CAN A STATE COMMIT A CRIME? DEFINITELY, YES!

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I. INTRODUCTION

As is well known, the International Law Commission (ILC) decided in 1976 to include an article in its Draft Articles on State Responsibility that makes a distinction between *normal* international wrongful acts, which it called *delicts*, on the one hand, and exceptionally grave breaches of international law which it called *international crimes*, on the other hand. Thus, the ILC followed a suggestion made by its then Special Rapporteur, Roberto Ago, who, as soon as 1939, suggested such a distinction.

The ILC maintained this distinction when it completed the first reading of its draft last year, in spite of strong (and probably growing) and passionate opposition, as this evening's debate will probably show. However, it is my deep conviction that:

1. the distinction between what are called *delicts* and what are called *crimes* answers an indisputable need and must be maintained;

2. the definition of crimes given in Article 19 of the ILC draft articles is acceptable, although perhaps unduly sophisticated;
3. the legal regime of these crimes as envisaged by the ILC is debatable since the method adopted to establish it has been grossly unsatisfactory; and
4. by way of conclusion, the word *crime* might be misleading, but the concept is indispensable in contemporary international law.

Let me take each of these four arguments separately.

II. THE DISTINCTION BETWEEN *DELICTS* AND *CRIMES* ANSWERS AN INDISPUTABLE NEED

Although part of the doctrine, lawyers (especially French international lawyers) and some States (including France) challenge this definition, the definition of *responsibility* deriving from Articles 1 and 3 of the ILC draft can hardly be challenged. In the modern, *post-Ago*, meaning of the term, responsibility is the situation resulting from an international wrongful act committed by a subject of international law or attributable (imputable if you prefer) to it.

Now, if this is so, it implies a differentiation in the legal regime of responsibility. It is absolutely unacceptable to assimilate purely and simply a genocide and an *ordinary* breach of international law, say a breach of bilateral-trade agreement. Both are, indeed, international wrongful acts, and both entail, therefore, the responsibility of their author. But it seems obvious, evident, necessary, and indispensable that the consequences deriving from each be clearly differentiated. And this is the case for a very good reason. The breach of the trade agreement, even though regrettable as any other violation of international law, only concerns the relations between the two (or more) State parties to the treaties, while genocide threatens international society as a whole, the very basis of the still fragile international community.

If this is so, international lawyers will immediately have in mind the celebrated *dictum* of the International Court of Justice in its famous 1970 Judgment in the *Barcelona Traction* case:

> An essential distinction should be drawn between the obligations of States towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the

> importance of the rights involved, all States can be held to have a legal interest; they are obligations *erga omnes*.[1]

Can we infer from this that a crime is a violation of an obligation *erga omnes*? Probably not, and this leads us to my second proposition.

III. THE DEFINITION OF CRIMES GIVEN IN ARTICLE 19, PARAGRAPH 2, OF THE ILC DRAFT IS ACCEPTABLE, ALTHOUGH PROBABLY TOO SOPHISTICATED

I recall this definition: An international wrongful act which results from the breach by a State of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as crime by that community as a whole constitutes an international crime.

This definition involves clearly three elements: First, a crime is an international wrongful act; on this, we all agree. Second, this internationally wrongful act results from the breach of an international obligation which is essential for the protection of fundamental interests of the international community. Third, it must be recognized as a crime by that community as a whole.

It is this last point which has attracted the biggest number of opponents. To say so would make the whole notion uncertain and *subjective*, all the more so as the very notion of *international community* would itself be subject to uncertainty. With respect, this is simply rubbish. Those who negate the concept of crime do not, as far as I know, contend that custom does not exist or should not exist. However, custom can hardly be said to be more precisely defined than crimes. It is, just to recall the widely accepted formula of Article 38, paragraph 1(b), of the Statute of the ICJ evidence of a general practice accepted as law. This does not even tell us who must accept the practice. At least Article 19 of the ILC draft tries to give a precision; the international community as a whole must give recognition.

And the formula is not that new. It has already been accepted in Article 53 of the Vienna 1969 Convention on the Law of Treaties, which defines *jus cogens* and only gives a supplementary precision by indicating that the *international community* is the international community *of states*; if this can help, let's include this in the second draft reading.

Now, does this mean that a crime is a breach of a peremptory norm of general international law? In 1976, the ILC, still in accordance with its Special Rapporteur, denied it for rather obscure theoretical

1. Barcelona Traction, I.C.J. 32 (1970).

reasons. I would rather suggest that the real reasons for that were *prudential* and *political*. Ago and the Commission were probably afraid that affirming bluntly that a crime is a violation of a norm of *jus cogens* would prevent wide acceptance of the concept of crime as a consequence of the defiance against *jus cogens* in some circles and from certain States (among which France was certainly the most decided opponent and is still the most persistent objector).

More than twenty years later (and thirty years or so after the drafting of the Vienna Convention), this caution seems no longer necessary. If you leave Asterix (France) aside, no one seriously contests anymore that norms of *jus cogens* have a real specificity among international law rules and the past objections against the concept have proved unfounded. The feared abuses have not occurred and, as has been aptly written about peremptory norms, "the vehicle does not often leave the garage."[2]

I, therefore, urge that it would be easier and more convenient to define an international crime as a breach of a norm of *jus cogens*. Indeed, this would not, in fact, change the existing definition since all three elements that I have noted would still exist:

1) a crime would still be an international wrongful act (a breach);

2) the breach would still be of an essential obligation towards the international community as a whole; and

3) the *subjective* (or *psychological*) element would still be present since, according to the very definition of *jus cogens*, a peremptory norm of general international law must be recognized as such by the international community of States as a whole.

Let me open a parenthesis here. Bob Rosenstock has complained in a recent interesting and most debatable article appearing in the ILC book, published as a contribution to the United Nations decade for international law that "the acceptance of the notion of *jus cogens* was conditioned on . . . express acceptance of the role of the International Court of Justice, while there is no comparable institution for denominating certain actions as criminal."[3] Very well. This is precisely why, at my suggestion, the Commission sought to include an article in the draft which would have been copied on Article 66 of the Vienna Convention of the Law of Treaties and would have provided for the compulsory jurisdiction

2. IAN BROWNLIE, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 10 (1988)

3. *International Law on the Eve of the twenty-first Century-Views from the International Law Commission*, U.N. Doc. E1F97.V4272 (1997) E/F 97.V4, 272 (1997).

of an arbitral tribunal or the ICJ in case of a dispute concerning the existence of a crime. For obscure reasons, the Commission, while not rejecting the proposal, has decided not to include it in the first draft and to come back to it during its second reading. Curiously enough, I understand (I was absent from the debate) that my friend, Bob Rosenstock, was among the firmer opponents to such a provision.

One last word on this second point: if it is accepted that a crime is a breach of a norm or *jus cogens*, couldn't it be said as well that it is a breach of an *erga omnes* obligation? It might help in the sense that *erga omnes* obligations are less contested than *peremptory norms*. However, I have strong doubts since if all norms of *jus cogens* certainly are *erga omnes*, there is no reciprocity, and one can think of many obligation *erga omnes*, which could hardly be seen as deriving from peremptory norms. Just to give an example, this is the case of the right of passage in international straits or international canals.

This draws attention on something very important, which is, exactly like peremptory norms, that crimes are to be extremely rare in the present state of the world; the international community does exist, but the solidarity on which it is based is still limited, which means that obligations essential for the protection of its fundamental interests are unavoidably very limited both in number and in scope. And in this respect, paragraph 3 of Article 19 of the ILC draft is far from convincing.

Paragraph 3 is the provision in which the ILC has endeavored to give examples of crimes. I have no time to enter into a lengthy discussion on this provision. Suffice it to say that: first, it is a bad method of codification to give *examples* in a codification instrument; second, this partial enumeration is all the more regrettable since it fixes rules which are and must stay in constant evolution; and third, and above all, the examples given are themselves highly debatable or, at least, too wide and imprecise. But if there are grounds to delete this list of examples, this would not be a reason to throw the baby out with the bath-water.

IV. THE LEGAL REGIME OF CRIMES ESTABLISHED BY ARTICLES 51 TO 53 OF THE ILC DRAFT IS UNCONVINCING (TO SAY THE LEAST)

I now come to my third proposition. Here again, I have no time to explain in detail why the legal regime of crimes contemplated by the ILC draft is subject to criticism. I have done it unfortunately in French, in my own contribution to the ILC book for the United Nations decade of

international law that I have just mentioned.[4] The main weaknesses of the draft in this respect are twofold: on the one hand, the special consequences attached to the commission of a crime are very limited and cast doubt on the usefulness of the very notion of *crimes* itself; but, on the other hand, the general consequences that the draft attaches to the *delicts* are themselves too wide and include elements which should be limited to the crimes.

Apparently these two criticisms are mutually exclusive. In fact these defects are cumulative here and this is a result of the wrong method followed by the ILC and its Special Rapporteur, Professor Arangio-Ruiz. Let me explain briefly.

When he assumed his functions of Special Rapporteur, Professor Arangio-Ruiz kept saying that he did not know what crimes could be and he proposed, in his first report on the subject, in 1988, to focus on the consequences of delicts, leaving for a later stage the codification of the consequences of a crime. However, at the same time and very unfortunately, the Special Rapporteur has drafted his reports as if the distinction did not exist, taking his examples more than not in the field not of delicts, but of crimes, and particularly studying the consequences of the illegal use of force, a crime *par excellence*. In spite of some protests (mainly from myself), the Commission has followed his suggestion and has not challenged the examples he has given.

As a result, the consequences of an international wrongful act (that is, in fact, of delicts) exposed in Articles 41 to 46 of the draft include several consequences which are (or should be) limited to crimes, such as punitive damages in Articles 42, paragraph 2, and 45, paragraph 2 (c) or the obligation for the State which has committed the international wrongful act to give assurances or guarantees of non-repetition contemplated in Article 46. This is even more true for the rules applying to counter-measures in Articles 47 to 50. They are well fitted to crimes but absolutely unacceptable as far as simple *delicts* are concerned since they facilitate much too much recourse to counter-measures, a means of reacting to internationally wrongful acts, which, by the nature of things, is reserved to powerful States. I can understand that the United States (and my friend Bob Rosenstock) are very enthusiastic about them; Chad is not; nor am I!

A consequence of this excessive severity against simple delicts is that, when the Commission arrives, at last, at the consequences of crimes, which, as the Commission rightly says in Article 51, must be added to all

4. ALLAIN PELLET, VIVE LE CRIME! REMARQUES SUR LES DEGRES DEL'ILLICITE EN DROIT INTERNATIONAL 287-315.

the other consequences of any other internationally wrongful act, not much can be added, and this explains the poor content of Articles 52 and 53.

However, this certainly does not mean that the concept of crime is an empty shell. In the first place, as I have just tried to explain, several consequences that the Commission draws from all international wrongful acts should certainly be reserved to the sole crimes and do not apply to simple delicts. In the second place, some very important consequences of crimes have unfortunately been omitted from the draft. At least one of these is what I would call the *transparency* of the State having committed a crime. This means that when an international crime is committed, not only the State itself is responsible, but also the natural persons who have decided, committed, planned, directed, incited, etc. such a crime.

An important warning is necessary here. I do not mean that a crime by a State and a crime against peace and security of mankind are a sole and unique notion. What I mean is, simply, that when a crime in the meaning of Article 19 of the draft on State responsibility is committed, then, and only then, can the individual responsibility of the individuals concerned be entailed. This explains why, according to Article 7 for the draft Code of crimes against the peace and security of mankind, the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Now, the responsibility of the individual through whom the State has committed the crime is obviously a *penal* or *criminal* responsibility, but what about the responsibility of the State itself? To answer this question, I come to my fourth and last proposition.

V. THE WORD *CRIME* MIGHT BE MISLEADING, EVEN THOUGH THE CONCEPT IS DEFINITELY INDISPENSABLE IN CONTEMPORARY INTERNATIONAL LAW

In order not to exceed my time too much, I'll try to make my point briefly.

I am among those who think that States can be held *criminal* in a sense which is close to the penal meaning of the term. Nazi Germany or Sadam Hussein's Iraq can be called *criminal States* and have been treated as such by the international community.

This being said, I am also among those who think that, in international law, analogies with domestic law are rarely helpful and usually misleading. International responsibility is neither civil nor penal; it is simply *international*. It is the least penal of all since, within the State, penal responsibility presupposes the existence of tribunals, which have

jurisdiction to establish it, a condition which is not fulfilled in international law. Hence, my firm conviction that the word *delict* to designate *simple* international wrongful acts is particularly inappropriate.

Now, what about the word *crime*? For the reasons I have just explained, it seems less shocking than the word *delicts*. After all, when a State breaches an international obligation essential for the interests of the international community as a whole, it never acts by chance or unintentionally. Therefore, the elements of intent and fault, which are not necessarily present in other international wrongful acts, are part of the crimes exactly as they are part of penal infractions in domestic laws. Moreover, even without a judge, the reactions of the international community to a crime clearly include punitive aspects.

However, this is not terribly important for me. The word *crime* is defensible as it has acquired its legitimacy since 1976 and is very widely used. Now if the analogy with domestic law seems really excessive and repulsive, it may be abandoned. But the reality will remain, as I said at the beginning of this statement, a genocide cannot be compared with a breach of a trade agreement; it is different in kind, by its very nature. Call it *breach of peremptory norm* or *violation of an essential obligation*, or call it *butterfly* or *abomination*. The fact remains, we need a concept and a name for this concept!