
Can a State Commit a Crime? Definitely, Yes!

Alain Pellet*

Abstract

Despite the strong (probably growing) and passionate campaign against the notion of state crimes led by a handful of powerful states and relayed by some ILC members, including the new Special Rapporteur, the distinction between what is termed 'delicts' and what is termed 'crimes' answers an indisputable need and must be maintained. However, while the definition of crimes given in Article 19 of the ILC Draft Articles on State Responsibility is acceptable, though perhaps unduly sophisticated, the legal regime of these crimes as envisaged by the ILC is debatable. The method adopted to establish this regime has been grossly unsatisfactory and it must be accepted that the word 'crime' might be misleading. The concept is nevertheless indispensable in contemporary international law.

As is well known, the International Law Commission decided in 1976 to include an article in its Draft Articles on State Responsibility which makes a distinction between 'normal' internationally wrongful acts, which it rather unfortunately called 'delicts', and exceptionally grave breaches of international law, which it termed, perhaps less unfortunately, 'international crimes'.¹ In this way, the ILC took up a suggestion made by its then Special Rapporteur, Roberto Ago, who, as early as 1939, had proposed such a distinction.²

The ILC maintained this distinction when it completed the first reading of its Draft Articles in 1996,³ despite strong (most likely growing) and passionate opposition, as several recent writings by members or former members of the Commission show.⁴

* University of Paris X-Nanterre and Institute of Political Studies, Paris; Member of the International Law Commission.

¹ *Yearbook of the ILC* (1976, II, Part 2), at 95–112.

² R. Ago, 'Le délit international', 68 *RdC* (1939-II) 415, also published in R. Ago, *Scritti sulla responsabilità internazionale degli Stati* (1979) 141.

³ See Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996, GAOR, 51st. Session, Supplement No. 10, UN Doc. A/51/10, at 131–132.

⁴ See, e.g., Rosenstock, 'An International Criminal Responsibility of States?', ILC, *International Law on the Eve of the Twenty-First Century — Views from the International Law Commission* (1997) 265; Pellet, 'Vive le crime! Remarques sur les degrés de l'illicite en droit international', *ibid.* 287; Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *EJIL* (1998) 163;

However, it is my deep conviction that:

1. the distinction between what is termed ‘delicts’ and what is termed ‘crimes’ answers an indisputable need and must be maintained;
2. the definition of crimes given in Article 19 of the ILC Draft Articles is acceptable, although perhaps unduly sophisticated;
3. the legal regime of these crimes as envisaged by the ILC is debatable, since the method adopted to establish it has been grossly unsatisfactory; and
4. by way of conclusion, the word ‘crime’ might be misleading, but the concept is indispensable in contemporary international law.

This short paper will examine each of these four arguments separately.

1 The Distinction between ‘Delicts’ and ‘Crimes’ Answers an Indisputable Need

Although part of the doctrine, especially as put forward by French international lawyers⁵ and some states (including France⁶) challenges this definition, the meaning of ‘responsibility’ deriving from Articles 1 and 3 of the ILC Draft Articles is hardly controversial; both provisions were reconfirmed by the Commission in 1998, in accordance with the recommendations made by its new Special Rapporteur on the topic, Professor James Crawford.⁷ In the modern, ‘post-Ago’, meaning of the term, responsibility is the situation which results from an internationally wrongful act committed by a subject of international law or attributable to it.

Now, if this is so, it implies a differentiation in the legal regime of responsibility: it is absolutely unacceptable to assimilate purely and simply a genocide and an ‘ordinary’ breach of international law, say a breach of a bilateral trade agreement. Both are, indeed, internationally wrongful acts, and both therefore entail responsibility on the part of their author. But it seems obvious, evident, necessary, and indeed indispensable that the consequences deriving from these two acts be clearly differentiated. And

Tomuschat, ‘International Crimes by States: An Endangered Species?’, in K. Wellens (ed.), *International Law: Theory and Practice* (1998) 253; and Rosenne, ‘State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility’, 30 *New York University Journal of International Law and Politics* (Fall 1997-Winter 1998) 145.

⁵ See e.g. Cottareau, ‘Système juridique et notion de responsabilité’ in Société française pour le droit international, colloque du Mans, *La responsabilité dans le système international* (1991) 3, esp. at 25 *et seq.*; Decaux, ‘Responsabilité et réparation’, in *ibid.*, at 147; or Combacau, ‘La responsabilité internationale de l’Etat’, in J. Combacau and S. Sur, *Droit international public* (1997) 514.

⁶ See Comments by France in UN Doc. A/CN.4/488, 25 March 1998.

⁷ Only slight drafting changes have been made regarding Article 3 (which is to become Article 2, since former Article 2 has been deleted). According to Article 1: ‘Every internationally wrongful act of a State entails the international responsibility of that State’. In its new drafting, Article 3 states: ‘There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State in international law; and (b) Constitutes a breach of an international obligation of the State’, see UN Doc. A/CN.4/L.569, 4 August 1998.

for a very good reason: the breach of a trade agreement, even though regrettable, as is any other violation of international law, concerns only the relation between the two (or more) states parties to the treaties, whereas a genocide threatens the international society as a whole, the very basis of the still fragile international community.

This sends us immediately back to the celebrated dictum of the International Court of Justice in its famous 1970 judgment in the *Barcelona Traction* case:

an essential distinction should be drawn between the obligations of States towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁸

Can it be inferred from this that a crime is a violation of an obligation *erga omnes*?⁹ Probably not, and this leads me to my second proposition.

2 The Definition of Crimes Given in Article 19, Paragraph 2 of the ILC Draft is Acceptable, Although Probably Too ‘Sophisticated’

According to Article 19, para. 2 of the ILC Draft Articles on State Responsibility:

An internationally wrongful act which results from the breach by a State of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime.

This definition clearly involves three elements:

1. a crime is an internationally wrongful act; this is obvious and needs no further elaboration;
2. this internationally wrongful act results from the breach of an international obligation which is essential for the protection of fundamental interests of the international community; and,
3. it must be recognized as a crime by that community as a whole.

It is this last point which has attracted the largest number of opponents: to accept this, it is argued, would make the whole notion uncertain and ‘subjective’, all the more so as the very notion of ‘international community’ would itself be subject to

⁸ ICJ Reports (1970), at 32.

⁹ During its 50th Session, in 1998, the ILC, after lengthy and difficult debates on the question of ‘crimes’, instructed its Special Rapporteur to envisage the special consequences of violations of (i) *erga omnes* obligations, (ii) peremptory norms (*jus cogens*) and (iii) other most serious breaches of international obligations, see Report of the ILC on the Work of its 50th Session, GAOR, 53rd Session, Supplement No. 10, at para. 331.

uncertainty.¹⁰ With respect, this is simply unsustainable. Those who negate the concept of crime do not, as far as I know, contend that custom does not exist or should not exist; however, custom can hardly be said to be more precisely defined than crimes; it is, just to recall the widely accepted formula of Article 38, para. 1(b) of the Statute of the ICJ, ‘evidence of a general practice accepted as law’. This does not even tell us by whom the practice must be accepted; at least Article 19 of the ILC Draft Articles tries to give a precision: recognition must be given by the international community as a whole.

And the formula is not that new: it had already been accepted in Article 53 of the 1969 Vienna Convention on the Law of Treaties, which defines *jus cogens*¹¹ and only gives a supplementary precision by indicating that the ‘international community’ is the international community of states. If this can help, there is certainly no objection to including this precision in the second reading of the ILC Draft Articles.

Now, does this mean that a crime is a breach of a peremptory norm of general international law? In 1976, the ILC, still in accordance with its Special Rapporteur,¹² denied this for rather obscure theoretical reasons.¹³ I would rather suggest that the real reasons for that decision were ‘prudential’ and ‘political’: Ago and the Commission were probably afraid that a blunt affirmation that a crime is a violation of a norm of *jus cogens* would prevent wide acceptance of the concept of crime as a consequence of the defiance against *jus cogens* in some circles and from certain states (among which France was certainly the most decided opponent and is still the most persistent — yet, at times inconsistent — objector).

More than 20 years later (and 30 years or so after the drafting of the Vienna Convention), this caution no longer seems necessary. If we leave Asterix (France) aside, nobody seriously doubts any more that norms of *jus cogens* have a real specificity among international law rules, and the past objections against the concept have proved unfounded: the then feared abuses have not occurred and, as has been aptly written about peremptory norms, ‘the vehicle does not often leave the garage’.¹⁴

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

¹⁰ See, e.g., the strong criticism of the notion of international crime of states by Prosper Weil in his remarkable (and most debatable) general course at The Hague Academy in 1992, ‘Le droit international en quête de son identité’, 237 *RdC* (1992, VI) 294.

¹¹ ‘For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. In his First Report, Crawford notes that this definition ‘is no more circular than the definition of peremptory norms of general international law (*jus cogens*) contained in article 53 of the Vienna Convention on the law of treaties of 1969, a definition now widely accepted’, see UN Doc. A/CN.4/490/Add.1, para. 48.

¹² See Ago’s Fifth Report, *Yearbook of the ILC* (1976, II, Part 1), UN Doc. A/CN.4/291, para. 150.

¹³ See *Yearbook of the ILC* (1976, II, Part 2), para. 62, at 111.

¹⁴ Brownlie, quoted in A. Cassese and J. Weiler (eds), *Change and Stability in International Law-Making* (1988), at 110.

1. a crime would still be an internationally wrongful act (a breach);
2. the breach would still be of an essential obligation towards the international community as a whole; and
3. the 'subjective' (or 'psychological') element would still be present since, according to the very definition of *jus cogens*, a peremptory norm of general international law must be recognized as such by the international community of states as a whole.

A possible objection deserves some discussion. In a most interesting and most debatable article in the ILC book published recently as a contribution to the UN decade for international law, the US member of the ILC, Mr Robert Rosenstock, recently complained that 'the acceptance of the notion of *jus cogens* was conditioned on . . . express acceptance of the role of the International Court of Justice', while 'there is no comparable institution for denominating certain actions as criminal'.¹⁵ This is precisely why, at my suggestion and endorsed by many other members,¹⁶ the Commission had sought to include an article in the Draft which would have been based on Article 66 of the Vienna Convention on the Law of Treaties and would have provided for the compulsory jurisdiction of an arbitral tribunal or the ICJ in case of a dispute concerning the existence of a crime. For obscure reasons, the Commission, while not rejecting the proposal, decided not to include it in its first Draft and to come back to it during its second reading.¹⁷ Unfortunately, the new Special Rapporteur only mentioned this possibility in passing in the very substantial part of his First Report which deals with 'the distinction between "crimes" and "delictual" responsibility', declaring that these proposals 'were not accepted'.¹⁸

One last word on this second point: if it is accepted that a crime is a breach of a norm of *jus cogens*, could it not be said as well that it is a breach of an *erga omnes* obligation? It might help in the sense that '*erga omnes* obligations' are less contested than 'peremptory norms'. However, this would be debatable, since if all norms of *jus cogens* are certainly *erga omnes*, there is no reciprocity; one can think of many obligations *erga omnes* which could hardly be seen as deriving from peremptory norms. By way of example, this is the case of the right of passage in international straits or international canals; however unfortunate a breach of such a right might be, it could hardly be held to be an international crime.

¹⁵ *Supra* note 4, at 272.

¹⁶ See UN Doc. ILC (XLVIII)/CRD.4/Add.1.

¹⁷ See Provisional Summary Records, 11–12 June 1996, UN Docs A/CN.4/SR.2458 and 2459, and the commentary of Draft Article 51 in ILC Report, 1996, *supra* note 3, at 167.

¹⁸ J. Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490/Add. 1, para. 51. If it is true that they were not 'accepted', the idea of transposing the system provided for in Article 66(a) of the Vienna Convention has nevertheless not been rejected either; it has only been set aside for the second reading (see *supra* note 17). In para. 43 the Special Rapporteur notes that '[t]here is a . . . contrast between the strong procedural guarantee associated with countermeasures under article 48 and part three, and the complete absence of procedural guarantees associated with international crimes'. It would, I think, be the Special Rapporteur's duty to make proposals in order to cure this weakness (keeping in mind the 1996 proposal).

And this draws attention to a very important point: just like peremptory norms, crimes are to be considered extremely rare in the present state of the world; the international community does exist, but solidarities on which this community is based are still very limited. And this means that obligations ‘essential for the protection of [its] fundamental interests’ are also unavoidably very limited, both in number and scope. And in this respect, paragraph 3 of Article 19 of the ILC Draft is far from convincing. In this paragraph, the International Law Commission has endeavoured to give examples of crimes.¹⁹ This is not the proper place to enter into a lengthy discussion of this provision.²⁰ Suffice it to say that:

1. giving ‘examples’ is a bad method of codification in a codification instrument;
2. this partial enumeration is all the more regrettable since it fixes rules which are, and must inevitably remain, in constant evolution; and
3. above all, the examples given are themselves highly debatable or are, at least, too broad and imprecise.

But if there are grounds for the deletion of this list of examples from the final Draft, this would not be a reason to throw the baby out with the bath water.

3 The Legal Regime of Crimes Established by Articles 51 to 53 of the ILC Draft is Unconvincing (to Say the Least)

A recurrent criticism addressed at the distinction between crimes and delicts is that, even if it were intellectually acceptable (which it is in the present writer’s view), it does not translate into two different legal regimes. Such a criticism would be partly justified if Articles 51–53 of the ILC Draft Articles were seen as rightly describing such a regime. However, this is not the case.

The main weaknesses of the Draft in this respect are threefold:

1. on the one hand, the special consequences attached to the commission of a crime are very limited and cast doubt on the usefulness of the very notion of ‘crimes’ itself;²¹ but

¹⁹ ‘Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from: (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

²⁰ For a more substantial criticism, see Bowett, *supra* note 4, at 167; Pellet, *supra* note 4, at 298–301 and Weil, *supra* note 10, at 297–299.

²¹ For a very well-argued analysis, see Tomuschat, *supra* note 4, at 255–261.

2. on the other hand, the general consequences that the Draft attaches to 'delicts' are themselves too wide and include elements which should be limited to crimes; and
3. the ILC has missed some important special consequences of crimes as opposed to delicts.

Apparently these criticisms (at least the first two) are mutually exclusive. In fact, these defects are cumulative here and this is a result of the erroneous method followed by the ILC and its Special Rapporteur, Professor Arangio-Ruiz: in contrast with the methodological principles accepted in 1976 by the Commission, which had firmly rejected the 'least common denominator' approach,²² the Commission followed this 'delicts plus' approach in 1993–1996.²³

When he took up his functions of Special Rapporteur, Professor Arangio-Ruiz repeatedly said that he did not know what crimes could be²⁴ and proposed, in his First Report on the subject, in 1988, to focus on the consequences of delicts, leaving for a later stage the codification of the consequences of crimes.²⁵ However, at the same time and very unfortunately, the Special Rapporteur drafted his reports as if the distinction did not exist, taking his examples more often than not from the field not of delicts, but of crimes, and studying particularly the consequences of the illegal use of force, a crime *par excellence*, while he was dealing, in principle, with the international consequences of delicts. Despite some protests (mainly from myself), the Commission followed his suggestion and did not challenge the examples he provided.

As a result, the 'consequences of an internationally wrongful act' (that is, in fact, of 'delicts') expressed in Articles 41–46 of the Draft include several consequences which are (or should be) limited to crimes, such as punitive damages in Articles 42, para. 2, and 45, para. 2(c) and the obligation for the state which has committed the internationally wrongful act to give assurances or guarantees of non-repetition contemplated in Article 46. And this is even more true for the rules applying to countermeasures in Articles 47–50: they are well fitted to crimes but absolutely unacceptable as far as simple 'delicts' are concerned, since they facilitate much too much recourse to countermeasures, a means of reacting to internationally wrongful acts which, by the nature of things, is reserved to powerful states; I can understand that the United States is very enthusiastic about them — Chad is not, nor am I!

A consequence of this excessive severity against simple delicts is that, when the Commission reached, at last, the consequences of crimes — which, as the Commission rightly says in Article 51, must be added to all the other consequences of any other internationally wrongful act — there was not much that could be added and this explains the poor content of Articles 52 and 53.

However, this certainly does not mean that the concept of crime is an empty shell: in

²² See Commentary of Article 19, *Yearbook of the ILC* (1996, II, Part 2), at paras 53–54.

²³ Crawford, First Report, *supra* note 18, at para. 73.

²⁴ See e.g. his intervention during the colloquium of the Société française pour le droit international in 1990, *supra* note 5, at 302.

²⁵ UN Doc. A/CN.4/416 and Add.1, *Yearbook of the ILC* (1988, II, Part I), paras 12–16, at 8–9.

the first place, as I have just tried to explain, several consequences that the Commission draws from all internationally wrongful acts should certainly be reserved solely to crimes and do not apply to simple delicts. In the second place, some very important consequences of crimes have very unfortunately been omitted from the Draft Articles — at least two.

First, in keeping with the dictum of the ICJ in *Barcelona Traction*,²⁶ only the ‘injured State’ may claim reparation when an ordinary wrongful act (what the ILC calls a ‘delict’) has been committed, while, in case of crime, a right of protection is vested in all other states which are deemed to be ‘injured’.²⁷ This seems to be accepted by the ILC, in Draft Article 40 para. 3, where it recognizes that “‘injured States’” means, if the internationally wrongful act constitutes an international crime, all states other than the wrongdoer’. But, the strange thing is that the Commission draws strictly no consequence from this important finding as far as countermeasures are concerned²⁸ (and only very limited consequences in other matters²⁹).

Second, the notion of ‘crime’ is a ‘conceptual necessity’ in order to explain what could be called the ‘transparency’ of the state that committed a crime. This means that when an international crime is committed, not only the state itself is responsible, but also the natural persons who decided, committed, planned, directed, incited, and so on, such a crime.³⁰

An important warning is necessary here: this does not mean that a crime by a state and a ‘crime against peace and security of mankind’³¹ are a sole and unique notion. It means simply that when a crime, in the meaning of Article 19 of the Draft Articles on State Responsibility, is committed, then (and only then) can the individual responsibility of the persons concerned be entailed, even though they were acting on behalf of the state. And this explains why, according to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

In all other cases, the agents of states are protected by the doctrine of state immunities in international law.

The parallel responsibilities of the state itself, on the one hand, and of its

²⁶ See *supra* note 8.

²⁷ A ‘right of protection’ must not be confused with a jurisdictional link, see ICJ, Judgment of 30 June 1995, *East Timor case (Portugal v. Australia)* ICJ Reports (1995), at 102.

²⁸ Special Rapporteur Arangio-Ruiz had proposed to include a special article dealing with this aspect, see Seventh Report, UN Doc. A/CN.4/469, and *Yearbook of the ILC* (1994, I), at 135; unfortunately, this proposal did not find enough support within the Commission.

²⁹ These consequences are listed in Article 53 of the Draft Articles.

³⁰ In his First Report, Special Rapporteur James Crawford reasons differently. He writes that ‘[i]t would be odd if the paradigm person of international law, the State, were treated as immune from committing the very crimes that international law now characterizes as crimes in all cases whatsoever’. *supra* note 18, para. 89. This may be true; but it is a different, political, problem, involving a value judgement.

³¹ In the meaning of the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the ILC in second reading in 1996.

representatives on the other hand, were recognized by the ICJ in its judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where the Court observed

that the reference in Article IX [of the 1948 Convention] to the 'responsibility of a State for genocide or for any other acts enumerated in Article III' does not exclude any form of State responsibility.

Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officers'.³²

Similarly, in the *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia, while recognizing the penal responsibility of the accused, considered that:

The continued indirect involvement of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the armed conflict in the Republic of Bosnia and Herzegovina . . . gives rise to issues of State responsibility. . .³³

There is no doubt that, in these cases, the responsibility of the individual 'through whom' the state has committed the crime is obviously a 'penal' or 'criminal' responsibility; but what about the responsibility of the state itself?³⁴

4 The Word 'Crime' Might be Misleading, even though the Concept is Definitely Indispensable in Contemporary International Law

It can certainly be sustained that states can be held 'criminal' in a sense which is close to the penal meaning of the term: Nazi Germany and Saddam Hussein's Iraq can be called 'criminal states' and have been treated as such by the international community. This seems to be the position of Crawford who, during the discussion of his First Report on State Responsibility, in 1998, declared himself, rather paradoxically, to be fervently in favour of a true regime of penal responsibility for states . . . provided this be done elsewhere than in the Draft Articles on State Responsibility.³⁵

This being said, it must be kept in mind that, in international law, analogies with domestic law are rarely helpful and usually misleading. International responsibility is neither civil nor penal, it is simply 'international';³⁶ and it is all the less penal since,

³² ICJ Reports (1996), at 616.

³³ Judgment of 7 May 1997, Trial Chamber II, *Tadić*, IT-94-I-IT, para. 606.

³⁴ In its commentary of Article 19, see *supra* note 22, the ILC sounded 'a warning against any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes. . . ' (at para. 59).

³⁵ See, e.g., ILC Report 1998, *supra* note 9, at para. 329; see also Crawford's First Report, *supra* note 18, at paras 89–92.

³⁶ The Czech Republic and France, while having opposing views on the existence and usefulness of the notion of crimes, both accept this view in their comments of the ILC Draft, see UN Doc. A/CN.4/488, Comments by Governments — Article 19; and Crawford, First Report, *supra* note 18, paras 52, 53 and 60.

within the state, penal responsibility presupposes the existence of tribunals which have jurisdiction to establish it, a condition which is not fulfilled in international law. Hence my firm conviction that the word 'delict' to designate 'simple' internationally wrongful acts is particularly inappropriate.

What about the word 'crime'? For the reasons explained above, it seems less shocking than the word 'delict': after all, when a state breaches an international obligation essential for the interests of the international community as a whole, it never acts by chance or unintentionally; therefore, the elements of intent and of fault, which are not necessarily present in other internationally wrongful acts, are part of the crimes, exactly as they are part of penal infractions in domestic laws. Moreover, even without a judge, the reactions of the international community to a crime clearly include punitive aspects.

However, this terminological problem is not terribly important: the word 'crime' is defensible; it has acquired its legitimacy since 1976 and is very widely used. However, if the analogy with domestic law seems really excessive and repulsive, it may be abandoned. But the reality will remain: as shown above, a genocide cannot be compared with a breach of a trade agreement; it is, by its very nature, different in kind. Call it 'breach of a peremptory norm' or 'violation of an essential obligation',³⁷ call it 'butterfly' or 'abomination', the fact remains: we need a concept . . . and a name for this concept!

³⁷ In a footnote appended to Draft Article 40, para. 3, the Commission has indicated: 'It was . . . noted that alternative phrases such as "an internationally wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia*, avoiding the penal implication of the term.'