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Bystander Obligations at the Domestic and International Level Compared

Otto Spijkers*

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* Assistant Professor of Public International Law at Utrecht University School of Law. This article is an expanded version of 'Can States Stand Idly by?: Bystander Obligations at the Domestic and International Level Compared', a blog post published at *Opinio Juris* (2 September 2013), available at http://opiniojuris.org/2013/09/02/29474/ (last visited 31 July 2014).

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Abstract

This article examines whether States have a legal obligation to assist victims of serious breaches of fundamental obligations owed to the international community as a whole. This so-called 'bystander State responsibility' is compared with a similar legal obligation to assist victims at the domestic level. First, the method of comparing the legal obligations of international bystander States with the legal obligations of domestic bystanders is examined. Is it appropriate to compare the two legal frameworks, and why (not)? What can we learn from such a comparison? After these preliminary remarks, the types of situation in which bystander intervention is – or ought to be – legally required are identified in general terms. This is followed by an *exposé* of the *raisons d'être* of bystander obligations. After having looked at reasons why bystanders ought to intervene in theory, the article analyzes justifications for not intervening in practice, both at the domestic and international level. Finally, the different stages of bystander intervention are compared. First, the bystander must be aware of the need to intervene, then the bystander must accept personal responsibility to do so, and then the bystander has to choose the appropriate type of assistance.

A. Introduction

In her opening statement to the Human Rights Council in September 2013, United Nations High Commissioner for Human Rights Navi Pillay said the following about the situation in Syria:

> "The International Community is late, very late, to take serious joint action to halt the downward spiral that has gripped Syria, slaughtering its people and destroying its cities. This is no time for powerful States to continue to disagree on the way forward, or for geopolitical interests to override the legal and moral obligation to save lives by bringing this conflict to an end. This appalling situation cries out for international action, yet a military response or the continued supply of arms risk igniting a regional conflagration, possibly resulting in many more deaths and even more widespread misery. There are no easy exits, no obvious pathway out of this nightmare, except the immediate negotiation of concrete steps to end the conflict. States, together with the United Nations, must

> find a way to bring the warring parties to the negotiating table and halt the bloodshed."[1]

Of course, the State of Syria is obligated to protect its own people from slaughter and destruction, and *a fortiori* prohibited from committing such offenses itself. But Pillay was not addressing the State of Syria here. She was instead referring to the responsibilities of other States to 'do something'. These States can be referred to as bystander States, since they are not directly involved in the conflict. So what must such bystander States do? Pillay referred to "the legal and moral obligation to save lives";[2] an obligation, presumably, that rests on the shoulders of all States, but especially on those of the most powerful. What exactly does this legal obligation to save lives entail, if it exists at all in the present international legal order? This is the question this article seeks to discuss. In order to explore this question in general terms, the international legal framework on bystander State responsibility will be compared with the obligations of bystanders in domestic legal systems, especially that of the Netherlands.

First, the method of comparing international bystander States to domestic bystanders is examined (section B.). Is it appropriate to compare the two legal systems, and why (not)? What can we learn from such a comparison, and is there a tradition of making such comparison of two categorically different types of bystanders? After this preliminary section, the types of situations where bystander intervention is – or ought to be – legally required are identified in general terms (section C.). This is followed by an *exposé* of the *raisons d'être* of bystander obligations (section D.). After having looked at theoretical reasons why bystanders ought to intervene, the article analyzes justifications for *not* intervening in practice, both at domestic and international levels (section E.). Finally, the different stages of bystander intervention are compared. The bystander must be aware of the need to intervene (section F.), then the bystander must accept personal responsibility to do so (section G.), and then the bystander has to choose the appropriate type of assistance (section H.). The article ends with a conclusion (section I.).

1 United Nations High Commissioner for Human Rights, 'Opening Statement at the Human Rights Council 24th Session' (9 September 2013), available at http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13687&LangID=E (last visited 31 July 2014).

2 *Ibid.*

B. Comparing International and Domestic Bystanders

I. Framing the Question

In this section, the appropriateness of comparing the international legal framework on bystander intervention with the domestic legal framework is assessed in a general sense. Can the situation of the international community of States, witnessing a terrible event in a specific part of the world and contemplating what to do about it, be compared with the situation of a group of human beings witnessing a fellow human being in mortal danger, and wondering whether to rescue that person? This article claims that such a comparison is indeed meaningful. It explores how the lessons learned relating to the obligations of so-called bystanders at the domestic level can be applied at the international level.

At the domestic level, the behavior and legal responsibilities of bystanders have been studied for many years. Admittedly, this has not led to a single approach to bystander responsibility adopted by all States in the world. Quite the opposite: the legal systems vary fundamentally. Many States do not have a provision at all in their criminal code making standing idly by when a crime is being committed a criminal offense. These States, essentially the Anglo-American legal systems, believe that the law should not enforce such acts of altruism on people. You cannot legally oblige people to be a hero, so it is said, and put them in prison if they refuse to be one. And among the States that *do* make standing idly by a criminal offense, there is considerable disagreement on the type of situation requiring bystander intervention.[3] The Netherlands has decided to make it a criminal offense not to intervene when a fellow human being is in *mortal* danger;[4] but the *German Criminal Code* already requires individuals to intervene when witnessing accidents, a common danger or an emergency.[5] Since the aim of this article is to look at the domestic approach in order to derive applicable lessons for the international legal order, it is not necessary to engage extensively in an exercise of comparative research and look in detail at the variations that exist in the domestic legal frameworks. In the remainder of this article, the provision on bystander intervention in the *Dutch Penal Code* will be referred to, as example of a domestic approach to bystander criminal responsibility.

3 See also *infra* section D. I.

4 See *Dutch Penal Code*, Art. 450. Cited according to L. Rayar & S. Wadsworth (transl.), *The Dutch Penal Code* (1997). See also *infra* section C. I.

5 *German Criminal Code*, Sec. 323c. Cited according to M. Bohlander (transl.), *The German Criminal Code: A Modern English Translation* (2008).

Although the responsibility of bystanders has been studied and developed mainly at the inter-individual level, it has been referred to many times *by analogy* in discussions on obligations of the international community to 'do something'. It was used to urge the United States of America (U.S.) to help Haiti in the 1980s;[6] to encourage the international community to stop Syria's destruction of Lebanon in 1989;[7] to encourage the United Nations Interim Force in Lebanon (UNFIL) to actively intervene;[8] to encourage the international community to intervene in the (civil) war in the former Yugoslavia in the 1990s;[9] to urge the US to rescue Colombia from drug related violence;[10] to critically evaluate the role of the United Nations and NATO in the reconstruction of Afghanistan and the fight against the Taliban;[11] to criticize the international community's lack of commitment to the peace talks between the government of Uganda and the Lord's Resistance Army, held in Juba, in Southern Sudan;[12] it was used in a critique of the slow response of the US and its allies to the events unfolding in Libya in 2011;[13] and finally, the US was qualified as bystander for its reluctance

6 A. Schlesinger Jr., 'Yes, Washington, There Is a Haiti', *The New York Times* (9 September 1987), available at http://nytimes.com/1987/09/09/opinion/yes-washington-there-is-a-haiti.html (last visited 31 July 2014).

7 J. Kirkpatrick, 'Lebanon is a Victim of World Indifference', *St. Louis Post-Dispatch* (3 September 1989).

8 N.N., 'Not-So-Innocent Bystanders', *Investor's Business Daily* (1 August 2006), available at http://news.investors.com/080106-421924-not-so-innocent-bystanders.htm (last visited 31 July 2014).

9 R. Ryan, 'Doing Nothing Sends a Dangerous Message to Other Hot Spots: Time to Act in Yugoslavia', *Boston Globe* (2 July 1992); M. C. Bernstein, 'Lessons of New York Apply to Sarajevo', *St. Louis Post-Dispatch* (20 September 1992); S. Bykofsky, 'Don't Watch in Silence While People Are Killed', *Atlanta Journal and Constitution* (28 January 1993), A13. See also P. Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (2002), 411-467.

10 C. Marquis, 'Facing Facts: Aid to Colombia; America Gets Candid About What Colombia Needs', *The New York Times* (25 February 2001), available at http://nytimes.com/2001/02/25/weekinreview/facing-facts-aid-to-colombia-america-gets-candid-about-what-colombia-needs.html (last visited 31 July 2014).

11 N.N., 'Gutless NATO Action Suggests Alliance', *The Star Phoenix* (16 September 2006).

12 A. Bradbury & P. J. Quaranto, 'Uganda: Not So Innocent Bystanders to Juba Talks', *The Monitor* (27 January 2008), available at http://allafrica.com/stories/200801280273.html (last visited 31 July 2014) .

13 L. M. Elkin, 'Libya and the "Bystander Effect"', *Business Insider* (14 March 2011), available at http://businessinsider.com/libya-and-the-bystander-effect-2011-3 (last visited 31 July 2014).

to intervene in Syria in the civil war that started in 2011.[14] The bystander-effect was also referred to in order to defend the US invasion of Iraq in 2003, as follows:

> "For years the Iraqi people had been screaming, in effect: 'Oh, my God. Please help me! Please help me! I'm dying!' How could America have answered, 'We don't want to get involved'? We are the biggest kid on the playground. If we won't help, who will?"[15]

The intervention in Iraq was supposedly an example of how things ought to be done: a bystander accepted its responsibility and intervened.[16]

These were all commentaries to specific events. But bystander State responsibilities were also invoked in order to criticize the inaction of States in response to more abstract evils. One such evil is the continuing environmental degradation,[17] and another is climate change.[18] And it was also invoked to make a more general point, not related to any specific incident. For example, transnational corporations were considered bystanders to human rights violations,[19] and Vetlesen looked at the role of bystanders to concrete acts of

[14] C. Krauthammer, 'While Syria Burns, Obama Stands Idly by', *Chicago Tribune* (30 April 2012), available at http://articles.chicagotribune.com/2012-04-30/news/ct-oped-0430-krauthammer-20120430-15_1_economic-squeeze-major-announcement-president-barack-obama (last visited 31 July 2014). See also S. Mohamed, 'Omissions, Acts, and the Security Council's (In)Actions in Syria', 31 *Boston University International Law Journal* (2013) 2, 415, 415-416. In the article Mohamed looks at whether such a comparison is fruitful and makes any sense.

[15] D. Gelernter, 'Bush's Greatness', *The Weekly Standard* (13 September 2004), available at http://weeklystandard.com/Content/Public/Articles/000/000/004/580vwath.asp?pg=2 (last visited 31 July 2014).

[16] Apparently, one of the biggest influences at the time, Paul D. Wolfowitz, also used the Kitty Genovese syndrome to convince the US to intervene. See F. Kools, 'Hameren op Aambeeld Irak', *Trouw* (6 December 2002), available at http://trouw.nl/tr/nl/5009/Archief/archief/article/detail/2580603/2002/12/06/Hameren-op-aambeeld-Irak.dhtml (last visited 31 July 2014).

[17] C. Cavendish, 'Wake up and Smell the Smoke of Disaster: Why Are We so Cool About Climate Change?', *The London Times* (8 November 2007), available at http://thetimes.co.uk/tto/opinion/columnists/camillacavendish/article2052032.ece (last visited 31 June 2014).

[18] G. Marshall & M. Lynas, 'Why we Don't Give a Damn', *New Statesman* (1 December 2003), available at http://newstatesman.com/node/146820 (last visited 31 July 2014).

[19] J. M. Amerson, 'What's in a Name? Transnational Corporations as Bystanders Under International Law', 85 *Saint John's Law Review* (2011) 1, 1, esp. 13-14.

genocide.[20] Grünfeld extensively researched the obligations of bystander States, especially in the face of genocide.[21] Scholarly discussions of the doctrines of just war, humanitarian intervention, and the responsibility to protect have also included references to bystander State responsibilities.[22]

II. Comparing the Domestic and International Legal Order

Do these comparisons have significance beyond the rhetoric effect? Can you really compare a State, witnessing an act of aggression committed against a neighboring State, with a man witnessing a murder in his neighbor's apartment? And can you compare the legal frameworks that regulate the rights and obligations of such witnesses? Of course, there are many differences between the two scenarios, but it is the similarities that are most striking and illuminating.

Much has been said about the similarities between the domestic and international legal order in general. The basic principles of the international legal framework are still to a large extent a copy of the basic principles of private domestic law. This was the case in the early days and it is still the case now. It has been suggested that the international legal order has become more 'public' or more '*sui generis*' in recent years. For example, Simma wrote in 2009 that the international legal order "begins to display more and more features which do not fit into the 'civilist', bilateralist structure of the traditional law", and that instead the international legal order was "on its way to being a true *public* international

20 A. J. Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander', 37 *Journal of Peace Research* (2000) 4, 519.

21 See F. Grünfeld, *Vroegtijdigoptreden van Omstanders ter Voorkoming van Oorlogen en Schendingen van de Rechten van de Mens* [Early Action of Bystanders to Prevent Wars and Violations of Human Rights], available at http://arno.unimaas.nl/show.cgi?fid=3830 (last visited 31 July 2014) [Grünfeld, Vroegtijdig Optreden van Omstanders]; A. Smeulers & F. Grünfeld, *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook* (2011) [Smeulers & Grünfeld, International Crimes and Other Gross Human Rights Violations]; F. Grünfeld & A. Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (2007) [Grünfeld & Huijboom, The Failure to Prevent Genocide].

22 See, e.g., G. Kent, 'Rights and Obligations', 34 *Natural Hazards Observer* (2010) 3, 1, 20; R. G. Wright, 'A Contemporary Theory of Humanitarian Intervention', 4 *Florida International Law Journal* (1989) 3, 435, 447; G. R. Lucas Jr., '"New Rules for New Wars": International Law and Just War Doctrine for Irregular War', 43 *Case Western Reserve Journal of International Law* (2011) 3, 677, 680-681.

law".[23] This is an ongoing process and the introduction of bystander State responsibility actually is part of that process.

After all, bystander responsibilities at the domestic level are not part of private law: doing nothing when someone is being murdered is itself considered a crime, not a mere tort or delict. Crimes are breaches of norms compliance with which people owe to their community as a whole, and not to other specific individuals. In this sense, criminal responsibility is *public* responsibility. When the domestic legislator decides to make standing idly by when faced with someone in mortal danger a criminal offense, the legislator thereby regards the obligation to intervene in such extreme situations as something owed to society as a whole, and not to the particular victim who is in mortal danger.

Applying this rationale at the international level presupposes that there is such a thing as public responsibility, i.e. responsibility owed to the international community as a whole, also in international law. An affirmative answer to such a question has far-reaching consequences, because it requires a legal framework outlining the consequences of a breach of such obligations owed to society. Considering its importance, it is not so surprising that the question has been discussed extensively by the International Law Commission (ILC). What the ILC was after, was a special legal framework regulating the consequences of serious breaches of particularly serious obligations. This set of rules is not directly applicable to bystander State obligations, because doing nothing to help a victim is generally not considered to be such a serious breach of a particularly serious obligation. Rather, it is the perpetrator that is held responsible for the serious breach of the particularly serious obligation. The responsibility of bystander States is a derivative or a consequence of the perpetrator's aggravated responsibility.

This can best be explained by briefly summarizing the decade-long discussion on the applicable legal framework for aggravated responsibility. The first attempt to come up with such a legal framework, of 1976, was to build it around the concept of 'State crime'. A State crime was defined as a breach by a State of an international obligation essential for the protection of fundamental interests of the international community. Examples of State crimes provided by the ILC at the time included aggression, the maintenance by force of colonial domination, slavery, genocide, *apartheid*, and massive pollution of

[23] B. Simma, 'Universality of International Law From the Perspective of a Practitioner', 20 *European Journal of International Law* (2009) 2, 265, 268.

the atmosphere or of the seas.[24] It was believed that it was in the interest of the international community and all its members that such breaches were never committed. Standing idly by when such a State crime is being committed is not itself a State crime. Rather, the obligation of bystander States to intervene when witnessing the commission of a State crime is one of the particular consequences triggered by the commission of such a crime. This is where the State crime provision differs from the domestic provision, which regards standing idly by itself also as a criminal offense.

In any case, the concept of State crime was generally believed not to be the suitable term for what the ILC really wanted to introduce into the world of State responsibility, namely the idea that "breaches could be committed by States [...] which might affect all States, so that it was up to the community of States as a whole to respond to them".[25] In other words, those who defended the concept of State crime did so, not because they wanted the perpetrator State to be 'punished', but because they believed the international community as a whole and all its members ought to have the possibility – and perhaps even obligation – to respond when its fundamental interests were under attack.[26] In 1996, the ILC provisionally adopted the *Draft Articles on State Responsibility*,[27] and despite all the objections to the concept of 'State crime', the 1996 *Articles* still included the concept introduced in 1976, virtually left unchanged.[28] It was only in 1998 that a new Special Rapporteur on State Responsibility, James Crawford, suggested that the ILC either use the word 'State crime' and adapt its rules accordingly (by

24 ILC, *Report of the International Law Commission on the Work of its Twenty-Eighth Session*, Yearbook of the International Law Commission (1976), Vol. II (2), 95-96.

25 ILC, *Summary Records of the Meetings of the Forty-Sixth Session*, Yearbook of the International Law Commission (1994), Vol. I, 89 (para. 64). When the Special Rapporteur (Mr. Arangio-Ruiz) later summarized the debate, he failed to mention the many objections to the use of the word 'crime'. Only after various objections to his summary did the Rapporteur indicate he was willing to "to refer to 'crimes' as *la chose* (the thing)". *Ibid.*, 139 (para. 59).

26 According to Mr. Pambou-Tchivounda, "Article 19 [...] had divided the victims of internationally wrongful acts into two categories: in the case of an international delict, the victim could be one or more States; in the case of an international crime, the victim was the international community of States as a distinct legal entity. Thus the nature of the victim was the touchstone for determining whether the internationally wrongful act concerned constituted a delict or a crime. In that way, the codification exercise had helped to promote the international community to the status of, as it were, a quasi-public legal authority." See *ibid.*, 77 (para. 30).

27 See *Draft Articles on State Responsibility*, Yearbook of the International Law Commission (1996), Vol. II (2), 58.

28 *Ibid.*, Art. 19, 60.

establishing punitive sanctions, means to determine guilt, State imprisonment, etc.), or drop it,[29] and focus instead on some alternative approach, based on *erga omnes* and *jus cogens* as guiding concepts in distinguishing certain fundamental norms and obligations from ordinary ones.[30] Now that the choice was phrased in such clear language, most ILC members realized the absurdity of the idea of State crimes – how can you put a State in prison? – and the concept was quickly dropped.

Crawford then suggested, as an alternative approach, to introduce a chapter on "serious and manifest breach[es] by a State of an obligation owed to the international community as a whole" to the ILC *Articles on State Responsibility*.[31] This formulation was meant to replace the concept of State crime.[32] Based on Crawford's suggestions, the ILC's Drafting Committee proposed a new set of two articles on the consequences of particularly serious breaches of particularly serious norms.[33] The first of these two articles introduced a new category of breaches, i.e. "serious breach[es] by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests".[34] Obligations owed to the international community as

[29] Crawford in fact came up with five suggestions. See ILC, *Report of the International Law Commission on the Work of its Fiftieth Session*, Yearbook of the International Law Commission (1998), Vol. II (2), 66-67, paras 252-259. See also ILC, *Summary Records of the Meetings of the Fiftieth Session*, Yearbook of the International Law Commission (1998), Vol. I, 97-99 (paras 2-10) [ILC, Summary Records of the Meetings of the Fiftieth Session].

[30] ILC, *Summary Records of the Meetings of the Fiftieth Session*, *supra* note 29, 97 (paras 78-81).

[31] ILC, *Third Report on State Responsibility: Addendum*, UN Doc A/CN.4/507/Add.4, 4 August 2000, 24, para. 412. See also ILC, *Summary Records of the Meetings of the Fifty-Second Session*, Yearbook of the International Law Commission (2000), Vol. I, 303 (para. 8) [ILC, Summary Records of the Meetings of the Fifty-Second Session].

[32] See ILC, *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Fifty-Fifth Session Prepared by the Secretariat*, UN Doc A/CN.4/513, 15 February 2001, 19-21, paras 89-94.

[33] On 8 August 2000, the *Articles* were referred to a Drafting Committee. See ILC, *Summary Records of the Meetings of the Fifty-Second Session*, *supra* note 31, 338 (para. 63). Gaja, Chairman of the Drafting Committee, presented a complete draft to the Commission on 17 August 2000. *Ibid.*, 386 (para. 1). The Drafting Committee's report is available as *State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading*, UN Doc. A/CN.4/L.600, 21 August 2000 [ILC, Draft Articles Provisionally Adopted by the Drafting Committee].

[34] ILC, *Draft Articles Provisionally Adopted by the Drafting Committee*, Art. 41 (1), *supra* note 33, 14. The *Articles* further defined a serious breach as "a gross or systematic failure by the

a whole are generally referred to as obligations *erga omnes*, and this Latin phrase was thus what replaced the references to State crime. In response to such breaches of obligations *erga omnes*, all States had a (1) duty of non-recognition; (2) a duty not to assist the responsible State; and (3) a duty to cooperate in bringing the breach to an end.[35] It is especially the latter obligation which reminds one of the duty of the bystander State to come to the assistance of the victim.

Crawford had some difficulty convincing his fellow ILC members of this new approach. Many of Crawford's colleagues preferred to see breaches of peremptory norms (*jus cogens*), and not breaches of obligations *erga omnes*, as triggering a duty for all other States to act in cooperation in order to bring such breach to an end. This view became more and more influential, and ultimately prevailed. The ILC *Articles on State Responsibility* as adopted in 2001 proclaim that States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law.[36] The concept used is thus peremptory norms (*jus cogens*), not obligations owed to the international community as a whole (*erga omnes*). Since the collection of peremptory norms and the collection of obligations *erga omnes* overlap, this sudden change of approach does not have any dramatic consequences in practice.

What is important is that the ILC embraced the idea that all States have a duty to act together to bring to an end any serious breach of a norm considered to be fundamental by the international community.[37] The acceptance of such an obligation makes the comparison with the obligation to act of a bystander at domestic level apt and interesting.

responsible State to fulfill the obligation, risking substantial harm to the fundamental interests protected thereby". *Ibid.*, Art. 41 (2), 14.

35 *Ibid.*, Art. 42 (2), 14-15.

36 *Articles on Responsibility of States for Internationally Wrongful Acts*, Arts 40 & 41, GA Res. 56/83 annex, UN Doc A/RES/56/83, 12 December 2001, 9 [Articles on Responsibility of States for Internationally Wrongful Acts].

37 It must be pointed out that the ILC did believe this was an example of progressive development, not a codification of existing customary international law. At the same time, the International Court of Justice has already referred to the obligations described in these articles – but without referring to the articles explicitly. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 200, paras 159-160.

C. When Bystander Intervention is Legally Required

I. Bystander Obligations at the National Level

Article 450 *Dutch Penal Code* states that any person who sees someone in immediate mortal danger, must provide support, if he can do so without endangering himself or others.[38] If he refuses to do so, and if the death of the victim follows, the bystander will be punished with imprisonment not exceeding three months.[39] Article 450 is addressed to everybody, but only those (1) witnessing a perpetrator assaulting a victim and (2) able to provide assistance to the victim, will breach the provision if they do nothing. As Article 450 clearly states, the bystander will only have committed the offense if the victim eventually dies, but it is not necessary that a causal link is established between the failure to act of that particular bystander and the death of the victim.[40] The Netherlands is not alone in this approach. In many other States, standing idly by when someone is in immediate mortal danger is equally a criminal offense.[41]

II. Bystander Intervention at the International Level

At the Dutch domestic level, a bystander is only legally required to intervene if the victim is in *mortal* danger.[42] In other words, such an obligation

38 Rayar & Wadsworth, *supra* note 4, 268.

39 See also Grünfeld, *Vroegtijdig Optreden van Omstanders*, *supra* note 21, 35.

40 There is not so much case law on Art. 450 *Dutch Penal Code*, and the existing cases are all about rather atypical events, in which the bystander is for some reason or another already quite involved in the events leading up to the death of the victim. There is a judgment of the Dutch Supreme Court of 25 March 1997 (the bystander sees another man lying down in the garage box of the bystander's father but does not look to see if the man needs help), a judgment of the The Hague Appeals Court of 1 December 2010 (police officers fail to rescue a man from being beaten to death), and a judgment of the District Court of 's-Hertogenbosch of 10 June 2003 (a so-called bystander does not 'rescue' a woman in the process of committing suicide) (copy of cases on file with author).

41 See for a comparative study F. J. M. Feldbrugge, 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue', 14 *American Journal of Comparative Law* (1966) 4, 630. In an appendix (*ibid.*, 655-657) to the article, Feldbrugge provided English translations of an impressive number of national law provisions from all over the world criminalizing people passing by when a fellow human being is in serious danger.

42 As mentioned above, this is the case in the Netherlands. Not all domestic jurisdictions restrict bystander responsibilities to situations involving mortal danger. For example, *German Criminal Code*, Sec. 323c, *supra* note 5, 200, stipulates that "[w]hosoever does not render assistance during accidents or a common danger or emergency although it

only exists in the most extreme of all cases. In international law, it is appropriate to define the obligation to intervene just as narrow.

One of the best-known attempts to define the type of situation requiring bystander State intervention at the international level is the Responsibility to Protect doctrine. In 2005, the United Nations General Assembly identified "genocide, war crimes, ethnic cleansing and crimes against humanity" as requiring an immediate response from the international community and all States.[43] The exact legal nature of this doctrine is still disputed. There is also debate about the rights and obligations that follow from the doctrine, both for the perpetrator and for all other States.[44] The responsibility of States to protect individuals from the so-called atrocity crimes listed above can, at least partly, be derived directly from the relevant treaties, in particular the *Genocide Convention* and the *Geneva Conventions on the Laws of War*. The former states that "the Contracting Parties confirm that genocide [...] is a crime under international law which they undertake to prevent and to punish",[45] and the latter proclaims that "the High Contracting Parties undertake to respect and to ensure respect for

is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to himself and without violation of other important duties shall be liable to imprisonment of not more than one year or a fine". For other examples, see Feldbrugge, *supra* note 41, esp. 655-657.

43 *2005 World Summit Outcome*, GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005, 30, paras 138-139. These four crimes taken together are nowadays generally referred to as 'atrocity crimes'.

44 In a series of reports, UN Secretary-General Ban Ki-moon has tried to shed some light on these questions. See UN Secretary-General, *Implementing the Responsibility to Protect*, UN Doc A/63/677, 12 January 2009; UN Secretary-General, *Early Warning, Assessment, and the Responsibility to Protect*, UN Doc A/64/864, 14 July 2010; UN Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, UN Doc A/65/877, 28 June 2011; UN Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, UN Doc A/66/874, 25 July 2012 [UN Secretary-General, Responsibility to Protect, UN Doc A/66/874]; and UN Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, UN Doc A/67/929, 9 July 2013. On bystander responsibilities, these reports are very carefully worded. Instead of talking about obligations of all States to protect, reference is made to instruments available for States to assist each other to meet their responsibilities to their own populations. The reports say very little about legal obligations of bystander States to make use of these instruments. An exception is the reference to the ICJ judgment of 2007 on the genocide in Srebrenica of 1995 (*infra* note 47) in UN Secretary-General, *Responsibility to Protect*, UN Doc A/66/874, *supra* this note, 11, para 40.

45 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Art. 1, 78 UNTS 277, 280.

the present Convention in all circumstances".[46] This still does not provide much clarity as to the precise rights and obligations of bystander States, but at least it is clear that States must do 'something' when serious breaches of humanitarian law or genocide are being committed. This obligation was reaffirmed by the International Court of Justice (ICJ) when it explained that the obligation of States parties to the *Genocide Convention* is "to employ all means reasonably available to them, so as to prevent genocide so far as possible".[47]

The Responsibility to Protect doctrine is very important in the discussion on the responsibilities of State bystanders, and most of the literature on bystander States is about genocide, war crimes, ethnic cleansing, and crimes against humanity – especially genocide. But the Responsibility to Protect doctrine does not cover all events requiring bystander State intervention, and it does not tell the whole story. There remains a need for a more general approach.

The search is thus for a category of breaches of international law so serious that States should not be permitted to stand idly by when witnessing such breaches. We know that States cannot stand idly by in the face of atrocity crimes, but is that all? Above, we referred already to the ILC *Articles on State Responsibility*, and more specifically the article that proclaimed the duty of all members of the international community to cooperate to bring to an end any serious breaches of peremptory norms.[48] It could be argued that this provision implicitly suggests that whenever a serious breach of a peremptory norm is committed, all States in the world are under an obligation to jointly do

46 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 1, 75 UNTS 31, 32; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 1, 75 UNTS 85, 86; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 1, 75 UNTS 135, 136; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 1, 75 UNTS 287, 288. The commentary to these conventions of 1952 explains that, "in the event of a [State] failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention". J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. I (1952), 26.

47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 182, para. 430 [ICJ, Application of the Genocide Convention]. On the obligation to prevent genocide, see also M. Vashakmadze, 'Shared Responsibility for the Prevention of Genocide?', *SHARES Research Paper* No. 14 (2012), available at http://sharesproject.nl/wp-content/uploads/2012/11/SHARES-RP-14-final.pdf (last visited 31 July 2014).

48 *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 41 (1), *supra* note 36, 9.

'something'. It thus appears that bystander State responsibilities are engaged not only in cases of atrocity crimes, but more generally: whenever a serious breach of a peremptory norm has been committed. This still does not provide us with a list of such obligations, but it does show that international law has at least a legal framework to identify the type of breaches and the type of norms triggering bystander State responsibility.

D. *Raisons d'être* of Making Bystander Intervention a Legal Obligation

I. *Raisons d'être* of Bystander Obligations at Domestic Level

According to the *travaux préparatoires*, Article 450 was included in the *Dutch Penal Code* because citizens, when witnessing someone in mortal danger, ought to do what the representatives of public authority would have done if only they were present.[49] When the authorities are absent, the citizen standing by has a duty to act.

The article was included in the *Dutch Penal Code* in 1880. Inclusion of this article was defended at the time with the argument that the 'popular consciousness' was offended by the impunity of people standing by when fellow citizens were dying.[50] Feldbrugge, who analyzed the theoretical justifications of similar provisions in domestic criminal legislation all over the world, concluded that "many legislators have come to realize that certain behavior with regard to persons in danger is so offensive to the moral feelings of a community that the interference of criminal law is called for".[51] This view is not universally embraced, not even in the Netherlands in 1880. When the Dutch legislator discussed the article, there was some resistance. A minority of the Members of Parliament believed that

> "[t]he act of omission which [Article 450] criminalizes is as a rule more due to shiftlessness rather than negligence, and when [the omission] results from mercilessness, it is better to leave it

[49] H. J. Smidt (ed.), *Geschiedenis van het Wetboek van Strafrecht: Volledige Verzameling van Regeeringsontwerpen, Gewisselde Stukken, Gevoerde Beraadslagingen, etc.* [History of the Netherlands Criminal Code: A Complete Collection of Draft Legislation, Exchanged Documents, Records of Deliberations, etc.], Vol. 3, 2nd ed. (1892), 290.

[50] *Ibid.*

[51] Feldbrugge, *supra* note 41, 654.

> to the indignation of the public than to punish the perpetrator as lawbreaker".[52]

The principal representative of this minority, Member of Parliament Donner, believed that the article demanded an act of "noble self-sacrifice" of the bystander, and it would be strange to make this a legal obligation.[53] You cannot legally oblige people to be a hero, and put them in prison if they refuse to be a hero. Instead of using legal means to punish a person standing idly by when someone was being killed, Donner "would prefer to leave such an inhuman monster [i.e. the passive bystander] to the punishment of the little grain of humanity that was left in him, and to the indignation of the public about such an act".[54]

In defense of what was to become Article 450 *Dutch Penal Code*, it was noted that in an 'ordered society' it was justified to make it a legal obligation to help in such extreme cases. Moreover, it was believed, very realistically, that "on many merciless individuals, a threat of criminal punishment might exert greater pressure than the fear of public opinion".[55] The Dutch Minister of Justice explained that

> "[t]he official protection of society, which generally guards and protects us, is at a certain moment temporarily absent, while we find ourselves in agony due to an accident. The government and the police are absent. The individual or individuals who happen to be present and who are the only ones able to provide assistance, represent society for the unfortunate. Upon them rests the duty to grant the assistance only they can provide."[56]

The *raisons d'être* of a legal obligation of bystanders to intervene are thus as follows: in the absence of representatives of public authority, individual members of society who happen to be present have to act on behalf of the society. If such bystanders do not do so, this is offensive to the moral feelings of a community.

52 Smidt, *supra* note 49, 290 (translation by the author).
53 *Ibid.*, 291 (translation by the author). See also H. G. van der Werf, 'Ben ik Mijn Broeders Hoeder?', *Executief: Maandblad Voor Burgerlijke Rechtsvordering* (1996) annex, 42-44.
54 Smidt, *supra* note 49, 292 (translation by the author).
55 *Ibid.*, 290-291 (translation by the author).
56 *Ibid.*, 293 (translation by the author).

Counterarguments were that you cannot impose such 'moral feelings' on people through legal means.

II. *Raisons d'être* of Bystander Obligations at Inter-State Level

What are the *raisons d'être* of legal responsibility to intervene at the international level? Here too, the main reason is that doing nothing in extreme cases is offensive to the moral feelings of an international community, and thus intervention should be a legal obligation. This does presuppose a sense of community, of 'togetherness'.

It has been suggested that the question of the responsibilities of bystanders in the international (legal) order only arose after this order started to look more like an international community in which all States lived together. It is, of course, debatable when such community started to emerge, but it is clear that the issue of bystander responsibility only arises when other States are actually considered as bystanders, i.e. as people 'present' at an emergency, and 'witnessing' it. If the international community is a patchwork quilt of isolated islands, then of course all States live on their own island, and nobody is bystander to anything. Lucas suggested that the shift came with the end of the Cold War:

> "[After the end of the Cold War] [t]he questions centered no longer on legal or moral *permissions* or the legal license to carry out conventional military campaigns of the sort that current international law pertaining to self-defense and collective security exclusively addresses. Instead, the even more troubling question in these new cases was, when should member-nations in the so-called 'international community' recognize an *obligation* to come to the aid of vulnerable nations or victimized populations? What sets of conditions or criteria would constitute, for example, not so much a 'just cause' for going to war, as an *overriding obligation* to come to the aid of vulnerable victims? And, upon whom would such an obligation fall?"[57]

It was this new approach to international responsibilities which made people compare State inaction with the inaction of the witnesses at the domestic

[57] G. R. Lucas, '"New Rules for New Wars" International Law and Just War Doctrine for Irregular War', 43 *Case Western Reserve Journal of International Law* (2011) 3, 677, 680-681 (footnotes omitted).

level. Commentators "wondered, by analogy, what sort of 'community' the international community was, if its member-states consistently turned a blind and uncaring eye away from such tragic and seemingly avoidable cases of genocide".[58] For these same reasons, the idea that all States have a responsibility to do something, or to 'protect', in case of grave human rights violations, also became popular after the end of the Cold War.

The introduction of the legal obligation for bystanders to intervene in order to save fellow-human beings in mortal danger in the Netherlands in the 1880s, was in part motivated by the acknowledgment that the State cannot be represented everywhere and all the time. It was thus sometimes up to individuals to 'represent' society in the absence of formal representatives, such as the police. At the international level, such formal representatives are practically non-existent. There is no global police force. The need for more formal representation of the international community – through United Nations organs? – has often been put forward, especially as a more institutionalized way to publicly defend compliance with *erga omnes* obligations,[59] but it does not currently exist. And thus it is *always* up to individual members of the community – i.e. States – to 'represent' the international community. This makes it even more urgent to have a provision similar to Article 450 *Dutch Penal Code* at the international level.

E. Why Bystanders Generally Prefer not to Intervene

I. Reasons for Bystanders not to Intervene at Domestic Level

Although intervening when someone else is in mortal danger might be the 'right thing to do', there are also many reasons not to intervene.[60] Rescue operations might end badly, with both the victim and the rescuer seriously harmed. This is a very likely scenario, if one keeps in mind that major incidents are rare and potential rescuers are generally not prepared, equipped or trained to intervene successfully, unlike the authorities.[61] And even if a rescue is successful,

58 *Ibid.*, 681.

59 P.-M. Dupuy, 'A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', 13 *European Journal of International Law* (2002) 5, 1053, 1066.

60 See J. M. Darley & B. Latané, 'Bystander Intervention in Emergencies: Diffusion of Responsibility', 8 *Journal of Personality and Social Psychology* (1968) 4, 377, 382, mentioning the fear of physical harm and public embarrassment) [Darley & Latané, Bystander Intervention in Emergencies].

61 B. Latané & J. M. Darley, *The Unresponsive Bystander: Why Doesn't He Help?* (1970), 30 [Latané & Darley, The Unresponsive Bystander].

nobody is really any better off than before the victim got into trouble. The victim will probably have suffered some harm already and the rescuer might be traumatized or physically hurt because of the rescue.[62] And thus, "the bystander to an emergency is in an unenviable position [and] [...] [i]t is perhaps surprising that anyone should intervene at all".[63]

II. Reasons for Bystanders not to Intervene at the International Level

The reasons not to intervene apply *a fortiori* at the international level. We saw that rescue operations involve great risks and costs. The rescuer can make matters worse, and not oversee the long-term consequences of his actions. Rescue operations can also fail to achieve their objective.

A painful example of the latter is the role of the United Nations and the Netherlands in the genocide in Srebrenica in 1995.[64] Grünfeld rightly pointed out that the Netherlands had at least attempted with good intentions to respond to the atrocities in Bosnia, while most other States literally stood idly by. When the Dutch government resigned over responsibility for what happened in Srebrenica, the Dutch Prime-Minister emphasized that it was the international community as a whole that had failed to provide adequate protection to the people in the 'safe areas', and the Netherlands, being a member of the international community, thus also failed.[65] The resignation was not in recognition of any special responsibility of the Netherlands. This makes good sense. After all, there is no reason why a State engaging in a failed rescue attempt is more responsible than bystanders who did absolutely nothing. In fact, at the domestic level only the bystanders that did nothing would be criminally prosecuted. You do not end up in prison if you attempt to save someone's life, but you ultimately fail to do so. At the international level, in practice it does not always work that way. All the bystander States in the world are left alone, whilst the Netherlands, which was part of a failed rescue attempt, is traumatized and is still facing various law-suits.[66] One can compare this with a man trying to save

62 *Ibid.*, 29.

63 *Ibid.*, 31.

64 See also Grünfeld, *Vroegtijdig Optreden van Omstanders*, *supra* note 21, 43-47.

65 *Ibid.*, 43-45.

66 See O. Spijkers, 'The Immunity of the United Nations before the Dutch Courts', 51 *Military Law and the Law of War Review* (2012) 2, 361; O. Spijkers, 'The Netherlands' and the United Nations' Legal Responsibility for Srebrenica Before the Dutch Courts', 50 *Military Law and the Law of War Review* (2011), 3/4, 517; and O. Spijkers, 'Legal

someone from drowning at sea, with lots of people watching from the beach. If the rescuer's attempts fail because of their apparent clumsiness, the 'rescuer' will be traumatized and criticized, including by all those watching from the beach doing nothing. But it is the people doing absolutely nothing that face criminal prosecution.

Even if a rescue attempt is entirely successful – which rarely happens at the international level – there seem to be little rewards for the rescuer. The rescuer is generally not recompensed for the costs of the rescue operation. This raises the question as to whether it is not wise for the rescuer to consider its own particular interests in a rescue.

F. Bystander Awareness of the Need to Intervene

I. Bystander Awareness at the Domestic Level

Whenever an event occurs, the bystander first has to notice it, and then interpret it as a situation obliging him to intervene.[67] In order to commit the offense of Article 450 *Dutch Penal Code*, the bystander must have had a certain awareness or consciousness of the danger the victim was in. Since intervening is not an attractive option (as explained just above), most bystanders will do their best to interpret what appears to be a victim in trouble as, in fact, a normal course of events.[68] When other bystanders do not intervene, this makes it even easier to interpret what is happening as not warranting intervention.[69] This way, a collective of bystanders can fool themselves. After all, the indecisiveness of other bystanders – and bystanders can remain indecisive for a very long time[70] – is then interpreted as a *decision* not to intervene. And if all others appear to have decided not to intervene, it is easier to do the same. This phenomenon is referred to as "pluralistic ignorance".[71]

Mechanisms to Establish Accountability for the Genocide in Srebrenica', 1 *Human Rights & International Legal Discourse* (2007) 2, 321, for more on Srebrenica and the many legal claims submitted in relation to it.

67 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 31.

68 *Ibid.*, 33.

69 *Ibid.* See also *ibid.*, 88-89 & 69-77.

70 *Ibid.*, 100. Latané and Darley discovered in an experiment they did that "non-intervening subjects had not decided *not* to respond [...] [but] they were still in a state of indecision and conflict concerning whether to respond or not". *Ibid.* Interestingly, the longer a bystander remains indecisive, the harder it becomes to make the decision to intervene. *Ibid.*, 122.

71 *Ibid.*, 42 & 110.

II. Bystander Awareness at the International Level

The argument that a State 'did not know something was going on' is untenable. Smeulers and Grünfeld believe that in the international community it is impossible not to notice the type of event warranting bystander intervention – think of genocide, war crimes, colonial domination by force, systemic torture, etc.[72] If a State fails to notice such and similar events, this can only be explained as a conscious and deliberate decision to look the other way, and remain ignorant. This is especially true with the improved capacities of various NGOs, journalists, and the United Nations to issue early warnings, especially when genocide is concerned. Such early warnings effectively oblige all bystanders to make a decision: to decide whether the event constitutes the type of event obliging bystander States to intervene, and then to either become rescuer, or collaborator. Early warnings are generally forthcoming; there is no shortage of such early warnings for those that wish to see them. Grünfeld and Huijboom thus conclude that, "generally speaking, it is not early warning that is lacking, but early action".[73]

In defense of the States standing idly by, it could be argued that it is perhaps easy to notice 'something' is happening, but that it is often very difficult at the international level to find out exactly who is doing what and what exactly needs to be done about it. To state the problem as a choice between doing nothing and thereby facilitating the serious breach of a peremptory norm, and doing the right thing and thereby becoming the *deus ex machina* that solves the problem, is of course an oversimplification.[74] It is often very difficult to decide on the right action, in such tragic contexts with lots of uncertainty and confusion.

G. Bystander Responsibility to Intervene

I. Bystander Responsibility to Intervene at Domestic Level

If the event is interpreted as the kind of event which obliges the bystander to intervene, the bystander has to accept that it is his *personal* responsibility to intervene. Once again, one must keep in mind the unattractiveness of intervention.

72 Smeulers & Grünfeld, *International Crimes and Other Gross Human Rights Violations*, *supra* note 21, 335-337.

73 Grünfeld & Huijboom, *The Failure to Prevent Genocide*, *supra* note 21, 14.

74 This is also why Hakimi does not believe that being a bystander is essentially the same as being a collaborator, or as being complicit in the crime. There is always a space between being a rescuer and a collaborator. See M. Hakimi, 'State Bystander Responsibility', 21 *European Journal of International Law* (2010) 2, 341, 354.

And thus the bystander will still try to find excuses for not-intervening. One excuse – or perhaps it can be called a justification[75] – for not intervening is to convince oneself that the victim somehow deserved it, or was asking for it.[76] In general, this justification is not accepted. As Feldbrugge concluded, "where the victim himself is to be blamed, entirely or in part, for having placed himself in a dangerous situation, there is no fundamental change in the duty of potential rescuers."[77] But there are exceptions. An extreme example is a person who is about to commit suicide. In the Netherlands, Article 450 *Dutch Penal Code* does not oblige a bystander to 'rescue' a person who attempts to commit suicide.

Other excuses are based on the idea that, even though a particular bystander might be 'somewhat responsible', others are 'even more responsible'. Some others might have a special relationship with the victim, and some others might be more competent to intervene.[78] Feldbrugge noted that the ability – and thus responsibility – to help depends on the bystander's "nearness to the danger, [...] [his] awareness of the danger, and [...] the existence of the possibility of effective interference".[79] It has been suggested that some people are more eager to intervene than others because they are – or feel – more competent. An experiment by Ted Huston gave the impression that "[p]eople who are able to suppress fear, or who feel less fear than others, perhaps as a result of a sense of competence, may be most apt to intervene in highly threatening situation".[80]

A related question is whether the perpetrator, after having wounded the victim, has a duty to provide assistance to that victim. There is no reason to suggest that the perpetrator can leave his victim to die when innocent bystanders

75 The difference between an excuse and a justification is that a claim of justification proposes that the act or omission was *objectively* defensible, i.e. it was the right thing to do; whilst a claim of excuse acknowledges that the act or omission was not defensible, but that the actor is not responsible for this act. Arguments referring to the diffusion of responsibility are thus excuses, not justifications, since the right thing to do was to act. See, e.g., K. M. McGraw, 'Avoiding Blame: An Experimental Investigation of Political Excuses and Justifications', 20 *British Journal of Political Science* (1990) 1, 119, 120-121; K. Greenawalt, 'Distinguishing Justifications From Excuses', 49 *Law and Contemporary Problems* (1986) 3, 89.

76 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 33-34.

77 Feldbrugge, *supra* note 41, 639.

78 See also L. May, 'Collective Inaction and Shared Responsibility', 24 *Noûs* (1990) 2, 269, 274-275, who argues that some members are better at motivating the entire group to intervene – and thus more responsible for the group's inaction.

79 Feldbrugge, *supra* note 41, 634.

80 L. Huston *et al.*, 'Bystander Intervention Into Crime: A Study Based on Naturally-Occurring Episodes', 44 *Social Psychology Quarterly* (1981) 1, 14, 22.

have an obligation to assist the victim. Feldbrugge had an interesting solution to this dilemma:

> "Where the danger to the victim has been caused intentionally [e.g. an attempt to murder the victim], the lesser offense of failure to rescue is 'absorbed' by the greater offense of attempted homicide or infliction of bodily harm. Where, however, the danger to the victim has been caused by negligence or accident [e.g. the perpetrator ran over the victim with his car], the failure to extend aid is the result of an independent decision of the potential rescuer, and as such deserves separate punishment."[81]

In any case, in almost all cases in which there is more than one person standing by when someone is in mortal danger, each bystander will ask him or herself: 'someone needs to do something, but why does it have to be me?' This question follows directly from what psychologists call a diffusion of responsibility: if many bystanders are all equally responsible, nobody is particularly encouraged to act.[82]

The situation is different if one of the bystanders has a special relationship with the victim, because then this particular bystander is "somehow closer to the victim than any of the other subjects", and cannot "diffuse his responsibility onto them so easily".[83] Sometimes the relationship is so close, that the bystander ceases to be a bystander. Take, for example, the example of the mother who refuses to feed her own starving child. This has little to do with bystander responsibility to rescue a person in mortal danger. The bystander is someone who happens to pass by, and it is clear that somewhere a line should be drawn between intentional homicide by omission, and failure to rescue.[84]

81 Feldbrugge, *supra* note 41, 638.

82 Diffusion of responsibility might also encourage action, but only if all others act. Then responsibility for the consequences is diffused among the participants. Think, for example, of a decision to join an existing "coalition of the willing". See A. L. McAlister, 'Moral Disengagement: Measurement and Modification', 38 *Journal of Peace Research* (2001) 1, 87, 88.

83 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 108. This also has legal consequences. See Mohamed, *supra* note 14, 425.

84 Feldbrugge, *supra* note 41, 649.

The situation is also different if (some of) the bystanders know each other, or constitute a recognizable group.[85] In such a case, instead of shared responsibility, one may speak of collective responsibility: the bystanders consider themselves united, as a collective, and responsibility is not diffused.[86] And finally, the situation also looks much better if the bystanders have an opportunity and incentive to talk to each other about what to do.[87]

II. Bystander Responsibility to Intervene at the International Level

This subsection is essentially about the 'why me?' question, raised this time at the international level. If the obligation breached is owed to the international community as a whole, and this community as a whole has an obligation to do something, then all bystander States might say: 'yes, the international community should do something, but that's not me; so why do *I* have to intervene?'

In principle, *all* States must cooperate to bring to an end any serious breach of a peremptory norm. Above, we saw that there are some reasons to single out a particular bystander at the domestic level. One such reason is that the bystander has a special relationship with the victim or perpetrator, or that the bystander is particularly competent to intervene. Such special relationships also exist at the inter-state level. Special relationships can be based on historical ties, shared values or interests, or even a shared language. An example of the latter is the group of francophone States. At the opening of the *jeux de francophones* in September 2013, the French Prime-Minister Hollande reminded the representatives of the other francophone States that France will not forget the francophone peoples, whenever their fundamental freedoms are violated and security is threatened. "Yesterday it was Mali, today it may be the Central African Republic or the Democratic Republic of Congo," said Hollande, "wherever a francophone country's rights are violated, we must, we the francophone States, be the first to provide them our solidarity and our support".[88] These are not empty phrases. France did indeed assist the Government of Mali when the country was

85 See also J. C. Hackler, K.-Y. Ho & C. Urquhart-Ross, 'The Willingness to Intervene: Differing Community Characteristics', 21 *Social Problems* (1974) 3, 328, 331-332.

86 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 106-107. They did not really manage to test this theory. See also May, *supra* note 78, esp. 269.

87 Even though the actual experiment did not test this hypothesis, it was suggested in Darley & Latané, 'Bystander Intervention in Emergencies', *supra* note 60, 382-383.

88 A Nice, 'François Hollande ouvre la 7e édition des Jeux de la francophonie', *Radio France Internationale* (7 September 2013), available at http://rfi.fr/france/20130908-nice-francois-hollande-ouvre-7e-edition-jeux-francophonie (last visited 31 July 2014) (translation by the author).

threatened by extremist groups in 2012. Similarly, it could be argued that a State sharing a cultural tie with the perpetrator – as opposed to the victim – could have a special responsibility. In fact, according to Hakimi, it is the bystander State's relationship with the perpetrator, and not the State's relationship with the victim, which essentially determines whether the bystander State has an obligation to protect.[89]

When it comes to genocide, the ICJ has provided some guidance on how to apply this idea of allocating special responsibility to particular States at the international level. As noted earlier, the obligation of States parties to the *Genocide Convention* is "to employ all means reasonably available to them, so as to prevent genocide so far as possible".[90] This general obligation applies to all States party to the *Genocide Convention*. But what does that mean exactly? It means, explains the Court, that a State can only be said to have failed to meet its obligations, when that State "manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."[91]

Important in the assessment of whether a bystander State has tried hard enough to rescue the victim is the State's "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", a capacity which

> "depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events."[92]

These criteria were later reiterated by the United Nations Secretary-General.[93] They echo the remarks made earlier about the importance of any special relationship the bystander might have with the victim, the perpetrator, or both.

Interestingly, in the assessment of whether the bystander State has done enough, the Court deems it "irrelevant whether the State whose responsibility is

89 Hakimi, *supra* note 74, esp. 355-367.
90 ICJ, *Application of the Genocide Convention*, *supra* note 47, 182, para. 430.
91 *Ibid.*
92 *Ibid.*
93 GA, *Responsibility to Protect: Timely and Decisive Response: Report of the UN Secretary-General*, UN Doc A/66/874, 25 July 2012, esp. 11, para. 40.

in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide".[94] This is especially so since "the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce".[95] Again, this is identical to the situation at the domestic level: if a bystander fails to intervene, the prosecutor does not have to prove that if the bystander would have done what he could have done that the victim would have been saved.

At the domestic level, a special kind of responsibility exists when (some of) the bystanders know each other, or constitute a recognizable group, to which the victim is also in some way affiliated. At the international level, one could think of organizations applying the 'musketeer principle' – all for one and one for all! – such as the North Atlantic Treaty Organization (NATO). Article 5 of the 1949 *North Atlantic Treaty of April* proclaims that an armed attack against one or more of the NATO members shall be considered an attack against them all and consequently they agree that they will all assist the victim State.[96] Such pledge of course makes NATO members responsible for the protection of fellow members when victim of a particularly serious breach of a peremptory norm: inter-state aggression.

H. Choosing the Appropriate Type of Bystander Assistance

I. Choosing the Appropriate Type of Bystander Assistance at Domestic Level

If the bystander decides to intervene, he must consider the appropriate type of assistance. Considering his lack of skills and training, it is not unlikely he will make the wrong choice. Feldbrugge noted, on the consequences of "negligent execution of the duty to rescue", that "the decisive factor in this respect is the rescuer's motivation".[97] In other words, a bystander cannot be blamed for a very clumsy rescue attempt, as long as he seriously meant to rescue the victim.

But even if he makes the right choice, his lack of experience and the lack of proper equipment makes it likely he will not be able to implement his strategy

94 ICJ, *Application of the Genocide Convention*, *supra* note 47, 182, para. 430.
95 *Ibid.*
96 *North Atlantic Treaty*, 4 April 1949, Art. 5, 34 UNTS 243, 246.
97 Feldbrugge, *supra* note 41, 645.

effectively. True enough, Article 450 of the *Dutch Penal Code* only asks of the bystander that he makes an *attempt* to rescue the victim; the effectiveness of the assistance or lack thereof is not taken into account. However, nobody likes to make a fool of himself in public. In the words of Latané and Darley:

> "[T]he bystander to an emergency is offered the chance to step up on stage, a chance that should be every actor's dream. But in this case, it is every actor's nightmare. He hasn't rehearsed the part very well and he must play it when the curtain is already up. The greater the number of other people present, the more possibility there is of losing face."[98]

Almost all reasons for not-intervening stated above get more convincing with each added bystander.[99] As Latané and Darley put it, "[i]f each member of a group of bystanders is aware that other people are also present, each will be less likely to notice the emergency, less likely to decide that it is an emergency, and less likely to act even if he thinks there is an emergency".[100] In States, such as the Netherlands, which have a legal obligation to assist, we may add that the bigger the group, the smaller the chance that you – of all people – will be criminally prosecuted for standing idly by. According to Latané and Darley, the inaction of a large group of people witnessing an incident which requires bystander intervention is most of all due to the diffusion of responsibility referred to above.[101]

II. Choosing the Appropriate Type of Bystander Assistance at International Level

What can the bystander State do when it decides to intervene? The ILC *Articles on State Responsibility* proclaim that all States must cooperate to bring to an end any serious breach of a peremptory norm. But how? Much can be – and has been – said about this question, especially in the context of the Responsibility to Protect. Here, the focus is on the general legal framework developed by the ILC.

98 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 40.

99 *Ibid.*, 125, for a summary of all reasons why intervention is less likely in large groups of bystanders.

100 *Ibid.*, 38. The suggestion that people are less likely to notice the emergency in a group is later qualified a little.

101 *Ibid.*, 90. See also *ibid.*, 111.

It has been suggested that all States could – or perhaps even should – take "'collective countermeasures'"[102], "solidarity measures",[103] or "countermeasures in the general interest"[104] in response to serious breaches of norms whose compliance is considered fundamental by the international community as a whole. These were all different names for the same idea: measures that would normally be unlawful but whose unlawfulness was precluded because they were taken with the aim to rescue the victim of a breach of a fundamental obligation owed to the international community as a whole. But such ideas proved very controversial.

A few States believed that collective countermeasures were legal and desirable,[105] but many others strongly disagreed. For example, China believed that "'collective countermeasures' could become one more pretext for power politics in international relations, for only powerful States and blocs of States are in a position to take countermeasures against weaker States".[106] Similarly, Russia remarked that "[i]t would be unacceptable for any State to take countermeasures at the request of any injured State, because that would give the big Powers the opportunity to play the role of international policemen".[107] Some States did not reject collective countermeasures *per se*, but demanded more safeguards against abuse.[108] For example, the Republic of Korea suggested that "further efforts should be made to find a way to reduce arbitrariness in the process of their implementation, and to alleviate the influence of the more powerful States".[109]

102 According to Crawford, "responses to breaches of obligations to the international community as a whole could be responses adopted by one State or by a number of States [and thus] [t]heir collective character was determined by the nature of the obligations and the breach in relation to which they responded, rather than the fact that they were acting as a group". See ILC, *Summary Records of the Meetings of the Fifty-Second Session*, *supra* note 29, 337 (para. 56).

103 M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *The British Yearbook of International Law* (2001), 337.

104 D. Alland, 'Countermeasures of General Interest', 13 *European Journal of International Law* (2002) 5, 1221, 1222.

105 One example is Spain. See ILC, *State Responsibility: Comments and Observations Received From Governments*, UN Doc A/CN.4/515, 19 March 2001, 54 [ILC, State Responsibility, UN Doc A/CN.4/515].

106 *Ibid.*, 69. See also GA, *Summary Records of the Sixth Committee: 14th Meeting*, UN Doc A/C.6/55/SR.14, 10 November 2000, 8, para. 40.

107 See GA, *Summary Records of the Sixth Committee: 18th Meeting*, UN Doc A/C.6/55/SR.18, 4 December 2000, 9, para. 51.

108 See also C. Annacker, 'The Legal Régime of Erga Omnes Obligations in International Law', 46 *Austrian Journal of Public and International Law* (1994) 2, 131, 160-161.

109 ILC, *State Responsibility*, UN Doc A/CN.4/515, *supra* note 105, 89.

And Iran "stressed that countermeasures should not be used by powerful States as a means of coercing smaller nations".[110] Many States expressed their desire for some provisions on dispute settlement, presumably as a means to prevent the abuse of (collective) countermeasures.[111]

The ILC members shared the hesitations of many States when it came to the article on collective countermeasures. Brownlie remarked that these collective countermeasures had no basis in existing international law, and that, if the ILC *Articles* would expressly allow them, they "provided a superficial legitimacy for the bullying of small States on the claim that human rights must be respected", and that "it would install a 'do-it-yourself' sanctions system that would threaten the security system based on Chapter VII of the Charter of the United Nations".[112]

The idea of explicitly allowing collective countermeasures did not survive all this criticism. In the end, the article on collective countermeasures in response to serious breaches in the ILC *Articles on State Responsibility* was replaced by a 'saving clause', the application of which is not restricted to serious breaches and which does not even mention countermeasures (it mentions "lawful measures"[113]).[114] As the Chairman explained, "[w]ith that saving clause, the Commission was not taking a position on the issue and had left the matter to the development of international law".[115] As Gaja rightly noted, the ILC thus

110 See GA, *Summary Records of the Sixth Committee: 15th Meeting*, UN Doc A/C.6/55/SR.15, 13 November 2000, 3, para. 13. See also statement by Israel, *ibid*., 5, para. 25.

111 See ILC, *Report of the International Law Commission on the Work of its Fifty-Second Session (2000): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Fifty-Fifth Session Prepared by the Secretariat*, UN Doc A/CN.4/513, 15 February 2001, 11, paras 19-21.

112 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, Yearbook of the International Law Commission (2001), Vol. I, 35 (para. 2) [ILC, Summary Records of the Meetings of the Fifty-Third Session].

113 According to Alland, the fact that it mentions only 'lawful measures' can actually mean that the 'without prejudice' does not cover countermeasures. But this depends on what 'lawful measures' means exactly, and that is not clear. See Alland, *supra* note 104, 1233.

114 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, *supra* note 112, 110 & 112-113 (paras 48 & 64). In the commentary, the conclusion was that "there appears to be no clearly recognized entitlement of States [whose legal interest is affected because they are member of the international community] to take countermeasures in the collective interest". ILC, *Report of the International Law Commission on the Work of its Fifty-Third Session*, Yearbook of the International Law Commission (2001), Vol. II (2), 139 (para. 7).

115 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, *supra* note 112, 112-113 (para. 64).

clearly "back-pedalled" to reach consensus,[116] and finally agreed to disagree.[117] Pellet believed this to be a "deeply regrettable" act of "regressive or recessive development" of international law,[118] but many others welcomed the initiative. It is regrettable that the ILC failed to make up its mind about what surely ought to have been the most far-reaching consequence of the recognition of norms whose compliance is of fundamental importance for the entire international community: the right – or obligation – of the international community to cooperate to bring such breach to an end by together taking countermeasures in response.[119]

I. Conclusion

The aim of this article was to examine the legal obligations of bystanders at the domestic level – with the legal framework of the Netherlands chosen as example – and to see whether the lessons learned could be applied, *mutatis mutandis*, to establish a legal framework of bystander State responsibility at the international level.

In the Dutch domestic legal order, it is a criminal offense to stand idly by, when a fellow human being is in immediate mortal danger, and the bystander can provide support without endangering himself or others. The Netherlands is not the only State with such a provision; many States in the world have it.

What can we learn from this legal framework for the international level? The first issue to examine is how to define a situation requiring bystander State intervention. At the Dutch domestic level, a bystander is only legally obliged to intervene when a victim is in mortal danger. In other words, it only applies in

116 M. G. Gaja (Rapporteur), 'Obligations and Rights Erga Omnes in International Law', 71 *Annuaire de l' Institut de Droit International* (2006) 2, 81, 105.

117 Some scholars nonetheless claim that solidarity measures are lawful. See C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), 250. See also J. A. Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law', 248 *Recueil des Cours de l'Académie de Droit International* (1994), 195, 422. C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours de l'Académie de Droit International* (1993), 325, 366-367 is more cautious.

118 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, *supra* note 112, 114 (para. 70).

119 See also L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13 *European Journal of International Law* (2002) 5, 1127, 1140-1144. Tams also expressed his disappointment. See C. J. Tams, 'All's Well That Ends Well: Comments on the ILC's Articles on State Responsibility', 62 *Heidelberg Journal of International Law* (2002), 759, 789-790.

the most extreme of emergencies. It was suggested that this should also be the case at the international level. It could be argued that international law already obliges bystander States to intervene in cases of genocide and war crimes, but there is no reason to stop there. It was suggested to define a situation requiring bystander State intervention in general terms as a serious breach of a fundamental obligation owed to the international community as a whole, or to follow the ILC and refer to serious breaches of peremptory norms.

The next issue was the *raison d'être* of a legal obligation for bystander States to intervene. The relevant Dutch article was included in the *Dutch Penal Code* with the argument that the 'popular consciousness' was offended by the impunity of people standing by when fellow citizens were dying. We saw that a similar argument can be made to recognize a legal responsibility to intervene at the international level: doing nothing in extreme cases is offensive to the moral feelings of an international community, and thus intervention should be a legal obligation.

Although intervening might in theory be the 'right thing to do', we saw that in practice there are good reasons not to intervene, both at the national and international level. Rescue operations often end badly, with both the victim and the rescuer traumatized and physically harmed. And even successful rescue operations leave their scars, both on the victim and the rescuer. Looking specifically at the international level, it was noted that the intervening State is seldom rewarded for its intervention, even if the intervention is entirely successful, which is rarely the case at the international level.

Finally, the different decision-making stages a bystander has to go through were examined. In order to commit the offense of Article 450 *Dutch Penal Code*, the bystander must have noticed the event, and he must have had a certain awareness of the danger the victim was in. At the international level, it is almost impossible not to notice an event of the type requiring bystander State intervention, such as genocide, war crimes, inter-state aggression, etc. However, disagreements might arise as to whether a specific event legally requires States to intervene. One often hears that terrible things have happened, but 'was it really genocide?' In other words, States are generally hesitant to intervene and thus they prefer not to qualify a certain event as legally requiring their intervention.

If the event is interpreted as one which obliges the bystander to intervene, the bystander has to accept that it is his particular responsibility to intervene. And if the bystander decides to intervene, he must consider the appropriate type of assistance. When choosing the appropriate type of intervention, bystander States sometimes have to follow the rules of a particular regime set-up for particular events requiring bystander State intervention. If there is no particular

regime, the bystander State has to resort to the general legal framework, which is applicable to all (other) events requiring bystander State intervention. In short, this comes down to a right – or perhaps even an obligation – to cooperate with all other States in the world to bring the breach to an end. Such collective action might include the taking of countermeasures against the perpetrator State, in the interest of the victim and the international community as a whole. Whether such countermeasures taken in the general interest are lawful under existing international law is still disputed.