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# *Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?*

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## Abstract

*The forthcoming discussion in the International Law Commission on the Draft Articles on State Responsibility may well lead to the removal of Articles 51–53, dealing with the consequences of international crimes. If this occurs, there will remain the question of what to do with two other references to international crimes included in the Draft Articles. Article 40(3) says that if the wrongdoing state commits a crime, 'all other States' are to be considered injured states. The definition of injured states should thus be widened, because all other states must be considered as injured when any* erga omnes *obligation is infringed, whether or not the violation constitutes an international crime. This is not to say that the consequences of violations of* erga omnes *obligations are necessarily the same as those of wrongful acts that do not affect any interest of the international community. Article 19 would be clearly deprived of meaning if Part Two of the Draft Articles failed to specify any consequence for international crimes. However, if Article 19 were simply removed, the inference would be that there exists no special regime for wrongful acts that seriously affect the interests of international society. A saving clause could be usefully included in the Draft Articles to the effect that they are without prejudice to any regime that may be established in the future to deal with serious infringements of* erga omnes *obligations.*

## 1 Introduction

As the lengthy and hard-fought debate on international crimes draws to a close within the ILC, it would be presumptuous to come up with new ideas. This brief comment has a more limited purpose: to offer some suggestions in relation to the references to

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international crimes in Draft Articles 19 and 40, in the event that the ILC should take the decision not to envisage special consequences for wrongful acts that seriously affect the interests of international society.

This assumption is not unrealistic. It takes heed of the criticism that several states voiced in their comments on the relevant Draft Articles[1] and the views expressed during the 1998 session of the ILC.[2] Opposition to the establishment of the category of international crimes clearly aims at the removal of Articles 51–53, which attempt to define certain legal consequences of such crimes. These same provisions have also been the subject of criticism, for different reasons, from those who support the notion of international crimes. Some argue that the provisions are inadequate, mainly because the consequences of crimes — as they appear in Articles 51–53 — do not significantly differ from those applying to ordinary wrongful acts.[3] Given the divergences concerning the existence of international crimes and their legal consequences, however, it is difficult to imagine that the ILC will elaborate a more comprehensive regime for crimes — including a suitable procedural machinery for ascertaining whether a crime has been committed.

Should Articles 51–53 be removed, the references to international crimes in Articles 19 and 40 would either have to be taken out as well or would need to be modified. These two provisions raise different issues, which will be briefly discussed in the following sections.

## 2 Which States are Injured when a Wrongful Act Affects the Interests of International Society?

Article 40 contains a definition of 'injured State'. Paragraph 3 reads as follows:

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

The 1996 ILC Report contains a footnote to this paragraph,[4] which states:

> The term 'crime' is used for consistency with article 19 of Part One of the articles. It was, however, noted that alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term.

Whatever decision is taken with regard to international crimes, the above definition as well as the alternative phrases suggested in the footnote would seem to be

[1] See especially UN Doc. A/CN.4/488.

[2] Report of the International Law Commission on the Work of its Fiftieth Session, UN Doc. A/53/10, paras 241–331.

[3] K. Zemanek, 'The Legal Foundations of the International System', 266 *RdC* (1997) 9, at 272; Arangio-Ruiz, 'Fine prematura del ruolo preminente di studiosi italiani nel progetto di codificazione della responsabilità degli Stati: specie a proposito di crimini internazionali e dei poteri del Consiglio di sicurezza', 81 *RDI* (1998) 110, at 122.

[4] Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, at 141.

inadequately worded. The fact that all other states are injured does not appear to depend on the seriousness of the wrongful act, but only on the type of obligation infringed. If an obligation is owed in a concrete circumstance towards all other states, it necessarily follows that any infringement of that obligation injures all other states. If one adopts the approach that was taken by the International Court of Justice in the *Barcelona Traction* case,[5] *erga omnes* obligations that are imposed on one state have as their counterpart rights for all other states. Thus, in the event of a breach of that obligation, all states are to be regarded as injured. It is the concept of *erga omnes* obligations, rather than the notion of international crimes or of serious wrongful acts, that should be evoked in Article 40.[6]

A change in the text along these lines would be consistent with the general definition given in Article 40(1), according to which

> '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.

The examples given in Article 40(2) are not completely consistent with this premise, because Article 40(2)(e)(iii) singles out only one particular category of *erga omnes* obligations: those established 'for the protection of human rights and fundamental freedoms'. This text could thus be taken as implying that only the infringement of certain *erga omnes* obligations — those protecting human rights and fundamental freedoms — causes injury to all other states. The same may be said of Article 40(3) and the alternative phrases in the footnote, both quoted above, which also concern only certain infringements of *erga omnes* obligations.

There is clearly some merit in the current Special Rapporteur's proposal that 'Article 40, paragraph 3, should be reconsidered, *inter alia*, so as to deal with the issues of breaches of obligations *erga omnes*.'[7] An alternative drafting suggestion would be to suppress Article 40(3) and to rephrase Article 40(2)(e)(iii) so as to cover infringements of *erga omnes* obligations in more general terms. Given that protection of

[5] ICJ Reports (1970) 32 (paras 33–34). While the Court referred to obligations owed to the 'international community', it made it clear that when a state is under an *erga omnes* obligation all the other states have a corresponding right.

[6] The same kind of criticism was voiced with regard to the similar wording of Article 5(3) of Part Two as adopted in 1983. 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 State* (1989) 151, at 154–157; Simma, 'International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility', in *ibid,* 283, at 299. On Article 40(3) see especially B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994-VI) 217, at 314. On the contrary, according to A. A. de Hoogh, in the case of obligations existing towards all states '[i]t would seem to present an overkill to define such States as injured'; see de Hoogh, 'The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective', 42 *AJPIL* (1991) 183 at 205. M. Ragazzi, *The Concept of International Obligations* Erga Omnes (1997), at 202, held that 'it would be wholly unacceptable to suggest in general terms, as it has been suggested, that the defining characteristics of obligations *erga omnes* is that their breach affects all States'; yet he did not seem to query that an infringement of this type of obligation injures all the other members of the international community.

[7] J. Crawford, 'First Report on State Responsibility', UN Doc. A/CN.4/490/Add.3, at 11 (para. 101).

human rights is a prominent example of this type of obligation, it would be more logical to refer to it in the same sub-paragraph.

The fact of considering all states as being injured when an *erga omnes* obligation has been infringed does not necessarily imply that all states would then be in the same position as an injured state in an ordinary bilateral situation. Infringements of *erga omnes* obligations could produce different consequences according to the quality of the injury that a state may have received.[8] Moreover, as some rules of international law 'do not protect States but rather human beings or groups directly' or 'deal with the preservation of the world's commons',[9] reparation in these cases should benefit human beings or groups or the world's commons rather than states. The Draft Articles could leave open the question whether certain serious infringements of *erga omnes* obligations have further negative consequences for the wrongdoing state than those generally applying to wrongful acts.

## 3 Should the Question of the Existence of International Crimes be Settled Once and For All?

The issues raised by Article 19 are harder, because this provision has acquired a symbolic significance that goes well beyond the type of consequence that may be defined in Part Two of the Draft Articles. Nevertheless, a positive assertion of the existence of international crimes in the Draft Articles clearly presupposes that certain special consequences of those crimes are identified at some point in the same Articles. If the provisions concerning those consequences are removed — as it is here assumed — it would be somewhat illogical to keep Article 19 as it now stands. On the other hand, the simple removal of this provision would convey the idea that all wrongful acts have the same type of consequence. This idea would prevail, even though the ILC Report suggested that there could be some special regimes for certain wrongful acts. The result would be that several states would express dissatisfaction with the Draft Articles.

The same would most likely occur if one stated, following the Special Rapporteur's suggestion,[10] that

> the exclusion from the draft articles of the notion of 'international crimes' of States is without prejudice (a) to the scope of the draft articles, which would continue to cover all breaches of international obligations whatever their origin, and (b) to the notion of 'international crimes of States' and its possible future development, whether as a separate topic for the Commission, or through State practice and the practice of the competent international organizations.

[8] For a recent discussion of the problem of 'differently injured States' see Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *EJIL* (1998) 163, at 175 note 25.

[9] Simma, 'From Bilateralism to Community Interest', *supra* note 6, at 319–321.

[10] *Supra* note 7.

This text would seem to imply that international law does not currently envisage anything that may be defined as an international crime of states.

The saving clause in Article 37 appears to be too general to alter the picture. According to this Article:

> The provisions of this Part [Part Two] do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

In order to leave the question of the existence of special regimes clearly open, it would be preferable for the Draft Articles to contain a more specific saving clause, providing that the Articles are without prejudice to any special regime that may exist, or may come into existence, for certain types of wrongful acts that seriously affect the interests of international society. It would be better not to use the term 'international crimes of States' because this expression has, rightly or wrongly, become associated with the idea that provision is made for certain consequences that are similar to penal sanctions. As has been pointed out many times, this is not necessarily the case. In any event, a more neutral term may be more acceptable.

One advantage of this proposed saving clause is that it would allow the possibility of future developments of international law in this field to be taken into account. The need for a dynamic approach is already acknowledged in the current text of Article 19(3), which refers to 'the rules of international law in force' in order to define international crimes. The clause here suggested would have a different import. On the one hand, it would not assume that there already exists a category of serious wrongful acts that give rise to more severe consequences than ordinary wrongful acts. On the other hand, the clause would also envisage the possibility that special regimes may provide for different consequences for different types of wrongful acts. These consequences could also be made conditional on specific elements of the wrongful act, such as the presence of fault.

Insofar as a special regime results from a treaty, the inclusion of a saving clause along the lines suggested here would appear to be particularly appropriate. The Draft Articles purport to state the consequences of wrongful acts only under general international law. It is likely that the more severe consequences of certain wrongful acts will first be established by treaty and will only later become part of customary law. This may be illustrated by the example of aggression. It is debatable whether the powers given to the Security Council by Chapter VII of the UN Charter with regard to ascertaining and fighting aggression necessarily include the power to inflict sanctions on the aggressor state.[11] It may be argued that, when faced with an aggression, the

[11] R. Ago, writing as the ILC Special Rapporteur, left the question open as to whether measures envisaged in Chapter VII may be defined as 'sanctions' and have an afflictive character or are only instruments for coercively ensuring compliance with the obligation not to resort to force. 'Fifth Report on State Responsibility', UN Doc. A/CN.4/291 and Add. 1 and 2, para. 105. Opinions seem to be divided at present in the ILC on the existence of a power on the part of the Security Council to inflict sanctions. See *supra* note 2, at paras 270–271.

Security Council's only task is to restore peace and security. However, should one consider that Chapter VII implies that the aggressor state is subject to severe consequences for its wrongful act, this would be the result of a treaty provision that may eventually become part of general international law.