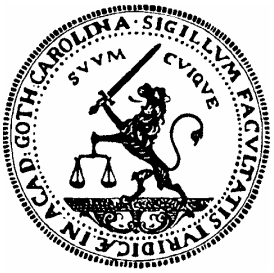

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The Elimination of the Concept of 'Crime' from the ILC's Draft Articles

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Abstract

In the first reading of the Draft Articles on State Responsibility, the ILC adopted Article 19, which made a distinction between two categories of internationally wrongful acts; 'delicts' and 'crimes' of states. This article, however, proved to be highly controversial. Consequently, the ILC in the second reading decided to 'decriminalize' state responsibility, i.e. delete Article 19 and its accessories and thereby free the Draft Articles from a concept of criminal responsibility. On the other hand, the ILC made special allowance for the effects of violating peremptory norms and obligations erga omnes. This thesis examines whether the elimination of the concept of 'crime', has just led to terminological change in the law of state responsibility. The analysis is based on a textual comparison between the relevant articles in the Draft of 1996 (in which the concept of 'crime' is incorporated) and the Draft of 2001 (in which the concepts of peremptory norms and obligations erga omnes are incorporated). Basically, the analysis has been conducted from three main viewpoints. Firstly, it has been examined whether the rules which govern the basis of state responsibility in the new draft correspond with the rules which govern the basis of state responsibility in the old draft. Secondly, it has been investigated whether the legal consequences of 'serious breaches of obligations under peremptory norms' and breaches of obligations erga omnes correspond with the legal consequences of 'crimes'. Lastly, it has been studied whether 'serious breaches of obligations under peremptory norms' and breaches of obligations erga omnes correspond with 'crimes'. This thesis shows that there are indeed many similarities between the old and the new drafts. However, in the view of the fact that breaches of obligations erga omnes and 'crimes' do not coincide, it has been concluded that the replacement of the concept of 'crime' by that of 'serious breaches of obligations under peremptory norms' and obligations erga omnes has not just led to a 'cosmetic' change in the law of state responsibility.

Contents

Abbreviations

A/CN.4	Symbol for documents of the International Law Commission
AJIL	American Journal of International Law
EJIL	European Journal of International Law
GA	General Assembly
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
NYIL	Netherlands Yearbook of International Law
UN	United Nations

1 Introduction

In the belief that not all violations of international obligations are of equal consequence, the International Law Commission (ILC) in 1976 provisionally adopted Article 19 (the article was confirmed in 1996), which made a distinction between two categories of internationally wrongful acts; 'delicts' and 'crimes' of states.[1]

Article 19, however, proved to be highly controversial. The main points of criticism were that the distinction of 'crimes' and 'delicts' would unnecessarily lead to a 'criminalization' of international law; that the international legal structure was not sufficiently developed for dealing with such a criminalization; and that the legal consequences of 'crimes'(Articles 51-53[2]) were so trivial that the distinction between 'crimes' and 'delicts' was not justified.[3] Consequently, the ILC in the second reading of the Draft Articles on State Responsibility decided to 'decriminalize' state responsibility, *i.e.* delete Article 19 and its accessories and thereby free the Draft Articles from a concept of criminal responsibility.[4]

On the other hand, it was necessary for the ILC to let the articles 'reflect that there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole' (the so called obligations *erga omnes*).[5] Accordingly, in the finalized version, which was adopted in 2001 (and which official name is 'Draft articles on Responsibility of States for Internationally Wrongful acts'), the ILC entitled Chapter III of Part Two 'Serious Breaches of Obligations Under Peremptory Norms'. The chapter contains two articles; Article 40 which defines a 'serious breach' and Article 41 which describes the consequences of a 'serious breach'. The consequences of a breach (*N.B.* not a *serious* breach) of an obligation *erga omnes* are dealt with in Articles 48 and 54.[6]

1.1 Purpose

In a scientific article written in 2002, Wyler concludes that the replacement of the concept of 'crime' by that of 'serious breaches' and breaches of obligations *erga omnes*, has just led to a terminological change (or

[1] For the text of Article 19, see Report of the ILC on the work of its forty-eight session, A/51/10 (1996), 60.
[2] For the text of Articles 51-53, see *ibid.* 64.
[3] See *e.g* First Report by Crawford, A/CN.4/490/Add. 3, paras. 52-60.
[4] See *ibid.* para. 97.
[5] Introduction to the commentaries on Articles 40 and 41, in Report of the ILC on the work of its fifty-third session, A/56/10 (2001), para. 7, 281.
[6] For the text of Articles 40, 41, 48 and 54, see Report of the ILC on the work of its fifty-third session, A/56/10 (2001), 53-54, 56 and 58.

'cosmetic' change) in the law of state responsibility.[7] This thesis seeks to determine whether this conclusion is true. In other words, to scrutinize the claim that no substantial change has occurred within the law of state responsibility.

1.2 Method and Sources

In order to see whether there, indeed, has just been a 'cosmetic' change in the law of state responsibility, it must be investigated whether the Draft of 2001, *in certain aspects*, correspond with the old draft (the Draft of 1996). The analysis in this thesis will accordingly be based on a textual comparison between the successive drafts of the ILC.[8]

First of all, it must be examined whether the rules which govern the basis of state responsibility (in particular the rules of attribution and the rules governing circumstances precluding wrongfulness) in Part One of the Draft of 2001, correspond with the rules which govern the basis of state responsibility in Part One of the old draft. This will be done in chapter 3.

Chapter 4 then investigates whether the legal consequences of 'serious breaches' and breaches of obligations *erga omnes* correspond with the legal consequences of 'crimes'.

Lastly, it must be examined whether 'serious breaches' and breaches of obligations *erga omnes* correspond with the violations envisaged in old Article 19, *i.e.* 'crimes'. Whether this is the case or not will be examines in chapter 5.

The most important sources that will be used in this comparative analysis are, of course, the Draft of 1996[9] and the Draft of 2001[10]. To gain a fuller understanding of the normative content of the relevant articles, additional sources such as the ILC commentaries to the articles, reports of the Special Rapporteurs, and scientific articles and books, will also be employed in the analysis.

[7] Wyler, 1147-1160.
[8] Up to a point, this thesis follows Wyler's method: Both examinations employ textual comparative analysis of relevant legal documents. However, when Wyler's comparative analysis just focus 'on the obligation and its breach', the comparative analysis in this thesis will also include other aspects of the drafts. See Wyler, 1148.
[9] For the text of the Draft Articles adopted at the first reading, see Report of the ILC on the work of its forty-eight session, A/51/10 (1996), 58-65.
[10] For the text of the Draft Articles adopted at the second reading, see Report of the ILC on the work of its fifty-third session, A/56/10 (2001), 43-59.

2 The Work of the ILC on the Law Relating to State Crime

In 1948 the General Assembly (GA) established the ILC, as a step towards fulfilling the Charter mandate of 'encouraging the progressive development of international law and its codification'.[11] Five years later (in 1953), the GA adopted Resolution 799 (VIII) requesting the ILC to undertake the codification of the principles of international law governing state responsibility. This text did not contain much information on the scope of the codification. In the memorandum to Article 18 of the Statute of the ILC, it was however stated that the codification of the rules on state responsibility 'must take into account the problems which have arisen in connection with recent developments such as the question of the criminal responsibility of states as well as that of individuals acting on behalf of the state'.[12]

2.1 Early Work on State Responsibility

In 1956, the first Special Rapporteur on state responsibility Garcia-Amador, brought his first report before the ILC. He raised the question whether international law recognized only the traditional civil responsibility of states, or if it also included forms of criminal responsibility. He concluded that 'the present state of international law does not know doubts whatsoever', and that 'particularly since the Second World War, the idea of international criminal responsibility had become so well identified and so widely acknowledged that it must be admitted as one of the consequences of the breach or non- observance of certain international obligations'. According to Garcia-Amador international law distinguished "merely wrongful" acts from "punishable" acts.[13] However, when speaking of "punishable" acts, he referred to acts done by individuals who are organs of the state and acting as such, rather than international crimes committed by states themselves. Garcia-Amador thereby refrained from taking a clear position on whether criminal responsibility could be imposed on the state as such.[14]

The ILC did not accept Garcia-Amador's approach of including criminal aspects in the codification effort. According to its members who spoke on the issue, it was not appropriate to deal with the matter of punishment of state organs in the context of codification of state responsibility.[15] Garcia-

[11] U.N. Charter, Art 13 (a); G.A. Res. 174 (II) of 21 November 1947.
[12] *Survey of International Law in Relation to the Work of Codification of the ILC* (1949), A/CN.4/I/Rev. I, 57 See also Jørgensen, 47-48.
[13] Report by Garcia-Amador, A/CN.4/96 (1956), 183.
[14] See Spinedi in Weiler, Cassese, and Spinedi (eds.), 11; see also Nolte, 1096.
[15] See Second Report, A/CN.4/106 (1957), 105.

Amador subsequently submitted to the ILC a draft limited to the question of state responsibility for injuries to aliens.[16]

In the Sixth Committee of the GA (1960-1962), this draft was severely criticized by the Soviet Union and other socialist countries. These countries believed that the codification of state responsibility for violations of the fundamental principles of international law was an urgent matter.[17]

Because of this criticism, the ILC set up a Sub-Committee on the codification of state responsibility.[18] It was agreed that the codification only should concern rules defining the conditions for the existence of an internationally wrongful act, so-called secondary rules, and not the rules that lay down obligations the violation of which may be the cause of responsibility, so-called primary rules.[19] Moreover, Ago (the chief representative of this position) recognized that the development that had taken place in the area concerning the most important obligations for the maintenance of peace, might have had effects in the area of responsibility. He proposed that the ILC should consider whether it was appropriate to draw a 'distinction between wrongful acts involving merely a duty to make reparation and those involving the application of sanctions'.[20] The ILC unanimously approved the Sub-Committee's work, and appointed Ago as Special Rapporteur on state responsibility.

2.2 The Work of Special Rapporteurs Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz

Occupied in codifying other areas of international law, it took until 1973 before the ILC actually started to work on the project. In the first articles of the Draft, no distinction was made between categories of internationally wrongful acts. Article 1[21], however, was designed to state a basic principle 'capable of encompassing in itself all the various possible cases'. One such case would be 'a distinct and more serious category of internationally wrongful acts, which might perhaps be described as international crimes'.[22]

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[16] See Third Report, A/CN.4/111 (1958), 71-73.
[17] They referred specifically to obligations in connection with the maintenance of international peace and security, aggression and other infringements of territorial integrity, independence and sovereignty of states, and the right of peoples to self-determination. See *e.g.* speeches by the delegations of the Soviet Union (A/C.6/SR.651 paras. 9-10 and SR. 657,para. 31; A/C.6/SR.717, para. 36); Romania (SR. 653, paras. 9-10); Hungrary (SR. 654, paras. 12-13; see Spinedi in Weiler, Cassese and Spinedi (eds.), 12.
[18] (1962) *Yrbk*ILC, vol. 2, 188-91.
[19] Report by Ago, Chairman of the Sub-Committee on state responsibility, A/CN.4/152 (1963), 227, 228; See also Spinedi in Weiler, Cassese, and Spinedi (eds.), 13-14.
[20] *Ibid.*
[21] Article 1, entitled 'Responsibility of a State for its Wrongful Acts', stated that 'every internationally wrongful act entails the internationally responsibility of that State'.
[22] Report of the ILC on the work of its twenty-fifth session, A/9010/Rev. 1 (1973), 172.

In 1976, the ILC began drawing up the articles in chapter III of the Draft dealing with the breach of an international obligation. In a report submitted to the ILC, Ago emphasized the urgency to distinguish, in the general category of international wrongful acts of states, a separate category including exceptionally serious wrongful acts. According to Ago, since the end of the Second World War, a growing tendency had arisen in international law to single out among international obligations a restricted set of obligations. He recalled in this context three specific changes since 1945. First, the development of *jus cogens* norms. Secondly, the rise of individual criminal responsibility directly under international law, and thirdly, the UN Charter and its provisions for enforcement action. He also made a lengthy analysis of practice, international case law and scholarly works, in order to prove that the international community already had established a distinction among wrongful acts. He mentioned in particular the ICJ's ruling in the *Barcelona Traction* case.[23]

In the light of the foregoing, the ILC in 1976 provisionally adopted Article 19[24] which stated:

> **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 recognized 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 those 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 atmosphere or of the seas.
>
> 4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.

[23] See Fifth Report by Ago, A/CN.4/291 (1976), 24-54.
[24] Text of Article 19; Report of the ILC on the work of its forty-eight session, A/51/10 (1996), 60.

In 1980, the ILC had completed the first reading of Part One of the Draft Articles on State Responsibility, dealing with the origin of international responsibility. It then started to work with the legal consequences of internationally wrongful acts, *i.e.* the content, forms and degrees of state responsibility. Between 1980 and 1996 Special Rapporteur Riphagen and Special Rapporteur Gaetano Arangio-Ruiz produced reports, dealing with the first reading of Parts II and III of the Draft Articles. ILC completed the first reading of Parts II and III in 1996.

Between 1980 and 1986, Riphagen presented seven reports, containing a complete set of Draft Articles on Part Two and Part Three. Since priority was given to other topics than state responsibility, only five articles from his version of Part Two was provisionally adopted. As regards to the subject matter of this thesis, the most important of these articles was the one which would later become Article 40. The article specified the criteria under which a state could be considered injured by an internationally wrongful act of another state, and thus entitled to require reparation and if necessary to apply countermeasures. Article 40[25] provided that:

> **Meaning of injured State**
>
> 1. For the purpose of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.
>
> 2. In particular, "injured State" means:
>
> (a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;
>
> (b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decisions of an international court or tribunal, the other State or State parties to the dispute and entitled to the benefit of that right;
>
> (c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
>
> (d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;
>
> (e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that;
>
> (i) the right has been created or is established in its favour;
>
> (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rules of customary international law, or
>
> (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

[25] *Ibid.* 62

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an "international crime", all other States.

Under Arangio-Ruiz (1987-1996), the ILC adopted the remainder of Part Two (in particular reparation and the consequences of 'crimes') and Part Three on dispute settlement.

As to the subject matter of this thesis, the most important of these articles were Articles 51, 52 and 53, which were incorporate in Chapter IV entitled 'International Crimes'[26]:

Article 51

Consequences of International Crimes

An international crime entails all the legal consequences of any other internationally wrongful acts and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52

Specific consequences

Where an internationally wrongful act of a state is an international crime:

(a) an injured state's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(b) an injured state's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53

Obligations for all States

An international crime committed by a state entails an obligation for every other state:

(a) not to recognize 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 obligation 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.

[26] *Ibid.* 64

2.3 The Work of Special Rapporteur James Crawford

In 1997, the ILC appointed James Crawford as Special Rapporteur on the topic of state responsibility. In his First Report, Crawford examined whether the distinction between 'crimes' and 'delicts' should be maintained in the Draft Articles.

According to Crawford (and many of the commentators to Article 19[27]) the notion of 'crime' implied a criminalization of responsibility.[28] Because of this, a proper regime for 'crimes' was needed, a regime which was not provided for in the Draft of 1996. Crawford noted that:

- Except for Article 19 itself, Part One (which governed the 'origin of international responsibility') made no distinction between 'crimes' and 'delicts'. As for the rules of attribution, 'a closer connection to the actual person or persons whose conduct gave rise to the crime should be expected'. Regarding the circumstances precluding wrongfulness, Crawford stated that 'it is not obvious that that the conditions applicable, for example, to *force majeure* or necessity should be the same for both'.[29] (For a closer examination, see chapter 4)

- Part Two, which governed the 'content, forms and degrees of responsibility' did, according to Crawford, distinguish between 'crimes' and 'delicts', but these distinctions did not 'amount to very much'. For example, the articles did not provide for any criminal sanctions on the responsible state.[30]

- Finally, the provisions for the settlement of disputes, contained in Part Three, made no special provision for 'crimes'.[31]

Crawford examined the possibility of incorporating in the Draft Articles a proper regime for 'crimes'. According to him, the task was not impossible, but it would be a major exercise.[32] With regard to the many other issues that the Draft Articles had to address, Crawford recommended that Article 19 should be eliminated, believing that the subject required separate treatment.[33] However, this would not preclude the development of the concepts of *jus cogens* norms and obligations *erga omnes* in the context of

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[27] See the comments of governments, First Report by Crawford, A/CN.4/490 (1998), Add. 1, paras. 52-60.
[28] Crawford considered that 'the appeal of the notion of international crimes […] can not be dissociated from general human experience', and that its 'underlying' notion […] must in some sense and to some degree be common […] to other forms of crimes'. *Ibid.* Add. 3 para. 81
[29] *Ibid*. para. 83.
[30] *Ibid.* Add. 1, para. 51 and Add. 3 para. 84.
[31] *Ibid.* Add. 3 paras. 85, 91 and 92.
[32] *Ibid.* para. 92.
[33] *Ibid*. para. 97.

the second reading of Part II. According to Crawford, both of these concepts needed to be reflected in the draft articles and doing so would not reintroduce the notion of 'crime' under another name.[34]

In the finalized 2001 version the concept of *jus cogens* was expressed in Chapter III entitled 'Serious Breaches of Obligations under Peremptory Norms of General International Law':[35]

> *Article 40*
>
> **Application of this Chapter**
>
> 1. This Chapter applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law.
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation.

> *Article 41*
>
> **Particular consequences of a serious breach of an obligation under this Chapter**
>
> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
> 2. No state shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
> 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Moreover, while peremptory norms, according to the ILC, focus on the primary rule itself and its non-derogable or overriding status, the emphasis of obligations *erga omnes* is essentially on the legal interest of all states in compliance.[36] Hence, Article 48 which deals with the 'invocation of responsibility by a state other than an injured state', and Article 54 which deals with the taking of 'lawful measures', do not refer to peremptory norms but to obligations 'owed to the international community as a whole'. The articles state:[37]

> *Article 48*
>
> **Invocation of responsibility by a state other than an injured state**
>
> 1. Any state other than an injured state is entitled to invoke the responsibility of another state in accordance with paragraph 2 if:
>
> (a) […]
>
> (b) The obligation breached is owed to the international community as a whole.

[34] *Ibid*. para. 98.
[35] Text of Articles 40 and 41; Report of the ILC on the work of its fifty-third session, A/56/10 (2001), 53-54.
[36] *Ibid.* para. 7, 281-282 (introduction to the commentaries on Articles 40 and 41).
[37] *Ibid.* 56, 58.

2. Any state entitled to invoke responsibility under paragraph 1, may claim from the responsible state:

(a) Cessation of the internationally wrongful act, and assurance and guarantees of non-repetition in accordance with Article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured state or of the beneficiaries of the obligation breached.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure the cessation of the breach and reparation in the interest of the beneficiaries of the obligation breached.

3 The Rules Which Govern the Origin of State Responsibility

A comparison between Part One of the Draft of 1996 and Part One of the Draft of 2001 reveals that there is not much to distinguish these parts from each other: The substance of Part One in the old draft has accordingly been kept intact in the new draft.

Still, Crawford claims that the elimination of the concept of 'crime' has had consequences for the rules which govern the origin of state responsibility (in particular for the rules of attribution[38] and the regime governing circumstances precluding wrongfulness[39]). He bases this conclusion on the conviction that the concept of 'crime', in contrast to the concept of 'serious breaches', contains criminal responsibility. For that reason these regimes *should* have made a distinction between 'crimes' and 'delicts' in the old draft.[40]

In order to see whether the elimination of the concept of 'crime' has had an impact on the rules of attribution and the regime governing circumstances precluding wrongfulness, it must first of all be investigated whether these regimes indeed should have been affected by the offending state's criminal responsibility. Secondly, it must also, of course, be examined whether the concept of 'crime' really involved criminal responsibility.

3.1 The Rules of Attribution

Crawford argues that, 'for a State to be held criminally responsible, a closer connection to the actual person or persons whose conduct gave rise to the crime, might be required'.[41]. What he probably means is that, when a 'crime' has been committed, only acts of the head of state or other high officials (or if the act has been committed by a lower official, that a direct

[38] The general rule in old chapter II is that the only conduct attributable to the state is that of its organs of government (Articles 5, 6 and 7(1)), or of others who have been empowered to exercise elements of the governmental authority (Article 7(2)), or have acted on behalf of the state (Article 8). As for chapter II in the Draft of 2001, this chapter has been significantly simplified and shortened. The substance, though, has been remained: Old Articles 5, 6 and 7(1) have become new Article 4. Old Article 7(2) has become new Article 5 and old Article 8 has become new Articles 8 and 9.

[39] Chapter V of the Draft of 1996 contains six circumstances precluding wrongfulness; consent, countermeasures, *force majeure*, distress, necessity and self-defence. These defences have been remained in new chapter V. Likewise, the criteria which apply to these defences have been left unchanged.

[40] Crawford, Bodeau, Peel, 672.

[41] First Report by Crawford, A/CN.4/490/Add. 3, para. 83.

link between the act and the high official can be established) can lead to criminal responsibility.[42]

One might, however, question whether this approach is a very wise one. Take for example group of lower police officers, who have systematically tortured prisoners. Would not the state be criminal responsible for these acts, even though the police officers were just regarded as lower officials?

Moreover, it is questionable whether the concept of 'crime' really involved criminal responsibility. As already noted (and criticized) by Crawford, the Draft of 1996 did not contain such responsibility (see sub-chapter 2.3). The intentions of the initiators of old Article 19 must therefore be examined. That is to say, whether Ago and the other authors of old Article 19 associated 'crimes' with criminal responsibility, or if the word, according to them, denoted something else.

The commentary to old Article 19 does not directly address this issue. It simply states that:

> For the purpose contemplated here, the essential question is not so much whether the responsibility incurred by a State by a reason of a breach of specific obligations entails 'criminal' international responsibility, but whether such responsibility is 'different' from that deriving from the breach of other international obligations of the State.[43]

However, in her study of the legislative history of Article 19 presented to the Florence Conference, Spinedi concludes that:

> It is very clear from the analysis of the proceedings of the International Law Commission, that the Commission had no intention to link the wrongful acts that it called international crimes with consequences of a type unknown to international law currently in force. The Commission wished to indicate in the Draft Article 19…that there are wrongful acts regarded by international community as more serious than all others because they affected essential interests of the Community. As a consequence, these wrongful acts entail a regime of responsibility different from that attaching to other wrongful acts…the difference relate to the forms of responsibility and to the subjects that may implement it. This does not mean, however, that the Commission had the intention to attach to these acts forms of responsibility similar to those provided in the penal law of modern domestics legal systems.[44]

Thus, the initiators of Article 19 did not identify the word 'crime' with criminal responsibility. All they wanted to do was to stress that 'crimes' lead to more severe consequences for the responsible state, and that all states in the international community can implement the responsibility when such a breach has been committed.[45]

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[42] See Nollkaemper, 632.
[43] Commentary on Article 19… para. 21, note 473, 104.
[44] Spinedi, in J. H. H. Weiler, A. Cassese, and M. Spinedi (eds.), 52
[45] See the analysis of Abi-Saab, 344-346.

But why did the ILC choose the word 'crime', which undeniably has a criminal connotation, when they had no intention of criminalizing the law of state responsibility? According to Ago and the other authors of the draft, the term 'crime' was chosen merely by the fact that several international treaties as well as legal literature use the word to describe the most serious assaults upon the international legal order.[46] Moreover, the word 'crime' has the advantage of stigmatizing the forms of behaviour to which it refers. As been pointed out by Jørgensen, 'if a state is accused of committing a "crime", there is considerably more stigma attached than if it is accused of committing a "very serious internationally wrongful act", and it can not be denied that the word "crime" has a certain symbolic, psychological value'.[47]

On the other hand, since the word has a criminal connotation, this terminology is misleading. The purpose of this essay is, however, not to evaluate the suitability of a word which does not fulfil what it promises, but to investigate which consequences the disappearance of Article 19 and its accessories had for the Draft of 2001.

Anyway, since the concept of 'crime' did not contain criminal responsibility, the disappearance of the notion of 'crimes' had no effect on the rules which govern the regime of attributions.

3.2 The Regime Governing Circumstances Precluding Wrongfulness

In contrast to the old rules of attribution, it is possible that the notion of 'crime' should have had an effect on the old regime governing circumstances precluding wrongfulness, but not because the concept contains criminal responsibility, but because the Draft of 1996 entails an 'aggravated'[48] regime of responsibility (for a closer examination of this regime, see next chapter).

Indeed, a study made by Nollkaemper shows that the emergence of 'fundamental norms' in international law might have had impact on the circumstances which can preclude wrongfulness. The author notices that defences for the law of individual responsibility generally are wider than defences for the law of state responsibility. This is justified because individual responsibility concerns criminal responsibility. According to Article 31 d in the ICC statute, for example, duress can be invoked as a defence against allegations of international crimes. Such an article is not incorporated in the Draft of 1996. According to Nollkaemper, however, the justification that defences for the law of individual responsibility generally

[46] Commentary on Article 19… para. 59, 118-119.
[47] Jørgensen, 185.
[48] Klein uses this term to express the idea that responsibility for "serious breaches" 'entails consequences which are more severe than those triggered by ordinary breaches', Klein, 1162.

are wider than defences for the law of state responsibility 'looses some of its force when state responsibility assumes the form of aggravated responsibility'. The author states that since a breach of a 'fundamental norm' may at the same time 'make the author of the act more visible and may seek trigger more serious consequences', it is possible that defences, such as duress, which normally can not be invoked, can be invoked when such a breach has been committed.[49] The normal reparatory functions (such as restitution, compensation and satisfaction) are, of course, still applicable in these cases, but the aggravated responsibility is precluded.

On the other hand, this argument is also applicable to the concepts of 'serious breaches' and *erga omnes* obligations, since these concepts also encompass consequences, which are more severe than those triggered by ordinary breaches (see next chapter).

[49] Nollkaemper, 635-636.

4 The Legal Consequences

Although the concept of 'crime' does not contain criminal responsibility it nevertheless contains an 'aggravated' regime of responsibility. This regime recognizes three different types of consequences when a 'crime' has been committed: First of all that more severe obligations are laid upon the responsible state, secondly that other states than the directly injured state can implement responsibility, and finally that certain specific obligations are binding on other states. The next point to examine is accordingly whether these consequences of 'crimes' are still present in the Draft of 2001.

4.1 Specific Obligations of the Responsible State

In the Draft of 1996, the obligations of the responsible state are set out in Articles 51 and 52. It is only Article 52, though, which deals with the specific obligations. The article states that, in cases of 'crimes', an injured state's entitlement to obtain restitution (a) and to obtain satisfaction (b) is not subject to the limitations/restrictions set out in Article 43 (c) and (d)[50] and Article 45 paragraph 3[51]. Thus, the responsible state can not avoid restitution even where it involves a disproportionate burden, or where it endangers the state's political independence and economic stability. Neither can the responsible state avoid satisfaction, even where giving satisfaction would impair the dignity of that state.

The Draft of 2001 does not contain any specific obligations of the responsible state in case of a 'serious breach'. After having examined relevant ILC documents, it seems though, that the authors of the draft did have an ambition to impose graver consequences on the responsible state in cases of 'serious breaches.

In his Third Report, Crawford, for example, recommends that punitive damages should be a specific consequence of 'serious breaches':

[50] Old Article 43 states that 'the injured state is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind: […] (c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or (d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

[51] Old Article 45 states: (1) the injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, cause by that act, if and to the extent necessary to provide full reparation. […] (3) The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

> [I]t can be envisaged that an injured State could be held entitled to demand punitive damages. In reality, following gross and systematic breaches of community obligations, there will always be a much wider group of persons indirectly affected, and major restoration work to be done. For the purposes of discussion, the Special Rapporteur proposes that in the case of gross breach of community obligations, the responsible State may be obliged to pay punitive damages.[52]

The Drafting Committee followed Crawford's recommendation, and incorporated in the draft provisionally adopted in 2000 an article (Article 42) which stated:

> A serious breach within the meaning of article 41 may involve, for the responsible state, damage reflecting the gravity of the breach.[53]

In the end, the Drafting Committee, however, decided to delete this provision. In the introduction to the commentaries on new articles 40 and 41, the ILC states that 'the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms of general international law'.[54] This view has been confirmed in recent jurisprudence. In the *Bosnia Genocide* case from 2007, the ICJ did not consider punitive damages, even though the case involved violations of the Genocide Convention.[55]

As for the specific consequences in old Article 52, Crawford viewed them as 'trivial', 'incidental' and 'unreal'.[56]

As regards the second exception, which allowed for restitution even if it endangered the offending states political or economic stability, this provision proved to be unnecessary since the limitation, which it was derogating from, was considered to be no more than a subcategory of Article 43 (c). As a number of governments pointed out in their comments to the first reading, '[i]f restitution plausibly and disproportionately threatens the political independence or economic stability of the responsible, the requirement of the third exception (para. (c)) will surely have been satisfied'.[57]

Regarding the first exception, which allowed for restitution even if that involved a burden out of all proportion, the main idea underlying this provision, that restitution is the primary form of reparation when a 'crime' has been committed, was regarded as convincing.[58] However, an improvement of the text regarding restitution, made during the second reading of state responsibility, made it possible to accommodate this idea in

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[52] Third Report by Crawford, A/CN.4/507 (2000), para. 409
[53] See Report of the ILC on the work of its fifty-second session, A/55/10, 120.
[54] See the introduction to the commentaries on Articles 40 and 41… para. 5, 279.
[55] *Application of the Convention on the Prevention of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), case 91, Judgement, February 26, 2007, paras. 459-471.
[56] Third Report by Crawford… para. 408.
[57] *Ibid.* 144 (d).
[58] *Ibid.* para. 408.

the draft without providing for a specific rule along the lines of old Article 52 (a). Instead of balancing the cost against the benefit of the injured state (old Article 43 (c)), the text now balances the cost against the benefit of obtaining restitution (new Article 35 (b)). The new formula, thus, makes it easier to claim restitution from the responsible state, since it takes into account in the equation the interest of all states in seeing restitution performed.[59]

As to the third exception, which allowed for measures by way of satisfaction which could 'impair the dignity' of the state, this provision has been criticized for being ill-considered. As have been pointed out in several ILC documents, history has shown that it is never constructive to humiliate states, even states which have committed a 'crime' or a 'serious breach'.[60] States which have committed such an act must, however, be prepared to face measures which fit the gravity of the breach. Thereby the reference to proportionality in new Article 37 paragraph 3, which states that '[s]atisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State'.

Thus, it seems that the specific provisions in old Article 52 in fact were unnecessary. It must accordingly be concluded that the elimination of the concept of 'crime' has had no effects on the specific obligations of the responsible state.

4.2 Rights of other States

The removal of the concept of 'crime' should also be analysed in terms of which effects this has had on the rights held by other states when a 'crime' has been committed. Here two main rights come into question: The right of other states to invoke responsibility and the right of other states to take countermeasures.

4.2.1 The Right of other States to Invoke Responsibility

Old Article 40 paragraph 3 lays down that, in the case of 'crimes', all other states are considered injured and thus have a right to invoke the responsibility of another state.

In the new draft, the right of all states to invoke responsibility is incorporated in Article 48 paragraph 1. According to the article, all states

[59] *Ibid*. para. 145
[60] *Ibid*. para. 193; see also Commentary on Article 36…para. 8, 268, and Second Report by Arangio-Ruiz (1989), in *Yrbk*ILC, vol. II, part one, 35-38, where the Special Rapporteur interestingly stresses the need 'to draw lessons of the diplomatic practice of satisfaction which shows that abuse…is not rare.

have such a right 'when the obligation breached is owed to the international community as a whole'. Moreover, Article 48 paragraph 2 holds that, in the case of such a breach, all states can claim from the responsible state 'cessation of the internationally wrongful act, and, assurance and guarantees of non repetition', and 'performance of the obligation of reparation […] in the interest of the injured State or of the beneficiaries of the obligation breached'. The article thus clarifies that, although all states in the international community have a right to invoke responsibility, they do not possess the same right as the directly injured state: That is to say, they are not allowed to claim reparation for their own sake.

Old Article 40 paragraph 3 does not contain such a clarification. In consequence one might suggest that, in case of a 'crime', all states have exactly the same rights as the directly injured state to sue for responsibility.

However, in his Sixth Report, Riphagen argues that 'a state which is considered to be an injured state only by virtue of Article 40 paragraph 3, enjoys this status as a member of the international community as a whole and should exercise its new rights and perform its new obligations within the framework of the organized community of States'.[61] 'The organized community of states' should accordingly ensure that the rights of all states do not become disproportionate in relation to the harm that they have suffered.

As for which institution should represent the international community, Riphagen had the UN, and particularly the Security Council, in mind.[62] The role of the Security Council in this matter has, however, been severely criticized. According to Klein the critique has been focused on three main aspects. First of all, the Security Council's ability to *effectively* implement the wishes of the international community has been questioned (as been noted by Dupuy, the Security Council has only effectively implemented the wishes of the international community during a short period immediately following the Gulf War[63]). Secondly, the *legitimacy* of the Security Council in this matter has been contested. It has been doubted whether the Security Council really represents the values of the international community. And finally, many commentators have pointed out that Chapter VII of the Charter gave the Security Council exclusive powers in relation to the maintenance of international peace and security, an area of law distinct from that of international responsibility.[64]

Anyway, after having examined the articles which finally were adopted on the consequences of 'crimes' (in particular old Article 53[65]), it is clear that the ILC, at the end of the first reading, had left the idea that the rights and the obligations of the indirectly injured states could only be exercised within

[61] Sixth Report by Riphagen, A/CN.4/389 (1985), para. 9, 14.
[62] See Klein, 1244-1245.
[63] Dupuy, 1067.
[64] Klein, 1248.
[65] For a closer examination of this article, see next chapter.

'the organized community of states'. It is only unfortunate that the ILC, by that time, did not do anything about old Article 40: That is to say, to let the article reflect that the rights of indirectly injured states are not the same as the rights of directly injured states.

4.2.2 The Right of other States to Take Countermeasures

According to old Article 47[66] an injured state can take countermeasures 'in order to induce [the responsible state] to comply with its obligations'. Since old Article 40 paragraph 3 clarifies that all states are considered injured when a 'crime' has been committed, clearly all states have a right to take countermeasures in the case of such a breach.

In the Draft of 2001 all states, in cases of breaches of *erga omnes* obligations, have the right to take certain measures 'to ensure the cessation of the breach and reparation in the interest of the beneficiaries of the obligation breached' (new Article 54). However, this article does not refer to countermeasures, but to 'lawful measures'. It must accordingly be concluded that the ILC did not include countermeasures in this group, since countermeasures are intrinsically unlawful.

On the other hand, new Article 22 states that 'the wrongfulness of an act […] is precluded if and to the extent that the act constitutes a countermeasure'. Thus, countermeasures are considered as 'lawful measures' according to this article. What is one to conclude?

According to Sicilianos, the ambiguity in Article 54 is deliberate. According to him the text of the article, in fact, does allow for the use of countermeasures. But, in order to ensure the reception of its draft by the Sixth Committee, the ILC, with the expression 'lawful measures', tried to satisfy those unfavourable to countermeasures on general interest.[67]

Thus, it seems that the Draft of 2001 does provide for countermeasures on general interest.

[66] The article states: '[…] the taking of countermeasure means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injures that it do so'.
[67] Sicilianos, 1143.

4.3 Specific Obligations binding on other States

According to old Article 53 (a) and (b), every other state is under an obligation 'not to recognize as lawful a situation created by a crime', and not to give aid or assistance to the state which has committed the crime. In sub-paragraph (c), the states are under an obligation to cooperate in order to fulfil the obligations of non-recognition and non-assistance. Sub-paragraph (d) deals with the obligation to cooperate in the application of measures designed to eliminate the consequences of the 'crime'.

The specific obligations in new Article 41 similarly involve elements of non-recognition, non-assistance and cooperation: According to the article, 'states shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40' (paragraph 1). Moreover, 'no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation' (paragraph 2). The obligation to cooperate in order to fulfil the obligations of non-recognition and non-assistance has, however, disappeared. According to Pellet, though, old Article 53 paragraph (c) had no real substance distinct from that of paragraphs (a) and (b).[68]

As for what form the cooperation in old Article 53 (d) should take, the brief commentary to the article states that 'in practice, it is likely that this collective response will be coordinated through the competent organs of the United Nations'.[69] However, apart from this collective response, the ILC believes that 'a certain minimum response to a crime is called for on the part of all States'.[70] This shows that the ILC, at the end of the first reading, had left the idea that 'crimes' could only be dealt with by an international institution (see previous sub-chapter).

The commentary to new Article 41 similarly refers to the UN and non-institutionalised cooperation. It states that: 'Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalised cooperation'.[71]

Thus, the specific obligations binding on all states in the Draft of 1996 have simply been moved to the new draft.

[68] See Pellet, 68
[69] Commentary on Article 53… para. 3, 72.
[70] *Ibid.* 3
[71] Commentary on Article 41… para. 2, 287.

5 The Identity between 'Crimes', 'Serious Breaches' and Breaches of Obligations 'Owed to the International Community as a Whole'

This chapter seeks to determine whether 'serious breaches' (new Article 40) and breaches of obligations 'owed to the international community as a whole' (new Articles 48 and 54) correspond with the violations envisaged in old Article 19, *i.e.* 'crimes'.

5.1 The Identity between 'Crimes' and 'Serious Breaches'

Old Article 19 paragraph 2 defines a crime as a breach of an obligation 'so essential for the protection of fundamental interest that its breach is recognized as a crime by that community as a whole'. Thus, the breached obligation must be 'essential' in nature. Moreover, the article provides that in order for a wrongful act to qualify as a 'crime', the act in question 'must be subjectively recognized as a 'crime' by the international community as a whole'.[72]

According to new Article 40 paragraph 1, the obligation breached must derive from a peremptory norm of general international law. The article does not define what must be understood by a peremptory norm of general international law. The commentary to Article 40, however, refers to Article 53 of the VCLT of 1969, which states that a peremptory norm is one which is 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[73] In addition to the criterion that the obligation breached must derive from a peremptory norm, Article 40 requires a second criterion to be met; the breach must be serious in nature.[74]

[72] Commentary on Article 19, in Report of the ILC on the work of its twenty-eight session, A/31/10 (1976), para. 61, 119.
[73] Commentary on Article 40, in Report of the ILC on the work of its fifty-third session, A/56/10 (2001), para. 2, 282
[74] *Ibid.* para. 1, 282.

5.1.1 The Character of the Obligation

In order to see whether 'serious breaches' are the same as 'crimes', it must first be analysed whether peremptory norms coincide with those obligations characterised by the ILC as 'essential obligations'.

To facilitate the determination of the wrongful acts in question, the ILC added some concrete examples of obligations whose breaches may constitute 'crimes'. These can be found in old Article 19 paragraph 3. The article refers, *inter alia*, to the prohibitions of aggression, genocide, slavery, colonial domination, apartheid and the infringements of essential obligations relating to peoples' right to self-determination or to the environment. Although not mentioned in the text of Article 19 itself, the commentary makes references to obligations relating to respect for human rights and fundamental freedoms.[75] Article 19 paragraph 3 does not purport to be exhaustive. This appears clearly from the use of *inter alia* in the text of the paragraph. In order to determine whether, at a given moment, other acts are regarded as 'crimes', the criterion in paragraph 2 must be applied.[76]

Since Crawford and the other members of the ILC considered it inappropriate to set out examples of peremptory norms in the text of new Article 40 itself, the article does not contain any references to the content of these norms.[77] Examples of norms, which are generally known as having a peremptory character, are instead listed in the commentary to the article. Aggression is mentioned, and so are the prohibitions against slavery, genocide and apartheid.[78] Although the prohibition of colonial domination is excluded from the commentary, as it is becoming increasingly out of date, the commentary nevertheless refers to the *East Timor* case and the obligation to respect the right of self-determination. Moreover, the commentary mentions the prohibition against torture and the basic rules of international humanitarian law applicable in armed conflicts.[79] Finally, like the examples listed in old Article 19, these examples do not claim to be exhaustive.[80]

As we can see, the examples mentioned in old Article 19 and the examples given by the ILC in the commentary to new Article 40, largely coincide. This raises the question whether 'essential obligations' is just another expression for obligations arising under peremptory norms. However, this was not the opinion of the ILC when old Article 19 was adopted. According to the ILC, the category of international obligations where breaches constitute 'crimes' was narrower than the category of obligations protected by peremptory norms. The ILC stated that;

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[75] See commentary on Article 19… para. 34, 110.
[76] *Ibid.* para. 64, 120.
[77] Commentary on Article 40… para. 3, 283.
[78] *Ibid*. para. 4, 283.
[79] *Ibid.* para. 5, 284.
[80] *Ibid*. para. 6, 284.

> although it may be true that failure to fulfil an obligation established by a rule of *jus cogens* will often constitute an international crime, it can not be denied that the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime'.[81]

Unfortunately, the ILC does not explain *why* it considered the category of international obligations where breaches constitute 'crimes' narrower than the category of obligations protected by peremptory rules. It may therefore be helpful to analyse the relationship between peremptory norms and 'crimes', in order to see whether there, indeed, exists a gap between these two concepts.

As already been mentioned above, the concept of peremptory norms was enshrined in the VCLT of 1969 in Article 53. The article states that peremptory norms are norms which can not be derogated from, by agreements of states. Any treaty derogating from such a norm is void, and if a new peremptory norm emerges, an already existing treaty that is in conflict with that norm becomes void and terminates according to Article 64 of the VCLT. Moreover, in accordance with Article 71 of the VCLT, the state parties to the treaty have to eliminate, as far as possible, the consequences of acts performed in reliance on provisions which conflict with the peremptory norm and bring their mutual relations in conformity with that norm.

The VCLT does not, however, deal with the effects that follow from a breach of such a norm by a state. For that reason, the ILC had to introduce a category of 'crimes'. Otherwise it would not have been possible to accommodate responsibility for breaches of peremptory rules of international law. As Ago stated in his Fifth Report:

> It would be hard to believe that the evolution of the legal consciousness of States with the regard to the idea of the inadmissibility of any derogation from certain rules has not been accompanied by a parallel evolution in the domain of State responsibility. Indeed, it would seem contradictory if the same consequences continued to be applied to the breach of obligations arising out of the rules defined as "imperative" and the breach of obligations arising out of rules from which derogation through particularly agreements is permitted.[82]

Thus, there exists a close relationship between peremptory norms and 'crimes'. In an exhaustive study exploring the existence of state criminality in international law, Jørgensen ponders whether this relationship is nothing but two sides of the same coin. She concludes, however, that;

> This image of a double-sided coin would appear to be a simplification and is not conceptually acceptable. There is no automatic and necessary link between *jus cogens* and international crimes except to the extent that public policy and the protection of certain moral values and imperatives within the international community overlap with the concept of crime. The concept of *jus cogens* is

[81] Commentary on Article 19… para. 62, 119-120.
[82] Fifth Report by Ago, A/CN.4/291 (1976), para. 99, 32.

> potentially of far broader scope than that of international crimes, even though the two may coincide in certain instances.[83]

Jørgensen is not the only one who leans toward the conclusion that the concept of peremptory norms has a broader scope than 'crimes'. Spinedi, for example, states that 'the violation of obligations contained in norms from which derogation is not permitted does not necessarily entail forms of responsibility different from those attached to the violation of obligations contained in norms from which derogation can be made'.[84] Thus, there exist norms, which are non-derogable by nature, but where breaches thereof hardly can be seen as 'crimes'.

In a scientific article written in 1999, Abi-Saab labels these norms 'systemic' peremptory norms, and these are inherent and necessary in order for a legal system to exist and operate (according to professor Pellet the principle *pacta sunt servanda* are, for instance, considered to be of peremptory nature[85]). Norms, on the other hand, which constitute the foundations of the international community, are named 'substantive' peremptory norms.[86] According to Abi-Saab it 'is these norms that are considered *d'ordre public* and it is their violation that entails the aggravated system of responsibility in international law.'

Thus, it seems that the ILC indeed was correct when it considered the category of international obligations whose breach constitutes a 'crime' narrower than the category of obligations protected by peremptory rules, since the concept of peremptory norms also embraces norms which are not considered *d'ordre public*.

However, in the same scientific article as above, Abi-Saab proposes that breaches of 'substantive' peremptory norms could replace the concept of 'crime'.[87] This is accordingly what has been done in the Draft of 2001. It is only regrettable that the ILC, in the commentary to new Article 40, failed to explain what must be understood by a peremptory norm of general international law, in the context of state responsibility.

5.1.2 The Seriousness of the Breach

As we can see when examining new Article 40 paragraph 1, the article requires that two conditions are met: The obligation in question must derive from a peremptory norm (as previously discussed), and the breach of this obligation must be serious in nature.

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[83] Jørgensen, 90-91.
[84] Spinedi, in J. H. H. Weiler, A. Cassese, and M. Spinedi (eds.), 135-136.
[85] Pellet, 63.
[86] Abi-Saab, 349.
[87] *Ibid.*

Old Article 19 paragraph 2, on the other hand, looks completely different insofar as the nature of the breach is concerned. According to the paragraph, a crime is a breach of an essential obligation, full stop! Hence, the additional criterion, that the breach must be serious in nature, is not required.

However, in addition to the basic criterion in paragraph 2, paragraph 3 makes references to the seriousness of the breach. According to Jørgensen, though, there was 'no suggestion that a two-stage test of seriousness was intended'.[88] She recalls in this context the ILC's interpretation of Article 19 in discussions on the Draft Code of Offences against the Peace and Security of Mankind:

> *The more important the subject-matter, the more serious the transgression.* An offence against the peace and security of mankind covers transgressions arising from the breach of an obligation the subject-matter of which is of special importance to the international community. It is true that all international crimes are characterized by the breach of an international obligation that is essential for safeguarding the fundamental interest of mankind. But some interest should be placed at the top of the hierarchical list. These are international peace and security, the right of self-determination of peoples, the safeguarding of the human being, and the preservation of the human environment. Those are the four cardinal points round which the most essential concerns revolve, and these concerns constitute the summit of the pyramid on account of their primordial importance. It will be noted, moreover, that because of this primordial importance article 19 cites them as examples in subparagraphs (a) to (d) of paragraph 3.[89]

Thus, in accordance with the above statement, 'a serious breach of an essential obligation' simply refers to the fact that some 'crimes' are more serious than others. In other words, a breach of an essential obligation always constitutes a 'crime'. But some 'crimes', such as genocide and aggression, are more serious because of the subject-matter of the obligation breached. If this interpretation of Article 19 is correct, it seems that the concept of 'serious breaches' is actually narrower than the concept of 'crimes'.

However, when examining the commentary to Article 19, it is quite clear that the above interpretation of Article 19 is not correct. In the commentary to Article 19, the ILC states that 'even the breach of an obligation of essential importance may not assume proportions sufficient to warrant it being characterized as a crime. This can be done only if the seriousness of the breach is established'.[90] Thus, it must be concluded that the article does require two conditions being met.

On the other hand, old Article 19 is somewhat confusing. Why refer to 'a *serious* breach of an international obligation […], such as that prohibiting

[88] See Jørgensen, 106.
[89] *Ibid.* See also Third Report on the Draft Code of Offences against the Peace and Security of Mankind by Thiam, A/CN.4/387 (1985), 70-71.
[90] Commentary on Article 19… para. 66, 120.

aggression' (paragraph 3 (a)), when this prohibition by its very nature requires a violation on a large scale?[91]

In this regard, the version of Article 19 originally proposed by Ago was tighter and better. The article clarified that certain 'crimes', such as aggression (mentioned in paragraph 2), necessarily imply a serious breach. Paragraph 3, on the other hand, required 'a serious breach by a State of an international obligation'.[92]

Regarding the definition of severity, new Article 40 paragraph 2 states that a breach of a peremptory norm 'is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation'. The commentary further clarifies that 'the term "gross" refers to the intensity of the violation; it denotes violations of a flagrant nature', and 'to be regarded as systematic, a violation would have to be carried out in an organised and deliberate way'.[93]

The commentary to old Article 19 refers clearly to the same parameters as above: In order to have achieved a certain degree of seriousness, the breach must be 'systematic', 'persistent', 'massive', 'flagrant' and 'large-scale'. [94]

Thus, not only the obligations in question seem to be identical, the breaches of the obligations in question must have achieved a certain degree of gravity (and the ILC uses the same parameters defining gravity in this context) in order for the acts to be regarded as a 'crime' or 'serious breach'. Hence, it must be concluded that 'serious breaches of obligations arising under peremptory norms' can identify the violation envisaged in old Article 19.

[91] See Wyler, 1158, in which the difference between 'substantive' and 'circumstantial' severity is discussed.
[92] Ago's proposed Article 18 stated that: […] (2) The breach by a State of an international obligation established for the purpose of maintaining international peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an 'international crime'. (3) The serious breach by a State of an international obligation established by a norm of general international law accepted and recognized as essential by the international community as a whole and having as its purpose: (a) respect for the principle of the equal rights of all peoples and of their right of self determination; or (b) respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or (c) the conservation and the free enjoyment for everyone of a resource common to all mankind is also an 'international crime'.
[93] Commentary on Article 40… para. 8, 285.
[94] Commentary on Article 19… para. 34, 110 and para. 70, 120.

5.2 The Identity between 'Serious Breaches' and Breaches of Obligations Erga Omnes

Since new Articles 48 and 54 do not refer to 'serious breaches under peremptory norms', but to breaches of obligations 'owed to the international community as a whole' (breaches of obligations *erga omnes*), the identity between these two types of violations must also be examined, in order to see whether there indeed has just been a 'cosmetic' change in the law of state responsibility.

5.2.1 The Relationship between Peremptory Norms and Obligations Erga Omnes

According to Crawford and the other members of the ILC, peremptory norms and obligations *erga omnes*[95] coincide (or 'there is at the very least substantial overlap between them'):

> The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole.[96]

The only difference between them is a 'difference in emphasis':

> While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance – *i.e.*, in terms of the present articles, in being entitled to invoke the responsibility of any State in the breach.[97]

This is accordingly the reason why the present ILC decided to refer to *erga omnes* obligations, instead of peremptory norms, in new Article 48.

That a 'difference in emphasis' exists between these two types of concepts is certainly true. But can we equate *erga omnes* obligations with obligations which derive from peremptory norms?

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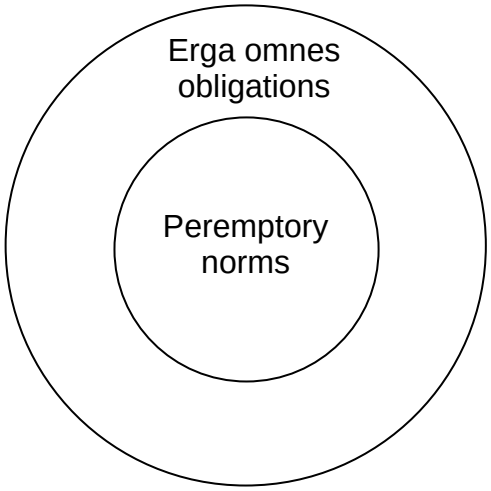
[95] The notion of *erga omnes* obligations was mentioned for the first time in the *Barcelona Traction* case. In a famous passage in this judgement the ICJ emphasized that; 'an essential distinction should be drawn between the obligations of a state towards the international community as whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*'. *Barcelona Traction, Light and Power Company, Limited*, Second Phase, ICJ Reports (1970), p. 32.
[96] Introduction to the commentaries on Article 40 and 41… para. 7, 281.
[97] *Ibid.*

Gaja, for example, put forward a theory on this subject, in which he made use of two concentric circles to illustrate his arguments. The widest of these circles was constituted by obligations *erga omnes*. According to Gaja, peremptory norms were also *erga omnes*, but the reverse was not true. Peremptory norms thus formed the second, narrower, circle.[98] Gaja's reasoning can be summarized in a simple Venn diagram:

The relationship between peremptory norms and erga omnes obligations according to Gaja



In Gaja's own words:

> The existence of a peremptory norm implies two rules: one that imposes an obligation *erga omnes*, another which forbids the conclusion of a treaty directed towards infringing the obligation and thereby makes the treaty invalid.[99]

Furthermore:

> Although a preventive measure concerning the validity of treaties no doubt contributes to the effectiveness of rules imposing obligations *erga omnes*, it can not be said that the existence of this type of rule depends on the preventive measure.[100]

Thus, in Gaja's view, *erga omnes* obligations can have an independent existence outside the realm of peremptory norms.

Today, this view seems to have won general acceptance among most international lawyers.[101] As been pointed out in an article written by Dupuy, there exist obligations which are considered to be *erga omne*s, such as

[98] See Gaja, in J. H. H. Weiler, A. Cassese and M. Spinedi (eds.), 156-160.
[99] *Ibid.* 159
[100] *Ibid.*
[101] See for example Sicilianos, 1137; Ragazzi, 189.

respect for the freedom of the seas, but since they permit possible compromises, they are not considered to be peremptory in nature.[102]

5.2.2 The Seriousness of the Breach

As been shown above, new Article 40 requires that two conditions are met: The obligation in question must derive from a peremptory norm, and the breach of this obligation must be serious in nature. New Articles 48 and 54, on the other hand, just refer to breaches of 'obligations owed to the international community as a whole'. Thus, even if obligations *erga omnes* and peremptory norms would coincide, breaches of 'obligations owed to the international community as a whole' can still not identify 'serious breaches', since the criterion of seriousness is missing in new Articles 48 and 54.

And let us note that, it is *only* when a *serious* breach of an 'essential obligation' has been committed, that all states in the international community can invoke responsibility and take countermeasure (old Article 40 paragraph 3). It must accordingly be concluded that, apart from the fact that obligations *erga omnes* and peremptory norms according to majority of international lawyers today do not coincide, there still exist a major difference between the old and the new draft, since new Articles 48 and 54, do not contain any criterion that the breach must be serious in nature.

[102] Dupuy, 1062.

6 Conclusions

Much point to the fact that the replacement of the concept of ‘crime’ by that of ‘serious breaches’ and breaches of *erga omnes* obligations has just been a matter of terminology:

- As been shown in chapter 3, ‘serious breaches’ fall under the definition of ‘crimes’: ‘Essential obligations’ and peremptory norms coincide and both old Article 19 and new Article 40 require that the breach in question must be serious in nature.

- Except for old Article 19 itself, Part One of the Draft of 1996 is based on a single notion of the internationally wrongful act, and so is Part One of the Draft of 2001. The argument by Crawford that the rules of attributions in the old draft *should* have entailed a distinction between ‘crimes’ and ‘delicts’, has proved to be incorrect, since this argument was based on the fact that the notion of ‘crime’ implied criminal responsibility, which it did not. It is another matter with the regime governing circumstances precluding wrongfulness. It is possible that this regime should have entailed such a distinction, since the concept of ‘crime’ entails an ‘aggravated’ regime of responsibility. But the same must be said about the concept of ‘serious breaches’, since it also concerns ‘aggravated’ responsibility.

- The Draft of 2001 does not contain any specific obligations of the responsible state, which is in contrast to the old draft and it’s Article 52. However, some improvements of the text regarding reparation, made during the second reading, made it possible to incorporate the main ideas of this article, without making a distinction between serious and non-serious breaches.

- At first sight, it seems that old Article 40 paragraph 3, in cases of ‘crimes’, gives all states in the international community exactly the same rights as the directly injured state. This stands in contrast to the new draft, which only gives limited rights to indirectly injured states (see Articles 48 and 54). However, “first sights” can often be deceiving, and a comparison between the old and new drafts is no exception to this rule. In fact, this thesis has shown that the rights given by old Article 40 paragraph 3 should be exercised ‘within the framework of the organized community of states’, which in this context means that the UN should ensure that these rights are not disproportionate in relation to the legal harm that the indirectly injured states have suffered. It must, however, be pointed out that Article 40 was drafted long before the final text of the old draft was adopted. By that time, Arangio-Ruiz had left the idea that ‘crimes’ could only be dealt with by an international institution. It is only unfortunate that the articles in the Draft of 1996 did not reflect that the rights of indirectly

injured states are not the same as the rights of directly injured states. Furthermore, both drafts seem to provide for countermeasures on general interest.

- Finally, the specific obligations of all states are almost identical: Both drafts involve the obligations not to recognize as lawful a situation created by a 'crime' or 'serious breach', and not to give aid or assistance to the state which has committed the 'crime' or 'serious breach'. Moreover, they contain the obligation to cooperate in order to bring to an end the 'serious breach' (or as the relatively milder version in old Article 53 states: 'to cooperate […] in the application of measures designed to eliminate the consequences of the crime').

But, before cementing the conclusion that the replacement of the concept of 'crime' by that of 'serious breaches' and obligations *erga omnes* has *not* led to any substantial changes in the law of state responsibility, one major difference between the drafts must be highlighted: When old Articles 19 and 40 both refer to 'crimes', new Articles 48 and 54 instead of referring to 'serious breaches of obligations under peremptory norms' as new Article 40, refer to breaches of obligations 'owed to the international community as a whole' (breaches of obligations *erga omnes*) . Although the present ILC considers that the concept of peremptory norms and obligations *erga omnes* to a large extent coincide (which they do not according to the majority of international lawyers today), one can not ignore the fact that the requirement that the breach in question must be serious in nature has been left out in new Articles 48 and 54. This opens the way for all states in the international community to invoke responsibility and to take countermeasures, even though the breach has not reached the level of 'crimes'!

To sum up: Although there are indeed many similarities between the old and the new draft, the fact that breaches of obligations 'owed to the international community as a whole' do not correspond with 'crimes', lead us to the conclusion that the elimination of the concept of 'crime' has been more than just a matter of terminology. The claim by Wyler that there has just been a 'cosmetic' change in the law of state responsibility is accordingly not true.

Bibliography

ABI-SAAB, GEORGES, 'The Uses of Article 19', European Journal of International Law (1999), vol. 10, no. 2, 339-351.

CRAWFORD, JAMES, BODEAU, PIERRE and PEEL, JACQUELINE, 'The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading', American Journal of International Law (2000), vol. 94, no. 4, 660-674.

DUPUY, PIERRE-MARIE, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', European Journal of International Law (2002), vol. 13, no. 5, 1053-1081.

JØRGENSEN,, NINA, *The Responsibility of States for International Crimes*, Oxford: Clarendon Press, 2000.

KLEIN, PIERRE, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law', European Journal of International Law (2002) vol. 13, no. 5, 1241-1255.

NOLLKAEMPER, ANDRE, 'Concurrence between Individual Responsibility and State Responsibility in International Law', International and Comparative Law Quarterly (2003) vol. 52, 615-640.

NOLTE, GEORG, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations', European Journal of International Law (2002) vol. 13, no. 5, 1083-1098.

PELLET, ALAIN, 'Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crimes?', Netherlands Yearbook of International Law (2001), vol. XXXII, 55-79.

RAGAZZI, MAURIZIO, *The Concept of International Obligations Erga Omnes*, Oxford: Clarendon Press, 1997.

SICILIANOS, LINOS-ALEXANDER 'The Classifications of Obligations and the Multilateral Dimension of the Relations of International Responsibility', European Journal of International Law (2002), vol. 13, no. 5, 1127-1145.

TAMS, CHRISTIAN J., 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' European Journal of International Law (2002) vol. 13, no. 5, 1161-1180.

WEILER, JOSEPH, CASSESE, ANTONIO and SPINEDI, MARINA (eds.), *Crimes of State: A Critical Analysis of the International Law Commission's Draft Article 19 on State Responsibility.* Berlin: Walter de Gruyter, 1989.

WYLER, ERIC, 'From State Crime to Responsibility for Serious Breaches of Obligations under Peremptory Norms of General International Law' European Journal of International Law (2002), vol. 13, no. 5, 1147-1160.

List of ILC Documents

Survey of International Law in Relation to the Work of Codification of the ILC, Memorandum submitted by the Secretary-General, A/CN.4/I/Rev. I (1949).

Report on International Responsibility by F.V. Garcia-Amador, Special Rapporteur, A/CN.4/96 (1956) *Yrbk*ILC, vol. 2, 173-231.

Second Report on International Responsibility by F.V. Garcia-Amador, A/CN.4/106 (1957) *Yrbk*ILC, vol. 2, 104-130.

Third Report on International Responsibility by F.V. Garcia-Amador, A/CN.4/111 (1958) *Yrbk*ILC, vol. 2, 47-73.

Report by Roberto Ago, Chairman of the Sub-Committee on State Responsibility, A/CN.4/152 (1963) *Yrbk*ILC, vol. 2, 227-259.

Report of the ILC on the work of its twenty-fifth session, A/9010/Rev.1 (1973) *Yrbk*ILC, vol. 2, 161-238.

Fifth Report on State Responsibility by Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (continued), A/CN.4/291 and Adds. 1-2 (1976) *Yrbk*ILC, vol. 2, part one, 3-54.

Report of the ILC on the work of its twenty-eight session, A/31/10 (1976) *Yrbk*ILC, vol. 2, part two, 95-122 (text of Article 19 and commentary).

Sixth Report on the content, forms and degrees of international responsibility (part two of the draft articles); and "Implementations" of international responsibility and the settlement of disputes (part three of the draft articles), by Willem Riphagen, Special Rapporteur, A/CN.4/389 (1985) *Yrbk*ILC, vol. 2, part one, 3-19.

Third Report on the Draft Code of Offences against the Peace and Security of Mankind by Thiam, A/CN.4/387 (1985) *Yrbk*ILC, vol. 2, part one, 63-83.

Report of the ILC on the work of its forty-eight session, A/51/10 (1996) *Yrbk*ILC, vol. II, part two, 57-73 (text of the articles adopted by the ILC on first reading, commentaries on Articles 50, 51 and 52).

First Report on State Responsibility by James Crawford, Special Rapporteur, A/CN.4/490 and Adds. 1-3 (1998).

Third Report on State Responsibility by James Crawford, Special Rapporteur, A/CN.4/507 and Adds. 1-4 (2000).

Report of the ILC on the work of its fifty-third session, A/56/10 (2001) GAOR, fifty-sixth session, supplement no. 10, 20-143 (text of the articles finally adopted by the ILC and commentaries).