
The Uses of Article 19

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Abstract

In his First Report to the International Law Commission as Special Rapporteur on State Responsibility, Professor Crawford severely criticizes the category of 'crime of state' and the attendant dual regime of responsibility introduced by Article 19 of the Draft Articles; he proposes to set it aside. This essay endeavours to respond to these criticisms by distinguishing the 'text' of Article 19 from the 'concept' behind it. Admitting the shortcomings of the 'text', it is argued that these can be easily perfected through good draftsmanship, making it more rigorous and giving it full effect throughout the Draft Articles. The concept behind the text remains of major importance, however, reflecting as it does in the field of state responsibility the emergence in contemporary international law of a hierarchy of norms ensuing from the recognition by the international community of the pre-eminence of certain common interests and values and the consequent necessity of surrounding them with maximum legal protection. The criticism of the concept of 'crime of state' based on the 'domestic analogy' ignores its specificity in international law. The recommended alternative course of action of reverting to a unitary regime while making special allowance for the effects of violating jus cogens norms (and erga omnes obligations) would necessarily reintroduce a binary regime. Moreover, it is feared that the abandonment of the dual regime of responsibility would be largely perceived as a setback in the evolution of general international law.

The subject I was asked to address for this symposium is 'The uses of Article 19'. Much that can be said in this respect has already been put forward in my written report and interventions at the 'Conference on State Responsibility and the Concept of Crimes of States', held in Florence in 1984;¹ a conference whose published acts are largely considered a doctrinal landmark in the development of the concept.

My main submission was that however one represented the situation before 1945, the UN Charter marked a quantum leap and a qualitative transformation in the normative structure of international law. For once the international community considers certain common values or interests as pre-eminent, as it did with the maintenance of international peace and security in the Charter, and surrounds them

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¹ Abi-Saab, 'The Concept of "International Crimes" and Its Place in Contemporary International Law', in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 141.

with greater legal protection by attaching graver consequences to the violation of their protective norms, it introduces a fundamental distinction and differentiation of functions between the norms of international law, as well as a certain hierarchy among them; a trend which was amplified by subsequent developments. It may have taken us some time to perceive and recognize this trend. But by the time the Commission restarted its work on state responsibility, it was a well-entrenched legal phenomenon; and Article 19 did no more than give expression to it in that area of international law.

Since the Florence Conference, however, much water has passed under the *Ponte Vecchio*: the Cold War has come to an end and a new configuration of power is emerging and starting to bear on the trajectory of the evolution of international law. At the time of the Conference, Professor Ago, the architect of Article 19, had already left the ILC to take up his position at the ICJ and had been replaced as Special Rapporteur by Professor Ripaghen, to be followed by Professor Arangio-Ruiz and now by Professor James Crawford, the first to come from the common law tradition. The Commission has finally finished a first reading of the three parts of the project and is now starting a second reading.

A second reading is a good moment for reflection and reconsideration. Professor Crawford has produced an excellent First Report that is both very well thought out and argued.² On Article 19, while recognizing that some qualitative hierarchy of norms has emerged in general international law,³ the Report carries a scathing criticism of Article 19 and accessories (Article 40(3) and Articles 51–53), and a recommendation to scuttle the whole thing for the time being and try to reach the same results by the alternative route of the special effects of *jus cogens* rules and *erga omnes* obligations within a unitary regime of responsibility.

My purpose here is critically to examine these criticisms and see whether they ultimately warrant the radical recommended course of action drawn on them (while avoiding, as much as possible, repetition of what I said 15 years ago).

1 The Text

My starting point is to distinguish between Article 19 as a ‘text’ initially prepared by Professor Ago and later debated, retouched and adopted by the ILC (the ‘signifier’), on the one hand, and the legal concept or phenomenon it purports to represent or give expression to (the ‘signified’), on the other. While the ‘text’ is, admittedly, not a shining example of limpidity and precision, one should keep in mind, in criticizing its drafting imperfections, that these criticisms do not necessarily attach to the ‘concept’ which it endeavours, perhaps inadequately, to express (and to whose relevance and importance my earlier piece was devoted).

² UN Doc. A/CN.4/490 (24 April 1998), with several addenda, of which Add. 1–3 are devoted to Article 19.

³ *Ibid.*, at para. 71.

Indeed, Professor Crawford's are largely drafting criticisms. They are addressed to the following points.

A *The Definition*

Paragraph 2 of Article 19 provides the definition of what constitutes a crime in the context of state responsibility:

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.

Professor Crawford describes this definition as circular. But he admits that it is no more circular than the definition of peremptory norms in Article 53 of the Vienna Convention on the Law of Treaties, which is widely accepted.⁴ Indeed, in spite of its awkward turn, the above definition is, in my submission, much better than that of Article 53, which defines *jus cogens* rules by their effect. Effects are the consequences, not the cause; and the cause does not appear in the definition as it should. In Article 19, the cause is at the basis of the definition; it is the recognition by the international community of the special importance of the common interest protected by the rule that entails the attribution to its breach of the graver consequence of considering it as a 'crime' (though not in the municipal law sense, as explained below). Secondary consequences flow from this major one, such as the production of certain substantive effects or the application of a particular procedure for determining such breaches. As consequences, these are not good criteria for a definition which is logically antecedent to them.⁵

B *The Examples*

The most severe criticisms are directed to paragraph 3, providing examples of the crimes defined in paragraph 2. While these criticisms are largely warranted, the examples were probably provided in order to demonstrate that the category is not moot or purely hypothetical and that several of its species are evident and recognizable in international practice. The same controversy had arisen in relation to *jus cogens* in the course of the preparation of the Vienna Convention on the Law of Treaties, when a recurrent criticism was that *jus cogens* would be an 'empty box'. Apart from the fact that even then this was not true, my answer at the time was that be it an empty box, the category was still useful; for without the box, it cannot be filled.⁶ This is obviously not true of the category of international crimes. At least the first three examples in Article 19, paragraph 3 provide clear cases in positive

⁴ *Ibid.*, at para. 48.

⁵ Cf. Abi-Saab, *supra* note 1, at 147.

⁶ Abi-Saab, 'The Third World and the Future of the International Legal Order', 29 *Revue Egyptienne de droit international* (1973) 27, at 53.

international law of aggravated responsibility for violations of certain fundamental norms.⁷

The drafting of these examples is another matter. Ago's earlier draft was, as noted by Crawford, tighter and better. It was the Drafting Committee that expatiated on the examples and used the loose language later criticized by Crawford. Admittedly, such loose language creates a large margin of indeterminacy or even a semblance of contradiction; for example, between the definition in paragraph 2, which highlights the fundamental importance of the breached obligation as the sole, 'qualitative' criterion, and the use of 'quantitative' adjectives such as 'massive' in describing the violations in paragraph 3. But these are mere drafting defects which can be easily remedied, once the Commission decides on the proper criterion (whether it is the importance of the rules alone, or combined with the scale of the breach, or the importance of the rules together with a *de minimis* limitation).

In any case, all now agree that the proper place of these examples is not in the definition itself, but in the commentary where they can be treated in some detail. Moreover, it is imperative to avoid any confusion between the 'secondary rules' of state responsibility which are being codified, and the 'primary rules' which have no place in such a codification (otherwise it would encompass all the substantive rules of international law).

C *The Consequences*

Professor Crawford underlines 'the marked contrast between the gravity of an international crime of a State, as expressed in Article 19, on the one hand, and the rather limited consequences drawn from such a crime in Articles 51 to 53, on the other';⁸ consequences which he also describes as 'for the most part non-exclusive'.⁹ After examining the three parts of the project, he remarks that 'except for Article 19 itself', the rules of Part I 'make no distinction between international crimes and international delicts'¹⁰ (for instance, in relation to circumstances precluding wrongfulness or by not requiring a *culpa* for crimes) and that 'the specific consequences attached to international crimes in Parts two and three are rather minimal'.¹¹

⁷ This is, in my opinion, the purpose of the phrase in the *chapeau* of this paragraph — 'on the basis of the rules of international law in force' (so severely criticized by Professor Crawford as 'lacking in specificity') — it was not to provide or enumerate in all details the relevant primary rules, but to demonstrate by their example that the aggravated consequences of the breach of such rules are already part of the 'law in force' and not merely *de lege ferenda*. The same comment applies to Professor Crawford's criticism of paragraph 1 of Article 19 ('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') as being redundant and stating the obvious, since there is no breach that would not constitute a wrongful act because of the subject-matter of the obligation. In fact, the purpose of this provision is quite another; it is another way of stating that the secondary rules of responsibility do not depend on, or that they operate regardless of, the contents of the primary rules whose breach puts the secondary rules into operation.

⁸ *Supra* note 2, at para. 43.

⁹ *Ibid.*, at para. 86.

¹⁰ *Ibid.*, at para. 83.

¹¹ *Ibid.*, at para. 51.

This may be true, but it does not mean that Article 19 is useless and that we can do without it. These defects can be explained by the context and process of drafting the article. Article 19 was a first attempt at formulating a strongly felt but hitherto not systematically expressed trend in contemporary international law, whose formal recognition and statement drained all the energy and attention that it could draw. It was by necessity a first approximation, whose full impact and consequential effects (particularly the secondary and tertiary ones) could not be instantaneously realized. Moreover, the piecemeal method of work of the ILC (taking almost 20 years between the adoption of Article 19 and finalizing the first reading of the whole draft), accentuated the tendency to focus on provisions in isolation, rather than as parts of an interactive whole.

Now that all the component parts have been completed, it is precisely the role of the second round, or the 'second reading', to integrate them into a coherent whole and to bring out their mutual relations and influences. The detailed criticisms by Professor Crawford of the scant and trivial impact of Article 19 on the whole draft, far from damning that article, should incite the ILC to integrate it properly in the draft and give it its full effect throughout. Indeed, these criticisms lay down the precise agenda of what should be done in this regard.

D Procedures

Here again, Professor Crawford underlines the 'contrast between the strong procedural guarantee associated with counter-measures . . . and the complete absence of procedural guarantees associated with international crimes'.¹²

This criticism, while warranted, calls for two remarks. First, the contrast between 'countermeasures' and 'crimes' is more apparent than real in this regard, for the strong procedural guarantees that surround countermeasures will have to apply first and foremost to whatever measures states would envisage to take in reaction to what they consider as an 'international crime'.¹³ The second remark is that procedures do not develop (at least *ab initio*) through custom. They have to be devised and added by agreement even to a codification treaty, as was done in the Vienna Convention on the Law of Treaties of 1969. There is nothing that prevents the ILC from drafting a provision along the lines of Article 66a of that Convention (establishing the compulsory jurisdiction of the ICJ over disputes relating to *jus cogens*, unless the parties agree on arbitration). This would provide the 'special procedure for determining authoritatively whether a crime has been committed, or what consequences should follow', to use Professor Crawford's language in criticizing its absence in the draft as it stands ('this is left for each State to determine *qua* "injured State"').¹⁴

¹² *Ibid.*, at para. 43; cf. paras 51, 85, 86.

¹³ This also takes care of the concern of some states in their comments that the consequences of the category 'allow for reactions by individual States acting without regard to the position of the international community as a whole' (*ibid.*, para 60(iii)); a legitimate concern in the face of the very alarming recent examples of wanton use of force by certain states on the basis of their own subjective determination of alleged violations by other states.

¹⁴ *Ibid.*, at para. 51.

2 The Concept

In sum, the criticisms of Article 19 (and the whole of the Draft Articles) as a ‘text’ highlight drafting and construction defects that are all perfectible with good legal craftsmanship, for which we can trust the consummate talents of the Special Rapporteur and the collective wisdom of the ILC membership.

The question remains, however, whether the concept behind the text — i.e., the existence of two species of violations of international obligations, designated by Professor Ago and the ILC as ‘crimes’ and ‘delicts’, subject to two different legal regimes of responsibility — is worth the effort.

The answer to this query requires in turn the prior examination of the following questions:

A Is Such a Distinction Warranted in Contemporary International Law?

Professor Crawford, after surveying judicial and state practice, answers in the affirmative:

What can be said is that . . . within the field of general international law there is some hierarchy of norms, and that the importance of at least a few basic substantive norms is recognized as involving a difference not merely of degree but of kind.¹⁵

However, he attaches to this answer a *proviso* which raises the next question.

B Is the Distinction Made in Article 19 the Appropriate One?

Here Professor Crawford’s answer is in the negative. The *proviso* which immediately follows the above quotation reads as follows:

On the other hand it does not follow from this conclusion that the difference in the character of certain norms would produce two distinct regimes of responsibility, still less that these should be expressed in terms of a distinction between ‘international crimes’ and ‘international delicts’.¹⁶

The reason for this rejection is basically the ‘domestic analogy’ with criminal law that the terminology used necessarily evokes,¹⁷ i.e. the issue of ‘criminalizing state responsibility’,¹⁸ as some have called it.

Judged by the standards of municipal criminal law, a gauge used by Professor

¹⁵ *Ibid.*, at para. 71.

¹⁶ *Ibid.*, at para. 71. Cf. para. 63: ‘Judicial decisions since 1976 certainly support the idea that international law contains different kinds of norms, and is not limited to the “classical” idea of bilateral norms. On the other hand there is no support in those decisions for a distinct category of international crimes of States.’

¹⁷ *Ibid.*, at para. 81.

¹⁸ The title of K. Marek’s article in 14 *Revue belge de droit international* (1978–79) 460.

Crawford throughout, the Draft Articles are found to be totally wanting.¹⁹ While a brief survey reveals that the criminal responsibility of states is hardly recognized in contemporary international law — in any case not at all in international judicial practice²⁰ — state practice, though using the language of ‘crimes’ from time to time,²¹ remains vague and inconsistent.²²

Of course, if we construe ‘international crimes’ (but also ‘international delicts’) in Article 19 in the strict sense of municipal criminal law, then this criticism will be totally warranted. But such a construction would be based, in my submission, on a misunderstanding of what Professor Ago and the ILC had in mind when they used this terminology in the article.

Though the Commission’s commentary on the article, when it was adopted in 1976, does not directly address this point, it still bears clear indications of excluding any analogy with municipal criminal law. It thus explains the choice of the expression ‘international crimes’ merely by the fact that it had become current usage in state practice and international treaties as well as in resolutions of international organizations and in legal literature.²³ Elsewhere, it warns that ‘it would be doubtful whether there would be any point in extending to international law the specific legal categories of internal law’, before adding that:

For the purposes contemplated here, the essential question is not so much whether the responsibility incurred by a State by 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.²⁴

This makes it clear that the purpose was ‘not to install a mirror-image system of penal law addressed to States, but simply to attach graver consequences to violations constituting “international crimes”, and to emphasize that such violations cannot be reduced to a mere bilateral relation between the victim and the perpetrator of the act’.²⁵

In her exhaustive study of the legislative history of Article 19 presented to the Florence Conference, Professor Marina Spinedi, the devoted assistant of Professor Ago throughout his work on the project, concluded as follows on this point :

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 Draft Article 19 . . . that there are wrongful acts regarded by the international community as more serious than all others because they affect essential

¹⁹ *Ibid.*, at paras 89–92, esp. the last one.

²⁰ *Ibid.*, at para. 63.

²¹ *Ibid.*, at para. 64.

²² *Ibid.*, at para. 65.

²³ *ILC Yearbook* (1976, II, Part 2) 118.

²⁴ *Ibid.*, at 104, note 473.

²⁵ Abi-Saab, *supra* note 1, at 146.

interests of the Community. As a consequence, these wrongful acts entail a regime of responsibility different from that attaching to other wrongful acts . . . the differences 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 domestic legal systems.²⁶

Indeed, that was also the understanding of the states who supported Article 19 when it was first drafted,²⁷ as well as those who support it now in their comments on the present round of Draft Articles, which are summarized by Professor Crawford as follows:

There is little or no disagreement with the proposition that ‘the law of international responsibility is neither civil nor criminal, and that it is purely and simply international’. As a corollary, even those Governments which support the retention of Article 19 in some form do not support a developed regime of criminal responsibility of States, that is to say, a genuine ‘penalizing’ of the most serious wrongful acts.²⁸

Professor Crawford considers, however, that ‘the appeal of the notion of “international crime” . . . cannot 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’.²⁹

The presumption of such a necessary association is not un rebuttable, however, particularly in international law. Even in municipal law, examples can be found of the use of the same terms or categories in different senses and with different connotations, according to context. Thus, in French law, ‘crimes’ and ‘delicts’ (*délits*) are two categories of the triptych of criminal offences (together with ‘contraventions’, in a descending order of gravity) in penal law. But in the context of civil responsibility, the term ‘delictual responsibility’ is used to denote tort responsibility in contrast to ‘contractual responsibility’, without any criminal law connotation.

This is more so the case in international law where, as so masterfully and elegantly demonstrated by Paul Reuter,³⁰ legal terms detach themselves from their municipal moorings to acquire specific contours and import, more consonant with the structure and functions of international law.

Nominalism apart, however, what is in question here is not so much the label as the phenomenon designated by it. It is whether, within international responsibility, there is a differentiation according to the gravity of the violation between two regimes, whatever we call them: ‘crimes’ and ‘delicts’, ‘aggravated’ and ‘simple’, ‘public’ and ‘private’, or even A and B. This does not preclude nor prejudice the parallel but separate issue of the existence or the possibility of a criminal responsibility of states in contemporary international law.

²⁶ Spinedi, ‘International Crimes of State: The Legislative History’, in Weiler, Cassese and Spinedi, *supra* note 1, at 52.

²⁷ *Ibid.*, at 50.

²⁸ *Supra* note 2, at para. 60(iv).

²⁹ *Ibid.*, at para. 81.

³⁰ ‘Quelques reflexions sur le vocabulaire du droit international’, *Mélanges Trotobas* (1970) 423.

C Is the Distinction Worth Our While?

Apart from the dangers of the ‘domestic analogy’, another argument put forward by Professor Crawford for abandoning the distinction of Article 19 is the very marginal role which would be left to the Draft Articles relating to the category of ‘crimes’ if the distinction is retained. The underlying reasoning can be summarized as follows: given the limited number of acts falling within the category of crimes, the multiplication of special regimes relating to them,³¹ these being usually peremptory norms, including the relevant provisions of the UN Charter and any action taken under them (which is not necessarily limited to the case of aggression), ‘the draft articles will be relegated to a secondary, residual role’.³²

This argument is closely related to another, that of the utility of having a dual regime, in view of the plurality of special regimes in the area, which seems to militate in favour of either multiple regimes or better still a unitary regime, with exceptions (of particular regimes for certain specific serious violations as *lex specialis*).³³

There are, however, valid counter-arguments. The examination of internal codes reveals that the existence of specific legal regulation of certain acts or situations is no obstacle to their simultaneous regulation generically as species of a more general category. Thus, all civil codes carry specific regulations of the most current types of contracts, such as the contracts of sale, rent, employment and insurance (*les contrats nommés*). But at the same time, in their general part on the sources of obligation, they provide the rules governing contracts in general. The same holds for criminal codes, where besides articles providing the definition and elements of specific crimes and misdemeanours, the general part provides some general rules by category: crimes, misdemeanours, contraventions, and even more general rules covering all of them. Far from being a redundant duplication, the generic or categorical treatment of species introduces order and structure in what would have remained otherwise isolated instances and brings out their common features which distinguish them from other categories. And it is this last aspect which ultimately justifies the existence of the category.

In the case at hand, the main trait which characterizes the category of ‘international crimes’ and distinguishes it from the other category of ‘international delicts’ resides in the legal interest of the international community in the violation. This means that the secondary rules which come into play address a triangular rather than a bilateral relation. At one of its angles lies a community interest which has to be accommodated in a particular way (different from that of a simple passive subject of responsibility in a bilateral relation) and which by its mere existence there affects the total shape of the legal relationships ensuing from the violation.

³¹ *Supra* note 2, at para. 73.

³² *Ibid.*, at para. 80.

³³ *Ibid.*, at para. 73.

D Can We Reach the Same Practical Results by Simpler Means?

As mentioned earlier, while recognizing the existence of a certain hierarchy of norms in contemporary international law, leading to a qualitative differentiation, Professor Crawford does not consider that the distinction of Article 19 inexorably follows by necessary implication. He suggests that the differentiation can be better taken into consideration in the Draft Articles by paying greater attention to the consequences of violations of *jus cogens* norms and *erga omnes* obligations.³⁴

While this proposal merits the most serious consideration, its persuasiveness ultimately depends, in my submission, on whether the two categories of *jus cogens* norms and *erga omnes* obligations would better enable us to identify the type of violations envisaged in Article 19 — i.e. breaches of an international obligation of essential importance for the protection of the fundamental interests of the international community — and to capture their differentiated consequences in terms of triangular responsibility relations, with the participation of the organized and the not so organized international community. This in turn requires a comparison of the ambit of these two categories with that of ‘international crimes’ as it emerges from Article 19.

Fortunately, this has been done, and very well done, by Professor Giorgio Gaja in his report to the Florence Conference,³⁵ which is at the basis of the theory of three circles. In short, as I understand it, obligations *erga omnes* constitute the widest circle, spanning well beyond those obligations imposed by norms protecting the fundamental interests of the international community. Obviously, this category calls for an adjusted treatment, but not necessarily that dictated by the hierarchy of norms.

Obligations deriving from *jus cogens* norms are necessarily *erga omnes*, but the reverse is not true. Hence, *jus cogens* rules constitute a narrower circle. Furthermore, the ILC, in its commentary on Article 19, when it adopted it in 1976, expressly stated its understanding ‘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’.³⁶ This means that the circle of ‘international crimes’ entailing the differentiated treatment (as a result of the hierarchy of norms) is narrower than that of *jus cogens*; a conclusion which needs an added explanation.

The difference between the two circles results from the approach followed in defining *jus cogens* rules not by the substantive cause or the *ratio legis* of attributing this character to them, but by the mere effect (or one of the effects) of this attribution, namely of their being non-derogable by agreement. This choice is easily explained by the context in which this definition was adopted, which is the law of treaties, where what mattered was non-derogability and the consequent invalidity of contrary agreements. But this gave *jus cogens* rules a connotation very different from their

³⁴ *Ibid.*, at para. 98.

³⁵ Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’, in Weiler, Cassese and Spinedi, *supra* note 1, at 151. Cf. his Hague Lectures, ‘*Jus Cogens* beyond the Vienna Convention’, 172 *RdC* (1981-III) 273.

³⁶ *Supra* note 23, at 120.

equivalents in municipal law. Indeed, in municipal law not all peremptory rules are considered *d'ordre public* or of a public policy character (while both *ordre public* and public policy go beyond articulated rules). Some peremptory rules or principles are inherent in the concept of law or legal system itself, and are thus imposed by logical or legal necessity for the legal system to exist and to continue to function in a regular manner. These are 'systemic' peremptory norms. But in addition, every legal system, reflecting in that the history, the culture and the collective vision of the world (*Weltanschauung*) of the society it purports to regulate, considers certain common interests and values as pre-eminent and worthy of special legal protection. The norms providing such protection are 'substantive' peremptory norms, social choice and designation. It is these norms that are *d'ordre public* and it is their violation that entails the aggravated system of responsibility in international law.

If we define *jus cogens* in the context of state responsibility in this 'substantive' manner, this would resolve the problem of tracing the ambit of the aggravated or triangular regime of responsibility.³⁷ It would go a long way down the road of Professor Crawford's proposal. We need not even call these violations 'international crimes', but merely breaches of 'substantive' (or some such adjective) *jus cogens* norms or obligations.

This is in addition to the contribution of such a solution to the rationalization of the architecture of the international legal system as a whole, by unifying the standards of reference in different contexts (giving hierarchy a more global meaning and significance), and by situating the loose definition of *jus cogens* in the Vienna Convention on the Law of Treaties in its proper perspective.

But we would still have a dual regime of responsibility.

E Is the Distinction Feasible?

This brings us back to the initial question of drafting or rather whether the distinction is amenable to operational legal rendering. In the light of the Commission's work, and the hiatus between the aspiration and the realization (by the end of the first reading), Professor Crawford tends to give a negative answer: 'The draft articles as they stand fail to do what the Commission set out to do in 1976, that is to say, to elaborate a distinct and specific regime of international crimes'.³⁸ Instead, the Commission ended up adopting what he calls the 'delict plus' approach;³⁹ an approach the Commission started by warning against, namely to establish 'a single basic regime of international responsibility . . . applicable to all internationally wrongful acts . . . and . . . to add extra consequences to it for wrongful acts constituting international crimes'.⁴⁰

However, as was explained above, the Draft Articles as they stand now have been

³⁷ In this I find myself in substantial agreement with Alain Pellet in his excellent article 'Vive le crime', International Law Commission, *International Law on the Eve of the Twenty First Century: Views from the ILC* (1997) 287.

³⁸ *Supra* note 2, at para. 89.

³⁹ *Ibid.*, at para. 73.

⁴⁰ *Supra* note 23, at 117.

developed in a piecemeal fashion and largely, in this respect, as a first approximation.⁴¹ It is precisely the role of the ‘second reading’ to tend to such deficiencies. Its task here is not limited to integrating the aggravated regime more fully and articulating its implications throughout the Draft Articles; indeed, passing from a single generic regime to two modulates not only the new species but both, i.e. it affects the ‘simple’ regime as well by operating a division of labour between, and greater specialization for, both of them.

Very schematically, the division of labour would be reflected in different points of emphases, without necessarily neglecting the rest in either of them. The simple regime of ‘international delicts’, dealing basically with a bilateral or ‘private’ relation, has as its main purpose to re-establish, as much as feasible, the passive subject of the relation in his legal position before the violation. Thus ‘injury’ and ‘reparation’ (which were a little neglected in the Draft Articles) would come back to the fore in this ‘simple’ regime of responsibility. In other words, it is a subject-oriented regime, with particular emphasis on the passive subject.

By contrast, the main purpose of the ‘aggravated regime’ of ‘international crimes’ is to defend the normative integrity of the legal system itself against patterns of behaviour which go against its most fundamental principles and thus undermine its regular functioning and credibility; whence the emphasis on the ‘violation’ as such (much more than its consequences in terms of injury and reparation, without however totally neglecting them), i.e. on the necessity of its cessation and the guarantees against its repetition as well as the uprooting of its continuous effects that bear witness to its perpetuation in another guise. In other words, it is a system-oriented regime with particular emphasis on the active subject of the relation.⁴²

Conclusion

In the third Addendum to his First Report, where he examines the ‘Possible Approaches to International Crimes of States’, Professor Crawford treats the ‘international crimes’ of Article 19 exclusively in the criminal law sense. As such, he concludes:

The recognition of the concept of ‘international crimes’ would represent a major stage in the development of international law. The present draft articles do not do justice to the concept and its implications for the international legal order, and cannot be expected to do so.⁴³

This leads him to recommend the deletion of Article 19 and its accessories from the

⁴¹ This is also true of commentaries, such as mine, *mea culpa* (*supra* note 1, at 148, 218), where I used the delict-plus approach, but with a view to demonstrating the ‘value added’ of the aggravated regime.

⁴² The traditional unitary and undifferentiated system of state responsibility covered the whole sphere which is divided between civil, criminal (or public) law responsibility in municipal law. The emerging binary system of international responsibility divides this sphere in a manner which does not necessarily coincide with the dividing lines in municipal law, both in terms of the attribution of components or effects and of their relative weight. The in-depth analysis of this aspect is the subject of a doctoral thesis being written by Santiago Villalpando.

⁴³ *Supra* note 2, at para. 100.

Draft, without prejudice to the possibility of treating them in a separate project later on, and the treatment of 'civil' state responsibility in a unitary regime.⁴⁴

However, as we have seen, neither Professor Ago, nor the Commission members at the time of the adoption of Article 19, nor the states who were in favour of the article then or now, understood 'international crimes' in Article 19 to mean acts engaging the 'criminal responsibility of States', but merely as an aggravated regime of state responsibility.

Moreover, setting aside Article 19 and its accessories from the ILC project would have two major technical inconveniences. The first is that taking into consideration the special effects of violations of (some of) *jus cogens* norms would necessarily reintroduce the same issue into the exercise in any case. The second is that, as just explained, the existence of two regimes affects and modulates the 'simple regime' as well. By setting aside the 'aggravated regime', the articulation of the unitary regime would thus take place in the absence of (or without taking into consideration) an important parameter, with the risk of the result developing a backward tilt.

The attraction of the solution proposed by Professor Crawford is understandable. The elements of the aggravated regime are in a state of flux, dispersed and difficult to discern and distinguish properly, for example, from the purely criminal law elements. But in varying degrees, this has always been the case of the subject matter of 'progressive development' (otherwise, there would be little or no need for it); and the present debate is not without recalling the debate over the concept of *jus cogens* in the 1960s which did not inspire greater certainty than that of 'international crime' now.⁴⁵

Both of these concepts bear witness to the emergence of a backbone for the international legal system, which marks a higher stage of evolution (from the invertebrate to the vertebrate). That this column is still rather soft or in the process of taking shape and hardening, that it is still somewhat difficult to discern its components and distinguish them from the other cells that surround them, does not mean that it is not there or that it is not forming and starting to take shape before our very eyes.

Indeed, this is the most challenging stage when codification, and particularly progressive development, can, and should, play a 'maieutic' or facilitative role, by helping developments in process to fully unfold and by enhancing their visibility and effect.

It can legitimately be feared that setting aside the dual regime of responsibility would be widely perceived as a reversal of the evolution of general international law from a community-oriented system back to a purely intersubjective one.

⁴⁴ *ibid.*, at para. 101.

⁴⁵ Even on the less controversial aspects of such a developed field of international law as the law of treaties, one still remembers the words of Sir Hersch Lauterpacht, writing in 1955, when he was Special Rapporteur on the subject: 'Once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is a rule of consensus of opinion on broad principle — even this may be an overestimate in some cases — there is no semblance of agreement in relation to specific rules and problems' before enumerating over several pages some such points in controversy in the law of treaties ('Codification and Development of International Law', 49 *AJIL*, (1955), 16 at 17).