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Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?

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Abstract

The International Law Commission's decision to maintain Articles 40 and 41 is based on the conviction that serious breaches of peremptory norms entail specific legal consequences within the field of state responsibility. Among these consequences, it is possible to distinguish between (i) specific obligations binding on other states, (ii) specific rights of other states and (iii) specific obligations of the responsible state. This article critically assesses whether international law recognizes specific consequences falling within the third of these categories. It discusses six prominent candidates suggested in international practice, literature, and the work of the ILC — such as the obligations to provide assurances of non-repetition, to pay punitive or exemplary damages or to prosecute individual perpetrators of serious wrongful acts. The article concludes that none of these candidates qualifies as a specific consequence of serious breaches of peremptory norms — partly because the alleged specific obligation has not been recognized in international law, and partly because it equally applies to internationally wrongful acts that do not constitute serious breaches in the sense of Article 40. It follows that international law at present does not impose specific obligations on states responsible for serious breaches of peremptory norms. This in turn raises doubts as to the viability of the distinction between serious breaches and ordinary wrongful acts.

1 Introduction

Part Two, Chapter III, of the Draft Articles on State Responsibility, adopted after second reading in 2001, is based on the ILC's conviction that 'there are certain consequences flowing from the basic concept[s] of peremptory norms of general international law . . . within the field of State responsibility'.¹ These consequences are specific in that they are entailed by serious breaches of obligations arising under peremptory norms of general international law as defined in Article 40. In order to

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¹ Draft Articles on State Responsibility, introductory commentary to Part Two, Chapter III, para. (7). The Draft Articles and commentaries are reproduced in UN Doc. A/56/10, at 43–365.

avoid fruitless discussions about the nature of the specific regime triggered by Articles 40 and 41 ('criminal', 'civil', 'truly international' etc.), I will refer below to a system of 'aggravated responsibility'.² While this is meant to be a relatively neutral term, it does express the idea that responsibility for breaches in the sense of Article 40 entails consequences which are more severe than those triggered by ordinary breaches. When analysing the specific consequences arising under a system of aggravated responsibility, it is possible to distinguish between three categories, namely: (i) specific obligations binding on other states; (ii) specific rights of other states; and (iii) specific obligations of the responsible state.

In the course of the present contribution, I will focus on the third category, i.e. I will analyse whether a state responsible for serious breaches is under obligations which would not be triggered by ordinary breaches. The title of this paper suggests that this may be open to doubt. Whether these doubts are justified will be assessed in the following.

2 Part Two, Chapter III, as Currently Drafted

As a first step, Part Two, Chapter III, as currently drafted, needs to be analysed. Article 41, which lists the special consequences of serious breaches of obligations under peremptory norms, is relatively silent on specific obligations of the responsible state. The positive obligation to cooperate and the prohibition against rendering aid or assistance (Article 41(1) and (2)) in particular only apply to states which are not themselves responsible for the breach.

The situation is slightly different with regard to Article 41(2) pursuant to which '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40'. As the commentary makes clear, 'no State' is to be taken literally; it includes the state responsible for the violation.³ Hence attempts, by the responsible state, to consolidate illegal situations through legal recognition are deemed to be unlawful. Examples would include the South African recognition of Transkei, Ciskei and Bophuthatswana; Japan's recognition of Manchukuo in 1931, or possibly Turkey's recognition of Northern Cyprus. That said, it may be doubted whether this specific obligation (as distinct from the obligation breached by the initial serious wrongful act in the sense of Article 40) is of great importance. In particular, questions of remedies, or the entitlement to invoke responsibility, would require further clarification: leaving questions of inter-temporal law aside, would every state have been entitled to invoke Japan's responsibility incurred by recognizing Manchukuo (as distinct from its responsibility for having committed an act of aggression)? If yes, would there have been any meaningful remedy for the second violation? It is submitted that, to date, international practice does not suggest that either of these

² For a slightly different use of the term 'aggravated responsibility' encompassing special rules on the invocation of responsibility, see A. Cassese, *International Law* (2001) 200–212.

³ Commentary to Article 41, para. (9).

questions could be answered in the affirmative. Possibly, the responsible state's specific obligation of non-recognition would better be seen as an implicit consequence of the initial violation.

Be that as it may, it is clear that Article 41 yields very little in terms of specific obligations of the state responsible for serious breaches in the sense of Article 40. Of course, the precise content, or incidence, of the responsible state's duty to make reparation will be affected by the seriousness of the breach, or the gravity of its consequences. However, these distinctions are merely gradual, and can be accommodated by applying the normal rules on reparation applicable to ordinary and serious breaches alike.⁴ In contrast, outside the alleged duty of non-recognition, Part Two, Chapter III, as it currently stands does not provide for specific obligations of the responsible state which would be *qualitatively* different from those entailed by ordinary breaches.

3 Analysis of Further Candidates

Stating that specific obligations of the responsible states are largely missing from the Draft Articles after second reading is of course only the first step. It remains to be seen whether Article 41 as it now stands is reflective of customary international law, or whether the ILC has been over-cautious in not providing for further specific obligations in the Draft Articles.⁵

In order to answer this question, I will address a number of selected candidates, which have been said to be part of a regime of aggravated state responsibility. These include specific obligations of the responsible state which would:

- 1 introduce preventive or punitive concepts of responsibility;
- 2 affect the incidence of specific forms of reparation;
- 3 link the concept of state responsibility with that of individual responsibility for breaches of international law; or
- 4 establish a role of independent parties competent to assess the conduct of the responsible state.

By way of caveat, it should be stated at the outset that some of these (alleged) specific obligations were discussed not in relation to serious breaches in the sense of Article 40, but rather to the system of aggravated responsibility applicable to international crimes of states. In view of the close relation between the two concepts, they will nevertheless be addressed in the following.

⁴ Cf. commentary to Article 41, para. (13).

⁵ The ILC's Commentary to Article 41(3) stresses the evolving nature of the regime of aggravated responsibility; see in particular para. (14), where it is stated that 'paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development'.

A Specific Obligations Introducing Preventive or Punitive Concepts of Responsibility

The first category of specific obligations set out above relates to the function of responsibility within a regime governing exceptionally serious breaches. As is made clear in the commentary to Article 41, a serious breach of peremptory norms 'entails the legal consequences stipulated for all breaches in Chapters I and II of Part Two'.⁶ In line with these rules, a state responsible for the serious breach is under an obligation of continued performance and cessation,⁷ and must provide reparation.⁸ There is little disagreement that the first two of these obligations apply irrespective of whether the wrongful act in question was of a serious or ordinary nature. As regards reparation, the situation is more complex. It has been claimed that serious acts in the sense of Article 40 give rise to legal consequences which go beyond a reparational, remedial purpose, i.e. which are not restricted to 're-establish[ing] the situation, which would, in all probability, have existed if that [wrongful] act had not been committed'.⁹ Since the rules of state responsibility have traditionally been focused on the reparation of past wrongs, this would mark a considerable development.¹⁰ Two additional consequences in particular have been suggested, namely:

- 1 an obligation to provide assurances and guarantees of non-repetition; and
- 2 an obligation to pay punitive or exemplary damages.

These will be dealt with in turn.

1 Guarantees and Assurances of Non-Repetition

Guarantees and assurances of non-repetition have, until recently, played a rather marginal role in the law of state responsibility.¹¹ In the view of some writers, however, they have a place within a regime of aggravated responsibility. Lattanzi and Graefrath in particular have claimed that states responsible for international crimes were under

⁶ Commentary to Article 41, para. (13).

⁷ Articles 29 and 30(a) respectively.

⁸ Articles 31 and 34.

⁹ *Chorzow Factory (Indemnity)* case, 1928 PCIJ Series A, No. 17, at 47.

¹⁰ On the remedial character of the traditional rules on responsibility, see e.g. Dupuy, 'Responsabilité et légalité', in *La responsabilité dans le système international* (Actes du Colloque de la Société Française pour le Droit International) (1991) 263, at 272 *et seq.* When juxtaposing the remedial and preventive approaches to responsibility, it must, however, be conceded that the distinction is not clear-cut. The traditional forms of reparation often implicitly contain a deterrent or preventive element: the same is of course true for the duty of cessation.

¹¹ But cf. the *Trail Smelter* case (3 RIAA (1934)); or the naval incidents involving the *Allianca*, *Herzog* and *Bundesrath*, in which the affected governments (the United States and Germany respectively) protested against interference with their shipping and demanded that positive orders be given to prevent a repetition of the acts (cf. J.B. Moore, *Digest of International Law*, vol. II (1898) 908–909; G.F. v. Martens, *Nouveau Recueil*, 2nd Series, vol. XXIX (1912) 456 and 486 respectively).

an obligation to provide guarantees and assurances of non-repetition.¹² When assessing the validity of this statement and its applicability to the system of aggravated responsibility under the second reading Draft Articles, two questions have to be addressed. It must be analysed: (i) whether international law recognizes guarantees and assurances as a distinct consequence of international wrongs at all; and (ii) if so, whether it does so only in relation to a special category of serious breaches in the sense of Article 40.

With regard to the first of these questions, the Court's recent judgment in the *LaGrand* case has considerably clarified matters.¹³ In the circumstances of the case, Germany had asked the Court to declare that, in view of the frequent violations by the United States of the right to consular assistance, the United States were under an obligation to provide Germany with specific guarantees and assurances against the repetition of such violations. The United States had replied that guarantees and assurances were not accepted remedies under international law.¹⁴ In its judgment, the Court largely granted the German claim. More specifically, it held that the United States was obliged to provide Germany with guarantees and assurances that the right to consular assistance would be respected in future trials of German nationals before US courts.¹⁵ Although it does not fully clarify the exact content of, or limits to, the duty to provide guarantees and assurances, it seems fair to say that this decision strengthens the role of such remedies in international law. This corresponds to the position taken by the ILC during the first reading of the Draft Articles¹⁶ and is reflected in new Draft Article 30(b), adopted shortly after the judgment.¹⁷

While, therefore, international law seems to accept that a state can be under an obligation to provide guarantees and assurances, it must be queried whether this consequence specifically applies to serious breaches of peremptory norms. The answer to this second question can be given relatively easily. Although the conditions under which the obligation arises are remarkably vague and imprecise,¹⁸ it is clear that they are not limited to breaches of peremptory norms, nor necessarily to breaches of a

¹² F. Lattanzi, *Garanzie dei diritti dell' uomo nel diritto internazionale generale* (1983) 529–531; Graefrath, 'Responsibility and Damages Caused', 185 *Recueil des Cours* (1984-II) 9, at 72. During the 1995 ILC debates, Tomuschat similarly stated that 'it was obvious that satisfaction and guarantees and assurances of non-repetition should be a normal consequence of the commission of a crime'. *ILC Yearbook* (1995), vol. I, at 92, para. 38.

¹³ *LaGrand* case (*Germany v. United States*), www.icj-cij.org/icjwww/idecisions.htm. On the case, see Tams, 'Consular Assistance and Rights and Remedies', www.ejil.org/journal/curdevs.html; summary in 13 *EJIL* (2002) 1259.

¹⁴ *LaGrand* case, *supra* note 13, Judgment, at para. 119; and see paras 46–48 for the United States' objection that the Court had no jurisdiction to pronounce on claims for guarantees and assurances.

¹⁵ *Ibid.*, at paras 123–125.

¹⁶ See Article 46 [10bis] of the 1996 draft, *ILC Yearbook* (1993), vol. II, Part One, at 81–83.

¹⁷ Cf. in particular paras (10)–(12) of the new commentary. The implications of the Court's *LaGrand* judgment are considered more fully in a symposium in the *Yale Journal of International Law*, with contributions by Professors Fitzpatrick, Quigley, Schabas, and the present author. See 'Symposium: Reflections on the ICJ *LaGrand* Decision', 27 *Yale Journal of International Law* (2002) 423.

¹⁸ See the formulation of Draft Article 30(b), pursuant to which states can be obliged to offer 'appropriate' guarantees and assurances, 'where circumstances so require'.

serious nature. Of course, guarantees and assurances can only be demanded if the breach of international law has had grave consequences and if there is a risk of repetition.¹⁹ However, it would be wrong to equate these two elements (gravity and risk of repetition) with the two distinctive features enumerated in Article 40, i.e. the peremptory character and the seriousness of the breach: For a start, a risk of repetition may be present even where breaches are neither intentional nor widespread. More importantly, however, there is no indication suggesting that the circle of obligations whose breach may trigger a duty to provide guarantees and assurances should be restricted to the category of obligations deriving from peremptory norms. For example, in *LaGrand*, the Court had to address the obligation to provide consular notification under Article 36 of the Consular Convention. Although there was no suggestion as to the peremptory character of that obligation, the Court considered the situation created by breaches of this obligation to be ‘grave’ enough to warrant the award of guarantees and assurances.²⁰

Generalizing these findings, one may conclude that the appropriateness of guarantees and assurances depends on a flexible weighing of circumstances rather than on criteria as strict as those set out in Article 40. In consequence, the duty to provide such guarantees and assurances does not constitute a specific consequence of serious breaches in the sense of that provision.

2 Punitive or Exemplary Damages

The concept of punitive or exemplary (i.e. non-compensatory) damages constitutes the most spectacular of the various specific obligations allegedly arising under a regime of aggravated responsibility. It is widely acknowledged, by supporters and critics alike, that its recognition would mean a significant step towards an effective regime of aggravated responsibility.²¹

The ILC’s position on the matter has, over the years, been far from consistent. Under the 1996 Draft, non-compensatory damages had been dealt with as part of the general rule on satisfaction. Article 45(2)(c) provided that ‘in cases of gross infringement of the rights of the injured State’, satisfaction might take the form of ‘damages reflecting the gravity of the infringement’. Whether this was intended to be an outright endorsement of the concept of punitive damages was a matter of debate,²² but it was

¹⁹ Commentary to Draft Article 46 [10bis] after first reading, *ILC Yearbook* (1993), vol. II, Part Two, at 82, para. (1).

²⁰ It is interesting to note that the Court assessed the seriousness not with regard to the breach in question, but with regard to distant consequences related to the initial violation. *in casu* the sentences imposed under US national law. This is particularly relevant since the Court had *not* held these judgments themselves to be in violation of international law, nor did it find that they were based on the previous violation of the Consular Convention: see *LaGrand* case, *supra* note 13, Judgment, paras 91 and 125.

²¹ See Crawford, First Report, UN Doc. A/CN.4/490, at para. 84; Third Report, UN Doc. A.CN.4/507, at para. 409; Tomuschat, ‘International Crimes by States: An Endangered Species?’, in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (1998) 253, at 261–262. Cf. also various statements made during the ILC’s 46th Session, *ILC Yearbook* (1994), vol. I, at 95 (Crawford), 104 (Mahiou) and 107 (Pellet).

²² See Commentary on old Article 52, para. (8), *ILC Yearbook* (1996), vol. II, Part Two, at 72.

certainly understood in that way.²³ What is important to note, however, is that Article 45(2)(c) applied irrespective of the qualification of a breach as either ‘crime’ or ‘delict’. Strictly speaking, therefore, it did not provide for a specific consequence applicable only in the case of crimes.

The position taken in the second reading Draft Articles is considerably more restrictive. As is made clear in the introductory commentary to Part Two, Chapter III, ‘the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms of general international law’.²⁴ Accordingly, Part Two, Chapter III, does not contain any provision on non-compensatory damages.

Interestingly, this is not only in marked contrast to the position taken under the 1996 Draft Articles, but also differs considerably from the provisional set of Articles adopted in July 2000.²⁵ Then Article 42(1), addressing the consequences of serious breaches of community obligations (as they then were), had provided that:

A serious breach within the meaning of article 41 [19] may involve, for the responsible State, damages reflecting the gravity of the breach.²⁶

Summing up the evolution of the ILC’s position, one could therefore say that the trend has been from (i) recognition of non-compensatory damages as a form of satisfaction, to (ii) recognition of non-compensatory damages as a specific consequence of serious breaches in the sense of Part Two, Chapter III, to, finally, (iii) rejection of punitive or other non-compensatory elements of reparation. In order to assess whether punitive or exemplary damages constitute a specific consequence of serious breaches in the sense of Article 40, it would again have to be shown that they are accepted under international law, and that they are only accepted as a consequence of serious breaches in the sense of Article 40. It is submitted that the answer to these questions lies not so much in statements of principle — such as the frequent reiteration of the maxim *societas delinquere non potest* — but has to be sought in international (mostly arbitral) practice.²⁷

When analysing the relevant decisions, one might first inquire whether international law has *expressly* recognized punitive or other non-compensatory damages. For a number of reasons, it would seem that this is not the case. In more recent jurisprudence, this view has been confirmed, for example in the Inter-American

²³ See e.g. Zemanek, ‘The Legal Foundations of the International System’, 266 *Recueil des Cours* (1997) 9, at 270–271; Wittich, ‘Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility’, 3 *Austrian Review of International and European Law* (1998) 101; M. N. Shaw, *International Law* (4th ed., 1997) 557.

²⁴ Introductory commentary to Part Two, Chapter III, at para. (5); see also Commentary to Article 36, para. (4).

²⁵ UN Doc. A/CN.4/L.600.

²⁶ See also *Restatement (Third)* (1987), vol. II, para. 901, Reporters’ Note 5; and R. Y. Jennings and A. D. Watts, *Oppenheim’s International Law*, vol. I (9th ed., 1992) 533.

²⁷ For an analysis of the relevant case law, see N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (2000) 187–207; Jørgensen, ‘A Reappraisal of Punitive Damages in International Law’, 68 *BYbLL* (1997) 247; Wittich, *supra* note 23, at 101; C. D. Gray, *Judicial Remedies in International Law* (1987) 26–28.

Court's decision in *Velasquez Rodriguez*, where the Court refused to award punitive damages, although the case involved human rights violations of a serious nature and although the Inter-American Commission had invited the Court to consider them.²⁸ In the crucial passage, the Court held that:

[a]lthough some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.²⁹

Commissioner Orrego Vicuna's concurring opinion in *Re Letelier and Moffitt* points in the same direction.³⁰ Concurring with the unanimous award, which did not award punitive damages, Orrego Vicuna took the opportunity to 'reiterate that international law has not accepted as one of its principles the concept of punitive damages'.³¹

Furthermore, cases which have sometimes been interpreted as endorsing the concept of non-compensatory damages are, upon reflection, not as unequivocal as it has sometimes been alleged. Taking the example of the *Janes* claim³² — sometimes regarded as supporting the concept of punitive damages³³ — it is at best ambiguous whether the indemnity awarded was intended to punish Mexico for its failure to try the murderers of Janes. Certainly, the Commission did not expressly say that this was the case. In contrast, it stressed that the non-punishment had caused grief and indignity to the dependants of Janes. Therefore, the award of \$12,000 might well be seen as a form of compensation for moral injury suffered by the victim's family.³⁴

Similar considerations apply to a number of other alleged precedents. In the *I'm Alone* case, the US–Canadian Commission recommended that 'as a material amend in respect of the wrong, the United States should pay the sum of \$25,000 to His Majesty's Canadian Government'.³⁵ Again, this stops short of an express endorsement of the concept of punitive damages. Moreover, it seems important to note that Canada had claimed more than \$30,000 in damages for expenses incurred as a consequence of the sinking of the ship. Thus the award may well be seen as a compensation for actual (material) loss.³⁶

Finally, the various attempts at settling the *Rainbow Warrior* affair provide equally inconclusive support for the view that international law accepted the concept of non-compensatory damages. As regards the UN Secretary-General's ruling of 6 July

²⁸ *Velasquez Rodriguez (Compensation)*, Judgment of 21 July 1989, 95 ILR 306, especially at paras 37–38.

²⁹ *Ibid.*, at para. 38.

³⁰ *Re Letelier and Moffitt*, 88 ILR 727; Commissioner Orrego Vicuna's Separate Opinion is reproduced *ibid.*, at 737.

³¹ 88 ILR 727, at 741.

³² 4 RIAA 82.

³³ See *Oppenheim's International Law*, *supra* note 26, at 533, n. 2.

³⁴ See Wittich, *supra* note 23, at 110–111.

³⁵ The award is widely seen as support for the concept of punitive damages: see *Restatement*, *supra* note 26, vol. II, para. 901, Reporters' Note 5; Dominicé, 'La satisfaction en droit des gens', in *Mélanges Perrin* (1984) 111, n. 63; *Oppenheim's International Law*, *supra* note 26, at 533, n. 4.

³⁶ See the detailed discussion by Wittich, *supra* note 23, at 121–123.

1986,³⁷ it is of course remarkable that a relatively large sum of money was awarded which seemed to go beyond the value of New Zealand's material loss.³⁸ Whether the award was non-compensatory, or even punitive, in nature, is, however, another matter. Two arguments in particular suggest a measure of caution. The first is that the Secretary-General designated the award as a form of compensation.³⁹ Secondly, the ruling did not set out how the precise amount of damages was calculated. Hence, one can only speculate about the punitive or compensatory nature of the damages awarded.⁴⁰

As regards the Arbitral Tribunal's decision of 30 April 1990,⁴¹ a short *obiter dictum* indeed seemed to allege that states were obliged to provide monetary compensation in cases of 'serious moral and legal damage, even though there is no material damage'.⁴² However, in the circumstances of the case, the tribunal only recommended the establishment of a fund, to which France would contribute a certain sum of money.

Finally, the comments of governments on Article 42 of the ILC's provisional set of Draft Articles adopted in August 2000 provide further support for a cautious approach. As is clear from the reactions in the General Assembly's Sixth Committee, the ILC's (then) acceptance of 'damages reflecting the gravity of the breach' was widely understood as a recognition of punitive damages and, on that basis, attracted considerable criticism.⁴³ In the words of the Japanese Government:

Damages reflecting the gravity of the breach seem scarcely different from 'punitive damages', which is not a notion established under international law.⁴⁴

To sum up these various statements, we can conclude that punitive or other non-compensatory damages have not expressly been recognized under international law.

That said, one might still distinguish between the express designation, and the real effect of an award of damages. As Commissioner Orrego Vicuna stated in *Letelier and Moffitt*, a tribunal awarding a disproportionate sum of compensation may at least indirectly punish the responsible state.⁴⁵ It must therefore briefly be considered whether international law has *implicitly* recognized the concept of non-compensatory

³⁷ 21 RIAA 199. We will leave aside the question of whether the ruling constitutes a form of arbitration, meditation or both. The differing views are analysed by Wittich, *supra* note 23, at 123–127.

³⁸ See Arangio-Ruiz, Second Report, *ILC Yearbook* (1989), vol. II, Part One, at para. 138; Shaw, *supra* note 23, at 555–556.

³⁹ See *Rainbow Warrior*, Ruling of the UN Secretary-General, at 213: 'My ruling is that the French Government should pay the sum of US\$7 million to the Government of New Zealand as compensation for all the damage it has suffered' (emphasis added).

⁴⁰ Gray, *supra* note 27, at 88–89.

⁴¹ 20 RIAA 217.

⁴² *Ibid.*, at 272 (para. 118); but cf. Wittich's critical analysis of this *dictum*, *supra* note 23, at 129–131.

⁴³ See Summary of Views Expressed in the UN General Assembly's Sixth Committee (55th Session (2000)), especially at 4 (United Kingdom), 8 (China), 19 (Japan), 143 (Brazil), 146 (United States) and 99 (Costa Rica); but cf. the statements by The Netherlands (*ibid.*, at 50) and Greece (*ibid.*, at 109).

⁴⁴ *Ibid.*, at 19.

⁴⁵ *Re Letelier and Moffitt*, Separate Opinion of Orrego Vicuna, 88 ILR 727, at 741; see also Gray, *supra* note 27, at 27–28.

damages. In the view of Commissioner Orrego Vicuna, this would be the case where a tribunal awarded damages clearly out of proportion to the loss actually suffered. It is clear that such awards would be difficult to justify where damages for material loss are at stake. However, the situation is different in cases involving claims based on immaterial harm. In determining the amount of money required to make good the immaterial harm, arbitral tribunals enjoy a wide measure of discretion. International judicial practice suggests that, at least in some cases, this discretion has been used in a very liberal way, and the amount of compensation awarded may have reflected the gravity of the infringement. Focusing on the cases discussed above, one might refer to the *Janes* claim, where the award of \$25,000 seemed quite considerable if compared to the actual violation of the law.⁴⁶ Similarly, irrespective of its formal designation, the award of \$7 million in *Rainbow Warrior (I)* could have been explained as an implicit condemnation of France's conduct. Finally, the case of *Zander v. Sweden* may be mentioned, in which applicants claimed damages for immaterial harm for having had to drink polluted water. The European Court of Human Rights awarded each applicant the sum of 30,000 Swedish kronor, which has been said clearly to exceed the usual sum of damages awarded in similar cases.⁴⁷

On the whole, there may therefore well be instances in which international tribunals have awarded 'covert' punitive damages, disguised as liberally calculated compensation for immaterial harm.⁴⁸ However, even when accepting that international law seems implicitly to recognize the covert award of non-compensatory damages, there are few indications that this should be a specific consequence of serious breaches in the sense of Article 40. Indeed, the possibility to determine generously the amount of compensation exists in practically all cases involving moral injuries. One might speculate that judges would be more likely to do so where the breach is of an egregious nature and affects fundamental rights of the individuals concerned. However, at least at present, this speculation is hardly supported by reality.

Summing up the preceding observations, it seems that under present-day international law, non-compensatory damages may not be awarded overtly. The phenomenon of 'covert awards' apparently including implicit elements of punishment, however, is not restricted to serious breaches in the sense of Article 40. Either way, non-compensatory damages do not constitute a specific consequence under a regime of aggravated responsibility.

B Specific Obligations Affecting the Incidence of Specific Forms of Reparation

It is another question as to whether international law recognizes specific consequences of serious breaches affecting the incidence of specific forms of reparation, i.e.

⁴⁶ See *supra* note 37; and cf. the references in Jørgensen, *supra* note 27, at 188.

⁴⁷ See the discussion *ibid.*, at 197.

⁴⁸ *Ibid.*, at 206–207; see also Gray, *supra* note 27, at 27.

the precise content of the duty to 'wipe out all the consequences of the illegal act'.⁴⁹ As is made clear in Article 34, reparation will consist of either restitution, compensation or satisfaction. Leaving aside the gradual distinction based on the legal effects of the wrongful act sustained,⁵⁰ it may be queried whether the regime of reparation should be modified in a qualitative way if the breach is of an exceptionally serious nature. Two aspects in particular need to be mentioned:

First, it has been asserted that, under a system of aggravated responsibility, the role of restitution as the primary form of reparation had to be reinforced. Hence, Article 52(a) of the 1996 Draft Articles provided that the responsible state could not avoid restitution even where it involved a disproportionate burden (disapplying old Article 43(c)), or where it endangered that state's political independence and economic stability (disapplying old Article 43(d)).⁵¹

Secondly, Article 52(b) removed limitations otherwise restricting claims for satisfaction. In particular, a state responsible for international crimes could not avoid satisfaction even where giving satisfaction would impair the dignity of that state (disapplying old Article 45(3)).

Both alleged specific consequences are part of a complex structure of exceptions and counter-exception established under the 1996 Draft Articles. This — as well as the use of indeterminate terms such as 'economic stability' or 'dignity of a state' — of course makes it difficult to apply the provisions to concrete situations. Nevertheless, when trying to analyse whether the consequences set out in (old) Article 52 are accepted under general international law, it is necessary to distinguish between paragraphs (a) and (b).

The main idea underlying (old) Article 52(a) is certainly convincing. Where the wrongful act in question affects fundamental obligations and is furthermore serious, compensation will often not be sufficient to re-establish the situation which would otherwise have existed. It is another matter whether this general interest in seeing restitution (rather than compensation) performed can only be achieved by disapplying certain limits on restitution. In this regard, (old) Article 52(a) is open to criticism.

Insofar as it allowed for restitution even where that involved a burden out of all proportion, it probably is too rigid a rule. Tomuschat has given the example of an aggressor state responsible for the destruction of historical cities, or for the nuclear contamination of a region.⁵² In these cases, would the responsible state be obliged to reconstruct the cities, even if this involved a burden out of all proportion as compared to compensation? And, similarly, in the second example, would it at all costs have to render habitable again the contaminated region? It is difficult to imagine that it

⁴⁹ *Chorzow Factory (Indemnity)*, 1928 PCIJ Series A, No. 17, at 47.

⁵⁰ See *supra* note 4 and the accompanying text.

⁵¹ The provision was based on Arangio-Ruiz' Seventh Report, UN Doc. A/CN.4/469, paras 18–26; cf. Fifth Report, *ILC Yearbook* (1993), vol. II, Part One, at 44, paras 179–180. In the same vein, Graefrath has argued that, under a regime of aggravated responsibility for state crimes, restitution was an integral part of the duty to make reparation and thus could not be substituted by compensation, even where the responsible state and the victim state so agreed: see Graefrath, *supra* note 12, at 71–72.

⁵² Tomuschat, *supra* note 21, at 256.

should. As the United Kingdom pointed out in its comments on the first reading draft, practice shows that conflicts involving large-scale violations of fundamental obligations are solved through political compromises rather than strict legal rules.⁵³ Although based on a convincing idea, Article 52(a) therefore seems to be formulated too strictly. In contrast, the text adopted during the second reading of the Draft Articles strikes a better compromise: While maintaining the idea that restitution must not be out of all proportion, the test is formulated in broader terms. Under the new formula, proportionality is no longer to be measured against the benefit of the injured state, but, more broadly, against the benefit ‘deriving from restitution’. Even without providing for a specific rule along the lines of Article 52(a), this would seem to allow accommodation of the general interest of all states in seeing restitution performed.⁵⁴

Insofar as (old) Article 52(a) disappplied (old) Article 43(d) — i.e. allowed for restitution even where it endangered the political independence or economic stability of the responsible state — it would seem to be unnecessary. In particular, it is difficult to see how a state could have ever plausibly invoked (old) Article 43(d). The Commission seemed to admit as much, by stating that the provision ‘referred to very exceptional circumstances’.⁵⁵ As a number of governments pointed out in their comments on the first reading draft, whenever restitution would seriously threaten the political independence or economic stability of the responsible state, that state could in any event avoid restitution since it surely would involve a burden out of all proportion in the sense of (old) Article 43(c). In addition, terms such as ‘political independence’ or ‘economic stability’ were so vague that the provision was difficult to apply. For all practical purposes, Article 43(d) therefore was no more than a subcategory of Article 43(c).⁵⁶ In line with this view, the Commission, during the second reading of the Draft Articles, decided to remove the special exception protecting a state’s political independence and economic stability, formerly contained in (old) Article 43(d). Consequently, there was no longer any need for an exception to the exception.

To sum up, one might therefore say that the specific exceptions contained in (old) Article 52(a) do not reflect general international law — either because of their too rigid formulation or because they are unnecessary. On the whole, one can probably agree with Tomuschat’s view that the provision seemed to be an ‘academic construct that simply satisfies the wish to provide for a special regime’.⁵⁷

As regards (old) Article 52(b), the situation is slightly different. Pursuant to the provision, states responsible for international crimes were obliged to accept humiliating forms of satisfaction, which otherwise would have been excluded. Unlike in the case of Article 52(a), one may seriously question whether the idea underlying this

⁵³ See the comments by the United Kingdom on the 1996 Draft Articles, reproduced in UN Doc. A/CN.4/488, at 139–140.

⁵⁴ See the Commentary to Article 35, para. (11); Third Report, UN Doc. A/CN.4/507 (2000), para. 408.

⁵⁵ Commentary to old Article 43, para. (17). It is interesting to note that the commentary did not cite a single instance in which states had actually relied on the exception in order to avoid restitution.

⁵⁶ Cf. the summary of views by Crawford, Third Report, UN Doc. A/CN.4/507, at para. 144(d).

⁵⁷ Tomuschat, *supra* note 21, at 257; see also Al-Khasawneh, *ILC Yearbook* (1994), vol. I, 99, para. 66.

provision is a sensible one. As is frequently noted, diplomatic practice provides a great number of examples of abusive demands for satisfaction, often made by the great powers during the era of colonialism.⁵⁸ In view of this practice, the first-reading commentary on satisfaction had stressed the need 'to draw lessons of the diplomatic practice of satisfaction which shows that abuses . . . are not rare'.⁵⁹ Interestingly — to quote Tomuschat again — 'this warning was obviously forgotten in the drafting of Article 52(b)'.⁶⁰

Leaving aside considerations of legal policy, one may doubt whether the provision actually reflects international law. The commentary to Article 52(b) provides very little guidance in this respect. All that is said is that 'by reason of its crime, the wrongdoing state has itself forfeited its dignity'.⁶¹ In his Seventh Report, the (then) Special Rapporteur had referred to demands for disarmament or demilitarization (as in the case of Iraq), or abrogation of discriminatory, racial or segregational legislation (as in the case of South Africa).⁶² However, upon reflection, it seems doubtful that any of his examples would have had to be justified as a humiliating form of satisfaction in the sense of (old) Article 52(b). In the case of Iraq, the measures were justified not under general international law, but under the special rules of the UN Charter. In the case of South Africa, demands for the abrogation of illegal legislation would better be interpreted as attempts to secure cessation and/or restitution. In short, modern state practice does not seem to support the rule put forward in (old) Article 52(b).⁶³

C Specific Obligations Relating to the Prosecution of Individual Perpetrators of Wrongful Acts

A third set of alleged specific consequences concerns the relation between the responsible state and the individual perpetrators of serious acts in the sense of Article 40. The recent renaissance of international criminal law has prompted increased debates on a number of issues arising in this respect, not the least questions of jurisdiction and immunities. Within a state responsibility context, it is another question that arises. It must be analysed whether a state responsible for exceptionally grave breaches of international law is under an obligation to take legal action, at the domestic level, against the individual perpetrators of these acts. This in turn would blur the line — consciously maintained in the ILC's, and other, relevant documents — between the spheres of state responsibility and individual responsibility under

⁵⁸ See the examples in Arangio-Ruiz, Second Report, *ILC Yearbook* (1989), vol. II, Part One, 35–38; Dominicé, *supra* note 35, at 98–99; Wittich, *supra* note 23, at 140; Commentary to Article 36 (second reading), para. (8).

⁵⁹ Commentary to old Article 45 (then Article 10), para. (25), *ILC Yearbook* (1993), vol. II, Part Two, at 81.

⁶⁰ Tomuschat, *supra* note 21, at 258. See also Bennouna, *ILC Yearbook* (1990), vol. I, at 169, para. 14.

⁶¹ Commentary to (old) Article 52, para. (6).

⁶² Arangio-Ruiz, Seventh Report, UN Doc. A/CN.4/469, at paras 31–32.

⁶³ See further Dominicé, *supra* note 35, at 98–99.

international law.⁶⁴ As a consequence, it could entail the duty of states to prosecute (or alternatively extradite) offenders, or, at least, not to adopt amnesty laws condoning the violation.

At present, no such obligation is contained in Part Two, Chapter III, of the second reading Draft Articles.⁶⁵ This contrasts with the position initially taken by Special Rapporteur Arangio-Ruiz, who, in his Seventh Report, had suggested that states responsible for the commission of international crimes were obliged either to prosecute or to extradite individual perpetrators of crimes against the peace and security of mankind. In its relevant parts, his Draft Article 18 provided:

Where an internationally wrongful act is an international crime, all States shall . . .

- (e) fully implement the *aut dedere aut judicare* principle, with respect to any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto.⁶⁶

In line with this view, Amnesty International, in a recent report, has argued that general international law increasingly recognizes a duty of states to prosecute (or extradite) perpetrators of offences which constitute crimes under international law.⁶⁷ This raises the question of whether the ILC should have recognized, within Part Two, Chapter III, a duty of states to bring to justice individual perpetrators of serious breaches of international law. It must therefore be analysed whether such a duty exists at all under international law, and whether it exclusively applies to serious breaches in the sense of Article 40.

With regard to the first question, recent developments in international law would indeed point towards the growing acceptance of an obligation to prosecute.⁶⁸ Two strands of arguments can be distinguished.

The first approach is based on the idea that the most serious international crimes attract specific obligations to investigate violations and try (or try or extradite) perpetrators. Treaty-based obligations to this effect are contained in a number of international conventions, including the four 1949 Geneva Conventions, the Genocide Convention, the Apartheid Convention, the Inter-American Convention

⁶⁴ Cf. Pellet, 'Une révolution inachevée', 42 *AFDI* (1996) 7, at 25; Pellet, 'Vive le Crime!', in International Law Commission (ed.), *International Law at the Eve of the 21st Century* (1997) 287, at 310–311. The relevant provisions upholding the distinction are Article 58 of the Draft Articles on State Responsibility and Articles 25(4) and 10 of the Rome Statute.

⁶⁵ But cf. the ILC's Commentary to Article 37 envisaging the punishment of offenders as a possible form of satisfaction (Commentary to Article 37, para. 5).

⁶⁶ Seventh Report, UN Doc. A/CN.4/469, Add.1, at 3.

⁶⁷ See Amnesty International, *Universal Jurisdiction — The Duty of States to Enact and Implement Legislation* (2001).

⁶⁸ For discussions in the literature, see e.g. Orentlicher, 'Settling Accounts. The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991) 2537; Scharf, 'Swapping Amnesty for Peace', 31 *Texas International Law Journal* (1996) 1; Boed, 'The Effect of a Domestic Amnesty', 33 *Cornell International Law Journal* (2000) 297; Edelenbos, 'Human Rights Violations: A Duty to Prosecute?', 7 *Leiden Journal of International Law* (1994) 5; Ambos, 'Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen', 36 *Archiv des Völkerrechts* (1998) 318.

Against Forced Disappearances and, although formulated in slightly weaker terms, the 1984 Torture Convention.⁶⁹

The second approach is based not on rules of international criminal law, but on the idea that the punishment of offenders may constitute a necessary aspect of the effective guarantee of human rights. Although none of the comprehensive human rights treaties expressly requires states to punish offenders, such a duty has been read into the obligations to ensure respect for human rights and to provide effective remedies for violations. The practice of various monitoring bodies confirms that states parties to the relevant treaties are legally bound to prosecute and punish those responsible for acts of torture, genocide or forced disappearances.⁷⁰ In the words of the Inter-American Court, states are under a positive obligation to:

organize the governmental apparatus and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention, and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.⁷¹

As a corollary, international monitoring bodies seem to recognize, albeit hesitantly, a prohibition against the granting of blanket amnesties for the violations of human rights obligations.⁷²

The question arises to what extent these various developments already justify the conclusion that the duty to prosecute (and not to amnesty) offenders has acquired the status of general international law. In view of the present evolution of the law, answers to this question can hardly be clear and unequivocal.

As regards the prohibitions against genocide and grave breaches of the laws of war, there certainly exists a considerable body of authority suggesting that states are

⁶⁹ See respectively Articles 51, 52, 131 and 148 of Geneva Conventions I–IV; Article 85 of Additional Protocol I (1977); Articles 4 and 6 of the Genocide Convention; Article IV(b) of the Apartheid Convention; Article IV of the Forced Disappearances Convention; and Article 7 of the Torture Convention.

⁷⁰ See e.g. *Velasquez Rodriguez* case (Merits), IACHR, 9 *Human Rights Law Journal* (1988) 212; *Caballero Delgado y Dantana*, IACHR, 17 *Human Rights Law Journal* (1996) 24; UN Human Rights Committee, General Comments Nos 7 (1982) and 20 (1992), www.unhcr.ch/tbs.doc.nsf. Cf. Ambos, *supra* note 68, with further references.

⁷¹ *Velasquez Rodriguez* case, *supra* note 70, at para. 169.

⁷² Treaties usually do not contain any provisions expressly prohibiting amnesties; pursuant to Article 6(5) of the Second Additional Protocol of 1977, state authorities shall even 'endeavour to grant the broadest possible amnesty' to those participating in the conflict. Nevertheless, various pronouncements by the Inter-American Commission, the Committee Against Torture, and the Human Rights Committee suggest that it would be a necessary corollary of the duty to provide effective remedies and to ensure respect for human rights: see the references in Amnesty International, *supra* note 67, Chapter XIV, nn. 89–90. Crucially, this view has now been confirmed by the Inter-American Court, in a judgment of 14 March 2001 in the *Barios Altos* case, where the Court declared Peruvian blanket amnesty laws to be incompatible with obligations under the ACHR: see *Barios Altos* judgment, www.corteidh.or.cr/serie_c/c_75_esp.htm, paras 41 *et seq.* For further discussion, see the articles by Scharf and Boed, *supra* note 68; Amnesty International, *supra* note 67, Chapter XIV, section VII; and Roht-Ariaza and Gibson, 'The Developing Jurisprudence on Amnesty', 20 *Human Rights Quarterly* (1998) 843.

obliged, even in the absence of treaty provisions, to prosecute offenders. Taking the example of genocide, this view is supported *inter alia* by various resolutions of the UN Security Council and General Assembly,⁷³ the ICJ's 1996 decision in the (*Bosnian*) *Genocide* case,⁷⁴ or the *Ntuyahaga* judgment of the ICTR.⁷⁵

In contrast, it is doubtful whether customary international law already recognizes a duty to bring to justice individuals responsible for acts of torture, crimes against humanity (where the absence of specific treaty provisions makes the search for a customary international law duty particularly relevant) or other serious human rights abuses. Evidence is at best ambiguous. On the one hand, the ICTY's *Furundzija* judgment and the practice of the Human Rights Committee suggest that the duty to prosecute those responsible for torture applies irrespective of treaty provisions.⁷⁶ With respect to crimes against humanity, various General Assembly resolutions urging states to prosecute crimes against humanity are usually relied upon.⁷⁷ In addition, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity⁷⁸ is similarly informed by the idea that these crimes need to be prosecuted.⁷⁹ Finally, the preamble to the 1998 Rome Statute, affirming 'the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes', provides the clearest expression of an emerging international consensus on the matter.⁸⁰

On the other hand, however, the actual practice of states is far from consistent, as can mainly be seen from the international community's reactions to national amnesty laws. Even when focusing on recent practice,⁸¹ one cannot fail to notice that the attempts of countries such as South Africa, Uruguay or Algeria to come to terms with past human rights abuses have been received favourably by the international community even though this often meant that those responsible for torture, crimes

⁷³ See SC Res. 978 (1995) and SC Res. 1291 (2000); GA Res. 49/206 (paras 4 and 6), GA Res. 50/200 (Preamble and paras 6 and 7), GA Res. 51/114 (para. 4) and GA Res. 54/188 (para. 3).

⁷⁴ See the ICJ's *dictum* that 'the obligation each State has to prevent and punish the crime of genocide is not territorially limited by the Convention': ICJ Reports (1996) 595, at para. 31; see also *Genocide Advisory Opinion*, ICJ Reports (1951) 15, at 23.

⁷⁵ ICTR, Decision on the Prosecutor's Motion to Withdraw the Indictment, Case ICTR-98-40-T (Trial Chamber I, 18 March 1999); see also Orentlicher, *supra* note 68, at 2565; *Restatement*, *supra* note 26, vol. II, para. 702, comment (d).

⁷⁶ *Furundzija* judgment, 37 ILM (1999) 317, at para. 155. See further the two General Comments Nos 7 (1982) and 20 (1992) of the UN Human Rights Committee, *supra* note 70.

⁷⁷ See e.g. GA Res. 2840 (XXVI) and GA Res. 3074 (XXVIII).

⁷⁸ 754 UNTS 73; see also the similar European Convention, 13 ILM (1974) 540.

⁷⁹ Orentlicher, *supra* note 68, at 2593; cf. Boed, *supra* note 68, at 315–317.

⁸⁰ See paras 4–6 of the Preamble to the Rome Statute.

⁸¹ Practice between 1945 and 1990 has led Scharf to state that '[t]o the extent that any practice in this area is widespread, it is the practice of granting amnesties or *de facto* impunity to those who commit crimes against humanity': see Scharf, 'The Letter of the Law', 59 *Law and Contemporary Problems* (1996) No. 4, 41, at 57.

against humanity or other serious human rights violations would go unpunished.⁸² The cases of Haiti, El Salvador and Cambodia, where the United Nations brokered or endorsed national amnesty laws, are probably even more striking.⁸³ In Haiti in particular, it is quite clear that the international community actually pressed for an amnesty which effectively condoned human rights abuses of the most serious nature.⁸⁴ With respect to Sierra Leone, the situation again is different: while the 1999 Peace Agreement did provide for a general amnesty,⁸⁵ the UN's Special Representative registered an oral disclaimer that this would not apply to genocide, crimes against humanity and war crimes — but there is no such exception for incidents of torture.⁸⁶

In view of this conflicting evidence, it would seem premature to conclude that general international law already recognizes a duty of states to prosecute and punish individual perpetrators of crimes other than genocide and large-scale war crimes. At least at present, the existing duty would seem to be better interpreted as a specific consequence of particular prohibitions. It does not, however, attach to the category of serious breaches of obligations arising under peremptory norms.

When taking into account possible developments of the law, there is further reason to doubt that the (arguably emerging) duty to prosecute individual perpetrators is a specific consequence of breaches of the kind envisaged in Article 40. Again, evidence is at best ambiguous. On the one hand, there is a considerable degree of congruence between the obligations addressed in Article 40, and those attracting a (possible) duty to prosecute. Hence, the duty has (or is alleged to have) acquired customary status in relation to the prohibitions against genocide, war crimes, torture, etc. — i.e. examples which are referred to in the ILC commentary to Article 40. Furthermore, the ICTY's *Furundzija* judgment, by implication, suggests that the prohibition against amnesty laws attaches to *all* peremptory norms of general international law.⁸⁷ Consequently, it would apply to the same circle of obligations referred to in Article 40.

On the other hand, one should not easily postulate that the duty to prosecute was

⁸² These precedents are discussed by e.g. Jørgensen, 'The Scope and Effect of the Algerian Law Relating to the Reestablishment of Civil Concord', 13 *Leiden Journal of International Law* (2000) 681; Dugard, 'Dealing with Crimes of a Past Regime', 12 *Leiden Journal of International Law* (1999) 1001; Scharf, *supra* note 68; and Edelenbos, *supra* note 68, at 13–14. See further Ambos, 'Impunity and International Criminal Law', 18 *Human Rights Law Journal* (1997) 1; and cf. the South African Constitutional Court's decision in *Azapo v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC), which upheld the South African amnesty.

⁸³ See the discussions by Ariaza and Gibson, *supra* note 72, at 849–850; and Scharf, *supra* note 68, at 1–18.

⁸⁴ See UN Doc. S/26297 (1993); and cf. the detailed discussion by Scharf, *supra* note 68, at 5–8.

⁸⁵ Article IX of the 1999 Peace Agreement, contained in UN Doc. S/1999/777.

⁸⁶ See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, at paras 22–24. The mixed criminal court for Sierra Leone will not be bound by the 1999 amnesties: see Article 10 of its Statute, contained in UN Doc. S/2000/915.

⁸⁷ 38 ILM (1999) 317, at para. 155, where the Trial Chamber stated: 'It would be senseless to argue, on the one hand, that, on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State condoning torture or absolving its perpetrators through an amnesty law.' See further Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes', 59 *Law and Contemporary Problems* (1996) No. 4, 63, at 65–66.

restricted to the types of breaches referred to in that provision. In particular, the majority of authorities cited in support of the emerging duty does not suggest that it is only attached to breaches of a widespread, systematic or large-scale nature. Instead, it is seen as a consequence of the peremptory character of a norm as such, irrespective of additional criteria qualifying the intensity of the breach.⁸⁸

Given the developing status of the law, it would of course be premature to draw any firm conclusions, or to predict the future evolution of the duty to prosecute. However, it is important to note that, once emerged, the duty to prosecute may not be restricted to breaches of a serious character in the sense of Article 40(2). This in turn would seem to reinforce the view that it does not constitute a special consequence of serious breaches in the sense of Article 40.

D Specific Obligations to Accept an International Assessment of the Circumstances

A final group of consequences allegedly arising under a regime of aggravated responsibility relates to the presence of third, independent parties entitled to assess and verify the effects of the violation. At present, the Draft Articles do not provide any rules on the assessment of breaches.⁸⁹

This non-institutional approach is in marked contrast to that of the Commission's penultimate Special Rapporteur on the topic, who had introduced a variety of detailed proposals aimed at establishing a system of independent, and institutionalized, dispute resolution. Insofar as these proposals provide for the involvement of the various United Nations organs, they are outside the ambit of the present contribution and will be dealt with separately.⁹⁰ However, Draft Article 18(2), submitted in 1995, envisaged a role for third-party dispute resolution outside an institutionalized (United Nations) framework. Under the provision, a state responsible for an international crime would have been obliged:

not [to] oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation.⁹¹

In the context of this paper, this alleged duty to accept fact-finding and observer missions can be dealt with relatively briefly.⁹² Of course, it cannot be denied that a state responsible for serious breaches of the kind contemplated in Article 40 will often

⁸⁸ See again *Furundzija* judgment, 38 ILM (1999) 317; and the statement by Bassiouni, *supra* note 87. It must be conceded that the situation is different with regard to breaches of the laws of war, since the respective provisions of the Geneva Conventions oblige states to punish those responsible for 'grave breaches'.

⁸⁹ Commentary to Article 40, para. (9).

⁹⁰ See Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law', in this issue.

⁹¹ Seventh Report, UN Doc. A/CN.4/469, Add.1, at 3.

⁹² Within the ILC, controversy surrounding the Special Rapporteur's proposals on the institutionalization of disputes involving crimes prevented any detailed discussion of Article 18(2); but cf. Tomuschat, *ILC Yearbook* (1995), vol. I, at 93, para. 40; and Fomba, *ibid.*, at 108, para. 53.

come under increasing political pressure to accept some form of independent assessment or monitoring of the situation. Nevertheless, practice quite clearly affirms that the actual sending of such missions, at least under general international law, is subject to the consent of the territorial state. This may be informed by a measure of realism, since, as Collier and Lowe have put it, '[t]here will arise considerable practical and legal difficulties if the territorial state refuses to cooperate'.⁹³ Perhaps more importantly, however, it reflects the attitude of states which have simply not accepted general rules prescribing mandatory inquiries on their territory. Of course, exceptionally, binding obligations may be found in treaties,⁹⁴ or could be imposed by the UN Security Council.⁹⁵ But, even under the relevant treaty provisions, the sending of fact-finding missions usually requires the consent of the parties to the dispute.⁹⁶ Consequently, all classic examples involving commissions of inquiry or fact-finding — such as the *Dogger Bank*, *Red Crusader*, *Tavignano* or *Tubantia* incidents or the inquiry into the murders of Letelier and Moffitt — were based on special agreements between the parties to the dispute.⁹⁷

Furthermore, although various General Assembly resolutions urge states to make use of inquiries, these inevitably stress the need to obtain the territorial state's consent.⁹⁸ The same result is borne out by the more recent examples involving fact-finding or monitoring by the Mitchell Commission or the OSCE observer mission in Kosovo.⁹⁹ In short, states are not obliged, under general international law, to accept independent fact-finding or observer missions on their territory. The ILC's decision not to include any such rule in Part Two, Chapter III, is therefore in line with general international law.

4 Conclusion

To sum up the preceding observations, the category of serious breaches of obligations under peremptory norms, as defined in Draft Article 40, does not, under present international law, give rise to specific legal obligations for the responsible state. None of the various candidates put forward in practice or literature, or suggested in the

⁹³ Collier and Lowe, *The Settlement of International Disputes* (1999) 27.

⁹⁴ See e.g. Articles 26 and 27 of the ILO Convention; or Article 26 of the ICAO Convention.

⁹⁵ See SC Res. 687, Section C, paras 8–9.

⁹⁶ See e.g. Articles 9 and 10 of the 1907 Hague Convention for the Pacific Settlement of Disputes, or, more recently, Annex VIII, Article 5, of the 1982 UN Convention on the Law of the Sea, and Article 90 of the 1977 Additional Protocol II to the Geneva Conventions.

⁹⁷ See 97 BFSP 77 (*Dogger Bank*); 118 UKTS (1961), Cmnd 1575 (*Red Crusader*); Scott, *The Hague Court Reports*, 1st Series (1916) 413 (*Tavignano*); *ibid.*, 2nd Series (1932) 135 (*Tubantia*); and 30 ILM (1992) 422 (*Letelier and Moffitt*).

⁹⁸ See GA Res. 46/59 (1991), especially para. 1.6; cf. also GA Res. 2329 (XXII).

⁹⁹ As to the Mitchell Commission, see the references in www.usembassy-israel.org.il/publish/peace/archives/2001/may/meridian.pdf. In the case of Kosovo, the OSCE observer mission was only sent after Richard Holbrooke and (then) President Milosevic had reached the agreement of October 1998 (see 38 ILM (1999) 24).

course of the ILC's debates, has so far acquired the status of general international law. The reasons for this are diverse: some of the alleged specific obligations have been accepted in international law, but are not restricted to serious breaches in the sense of Article 40 (e.g. guarantees and assurances of non-repetition, and some of the limits on reparation). In other cases, a duty may be said to be emerging, but possibly also applies to wrongful acts that do not qualify as serious breaches under that provision (e.g. a duty to prosecute individual perpetrators, or to provide for non-compensatory damages). Finally, insofar as fact-finding missions are concerned, there is little evidence for even an emerging duty of the territorial state to admit them.

It remains to be seen where this leaves us with regard to the more general problem of introducing into the Draft Articles categories such as that of serious breaches in the sense of Article 40. As a starting point for the evaluation, it may be useful to recall Judge Jessup's statement that '[o]ne is entitled to test the soundness of a principle by the consequences which would flow from its application'.¹⁰⁰

Applying this to the concept of serious breaches of obligations arising under peremptory norms, one might say that qualitative distinctions between different categories of wrongful acts would only be justified if they entailed specific legal consequences which do not arise from ordinary breaches. Indeed, this corresponds to the view taken by the ILC's Special Rapporteur during the course of the second reading, and shared by the majority of members of the Commission.

Of course, the present paper cannot attempt comprehensively to assess the viability of the ILC's distinction introduced in Part Two, Chapter III. After all, it has only analysed one category of possible specific consequences arising from serious breaches in the sense of Article 40, namely, those imposing additional obligations on the responsible state. It may therefore well be that other specific consequences (entailing specific rights or obligations of *other* states) exist, which would justify the differentiation between the two types of wrongful act.¹⁰¹

Nevertheless, when focusing solely on the specific obligations of the responsible state, it has to be concluded that present-day international law does not justify a distinction between serious breaches in the sense of Article 40, and other ordinary wrongful acts. From the (necessarily limited) perspective taken in this paper, the category of serious breaches in the sense of Article 40 is therefore unnecessary, and its inclusion in the Draft Articles not justified.

¹⁰⁰ *Barcelona Traction* case, Separate Opinion of Judge Jessup, ICJ Reports (1970) 3, at 220.

¹⁰¹ See *supra*, at 1162, for the distinction between three categories of possible specific consequences entailed by serious breaches in the sense of Article 40. For an analysis of possible rights and obligations of other states see the contributions to this symposium by Gattini, Scobbie and Alland. My own view is set out in 'All's Well That Ends Well? Comments on the ILC's Articles on State Responsibility (2001)', 62 *Zeitschrift für ausländisches Recht und Völkerrecht* (2002) 759.