concerned with individual fault, which is left to national law. In contrast, the law of individual responsibility attributes fault directly to the individual as a matter of international law. Also, the argument that state fault cannot be relevant because individuals cannot be isolated within a state[91] loses much of its force. The transparency of the state may allow for imputation of the intent to

[87] Pellet, 'Can a State Commit a Crime?,' op cit, 434; Crawford, *The International Law Commission's Articles on State Responsibility*, op cit, commentary to Art 40, para 8.

[88] See for a discussion of the concept of individual and state intent in the context of the Genocide Convention: M Koskeniemmi, 'Evil Intentions of Vicious Acts? What is *prima facie* evidence of genocide?', in Matti Tupamäki (ed), *Liber Amicorum Bengt Broms, Celebrating His 70th Birthday 16 October 1999* (Helsinki: Finnish Branch of International Law Association, 1999), 180.

[89] A Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', 247 *Recueil des Cours* (1994) 9, at 31–2.

[90] Pellet, remarks in ILC, 2993rd Meeting, *Yb ILC* (1995), Vol I, p. 97. See for a critique on the treatment of fault in the work of the ILC on state responsibility also A Gattine, 'La notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responabilité internationale', 3 *EJIL* (1992) 253; and id, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility', 10 *EJIL* (1999) 397. Dupuy, op cit, 1096 notes that intention does remain individual and is only in a sense communicated to the state because the origin of the state is men.

[91] Jiménez de Aréchaga, International Responsibility, in Max Sorensen, et al (eds), *Manual of Public International Law* (London: Macmillan, 1968), 535.

the state.[92] Another barrier to considering fault in the determination or implementation of state responsibility was that the nature of international legal procedures for interstate adjudication would not be adequate for determining individual guilt.[93] For interstate procedures that still may be true. But in a case when individual guilt would be determined in a separate procedure for individual responsibility, the availability of such a procedure would take away the objection against considering individual guilt in an interstate procedure.

The relevance of fault for the principles on state responsibility is not confined to aggravated responsibility. Individual fault may influence form and amount of remedies, for instance, in the determination amount of compensation and in particular the forms of satisfaction.[94] That influence may well manifest itself in the normal reparatory functions of state responsibility (see Section III.A). The influence can be expected to become stronger and more visible, however, in case of aggravated responsibility.

C. Defences

In principle, the defences for individual responsibility and state responsibility are different. Most defences for individual responsibility are not recognised in the same form in the law of state responsibility. For instance, if the author of an act acted because of a mistake of law or fact[95] that may constitute a defence against individual responsibility, but if damage nonetheless occurred, the injured state will be entitled to reparation. Also in case of a defence of superior orders[96] or a mental disease,[97] the fault that is necessary for the assignment of individual responsibility may fall away, but (objective) state responsibility may still be possible.

One defence which to a certain extent applies to both individual and state responsibility is the principle that a person cannot be held responsible for an act that was committed to save his or her life. If this defence is found applicable, the act will lead neither to state responsibility[98] nor to individual responsibility.[99] The link between the provisions is particularly close, as also the principle of state responsibility, at least as formulated by the ILC, is expressly focused on the act of an individual. It is the distress of the individual author of the act, not of an abstract state, that constitutes the defence.

Otherwise the defences for the law of individual responsibility generally are wider. This may be justified because individual responsibility concerns criminal responsibility. However, that justification looses some if its force when state responsibility assumes the form of aggravated responsibility. This is particularly visible for the defence of duress. Under the ICC Statute, duress

[92] Arangio-Ruiz, State fault, op cit, 29.
[93] J Basdevant, 'Règles Générales du Droit de la Paix', 58 *Recueil des Cours* (1936) 672.
[94] See Arangio-Ruiz, *State Fault*, op cit, 36.
[95] Art 32 ICC Statute.
[96] Art 33 ICC Statute.
[97] Art 31(1)(a) ICC Statute.
[98] Art 24(1) ILC Articles.
[99] Art 31(d) ICC Statute.

can be invoked as defence against allegations of international crimes.[100] In contrast, Article 26 of the ILC Articles provides that the otherwise applicable defences do not preclude 'the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law'. The defences under the law of individual responsibility thus would appear to be wider than under the law of state responsibility. While this may be perfectly proper if we understand responsibility in its normal reparatory function, it is less obvious in the case of serious breaches that may at the same time make the author of the act more visible and may seek trigger more serious consequences.

It may be added that if the acts which will result in aggravated responsibility are indeed systematic and widespread, the problem identified here is of a theoretical nature. It is unlikely that their systematic nature can be explained by duress. But the terms and conditions for aggravated responsibility are by no means settled. In a further development of the law, the relationship between individual defences and those of the state may require further attention.

D. Remedies

The remedies for state responsibility and for individual responsibility are different. The former leads to reparation, the latter to punishment of individuals. This difference is directly related to the invisibility of the individual (and his or her fault) in the law of state responsibility. In cases of partial transparency, that distinction loses some of its ground. Punishment of individuals can then be part of the remedy for state responsibility.

The obligation of states to punish individuals is primarily a matter for primary rules. Most of the acts which entail individual responsibility imply for the state the obligation to prosecute. This is the case for obligations in relation to torture,[101] war crimes,[102] and genocide.[103] When individual conduct (which may lead to individual responsibility) is attributed to the state, this will result in the (continued) duty of performance of the obligation to prosecute individual perpetrators.[104] This is not primarily a matter of remedies, but rather of the primary norms. Incorporating obligations to punish individuals who violate

[100] Art 31(d). In contrast, the Trial Chamber of the ICTY in the *Erdemovic* case held that duress could not afford a 'complete defense to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives'. ICTY, *Prosecutor v Erdemovic*, Case No: IT-96-22-A, Judgment, (Oct 7, 1997), 37 ILM 1182 (1998), Joint Separate Opinion of Judges McDonald and Vohrah, para 88.

[101] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc E/CN.4/1984/72, reprinted in 23 ILM 1027 (1984), Art 4–7. This obligation also is based on human rights law, see eg *Godínez Cruz* Case, Judgment of 20 Jan 1989, Inter-Am Ct HR (Ser C) No 5 (1989), stating that the obligation to punish was part of the 'legal duty to take reasonable steps to prevent human rights violations' (paras 184–5).

[102] Art 146 Geneva Convention [IV].

[103] Art 4–6 Genocide Convention.

[104] Art 29 ILC Articles.

fundamental norms of law appears to be the prime way in which individual responsibility can be integrated in the law of state responsibility.

The obligation to punish responsible individuals also can 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[105] 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, disciplinary action against, or punishment of, those responsible.[106]

The ILC did not appear to have considered in this context acts which were criminalised by international law and which would result in individual responsibility. Also the few cases that have arisen in state practice, such as the *Aerial Incident* case[107] and the *Rainbow Warrior* case, did not involve acts which entailed individual culpability under international law.[108] This also is true for the practice of human rights courts.[109] However, punishment as form of satisfaction would appear to apply *a fortiori* to acts that can be attributed to individuals.[110]

[105] This Article has not been included in the Articles as adopted in 2001, but the exclusion appears unrelated to the principle discussed here.

[106] 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 Statement of the Chairman of the Drafting Committee, Mr Peter Tomka at the 53rd session of the ILC, available at <http://www.un.org/law/ilc/sessions/53/english/dc_resp1.pdf> and J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 233.

[107] Following the shooting down of an Israeli plain 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'. *Case concerning the Aerial Incident of July 27th, 1955 (Israel v Bulgaria)*, Preliminary Objections, Judgment of 26 May, ICJ Reports (1959), 127.

[108] 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* case *(New Zealand v France)*, 74 ILR 241, at 271–2. 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 (Whiteman, Digest, vol 8, 742–3) and in the case of the killing of two United States officers in Tehran (RGDIP, vol 80, 257).

[109] Eg *Clemente Teherán et al*, Order of the Court of 19 June 1998, Inter-Am Ct HR (Ser E) No 2 (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'; *Godínez Cruz*, Compensatory Damages (Art 63(1) American Convention on Human Rights), Judgment of 21 July 1989, Inter-Am Ct HR (Ser C) No 8 (1989), para 31. In some cases the distinction between a remedy and a continued obligation is not drawn sharply. In the *Godínez Cruz* case, Judgment of 20 Jan 1989, Inter-Am Ct HR (Ser C) No 5 (1989), the Court stated that the obligation to punish was part of the 'legal duty to take reasonable steps to prevent human rights violations' (para 184–5). See also the *Giraldo Cardona* case, Order of the Court of 30 Sept 1999, Inter-Am Ct HR (Ser E) No 2 (1999) and the *Blake* case, Reparations (Art 63(1) American Conventions on Human Rights), Judgment of 22 Jan 1999, Inter-Am Ct HR (Ser C) No. 48 (1999), para 63–5.

[110] Rosenne, State Responsibility and International Crimes, loc cit. Austria commented on the first draft of the ILC Articles by stating that Art 45(2)(d) should better reflect the growing number of international obligations to prosecute or extradite individuals, see UN Doc A/CN.4/488, 111.

An obligation to punish individuals as part of the remedy (or continued duty of performance) can be ordered by a court specifically charged with determining and implementing state responsibility, depending of course upon the powers of the court in question.[111] A synergy between individual and state responsibility may then occur, as the implementation of an obligation to punish is at the same time a remedy against both the state and the individual.

This form of reparation falls within the normal scheme of reparation as that which exists for ordinary wrongful acts and, also when primary rules are silent, there is not necessarily a need to move to a new and special regime for aggravated responsibility. Nonetheless, the fact that the individual can be held separately responsible may well be relevant for the implementation of this remedy. It can be recalled that, traditionally, orders to prosecute individuals as a form of satisfaction have been considered as undue interference in the internal affairs of states.[112] When the individuals whose acts caused the responsibility of the state are no longer 'hidden', but themselves subject of international responsibility, courts that are asked to determine consequences of state responsibility may be less cautious in granting remedies aimed at particular individuals.

Punishment of individuals also can be ordered by a court or tribunal charged with determining individual responsibility. A judgment against an individual perpetrator can be considered as a (partial) remedy against 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'.[113] Although it is not likely that these courts would construe their role in this manner, it is possible to conceive of the criminal and the interstate courts as cooperating in the joint implementation of international responsibility.

[111] As to the ICJ, it would appear to be within its powers to order in appropriate cases prosecution of individual authors of acts or, alternatively, cooperation with international criminal tribunals. Cf. the *Iranian Hostages* case: ICJ Reports (1980), 1. See Gray, loc cit, 59–68. In the second order in the *Application of the Genocide Convention* case, ICJ Reports (1993) 348, para 56, the Court noted the decision to establish to ICTY to prosecute individuals, but did not draw direct conclusions from it; see also Rosenne, 'War Crimes and State Responsibility', loc cit, 100. Also the Inter-American Court on Human Rights has assumed the power to order punishment. The European Court on Human Rights on the other hand has not interpreted its own competence as extending to orders for prosecution or punishment. See Harris, O'Boyle, Warbrick, op cit, 684.

[112] *Yb ILC* (1993) Vol. II (Part Two), 76–81. 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 draft articles', see A/CN.4/504, 120, para 72.

[113] Dupuy, loc cit, 1091. Also Triffterer, loc cit, 346 (noting that since 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).

VI. CONCLUSION

In respect to a limited number of breaches of international law, the international community may proceed along two paths—the path of individual responsibility and the path of state responsibility. It may be possible to speak of a law of international responsibility, of which the law of individual responsibility and the law of state responsibility are component parts and which in particular cases are interrelated.

Perhaps the focus of lawyers has recently been too fixed on the former. The law on state responsibility has an important role to play: either as a reparatory counterpart or to address the systemic causes of individual criminality. While the recognised law on state responsibility properly deals with the reparatory counterpart, it is underdeveloped with respect to the aggravated responsibility that characterises cases of concurrent responsibility. This is in part a matter for primary rules, which can acknowledge the interplay, for instance in the sphere of fault or the obligation to prosecute. It also is a matter for secondary rules, in particular for the principles governing attribution, defences, and remedies.

The influence of individualisation of responsibility on state responsibility can in part manifest itself within the principles for ordinary state responsibility, for instance in the form of prosecution of individuals as a remedy (though its implementation may well be influenced by parallel individual responsibility). In part it will manifest itself in aggravated responsibility. In particular in the latter case, problems of attribution, defences, and remedies may need further thought and development.

The ILC Articles do not deal with these aspects in an exhaustive manner. The finalisation of the Articles, developed over a period of several decades, coincided with the period in which individualisation of international responsibility, and thereby concurrence, emerged. In a different context, Shabtai Rosenne said that the 1996 version of the draft Articles of the ILC on state responsibility are 'inadequate, if not substantially flawed' and 'do not take sufficient account of the consequences of the breakdown of the traditional State system of the nineteenth century, nor of its replacement by a new system which is slowly taking place before our very eyes'.[114] In large part this remains true of the 2001 Articles. The ILC did envisage development of the law, but confined that to the consequences of aggravated responsibility. It needs further thought as to whether that will be sufficient or whether matters of attribution and defences may also need development.

The ILC Articles do not preclude interactions between the law of individual responsibility and the law of state responsibility (to which it should be added that many of the practical manifestations of the interactions concern

[114] Rosenne, 'State Responsibility and International Crimes', op cit, 165.

matters of evidence and presumptions in interstate proceedings—issues not covered at all by the Articles). However, they also do not provide them with much guidance. Now that the ICC is starting its work, developing the law on aggravated forms of responsibility – which inevitably will touch on the problems of concurrent forms of state responsibility – should be a key area for the development of international law.