

**RETHINKING STATE CRIMINALITY IN INTERNATIONAL LAW: LEGAL
BARRIERS AND FUTURE PROSPECTS**

By

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ABSTRACT

This thesis examines the historical development of state criminal responsibility under international law, from early attempts at codification to contemporary discourse on holding states accountable for international crimes. It traces foundational efforts like the Draft Code of Offenses against the Peace and Security of Mankind and the ILC's Draft Article 19 on "international crimes of states," analyzing factors behind Article 19's removal and arguments for retaining the concept's viability. Doctrinal analysis evaluates scholarly perspectives on whether states can fulfill criminal responsibility requirements, surveying procedural/substantive impediments to establishing state criminality. By systematically comparing and contrasting parallels/differences in attributes like subjects of responsibility, norms, procedures and consequences under domestic criminal law versus international responsibility frameworks, the feasibility of this proposed additional layer of accountability is assessed. Despite conceptual appeal, actualizing binding state criminal responsibility faces constraints at the current stage of international legal development, including difficulties in attributing intent/conduct for culpability determination, lack of enforcement mechanisms, risks to cooperation and compliance. Challenges reconciling criminal law concepts like *nullum crimen sine lege* with the decentralized nature of international law also arise. While state criminal responsibility remains theoretically viable, translating it into international judicial practice involves profound hurdles. Incremental developments in areas like collective sanctions for community interests provide foundations but further evolution is needed before comprehensive state criminal liability can crystallize under international law. However, the principle retains conceptual force and future shifts in international politics could engender greater regulation of state criminality.

Keywords: State Criminality, International Crimes, State Responsibility, Individual Criminal Responsibility

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1. INTRODUCTION

The current international legal framework for state responsibility is provided by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission in 2001 which is a non-binding instrument though it has been regarded to codify a number of customary international law.¹ ARSIWA establishes general principles and procedures for when states can be held civilly responsible for breaches of international obligations.² However, ARSIWA does not address the specific issue of whether states can or should be subject to criminal responsibility under international law, in the way individual persons can be held criminally responsible under international criminal law instruments such as the Rome Statute of the International Criminal Court (ICC).³ At the moment international criminal responsibility is only individualized. Under the Rome Statute only individuals can be held criminally responsible for international crimes under the jurisdiction of the court.⁴ States in no way can be held criminally responsible. While doctrinally coherent, this lacuna gives rise to concerns from both theoretical and practical standpoints. On a conceptual level, the gravity of the most serious breaches of international law can be seen as warranting the possibility of criminal responsibility attributed not only to culpable individuals but also the state itself.⁵ At the same time, from a consequentialist perspective, the absence of criminal accountability may reduce deterrence and weaken the normative force of international law.⁶ Victims also arguably have an interest in punitive sanctions reflecting the nature of the harm perpetrated against them.⁷ Consequently, re-examining the legal viability of state criminal responsibility under contemporary international law is needed to fully evaluate the merits of this proposed additional layer of accountability and its potential role in reformulating the principles of state responsibility.

The possibility of attributing criminal responsibility to states alongside or beyond civil responsibility has been debated for decades without definitive resolution. Early efforts to formulate the principle, such as the International Law Commission's Draft Article 19 on "international crimes" failed to gain traction and was ultimately abandoned.⁸ However, Special

¹ UN Doc A/RES/56/83, 28 January 2002.

² James Crawford, *State Responsibility: The General Part* 25-50 (Cambridge University Press, 2013).

³ Rome Statute of the International Criminal Court, 17 July 1998, Article 25.

⁴ *Ibid.* Article 25(1).

⁵ Geoff Gilbert, *The Criminal Responsibility of States*, 39 *Int'l & Comp. L.Q.* 356 (1990), <http://www.jstor.org/stable/760200>.

⁶ S. Fleming, *Leviathan on Trial: Should States be Held Criminally Responsible?*, 13 *Int'l Theory* 427 (2021).

⁷ *Ibid.*

⁸ Crawford, James. "The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading." *The European Journal of International Law* 10, no. 4 (1999): 660-671, at 664-665.

Rapporteur James Crawford maintained this rejection was without prejudice to the future evolution of state criminality, leaving the door open to crystallization through custom.⁹ This lingering uncertainty underscores the value of reexamining the historical development and evaluating the legal feasibility of state criminal responsibility under contemporary international law.

Through doctrinal analysis, this thesis traces the trajectories of the debate about whether states should be criminally responsible under international law from initial codification attempts to current discourse. Preliminary foundations, such as the Draft Code of Offenses Against the Peace and Security of Mankind and the inclusion of Article 19 in the ILC's Draft Articles on State Responsibility, are explored as precursors to enduring controversies. Factors motivating the removal of Article 19 are critically assessed, alongside Crawford's insistence that discarding the provision did not invalidate the concept.¹⁰

Against this background, the thesis examines scholarly perspectives on whether states can fulfill the requirements of criminal responsibility and surveys procedural and substantive impediments involved in establishing an international crime of state.¹¹ By systematically evaluating parallels and differences between holding states criminally accountable under international law versus prosecuting individuals domestically, the feasibility and desirability of this proposed additional layer of responsibility is weighed.¹²

Ultimately, this thesis illustrates that while state criminal responsibility remains an intriguing theoretical prospect, realization as binding law is constrained by institutional limitations at the present stage of international legal development. However, the principle retains conceptual viability and future shifts in international politics could engender greater regulation of state conduct.

⁹ Crawford, James. "First Report on State Responsibility." United Nations Document A/CN.4/490 and Add.1-7 (1998), ¶¶ 63-65.

¹⁰ James Crawford, First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/490 and Add.1-7 (1998), reprinted in [1998] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 1), pp. 66-67, at p. 67.

¹¹ Alain Pellet, Can a State Commit a Crime? Definitely, Yes!, 10 Eur. J. Int'l L. 425 (1999).

¹² S. Fleming, Leviathan on Trial: Should States be Held Criminally Responsible?, 13 Int'l Theory 427 (2021).

2. DEVELOPMENT OF THE CONCEPT OF RESPONSIBILITY FOR INTERNATIONAL CRIMES

2.2.The Period Between the 1st and 2nd World War

The period between the First World War and the Second World War witnessed significant developments in the concept of international criminal responsibility. Studies on state responsibility significantly increased as a result of worldwide order-upsetting events. The majority of the writings created during this time period conformed to a single notion of state responsibility and a bilateral strategy for responses in the form of countermeasures.¹³ However, the separation of responsibility depending on how crucial a violation of one obligation compared to another is as well as the effects it may have to the international community at large emerged. There was a growing trend to differentiate between wrongful acts based on their severity and to categorize the most serious violations as being subject to a stricter system of accountability in international law. By connecting the infringement of these interests to more severe repercussions, the goal during this time was to more effectively safeguard the basic interests of the international community. This trend was particularly evident in international law related to peace and aggression, including issues related to sovereignty, colonial domination, independence of peoples, and acts of genocide and apartheid.¹⁴

2.2.1. State Practice

States started to recognize the need for holding individuals accountable for international crimes committed during times of war. The aftermath of the First World War spurred discussions among states about the establishment of international tribunals or mechanisms to prosecute those responsible. Some states took initiatives to incorporate provisions for the prosecution of war crimes into their domestic legal systems. For example, Germany's Leipzig War Crimes Trials (1921-1922)¹⁵ and the Soviet Union's trials against individuals involved in the Russian Civil War (1918-1922)¹⁶ demonstrated initial attempts at enforcing criminal responsibility at the national level. Similarly, at the international level, Germany was deemed responsible by the Treaty of Versailles, which was signed on June 28, 1919, for beginning and leading the

¹³ Ch. De Visscher, *State Responsibility* 116-119 (Brill 1924).

¹⁴ André De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* 456 (Martinus Nijhoff Publishers 1996).

¹⁵ Gerd Hankel, *Leipzig War Crimes Trials, in 1914-1918*-online. *International Encyclopedia of the First World War* ¶¶ 3-5 (Ute Daniel et al. eds., 2016).

¹⁶ Matthew Rendle, *Defining the 'Political' Crime: Revolutionary Tribunals in Early Soviet Russia*, 65 *Eur.-Asia Stud.* 1771, 1775-76 (2013).

First World War.¹⁷ Some of the sanctions outlined in the Treaty can be considered as criminal penalties, even outside of the sanctions specifically identified as criminal in Articles 227-230. This is the case with the reduction of military contingents.¹⁸ The Arbitral Tribunal established under the Annex to the Treaty of Versailles was responsible for determining the reparations owed by Germany to the Allied Powers and their associates for damages caused during the First World War. In its judgments on Germany's liability for harms in Portuguese colonies in South Africa (the Naulilaa incident) and for crimes committed before Portugal entered the war, this Tribunal upheld the propriety of employing sanctions in the form of retaliation (the Cysne affair).¹⁹ The concept of a different system of liability was likely not in question for the Tribunal, albeit within the context of a bilateral approach to inter-state relations.²⁰ Articles 11 and 16 of the League of Nations Pact, which was adopted on April 28, 1919 and included in the Treaty of Versailles, as well as the Treaties of Saint-Germain, Trianon, and Neuilly, resulted from the Paris Peace Conference that took place from January 12 to June 28, 1919. These provisions stipulated a unique system of sanctions in the event of aggression, to be implemented by all member nations, both in the case of foreign aggression and internal strife.²¹

2.2.2. The League of Nations

The League of Nations also played a crucial role in shaping the discourse on international criminal responsibility between the two world wars. The League of Nations, established after the First World War, aimed to promote disarmament, prevent conflicts, and address war crimes. It formed the Temporary Mixed Commission for the Reduction of Armaments [C.T.A.] (1921-1924) to examine the question of disarmament.²² The Commission's work contributed to the understanding that individuals should be held accountable for grave breaches of international law. However, the lack of enforcement mechanisms limited the effectiveness of these early international efforts. Despite the limitations, the League of Nations' initiatives laid the groundwork for future developments in international criminal responsibility. During this time, the International Association of Penal Law was established, led by Q. Saldaña and H. Donnedieu de Vabres, as a successor to the dissolved International Union of Criminal Law. Saldaña put forth a Draft International Criminal Code in 1925, which held individuals and

¹⁷ Philander C. Knox, Treaty of Versailles art. 231 (Govt. Printing Off. 1919).

¹⁸ Ibid. art. 159.

¹⁹ *Germany v. Portugal* (The Naulilaa Arbitration), 2 R.I.A.A. 1011, 1017-18 (1928).

²⁰ Naulilaa Case (*Port. v. Ger.*), 2 R.I.A.A. 1011 (Special Arb. Trib. 1928).

²¹ J.L. Kunz, Article XI of the Covenant of the League of Nations, in 39 *Recueil des Cours* 679, 690-91 (1932).

²² Andrew Webster, 'Absolutely Irresponsible Amateurs': The Temporary Mixed Commission on Armaments, 1921-1924, 54 *Austl. J. Pol. & Hist.* 373, 379-80 (2008).

states responsible and gave jurisdiction over them to either the PCIJ or the Council of the League. The League of Nations Assembly on September 24, 1927 approved a resolution known as the "Declaration Pertaining to Wars of Aggression". This declaration stated that wars of aggression should never be used as a means of resolving disputes between states and therefore, it is considered an international crime.²³

2.2.3. The Writings of Authors and Legal Scholars

Numerous authors and legal scholars also contributed to the discussions. Their writings provided intellectual foundations for the establishment of a coherent legal framework. Some authors managed to clearly express the idea of State criminal responsibility. H. Lauterpacht believed that individuals should not be immune from criminal responsibility for actions taken as part of a collective action.²⁴ R. Ago suggested that crimes and state offenses could be differentiated even without a centralized international community, based on the nature of the punishment.²⁵ V. Pella, with the support of the Inter-Parliamentary Union, proposed in 1925 the "Fundamental Principles of a Repressive Code of Nations."²⁶ He later, as part of the AIDP's efforts, completed the "Draft Statute for the Creation of a Criminal Chamber within the PCIJ" in 1928 and the "Plan of a Repressive Code Worldwide" in 1935.²⁷ According to Pella's projects, crimes should fall under the purview of an International Criminal Court, which would have the power to rule on matters involving people, states, and non-state legal entities while upholding the concept of cumulative responsibility in both individual and societal criminal justice. Pella proposed that criminal responsibility should be specifically addressed for serious crimes, including war of aggression, war crimes, and other offenses subject to universal jurisdiction. He also suggested adopting real security measures against States that engage in illegal conduct to prevent it from happening again. These measures related to political, military, informational, and ideological aspects of national security, as well as the unification of domestic criminal law and the incorporation of international norms into the legal systems of

²³ Assembly of the League, Declaration Relative to Wars of Aggression, Res. of Sept. 24, 1927, ¶¶ 1-3, Doc. A.119.1927.IX (Sept. 24, 1927).

²⁴ H. Lauterpacht, General Rules of the Law of the Peace, 62 *Recueil des Cours* 99, 119-20 (1937).

²⁵ R. Ago, *Le Tort International*, 68 *Recueil des Cours* 419, 429 (1939).

²⁶ Aurora Ciuca, Romanian Contributions to the Codifications of International Law: Vespasian V. Pella, 5 *Eur. J. L. & Pub. Admin.* 142, 146 (2018).

²⁷ AIDP, Draft Statute for the Creation of a Criminal Chamber within the PCIJ, by V. Pella, 1928, at 132-35; V. Pella, *The Collective Criminality of States and the Criminal Law of the Future* 135-40 (State Printing Office 2d ed. 1926).

states.²⁸ In addition, it is worth mentioning that in 1944, a year when proposals for the formation of the United Nations were being discussed at Dumbarton Oaks, H. Kelsen made a significant contribution by presenting a draft agreement for a permanent association for maintaining peace and a subsequent treaty on individual responsibility for violating international law, which would lead to international criminal jurisdiction. Kelsen approached the topic of international criminal law not from a traditional criminal law perspective focused on punitive measures, but based on the objective principles of his pure theory of law that aimed to separate law from morality and politics.²⁹ The pure theory of law views the law as a unified system of norms, derived from a Grundnorm or basic norm, and focuses on law as it is rather than how it ought to be.³⁰ In contrast, the traditional criminal law perspective involves value judgements about morality, culpability, and appropriate punishment. By grounding his vision in the pure theory of law, Kelsen was able to conceptualize an international legal order binding on states through an objective, value-neutral lens.

In the period between the First World War and Second World War, the development of international criminal responsibility involved perspectives from multiple stakeholders. States recognized the need for accountability, as evidenced by domestic prosecutions of war crimes in Germany and other nations after World War I. The League of Nations spearheaded early international efforts to investigate war crimes and establish principles holding individuals responsible for violations of international law.³¹ Legal scholars and theorists such as Kelsen, Saldaña, and Donnedieu de Vabres also contributed to the evolving conceptual understanding of international criminal responsibility. Although still influenced by traditional concepts of state responsibility, authors like Kelsen approached the subject through new lenses like the pure theory of law. While not definitive, these collective efforts planted seeds that would contribute to later developments in international criminal law.

²⁸ Mamolea, A. “Vespasian V. Pella: International Criminal Justice as a Safeguard of Peace, 1919–1952,” in Mégret, F. and Tallgren, I. (eds) *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents*. Cambridge: Cambridge University Press, pp. 49–92 (2020).

²⁹ Mónica García-Salmones Rovira, Not Just Pure Theory: Hans Kelsen (1881-1973) and International Criminal Law, in *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* 174, 200 (Frédéric Mégret & Immi Tallgren eds., Cambridge University Press 2020) at 27.

³⁰ Joseph Raz, Kelsen’s Theory of the Basic Norm, 19 Am. J. Juris. 94, 96 (1974).

³¹ Assembly of the League, Declaration Relative to Wars of Aggression, Res. of Sept. 24, 1927, Doc. A.119.1927.IX (Sept. 24, 1927).

2.3.The Period after the Second World War

The Potsdam Conference in Berlin, which was attended by the US, USSR, and UK and took place from July 17 to August 2, 1945, serves as an example of state practice after World War II regarding international criminal responsibility. The conference established a Control Council to govern Germany and implemented various sanctions, including disarmament, complete demilitarization, reforms for democratic development, control over the German economy to eliminate military potential, and dismemberment of the military and merchant navy. These measures appear to be preventive steps taken to ensure that the offenses are not repeated.³² The most noteworthy aspect is the development of new international laws that impose obligations on states that are crucial for the survival of the international community as a whole. While there is no official exhaustive list of peremptory norms, the ILC in its commentary to Article 53 of the VCLT has given examples of norms that have commonly been accepted to include rules such as the prohibition of the use of force between states, the prohibition of slavery, racial discrimination, piracy, torture and genocide, as well as peoples' right to self-determination.³³ Some of these examples are part and parcel of international crimes provided for under the Rome Statute. Cherif Bassiouni noted that enough legal basis does exist to classify war crimes, genocide, aggression and crimes against humanity as *ius cogens* crimes.³⁴ His basis of argument is that the obligations arising from the status of *ius cogens* are inderogable and include the duty to prosecute or extradite perpetrators, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities including of heads of states, the non-applicability of the defense of "obedience to superior orders" (except as mitigation of sentence), the universal application of these obligations in times of peace or war, their non-derogation under "states of emergency," and the principle of universal jurisdiction over perpetrators of such crimes. However, Bassiouni notes that the position regarding how crimes obtain the *ius cogens* status has differed among publicists.

In the post-WWII period, key human rights norms started gaining recognition, although not yet as established peremptory norms or jus cogens. The 1945 UN Charter establishes a framework for promoting and protecting human rights through principles of equality, non-discrimination,

³² A. Gros, The Legal Condition of Germany, 50 *Revue générale de droit international public* 75, 79-80 (1946).

³³ Int'l Law Comm'n, Rep. on the Work of its Fifteenth Session, U.N. Doc. A/CN.4/SER.A/1963/ADD.1, at 705th mtg. ¶ 3 (1963).

³⁴ M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 *Law & Contemp. Probs.* 63, 70-71 (Fall 1996).

and upholding fundamental freedoms.³⁵ The emergence of these non-derogable human rights norms later provided a basis for holding individuals criminally responsible for violations. For instance, the 1945-46 Nuremberg trials prosecuted Nazi defendants for committing violations including war crimes, crimes against humanity, and waging aggressive war, establishing precedent for international criminal trials based on such atrocities.³⁶ The Nuremberg trials involved 13 trials conducted between 1945 and 1949 against Nazi defendants as a result of the atrocities committed during World War II. The idea of holding those responsible for war crimes accountable gained momentum during conferences such as the Third Moscow Conference in 1943 and the Tehran Conference later that year. The Allies, particularly the United States and the United Kingdom, were instrumental in shaping the concept of the Nuremberg Trials and establishing the legal principles that would guide them. The Nuremberg Trials introduced several important concepts and principles to international law. One of the key contributions was the establishment of the Nuremberg principles, which were formulated by the International Law Commission of the United Nations.³⁷ These principles served as guidelines for determining what constitutes a war crime. The first principle was of great importance. It affirmed that individuals who commit acts that qualify as crimes under international law are responsible and liable to punishment. The tribunal noted “*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*”³⁸ This formed the foundation of the first Nuremberg principle that, “*Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.*” A basis for International Criminal Responsibility.

The Nuremberg principles were affirmed by the United Nations General Assembly in its resolution 95(I) of 1946.³⁹ The resolution directed the Committee on the Codification of international Law to formulate a general codification of offences against the peace and security of mankind. This work did not take place until after the establishment of the International Law

³⁵ U.N. Charter, arts. 1(3), 55-56.

³⁶ International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 Am. J. Int'l L. 172, 216-19 (1947).

³⁷ Int'l Law Comm'n, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l L. Comm'n 374, ¶¶ 1-8, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

³⁸ International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 Am. J. Int'l L. 172, 221 (1947).

³⁹ Affirmation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/RES/95(I), at 188 (Dec. 11, 1946).

Commission in 1947, which was then directed by Resolution 177(II) to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and prepare a draft code of offenses against the peace and security of mankind.⁴⁰ The ILC was also instructed to indicate the place to be accorded to the principles mentioned in the Charter. The ILC worked on the draft code of crimes against the peace and security of mankind from 1982 to 1995, during which it considered various aspects of the draft code, including its scope and structure. The Special Rapporteur, Doudou Thiam, played a crucial role in the process. The draft code was intended to address offenses that threatened international peace and security, such as aggression, genocide, crimes against humanity, and war crimes. The code aimed to establish universal jurisdiction over these crimes and ensure individual criminal responsibility for their commission. Over several decades, the ILC prepared multiple drafts listing serious offenses, including aggression, genocide, crimes against humanity, and colonial/alien domination, however, disagreements persisted between countries regarding definitions and the code's purpose.⁴¹ By 1996, the ILC had abandoned efforts to establish a single comprehensive code, yet the draft code significantly influenced later developments, including shaping definitions incorporated into the 1998 Rome Statute establishing the International Criminal Court (ICC), which enumerates most major international crimes originally detailed in the ILC draft code.⁴²

Similarly, key international crimes started being defined in major treaties and UN resolutions in the post-WWII period. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide officially termed genocide as a "crime under international law" in Article 1.⁴³ UN General Assembly Resolution 2625, passed on October 24, 1970, addressed principles of international law concerning friendly relations and cooperation between states. This resolution categorized aggression as violating the right to self-determination and territorial integrity.⁴⁴ Subsequently, UN General Assembly Resolution 3314, adopted on December 14, 1974, defined aggression as a "crime" violating peace and the UN Charter.⁴⁵ By classifying aggression in this way, these UN resolutions sparked global responsibility and began cataloging

⁴⁰ Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, G.A. Res. 177(II), U.N. Doc. A/RES/177(II), at 111 (Nov. 21, 1947).

⁴¹ Tomuschat, C. (2014). The Legacy of Nuremberg. *Journal of International Criminal Justice*, 12(4), 830–844.

⁴² *Ibid.*

⁴³ Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

⁴⁴ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625, at 123 (Oct. 24, 1970).

⁴⁵ Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/29/3314, at 142 (Dec. 14, 1974).

behaviors that constituted aggression. This suggests that Chapter VII of the Charter's processes might be used. Apartheid was classified as a "crime against humanity" and a danger to "international peace and security" by the International Convention for the Suppression and Punishment of Apartheid.⁴⁶ In order to prevent and stop these crimes, governments had to implement the resolutions adopted by the Security Council and other UN organizations.⁴⁷ In the framework of maintaining international peace, the Convention underscored the threat that apartheid poses and the Security Council's reaction.

2.4.The Development in the Work of the International Law Commission

2.4.1. The Work of Special Rapporteur FV Garcia Amador (1956–1961)

At the Seventh Session of the ILC, the Commission appointed Special Rapporteur Garcia Amador to lead the work on codification of the principles of state responsibility.⁴⁸ However, Amador was faced with a dilemma on the method of his work when it came to this question considering that at the time the development of international law on the question of responsibility was not ripe.⁴⁹ Considering the mandate given to the ILC by the UN General Assembly through its resolution adopted on the eighth session of 7th December 1953, did not provide exactly on the methodology of the task of codification of the principles of state responsibility.⁵⁰ At the time of determination of topics that the ILC were to consider for codification pursuant to Article 18 of the ILC Statute, the law on state responsibility was part of the topics proposed.⁵¹ This proposal indicated that such a law must consider the contemporary issues of the time then that dealt with development of international law such as the issue of criminal responsibility. Amador noted that the concept of state responsibility has developed through certain concepts and principles that became traditional tenets of international law.⁵² However, the development of contemporary international law has seen the emergence of new aspects of international law such as community interests in breaches of international law as compared to individual interest, the legal personality of the subjects and

⁴⁶ International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 1, Nov. 30, 1973, 1015 U.N.T.S. 243.

⁴⁷ Ibid. art. VI.

⁴⁸ Int'l L. Comm'n, Report of the International Law Commission to the General Assembly, 10th Sess., Apr. 28-Jul. 4, 1958, ¶¶ 31, 33, U.N. Doc. A/2934 (1958).

⁴⁹ Int'l L. Comm'n, Report of the Special Rapporteur Mr. F.V. García-Amador on State Responsibility, 11th Sess., Jun. 1-Jul. 24, 1959, ¶ 35, U.N. Doc. A/CN.4/106 (1959).

⁵⁰ G.A. Res. 799 (VIII), at 4 (Dec. 7, 1953).

⁵¹ Ibid.

⁵² F.V. García-Amador, State Responsibility: International Responsibility, ¶¶ 181-82, U.N. Doc. A/CN.4/96 (1956).

beneficiaries of international law as well as the emergence of responsibility of international organisations attributable to them.⁵³ Thus, Amador argued the need for codification of responsibility needs to be looked in both spheres of responsibility; civil and criminal since a difference had not yet been drawn by then between the two.⁵⁴

First, he elaborated that the traditional concept of responsibility in international law has been premised on the payment of reparations for breach or non-performance of an international obligation.⁵⁵ This was juxtaposed to the concept of liability under municipal law. However, he noted that the responsibility is not only restricted on payment of reparations but extends to other kind of ramifications for such breaches or non-performance of international obligations. These ramifications may be in form of punishment which triggers criminal responsibility. Thus, a breach or non-performance may lead to either a wrongful act or a wrongful act that encompasses an international crime.⁵⁶ Therefore, Amador determined that both civil and criminal responsibility may exist when there is a breach or non-performance of an international obligation. Amador concluded that the law on state responsibility should encompass the rights and interests protected at the time in the development of international law i.e., criminal and civil.⁵⁷

2.4.2. The Work of Special Rapporteur Mr. Roberto Ago (1969–1972, 1976–1980)

The first point of challenge for Special Rapporteur, Mr. Roberto Ago was whether a difference should be drawn on the different types of internationally wrongful acts so as to classify the different breaches to different international obligations.⁵⁸ He indicated that for such a difference to be made then there should be different regimes of responsibility under international law for the purpose of triggering state responsibility.⁵⁹

He acknowledged that before there was only one regime of responsibility acknowledged by jurists which was the classical view.⁶⁰ However, the period between the two world wars seems

⁵³ Int'l L. Comm'n, Documents of the Eighth Session Including the Report of the Commission to the General Assembly, ¶ 176, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957).

⁵⁴ Ibid. ¶ 180.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Int'l L. Comm'n, Summary Records of the 1517th Meeting, 28th Sess., May 3, 1976, ¶ 33, U.N. Doc. A/CN.4/SER.A/1976 (1976).

⁵⁹ Int'l L. Comm'n, Rep. on the Work of Its Twenty-Eighth Session, 28 U.N. GAOR Supp. No. 10, at 52-53, U.N. Doc. A/31/10 (1976).

⁶⁰ Ibid. at 50, ¶ 3.

to have triggered a push for different other regimes as long as breaches of obligations happen that have an effect on the international community as a whole.⁶¹ These included acts such as Genocide, apartheid, and aggression. These kinds of breaches were referred to as international crimes. In that sense, Special Rapporteur, Mr. Roberto Ago's work had to determine whether to adopt the classical view or go beyond to incorporate other regimes or responsibilities such as international criminal responsibility for international crimes. To do so he started by drawing a distinction between delicts and crimes under international law.

He first argued that there were obligations to states and obligations to the whole international community. This argument was a result of the ILC deciding to regulate the different regimes arising from the breach of obligations - on one hand, those that only affect a state and on the other, those that affect the international community as a whole.⁶² The ILC had crafted rules that they regarded as *ius cogens* that could not be derogated by treaty law. Their breach would trigger criminal responsibility upon individuals acting as part of organs of states.⁶³ Thus, Special Rapporteur, Mr. Roberto Ago argued that since there exist rules of *ius cogens* such as acts of crimes against peace, crimes against humanity and war crimes triggered responsibility upon individuals even when acting on behalf of the state, it would be wrong that states should not be held accountable in the same manner of responsibility with those individuals.⁶⁴ That would mean states can easily evade international responsibility. An example is if a state starts a war on aggression and then claims not to be responsible because they have punished individuals responsible domestically when the actions were attributed to the state itself. To apply this example Ago elaborated it would mean giving importance to one form of responsibility over another.⁶⁵ This led to a distinction between the responsibility that would arise over breach of delicts and one that would arise over breach of crimes i.e., responsibility for breach of certain obligations which either the consequences of the substance would lead to a very serious breach compared to others and the second one where the breach has consequences on the fundamental interests of the international community as a whole.

⁶¹ Ibid. at 39, ¶ 66 & 50-51, ¶ 5.

⁶² Georg Nolte, From Dionisio Anzilotti to Robert Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations, 13 Eur. J. Int'l L. 1083, 1084-85 (2002).

⁶³ Ibid. at 1085.

⁶⁴ Int'l L. Comm'n, Summary Records of the 1517th Meeting, 28th Sess., May 3, 1976, ¶ 33, U.N. Doc. A/CN.4/SER.A/1976 (1976).

⁶⁵ Int'l L. Comm'n, Rep. on the Work of Its Twenty-Eighth Session, 28 U.N. GAOR Supp. No. 10, at 52, ¶ 155, U.N. Doc. A/31/10 (1976).

At the twenty-eighth session of the ILC in 1976, the Commission, adopted on first reading the provision of Article 19 Part 1 of the Draft Articles on State Responsibility as proposed by the then Special Rapporteur, Mr. Roberto Ago.⁶⁶ This Article was specifically meant to point out some internationally wrongful acts that are regarded as "international crimes". Examples of these were provided by then to include; aggression, which was a breach of international peace and security obligation, colonial domination which was a breach of the self-determination obligation, slavery, apartheid, and genocide which were breaches of protection of human beings' obligations, and environmental pollution which was a breach of the protection of human environment obligation. However, these examples were non-exhaustive.⁶⁷ The basis of Special Rapporteur to include international crimes of states within the draft articles was that a state that may become a victim of an international wrongful act has a right to not only demand reparation *lato sensu* but also issue sanctions as a form of punishment for the wrongful acts committed against such a state.⁶⁸ This means that such a state would not only use the form of reprisal, but also use force with an afflictive aim, which may be triggered in certain circumstances - such as during aggression or in exercise of the right to self-defense. Thus, the proposal by Special Rapporteur was the application of sanctions for violations of obligations that trigger criminal responsibility over states.⁶⁹ The term "sanctions" was elaborated in the commentary to article 1 part 1 as:

"The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation".⁷⁰

Thus, the proposal made by Special Rapporteur, Mr. Roberto Ago was that criminal responsibility will arise upon a state that is in violation of obligations. These obligations are regarded by the international community as a whole to be international crimes due to them

⁶⁶ Int'l L. Comm'n, Rep. on the Work of Its Twenty-Eighth Session, 28 U.N. GAOR Supp. No. 10, U.N. Doc. A/31/10 (1976).

⁶⁷ Ibid. ¶ 54.

⁶⁸ Int'l L. Comm'n, Eighth Report on State Responsibility, ¶¶ 1-3, U.N. Doc. A/CN.4/318 and Add.1-4 (1979).

⁶⁹ Ibid. ¶ 5.

⁷⁰ Int'l L. Comm'n, Rep. on the Work of Its Twenty-Fifth Session, 25 U.N. GAOR Supp. No. 10, at 176, ¶ 30, U.N. Doc. A/9010/Rev.1 (1973).

being in violation of the fundamental interests of the international community.⁷¹ That being said the appropriate remedy for such a breach would be the imposition of sanctions.

This introduction of the concept of international crime according to Mr. Ago undoubtedly reflected a movement towards more ethics in the international order. He argued that by virtue that international law had given states power to punish crimes of aggression, apartheid and genocide then it was a clear indication that international law had given importance to certain obligations over others thus the need to differentiate the forms of responsibility.⁷² However, traditionally, there was no differentiation of international responsibility, either according to the source of the norm violated being conventional or customary or according to the nature of the norm violated that is, its greater or lesser importance for the maintenance of the legal order.⁷³ On the other hand, it is known that domestic laws clearly differentiate between two types of liability depending on the nature of the norm violated: civil liability entailing an obligation to make reparation, criminal liability entailing the application of a penalty.⁷⁴

It was undoubtedly that kind of analysis that was at the origin of the distinction that had been adopted by the Commission following Ago's proposals. For him, simple reparation is not sufficient for the acts most infringing on the values of international society: "the obligation to make reparation... proposes to realize the situation that would have existed if the crime had not been committed. It is therefore a simple function of reinstatement or compensation that comes out to him. The sanction is of a completely different nature. On the contrary, it has an afflictive or repressive nature."⁷⁵ It was this idea of punishment in addition to reparation when an international crime was committed that Ago had tried to get the Commission to adopt, as he explained in one of his reports:

"So far... liability was essentially defined as civil liability. The question is whether all internationally wrongful acts do not reveal a category of acts whose nature and consequences may be different, facts for which it is unthinkable, inter alia, to be satisfied with a simple reparation. This is the case, for example, of certain international crimes such

⁷¹ Int'l L. Comm'n, Eighth Report on State Responsibility, ¶ 5, U.N. Doc. A/CN.4/318 and Add.1-4 (1979).

⁷² Int'l L. Comm'n, Rep. on the Work of Its Twenty-Eighth Session, 28 U.N. GAOR Supp. No. 10, at 58, ¶ 66, U.N. Doc. A/31/10 (1976).

⁷³ Ibid. at 58, ¶ 65.

⁷⁴ Ibid. at 58, ¶ 67.

⁷⁵ Int'l L. Comm'n, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, ¶ 70, U.N. Doc. A/CN.4/246 and Add.1-3 (1971).

*as the violation of certain obligations essential to peacekeeping, aggression in particular or, in other areas, genocide."*⁷⁶

Initially, Ago seems to have proposed the idea of state criminal responsibility without clear precedents or authority to draw on.⁷⁷ When Article 19 was proposed and adopted, there were no prior judicial decisions confirming that states could be held criminally responsible under international law. Ago acknowledged the lack of definitive international judicial or arbitral decisions distinguishing between state crimes and delicts. He referred to certain cases involving reprisals or countermeasures as indirect support for such a distinction, and emphasized the "essential distinction" made by the International Court of Justice in the *Barcelona Traction* case between obligations owed to particular states versus obligations owed to the international community as a whole.⁷⁸ According to Ago, this passage presents an important argument supporting the theory that there are two separate regimes of international responsibility depending on the subject-matter of the breached international obligation. Thus, he suggested that there are two different types of internationally wrongful acts of the state. Those that trigger criminal responsibility and delicts.

However, the idea of criminal responsibility of states was gradually abandoned, in the face of the reluctance of States such as to be subject to international punishment for crimes committed. For example, States like China argued that it is unrealistic and impracticable to have criminal responsibility of states when all states are equal and thus no organ exists to punish states.⁷⁹ Sovereign States, which were too reluctant to incur a "punishment", while accepting the distinction between crimes and delicts in the Commission's draft had hardly drawn any decisive conclusions.⁸⁰ Prior to World War II, responses to the League of Nations' efforts to codify rules on injuries to foreigners reveal that states did not differentiate responsibility regimes based on the importance of obligations violated.⁸¹ For instance, replies to the 1930 Hague Conference show governments unanimously accepted breaches require reparation, though they did not preclude other responses like reprisals.⁸² States also recognized multiple

⁷⁶ Ibid. at ¶ 71.

⁷⁷ Crawford, James. "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect." *The American Journal of International Law* 96, no. 4 (2002): 874-90.

⁷⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 3.

⁷⁹ Press Release GA/L/3089 21st Meeting (AM) 5 November 1998.

⁸⁰ Comments and Observations Received from Governments, 25 March 1998, Doc. A/CN.4/488, at 58.

⁸¹ League of Nations, Acts of the Conference, p. 237.

⁸² League of Nations, Bases of discussion, pp. 128-129.

forms of “reparation” suited to circumstances.⁸³ Still, they did not connect the gravity of obligations breached to applicable responsibility or admissible responses.⁸⁴

The post-WWII period indicates definitive movement towards differentiating responsibility per the importance of rules violated – what Special Rapporteur Roberto Ago later classed as ordinary breaches versus international crimes.⁸⁵ By the 1986 Draft Articles, violations of essential obligations like aggression incurred heightened responsibility forms for states, including penalties beyond reparation.⁸⁶ This reflected firm consolidation that especially serious breaches warranted not just invoking responsibility, but harsher consequences.

In essence, state practice progressed from a uniform responsibility doctrine to a bifurcated approach sanctioning states themselves for violations of fundamental norms, inaugurating the concept of “state crimes” in modern international law.⁸⁷

2.4.3. *The Work of Special Rapporteur Wilhelm Riphagen (1980–1986) and Gaetano Arangio-Ruiz (1988–1989, 1991–1996)*

The next Special Rapporteur, the Dutchman Wilhelm Riphagen, worked on the second part of the Project, concerning the content, forms, and degrees of international responsibility, and the third part, concerning the implementation of liability and the settlement of disputes, from 1980 to 1986, and presented seven reports to the Commission.⁸⁸ When W. Riphagen's mandate expired, the ILC approved five new articles, providing for some consequences in the event of a state crime.⁸⁹

From 1987 to 1996, the next Special Rapporteur, the Italian Gaetano Arangio-Ruiz, took up and revised W. Riphagen's work, presenting eight reports on the second and third parts of the project. Before resigning from his position, he paid special attention to the consequences of the crimes. The fourth report, dedicated to general consequences of the wrongful act, is central to G. Arangio-Ruiz's work.⁹⁰ The fifth report and Add.2-3, the sixth report and Add.1, the seventh

⁸³ League of Nations, Bases of discussion, p. 20.

⁸⁴ League of Nations, Acts of the Conference, p. 237.

⁸⁵ Yearbook... 1976, vol. II(2), pp. 95-96, document A/CN.4/291 and Add.1 and 2.

⁸⁶ Yearbook..., 1986, vol. II(2), pp. 24-25, document A/CN.4/397 and Add.1.

⁸⁷ Crawford, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect, p. 884.

⁸⁸ Int'l Law Comm'n, Report of the Int'l Law Comm'n on the Work of Its Thirty-Eighth Session, UN GAOR, 41st Sess., Supp. No. 10, at 40, UN Doc. A/41/10 (1986).

⁸⁹ Ibid. At 65

⁹⁰ G. Arangio-Ruiz, Fourth Report on State Responsibility, in 1992 Yearbook of the Int'l L. Comm'n, vol. II, pt. 1, U.N. Doc. A/CN.4/444, at 1.

report and Add.1 containing articles 15-20 governing the consequences of crimes and Add.2 containing draft article 7 of part III, concerning the consequences of non-execution of a criminal sanction, as well as the eighth report, are all specifically devoted to the consequences of crimes.⁹¹ In particular, draft article 19 of part two, contained in the seventh report Add.1, provided for the possibility of unilateral recourse to the ICJ by the State victim of the crime, following the authorization of the SC or the GA, whereas draft article 7 of part three, contained in the seventh report Add.2, introduced the possibility of unilateral recourse to the ICJ by the injured State in the event of violation of the criminal sanction.⁹² On first reading in 1996, the ILC approved the full text of the Draft Articles on State Responsibility.

2.4.4. The Work of Special Rapporteur Mr. James Crawford (1998–2001)

From 1997 the Project advanced under the overall revision of the fourth Rapporteur; James Crawford, who led the Commission to the adoption of the new text on second reading, at the 53rd session, in 2001. The ILC submitted the text of the Draft definitively adopted, on second reading, in 2001, at the GA, recommending “to take note of the Draft on the responsibility of the State for internationally wrongful acts in a resolution and to annex the Draft to the resolution” and considered “the possibility, at a later stage and in view of the importance of the subject, of convening an international conference of plenipotentiaries to consider the Draft Articles on State Responsibility with a view to their adoption”.⁹³

In December 2001, through Resolution 56/83, the UN General Assembly took note of the Draft Articles on Responsibility of States for Internationally Wrongful Acts presented by the International Law Commission. The resolution had been formulated by the Sixth Committee based on its Report A/56/589. While annexing the text of the Articles to the resolution, the GA recommended that the text be brought to the attention of governments without prejudice to their possible adoption or any other appropriate action. In other words, the resolution served to disseminate the Draft Articles prepared by the ILC, but did not itself adopt or endorse them, leaving open options for future adoption or other treatment by individual states. Furthermore,

⁹¹ G. Arangio-Ruiz, Fifth Report on State Responsibility, 1993, U.N. Doc. A/CN.4/453 and Add. 1–3, U.N. Docs. A/CN.4/453; G. Arangio-Ruiz, Sixth Report on State Responsibility, 1994, U.N. Doc. A/CN.4/461 and Add. 1–3, U.N. Docs. A/CN.4/461; G. Arangio-Ruiz, Seventh Report on State Responsibility, 1995, U.N. Doc. A/CN.4/469 and Add. 1–2, U.N. Docs. A/CN.4/469; G. Arangio-Ruiz, Eighth Report on State Responsibility, 1996, U.N. Doc. A/CN.4/476 and Add.1, U.N. Docs. A/CN.4/476.

⁹² G. Arangio-Ruiz, Seventh Report on State Responsibility, 1995, UN Doc. A/CN.4/469 & Add. 1–2, UN Doc. A/CN.4/469.

⁹³ ILC, Rep. on the Work of its Fifty-Third Session, Apr. 23–June 1 and July 2–Aug. 10, 2001, in AG, Doc. UN GAOR, 56th Sess., Supp. No. 10, A/56/10, ¶¶ 72–73 (2001).

the GA decided to include in the provisional agenda of its fifty-ninth session (2004) an item entitled 'State responsibility for internationally wrongful acts'.⁹⁴ In accordance with Resolution 56/83, the preliminary list of issues included in the provisional agenda of the fifty-ninth regular session of the GA provides, under item 143, the issue of “State responsibility for internationally wrongful acts”.⁹⁵ At the fifty-ninth session, following the Draft Resolution proposed by the Sixth Committee, the GA adopted Resolution 59/35 (based on the report of the Sixth Committee A/59/505) of 2 December 2004, recommending the articles on State responsibility for the attention of Governments, without prejudging the question of their future adoption or other appropriate decision and placed the question on the agenda of the sixty-second session.⁹⁶

The second complete reading of the Draft, adopted, in final way, in August 2001, under the direction of James Crawford, and submitted to the attention of the UNGA, erased article 19 from the context of the Project, following a long and lively debate.⁹⁷

2.4.4.1.Criticism of the Article

The removal of Criminal Responsibility of States in the draft Articles on state responsibility was as a result of a debate that saw comments from the special rapporteur and states representative.⁹⁸ Crawford pointed out that there is a noticeable difference between the seriousness attributed to an international crime committed by a state, as expressed in Article 19 of the Draft Articles, and the relatively limited consequences outlined in Articles 51 to 53. Additionally, there is a further contrast between the strong procedural protections associated with countermeasures under Article 48 and part three, and the complete absence of procedural guarantees linked to international crimes.⁹⁹ He elaborated that the definition of international crimes as provided under Article 19(2) of the draft articles has a circular nature which had been acknowledged. However, he argued that it is no more circular than the definition of peremptory norms of general international law (*ius cogens*) stated in Article 53 of the 1969 Vienna

⁹⁴ GA Res. 59/35, Responsibility of States for Internationally Wrongful Acts (Dec. 2, 2004).

⁹⁵ GA Res. 56/83, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2001), reprinted in [vol #] Y.B. Int'l L. Comm'n [part IV] 43 (2001)

⁹⁶ GA Res. 59/35, Recommendation of the International Law Commission's Articles on State Responsibility, UN Doc. A/RES/59/35 (Vol. I) (Dec. 2, 2004), reprinted in [vol #] Y.B. Int'l L. Comm'n [part II] 128, 129 (2004).

⁹⁷ ILC, Rep. on the Work of Its Fifty-Third Session, April 23-June 1, and July 2-August 10, 2001, UN GAOR, 56th Sess., Supp. No. 10, A/56/10, 44-60 (2001).

⁹⁸ Y.B. Int'l L. Comm'n, vol. II, pt. I, 1980, p. 87, U.N. Doc. A/CN.4/328 & Add.1-4.

⁹⁹ James Crawford, First Rep. on State Responsibility, Special Rapporteur, Int'l L. Comm'n, U.N. Doc. A/CN.4/490 & Add. 1-7 (1998).

Convention, which is widely accepted.¹⁰⁰ Alternatively, he argued that the category of 'crimes' could be defined in other ways. One approach could be to differentiate 'crimes' from 'delicts' based on the presence of a specific system for investigation and enforcement. Another possibility is to distinguish them by the substantive consequences they entail, with 'delicts' being breaches of obligations that only lead to compensation or restitution, while crimes involve fines or other sanctions.¹⁰¹ However, he noted that Article 19, paragraph 2, did not adopt either of these approaches. Paragraph 2 of Article 19 stated: "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." Furthermore, he noted that the draft articles did not specify any distinct or exclusive consequence of an 'international crime,' nor do they establish an authoritative procedure for determining the commission of a crime.¹⁰²

Crawford further argued that even advocates of the principle underlying Article 19 strongly criticized paragraph 3, and that their concerns were justified.¹⁰³ Paragraph 3 provided a non-exhaustive list of examples like aggression, genocide, and apartheid that "may result" in international crimes. Crawford first criticized the definition provided was misleading and vague. He argued that it suggested that a crime "may result" from one of the listed acts in Article 19(3), without clearly specifying the conditions under which it would qualify as a crime.¹⁰⁴ Secondly, while it acknowledged the role of paragraph 2 and unspecified "rules of international law in force," it failed to provide concrete guidance on how these factors determine whether a breach constituted a crime. Thus, it lacked specificity and clarity.¹⁰⁵ Crawford argued that the problem did not lie in the inclusive nature of paragraph 3, as it was expected to be so, but rather in its failure to guarantee that the enumerated breaches would indeed be considered crimes if proven.¹⁰⁶ The determination of whether they "may" constitute crimes depended on various factors, including "the rules of international law in force."¹⁰⁷ Although the draft articles, including Article 19, paragraph 3, were not intended to restate primary rules, it was important to avoid creating the impression that they did. Lastly, Crawford

¹⁰⁰ James Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 (2000), 384-85.

¹⁰¹ Ibid. 385.

¹⁰² Ibid.

¹⁰³ James Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 (2000), ¶ 386.

¹⁰⁴ Ibid., ¶ 387.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., ¶ 388.

¹⁰⁷ Ibid.

argued that the subparagraphs within paragraph 3 were disjointed both in their content and their relationship to existing international law.¹⁰⁸ Considering that paragraph 3 served an illustrative role and lacked independent normative content, it would have been more appropriate to replace it with a more detailed commentary, provided the distinction between crimes and delicts was maintained in the draft articles. Crawford asserted that paragraph 3 of the articles could be linked back to paragraph 2. However, paragraph 3 introduced a new aspect by focusing on the seriousness of breaching the norms rather than emphasizing their importance. While paragraph 2 highlighted the essential norms for protecting the fundamental interests of the international community, paragraph 3 considered only "serious" breaches as crimes, sometimes qualified by phrases like "on a widespread scale" or "massive." Crawford noted that international law did not specifically prohibit "widespread" cases of genocide; it simply prohibited genocide itself. Therefore, paragraph 3 introduced an additional element of seriousness to the breach independent of the legal definition of the crime.¹⁰⁹ It was common for criminal law norms to incorporate a definitional element corresponding to the scale or seriousness of the prohibited conduct, but paragraph 3 seemed to introduce an unspecified additional element of seriousness. Overall, the two paragraphs could be interpreted as stating that if an act of aggression or genocide was considered so serious by the international community that it was stigmatized as criminal, then it should be regarded as a crime. However, this interpretation did not provide a definition of international crimes.¹¹⁰

2.4.4.2. Decriminalisation of Responsibility of States

Crawford believed that addressing the question of state crimes for the future is unnecessary and unfeasible.¹¹¹ While some emerging practice supports this idea, except for the crime of aggression, there is currently no comprehensive system to handle the criminal behavior of states.¹¹² The absence of a coherent system, both in terms of procedure and substance, is equally significant.¹¹³ It is unlikely that the draft articles alone can fill this gap since they have other important issues to address and overburdening them would increase the risk of outright failure. On the other hand, Crawford noted that the concepts of obligations *erga omnes* (obligations to

¹⁰⁸ Ibid., ¶ 389.

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ James Crawford, First Rep. on State Responsibility, Special Rapporteur, Int'l L. Comm'n, UN Doc. A/CN.4/490 & Add. 1-7 (1998), 66-67.

¹¹² Nina H. B. Jørgensen, *The Responsibility of States for International Crimes* 23-25 (Oxford University Press 2000).

¹¹³ James Crawford, First Rep. on State Responsibility, Special Rapporteur, Int'l L. Comm'n, UN Doc. A/CN.4/490 & Add. 1-7 (1998), 66-67.

the international community as a whole) and non-derogable norms (*ius cogens*) should be appropriately incorporated into the draft articles.¹¹⁴ This inclusion did not mean reintroducing the idea of "international crimes" under a different name.¹¹⁵ In the past, the general framework of state responsibility has covered various breaches of international law, including the most serious ones.¹¹⁶ He opined that international organizations, specifically organs such as the Security Council, are not the exclusive authority for addressing the most severe breaches.¹¹⁷ States, in solidarity with those directly affected, also have a role to play. Thus, Crawford argued that like any legal system, international law has the ability to separate the issue of criminal responsibility of legal entities from matters that arise under general obligations.¹¹⁸ Although there may be connections between the two categories, they remain distinct. The general law of obligations operates independently of criminal justice administration. Under this system, the law of obligations covers a wide range of offenses, including serious breaches of obligation that may also qualify as crimes. Crawford indicated this approach was considered the most suitable and coherent solution to address the problem of international crimes raised by Article 19, as it allows for the possibility of seeking compensation through an order for redress after determining guilt, without undermining other serious breaches of international law that coexist in the draft articles.¹¹⁹

2.4.4.3.Crawford Recommendations

Given the aforementioned reasons, Crawford argued that the acknowledgment of the concept of "international crimes" would have marked a significant milestone in the advancement of international law. The draft articles by then failed to adequately address the concept and its implications for the international legal system, and it therefore was unrealistic to have expected them to do so. Crawford thus recommended that the subject necessitated separate consideration, either by the ILC, if entrusted with this task by the Sixth Committee, or by another relevant body. Crawford advised that articles 19 (and consequently, articles 51 to 53) be removed from the draft articles. In the context of the second reading of part two, article 40, paragraph 3, be reevaluated, among other things, to address the issue of breaches of obligations *erga omnes*. However, the important aspect was that Crawford indicated that it should have

¹¹⁴ Ibid., pp. 66-69.

¹¹⁵ Ibid., p. 69.

¹¹⁶ Malcolm N. Shaw, *International Law* 780-783 (Cambridge University Press, 6th ed. 2008).

¹¹⁷ James Crawford, *First Rep. on State Responsibility*, Special Rapporteur, Int'l L. Comm'n, UN Doc. A/CN.4/490 & Add. 1-7 (1998), 70.

¹¹⁸ Ibid., pp. 70-71.

¹¹⁹ Ibid., pp. 71-73.

been understood that excluding the notion of "international crimes" committed by states from the draft articles did not prejudice (a) the scope of the draft articles, which would have continued to encompass all breaches of international obligations regardless of their origin, and (b) the concept of "international crimes of states" and its potential future development, either as a distinct topic for the ILC or through state practice and the practices of relevant international organizations.

3. THE CURRENT CONCEPT OF RESPONSIBILITY FOR INTERNATIONAL CRIMES

The adoption of the draft articles on State responsibility resulted in a distinction between two different types of responsibility under international law: State responsibility for internationally wrongful acts and individual criminal responsibility for international crimes. The application of state responsibility for internationally unlawful conduct will not be hindered by an individual's criminal responsibility, according to the Rome Statute of the International Criminal Court.¹²⁰ The Draft Code of Crimes against Peace and Security of Mankind has previously made this clear.¹²¹ Furthermore, it is made explicit in the Articles on State Responsibility that the exercise of individual criminal responsibility will not be hampered by state responsibility.¹²² As a result, there might be concurrent State and individual responsibilities for wrongdoing or criminal behavior.

3.1. Individual Criminal Responsibility

Several international law documents were developed following World War II to address individual criminal responsibility. The Nuremberg and Tokyo Military Tribunal Statutes gave way to the ICTY and ICTR statutes, which dealt with particular instances, in the evolution of these documents. The comprehensive Principles of International Law were developed based on the legislation and decision of the Nuremberg Tribunal during this time as a result of the International Law Commission's (ILC) work on defining comprehensive and fundamental standards for international criminal law. The International Law Commission (ILC) also prepared the Statute for the International Criminal Court (ICC) and the Draft Code of Crimes against the Peace and Security of Mankind. The Statute of the ICC, which was greatly

¹²⁰ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002, Article 27.

¹²¹ Draft Code of Crimes against the Peace and Security of Mankind 1996, Article 4.

¹²² International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, UN Doc. A/56/10, 43 I.L.M. 20 (2004), (Articles on State Responsibility), article 58.

influenced by the Draft Code of Crimes against Peace and Security of Mankind but was not implemented, became a law once the treaty was signed in Rome in 1998.

The prospect of holding corporations liable for international crimes proved deeply polarizing during ICC negotiations. France spearheaded demands to enable prosecuting legal persons, arguing companies could perpetrate atrocities akin to individuals.¹²³ Nations like Algeria and Jordan supported France's initiative to empower the ICC to directly try corporate entities.¹²⁴ However, many states fiercely opposed this vision. China, Mexico, Sweden and others warned of due process difficulties in assigning criminal culpability to corporations.¹²⁵

Ultimately France secured preliminary adoption of draft provisions granting the ICC jurisdiction over legal persons.¹²⁶ The Rome Conference Working Group text even suggested societal responsibility for collective criminal conduct.¹²⁷ Still, staunch disagreements meant this ground-breaking move was short-lived. Wary of limiting state ratifications, France's proposal was abandoned in the final ICC Rome Statute.¹²⁸ Nonetheless, the debate spotlighted how extending international criminal responsibility beyond individuals alone requires surmounting towering doctrinal hurdles among nations. 20 years later, France still maintains companies warrant accountability alongside human perpetrators.¹²⁹ But the failed bid to enable corporate prosecutions by the ICC itself reflects the enduring complexity of this agenda.

As it stands, the current framework provides for individual criminal responsibility over international crimes such as Genocide, Crimes against Humanity, War Crimes and Aggression, which are prosecuted by the permanent court of the ICC. Since the Nuremberg trials, the responsibility for these crimes has been individualized and remains so to date. Therefore, states are not held criminally responsible within the current regime of international criminal responsibility but are only held internationally responsible for international wrongful acts under the law on state responsibility.

¹²³ France, Proposal of Art. 17 on Individual Criminal Responsibility, Apr. 2, 1998, A/AC.249/1998/DP.14.

¹²⁴ Ibid.

¹²⁵ Report of the Preparatory Committee for the ICC, Apr. 14, 1998, A/CONF.183/2/Add.1.

¹²⁶ Ibid.

¹²⁷ Working Group Report on General Principles of Criminal Law, July 6, 1998, A/CONF-183/C-1/WGPP/L-4/Add-1.

¹²⁸ Ibid.

¹²⁹ Statement of France to 18th ASP Session on Amendments, Dec. 6, 2019, ICC-ASP-18-FRA-ENG-06122019.pdf.

3.2.State Responsibility

Draft Article 19, which addressed the criminal liability of states, was eliminated from the final version of ARSIWA as a consequence of the ILC study on responsibility. As a result, there is now a difference between the two regimes when it comes to international crimes, notably in terms of individual and state responsibility under the Articles on State Responsibility. The final framework was broken down into four sections: the first section dealt with the state's internationally wrongful acts; the second section dealt with the content of international responsibility; the third section dealt with how international responsibility was to be put into practice; and the fourth section dealt with general provisions. This final version adhered to the general theory of responsibility put forth in previous ILC readings, but with a simplified text. However, it deviated somewhat from the formulation of criminal responsibility.¹³⁰

When determining the degree of responsibility for an offense based on the structure of the act, a distinction is made between offenses that are generally illicit and those that violate peremptory norms of international law (*ius cogens*). Chapter III of the text, specifically Article 40, only applies to cases where a state seriously breaches an obligation arising from a peremptory norm of general international law. A breach of such an obligation is considered serious if it indicates a flagrant or systematic failure on the part of the responsible state to fulfill its obligation. The violation of *ius cogens* is not differentiated based on the severity of the offense in the Draft Articles, which creates a uniform categorization of *ius cogens* breaches rather than distinguishing gradations of severity. This includes violations of peace, self-determination of peoples, and certain fundamental human rights that have attained *jus cogens* status such as prohibitions on genocide, slavery, torture and racial discrimination. However, not all human rights violations automatically equate to breaches of peremptory norms. The Draft Articles adopt an expansive notion of *ius cogens* that encompasses various serious breaches, without delineating their relative gravity.

The 1996 Draft does not clearly define the content of *ius cogens*, relying on an existing, purely formal notion.¹³¹ The sanctions regime in the second part of the Draft applies uniformly to all international offenses by States¹³² and includes the cessation of wrongful conduct, reparation,

¹³⁰ James Crawford, First Rep. on State Responsibility, UN Doc. A/CN.4/490 & Add. 1, 2/Rev. 1, 3-7 (1999), 1-11.

¹³¹ James Crawford, Second Report on State Responsibility, U.N. Doc. A/CN.4/498 and Add.1-4 (1999), art. 26, ¶ 1.

¹³² J. Crawford, Fourth Rep. on State Responsibility, U.N. Doc. A/CN.4/517 & Add. 1, 18 §§ 43-23 (2002).

restitution, compensation, and satisfaction.¹³³ Countermeasures, described in Part Three of the Draft, are an ordinary procedure to be used in case of violation of international obligations.¹³⁴ Only the concerned State or group of States can react with countermeasures if there is a violation of a bilateral or plurilateral obligation, responding to stop the illicit conduct and provide reparation, as outlined in articles 42, 48, and 54.

If a norm of *ius cogens* is violated, Article 41 of the relevant chapter outlines specific consequences. It states that all states must cooperate to bring an end to any serious breach of the obligation by lawful means. Additionally, no state can recognize a situation created by such a breach as lawful or provide assistance in maintaining the situation. Other repercussions described in the same chapter or any extra consequences resulting from the breach under international law are not superseded by this article. *Ius cogens* violations fall under two categories in terms of the procedural repercussions of the offense. The first is that all nations have a responsibility to work together to put an end to the wrongdoing,¹³⁵ and all nations have the right to do so.¹³⁶

The second characteristic of the consequences of violating *ius cogens* pertains to the inability of third-party states to acknowledge the legality of such a violation. This was already anticipated in the 1996 Draft, but it is not very significant because it is unlikely that any state would disregard the illegality of the act, even if it were a minor violation. The issue at hand is not the seriousness of the obligation breached, but rather the form of the violation. The relevance here is that certain *ius cogens* norms, such as prohibitions on genocide, crimes against humanity, and aggression, are also considered international crimes under treaty and customary law. Violating these peremptory norms may thus give rise to individual criminal responsibility. While the Draft Articles focus on state responsibility, the connection to international crimes underscores the gravity and community-wide interests involved when core *ius cogens* norms are breached. Given these considerations, the doctrine notes that the Draft reflects a unified view of international offenses in terms of the distribution of State responsibility.¹³⁷

¹³³ Dinah Shelton, Righting Wrongs: Reparations in the Articles on State Responsibility, 96 Am. J. Int'l L. 833 (2002).

¹³⁴ D.J. Bederman, "Contra-Intuiting Countermeasures," 96 Am. J. Int'l L. 817 (2002).

¹³⁵ Articles on Responsibility of States for International Wrongful Acts, 2002, Article 41(1).

¹³⁶ Ibid. Articles 42 (1) (b), 48 (1) (b), and 54.

¹³⁷ Georges Abi-Saab, The Uses of Article 19, 10 Eur. J. Int'l L. 340 (1999).

3.3 Current Arguments for and against Incorporating State Criminality

3.3.1. Incompatibility of the Criminal Model with the Egalitarian structure of International Law.

Challengers

Some authors expressed concerns about the compatibility of applying criminal liability to states with the decentralized and egalitarian structure of international law. They questioned whether the criminal model, which relies on legislators designating crimes and judges enforcing responsibility, could fit into a system involving the coexistence of equal sovereigns.¹³⁸ These authors saw the absence of a higher authority in international law with the power to define crimes, judge violations, and punish state offenders as an insurmountable obstacle to transferring criminal law concepts to the international level.¹³⁹ Additionally, the principle of sovereign equality was seen as precluding one state from criminally punishing another, as reflected in the adage "equals have no sovereignty over each other".¹⁴⁰ There were also doubts raised about whether an impartial third party could be conceived to judge state criminality in an international system defined by competing national interests.¹⁴¹ Overall, these arguments emphasized the conceptual and practical difficulties of reconciling criminal responsibility of states with the fundamental doctrines and decentralized nature of the international legal order.

Proponents

The notion of holding states criminally liable under international law has garnered support from some legal scholars, who contend that there are no inherent theoretical barriers to this possibility.¹⁴² Proponents acknowledge the decentralized nature of the international system and the lack of a higher governing authority, but argue this does not necessarily preclude criminal responsibility.¹⁴³ They point out that the absence of hierarchical authority has not prevented the emergence of an international legal order with recognized rules and norms.¹⁴⁴ Within domestic legal systems, it is accepted that victims can initiate criminal proceedings against perpetrators despite there being no overarching power over them.¹⁴⁵ By analogy, it is argued

¹³⁸ Bernhard Graefrath, *International Crimes – A Specific Regime of International Responsibility of States and its Legal Consequences*, in *International Crimes of State* 163 (Josef Mestmacker ed., 1989).

¹³⁹ George Schwarzenberger, *The Problem of an International Criminal Law*, 3 *Current Legal Probs.* 267 (1950).

¹⁴⁰ Michael Akehurst, *Jurisdiction in International Law*, 46 *Brit. Y.B. Int'l L.* 145, 189 (1972-1973).

¹⁴¹ Antonio Cassese, *International Criminal Law* 58-59 (2003).

¹⁴² Brownlie, Ian. "State Responsibility Part I." 16 *Int'l & Comp. L.Q.* 856 (1967).

¹⁴³ Gilbert, Geoff. "The Criminal Responsibility of States." 39 *Int'l & Comp. L.Q.* 352 (1990).

¹⁴⁴ Acquaviva, Guido. "Corporate Criminal Liability Under International Law." 34 *Fordham Int'l L.J.* 520 (2011).

¹⁴⁵ ANTONIO CASSESE, *INTERNATIONAL LAW* 364 (Oxford Univ. Press 2005).

that an injured state could legitimately demand punishment against a state that committed legal wrongs against it.¹⁴⁶ Just as individuals have recourse under municipal law, states within the horizontal international order should be able to pursue criminal sanctions as an injured party. Furthermore, advocates contend that international criminal responsibility is consistent with the horizontal structure of international relations.¹⁴⁷ In the absence of a higher authority, states interact as equals and are responsible to each other for adhering to international rules.¹⁴⁸ Allowing punitive measures would uphold this horizontal accountability.¹⁴⁹ Overall, proponents believe that the lack of a central authority does not conceptually preclude holding states criminally liable under international law.

3.3.2. The principle *societas delinquere non potest*

Challengers

Traditionally, under domestic legal systems, collective entities like corporations were not subject to criminal liability due to their abstract nature as legal persons.¹⁵⁰ Some experts have raised two key obstacles to holding states criminally responsible under international law: a) they argue that only individuals should face accountability for "crimes," not the state which is merely an instrumentality for their actions (with only government organs potentially bearing criminal responsibility);¹⁵¹ b) since the state is a collective entity, it cannot be subjected to criminal penalties like imprisonment or severe punishments designed for natural persons.¹⁵² This view is reflected in the statement from the Nuremberg Tribunal that individuals, not abstract entities, commit crimes requiring punishment under international law.¹⁵³ According to this perspective, the collective nature of the state makes it inherently incompatible with criminal liability.

Proponents

¹⁴⁶ Ibid.

¹⁴⁷ Diehl, Paul F., Charlotte Ku, and Daniel Zamora. "The Dynamics of International Law: The Interaction of Normative and Operating Systems." 57 Int'l Org. 61 (2003).

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ International Law Commission, Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, Jan. 1995, UN Doc. A/CN.4/L.512, ¶ 260.

¹⁵¹ Leopoldo J. Vilarino Pintos, Bases for a Theory of Criminal Responsibility of States in International Law, in Individual and State Responsibility for International Crimes 370, 370-72 (Eugenia López-Jacoiste ed., 2019).

¹⁵² Antonio Cassese, On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 Eur. J. Int'l L. 2, 4 (1998).

¹⁵³ Judgment of the International Military Tribunal at Nuremberg, Trial of Major War Criminals before the International Military Tribunal, Nuremberg, Nov. 14, 1945-Oct. 1, 1946, 1 International Military Tribunal 235 (1947).

In respect of the argument on the principle of *societas delinquere non potest* proponents argue that the argument seems disconnected from the reality of the international community, since states do appear capable of conduct that undermines foundations of international society. Moreover, some criminal acts like aggression seem to inherently require state machinery.¹⁵⁴ Some argue that criminally prosecuting states is misguided, since states cannot possess criminal intent or face imprisonment like individuals. However, states may still engage in socially dangerous conduct violating core community values. While states have civil responsibility for international wrongs, some scholars contend that criminal responsibility should not be ruled out if states perpetrate serious international offenses equivalent to domestic crimes.¹⁵⁵

The principle that collective entities cannot have criminal liability has been overturned in some domestic legal systems, which now recognize corporate criminal liability. For example, the United States and United Kingdom both passed laws in the early 20th century imposing criminal liability on corporations for acts like fraud, antitrust violations, and regulatory offenses.¹⁵⁶ Just as corporations are capable of serious criminal offenses domestically, especially in economic/financial realms, scholars like Pellet argue that states could also perpetrate genuine "international crimes" in the international sphere that warrant punitive measures beyond civil reparations.¹⁵⁷ Some argue that extending the possibility of criminal liability beyond just individuals to collective entities like states represents an advancement in international law, not a regression.¹⁵⁸ The evolution of domestic corporate criminal liability demonstrated that collectives can engage in serious criminal wrongdoing threatening society's interests. In *Ayyash et. al*, the Special Tribunal for Lebanon (STL) held the television Network Al Jadeed for contempt of court and obstruction of Justice.¹⁵⁹ The appeals Chamber affirmed that the STL had inherent right to hold legal persons in contempt based on the principle of effectiveness and the interpretation of the STL Statute and International Human Right Law.¹⁶⁰

¹⁵⁴ International Criminal Court, Assembly of States Parties, Elements of Crimes, including draft Elements of Crimes for crimes of aggression (art. 8bis), ICC-ASP/16/20, vol. III (2017)

¹⁵⁵ André Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law, 52 Int'l & Comp. L.Q. 639 (2003)

¹⁵⁶ Celia Wells, Corporations and Criminal Responsibility 1-5 (Oxford University Press 2001).

¹⁵⁷ Alain Pellet, Can a State Commit a Crime? Definitely, Yes!, 10 Eur. J. Int'l L. 425 (1999).

¹⁵⁸ A. Lang, Crime and Punishment: Holding States Accountable, 21 Ethics & Int'l Aff. 239 (2007).

¹⁵⁹ F. De Jong, International Corporate Criminal Liability at the Special Tribunal for Lebanon: Prosecutor v. Karma Al Khayat and Al Jadeed, Peace Palace Library (2015).

¹⁶⁰ Al Jadeed S.A.L. & Ms Khayat (STL-14-05) Available at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05>

The Appeals chamber also noted that there is a growing trend towards recognizing corporate criminal liability in domestic and international law.¹⁶¹

In that light, limiting international criminal responsibility solely to individuals while absolving states seems outdated. Just as domestic law evolved to hold organizations criminally accountable for offenses like fraud and environmental crimes, international law should also adapt by recognizing that states can perpetrate grave "crimes" against the global community warranting punitive consequences beyond compensation.¹⁶² From this view, the exclusion of states from international criminal accountability represents an unjustified gap in the law that progress requires filling. However, counterarguments note key differences between states and corporations that could make this domestic to international analogy imperfect. Corporate criminality cannot be directly analogous as a basis for state criminality due to fundamental differences in the nature of a state versus a corporation as a legal entity. Unlike a corporation, which is a legal fiction acting through culpable officers, a state as a sovereign "abstract entity cannot as such possess a criminal intent or face criminal fault in the sense of domestic or national law."¹⁶³ Additionally, international law lacks elaborate codified criminal codes for state conduct equivalent to those faced by corporations domestically.¹⁶⁴ The very remedies associated with criminalization like custodial sentencing also do not apply literally to amorphous state entities as they could toward an individual corporate officer.¹⁶⁵ Hence, state responsibility generally occurs through alternative civil frameworks better suited to the complexity of evaluating wrongful state breaches of international obligations that lack the personal criminal intent required in domestic corporate criminality.¹⁶⁶

3.3.3. Impossibility of A *Mens Rea* of The State.

Challengers

Related to the nature of states is the issue of *mens rea*, or criminal intent. While the actions of state officials may be attributed to the state for reparations in civil contexts, some argue this

¹⁶¹ Ibid.

¹⁶² Philip Pettit, Responsibility Incorporated, 117 Ethics 176 (2007).

¹⁶³ Vilarino Pintos, Leopoldo J. "Bases for a Theory of Criminal Responsibility of States in International Law." In Individual and State Responsibility for International Crimes, edited by Eugenia Lopez-Jacoiste, 370-72 (2019).

¹⁶⁴ Kai Ambos, Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis — From Nuremberg to the Hague, in Substantive and Procedural Aspects of International Criminal Law 1, 1–31 (2000). https://doi.org/10.1163/9789004531413_002.

¹⁶⁵ S. Fleming, Leviathan on trial: Should states be held criminally responsible? 13 Int'l Theory 432 (2021).

¹⁶⁶ Ibid.

principle does not translate to criminal responsibility.¹⁶⁷ Since states cannot possess a criminal mind or intent, a key requirement for criminal liability is absent.¹⁶⁸ The notion of *mens rea* suggests states cannot meet the mental element required to impose criminal punishment, as they lack capacity for conscious awareness or decision-making.¹⁶⁹ This view holds that the fundamentally different standards of culpability between criminal and civil spheres make state criminal responsibility incompatible with legal doctrine on the mental state of offenders.

Proponents

Some authors have countered that it is possible to conceive of a notion analogous to criminal intent when examining state actions.¹⁷⁰ Under this view, the state apparatus can be regarded as possessing some form of intentionality and deliberate will, including deceptive conduct associated with criminality.¹⁷¹ Just as legal entities like corporations are deemed capable of criminal intent through the criminal intent of corporate employees/agents acting within the scope of their role onto the corporation itself or through the combined knowledge of all employees which can be aggregated and imputed onto the corporation as its collective intent or through authorized policies or negligent oversight, the state machinery could demonstrate a willful blindness or endorsement of criminal acts that fulfills the mental requirement for culpability.¹⁷² The collective intent would be embodied in state organs and state agents and manifested through state policies, laws, or systemic failure to prevent criminal conduct.¹⁷³ For example, a state's military forces may carry out systematic atrocities with implicit approval from political leaders.¹⁷⁴ Alternatively, a state's persistent failure to punish certain acts could reflect a tacit tolerance or encouragement of criminality.¹⁷⁵ In this way, the collective knowledge and will of the state apparatus could potentially satisfy the *mens rea* requirement.¹⁷⁶

¹⁶⁷ Antonio Cassese, *International Law* 277 (2d ed. 2005).

¹⁶⁸ Robert Currie & Joseph Rikhof, *International & Transnational Criminal Law* 254 (Irwin Law 2d ed. 2013).

¹⁶⁹ Vilarino Pintos, Leopoldo J. "Bases for a Theory of Criminal Responsibility of States in International Law." In *Individual and State Responsibility for International Crimes*, edited by Eugenia Lopez-Jacoiste, 370-72 (2019).

¹⁷⁰ Gaetano Arangio-Ruiz (Special Rapporteur on State Responsibility), Fifth Report on State Responsibility, [1989] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/427 and Add.1, ¶ 159.

¹⁷¹ *Ibid.*

¹⁷² Foerschler, Ann. "Corporate Criminal Intent: Towards a Better Understanding of Corporate misconduct." *California Law Review* 78, no. 5, 1294 & 1295 (1990); Arangio-Ruiz, Eighth Report on State Responsibility, [1995] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/476/Add.1, ¶¶ 48-55.

¹⁷³ *Ibid.* ¶ 49.

¹⁷⁴ *Ibid.* ¶ 51.

¹⁷⁵ *Ibid.* ¶ 53.

¹⁷⁶ *Ibid.* ¶¶ 48-55.

Therefore, some argue the hurdle of establishing criminal intent does not necessarily preclude holding states criminally responsible under international law.¹⁷⁷

3.3.4. Difficulties in Respecting the Principle *nullum crimen nulla poena sine lege*.

Challengers

The principle of legality, central to criminal law, requires that conduct must be expressly defined as a crime with predetermined punishment at the time of occurrence to justify conviction.¹⁷⁸ The challenges faced in enumerating international crimes under Article 19 of the ILC's draft articles, akin to defining peremptory norms in Article 53 of the Vienna Convention on the Law of Treaties, illustrate the difficulty of comprehensively listing illegal state acts.¹⁷⁹ Similarly, developing a penalty scale such as imprisonment appropriate for state criminality would meet comparable conceptual obstacles. The vagueness and interpretive questions around prohibited state actions and applicable punishments indicate problems fulfilling legality requirements fundamental to criminal law. This underscores issues in directly transplanting domestic criminal law principles like *nullum crimen sine lege* to the international context.

Proponents

Proponents of holding states criminally responsible under international law contend that customary international law could potentially identify offenses with adequate specificity to meet criminal law standards.¹⁸⁰ They argue it is feasible over time to delineate through state practice and *opinio juris* a graded "scale" of penalties proportionate to different state crimes.¹⁸¹ In this view, the legality principle does not necessarily preclude criminal accountability for states under international law.¹⁸² Custom may progressively delineate prohibited acts and punishments with sufficient clarity to uphold legality, especially as norms develop further.¹⁸³ Rather than a fixed barrier, legality is seen by advocates as an evolving challenge that can be progressively overcome through the clarification of specific crimes and proportional sanctions

¹⁷⁷ Int'l Law Comm'n, Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, ¶ 243, U.N. Doc. A/CN.4/L.532 (Jan. 31, 1994).

¹⁷⁸ Grădinaru, Daniel, The Principle of Legality 289 (RAIS Conference Proceedings - The 11th International RAIS Conference on Social Sciences, November 20, 2018), <https://ssrn.com/abstract=3303525>.

¹⁷⁹ Crawford, James. "The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading." *European Journal of International Law* 10, no. 4 (1999): 660-671.

¹⁸⁰ Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. Int'l Crim. Just. 834 (2006).

¹⁸¹ Leila Nadya Sadat, *The Concept of State Responsibility for International Crimes*, 8 VA. J. INT'L L. 871 (1994).

¹⁸² Michael Akehurst, *Custom as a Source of International Law*, 1974 BRIT. Y.B. INT'L L. 1.

¹⁸³ *Ibid.*

applicable to states.¹⁸⁴ There are analogous examples of customary international law specifying individual offenses, such as piracy and war crimes.¹⁸⁵ Proponents contend similar customary evolution is possible regarding state responsibility.¹⁸⁶ In this perspective, legality does not fundamentally impede holding states criminally liable under international law as custom advances.¹⁸⁷ It is an issue requiring gradual refinement, not an insurmountable conceptual obstacle.¹⁸⁸

3.3.5. Inadequacy of Penal Sanctions to State Repression.

Challengers

A significant critique against criminalizing state responsibility focuses on the consequences of available penalties. Since certain punishments like imprisonment are inapplicable to states, the remaining options (e.g. monetary fines) may be inadequate to fulfill criminal law objectives.¹⁸⁹ Mere fines for egregious crimes like genocide or war crimes are questioned on effectiveness grounds.¹⁹⁰ The ICTY Appeals Chamber has affirmed that under current international law, states cannot face criminal sanctions analogous to domestic systems.¹⁹¹ Additionally, sanctioning a criminal state could collectively punish innocent populations, raising concerns about distinguishing between culpable leaders and general citizens who may have been victims.¹⁹² This view doubts whether viable penalties exist that target guilty state organs without adversely impacting blameless people. Absent punishments with appropriate scope and severity, state criminal responsibility may fail to meet expectations of criminalization.

Proponents

Proponents argue that political, economic, or military sanctions such as arms embargo could serve as appropriate punishments for unlawful state actions that are classified as criminal.¹⁹³ While sanctions may negatively impact innocent populations, formally categorizing state acts

¹⁸⁴ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 272 (2d ed. 2008).

¹⁸⁵ *Ibid* at 273.

¹⁸⁶ Leila Nadya Sadat, *The Concept of State Responsibility for International Crimes*, 8 VA. J. INT'L L. 871 (1994).

¹⁸⁷ Michael Akehurst, *Custom as a Source of International Law*, 1974 BRIT. Y.B. INT'L L. 1.

¹⁸⁸ *Ibid*.

¹⁸⁹ Gilbert, Geoff. "The Criminal Responsibility of States." *The International and Comparative Law Quarterly* 39, no. 2 (1990): 352, <http://www.jstor.org/stable/760200>.

¹⁹⁰ *Ibid*.

¹⁹¹ *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108bis, Judgement on Req. of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, ICTY App. Chamber, ¶¶ 143-46 (Oct. 29, 1997).

¹⁹² Erskine, Toni. "Kicking Bodies and Darning Souls: The Danger of Harming 'Innocent' Individuals while Punishing 'Delinquent' States." 24 *Ethics & Int'l Aff.* 272 (2010).

¹⁹³ Peter Andreas & Ethan Nadelmann, *Criminalizing Consequences of Sanctions: Embargo Busting and Its Legacy*, 49 INT'L STUD. Q. 335 (2005).

as crimes and controlling punishments through legal frameworks and judicial oversight is seen as preferable to leaving this sphere unregulated.¹⁹⁴ This risks enabling greater abuses absent any accountability.¹⁹⁵ However, advocates also contend it is questionable to completely exempt all individuals from any responsibility for state crimes in all situations.¹⁹⁶ This view favors defined legal processes for sanctioning over unchecked retaliation, and believes culpable leaders and complicit officials, rather than entire populations, may warrant some personal liability in certain cases.¹⁹⁷ Overall, the criminalization approach is seen as expanding accountability through lawful means rather than absolving all citizens or enabling unconstrained hostile reactions.¹⁹⁸

3.3.6. Punitive and Stigmatizing International Sanctions.

Challengers

The prospect of punitive and stigmatizing international sanctions against states has been raised repeatedly. However, this does not always align with the evolving reality of the international community. While afflictive penalties have been proposed theoretically, their feasibility and appropriateness remain doubtful given the decentralized nature of the international legal order. The lack of consensus around severe international punishments and the absence of enforcement mechanisms suggests this kind of criminalization may exceed the current stage of development of international society. Additionally, the prospect of punitive consequences for internationally wrongful acts historically emerged in contexts lacking collective interest, namely punitive damages and reprisals.¹⁹⁹ These were contemplated as complementary to compensation within bilateral state responsibility.²⁰⁰ Their afflictive aspects supplemented remedial liability rather than forming an independent penal paradigm. Resembling private penalties in domestic law, these punishments arose from bilateral relations and damages-centric responsibility. Absent assertion of community-wide interests, punitive additions to civil liability did not amount to criminalization. Only if elevated beyond reciprocal state obligations could punitive elements

¹⁹⁴ Richard L. Lippke et al., *Punishment Drift: The Spread of Penal Harm and What We Should Do About It*, 11 CRIM. L. & PHIL. 645 (2017).

¹⁹⁵ *Ibid.*

¹⁹⁶ David D. Caron et al., *State Crimes in the ILC Draft Articles on State Responsibility: Insights from Municipal Experience with Corporate Crimes*, 15 MICH. J. INT'L L. 307 (1998).

¹⁹⁷ *Ibid.* at 311-12.

¹⁹⁸ Peter Andreas & Ethan Nadelmann, *Criminalizing Consequences of Sanctions: Embargo Busting and Its Legacy*, 49 INT'L STUD. Q. 335 (2005).

¹⁹⁹ F.V. García-Amador, L.B. Sohn & R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 10 (Oceana Publications 1974).

²⁰⁰ Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, 2 Y.B. Int'l L. Comm'n 27 (2001).

potentially integrate into a system of criminal responsibility based on protecting international society, rather than merely bilateral retaliation.²⁰¹

Proponents

In contrast to the primarily reparatory aim of traditional state responsibility focused on bilateral obligations between states, the system of obligations owed to the international community as a whole enables transcending this limited purpose.²⁰² First, consequences like non-recognition of unlawful situations, denial of international assistance, and requirements to cease and make reparation impose non-material costs on responsible states apart from compensating specific victims' damages.²⁰³ Second, countermeasures applied collectively for the common interest, disconnected from repairing a directly injured state's harm, can directly target wrongdoing states' ill-gotten gains and benefits from illegal acts.²⁰⁴ Unlike bilateral responsibility centered on harm to individual injured states, community obligations enable depriving law-breaking states of advantages through non-material costs and deterrent collective sanctions.²⁰⁵ This conceptual expansion indicates a shift from purely remedial liability towards overtly punitive dimensions when applied to uphold community interests.²⁰⁶

4. THE FEASIBILITY OF INTERNATIONAL CRIMINAL RESPONSIBILITY OF THE STATE

The mere fact that the international criminal responsibility of states was not included in ARSIWA does not preclude future development to incorporate it. In order to determine whether the time has reached to consider whether to have international criminal responsibility for states it is important to discuss its feasibility. As noted by the separate opinion of Judge Jessup anyone has the right to test whether a principle is sound or not based on the results of application of such a principle.²⁰⁷ Therefore, the broader debate on the feasibility of criminalizing state responsibility can be examined through a segmented analysis comparing international responsibility to international and domestic criminal law. The goal is to assess

²⁰¹ Gilbert, Geoff. "The Criminal Responsibility of States." 39 Int'l & Comp. L.Q. 345, 357 (1990).

²⁰² Roberto Ago (Special Rapporteur on State Responsibility), Second Report on State Responsibility, [1970] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/CN.4/233.

²⁰³ Günther Handl et al., State Liability for Accidental Transnational Environmental Damage by Private Persons, 74 AM. J. INT'L L. 525 (1980).

²⁰⁴ Christian Dominicé et al., The International Responsibility of States for Breach of Multilateral Obligations, 10 EUR. J. INT'L L. 353 (1999).

²⁰⁵ Ibid.

²⁰⁶ Roberto Ago (Special Rapporteur on State Responsibility), Second Report on State Responsibility, [1970] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc. A/CN.4/233.

²⁰⁷ Judge Jessup, Separate Opinion, Barcelona Traction, Light and Power Company, Limited, (1970) ICJ Reports 3, 220.

elements in the evolving international community that support or discourage analogies to criminal law. This involves looking at convergences and divergences across different aspects of each system to evaluate the feasibility and desirability of applying criminal law concepts to states under international law. Key factors to weigh include the subjects of responsibility, substantive norms, procedures, and consequences. By breaking down the issue into discrete components, a more nuanced assessment can identify where parallels are stronger or weaker between holding states accountable for international crimes versus individual criminal prosecution.

4.3. Subjects of Responsibility

While the concept of state criminal responsibility has normative appeal in strengthening accountability for serious international crimes, there are significant practical challenges to its implementation. A core function of criminal law is retribution against an identifiable perpetrator for their culpable conduct. However, the modern state is an abstract juridical entity that cannot be imprisoned or personally sanctioned in the way responsibility requires.²⁰⁸ Any international tribunal seeking to prosecute a state would face immense difficulties in clearly attributing the acts and mental state necessary for culpability to an entire government apparatus as opposed to specific officials.²⁰⁹ There are also concerns about how to fairly and effectively prosecute a representative of the state at trial in a manner analogous to individual prosecution.²¹⁰ These challenges bring into question whether international criminal law, as opposed to other alternatives like interstate complaints, is the appropriate mechanism for adjudicating state responsibility.

Even if such legal and procedural difficulties could be overcome, the feasibility of a system that criminally prosecutes sovereign states is limited by political and practical constraints. Powerful states are unlikely to submit to an international court's criminal jurisdiction over their official acts.²¹¹ Enforcing sanctions against a recalcitrant state accused of international crimes would require compelling its compliance through coercive mechanisms unlikely to be accepted

²⁰⁸ Simpson, George, Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law, in André Nollkaemper & Harmen Van der Wilt, eds., *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), 74, <https://doi.org/10.1017/CBO9780511596650.005>.

²⁰⁹ Ibid.

²¹⁰ M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligations Erga Omnes, 59 L. & Contemp. Probs. 74, 76 (1996).

²¹¹ Milan Sahovic, The Fictions of Criminalizing States, 21 New Crim. L. Rev. 94 (2018).

in the current international order.²¹² Overall, while normatively desirable, assigning criminal responsibility to states may prove an unworkable solution that ultimately undermines rather than strengthens the enforcement of international law.²¹³

4.4. Substantive Norms

The examination of positive law concepts like *jus cogens* and *erga omnes* obligations reveals an evolution in international law towards greater protection of certain universal collective goods and values foundational to international society.²¹⁴ Given their social dangerousness, state acts contravening such interests through internationally wrongful conduct of sufficient gravity bear notable resemblance to criminal offenses.²¹⁵ This connection is reflected in the previously codified term "international crimes," denoting serious breaches of duties essential for safeguarding fundamental international community interests.²¹⁶ As international law increasingly upholds collective values through peremptory norms, state violations of comparable severity take on criminal dimensions. The identification of vital community-wide interests and their relation to the gravity of wrongdoing provide a basis for analogizing certain state behaviors to criminal acts.

A salient example illustrating the intersection between state obligations under international law and individual criminal responsibility can be found in the four international crimes enumerated in the Rome Statute of the International Criminal Court. The crime of genocide constitutes not only a breach of the obligation to prevent and punish genocide enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide, but also an international crime under Article 6 of the Rome Statute. Similarly, war crimes involve violations of international humanitarian law duties codified in the Geneva Conventions and their Additional Protocols, as well as serving as a basis for individual criminal liability under Article 8 of the Rome Statute. Crimes against humanity contravene key peremptory norms of international law safeguarding fundamental human rights found in multiple multilateral treaties, in addition to triggering the jurisdiction of the International Criminal Court under Article 7. Finally, the crime of aggression

²¹² Leila Nadya Sadat, States Are as Likely to Defy the ICC as Assad Is to Surrender, *The Guardian*, Aug. 28, 2013.

²¹³ David Luban, State Criminality and the Ambition of International Criminal Law, in Tracy Isaacs and Richard Vernon, eds., *Accountability for Collective Wrongdoing* 65 (Cambridge: Cambridge University Press, 2011).

²¹⁴ E. Wyler et al., From 'State Crime' to Responsibility for 'Serious Breaches of Obligations Under Peremptory Norms of General International Law, 13 *Eur. J. Int'l L.* 1147 (2002), <https://doi.org/10.1093/EJIL/13.5.1147>.

²¹⁵ *Ibid.* p. 1151.

²¹⁶ Philip C. Jessup, *A Modern Law of Nations: An Introduction* 2, 12 (Macmillan Co., 1948).

constitutes a violation of the prohibition on the use of force delineated in Article 2(4) of the United Nations Charter, while also subjecting individual leaders to potential prosecution pursuant to Articles 5 and 8 bis of the Rome Statute. This increasing convergence between erga omnes obligations under international law, jus cogens norms, and the emerging field of international criminal law signals a powerful momentum behind calls for the further recognition of state criminality as a legal concept.

4.5. Procedures

The need for regular procedures with impartial judicial oversight to impose sanctions, along with procedural safeguards, faces particular obstacles within the decentralized nature of international law.²¹⁷ In theory, customary international law could evolve substantial guarantees tailored to penal measures against states.²¹⁸ Custom may delineate criminality, define offenses, and prescribe penalties to ensure predictability, akin to international criminal law's *nullum crimen sine lege* principle for individuals. Appropriate state sanctions could develop through custom that avoid collective punishment of innocent populations. Custom may also enable responsible states to atone criminality and remove stigma, just as domestic penalties allow rehabilitation. While challenging, customary international law could conceivably crystallize penal safeguards for state criminality if creative sanctions take shape that uphold legality and mitigate excessive suffering.

However, ensuring effective investigation and fair trials with robust defense rights would likely require new conventional mechanisms that states agree to use for imposition of penalties. Existing dispute settlement falls short of criminal law standards.²¹⁹ The ICJ in particular lacks compulsory jurisdiction, evidentiary and procedural safeguards, and punitive powers expected in criminal proceedings. Negotiating appropriate judicial processes for state criminality would likely involve comprehensive bargaining to identify associated guarantees, even if custom preliminarily crystallized some.²²⁰ Given the challenges faced by the ILC in developing implementation procedures for state crimes, negotiating detailed enforcement frameworks seems unlikely in the near future. While custom may incrementally advance, establishing

²¹⁷ James Crawford, Third Report on State Responsibility, Yearbook of the International Law Commission, 2000, vol. II, Part One, ¶ 384, UN Doc. A/CN.4/507 & Add. 1-4.

²¹⁸ T. Meron, Is International Law Moving towards Criminalization, 9 Eur. J. Int'l L. 18 (1998), <https://doi.org/10.1093/EJIL/9.1.18>.

²¹⁹ James Crawford, Third Report on State Responsibility, Yearbook of the International Law Commission, 2000, vol. II, Part One, ¶ 384, UN Doc. A/CN.4/507 & Add. 1-4.

²²⁰ Nina H.B. Jorgensen, The Responsibility of States for International Crimes 208, 208-211, 215-217 (Oxford University Press 2000).

adequate institutions through treaties to apply criminal law principles to states remains a distant prospect. On the other hand, the the International Criminal Court faces significant procedural hurdles that limit its viability as a mechanism for prosecuting state criminality; Firstly, the Rome Statute only grants the ICC jurisdiction over natural persons rather than states themselves. There are no recognized provisions or precedents for directly charging a state before the ICC. This precludes litigation alleging state criminality. Secondly, the ICC's complementarity principle requires that the Court only prosecute crimes when national jurisdictions exhibit an inability or unwillingness to genuinely do so. State criminality charges would fail on complementarity grounds since states are unlikely to self-initiate credible processes alleging their own criminality. Thirdly, the Rome Statute does not enumerate or define crimes attaching to unlawful state policies or state-sanctioned patterns of abuse more broadly. The codified crimes focus heavily on issues of individual responsibility. From a procedural perspective, any charges intimating state criminality would likely fall outside the ICC's strict subject matter jurisdiction. Finally, amendments to the Rome Statute require overwhelming state consensus, including ratification by at least 7/8th of state parties. Garnering adequate state support to formally expand the ICC's authority into the realm of state criminality poses a monumental procedural challenge.

4.6. Consequences

Subjecting states to international criminal prosecution may undermine compliance with international law more broadly. States would be less willing to accept emerging legal norms and obligations if doing so opened them up to the remote but severe possibility of criminal indictment. This could chill the development of customary international law.²²¹ Additionally, equating states with individual perpetrators risks distorting the concept of individual criminal culpability. When attributing criminality based on official acts of states, there is a concern that it diminishes moral responsibility of actual human decision-makers.²²² There is debate on whether attributing criminality to states diminishes responsibility for individual human decision-makers who directed state policies leading to atrocities.²²³ Legal scholar Joseph Fine warns of a "worrisome marginalization of moral responsibility" if focus shifts from accountability of political and military officials to criminalization of state structures.²²⁴

²²¹ Eric Engle, "The Transformation of the International Legal System: The Post-Westphalian Legal Order," 23 *Quinnipiac L. Rev.* 23, 39-40 (2004).

²²² David Luban, "State Criminality and Unallayed Sovereignty," in Tracy Isaacs and Richard Vernon eds., *Accountability for Collective Wrongdoing* 60, 63 (2011).

²²³ See Joseph L. Fine, "The ILC's State Crime Article", 13 *Journal of International Criminal Justice* (2015), p. 125.

²²⁴ *Ibid.*

Mounting psychology research on diffusion of responsibility also finds blame can be deflected from individuals if dispersed across groups or institutions.²²⁵

International law undoubtedly upholds duties and responsibility concurrently for both state and individual officials.²²⁶ But as the influential 1996 Draft Code emphasizes, "acts or omissions" by "human beings" are the root source of state criminality flowing from policies they propound.²²⁷ So affirming culpability in law should not overshadow faulting the flesh-and-blood people behind state harms at the moral and political level too. There are warnings that popular perceptions of blameworthiness can shift if state-focused narratives prevail over spotlighting agency of decision-makers in fostering atrocities.²²⁸ Hence articulating responsibility frameworks that capture both individual moral actors and state machinery they harness remains imperative to deliver balanced justice. It may also provoke counterproductive nationalist sentiments within states.²²⁹

Rather than strengthen the international legal order, state criminal responsibility could compromise peaceful inter-state relations and deter vital global cooperation. The prospect of prosecution might damage channels of communication between states or delegitimize governments in the eyes of their populace.²³⁰ This could impair conflict resolution and humanitarian or socio-economic partnerships between states. If applied inconsistently due to political or capacity constraints, it may also undermine the perception of international justice as an equitable and principled endeavor.²³¹ On balance, while wanting to remedy systemic harms, subjecting abstract entities like states to criminal law appears to present prohibitive costs to international security and development.

5. CONCLUSION

Based on the arguments put forth both in favor of and against holding states criminally responsible for egregious violations of international law, I am more persuaded by Crawford's view that there isn't sufficient basis for state criminality. Ago failed to provide sufficient legal

²²⁵ See John M. Darley & Bibb Latane, "Bystander intervention in emergencies: Diffusion of responsibility", *Journal of Personality and Social Psychology* (1968), pp. 3–4.

²²⁶ Rome Statute of the International Criminal Court (2002), Articles 25, 27.

²²⁷ Draft Code of Crimes Against the Peace and Security of Mankind with commentaries (1996), pp. 44-47.

²²⁸ Joseph L. Fine, "The ILC's State Crime Article", 13 *Journal of International Criminal Justice* (2015), p. 126-127.

²²⁹ Beth Van Schaack, "Par in Pares Non Habet Imperium: Complementarity and the Crisis in Libya," 90 *Int'l L. Studies* 271, 278 (2014).

²³⁰ Leila Nadya Sadat, "Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute," 49 *DePaul L. Rev.* 909, 926 (2000).

²³¹ Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court," 33 *Mich. J. Int'l L.* 265, 267 (2012).

basis or precedent for such a disruptive move, while the actual concept itself faces inherent difficulties when applied to an entity like the abstract state. Specifically, establishing criminal intent is problematic for a diffuse body lacking singular decision-making capacity. Additionally, enforcement poses pragmatic concerns, as the typical punitive sanctions of fines or imprisonment do not directly map onto a sovereign state entity comprising an entire society. Finally, Crawford rightly notes the lack of adjudication frameworks or guidelines around investigating alleged state crimes compared to well-established procedures for prosecuting individual violations across jurisdictions. In light of these substantive issues around intent, enforceability and institutional readiness, I believe incorporating state criminal responsibility without further groundwork would overly disrupt existing doctrine. The questions around operationalizing this paradigm shift remain too great presently to include such a radical move in the current Draft Articles.

After conducting our study, the international legal order seems to have the potential to provide guarantees akin to those found in criminal law, thus ensuring the protection of the rights of the State whose criminal responsibility is under scrutiny. However, despite certain similarities, international responsibility does not fully embody a true criminal model for states. While it has progressed beyond the stage of reparation and established the protection of universal collective interests, general international law does not have strictly afflictive and infamous sanctions, nor has it established a system of purposes comparable to domestic criminal law. The absence of a higher authority, comparable to the State in national laws, within contemporary international law creates an insurmountable obstacle for the imposition of sentences within a coherent, impartial, and efficient repressive policy. At present, international law can only approximate the criminal system of domestic legal orders through institutional mechanisms established by treaties and international organizations, which nevertheless have limited scope. Consequently, international law faces difficulties in ensuring a coherent repressive policy, and it cannot effectively protect collective goods using criminal law methods. Therefore, the establishment of mechanisms beyond traditional reparation cannot be founded on an analogy with criminal law due to these inherent limitations.

The conclusion of our study reinforces a well-established belief in the legal doctrine, which is that the issue of international responsibility of States cannot be addressed solely through a rigid analogy with the experiences of national legal systems or the current international criminal system. The evident dissimilarities between the evolution and reality of international law and national legal systems make such a direct comparison impractical. Whether applied to explain

the current state of State responsibility or proposed for future development, the criminal law model is not suitable for the context of international criminal responsibility of states. While concepts and mechanisms of criminal law can serve as starting points and references to better understand phenomena within the international legal order, they should not be strictly applied as an analogy. The international legal order requires specific structures and institutional guarantees tailored to the context of interstate relations.

While principles and concepts from domestic criminal law can provide useful insights, they should not be applied to international law without considering the particularities of the international legal order. Strictly adhering to domestic criminal law notions could lead to potentially harmful consequences when attempting to transplant concepts from national legal systems to the fundamentally different international environment. Instead, the study of state responsibility in international law should account for the unique characteristics of the international legal order and seek solutions adapted to its specific challenges.

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