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# *From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law'*

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## **Abstract**

*The article endeavours to determine whether there has been any substantial change in the law of state responsibility brought about by the ILC through the replacement of the concept of 'crime' in old Article 19 by that of 'serious breach' in Article 40. Restricting the analysis to the viewpoint of international legality, it is argued that this new concept follows the line sketched out by Roberto Ago, as the new concept also aims at reinforcing international legality particularly through collective intervention based on the idea of states' legal interests whenever a serious breach of a peremptory norm of general international law occurs. Furthermore, the ILC commentary shows that serious breaches hardly differ from crimes *ratione materiae*. Similarly, a serious breach should be interpreted by recourse to the same criteria as those used by Article 19, namely, the essential importance of the obligation violated and the serious nature of the breach. Finally, when comparing the legal consequences of serious breaches to those of crimes, it seems legitimate to draw the conclusion that the former is the twin brother of the latter.*

## **1 Introduction**

There has been much debate on the birth of the 'international crime' and its incorporation into the Draft Articles on State Responsibility by the ILC. Now, however, the time would seem to have come for its death notice, since 'crime' has disappeared from the text finally adopted by the ILC. Whether to celebrate or to mourn

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its passing, or whether ‘crime’ simply mutated into a ‘serious breach’, is the question to be considered here.<sup>1</sup>

To be fully satisfactory, an answer to this question has to be based on an overall comparative analysis of the successive ILC Drafts. We have not done this, but have instead confined ourselves to focusing on the obligation and its breach, in other words the ‘originating act’ of responsibility in the restrictive sense of the term.<sup>2</sup>

Before comparing ‘crime’ and ‘serious breach’ from the viewpoint of international legality (section 3 below), we shall seek to determine whether and how the distinction between ‘crimes’ and ‘offences’ had ‘criminalized’ the law of international responsibility (section 2 below), in order to be able to judge whether the law of international responsibility has indeed now been ‘decriminalized’ by the final Draft.

## 2 The ‘Criminalization’ and ‘Decriminalization’ of Responsibility

The major objective of the ILC and its Special Rapporteur James Crawford in deleting ‘crime’ and replacing it with the concept of ‘serious breach’ was to free the Draft Articles of a concept of criminal responsibility inspired by domestic law. According to many commentators, the distinction introduced in Article 19 of the Ago Draft between ‘crimes’ and ‘delicts’ led to a ‘criminalization’ of responsibility.<sup>3</sup>

Decriminalizing state responsibility was the option finally adopted, on the grounds of, on the one hand, embryonic state practice in the area, and, on the other,<sup>4</sup> the inconsistency of the previous Drafts which, while maintaining the distinction between crimes and delicts, had failed in the task of establishing a legal system specifically tailored to international crimes.<sup>5</sup>

### *A International Responsibility and the Domestic Analogy*

Even before the drafting of Article 19, it seems that, in general terms, by analogy with domestic law, the law of responsibility was seen as having ‘civil’ aspects — based on the essential obligation to make reparations for damage — and ‘criminal’ aspects — based on the right of the victim state to take ‘sanctions’ against the state guilty of the

<sup>1</sup> At the request of the organizer of the excellent symposium, Professor P.-M. Dupuy, which led to publication of these articles.

<sup>2</sup> In a broad sense, the definition of the originating act is ‘also bound up with that of the rules of attribution’, as Dupuy, ‘Le fait générateur de la responsabilité internationale des Etats’, 188 *RdC* (1984-V) 26, clarifies.

<sup>3</sup> Cf. the observations by governments, particularly from Western countries like France, Germany or the UK (see UN Doc. A/CN.4/488 and Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490/Add 1, paras 52–59).

<sup>4</sup> First Report on State Responsibility, UN Doc. A/CN.4/490/Add.3, para. 97.

<sup>5</sup> *Ibid.*, at para. 91. On this point, see below.

wrongful act. This ‘unity’<sup>6</sup> of the law of responsibility is its distinguishing feature, and is explained in particular by the ‘horizontal’ of an international society made up of sovereign states, equal before the law, and reluctant to institutionalize binding mechanisms enabling reparation for damage and the infliction of sanctions on the state responsible.<sup>7</sup>

It is impossible to grasp international responsibility without referring to the categories of domestic law that were used to construct it through the centuries;<sup>8</sup> in this sense, no concept in international law exists ‘of itself’.<sup>9</sup> But the various ways of using the analogy have often led to inconsistent assessments of the civil and criminal aspects of responsibility. For instance, denying it a criminal character because of the absence in international society of a higher centralized authority capable of imposing ‘criminal’ penalties ought also to lead to denying it any civil aspect, since domestic civil legal orders similarly require the same type of authority in order to function.<sup>10</sup>

Additionally, by restricting the analogy to the legal consequences of responsibility, some commentators have felt they could discern the civil component in the common ‘compensatory’ nature of the modes of reparation, and the criminal component in the penal nature intrinsic to the types of sanction used in international law.<sup>11</sup>

But the undeniable existence of a penal element in reparations, and of a compensatory element in sanctions, enables the retention of the — vague — idea of their co-presence in international responsibility.<sup>12</sup> This is manifested in ‘punitive’ damages, or more generally in types of satisfaction, and also in countermeasures of a predominantly economic nature. Even reparation in the form of an indemnity may involve ambiguity if the amount awarded is substantially more than that strictly associated with material damage.<sup>13</sup>

Ought we then to assess the distinction between crimes and delicts as a true ‘criminalization of responsibility’?

<sup>6</sup> Dupuy, *supra* note 2, at 31 *et seq.*; and Combacau and Sur, *Droit international public* (4th ed., 1997) 517, for whom international responsibility is exclusively ‘civil’ responsibility.

<sup>7</sup> See e.g. Cottureau, ‘Système juridique et notion de responsabilité’, in *La responsabilité dans le système international* (Actes du Colloque de la Société Française pour le Droit International) (1991) 4–5; Dupuy, *supra* note 2, at 32.

<sup>8</sup> On this evolution, see Dupuy, *supra* note 2, at 22 *et seq.*; or Cottureau, *supra* note 7, at 3 *et seq.*

<sup>9</sup> We are rightly reminded that ‘no absolute or pure concept of crimes can be reached’: Barboza, ‘State Crimes: A Decaffeinated Coffee?’, in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *Liber Amicorum Georges Abi-Saab* (2001) 358.

<sup>10</sup> Cf. Spinedi, ‘La responsabilité de l’Etat pour “crime”: une responsabilité pénale?’, in A. Pellet and E. Decaux (eds), *Droit international pénal* (2000) 106–107.

<sup>11</sup> Nor does the statement that international responsibility is neither civil nor criminal but ‘international’ clarify matters (cf. Barboza, *supra* note 9, at 360).

<sup>12</sup> Spinedi, *supra* note 10, at 108, states that ‘even in modern State legal systems reparation has in part retained a repressive function’.

<sup>13</sup> As for instance in the *Rainbow Warrior* case, where the sum of US\$7 million awarded to New Zealand by the UN Secretary-General by way of ‘compensation’ seemed to involve a punitive aspect (in this connection, see Tams, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?’, in this issue).

## B *The Distinction between Crimes and Delicts*

The point is well known: the general approach in the Ago Draft was aimed fundamentally at reinforcing international legality, by putting the emphasis on the obligation and its breach much more than on the conduct of the culprit and the effects on the victim.<sup>14</sup> This emerges at the outset in Article 1: ‘every international wrongful act of a State entails the international responsibility of that State’. Hence, damage as an independent constituent of responsibility was banished from the Draft, and the positivist, ‘objectivist’ view defended by the ILC removed the element of fault from the ‘act of State’.<sup>15</sup>

The Ago Draft, wishing to take account of the then recent development of *jus cogens* and the notion of ‘international community’ underlying it,<sup>16</sup> began integrating into the law of responsibility ‘disputes on legality and legitimacy’, alongside the classical cases of reparation.<sup>17</sup> The emergence of obligations regarded as essential by the international community should imply the special treatment of any breaches of such obligations in order to safeguard this embryonic international *ordre public*. In this context, recourse to the notion of ‘crime’ was an attempt to be part of the new thinking by establishing a specific responsibility regime independent of analogies to domestic criminal law. By relinquishing the *culpa* of the culprit committing the wrongful act in favour of a more objective defence of international *ordre public*, it was logical to free oneself from the criminal law:

For the purposes contemplated here, we are interested not so much in determining whether the responsibility ... does or does not entail ‘criminal’ international responsibility, as in determining whether such responsibility is or is not ‘different’ from that deriving from the breach of other international obligations of the State.<sup>18</sup>

Accordingly, the system of ‘aggravated’ responsibility for international crimes contemplated by Ago, while based on the idea of collective intervention by states, did not have punishment as a primary goal, since it aimed above all at guaranteeing international legality.<sup>19</sup>

This line, as sketched out by Ago, was followed by his successors, Riphagen and

<sup>14</sup> On this point, cf. e.g. Combacau and Sur, *supra* note 6, at 523; Dupuy, *supra* note 2, at 98; Cottureau, *supra* note 7, at 89; or Wyler, *L’illicite et la condition des personnes privées* (1995) 3 *et seq.*

<sup>15</sup> On fault, cf. below.

<sup>16</sup> We know the influences that Article 53 of the Vienna Convention on the Law of Treaties and the celebrated *obiter dictum* in the ICJ judgment in the *Barcelona Traction* case had on Ago: see his ‘Fifth Report on State Responsibility’, *ILC Yearbook* (1976), vol. II, Part One, at 3 *et seq.*, paras 89 and 98 *et seq.*; cf. also Dupuy, ‘Responsabilité et légalité’, in *La responsabilité dans le système international* (Actes du Colloque de la Société Française pour le Droit International) (1991) 269.

<sup>17</sup> Dupuy, *supra* note 2, at 81 *et seq.* Of course, the distinction between these three types of litigation is purely methodological, since any ‘reparatory’ function involves at the same time some redressing of legality and legitimacy (cf. the speech by Combacau, *La responsabilité dans le système international* (Actes du Colloque de la Société Française pour le Droit International) (1991) 307).

<sup>18</sup> Ago, *supra* note 16, at para. 101, n. 154.

<sup>19</sup> See the article by Marina Spinedi, ‘From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility’, 13 *EJIL* (2002) 1099. The importance of Chapter VII of the UN Charter in this context should be stressed.

Arangio-Ruiz, who adapted the pre-existing mechanisms of pressure and dispute settlement specific to international law without introducing criminal procedures and sanctions from domestic law. And let us note that the consequences of a crime do not fundamentally differ from those of a delict: the state responsible is bound to make reparation for damage and is exposed to countermeasures.<sup>20</sup> The 'specific' obligations do not bind the state responsible but bear on other states, namely, all states in the international community. They involve non-recognition of the situation resulting from the crime, non-assistance to the criminal state, and cooperation in order to restore international legality.<sup>21</sup> Thus the analogy with domestic law seems to have at its core the idea of 'aggravated' responsibility in the case of a crime, ultimately entailing very modest consequences, and is consistent with the decentralized nature of international society.

Commenting on his predecessors' work, Crawford rightly stressed that the obligations on states other than the criminal state were not novel and that the mansuetude displayed towards that state casts doubt on the existence of a genuine legal system for state crimes.<sup>22</sup> Why in these circumstances was the elimination of the notion of 'crime' from the Draft nonetheless perceived as a very important issue, and its replacement by the notion of 'serious breach' regarded as more than a mere terminological change?<sup>23</sup>

### 3 Comparison between Crimes and Serious Breaches from the Viewpoint of International Legality

#### A *A Semantic Problem?*

For (allegedly) methodological reasons, the terms 'damage' and 'fault' do not appear in the Ago Draft, although the former can be found in the second part of the Arangio-Ruiz Draft and the latter in the second and third parts of the Crawford Draft.<sup>24</sup> Classically, damage is regarded as a condition of responsibility,<sup>25</sup> strictly delimiting its outlines *ratione personae* (the bilaterality of the relations in general) and *ratione*

<sup>20</sup> See Articles 14–15 in the Riphagen Draft and Articles 51–53 in the Arangio-Ruiz Draft. On the innovation relating to entitlement to take countermeasures, see below.

<sup>21</sup> Cf. Article 53 of the Arangio-Ruiz Draft. The dispute settlement methods provided for (conciliation, arbitration etc.) are specific to the international system.

<sup>22</sup> See 'First Report', *supra* note 4, at paras 81, 84, 86, 91 and 92, from which it can be seen that the Special Rapporteur remains attached to the domestic analogy; by this yardstick, noting the lack of consensus on the content of an international crime, in contradiction to the criminal principle *nullum crimen sine lege*, as well as the absence of institutionalized investigation procedures and judgments capable of imposing effective sanctions on the guilty state, he concludes that the concept of an international crime is inadequate, and proposes its elimination (*ibid.*, at para. 101).

<sup>23</sup> The biggest fear of the advocates of the 'crime' is that, by dropping the concept, one might also deprive oneself of a legal system distinct from that for 'simple' breaches (cf. Abi-Saab, 'The Uses of Article 19', 10 *EJIL* (1999) 339 *et seq.*).

<sup>24</sup> Cf. Articles 42–46 of the Arangio-Ruiz Draft and Articles 31, 34–39 and 47 of the Crawford Draft.

<sup>25</sup> Cf. Cottareau, *supra* note 7, at 25.

*materiae* (the associated obligation to make reparation).<sup>26</sup> That the elimination of damage from the law of responsibility was considered to be a ‘conceptual revolution’<sup>27</sup> may be surprising, particularly when one considers that its omnipresence in the second part of the Draft<sup>28</sup> conferred on it a sort of implicit pre-existence; although absorbed into wrongfulness, damage is nonetheless a condition *sine qua non* of reparation. Why, then, was its nominal deletion from Article 1 so strongly resented?

Much the same can be said for ‘fault’, also absent from the Drafts but implicitly appearing in Articles 19 and 23 of the Ago Draft and Article 10(2) of the Crawford Draft.<sup>29</sup> These concepts were a victim of the ‘objectivization’ of responsibility brought about by positivism<sup>30</sup> — its shadow nonetheless partly obscures the ‘act of State’ as stealthily as smoke saturates clear air.<sup>31</sup> Suffice it to note, for instance, that the ICJ established Albania’s responsibility in the *Corfu Channel* case on the basis that Albania *could not be unaware* of the existence of mines floating in its territorial waters, or Iran’s responsibility in the *Hostages* case based on a lack of due *diligence* (its failure to protect the US embassy in Tehran).<sup>32</sup>

Has the signified once again survived the elimination of the signifier?

Doctrine also conferred on the distinction introduced by Article 19 between crimes and delicts a destabilizing effect comparable to previous ‘conceptual revolutions’.<sup>33</sup>

If indeed the presence or absence of a word can alter the concept it is associated with, then the matter may be represented as a gravitational field, with the centre of gravity liable to shift if the balance of attractive forces is changed by the elimination or addition of elements. Thus, eliminating fault made the author of the wrongful act lose some attractive force, while eclipsing ‘damage’ took away much from the ‘victim’ aspect while simultaneously increasing the weight of ‘obligation’ in the conceptual field of responsibility. See Figure 1.

<sup>26</sup> ‘It is a principle of international law, or a general conception of law, that any breach of a commitment entails the obligation to make reparations’: *Chorzow Factory* case, 1928 PCIJ Series A, No. 13, at 29.

<sup>27</sup> Pellet, ‘La codification du droit de la responsabilité’, in Boisson de Chazournes and Gowlland-Debbas, *supra* note 9, at 290.

<sup>28</sup> Cf. *supra* note 24.

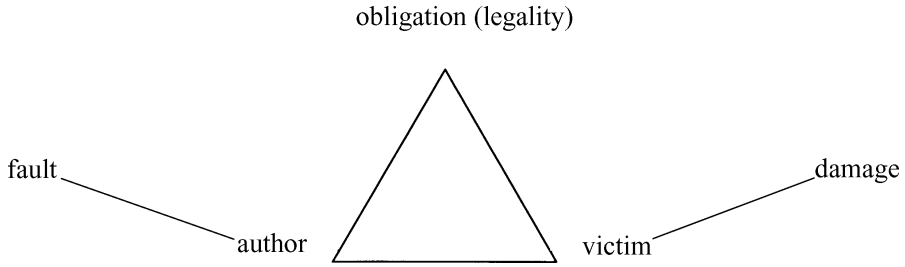
<sup>29</sup> It is, it has been pointed out, hard to see how to commit aggression or genocide without intention (Article 19), lack of due diligence without negligence (Article 23) or a serious breach, namely, a ‘flagrant or systematic failure to perform the obligation’, without fault (Article 40(2)). We cannot here discuss the basis of this observation, which derives from a very definite view of imputability (on this point, see Barboza, *supra* note 9, especially at 361–365).

<sup>30</sup> ‘The secular substitute for sin’, fault, has, like imputability, undergone a ‘purge’ aimed overall at the originating act, reduced to a mere ‘failure of objective legality’ (Dupuy, *supra* note 2, at 29–33). See also L. Cavaré, *Le droit international positif*, vol. II (4th ed., 1969) 460 *et seq.*

<sup>31</sup> The metaphor used by Gattini, ‘Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility’, 10 *EJIL* (1999) 397 *et seq.*

<sup>32</sup> See Dupuy, *supra* note 2, at 35.

<sup>33</sup> ‘The transposition to international responsibility of crimes and delicts . . . while not converting it into criminal responsibility nonetheless reflects a revolutionary change in the philosophy of international responsibility.’ Weil, ‘Le droit international en quête de son identité. Cours général de Droit international public’, 237 *RdC* (1992-VI) 301.



We may note that, by being reduced to the level of an occasional (according to the content of the primary obligation at stake) feature of wrongfulness,<sup>34</sup> ‘damage’ lost its status as an autonomous and necessary constituent of responsibility. The phenomenon of interaction between the poles of the gravitational field ultimately makes it impossible to change any element in the system without repercussions at all levels.<sup>35</sup> *Ipsa facto*, the system focused on the obligation and its breach, in particular on the protection of ‘international *ordre public*’ as a collective interest transcending that of the victim state. It is symptomatic of the poor integration of international society that ‘damage’ reappears for the purpose of establishing the legal interest of all states in defending legality; such states are raised for the occasion to the dignity of ‘injured States’ in the event of a crime.<sup>36</sup> But the noteworthy point is the transformation that has come about in the relations of responsibility: the bilateral mechanism intended to ensure reparation for damage has become a multilateral mechanism involving all states in the international community.<sup>37</sup>

For its part, the notion of ‘crime’ as a serious breach of obligations of essential importance<sup>38</sup> was supposed to contribute to this movement. The question to consider then becomes the following: has the replacement of ‘crimes’ by ‘serious breaches’ similarly brought a shift in the centre of gravity of responsibility, or was it a mere ‘cosmetic exercise’,<sup>39</sup> taking part in the same movement towards the pole of obligation?

<sup>34</sup> On my interpretation of the ILC’s view, wrongfulness, and hence responsibility, can arise without economic damage (see Wyler, *supra* note 14, at 135). For Stern, referring to the Arangio-Ruiz Draft, ‘damage has thus disappeared only because the wrongful act itself is damage, or legal harm’. Stern, ‘Conclusions’, in *La responsabilité dans le système international* (Actes du Colloque de la Société Française pour le Droit International) (1991) 332.

<sup>35</sup> ‘[I]n responsibility, the relations between concepts are of a circular nature’: Cottureau, *supra* note 7, at 72. As Dupuy has noted, for the ILC, ‘to the extent the need for damage disappears, the victim’s individuality is blurred. Concomitantly, the emphasis will tend increasingly to be placed no longer on the obligations of the state responsible but on the *rights* of the injured states.’ Dupuy, *supra* note 2, at 97.

<sup>36</sup> See Article 40(2) in the Arangio-Ruiz Draft, which states: “‘injured State’ means, if the internationally wrongful act constitutes an international crime, all other States.”

<sup>37</sup> Ago stated this clearly: ‘it would seem contradictory if in the case of the breach of a rule so important to the entire international community that it is described as “imperative”, the relationship of responsibility were still established solely between the State which committed the breach and the State directly injured thereby’ (Ago, *supra* note 16, at para. 99).

<sup>38</sup> See Combacau and Sur, *supra* note 6, at 524.

<sup>39</sup> The term is taken from Crawford, *supra* note 4, at para. 87.

To remain within the scope of the topic, our analysis will be restricted to the obligation (its content and legal nature) and the breach (its type), avoiding the legal regimes governing ‘crimes’ and ‘serious breaches’ respectively.<sup>40</sup> However, we shall permit ourselves two minor — but nonetheless important from the viewpoint of international legality — incursions.

First, in the event of a ‘serious breach’, as in the event of a ‘crime’, all states have a recognized legal interest, as members of the international community, in defending legality, whether the state is called an ‘injured’ state (Article 40(2) in the Arangio-Ruiz Draft) or a state ‘other than the injured State’ (Article 48 in the Crawford Draft) and whether the state is empowered to ‘assert’ (Article 40(2)) or ‘invoke’ (Article 48) the responsibility of the actor state.<sup>41</sup>

Secondly, by comparison with the provisions of the Arangio-Ruiz Draft (Articles 51–53), those of the Crawford Draft (Articles 48–54) on aggravated responsibility have replaced the possibility of a state taking ‘lawful measures’ with that of taking countermeasures. In both cases, these measures have no specific nature, and thus any state victim of a delict or of a ‘non-serious’ breach may have recourse to them. The important point here is that this power has been extended to all states in the case of aggravated responsibility.

However, while the Arangio-Ruiz Draft allowed any state to take countermeasures in the event of a crime, without it being clear whether this meant responses *ut singuli* in defence of ‘general interests’ or genuine collective actions,<sup>42</sup> it may be thought that the ‘lawful measures’ of the present Article 54 constitute, if not a return to classical ‘bilateralism’, at least a very cautious appeal to rally round the banner of general interest.<sup>43</sup> In any case, it is at least paradoxical that the response to serious breaches of peremptory norms should be left to the sovereign discretion of states instead of being dealt with collectively, especially since Article 41(1) puts an obligation on states to ‘cooperate to bring to an end through lawful means any serious breach’.

## B *The Obligation Ratione Materiae*

To establish the content of the obligation breach of which constitutes a crime, namely, the serious breach of an obligation recognized as ‘essential for the protection of fundamental interests of the international community’, Article 19 of the Ago Draft refers to the prohibitions on aggression, genocide, slavery, colonial domination, apartheid and the infringements of essential obligations relating to peoples’ rights to self-determination or to the environment. The commentary further mentions serious

<sup>40</sup> On this point, see the contributions from Tams, Scobbie and Alland in this issue of the journal.

<sup>41</sup> For a critique of the notion of ‘injured State’ in the current Draft, see Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, 13 *EJIL* (2002), esp. at 1127. For a critique of the vagueness of the expression ‘invoke their responsibility’, see the articles by Scobbie and Gattini in this issue.

<sup>42</sup> Cf. Alland, ‘Countermeasures of General Interest’, 13 *EJIL* (2002) 1221.

<sup>43</sup> *Ibid.*; and Klein, ‘Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law’, 13 *EJIL* (2002) 1241.



infringements of human rights and fundamental freedoms.<sup>44</sup> While the emphasis is placed on aggression,<sup>45</sup> Article 19 creates no hierarchy among these crimes and does not purport to be exhaustive, so as not to prejudice future developments in this regard.<sup>46</sup>

By comparison, Article 40 in the Crawford Draft, relating to ‘serious breach[es] . . . of an obligation arising under a peremptory norm of general international law’, looks completely different, in so far as (taking inspiration from Article 53 of the Vienna Convention<sup>47</sup>) it includes no indications as to the content of these norms. The commentary nevertheless refers clearly to the same prohibitions as in Article 19 of the Ago Draft: race discrimination, torture and crimes against humanity take the place of colonial domination in a list that is likewise not exhaustive. It adds ‘basic rules of international humanitarian law applicable in armed conflict’, in conformity with the advisory opinion of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case.<sup>48</sup> Only the methodological concern to let the primary rules give content to the ‘serious breaches’ (on the model of Article 53 of the Vienna Convention) induced the ILC not to follow the model of Article 19 in the Ago Draft, which flew its colours openly.

Nevertheless, this difference should not fool us: ‘serious breaches’ largely overlap with crimes *ratione materiae*.

### **C The Legal Nature of the Obligation**

Independently of any reference to the content of the obligation, Article 19 of the Ago Draft defines a crime as a serious breach of an 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’. But what is one to understand exactly by an ‘essential’ obligation, given the non-exhaustive nature of the list of breaches which constitute a crime?

Although referring to the ICJ’s *Barcelona Traction* judgment, the term ‘obligations *erga omnes*’ is rarely used by the ILC, which prefers instead the term ‘peremptory norms’ from Article 53 of the Vienna Convention. However, the ICJ clearly affirmed that, in the event of a breach of an essential obligation for the international community, any state is empowered to ‘assert the responsibility’ of the actor state.

However, a certain ambiguity prevailed as to the relationship between *jus cogens* and obligations breach of which constitutes a crime:

It can be accepted that obligations whose breach is a crime will ‘normally’ be those deriving from rules of *jus cogens*, though this conclusion cannot be absolute. But above all, 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 cannot be denied that the category of international

<sup>44</sup> *ILC Yearbook* (1976), vol. II, Part Two, at 110, para. 34.

<sup>45</sup> Article 15 in the Riphagen Draft bears the mark of this ‘crime among crimes’ by making it its exclusive object.

<sup>46</sup> *ILC Yearbook* (1976), vol. II, Part Two, at 120, para. 64. The influence of the solutions adopted in Articles 53 and 64 of the Vienna Convention is explicitly pointed out (*ibid.*, at para. 61).

<sup>47</sup> An explicit reference thereto is made by the ILC, Commentary on Article 40, UN Doc. A/56/10, para. 3.

<sup>48</sup> *Ibid.*, at 306, para. 5.

obligations admitting of no derogation is much broader than the category of international obligations whose breach is necessarily an international crime.<sup>49</sup>

The statements by Professors Conforti and Spinedi at the Florence Colloquium throw light on these lines: non-derogability, while certainly a feature of a norm of *jus cogens*, need not coincide with the ‘essential’ nature in general attaching to peremptory law, since it is a technical notion intended to regulate certain relations among treaties.<sup>50</sup> For instance, an agreement among states could not on pain of nullity derogate from the ban on exercising moral constraint on the representative of a state; were it however to do so, this could not be seen as an international crime. The notions of *systemic jus cogens* or *public interest jus cogens*, highlighted by legal scholars,<sup>51</sup> express this difference.

It is still no less true, as the second sentence of the passage cited clarifies, that breach of a norm of *jus cogens* will ‘often’ constitute a crime.<sup>52</sup>

Article 40 in the present Draft seems to have moved some distance from its predecessor, Article 41, which was aligned very faithfully on the old Article 19, terming a ‘serious breach’ the breach of an ‘international obligation so essential for the protection of fundamental interests of the international community’. Article 40, for its part, uses the expression ‘serious breach by a State of an obligation arising under a peremptory norm of general international law’.

But the Special Rapporteur Crawford’s Fourth Report tells us that ‘the notion of an obligation owed to the international community’ may also mean ‘an obligation *erga omnes*’ within the meaning of the *Barcelona Traction* judgment. He further illuminates this by clarifying that these notions largely coincide with that of peremptory norms.<sup>53</sup> Consequently, there are firm links between the notions of obligations due to the international community (or obligations *erga omnes*) and peremptory norms, thus bringing Article 40 (in the final Draft), Article 41 (in the previous Draft) and Article 19 (in the Ago Draft) close together.

Crawford further refines the analysis by stressing the ‘difference of emphasis’ between these concepts: the former expresses its universal scope (all states are bound),

<sup>49</sup> *ILC Yearbook* (1976), vol. II, Part Two, at 119 and 120, para. 62. On this problem, see Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’, 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) 273 *et seq.*

<sup>50</sup> See R. Kolb, *Théorie du Jus Cogens international* (2001), esp. at 172–173. See also *infra*, at 1157.

<sup>51</sup> ‘Systemic *jus cogens*’ refers to the existence of rules binding on the basis of logical necessities associated with the functioning of a legal system (see *Abi-Saab, supra* note 23, at 349), for instance the judicial system of the ICJ: ‘as regards the course of the procedure, on many points the Statute is *jus cogens*’ (*Abi-Saab, ‘Cours général de droit international public’, 207 RdC (1987-V) 259*). It is to Kolb’s credit that he historically located and thematized a concept of ‘public utility’ *jus cogens* in international law, which seems broader than that of ‘systemic *jus cogens*’ (Kolb, *supra* note 50, especially at 181 *et seq.*).

<sup>52</sup> See Dupuy, *supra* note 2, at 56.

<sup>53</sup> UN Doc. A/CN.4/517, para. 49; similarly for the ILC, Commentary on Article 40, UN Doc. A/56/10, para. 7.

the latter puts ‘the emphasis on the primary rule itself and its non-derogable or overriding status’.<sup>54</sup>

This deserves to be emphasized, since in fact the field of application *ratione personae* of an obligation — an obligation *erga omnes* — is often confused with that of its binding force — the non-derogable nature of a peremptory obligation. Here, a delicate problem emerges from the transposition of a concept relating to the theory of nullity of *legal acts* — non-derogability — to the area of wrongfulness of ‘material’ *conduct*. Conduct cannot be called ‘void’, in contrast to a legal act, so that non-derogability — implying nullity and inopposability — can be seen as an inadequate concept to apply to the issues of responsibility. But this point, which undoubtedly merits further investigation, cannot detain us in the context of this study.

Be that as it may, one cannot deny that in general a peremptory norm will very often also be held valid *erga omnes* because of its importance in the eyes of the international community.<sup>55</sup> The ultimately modest jump between Article 41 (in the previous Draft) and Article 40 (in the final Draft) finds its justification in these differences of viewpoint, with the ILC choosing to refer to peremptory norms (Article 40) in Part Two, Chapter III, entitled ‘Content of the International Responsibility of a State’, and to the obligation to the international community (Article 48) in Part Three, entitled ‘The Implementation of the International Responsibility of a State’.<sup>56</sup>

The important point for our purposes is not so much these methodological considerations as the observation of a close kinship linking the present Article 40 to Article 19 in the Ago Draft from the viewpoint of the nature of the obligation breach of which constitutes a ‘serious breach’ or a ‘crime’.

## D *Types of Breach*

Specifically in relation to the breach, this kinship cannot be denied — quite the contrary. The crime in Article 19 requires two conditions to be met, one relating to the ‘essential importance’ of the obligation, the other to the serious nature of the breach.<sup>57</sup> The ILC is as clear on this point as Article 19 itself, which tirelessly repeats that the crime results from a ‘serious breach of an international obligation of essential importance’. In consequence, any non-serious breach of an obligation of essential importance or any serious breach of an obligation of non-essential importance is to be regarded as a delict, not a crime.

But a difficulty of a semantic nature arises at this point: certain crimes necessarily imply a serious breach, with the consequence that in such a case the assumption of a non-serious breach is logically impossible, or, putting it differently, the requirement

<sup>54</sup> *Ibid.*

<sup>55</sup> Cf. Dupuy, *supra* note 16, at 270.

<sup>56</sup> See the ILC, Commentary on Article 40, UN Doc. A/56/10, para. 7.

<sup>57</sup> ‘[T]he conclusion that an international crime has been committed depends in every case on two requirements being met: (a) the obligation in one or other of the spheres mentioned must be “of essential importance” for the pursuit or the fundamental aim characterizing the sphere in question; and (b) the breach of the obligation must be a “serious breach”.’ *ILC Yearbook* (1976), vol. II, Part Two, at 120, para. 66.

for a serious breach as a distinct condition is superfluous. This constitutive gravity of the crime, termed ‘substantive’, is opposed to ‘circumstantial’ gravity.<sup>58</sup>

According to Ago, aggression is in itself a serious, substantive breach, the crime *par excellence*,<sup>59</sup> whereas, for instance, infringements relating to the environment or human rights must, in order to reach the criminal threshold, be particularly grave in the specific case, i.e. a circumstantial gravity.<sup>60</sup>

However genuine this problem of internal consistency in the definition of the crime may be, we can spare ourselves further analysis. It suffices for our purposes to stress that, here again, there is nothing to distinguish Article 19 from the new Article 40, which, as noted above, implicitly preserves the list of crimes in Article 19 as well as the two conditions associated with the ‘essential’ nature of the obligation and the seriousness of the breach, as we shall see.

Regarding the minimum threshold of gravity of the crime, the criteria indicated by the ILC relate to the intensity and repetition of the breach: the breaches must be ‘massive’, ‘flagrant’, ‘persistent’, ‘systematic’ and ‘large-scale’.<sup>61</sup>

As to Article 40 in the current Draft, which institutes aggravated responsibility in the case of serious breach of an ‘obligation arising under a peremptory norm of general international law’, it similarly requires the same two conditions as Article 19. The ILC stresses this in its commentary.<sup>62</sup>

In perfect symmetry (but, alas, tautologically), a ‘serious breach’ is, thus, a serious breach of an obligation essential to the international community, so that here too a non-serious breach of a peremptory norm or a serious breach of a non-peremptory norm cannot be called a ‘serious breach’.<sup>63</sup>

As stated, here once again we hit the reef of the crime *per se*: ‘It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.’<sup>64</sup>

But, in harmony with Article 19, such a breach is considered serious because of the criteria adopted, whether the ‘gross’ nature of the breach is measured by the yardstick of its ‘intensity’, its damaging effects, or its ‘systematic’ (meaning ‘organized and deliberate’) nature. ‘Gross’ recalls the ‘intensity’ of the breach, and ‘systematic’ its

<sup>58</sup> For a further consideration of this point in relation to our subject, see Palmisano, ‘Les causes d’aggravation de la responsabilité des Etats et la distinction entre “crimes” et “délits” internationaux’, 4 *RGDIP* (1994) 629 *et seq.*

<sup>59</sup> Ago, *supra* note 16, at 38 and 39, para. 117.

<sup>60</sup> *Ibid.*, at 53, para. 150; and *ILC Yearbook* (1976), vol. II, Part Two, at 121, paras 70–71.

<sup>61</sup> *Ibid.*, at 110, para. 34 and at 120, paras 70 and 71. For an analysis of the ‘threshold of gravity’, see Salmon, ‘Les obligations quantitatives et l’illicéité’, in Boisson de Chazournes and Gowlland-Debbas, *supra* note 9, esp. at 311 *et seq.*

<sup>62</sup> ‘Article 40 ... establishes two criteria in order to distinguish “serious breaches of obligations under peremptory norms of general international law” from other types of breaches. The first relates to the character of the obligation breached ... The second qualifies the intensity of the breach, which must have been serious in nature.’ ILC, Commentary on Article 40, UN Doc. A/56/10, para. 1.

<sup>63</sup> *Ibid.*, at para. 7.

<sup>64</sup> *Ibid.*, at para. 8.

‘repetition’, in Ago’s vocabulary, even if in the eyes of the present ILC the stress should be more on the planning of the crime, i.e. in relation to its ‘systematic’ nature.

We may not, however, find too many disparities between Article 19 in the Ago Draft and Article 40 in the current Draft in terms of types of breach: crimes and serious breaches are the twin brothers of horror.

## 4 Conclusion

A comparison of the notion of ‘crime’ with ‘serious breach’ from the viewpoint of their respective relationships with international legality leads us to doubt whether there has been anything more than a ‘cosmetic’ change in the law of responsibility: the murder of crime does indeed look innocent.

But perhaps this scepticism will fade after considering the arguments put forward by the present Special Rapporteur in an article written jointly with Pierre Bodeau.<sup>65</sup> There, the authors give us three reasons why eliminating the notion of crime is not just a ‘problem of terminology’.

First, the new Draft, in Part One, ‘retreats from the idea that internationally wrongful acts of a state constitute a single category and that the criteria applying to these acts (in respect particularly of attribution and the circumstances excluding wrongfulness) are indifferent to any distinction between “delictual” and “criminal” responsibility’. This is, of course, in contrast with Article 19 and its two categories. One might perhaps object that, on the one hand, the notion of crime, being aimed solely at establishing aggravated responsibility using the pre-existing resources of international law, equally seems free of ‘any distinction between delictual and criminal responsibility’, and that, on the other hand, the reason for the absence in Part One of the present Draft of an Article relating to the categories corresponding to those of crimes and delicts is purely methodological and hence chiefly formal.

The essential point is that the present Draft similarly contains two categories of wrongful acts, ‘serious’ and ‘non-serious’. The importance of the position of the provisions in question in the structure of the various Drafts should not be exaggerated; Crawford himself has insisted on the fact that the distinction between crimes and delicts appeared only in Article 19 of Part One, which is not repeated in other Articles in the same part, thus making it of only relatively minor importance.<sup>66</sup>

Secondly, ‘the notion of international crime has been divided into several elements that are more intimately linked with the correlative concepts of peremptory norms and of obligations towards the international community as a whole ... On both hypotheses, the Draft Articles are concerned first and foremost with the nature of the obligation violated more than with the circumstances of the violation itself.’ It does

<sup>65</sup> Crawford and Bodeau, ‘La seconde lecture de projet d’articles sur la responsabilité des Etats de la Commission du droit international’, 104 *RGDIP* (2000) 931.

<sup>66</sup> He rightly notes that the notion of crime has no effect on the notions of *force majeure*, necessity and complicity (involvement of a state in a wrongful act of another state), and that it seems difficult to entirely avoid fault in this context. First Report on State Responsibility, UN Doc. A/CN.4/490/Add.3, para. 83.

not seem to me that the notion of crime has been ‘divided into several elements’, but only into serious and non-serious breaches — a binary scheme identical with the old one. Additionally, since serious breach is defined using the same criteria as crime, namely, the essential nature of the obligation *and* the seriousness of the breach (i.e. seriousness is measured using identical elements), it is hard to see how the present Article 40 differs structurally from Article 19, or how its elements are ‘more intimately linked’ with the nature of the obligation breached than previously.

Finally, Crawford and Bodeau specify that the chapter on serious breaches in Part Two is ‘aimed at reflecting the values inspiring Article 19 without going into the issues of “crime”’. One might reply to this that, if crime is implicit in ‘serious breach’, that is because it is the crime ‘that dare not speak its name’, in the elegant formula of the Special Rapporteur himself, who reproved this solution by saying: ‘there is no justification for a merely cosmetic exercise.’<sup>67</sup>

The absorption of damage into wrongfulness, the softening of state conduct, freed from all *culpa*, like the integration of the distinction between crimes and delicts, was an important move in the conceptual development of responsibility, which acted to strengthen international legality. Thus, the recent replacement of ‘crimes’ by ‘serious breaches’ does not seem too radical a shift in the same direction. One might even think it a purely ‘cosmetic’ change.

Nevertheless, it ought not to be thought that this amounts to a total absence of change. In fact, the connotations conveyed by words have profound repercussions, which explains the mistrust displayed towards ‘crime’ — that ‘troublesome word’<sup>68</sup> — especially in political circles. Since Dostoyevsky, it has been a tough task to dissociate crime and punishment . . .

But there is today every reason still to believe that ‘crime’ — which ‘still haunts the Draft on State Responsibility’ in the words of one government representative — is, if it is a phantom, equally a dwarf shackled in chains the clanking of which is scarcely of such a nature as to scare states.

<sup>67</sup> *Ibid.*, at para. 87.

<sup>68</sup> Combacau and Sur, *supra* note 6, at 523.