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A BRIEF NOTE ON THE COMPETENCE OF THE UN SECURITY COUNCIL IN INTERNATIONAL CRIMES OF STATES*

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INTRODUCTORY REMARKS

In the task of the promotion of the codification and the progressive development of international law governing "State Responsibility" with which the International Law Commission (ILC) was entrusted as early as in 1953, the formulation of draft article 19 on "international crimes and international delicts" has emerged as one of the most controversial attempt to attribute criminal responsibility to States, by giving rise to fierce legal and political debates inside and outside the Commission.

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In paragraph 1 of draft article 19, a State can, in principle, only be held responsible for legal consequences if its internationally wrongful act results from a breach of an international obligation, regardless of whose subject-matter. However, its paragraph 2 designates a special category for more serious delinquencies as distinct from "delicts" that denote relatively less serious internationally wrongful acts. By doing so, the ILC introduced the concept of "international crimes" that is deemed by "the international community as a whole" to be "serious breaches of obligations essential for the protection of fundamental interests of that community". Accordingly, States that allegedly commit an international crime as a result of some serious breaches of obligations as such are subject to a special responsibility regime which entails legal consequences somewhat different from the regime of consequences for delicts in a sense of severity. Thus, in order for those obligations to qualify an international crime, they are to be of *ergà omnes* character, as being owed to the international community as a whole. The *erga omnes* character of obligations whose breach, when reached a serious degree, gives rise to international crimes necessarily requires a special international criminal regime established on the basis of the organized international community as whole. In addition to a system where unilateral *uti singuli* measures are vested in one or more injured States, this system calls for those measures to be taken *uti universi* through the community of States as a whole, so that their legitimacy can be justified by the common will of the latter. Bearing in mind that not all breaches of *erga omnes* obligations would necessarily amount to international crimes, the so-called organized community of States, thus, has a particular role to play in determining the personal subjects of the rights and obligations under the theory of "international crimes and delicts", with respect to the tertiary legal relationship between the wrongdoing State and the victim state or less directly injured other States, since the subjective aspect of an *erga omnes* obligation relates to the competence of the organized international community in representing the "common will" of all States as a basis for the legitimacy of the faculté of reaction *uti universi*. The other side of the coin is its objective contour in which one basic criterion for the determination of crimes as such is the degree or gravity of breaches in question that would affect the content and limits of the consequences attachable thereto. Where it is coupled with an obligation of an *erga omnes* character, the right to take countermeasures is conferred not only upon the victim State but also upon not directly injured States collectively, since it is considered that there is a common interest states of in protecting the principles prohibiting aggression and genocide, and the principles concerning the basic rights of the human-being including protection from slavery and apartheid. Nonetheless, state practice scarcely reveals any case wherein a third State has claimed a right to reprisals involving the use of force on the basis of the breach of an *erga omnes* obligation. Conversely, precedents in international practice evidence ample legal authority to demonstrate that injured States, indeed, prefer to invoke an existing international system of which the wrongdoing State is also member, so as to obtain a collective intervention in tackling very serious breach-

es. In the present state of international law, the only world-wide system serving to this end is the United Nations within which the Security Council functions as being the organ taking the necessary actions with regard to threats to the peace, breaches of the peace, and acts of aggressions, in addition to which the General Assembly deals with general matters concerning the international peace and security. Nevertheless, to see how far the structure of United Nations organs meets the need for the envisaged organized international community, one should study the way they exercise, *de lege lata* or perhaps *de lege ferenda*, their authority to determine the occurrence of an act, and if so, whether it amounts to a crime imputable to a State, and then, its responsibility for that crime which would entail the application of or contribution to sanctions by the United Nations as legally organized measures against a wrongdoing State.

THE COMPETENCE OF THE SECURITY COUNCIL

The Security Council is entrusted with the maintenance of international peace and security, for which it discharges its duties laid down within Chapter VII among the others under the responsibility on behalf of the members of the United Nations. It appears that the competence and the power of the Security Council, however confined to the scope of Chapter VIII, are well-adequate to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and to take the necessary measures in the form of economic, political or military sanctions to maintain or restore international peace and security. In doing so, it can address the crime of aggression. As for the other crimes contemplated in draft article 19 (3), the Security Council, in principle, retains *ratione materiae* jurisdiction, as far as such crimes qualify the requirements laid down by article 39.

Notwithstanding its full competence under Chapter VII of the Charter, the UN mechanism for peace maintenance seems to differ from a special regime of criminal responsibility what the ILC envisages in its Draft Articles on the ground that the conditions required by article 39 in order for the Security Council to invoke articles 41 and 42 are not necessarily the same as those required for criminal responsibility of states. To start with, the existence of an internationally wrongful act is not necessarily a prerequisite essential for the Security Council to conduct its functions under Chapter VII. But all actions against the international peace and security are susceptible of falling within the competence of the Security Council. Secondly, one should also be reminded that the mechanism brought by the Charter for peace maintenance has, in principle, no punitive character, except for some cases where the Security Council regrettably seems to have acted *ultra vires*.

Article 39 accords the Security Council a power to determine the existence of breach of an obligation of a fundamental nature in so far as its violation relates to a

threat of the peace, breach of the peace, and act of aggression. This qualification process entails not only a simple fact-finding but attribution of an international unlawful act to its author in order that a causal link can be established to meet the requirements of invoking measures and sanctions in articles 41 and 42. Nonetheless, the Security Council retains a great deal of discretion in exercising its competence, for the Charter does not provide for tacit criteria according to which a threat of the peace can be identified on a uniform basis. It is due to the fact that the Security Council is essentially a political organ representing the equilibrium of powers and self-interests of States, as a result of which it is always more than likely that the quality of the fact-finding and attribution would be deprived by ill-judged political decisions based on factual circumstances. No doubt, the main reason for this is its composition that enables five permanent member States to get an unequal footing amongst the others by means of their right to veto. As matter of fact, by the same token, concerns about political discretion of the Security Council are equally justified in the case of the adoption of countermeasures to collectively react to an internationally wrongful act by virtue of articles 41 and 42.

The question of how far the Charter covers the crimes described by article 19, and how responsive the Charter is towards consequences of those crimes is related to the extent to which the Security Council implements the Charter provisions. The act of aggression is the most apparent in article 39 and the consequences to be attributed thereto are made clear as measures of individual and collective self-defence, and measures decided by the Security Council in articles 41 and 42. In that respect, for the competence of the Security Council is *de lege lata* full, there seems no need for the consequences of aggression to be regulated elsewhere, unless, of course, a judiciary control mechanism is envisaged to set up as a supervisionary body complementary to the Security Council. Because otherwise inclusion of the consequences of aggression would be construed as an amendment to the Charter, if not, as redundant where nothing significantly different from the existing mechanism therein was brought by the Draft Articles. Still, one might raise an issue that substantive consequences of aggression i.e. reparation including restitutio, compensation, satisfaction and quarantees of non-repetition, are left out of the Charter to recover by injured States maybe with the involvement of the Security Council *de lege ferenda*.

As for the remaining crimes that do not qualify the criteria set by article 39, and thereby are not covered by the Charter, there are examples of Security Council practice that would demonstrate the scope of its competence, by being linked to the fundamental norms of self-determination, human rights or the prohibition of the use of force, has undergone a change, *de lege ferenda*, in a view to recourse to countermeasures not involving the use of force. The legitimacy of the Security Council competence is sought, as perhaps on the case by case basis, in the gravity of the situation with which it is confronted. Indeed, the responsibility of the Security Council for situation wherein armed

conflict is involved as a threat to the maintenance of international peace and security has evolved outside the Charter with reference to humanitarian law. Suffice to say, the lack of competence is obvious for the Security Council in the cases of, what the ILC calls, international crimes, save aggression, to the effect that the applicable regime envisaged by the ILC does not fall within the Charter in so far as they do not amount to a threat to international peace and security, so that its capabilitiy of implementing such a legal regime is to be deemed *de lege ferenda*.

CONCLUDING REMARKS

In an oversimplified wording, the theory of international crimes and delicts, elaborated by the ILC, represents the progressive development of international law, and yet, seemingly suffers in its normative quality. It is superfluous to speak of crimes of States in the absence of a supra-national authority in international law, put another way, "there is no jurisdiction between equals". The ILC seems to seek the justification of the distinction between international crimes and delicts in the existence of a special regime that entails somewhat different legal consequences attributable to international crimes. The so-called *erga omnes* character of obligations susceptible of international crimes requires the recognition of the faculté of reaction *uti universi* thereto as a reflection of the common will of the community of States as a whole. At present, there appears no other "organized international community" but the United Nations whose organ designed to react to situations as such is the Security Council with the full *ratione materiae competence* in the determination of the existence, the attribution, and the consequences of international delinquencies in so far as they are related to article 39. Thus, the crime of aggression is, to some extent, covered by the Charter, while as for the other three crimes not involved any threat to or breach of international peace and security, the Security Council lacks in competence *de lege lata*. If the Security Council was to remain the only capable organ of doing so, it would seem inescapable that the ILC's new regime for criminal responsibility of States would be bound to bring about some necessary amendments in complementary nature to the existing Charter. The viability of such a move forward remains to be seen in the future. Yet another inherent deficiency of the Security Council-oriented mechanism with an expended power stems from the very nature of this organ, that is, its political discretion in conducting business. In that respect, one is excepted to concede a further rectification of the current structure of the Security Council as indispensable, since it can hardly be regarded as a widely acceptable representative body on whose resolutions the common *political* will of the international community as whole is reflected. Hence, as far as the Security Council's competence is concerned, the present writer, confining himself however to that point only, wholeheartedly endorses the dismissive view taken by the special rapportaur in his winding-up statement of June 6, 1994 that the Security Council, as it stands, is by no means an appropriately and adequately

competent body for legally implementing the envisaged special responsibility regime of the so-called international crimes attributable to sovereign States, especially as regards three suggested types of crimes other than aggression. In any event, a minimum safeguard of judicial review, if not a first hand judicial competence in handling disputes in question, ought to be an overriding option to be taken into consideration for the crimes which do not require an instant reaction. Yet, the present status of the ICJ poses some uneasy questions which would similarly call for a further revision of the Charter, giving, in all likelihood, rise to some hard problems that have been addressed earlier in this paper.

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