

International Crimes of State

A Critical Analysis of the ILC's Draft Article 19
on State Responsibility

Edited by

Joseph H. H. Weiler Antonio Cassese
Marina Spinedi



1989

Walter de Gruyter · Berlin · New York

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Preface

This volume is testimony to the growing collaboration between the European University Institute and the University of Florence.

It presents the results of a highly successful conference* organized by the two institutions to discuss the concept of Crimes of State as found in Article 19 of the International Law Commission Draft Articles on State Responsibility.

To the outside observer the Conference on Crimes of State presented a remarkable experience. It convoked around the table judges, diplomats and academicians — all scholars of the highest repute. Participants represented all major legal families and international law groupings. All major religions were presented as were different philosophical traditions.

They gathered to discuss a controversial and perhaps even an explosive subject. And yet the debate was characterized by a geniality uncommon in diplomatic settings, rare among lawyers and, should I say, unknown to the most litigious of professions — university professors.

I am pleased to present the results of the conference in book form and thank warmly all those who contributed to the success of this truly transnational scholarly venture.

Florence, June 1987

Werner Maihofer
President of
the European University Institute

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Introduction

The International Law Commission adopted in 1976, in Article 19 of its Draft Articles on State Responsibility, a distinct category of particularly serious wrongful acts to be called international crimes. This category would entail a regime of responsibility distinct from that of other wrongful acts called international delicts.

The reaction to this draft article among states and legal scholars has varied. In the Sixth Committee of the General Assembly a large number of state representatives accepted the new provision and some even considered it as a *conditio sine qua non* for the adoption of the Draft Articles. Other representatives expressed reservation of or openly rejected this approach. The provision has proved equally controversial in the academic legal literature.

Whereas the often fierce controversy may be an indicator of the importance, legal and political, attaching to this issue, a closer examination of the contrasting positions reveals a curious fact: they have frequently been based on different interpretations or a different understanding of the consequences which the ILC intended to attach to the concept of international crimes of states. Not uncommonly, those who criticize the concept of international crimes of states assume that it will create forms of responsibility which the defenders of the concept do not have in mind. Equally, one can find authors who share the same views as to the consequences of international wrongful acts, yet some find it helpful to refer to crimes of states while others do not. Finally, there are those who support the concept of crimes of states and yet disagree as to the consequences which attach to these acts. In short the debate has been characterized by a large measure of discussion at cross-purposes.

This volume has several objectives. In the first place it aims to give a relatively up-to-date account of the state of the art in this area; a kind of "Guide to the Perplexed" on the notion of Crimes of State.

This objective is achieved principally by the centre-piece of the volume to be found in Part I: a working document by Marina Spinedi which recapitulates the entire "legislative history" and academic discussion of the concept. At the end of the volume we present an exhaustive bibliography on the concept, also authored by Marina Spinedi.

The second objective of the volume is to revisit some of the central issues surrounding the concept of Crimes of State with a view to eliminating

some of the cross-purpose discussion alluded to above. In Part II the reader will find four studies presented to, and in Part III the edited version of a discussion which took place at, an international conference held at the European University Institute in Florence.

It would be helpful to explain briefly the organization of the conference since Parts II and III of the volume follow this organization.

The participants to the conference represented a wide mixture of scholars with a broad range of experiences. Participants included the President and several members of the International Court of Justice; several members of the International Law Commission, diplomats and academics representing all major trends in the international legal order: Western, Socialist and Third World. The full list may be found below. We would mention by name in this introduction only two of our distinguished participants: The two special *Rapporteurs* on State Responsibility: Judge Ago, the author of the concept of Crimes of State in its current guise and his successor Professor Riphagen. Obviously, their participation added a particular dimension to our discussions.

The debate, introduced by President Elias, revolved around four themes which are replicated in the organization of the volume.

Theme 1 — Lex Lata

This theme was introduced by a paper given by Professor Abi-Saab which may be found in Part II. The discussion sought to establish the extent to which international law already differentiated between different categories of wrongful acts, and more importantly between different regimes of state responsibility — even if not utilizing the term Crimes of State.

It became immediately apparent that the most fertile example for a differentiated regime was to be found in the context of the 1949 Geneva Conventions. We do not propose to replicate here the contents of the discussion save to say that the first two sections of Part III of this volume contain respectively the debate on Crimes of State in existing law in general and then a special section on the Geneva Conventions as an example of this theme.

Theme 2 — Crimes of State and Associated Concepts

This theme was introduced by a paper given by Professor Gaja which may be found in Part II. This seemed to be an essential theme given the affinity of the concept of Crimes of State to the notion of obligations *erga omnes*, the concept of *jus cogens* and crimes under international law (Nuremberg type). Elucidating the differences between these three notions and the concept of Crimes of State offered a further refinement to our understanding of the concept.

Theme 3 — The Construction of a Differentiated Order de lege ferenda and the Concept of Crimes of State within such a Construction

This theme was introduced by a paper presented by Professor Graefrath which may be found in Part II. The discussion revolved around the following premise. Even if existing international law has moved away from a homogeneous view of wrongful acts and state responsibility towards a differentiated regime, it is clear that such a movement is still fragmentary, partial and replete with lacunae. Article 19 cannot be seen as mere codification. It has, beyond doubt, an element of progressive development. The discussion sought therefore to elucidate the *consequences* of introducing such a concept. This indeed is the title we have given to that part of the discussion in Part III of this volume which touches on this issue.

Theme 4 — The Conditions for, and Viability of, the New Concept in the World Order

This theme was introduced by a paper presented by Professor P. M. Dupuy.

In this part of the discussion we were mainly concerned to investigate the problems of actuating the concept of Crimes of State in the current world order.

The discussion of Themes 2 and 3 became fused in the context of the conference.

The focal points of the discussion were the following:

- i. what measures may the "victim" state adopt vis-à-vis the perpetrator of a crime of state and in particular may the victim adopt punitive sanctions regardless of the willingness of the offending state to make reparations?
- ii. what measures, if at all, may states which are not "directly" affected, adopt vis-à-vis the perpetrator?
- iii. in the latter case, must there be a collective decision-making procedure as a condition for triggering reactions by "non directly" affected states?
- iv. what meaning is to be given to the notion of a wrongful act affecting "the international community as a whole" which forms part of the definition of a crime of state and may also be important for its operationalization.

Obviously these were only the principal issues. There were many others.

In Part IV of this volume we reproduce a few general overviews of the topic presented by some of the participants touching on all issues.

In the period between the discussion and the editing and preparation of the volume, the International Law Commission continued to debate the issue of Crimes of State with particular reference to some new draft articles presented by Professor Riphagen.

Part V of the volume contains a paper by Professor Bruno Simma — *International Crimes: Injury and Countermeasures: — Comments on Part 2 of the ILC Work on State Responsibility* — which offers an up-to-date analysis of this most recent development of the field.

Part VI contains a revised version of the concluding speech given at the conference by Joseph Weiler. Entitled *On Prophets and Judges*, it attempts to take a distance from the substantive issues and instead to examine some of the jurisprudential differences which distinguish and differentiate among supporters and opponents of the concept of Crimes and State.

Part VII contains a comprehensive bibliography on the concept of Crimes of State authored by Marina Spinedi.

Finally, in Part VIII we attach, as an annex, all the draft articles on State Responsibility examined and adopted so far by the ILC, as well as the draft articles submitted by special *Rapporteur* Riphagen in 1982 and 1984.

It is the sincere hope of the editors that the different parts of this volume will serve as a primary source for all students of the concept of Crimes of State.

One of the participants in the conference, Professor Ted Stein, among the most promising of the new generation of American international law scholars, died shortly after his participation in the conference. We mourn his death. We present the late Ted Stein's contribution to the discussion immediately after the introductory remarks of President Elias in Part III.

This volume is based on the belief that the issues underlying the controversy about the concept of Crimes of State and Article 19 of the Draft Articles on State Responsibility of the International Law Commission are of great importance to our understanding of current trends in international law in general and the evolving law of state responsibility in particular. We offer this book as a modest contribution to the ongoing debate.

Joseph H. H. Weiler
Ann Arbor and Florence

Antonio Cassese
Florence

Marina Spinedi
Parma

some of the cross-purpose discussion included in Part II the reader will find that studies are aimed to, and in Part III the edited version of a discussion which took place at an international conference held at the University of Toronto, Institute of Law.

It would be helpful to explain briefly the organization of the conference since Parts II and III of the volume are this organization.

Part I

Crimes of State: The Legislative History

The participants to the conference represented a wide mixture of scholars with a broad range of expertise. Included in the President and several members of the Institute of Law were several members of the International Law Commission. The Commission's members representing all major trends in the international legal order: Western scholars and Third World. The full list may be found below. We would mention by name in this introduction only two of our distinguished participants. The two special rapporteurs on State Responsibility, Judge Ago, the author of the concept of Crimes of State in the current guise and his successor Professor Riphagen. Obviously, their participation added a particular dimension to our discussions.

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Theme 2 - Crimes of State and Associated Concepts

This theme was introduced by a paper given by Professor Ago which may be found in Part II. This seemed to be an essential theme given the affinity of the concept of Crimes of State to the notion of obligations vis-à-vis the concept of law and crime under international law (Nuremberg type). elucidating the differences between these three notions and the concept of Crimes of State offered a further refinement to our understanding of the concept.

International Crimes of State

The Legislative History

MARINA SPINEDI

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