
Crimes of State and the 1996 Report of the International Law Commission on State Responsibility

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Abstract

This article argues that Article 19 of the Draft Convention on State Responsibility, first adopted in 1976, presents a number of substantial problems relating to the definition of crimes of state, the appropriate organ for making decisions on when a crime of state has been committed, and the consequences of such a crime. The International Law Commission, in seeking to adopt a series of articles spelling out the consequences of Article 19 during its 1995 and 1996 sessions, recognized those inherent difficulties. A controversial debate ensued. The purpose of this paper is to set out and clarify the issues involved in this debate so that the question of if and how the concept of 'crimes of state' should be accommodated in the new Draft Articles on State Responsibility may be effectively and conclusively answered.

1 Introduction

The idea of a distinction between 'normal' state delicts and delicts which are 'grave', 'aggravated,' or 'criminal' was not new¹ when Roberto Ago, as Special Rapporteur of the ILC on State Responsibility, introduced the concept of 'international crimes' in his Fifth Report.² Article 19, as adopted in 1976, provided as follows:

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¹ See Mohr, 'The ILC's Distinction between International Crimes and International Delicts and its Implications', in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (1987) 114, at 117–118.

² *Yearbook of the ILC* (1976 — II, part 1) 24, at paras. 72–155.

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
 - a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
 - b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
 - c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as that prohibiting slavery, genocide and apartheid;
 - d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the environment or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Even the most cursory reading of Article 19 reveals the substantial problems inherent in the draft. They can be summarized in the following questions:

i) What are the obligations referred to in paragraphs 2 and 3?

It is clear that they are not legally defined in the clear and precise sense normally required by the maxim *nulla poene sine lege*. Article 19 is a description of the kind of obligations covered by the Article, not a definition of those obligations. Thus, some body — presumably a judicial body — would have the difficult task of deciding whether the international community 'recognised' a particular breach as a crime; or whether the breach was sufficiently 'serious'; whether the obligation was of 'essential importance'; and, of course, whether the breach was proven on the evidence.³

ii) Who decides that an obligation is of this kind; that it has been breached; and that the breach is 'serious'?

³ For example, the obligation to respect treaties is clear. But would a breach meet the requirements of para. 3(a)? If the treaty were a peace treaty, or an armistice agreement, it might, but such a finding would require an assessment of all the circumstances. Similarly, whilst there are many treaties establishing environmental obligations, a breach would not automatically meet the requirements of para. 3(d). In adopting the many environmental treaties that now exist, states certainly did not believe that they were contemplating criminal responsibility in the event of a breach.

It is perhaps surprising that this question — in a sense the most difficult question — does not appear to have been addressed when Article 19 was so well received.

iii) What consequences flow from such a decision?

It is clear that this last question was one which the Commission assumed from the outset would be part of its subsequent work. Equally clearly, it was assumed that the consequences would be more serious than in the case of ordinary delicts. Otherwise there was little point in distinguishing between ordinary delicts and crimes, if the consequences were to be the same. But the lack of real analysis of the first two questions, (a) and (b), both in the Commission and in the Sixth Committee, is perhaps surprising. In fact, and despite these outstanding difficulties, the draft Article 19 was greeted with acclaim in the Sixth Committee of the General Assembly in 1976 (except for Sweden⁴) and the text of Article 19 has remained unchanged to this date. However, in the 1995 and 1996 sessions of the Commission, when it attempted to adopt a series of articles spelling out the consequences of Article 19, the inherent difficulties of Article 19 were recognized, and it was this that gave rise to a difficult and controversial debate. For this reason, the Commission's Report⁵ contains a special request to Member States to focus and comment on the different proposals made in the Commission. It is important that they do so, and, to this end, they will need to understand fully the issues involved.

2 Charter Interpretation as a Means of Avoiding the Need for Separate Treatment of International Crimes?

One view, clearly expressed in the Commission during 1995–1996,⁶ was that there was no need to make separate provision for crimes in the Commission's draft, since, on a proper interpretation of the Charter, the Security Council was well able to deal with crimes. As summarized by Arangio-Ruiz:

[The] argument centred on the idea that, since most crimes — and not just aggression — constituted a threat to the peace under Chapter VII of the Charter, there was no need for a convention on State responsibility to include provisions in the matter of state crimes. The competence of the Security Council would be quite sufficient for both the determination of existence/attribution of a crime to a state as well as decisions on the consequences in terms of Chapter VII measures. In response to the objection that the Council's task is limited to maintaining the peace and does not extend to acting as judge ... [it was] argued, in substance, that the subject was covered by the Council's implied powers ... extending to both the judicial and the legislative function.⁷

⁴ UN Doc. A/CN.4/342, at 5.

⁵ UN Doc. A/51/10, at 110.

⁶ This is the view castigated by Arangio-Ruiz, 'The Federal Analogy and UN Charter Interpretation: A Crucial Issue', 8 *EJIL* (1997) 1, at 23–25.

⁷ *Ibid.*, at 24.

The present writer agrees with Arangio-Ruiz that the Charter never intended that the Security Council should assume a judicial power in relation to attributing responsibility for international crimes.⁸

It is certainly true that, in dealing with the Iraqi invasion of Kuwait in 1990, the Security Council condemned Iraq and imposed punitive sanctions, including stringent economic embargoes, restrictions on trade and communications, obligations of compensation, demilitarized zones, dismantling and removal of chemical and biological weapons and weapons of mass destruction.⁹ Thus, it might be argued that the Security Council has already demonstrated its capacity to deal with international crimes.

But the argument is not convincing. In fact, the Security Council made no finding that a 'crime' had been committed — the resolutions contain no such term — and the breach of international peace and security for which Iraq was condemned in Resolution 660 (1990) of 2 August 1990 falls far short of the breadth of offences described in Article 19. It is striking that the Council used neither the notion of 'crime', nor made any reference to Article 19, to condemn the massive pollution of the Gulf caused by Iraq's sabotage of the Kuwaiti oil installations.

This is not to deny that certain powers may be implied from Article 39, or Chapter VII as a whole. But it is not possible to assume from this that the Council can therefore act judicially and exercise all the powers necessary to deal with 'international crimes', and thus eliminate the need for Article 19. The 'federal analogy' is inexact and unpersuasive. Acceptance of the implied powers doctrine cannot extend to powers which are not provided for in the Charter, were never in contemplation when the Charter was drafted, and do not flow from the express powers by necessary or reasonable interpretation.

If this is so, then it follows that international crimes cannot be dealt with under the existing Charter provisions and that the proposed new Convention on State Responsibility will have to deal with them if such crimes are to find a place in the general law of responsibility. In that case, the three questions posed above remain. They require separate treatment.

⁸ It is true that, in the exercise of its powers under Chapter VII, the Security Council may appear to make an initial determination of responsibility, for example where it determines that a state has breached international peace and security. But this does not mean that the Council therefore has judicial powers. To take a domestic law analogy, a police officer may intervene in a street brawl and arrest A, rather than B, for a breach of the peace. But no one assumes that the police officer has judicial powers. Those rest with the criminal courts which may, in due course, find the accused not guilty.

⁹ The texts of the many resolutions are conveniently reproduced in U. Villani, *Lezioni su L'ONU e la Crisi del Golfo* (1991), 132–189; and in E. Lauterpacht, L.J. Greenwood, M. Weller and D. Bethlehem (eds.), *The Kuwait Crisis: Basic Documents*, vol. 1 (1991).

3 The Adequacy of Existing Definitions of International Crimes

A Aggression and Related Offences (Article 19(3)(a))

As regards aggression, we have the General Assembly's definition in Resolution 3314 (XXIX) of 1974. However, its utility is weakened by the fact that it is expressly stated to be non-exhaustive and by the fact that it was designed as a guide to states and to the Security Council in exercising its powers under Article 39, rather than as a definition to be used for attributing criminal responsibility. Moreover, paragraph 3(a) of Article 19 purports to be broader than just aggression. Do we know what other obligations are included? I believe not.

Perhaps the international community may be content to leave this category of crimes undefined, relying on the good sense and judgment of the body applying the definition.¹⁰ Nevertheless, Member States need to decide this.

B Crimes against the Right of Self-Determination (Article 19(3)(b))

Experience suggests that this is a highly controversial category, and that the problems are as much conceptual as they are simply factual. For example, has the United Kingdom committed such a crime in Northern Ireland? Or Indonesia in East Timor? Or Argentina in invading the Falklands? Or India in suppressing the Nagas? Or China in occupying Tibet?

These examples — and there are many more — suggest that the problem is not simply one of ascertaining the facts, but is more one of agreeing when a right of self-determination exists. Absent such an agreement, it is difficult to apply a definition of such a crime.

C Crimes Relating to Safeguarding the Human Being, Such as Slavery, Genocide and Apartheid (Article 19(3)(c))

This is a very loose description of what is potentially a broad category of crimes in the nature of treaty offences. For such treaties exist not only in relation to slavery, genocide and apartheid but they also cover a wide field of human rights, enforced labour, child labour, safety at work, and so on. States may have accepted such treaty obligations with hesitation, and certainly would not expect to find that breaches are to be 'criminalized' under this broad provision.

¹⁰ Arguably, the position is no worse than that faced by the Nuremberg Tribunal in applying the concept of 'crimes against the peace', defined in Article 6 (a) of the London Charter as 'the planning or waging of a war of aggression, or a war in violation of international treaties'. The relevant treaty, the Pact of Paris of 1928, provided no more of a definition than prohibiting war 'as an instrument of national policy'.

4 The Issue of Which Organ or Organs Decide When a State Has Committed a Crime

This was the issue that proved highly controversial in the Commission in 1995–1996, not because the Commission refused to ‘engage in a serious discussion of the Special Rapporteur’s concern’,¹¹ but more because of its inherent difficulties. In fact, various ‘solutions’ were proposed, but they all posed problems.

A *The International Court of Justice*

Some members, attracted by the way in which, under the Vienna Convention on the Law of Treaties, disputes over *jus cogens* are to be referred to the ICJ, favoured reference of this issue to the ICJ.¹² The Special Rapporteur, in his 1995 Report,¹³ also favoured a unilateral right of recourse to the ICJ, failing agreement to arbitrate, for the resolution of disputes over the legal consequences of a crime.¹⁴

The difficulties confronting this solution were of two kinds. First and foremost, there were problems over the Court’s competence or jurisdiction. Jurisdiction would have to derive from the proposed new Convention on State Responsibility.¹⁵ But would states accept compulsory jurisdiction over a wide range of ill-defined crimes? This seemed highly unlikely.

Second, there were practical difficulties. Given that most substantial cases in the ICJ take four to five years to reach judgment, would states wait that long before embarking on the punitive consequences set out in Articles 52 and 53? Or, if they were permitted to apply these ‘consequences’ prior to any judicial decision, would it be right to allow these to continue for four or five years and then be suspended as a result of a judgment deciding they had been applied wrongly? To some members of the Commission, the problem required a much speedier resolution than the ICJ could offer.¹⁶ And who ‘prosecutes’ the crime? The victim state? It must be recalled that, under Article 40(3), all states are ‘injured states’ in the event of a crime, so that, potentially, nearly 200 states could appear before the ICJ as claimants or ‘prosecutors’. The litigation would be unmanageable.

¹¹ Arangio-Ruiz, *supra* note 6, at 24 note 37.

¹² UN Doc. A/51/10, at 167.

¹³ UN Doc. A/CN.4/469/Add.2, 29 May 1995.

¹⁴ This therefore assumed that states had adopted certain punitive consequences under Arts. 52 and 53, and that the alleged ‘criminal’ state wished to dispute their action.

¹⁵ It could scarcely be derived from the pre-existing bases of jurisdiction which do not bind all states to the same extent; and to rely on Optional Clause Declarations would be particularly hazardous, since these can be changed or withdrawn at will in most cases.

¹⁶ It may be unreasonable to expect that ‘criminal’ cases can be expedited. Problems of evidence may in fact prove difficult and very time-consuming, particularly if there are several ‘injured’ states which all wish to plead and produce evidence. The Special Rapporteur, in June 1995, proposed reference to a Chamber of the ICJ rather than the full Court. But in practice the use of Chambers has not resulted in significant savings of time.

B Arbitration

In effect, this was the Commission's preferred choice. It decided to confine itself to the mechanisms for settlement of disputes found in Part III of its draft articles, which provide for negotiation, good offices, conciliation and arbitration.¹⁷ Thus, arbitration is the binding, legal method of settlement to be used and the Commission assumed that this would be initiated by the state alleged to have committed a crime and made the object of the punitive consequences set out in Articles 52 and 53. In short, the alleged 'criminal', believing itself to be innocent (or believing the punitive consequences it was suffering to be unjustified) would use arbitration as a means of establishing its innocence and thus having the punitive consequences being applied against it stopped.

The idea has certain attractions. Although arbitration is not compulsory, pressure to arbitrate would come through the punitive consequences. The Tribunal would be smaller than the ICJ — only five members — and quicker; it would have to give its award within six months of the close of oral argument (Article 59). Yet there are snags. If scores of states applied the sanctions, or punitive consequences, of Articles 52 and 53, then the alleged 'criminal' state would have to select one or more states to be respondents in the arbitration: arbitration against a score or more respondents would be impractical. But the arbitral proceedings would not be a 'test case' unless all 'injured states' were bound to respect the award. Special provision would thus have to be made for this.

It should be added that several members of the Commission would have gone further, and the Commission's Report requests states to comment upon their alternative proposal.¹⁸ Under this proposal, the Conciliation Commission¹⁹ would be empowered, upon request, to state in its Final Report whether in its view there was *prima facie* evidence that a crime had been committed. An affirmative answer would permit either party to compel arbitration, thus producing compulsory arbitration.²⁰

C The Security Council

The fact that, at present, the Security Council has no power to make a binding, conclusive finding that a crime has been committed does not preclude the option that

¹⁷ The Commission's decision not to include any special reference to the ICJ in Part III does not, of course, exclude states in dispute from going to the Court by agreement. But arbitration under Part III is compulsory in the sense that a state made the object of countermeasures can compel it (Article 58(2)). The Commission felt that states might accept this, whereas they were unlikely to accept the compulsory jurisdiction of the ICJ in such a case.

¹⁸ UN Doc. A/51/10, at 166.

¹⁹ Reference to the Conciliation Commission would not in all cases be a required pre-condition of the right to request arbitration: the parties would be free to dispense with it.

²⁰ Misgivings about this proposal were based upon the fear that, having provided for compulsory arbitration for countermeasures, to do so also for crimes would risk losing the support of some states for the draft as a whole.

a new Convention on State Responsibility might confer such a power on the Council. No such proposal was made in the Commission, and it is believed to be an unattractive proposal for a variety of reasons.

There is, first, the objection that the determination that a state has committed a crime should be made by an impartial legal body, and not by a political organ. Past experience has tended to show that Member States, especially the permanent members, have used Chapter VII as a means of pursuing their own political agenda, rather than, as guardians of legality, acting on behalf of the membership as a whole.²¹ It was the present writer's view that matters might be improved if the Council were committed to appointing a Commission of Jurists as a subsidiary, *ad hoc* body; a state would then be assumed responsible for a crime only when, after considering all the evidence, the Commission of Jurists so advised.²² But the idea met with no support in the Commission.

A second, and substantial, objection is that if the Council were invested with a new power to determine legal responsibility for a crime, and if this were not done by amendment of the Charter but by a separate treaty, then it is extremely doubtful whether a state member of the UN, which is however not a party to the new Convention on State Responsibility, would be bound to recognize the exercise of such a power as legally valid.

D *The General Assembly*

It was the proposal of the Special Rapporteur in 1995²³ that the General Assembly might be used to form a preliminary view on criminality in all cases other than aggression (these being left to the Security Council). The Assembly would pass a resolution recording its 'concern' that there existed *prima facie* evidence of a crime, and this collective act would then 'trigger' the punitive consequences of Articles 52 and 53. The idea held an attraction in that, instead of states resorting to these punitive consequences on the basis of their own individual assessment, there would be a collective assessment. Moreover, under the Special Rapporteur's proposal, this resolution would simply be an interim stage in order to authorize the sanctions. The final judgment on whether a crime had in fact been committed would be reserved to the ICJ.

The proposal met with little support, in part because it was linked to the idea of vesting the ICJ with compulsory jurisdiction, and in part because some members saw the General Assembly as being hardly less 'political' than the Security Council.

²¹ Security Council policies towards Iran during the Gulf War between Iran and Iraq, or towards Libya, are suspect in this regard.

²² The device of using a Commission of Jurists in this way, to advise on whether there had been a breach of the Covenant, was used by the Council of the League of Nations. Such cases were the Corfu Incident of 1923; the frontier dispute between Greece and Turkey in 1926; and the *Salamis* case between Greece and Germany in 1927.

²³ Informal Addendum 3 to UN Doc. A/CN.4/469, 2 June 1995.

E Individual States

In the Commission's view '... in the first instance it would be for the injured State or States to decide that a crime had been committed'.²⁴ Given that in the case of a crime all states are injured states, this creates a potentially chaotic situation, with part of the UN membership applying sanctions under Articles 52 and 53, and the other part declining to do so.²⁵ To this extent, a collective decision by either the Security Council or the General Assembly may be preferable. Admittedly, this phase, in which states act individually, is envisaged as a preliminary phase, and a more authoritative decision could emerge from the Security Council, from the Conciliation Commission, or from the Arbitration Tribunal should the alleged 'criminal' state initiate arbitration. But, clearly, reliance on these purely unilateral decisions could continue for some time, and restraint on what states chose to do would ultimately stem from the possibility that the Arbitration Tribunal (if established) would condemn unjustified or excessive sanctions.

The advantage of a decentralized system, in which states individually decide whether a crime has been committed and what 'sanctions' should be imposed, lies partly in the fact that it avoids giving too much power to the Security Council and partly in the fact that the dispute mechanisms are easier to operate. For if the Security Council were to take mandatory, binding decisions, and states simply carried out those decisions as a matter of legal obligation, the proper respondent to any legal action brought by the alleged 'criminal' would be the Security Council. But the ICJ certainly could not be used,²⁶ and although arbitration could, there may be considerable resistance to allowing judicial review of Security Council decisions.²⁷

5 The Consequences of a Crime

The Commission's basic aim was to visit a crime with the same consequences as an ordinary delict, but to add further 'punitive' consequences. This aspect of the problem

²⁴ UN Doc. A/51/10, at 165.

²⁵ There is also the allied problem of 'differently injured' states, which the Commission discussed but, in the end, submitted no article on it. Although all states are 'injured' states in the event of a crime, in reality they may be affected very differently. For example, when Iraq invaded Kuwait, the injury to Kuwait far exceeded the injury to states in South-east Asia or Latin America. Thus, the 'remedies' which can be sought under Articles 41-46 should not, in principle, be available to states irrespective of whether they have suffered any material damage. But should they be able to claim cessation (Article 41); or reparation (Article 42); or restitution (Article 43); or compensation (Article 44); or satisfaction (Article 44); or assurances of non-repetition (Article 45)?

²⁶ Because of Article 34 of the Statute ('only States ...').

²⁷ Even if, as the ILC Draft proposes, states take the decisions, in the event that these decisions are simply fulfilling a legal obligation to accept and carry out a prior decision of the Security Council, then how would an arbitral tribunal deal with a claim brought by the alleged 'criminal' against such a Member State? Would it treat the prior Council decision as excusing the respondent state? Or would it feel bound to examine the correctness — as a matter of fact and law — of the Council decision, thus excusing the Member State only where the Council decision was 'lawful'?

did not, in the event, prove very controversial. It was achieved in two ways: first, by removing some of the restrictions on claims by injured states and, second, by creating obligations for all states in the event of a crime.

A Claims by Injured States

The Commission saw a need to vary the conditions for only two types of claims: those for *restitutio in integrum* and those for satisfaction.

1 Restitutio

The effect of Article 52(a) is to remove two limiting conditions from the normal requirements for a claim for restitution. Under Article 43(c) a claim for restitution may not be brought where, if successful, the burden placed on the wrongdoer would be disproportionate to the benefit to the claimant. And under Article 43(d) a claim may not be brought where this would 'jeopardise the political independence or economic stability' of the wrongdoer. Both limitations are removed in the case of a crime. As the Commission stated in its commentary:

Restitutio is essentially the restoration of the situation as it existed prior to the unlawful act, and the Commission believes a wrongdoing State ought never to be able to retain the fruits of its crime ... however painful or burdensome restoration might be.²⁸

2 Satisfaction

The effect of Article 52(b) is to remove, in the case of a crime, the limitation in Article 45(3) that a demand for satisfaction may not be such as to impair the 'dignity' of the wrongdoing state. As the Commission said, '... by reason of its crime, the wrongdoing State has itself forfeited its dignity'.²⁹

B Obligations for all States

Article 53 contains four obligations for all states, namely:

- (a) not to recognise as lawful the situation created by the crime;
- (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
- (c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
- (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

However, as the Commission's commentary notes,³⁰ '... in practice it is likely that this collective response will be coordinated through the competent organs of the United

²⁸ UN Doc. A/51/10, at 168.

²⁹ *Ibid.*

³⁰ *Ibid.*, at 170.

Nations . . .'. Hence, although in principle these obligations rest on states whenever a crime is committed, and the decision that a crime has been committed is for each state to reach, in practice it is likely that the Security Council will both take the decision and coordinate the sanctions.

6 Conclusions

The question of how the new Draft Articles on State Responsibility should accommodate the concept of 'crimes of state' is undoubtedly one of the most difficult questions that governments will have to consider when they comment on the draft. Certainly it is mistaken to assume that the Commission neglected to give proper consideration to the proposals of the Special Rapporteur, whether that be from lethargy or from poor judgment. On the contrary, the Commission gave very serious consideration to the problem in 1995–1996, as well as to the Special Rapporteur's proposals. If they failed to be convinced, it was for good reason.

The present writer took the view, with regret, that there were too many difficulties at the time to make it prudent to incorporate crimes into the draft, and his view was that it might be better to delete Article 19 and confine state responsibility to 'ordinary' delicts, rather than risk a controversy that might place the entire draft in jeopardy. However, the Commission thought otherwise and it is now for Member States of the UN to express their views. The questions they must address are the following:

- i) Are 'crimes' adequately defined?
- ii) Who decides when a crime has been committed? Should it be a Court and hence a 'legal' decision; and, if so:
 - a) which Court, and how does it acquire jurisdiction? and
 - b) how do the functions of such a Court relate to the actions which Member States and the Security Council may be taking independently?Or should it be a 'political' decision, without the possibility of any judicial review, and taken by either the Security Council or the General Assembly?
- iii) Are the 'sanctions' enumerated in Articles 52 and 53 adequate? And how are sanctions undertaken by individual states to be coordinated with any that a Court, or the Security Council, might order?

These are not easy questions, and it is to be hoped that the written comments of governments, and the discussion in the Sixth Committee, do them justice. If they do not, the Commission will be placed in an impossible position when it reviews the draft articles on second reading.