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Walking the Thin Line Between Progressive  
Development and Disintegration of the  
International Legal Order**

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## STUDENT CONTRIBUTIONS

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# THE CONCEPT OF INTERNATIONAL CRIMES OF STATES: WALKING THE THIN LINE BETWEEN PROGRESSIVE DEVELOPMENT AND DISINTEGRATION OF THE INTERNATIONAL LEGAL ORDER

HANS-MARTIEN TEN NAPEL\*

*Consideration is given of the 'classical' view on state responsibility for internationally wrongful acts and the reasons why, at least according to the International Law Commission of the United Nations, this view no longer corresponds to the realities of international legal life. The author then focuses on the novel concept of international crimes of states. Both the constituent elements and the legal consequences of international crimes, as conceived of by the International Law Commission, are discussed. According to the author, without the simultaneous acceptance of compulsory means of pacific settlement, the potentially fruitful concept of international crimes of states might prove disastrous for the international community.*

### 1. INTRODUCTION

The International Law Commission of the United Nations was established by General Assembly Resolution 174(II) of 21 November 1947.<sup>1</sup> Its thirty-four (originally fifteen) members, who shall be persons of recognized competence in international law, are

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1. Art. 13(1.a) jo. 22 and 7(2) Charter of the United Nations.

elected quinquennially by the General Assembly from a list of candidates nominated by the governments of states members of the United Nations. The Commission has as its objective the promotion of the progressive development of international law and its codification. In its Statute, the expression 'codification of international law' is used as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine. 'Progressive development of international law', on the other hand, stands for the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of states.<sup>2</sup> This distinction between *lex lata* and proposals *de lege ferenda*, however, cannot be too rigidly insisted upon. As will be demonstrated below, large codification projects often contain elements of progressive development of international law.

For more than thirty years, the International Law Commission has been working on the topic of state responsibility for internationally wrongful acts. This article will deal with what is probably the most intriguing aspect of the Commission's work in the field so far: the differentiation between international crimes and international delicts. In two consecutive sections of this article, the constituent elements of an international crime of a state and the legal consequences of international crimes, as conceived of by the International Law Commission, will be discussed. Under a separate heading, the need for simultaneous acceptance of compulsory means of pacific settlement will be stressed. In order to be able to fully assess the impact of the Commission's proposals, however, it is necessary to concentrate first on what might be called the 'classical' view on state responsibility for internationally wrongful acts and the reasons why, at least according to the Commission, this view has gradually become obsolete.<sup>3</sup>

## 2. STATE RESPONSIBILITY: THE 'CLASSICAL' VIEW

"[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation", the Permanent Court of International Justice declared in the *Chorzow Factory Case* of 1928.<sup>4</sup> Traditionally, an internationally wrongful act of a state is supposed to have taken place, when: (1) conduct consisting of an action or omission is imputable to the state under interna-

2. Arts. 1(1), 2(1), 3, 10 and 15 Statute of the ILC.

3. In writing this article, I have drawn extensively on both the reports of special rapporteurs for state responsibility and the summary records of the meetings of successive sessions of the International Law Commission. The term "classical" view, which seems to be particularly appropriate in this context, has, for example, been taken from Roberto Ago's Fifth Report on State Responsibility, to be discussed below, see, e.g., [1976] 2(1) Yearbook ILC 26.

Generally, this article covers the developments in the work of the International Law Commission up to 1988. It has not been possible for me also to take account of the documents of the Commission's most recent session.

4. *Chorzow Factory Case* (1928), PCIJ Ser. A, No. 17, 29. Cf. Art. 36(2.d) Statute of the International Court of Justice.

tional law; and (2) that conduct violates an obligation established by a rule of international law in force between the state responsible for the action or omission and the state injured thereby.<sup>5</sup> Regardless of the content of the obligation breached, the international responsibility flowing from an internationally wrongful act is entailed only with regard to the state that is directly affected by the unlawful act. It involves an obligation to make good, that is to say, to give reparation for the injury caused.

In the Chorzow Factory Case the Permanent Court of International Justice also stated, that "[t]he essential principle in the actual notion of an illegal act (...) is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."<sup>6</sup> *Restitutio in integrum* is, without doubt, the ideal form of reparation. In practice, however, the payment of indemnity often takes its place, because of legal or material impossibility. Thus, no restitution in kind can possibly be granted when that involves in effect the annulment of a definitive judicial decision or if an unlawfully seized vessel has been sunk. Satisfaction, the third form of reparation, is especially appropriate for injuries of a non-material nature. Current methods of satisfaction include the presentation of official regrets and apologies and the formal acknowledgment or judicial declaration of the unlawful character of an act. In the Corfu Channel Case, for instance, the International Court of Justice declared that "to ensure respect for international law (...) the Court must declare that the action of the British navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her counsel, and is in itself appropriate satisfaction."<sup>7</sup> Depending on the circumstances of the case, the nature of reparation may, therefore, consist in *restitutio in integrum*, indemnity or satisfaction.

If the author of the violation of the international obligation refuses to make reparation or to appear before an international tribunal, the state that is directly affected by the unlawful act has the right to try and enforce its claim on the wrong-doing state through a retorsion or, what is more, a reprisal. Both retorsions and reprisals are, as a matter of fact, individual sanctions, carried out by way of self-help. A retorsion may be defined as a lawful measure which is designed to injure the offending state, for instance, cutting off voluntary economic aid. Reprisals, on the other hand, are acts which would normally be illegal but which are rendered legal by a prior illegal act committed by the other state. Although reprisals need not take exactly the same form as the original illegal act, they should be roughly proportional to the original wrong.<sup>8</sup> In case of a material breach

5. Sometimes loss or damage is regarded as a third constituent element of an internationally wrongful act of a state. See, e.g., Jiménez de Aréchaga, *International Responsibility*, in M. Sørensen (ed.), *Manual of Public International Law* 534 (1968). Art. 3 of Part 1 of the draft articles on state responsibility, however, shows that the ILC is of a different opinion.

6. Chorzow Factory Case (1928), *supra*, note 4, at 47. See also Jiménez de Aréchaga, *supra*, note 5, at 564-572.

7. Corfu Channel Case, 1949 ICJ Rep. 35.

of a bilateral treaty by one of the parties, the other one is, according to the general principle *exceptio non adimpleti contractus*, entitled to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.<sup>9</sup>

Where strict adherence to the 'classical' view on state responsibility for internationally wrongful acts, as summarized above, may lead in practice, was demonstrated once again by the Judgment of the International Court of Justice in the South West Africa Cases. Ethiopia and Liberia, acting in their capacity of former members of the League of Nations, had put forward various allegations of contraventions of the League of Nations Mandate for South West Africa, said to have been committed by the Government of South Africa as the administering authority. In its Judgment of 18 July 1966, the Court eventually rejected the claims of Ethiopia and Liberia. In fact, it did not go so far as to deny the serious breach of international obligations by the Government of South Africa. But as neither Ethiopia nor Liberia nor, for that sake, any other state was directly injured in its own legal interests by this conduct, nothing could be done about it *in jure*. The Court emphatically declined to allow "the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest (...). [A] right of this kind (...) is not known to international law as it stands at present".<sup>10</sup>

### 3. RECONSIDERATION OF THE 'CLASSICAL' VIEW

At its very first session, in 1949, the International Law Commission, after due deliberation, drew up a provisional list of fourteen items which it considered suitable for codification. The question of state responsibility for internationally wrongful acts, which had already had a long history of codification at the time<sup>11</sup>, was amongst these topics.<sup>12</sup> Not until 1955, though, did the Commission appoint a special rapporteur for state responsibility, Francisco García Amador of Cuba.<sup>13</sup> As the six reports submitted by García Amador between 1956 and 1961 unmistakably focused on the controversial subject of the responsibility of states for injury caused in their territory to the person or property of aliens, they were severely criticized both within the Commission and by the Sixth

8. See the award on the responsibility of Germany arising out of damage caused in the Portuguese colonies of Southern Africa (Naulilaa incident), rendered on 31 July 1928, 2 Reports of International Arbitral Awards (R.I.A.A.) 1025 *et seq.* See also M. Akehurst, *A Modern Introduction to International Law* 5-7 (1985).

9. Art. 60-(1) Vienna Convention on the Law of Treaties.

10. South West Africa Cases, Second Phase, Judgment, 1966 ICJ Rep. 47.

11. See F. Malekian, *International Responsibility of States. A Study on the Evolution of State Responsibility with Particular Emphasis on the Concept of Crime and Criminal Responsibility* 14-17 (1985).

12. [1949] Yearbook ILC 278-281. The Commission, however, decided to give priority to the following three topics: the law of treaties, arbitral procedure and the regime of the high seas.

13. [1955] 1 Yearbook ILC 190.

(Legal Affairs) Committee of the General Assembly.<sup>14</sup> The International Law Commission thereupon established a sub-committee under the chairmanship of Roberto Ago of Italy, which embarked on a thorough consideration of the most appropriate way of approaching the codification of state responsibility.<sup>15</sup> The principal recommendations contained in the sub-committee's final report were: (1) not to limit the study of the topic to a particular field, such as responsibility for injuries to the person or property of aliens; and (2) in codifying the rules governing international responsibility, not to engage in the definition and codification of the so-called 'primary' rules whose breach entails responsibility for an internationally wrongful act. In other words, the Commission should henceforth concentrate on the whole of responsibility and nothing but responsibility.<sup>16</sup> After having unanimously approved the report of the sub-committee, the Commission in 1963 appointed Ago the new special rapporteur for state responsibility, replacing García Amador who had actually ceased to be a member of the Commission. For well over one and a half decades, until his appointment as judge in the International Court of Justice in 1979, special rapporteur Ago has proceeded more or less on the basis of the new approach. Between 1969 and 1979 he presented eight reports to the Commission, all of which were extensively discussed. Largely as a result of Ago's efforts over the years, at its thirty-second session in 1980, the Commission was able to adopt on first reading Part 1 of a comprehensive draft, dealing in 35 articles with the origin of international responsibility.<sup>17</sup>

Meanwhile, one of the most delicate aspects of the task to be carried out in codifying the rules of international law relating to state responsibility, has been for Roberto Ago to establish whether a basic distinction should be made between internationally wrongful acts, "according to the degree of essentiality that respect for the obligations has for the international community, precisely because of the content of the obligation, and according to the seriousness of the breach of that obligation."<sup>18</sup> In his well-known Fifth Report (1976), Ago, ultimately, answered this question in the affirmative. According to him, the 'classical' view on state responsibility, as dealt with in the previous section of this article, no longer corresponded to the realities of international legal life. He argued that, instead, "some new rules of international law have appeared, others in the process of formation have been definitively secured, and still others, already in existence, have taken on a new vigour and a more marked significance", that all three groups of rules - whatever the differences between them may exactly be - "impose on states

14. See, e.g., Official Records of the General Assembly, First part of the fifteenth session, Sixth Committee, 649th to 672nd meetings and *id.*, Annexes, agenda item 65, document A/4605, paras. 19-24. Previously, the controversial matter of the law relating to foreigners had accounted for the failure of the 1930 Conference for the Codification of International Law at The Hague.

15. [1962] 1 Yearbook ILC 45.

16. [1963] 1 Yearbook ILC 79 and [1963] 2 Yearbook ILC 223-224; [1977] 1 Yearbook ILC 215.

17. [1980] 2(2) Yearbook ILC 30-34. As a matter of fact, Art. 19 (at the time still Art. 18), which will be discussed below, had already been approved unanimously by the Commission in 1976, see [1976] 1 Yearbook ILC 253.

18. [1976] 1 Yearbook ILC 5.

obligations whose fulfilment represents an increased collective interest on the part of the entire international community", and that any breach of these obligations "cannot be regarded and dealt with as a breach 'like any other'" and "must therefore be subject to a different régime of responsibility."<sup>19</sup>

As direct or indirect evidence of his conviction, Ago put forward in his Fifth Report: (1) the distinction, recently established among the general rules of international law, of a particular category of rules known as 'imperative' rules, or rules of *jus cogens*; (2) the system provided by international law since the Second World War for the punishment of crimes known as 'crimes under international law' (a category including crimes against peace, crimes against humanity and war crimes), which is characterized by, at least, two features: (a) it regards as personally punishable individuals who have committed actions in their capacity as organs of the state; and (b) it holds that tribunals of states other than that to which the organs in question belong have the right and duty to try and punish the perpetrators of such crimes; and (3) the fact that the Charter of the United Nations combines the prohibition of the threat or use of force with an explicit indication of the consequences attendant upon any breach (Chapter VII of the Charter).<sup>20</sup>

Ten years ago, Krystyna Marek, in what is probably the most sceptical article on the concept of international crimes of states written thus far, already passed a harsh judgement on these arguments. According to her, (1) "[o]ne obscure notion - that of *jus cogens* - is thus to serve as a basis for another obscure notion - that of international criminal responsibility - , an operation known as defining *ignotum per ignotum*"; (2) "[t]he controversial issue of the trial of war criminals, bearing as it does on the punishment of *individuals* under international law, is strictly irrelevant to the problem of 'punishment of States'; and (3) "[t]o claim any effectiveness for the Charter provisions on the prohibition of the threat and use of force is sheer fantasy".<sup>21</sup> This may, to a certain extent, indeed be true. Just like it may also be true that, as Marek observes in the very same article, Ago's Fifth Report on state responsibility "analyzes at great length State practice, arbitral and judicial decisions as well as writings of publicists, to conclude in practically every case that they include nothing in support of its thesis but that things might possibly have been different from what they actually were", and that "[t]he reader can therefore be referred to it for all the abundant material which directly contradicts its main proposition".<sup>22</sup> But somehow, this criticism seems to miss the point, since the International Law Commission has as its objective not only to codify but also to progressively develop international law. For obvious reasons, Ago has attempted, throughout his Fifth Report, to demonstrate that his views are strictly based on the sources of international law mentioned in Article 38(1) of the Statute of the International Court of Justice. That this is not, at least not necessarily, the case, does not matter anyway, because he was

19. [1976] 2(1) Yearbook ILC 31.

20. *Id.*, at 31 ff.

21. Marek, *Criminalizing State Responsibility*, 1978-1979 Revue Belge de Droit International 460-485, at 467-469.

22. *Id.*, at 461-462.

fully qualified to formulate proposals *de lege ferenda* as well. In fact, Ago himself has admitted time and again that, at least with respect to the distinction between international crimes and international delicts, he has been engaged in progressive development of international law.<sup>23</sup>

Even if one agrees that Ago was fully qualified to progressively develop international law, however, it remains the question whether the position taken by Ago in his Fifth Report was an appropriate one. I think it was. More and more, international law has created international obligations, for instance in the field of human rights, which are considered to be of fundamental importance for the international community, but whose breach does not directly affect other states in their legal interests. As a result, a particularly unsatisfying result one may add, nothing can be done about it *in jure*.<sup>24</sup> Perhaps this has also been the reason why the International Court of Justice itself, in its dictum in the Barcelona Traction Case of 1970, has raised doubts about the validity of the 'classical' view on state responsibility for contemporary practice. Only four years after its deplored Judgement in the South West Africa Cases quoted above, and within a few months of the conclusion of the Vienna Conference on the Law of Treaties, the Court declared in the Barcelona Traction Case:

(33) (...) In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

(34) Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 23*); others are conferred by international instruments of a universal or quasi-universal character.<sup>25</sup>

23. See, e.g., [1976] 1 Yearbook ILC 19, 61. Ago, however, usually added that the term 'international crime' as such, like 'jus cogens', was quite old, referring as he did to 'the lone but highly authoritative voice' of the Swiss jurist J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (1872).

24. See Kooijmans, *Actie, Harde Actie. Enkele Opmerkingen over de Volkenrechtelijke Toelaatbaarheid van Eenzijdige Sanctiemaatregelen*, 1983 *Internationale Spectator* 771-777, at 773.

25. Barcelona Traction, Light and Power Company, Limited, Judgement, 1970 ICJ Rep. 32. Admittedly, in par. 91 of the very same judgment, the Court goes on to state that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has to be sought". And even on the European level an *actio popularis* remains the exception to the rule of *pas d'intérêt, pas d'action*, see Seidl-Hohenveldern, *Actio Popularis im Völkerrecht*, in *Instituto di Diritto Internazionale e Straniero dell' Università di Milano* (ed.), *Comunicazione e Studi*, 809-810, 813 (1975). Nevertheless, it is difficult to completely argue away the dictum in the Barcelona Traction Case.

#### 4. THE CONSTITUENT ELEMENTS OF AN INTERNATIONAL CRIME

Article 19 of Part 1 of the draft articles on state responsibility for internationally wrongful acts, which is very much the result of Roberto Ago's investigations in his Fifth Report and clearly inspired by the dictum of the International Court of Justice in the Barcelona Traction Case, provides:

*International crimes and international delicts*

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
  - (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
  - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
  - (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;
  - (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.<sup>26</sup>

In a sense, paragraph 2, which states the general rule as to what constitutes an international crime, is the key to Article 19. As is demonstrated by the introductory words 'Subject to paragraph 2', paragraph 3 of Article 19 should be understood exclusively in the light of the previous paragraph and within the limits which paragraph 2 defines. Paragraph 4, then, goes on to negatively define international delicts. In order to avoid the false impression that in the end only breaches of international obligations which are considered to be the most essential are significant, paragraph 1, finally, emphasizes the equally wrongful nature of international delicts.<sup>27</sup>

From paragraphs 2 and 3 of Article 19 it follows, that there are several conditions governing the identification of an international crime. As a matter of fact, there must have been: (1) a *serious* breach of an international obligation, (2) which is so *essential* for (3) the protection of *fundamental* interests of the international community (4) that its breach is *recognized* as a crime (5) by that community *as a whole* (6) and which is based on the rules of international law *in force*.

26. Draft arts. 1 to 35 of Part 1 are published in [1980] 2(2) Yearbook ILC 30-34.

27. [1976] 1 Yearbook ILC 239; [1976] 2(2) Yearbook ILC 118.

To begin with, it must be stressed that not just any minor breach of an international obligation, however essential it may be, constitutes an international crime. The breach must, on the contrary, have been *serious* (repeated in all four subparagraphs!). It must have reached a certain degree of gravity. Interestingly, even Article 39 of the Charter of the United Nations does not stipulate this as a condition. This provision solely refers to 'any threat to the peace, breach of the peace, or act of aggression', without qualifying them as 'serious'.

What is to be understood by *fundamental* interests of the international community is cleared up in part by paragraph 3 of Article 19. Paragraph 3 lists, by way of example, the general categories or fields in which international crimes might occur, notably the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. The non-exhaustive character of the list - so far the Commission has been unable to reach agreement on an exhaustive list of international crimes of states<sup>28</sup> - is indicated by the words *inter alia*. Of each of these general categories, then, one or more specific examples (mark the words 'such as', which are, once again, repeated in each subparagraph!) are given: aggression - a term which is, by the way, employed in subparagraph 3(a) on the understanding that it has the meaning given it by the Definition of Aggression, General Assembly Resolution 3314 (XXIX), adopted by consensus by the General Assembly on 14 December 1974, so that the use of 'economic force' is not included in the concept -, the establishment or maintenance by force of colonial domination, slavery, genocide and apartheid, and massive pollution of the atmosphere or of the seas, respectively. These examples, obviously, demonstrate which international obligations the Commission thinks *essential* for the protection of the fundamental interests of the international community.

The international obligation at stake must, however, not only *be* essential for the protection of fundamental interests of the international community, but, according to paragraph 2 of Article 19, its breach must also be *recognized* as a crime by that community as a whole. At first sight, the definition may seem to fall into a vicious circle here. In reality, however, the wording probably refers to the *opinio juris sive necessitatis*, as defined by the International Court of Justice in its Judgement in the North Sea Continental Shelf Cases in 1969:

[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.<sup>29</sup>

In this respect, paragraph 2 of Article 19 resembles Article 53 of the Vienna Conven-

28. M. Spinedi, *Les Crimes Internationaux de l'Etat dans les Travaux de Codification de la Responsabilité des Etats entrepris par les Nations Unies*, EUI Working Paper No. 88, at 23 (1984).

29. North Sea Continental Shelf Cases, 1969 ICJ Rep. 44.

tion on the Law of Treaties, in which a peremptory norm of general international law is defined actually as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". No explicit reference is made to the concept of *jus cogens* in Article 19, however. The Commission seems to halt between two opinions here. At one time, it observes that:

[a]lthough 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 obligations admitting no derogation is much broader than the category of obligations whose breach is necessarily an international crime.<sup>30</sup>

At another time, the Commission has to admit that:

[i]t would seem contradictory if, in the case of a breach of a rule so important to the entire international community as to be described as a 'peremptory' rule, the relationship of responsibility was established solely between the State which committed the breach and the State directly injured by it.<sup>31</sup>

The formula 'international community as a whole' in paragraph 2 certainly does not imply, that the unanimous consent of all states constituting the international community is required. On the other hand, not just any majority of states will be able to impose their views on the minority. What is in fact required is, at least according to Ago, referring as he did in his turn to the debates at the United Nations Conference on the Law of Treaties, "that the main groups of States making up the international community - namely the various essential components of that community - should recognize the peremptory nature of a norm, even though some individual states might hold a different opinion."<sup>32</sup>

Finally, from the words 'on the basis of the rules of international law in force' in paragraph 3 it is plain, that the specific examples of the major fields enumerated in subparagraphs (a) to (d) are supposed to be strictly based on the generally recognized and accepted rules of present-day international law, whether conventional or customary.<sup>33</sup> One might see little point in the addition of the words *in force*, because any mention of rules of international law, one is tempted to say, necessarily implies that the rules referred to are in force. Probably, therefore, these words have been used purely for psychological reasons, so as to unequivocally exclude trends which have not yet evolved into rules of law.<sup>34</sup> Also, it should be remembered that, as early as 1963, the International Law Commission had decided, in codifying the rules governing international responsibility, not to engage in the definition and codification of 'primary' rules. Ago has been the first to admit, that the drafting of Article 19 made it virtually impossible for him not to take into consideration the content of 'primary' rules, since it was precisely on the basis of the content of those obligations that the different categories of offences had to be es-

30. [1976] 2(2) Yearbook ILC 119-120.

31. *Id.*, at 102.

32. [1976] 1 Yearbook ILC 251-252.

33. *Id.*, at 240.

34. *Id.*, at 244 (El-Erian, Egypt).

tablished. In doing so, Ago, however, did not want to define himself the 'primary' rules that were to govern inter-state relations in specific domains. Instead, he wanted as much as possible to simply "take cognizance of the existence of those rules and accept them as they have been defined in other instruments, to the extent that this has been done."<sup>35</sup> The reason why Ago nevertheless included the safeguarding and preservation of the human environment in paragraph 3 as an example of a major category in which international crimes may occur, is that he believed that, while the international crimes enumerated in the preceding subparagraphs, with the exception of aggression, should sooner or later become things of the past, the crimes referred to in subparagraph (d) could be the crimes of the future.<sup>36</sup>

All in all, the International Law Commission seems to have taken considerable care not to make the notion of an international crime too broad. Careful reading of paragraph 3, moreover, reveals that in specific cases there are even additional conditions to be fulfilled. Colonial domination, for instance, must have been established or maintained *by force* (sub b). This is because, according to Ago, there could be cases in which a people under colonial domination might feel no need to separate from the mother country.<sup>37</sup> The breach of an obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid must, furthermore, have taken place *on a widespread scale* (sub c). The expression 'on a widespread scale' is supposed to mean, that the breach must have affected a substantial number of persons and not merely a few individuals.<sup>38</sup> Finally, the pollution of the atmosphere or of the seas must have been *massive* (sub d), a wording which reminds somewhat of the famous phrase from the Trail Smelter Arbitration of 11 March 1941:

[u]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, *when the case is of serious consequence* and the injury is established by clear and convincing evidence.<sup>39</sup>

In spite of all this, however, the scope of Article 19 remains uncertain. For one thing, the judgement on at least some of the conditions must necessarily be subjective and political. When, for example, must the breach of an international obligation be considered *serious*? More importantly, however, the draft article tends to violate the general principle of legality, expressed in the formula *nullum crimen sine lege*, which is probably applicable in the international legal context as well. In the order concerning the request for indication of provisional measures in the Tehran Hostages Case, the International Court of Justice, for example, declared that "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of

35. [1976] 2(1) Yearbook ILC 52.

36. [1976] 1 Yearbook ILC 253.

37. [1976] 1 Yearbook ILC 252.

38. *Id.*

39. Trail Smelter Arbitration of 11 March 1941, 3 R.I.A.A. 1165. Italics added.

diplomatic envoys and embassies" and referred to "imperative obligations"<sup>40</sup>. Later on, in the Judgement, the Court recalled yet again "the extreme importance of the principles of law which it is called upon to apply in the present case" and considered it to be its duty to draw the attention of "the entire international community" to the "irreparable harm" that may be caused by events of the kind now before the Court.<sup>41</sup> Still, one cannot be sure whether even a serious breach of the principle of inviolability of the persons of diplomatic agents and the premises of diplomatic missions, like the one in Tehran, would constitute an international crime. In her already cited article, written ten years ago, Krystyna Marek observed that "the '*inter alia*' in a text purporting to be penal law surely is a historical achievement" and wondered "why, in view of the '*inter alia*' and the 'such as', the drafters of this rubber text have bothered at all to proceed to an enumeration."<sup>42</sup> The United States member of the International Law Commission, Stephen Schwebel, noted in 1980, that "it was quite clear from the comments of states that a large number of states seriously challenged that draft article on very substantial grounds". According to him, this was due to the fact that Article 19 "entailed criminalizing state responsibility" and that "it did so in vague, subjective, selective and open-ended ways"<sup>43</sup>.

## 5. THE LEGAL CONSEQUENCES OF INTERNATIONAL CRIMES

From the very beginning Willem Riphagen of the Netherlands, who in 1980 succeeded Ago as special rapporteur for state responsibility, emphasized in his reports that the International Law Commission, having recognized the progressive development of international law by provisionally adopting Article 19 of Part 1 of the draft, had to carry this development to its logical conclusion by proposing 'secondary' and 'tertiary' rules in

40. 1979 ICJ Rep. 19-20.

41. 1980 ICJ Rep. 42-43. See also Frowein, *Collective Enforcement of International Obligations*, 1987 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67-79, at 74.

42. Marek, *supra*, note 21, at 474-475. See also Dupuy, *Action Publique et Crime International de l'Etat: à Propos de l'Article 19 du Projet de la Commission du Droit International sur la Responsabilité des Etats*, 1979 *Annuaire Français de Droit International* 539-554, at 541.

This is, indeed, not quite clear. The Commission would probably be better advised to follow the example of Art. 53 of the Vienna Convention on the Law of Treaties (VCLT) and refer the specific examples of international crimes to the Commentary to Art. 19. Art. 53 of the VCLT, as a matter of fact, does not contain any rules of jus cogens. In the Commentary to Art. 53, however, some examples are mentioned. These include: (1) a treaty contemplating an unlawful use of force contrary to the principles of the Charter; (2) a treaty contemplating the performance of any other act criminal under international law (!); and (3) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate. Cf. Schwebel, *Some Aspects of International Jus Cogens as formulated by the ILC*, 1967 *A.J.I.L.* 946-975, at 963-964. *Contra*, Mohr, *The ILC's Distinction between 'International Crimes' and 'International Delicts' and its Implications*, in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* 115-141, at 123. Mohr believes, that the method chosen by the Commission in formulating Art. 19 (par. 2 and especially par. 3) offers some advantages compared with the purely abstract method reflected in Arts. 53 and 64 of the VCLT.

43. [1980] 1 *Yearbook ILC* 92.

this respect.<sup>44</sup> Whereas, in this terminology, 'primary' rules are rules of conduct, 'secondary' rules deal with the legal consequences of acts or omissions not in conformity with the 'primary' rules of conduct, and 'tertiary' rules, finally, concern the implementation of the 'secondary' rules.<sup>45</sup> As Riphagen was to find out soon, his main handicap was that in present-day international law there is "an abundance of primary rules of conduct but a relative scarcity of secondary rules and a virtual absence of tertiary rules"<sup>46</sup>. His task has, therefore, been far from simple. Ago's legacy - the novel concept of international crimes of states - must have weighed heavy upon him. Yet, between 1980 and 1985, Riphagen managed to submit six reports on Part 2 of the draft articles concerning content, forms and degrees of state responsibility. By the end of its thirty-seventh session, in 1985, the Commission had provisionally adopted draft articles 1 to 5 of Part 2 on first reading and had referred Articles 6 to 16 to the Drafting Committee.<sup>47</sup> On 2 July 1986 the Chairman of the Drafting Committee, however, reported that, due to lack of time, it had not even been possible for the Committee to conclude its work on draft Article 6 successfully.<sup>48</sup> In the meantime, at its 1985 and 1986 sessions, the Commission had also begun, with a preliminary exchange of views on the basis of Riphagen's seventh report, its consideration of the rapporteur's proposals on the possible content of Part 3 to the draft articles dealing with the implementation (*mise en oeuvre*) of international responsibility and the settlement of disputes. I will return to these subjects later on. The remainder of this section will concentrate on Part 2 of the draft.

The legal consequences of international crimes of states are dealt with in Articles 5(3), 14 and 15 of Part 2 of the draft articles on state responsibility. These articles read as follows:

*Article 5*

(...)

3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

*Article 14*

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as legal the situation created by such crime; and

(b) not to render aid or assistance to the State which has committed such crime in main-

44. [1983] 2(1) Yearbook ILC 12.

45. *Id.*, at 8.

46. *Id.*; see also Simma, *Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission*, 1986 Archiv des Völkerrechts 357-407, at 358.

47. [1986] 2(2) Yearbook ILC 38-39.

48. *Id.*, at 35-38.

taining the situation created by such crime; and

(c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

#### *Article 15*

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.<sup>49</sup>

It follows from these articles, that in case of an international crime: (1) all other states are supposed to be directly injured in their own legal interests; (2) all the legal consequences of an international delict are entailed; (3) every other state is obliged (a) not to recognize as legal the situation created by such crime; (b) not to render aid or assistance to the state which has committed such crime in maintaining the situation created by such crime; and (c) to join other states in affording mutual assistance in carrying out these two obligations; (4) in addition, such rights and obligations are entailed as are determined by the applicable rules accepted by the international community as a whole; and (5) there is a *lex specialis* for aggression.

Article 5 (3), labelled 'strange and even ridiculous' by Nikolai Ushakov (Union of Soviet Socialist Republics) and 'dangerous' and 'far-reaching' by Stephen McCaffrey (United States of America)<sup>50</sup>, first of all, indicates the *erga omnes* character of the breach. The concept of international crimes of states clearly does away with the 'classical' distinction between the directly affected state and third states. All states see themselves granted, by definition, an interest in acting which derives from the fact that they have been granted a legally protected interest of a universal nature.<sup>51</sup>

Article 14(1) goes on to state that in case of an international crime all the legal consequences of international delicts are entailed. The legal consequences of international delicts are to be found in Articles 6 to 13 of Part 2 and Articles 1 and 2 of Part 3 of the draft. On average, the content of these provisions does not seem to differ substantially

49. Draft Arts. 1 to 5 of Part 2 are published in [1986] 2(2) Yearbook ILC 38-39. For Arts. 6 to 16 of Part 2 and Arts. 1 to 5 and the Annex of Part 3, see U.N. Doc. A/CN.4/380 and A/CN.4/380/Corr.1, U.N. Doc. A/CN.4/397 and A/CN.4/397/Corr.2 respectively. See also the appendices in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility*, 325-347 (1987).

50. [1985] 1 Yearbook ILC 310-311.

51. The reference to Arts. 14 and 15 in Art. 5(3) is placed in square brackets, because these articles have not yet been provisionally adopted and new articles on international crimes might conceivably be added to the draft, *id.*

from the 'classical' view on state responsibility, as summarized above. Surprisingly, however, satisfaction, which would seem to be especially appropriate when an international crime has been committed, is not even mentioned in the draft. In case of an international delict, the injured state may require *restitutio in integrum* or indemnity from the wrong-doing state.<sup>52</sup> A state which wishes to do so must, as a matter of fact, notify the state alleged to have committed the internationally wrongful act of its claim. This notification must indicate the measures required to be taken and the reasons therefore. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of this notification, the claimant state wishes to resort to reciprocity or reprisals, it must notify the state alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that state. The notification must, once again, indicate the measures intended to be taken. The term 'reciprocity' is used in Part 2 of the draft articles as meaning that the injured state suspends the performance of its obligations towards the state which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached. A 'reprisal', on the other hand, means that the state is entitled to suspend the performance of its other obligations towards the offending state. The exercise of this right by the injured state shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.

Article 14(2) in fact does not contain an exhaustive list of obligations for all other states. What it intends to do is merely to describe the minimum for all states which will apply to all international crimes.<sup>53</sup> The formulation of subparagraph 2(a), dealing with the result of an international crime, *i.e.* the situation created by it, is inspired by the rule embodied in the 1970 Declaration on Principles of International Law which states that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal".<sup>54</sup> The formulation of subparagraph 2(b), on the contrary, is inspired, *inter alia*, by Article 71 *in fine* of the Vienna Convention on the Law of Treaties. It prohibits international co-operation with the author state merely to the extent that such co-operation helps the author state to maintain the situation created by the crime. Consequently, it does not cover international co-operation with the author state in fields which have absolutely nothing to do with the international crime or the situation created thereby.<sup>55</sup> While the minimum obligations in paragraph 2 under (a) and (b) deal with the two sides of the relationship between the author state and any other state, the third obligation actually refers to the relationship between those other states. The idea of subparagraph 2

52. According to Art. 6(1) of Part 2 of the draft articles, the injured state may actually also require the offending state to: (1) discontinue the act, to release and return the persons and objects held through such act, and to prevent continuing effects of such acts; (2) apply such remedies as are provided for in its internal law; and (3) provide appropriate guarantees against repetition of the act.

53. [1982] 1 Yearbook ILC 240.

54. [1982] 2(1) Yearbook ILC 48-49.

55. *Id.*

(c) has been taken from Article 49 of the Charter of the United Nations. It takes into account the fact that often a measure taken by one state loses its actual effect if it is evaded through or substituted by dealings with another state. An example of mutual assistance would be if a state broke off economic relations with a state which had committed an international crime, and a third state then established economic relations with the former state.<sup>56</sup> Paragraph 4 provides for the rights and obligations under paragraphs 2 and 3, a position intermediary between the obligations stipulated in Article 103 of the Charter of the United Nations.<sup>57</sup>

In addition, Article 14(1) speaks of the 'applicable rules accepted by the international community as a whole'. These rules, however, must, according to Riphagen, for the present be viewed merely "as a window on the future development of the international community as a whole"<sup>58</sup>. The British member of the International Law Commission, Sir Ian Sinclair, was probably right in observing that "[e]laboration of the additional legal consequences involved might bring down what was already a very flimsy edifice. The Commission was exploring unknown territory and could only rely upon a compass to indicate the general direction, leaving it to succeeding generations to plot the detailed landmarks along the way."<sup>59</sup>

A large variety of trespasses comes under the heading of international crimes, but, again according to Riphagen, aggression had to be singled out for special mention, because it is governed by the relevant provisions of the Charter of the United Nations. The reference to the Charter in Article 15 of Part 2 of the draft is supposed to include Article 51 of the Charter, which speaks of the 'inherent right' of individual or collective self-defence if an armed attack occurs. In its present form, draft Article 15, to me, seems to serve only as a 'reminder', devoid of any effect. The absence of such a rule from an international instrument on state responsibility would in no way signify that that instrument could allow a derogation from the rule, which derives from the principle of the prevalence of the obligations provided for by the Charter of the United Nations.<sup>60</sup> To a certain extent, the same goes for Article 14(3).

On balance, it seems as though, in cases where an international crime has been committed, the obligations for all other states are particularly mild. Doudou Thiam of Senegal, since 1982 the Commission's special rapporteur for the draft code of offences against the peace and security of mankind, at least voiced the feelings of several of his colleagues in asking:

[w]as it really so much to ask of a State not to recognize as legal the situation created by an international crime? Was it not the least that could be asked of the other members of the international community not to render aid or assistance to the author state in maintaining the situation created by an international crime? What was the point of the mutual as-

56. *Id.*; see also [1985] 1 Yearbook ILC 162.

57. [1982] 2(1) Yearbook ILC 50.

58. [1984] 1 Yearbook ILC 320.

59. [1985] 1 Yearbook ILC 118.

60. [1984] 1 Yearbook ILC 263.

sistance referred to in subparagraph (c), since the obligation in subparagraph (a) not to recognize as legal the situation created by an international crime called for no mutual assistance, and the obligation in subparagraph (b) was a negative obligation that did not call for any mutual assistance either?<sup>61</sup>

Nevertheless, it is probably wrong to suppose that "[t]o adopt Article 14 would be tantamount to accepting that the legal consequences of certain international crimes would be no more than those provided in the articles for international delicts; and that, in turn, would be tantamount to dropping the distinction established in part 1 of the draft between international delicts and international crimes."<sup>62</sup> The important thing to note here is that, while the obligations may be mild, the combined impact of these articles on the rights of all other states in case of an international crime is, in a word, tremendous. If, by definition, all states are directly injured in their own legal interests by an international crime, it follows that all states are entitled to reparation.

So far so good. But how will things work out in practice? As can be expected, *restitutio in integrum* will most of the time be impossible. And what monetary compensation might be asked in the case of, for example, a gross violation of human rights? Satisfaction would seem to be a particularly appropriate form of reparation, but is not even mentioned in Part 2 of the draft articles. Moreover, a state which has committed an international crime is not likely to be inclined to make reparation to any or all other states of its own free will. Thus, it appears that reparation in the case of an international crime will often come down to retorsions or, what is worse, reprisals.<sup>63</sup> Riphagen did not even exclude the possibility of punitive measures like, for instance, the imposition of a heavy financial burden upon a state or taking away part of the territory of a state.<sup>64</sup>

## 6. THE NEED FOR SIMULTANEOUS ACCEPTANCE OF COMPULSORY MEANS OF PACIFIC SETTLEMENT

These, however, are rather depressing findings. All the more so, since determining in each specific case whether a state has committed an international crime and what legal consequences are invoked by it, will certainly be a delicate matter which may raise both factual and legal problems. Indeed, a whole series of disputes can arise, concerning, for example, whether an international crime has actually taken place, whether the conduct is attributable to a state under international law, whether the effective local remedies have been exhausted, whether another state is implicated in the international crime, or whether there have been any circumstances precluding wrongfulness. Yet, Article 19 does not by any means indicate by whom and by what procedure recognition as an international crime is supposed to take place. The Charter of the United Nations, of course,

61. [1985] 1 Yearbook ILC 106 (Thiam, Vietnam).

62. *Id.*, at 101 (Calero Rodrigues, Brazil).

63. See Kooijmans, *supra*, note 24, at 774.

64. [1985] 1 Yearbook ILC 95.

lays down the procedure for determining the existence of aggression.<sup>65</sup> But what about the other crimes listed in Article 19? In the absence of an independent and authoritative establishment of both the facts and the applicable law, every state will run the risk of being charged by any or all states with having committed an international crime and of being faced with a large variety of demands and reprisals by any or all other states. In fact, states will be made very much judge and legislator in their own case. Nothing short of a *bellum omnium contra omnes* must be feared.<sup>66</sup>

Fortunately, Willem Riphagen seems to have been well aware of all this. In Part 3 of the draft articles, dealing with the implementation (*mise en oeuvre*) of international responsibility and the settlement of disputes, he has, at least, laid down a minimum of organizational arrangements in connection with the substantive rules of state responsibility. This final part of the draft, which consists of 5 articles and an Annex to which virtually no reservations are allowed<sup>67</sup>, actually follows the relevant provisions of international instruments like the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.<sup>68</sup> If objection has been raised against measures taken or intended to be taken (reciprocity, reprisals), by the state alleged to have committed the internationally wrongful act, or by another state claiming to be an injured state in respect of the suspension of the performance of the relevant obligations, the states concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations (negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, etcetera). If no solution has been reached within a period of 12 months following the date on which the objection was raised, any one of the parties to a dispute concerning reprisals and their limitations, may set in motion the procedure specified in the Annex to Part 3 by submitting a request to that effect to the Secretary-General of the United Nations. A conciliation commission will then be constituted, whose report, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties. The report shall in fact have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute. Any one of the parties to disputes concerning the question of whether a measure of reciprocity or reprisal oversteps the limits imposed by a peremptory norm of general international law, or to disputes concerning the additional rights and obligations referred to in Article 14 of part 2, may, on the other hand, by a written application, submit it to the International Court of Justice for a decision.<sup>69</sup>

65. Art. 39 *et seq.* Charter of the United Nations.

66. See Marek, *supra*, note 21, at 481; and Akehurst, *Reprisals by Third States*, 44 *British Yearbook of International Law* 15-16 (1971).

67. See Art. 5 of Part 3 of the draft articles.

68. [1986] 1 *Yearbook ILC* 58.

69. See Art. 3-(1) and 4 of Part 3 of the draft articles as well as the Annex to Part 3.

At the conclusion of its discussion, in 1986, the International Law Commission referred draft articles 1 to 5 of Part 3 and the Annex to the Drafting Committee.<sup>70</sup> Before that, Riphagen had stated explicitly that the provisions of Part 3 are also intended to apply to disputes in connection with the articles of Part 1 (including Article 19).<sup>71</sup> Thus, as a matter of fact, all questions concerning the interpretation and application of Article 19 of Part 1 and Articles 5(3), 14 and 15 of Part 2 of the draft articles, will come under the jurisdiction of the International Court of Justice. As will be clear from the preceding pages, I fully agree with Riphagen at this point. At the same time, however, I realize, that his statement will not exactly increase the willingness of states to accept the provisions of Part 3 of the draft. Thus, one of the main problems the Commission will have to cope with in the near future is that, although a convention which did not include a system of settlement would no doubt be incomplete, ineffective and even disastrous for the international community, the inclusion of a procedure of that kind might actually prevent the convention from being accepted. As Manfred Mohr rightly observes in a recent article on the topic, the distinction between international crimes and international delicts has always been the main concern of representatives of socialist states and socialist, especially Soviet, writers dealing with the issue of state responsibility (like, for example, Tunkin, Levin and Kuris).<sup>72</sup> Especially, these states are, therefore, likely to try to get rid of Part 3 of the draft. In fact, Mohr, himself a Research Fellow at the Institute for Theory of State and Law of the Academy of Sciences of the German Democratic Republic in Berlin, in his article, already complains that Riphagen has 'over-emphasized' problems of interpretation and procedure and that this kind of 'exaggeration' must not be used to question the very principle of differentiation as stipulated in Article 19.<sup>73</sup> He adds, that:

[b]y general agreement there are (...) situations which are so dangerous or, in some other way, of an 'emergency character', that they require immediate countermeasures without the need for, or even the possibility of, further procedural or other steps of implementing the responsibility in question. And the occurrence of such peculiar situations would surely be typical of international crimes threatening the very existence of a State or States. This is another reason why Riphagen's excessive emphasis on the procedural issue, in particular, as far as the 'provisionally' adopted article 19 is concerned, should not be accepted.<sup>74</sup>

Two years ago, the Romanian member of the International Law Commission, Constantin Flitan, already predicted that states which do not accept the compulsory jurisdiction of the Court, will not become parties to the convention, and stated that "[h]e did not think the Commission would willingly accept that a large number of States would not accede to such an important as the future Convention".<sup>75</sup>

70. [1986] 2-(2) Yearbook ILC 35-38. The Drafting Committee has, however, not yet been able to consider these texts.

71. [1986] 1 Yearbook ILC 60.

72. Mohr, *supra*, note 42, at 117.

73. *Id.*, at 124-125.

74. *Id.*

75 [1986] 1 Yearbook ILC 59-60.

As Riphagen had not been reelected to the Commission in the 1986 quinquennial elections, no substantive discussion of the topic of state responsibility took place at the thirty-ninth session, held from May 4 to July 17, 1987. The Commission did, however, appoint yet another special rapporteur for state responsibility, Gaetano Arangio-Ruiz of Italy.<sup>76</sup> A large responsibility rests on his shoulders.

## 7. CONCLUSION

This article has dealt with the novel concept of international crimes of states. Its main thesis has been that the distinction between international crimes and international delicts must be regarded as a major step forward, provided that states will simultaneously accept compulsory means of pacific settlement.

The article started off with a discussion of the 'classical' view on state responsibility for internationally wrongful acts. Today, it was argued, this view has become obsolete, because over the last couple of decades international law has more and more created international obligations, which are considered to be of fundamental importance for the international community, but whose breach does not directly affect other states in their legal interests. Therefore, although the evidence put forward by him is not always convincing, the overall position taken by Roberto Ago in his Fifth Report on state responsibility is an appropriate one.

Next, the constituent elements and the legal consequences of international crimes of states, as conceived of by the International Law Commission, were dealt with. With respect to the constituent elements of an international crime of a state, it was concluded that, although the International Law Commission has taken considerable care not to make the notion of an international crime too broad, the scope of Article 19 of Part 1 of the draft articles remains uncertain. With regard to the legal consequences of international crimes, it was noted that, whereas the obligations for states in the case of an international crime seem to be particularly mild, the combined impact of Articles 5(3), 14 and 15 of Part 2 of the draft articles on the rights of states is, in a word, tremendous.

Under these circumstances, determining in each specific case whether an international crime has been committed and what legal consequences are invoked by it, will be a delicate matter. In the last paragraph of this article it was therefore argued, that Special Rapporteur Willem Riphagen has been perfectly right in drafting Part 3 on the implementation of international responsibility and the settlement of disputes. It is to be hoped, that the Commission will stick to it, even if this might temporarily prevent the entire convention from being accepted. The only way to prevent a disastrous *bellum omnium contra omnes* is, I believe, to make sure, that all questions concerning the interpretation and application of both Article 19 of Part 1 and Articles 5(3), 14 and 15 of Part 2 of the draft articles, will come under the jurisdiction of the International Court of Justice. The Inter-

76. Report of the International Law Commission on the work of its thirty-ninth session, 42 U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/42/10 (1987).

national Law Commission is walking a truly thin line between progressive development and disintegration of the international legal order.

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