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Crimes of State

Joseph H. H. Weiler
University of Michigan Law

On Prophets and Judges

*Some personal reflections on State Responsibility and Crimes of State**

Joseph H.H. Weiler

President of the International Court of Justice, Your Excellencies, Ladies and Gentlemen:

In 1976 the International Law Commission unanimously adopted, on first reading, Article 19 of the Draft Articles on State Responsibility, worded as follows:

ARTICLE 19

International Crimes and International Delicts

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

* An abbreviated version of the closing speech to an international conference convened to discuss the International Law Commission's Draft Article on Crimes of States.

The Controversy Over Crimes of State: A Paradox

None of the Draft Articles on State Responsibility adopted by the International Law Commission has provoked as much controversy as Article 19 on Crimes of State. Yet, strangely enough, even if the issues themselves have received exhaustive treatment, the debate about the issues, the debate which divides proposers of, and opposers to, the adoption of the new category of State Responsibility, has remained largely unexplored. It is this second dimension which will be the focal point of these brief remarks — concluding the Florence Conference on State Responsibility and Crimes of State.

What interests me here, therefore, as distinct from most other contributions to the ongoing discussion, is *not* the notion of Crimes of State in itself but rather the international law *Weltanschauung* of those, states and particularly scholars, debating the concept. Why is it that some scholars and some states espouse, even enthusiastically, the concept whereas others reject it, at times as anathema?

In trying to understand the basic positions which divide supporters and opposers we face a perplexing paradox: Despite the fierceness with which opposition to, and support of, Article 19 is expressed, it is difficult to identify any systematic commonality among those who support and those who oppose Article 19.

If one looks at the various issues to which Article 19 gives rise, we would expect that in relation to each of these, supporters and opposers would find themselves holding opposing views. As I shall show, this is not the case. Indeed, it is not readily evident that holding any specific view about issues would lead necessarily to an acceptance or a rejection of the notion of Crimes of State.

The debate over the notion of Crimes of State involves many issues, but sufficient for our purposes will be to examine the most basic.

The first of these is the affirmation, encapsulated in Draft Article 19, that international wrongdoing is not all of one kind, that certain wrongs are more serious than others and, in particular, that the suppression of certain wrongs, like crimes in the domestic legal system — and we should not be afraid of making this basic analogy — is of interest not only to the directly harmed party but to the international community as a whole. This is perhaps the most basic notion on which the concept of state crimes is postulated.

And yet, surprisingly perhaps, there is widespread acceptance, even if not total consensus, among both scholars and states, of this basic proposition.

This means that we can readily find both states and scholars who *accept the differentiation of State Responsibility and yet reject the concept of Crimes of State.*

The second basic proposition encapsulated in the notion of Crimes of State relates to the modes of imposing responsibility on the wrongdoer (the State perpetrating the crime) and the permitted response of the "victim" state and the international community. For most international wrongs, the usual consequence is the emergence of a liability for *restitutio in pristinum* and/or reparations. "Sanctions" by the victim can only be applied if there is a secondary failure by the wrongdoer to undo the wrong. The debate about Crimes has revolved around the question whether in this case a (pacific) sanction may be applied in direct reaction to the crime.

It is impossible to draw the line between the Ayes and the Nays, between those who accept or reject the idea of state crimes, by looking at the positions adopted in relation to this issue. We will find that views differ on this point almost equally between those who accept and reject the concept.

The third basic issue on which opinions have differed sharply relates to the rights and duties of third parties vis-a-vis the perpetrator of the putative Crime. Do they have a "right of action"? Do they have a duty not to condone? And if the answer is in the affirmative, may they react by themselves, or must they wait for some collective decision

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making? Debate here is at its sharpest and the cleavage at its deepest — a matter to which I shall return below — but the riddle of trying to explain acceptance or rejection of the concept of Crimes of State is not directly helped by examining this cleavage. For as with the previous issue, the "battle lines" do not converge. You will find those who reject the notion of Crimes of State most strongly and yet accept that certain wrongs do give rights or impose duties on third parties — even on the international community as a whole; the notion of obligations *orga omnes* is invoked in this context. You will find those who accept the notion of Crimes of State and yet reject such an extension of international responsibility.

So much, then, for trying to explain the debate by reference to the basic issues.

As I have already noted, we draw the same *impasse* if we try to define the division of reference to the classical ideological trichotomy of the world order. The divisions between those who accept or reject the notion of Crimes of State is not directly traceable to this classical division of the international order. The Florence Conference brought together scholars "representing" all three "Worlds." And yet one found Occidentals who accepted the notion, Socialists who expressed some skepticism, and Third World scholars on both sides of the divide. This is also confirmed by examining the practice of states in the 6th Committee and the General Assembly.

The key to understanding the cleavage is, in my view, to realize that beneath the surface language of the debate about the concept of Crimes of State there is a more acute controversy touching on the deep structure of the international legal process.

In trying to explain this deeper controversy, I shall make use of the Biblical metaphors of Judges and Prophets as explicated at the moment of law giving and law making at Sinai. The precise meaning I attribute to these metaphors and their meaning to the Crimes of State debate will emerge in the remainder of this speech.

The very word Crime stimulates cleavage.

Unraveling the Paradox: What's in a Name?

To see this, we should look first at one parameter which is both trivial and important at the same time: the nomenclature. The very word Crime stimulates cleavage.

It is clear that the choice of the word has instigated much unnecessary debate. The rejection of Article 19 as an attempt to impute penal responsibility to States — a notion repugnant to the Special Rapporteur as well as to the ILC — would never have occurred if another word had been chosen. Likewise, the ferocity of the debate would never be as it has become if another word had been chosen. Try and imagine the reaction to a Draft Article which said something like: "Particularly serious wrongs affecting the international community as a whole may produce a different regime of responsibility." Certainly a formulation such as this would raise the very same issues which the actual Draft Article 19 raises, but just as certainly, the tone of the debate would be quite different.

It is not surprising that many of the discussants in the Florence Conference, even those who accept the notions embedded in the concept of Crimes of State, were critical of the label "crime." A very common charge has been that in some ways the triviality of a name has contributed to obscuring the *real* issues and creating false dilemmas.

If this were so, the recommended action would be to retain the concept — of a differentiated regime of international responsibility — and to jettison the unnecessarily emotive and confusing term — Crimes of State.

The cure is not so simple. In understanding why, we shall take the first step not only toward an understanding of the deeper issues which divide proposers and opposers of Article 19 but also toward affirming some important elements in the international legal

order which are reflected in the Crimes of State debate. In other words, I believe that the *term* crime is, at least in one profound sense, the real issue. I shall try to explain this by using another hypothetical case.

Let us imagine that the substantive issues were resolved; that agreement was found on a differentiated regime of responsibility corresponding to a differentiated regime of wrongs; that agreement was further found on the issues of sanctions and third-party reactions; but that the price of this agreement was the dropping of the *term* Crimes of State. I would not wish to anticipate the political outcome of such a scenario, but I believe that many of the proponents of the concept of Crimes of State would be bitterly disappointed with such an outcome.

The fact is that the concept of Crimes of States carries more than the simple technical construct of a differentiated regime of responsibility. It has a symbolic value which transcends this technicality. This may be trite, but it is still worth remembering.

Why is this symbolism important? I can see two issues of significance.

The Symbolic Value of the Word Crime: First Consideration

The first is the simple reaffirmation of the important value of words and behaviour characterization in the international legal order. This has been one of the permanent and most fascinating aspects of international life ever since the emergence of a cohesive international legal order. As skeptics of the very notion of international law never tire of reminding us, states may (and do) in many instances act in violation of international law with relative impunity. Binding resolutions or international organs are not infrequently flouted, the jurisdiction and decisions of international adjudicators are more than rarely disregarded and customary law is often violated. This, of course, is trite. And yet, curiously, we see again and again international actors maneuvering in all manner of ways to avoid characterization of their action as illicit. If they can, they will seek a Security Council Veto in order to avoid a condemnation, even if in practice the condemnation will amount to nought; they will avoid jurisdiction in order to prevent a negative outcome of a judicial deliberation, and they will argue tenaciously about the content of a customary rule rather than simply disregard it.

This, of course, suggests that words and the way they characterize behaviour serve as constraints on illicit international action. Almost all observers of the international legal order would agree. Indeed, this very fact motivates those on *both* sides of the Crimes of State debate.

For those who support Article 19 in its present form, it is the efficiency of language which justifies, even necessitates, the term Crime. The wrongful acts which they have in mind are so grave, so heinous (genocide, for example) that nothing less than the most abject condemnation, translated into the most powerful "negative" in the legal vocabulary, will suffice. By using the word Crime the international legal system will be doing its best, albeit its limited best (for it lacks the flexible capacity to "punish" that municipal systems enjoy), to contribute to a suppression of this behaviour.

If States care, as clearly they do, about being labeled by others as international wrongdoers, so much more will they care — the supporters of Article 19 will claim — about the attachment of the tag of a "criminal."

If one doubts the importance of this symbolism, one need simply read the comments at the Conference by many of those judges, diplomats and scholars supporting the present draft of Article 19. The emotionalism of many of the supporters is not only a response to the heinous nature of the crimes proscribed. It also reflects a deep-seated commitment to a strategy of developing the fragile world order. It is the first element in what I would like to call, if only for the purposes of those concluding remarks, the Prophetic *Weltanschauung* of international law.

Those who oppose Article 19 also feel deeply. It would be "unfair" and wrong to ascribe to them a callousness toward the commission of those wrongs the supporters would have us term Crimes. Defenders and rejectors share the same attitude toward aggression, genocide and other candidates for the term Crime. The criticism of the term Crimes is not bred by a lesser interest in having these wrongs suppressed.

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It is possible that some of those who reject or question the wisdom of Article 19 do so because they believe that the language we use to characterize behaviour has little or no value in the international order. But it is also possible that objection to using the term Crime may reflect a belief in the efficiency of language and a desire to *preserve the constraining power of the way in which the international legal order labels behaviour.*

In other words, precisely because the notion of Crimes of State cannot in the world order as perceived today have the connotation of penal responsibility — a fact which the adherents of Article 19 themselves are at great pains to emphasize — it would corrode the value of words to use the term Crime in this instance. To accentuate the label, without a meaningful possibility to augment the response, would be similar to printing money without increasing the corresponding quantity of wealth.

In the eyes of those who oppose the draft, this is an inherent contradiction of Article 19. It uses the term Crime in order to borrow the symbolic connotation which the term evokes from its usage in municipal law. At the same time, the supporters of Article 19 explicitly reject the operationalization of penal responsibility. Since the same behaviour has been characterized so far as simply wrongful, the simple addition of a new label, with nothing meaningful more, may lead to greater sanctioning but might equally lead to a diminution of the concept.

This second approach, which seeks to preserve the integrity of the use of legal terms, contains the first element for what, for the purposes of these concluding remarks, I define as the Judge *Weltanschauung* of international law.

The Symbolic Value of the Word Crime: Second Consideration

My second reflection has its genesis in the changing world of international legal scholarship in the last four decades.

My focus here is primarily on scholars and, to a lesser degree, on state practice. My thesis is simple enough: The creation of Crimes of State as a category of international wrongs and the intellectual debate surrounding this creation are a reflection of a growing disillusionment with what has been considered as the great breakthrough of the post-war era — the evolution of the Charter System — to many still the only valid framework of international law and world order.

The argument is a generational analysis. As with my first consideration, I shall argue that the same disillusionment may produce contrasting attitudes to the terminology — and perhaps to even more than the terminology — of Article 19.

In many ways, the era of the Charter Model of international law has been for many academic scholars and practitioners of international law a heroic achievement. The post-war generation was actively involved in system building on the ashes of that great conflagration which saw the ignoble demise of previous systems of collective security, the abject disregard of international norms and the greatest carnage of all times. The Charter era was characterized by the evolution of new norms, new institutions and new procedures — a story too well known to even bear repeating.

Scholars had great faith in the ability of the international legal process to provide adequate solutions — at least on the normative level — to the problems of this new world. These beliefs managed to endure for much of the post-war era despite the fact that legal positivism, or at least legal empiricism, became the only legitimate model of scientific jurisprudence; despite the fact that the rapidly growing number of states made determination of state practice all the more difficult (but still necessary in a consensual-positivistic model); and despite the consolidation of a growing ideological cleavage in the international order.

This faith was rooted in three kinds of belief:

- The belief that in the Charter and the Charter System one had a stable source of "higher law" which was consensual in origin and hence legitimate in a positivist model and yet, at the same time, able to give the kind of confidence that earlier generations drew from natural law models. The Charter was assimilated to a

Constitution in the municipal order which fulfills that very bridging function in municipal law.

- The belief in the emergence of the so-called "New Sources" of international law which would facilitate law making even in a numerically large and ideologically divided international society.
- A belief in the power of objective and scientific jurisprudence in making legal determinations — both by courts, state and other international actors, and scholars.

The decline of, and disillusionment with, the Charter System is again a phenomenon which does not need much elaboration. Whilst one need not be overly pessimistic, it is clear, as a minimum, that the system did not live up to expectations in many of its major facets. At the risk of being banal, I would mention some salient features of this decline. First and foremost was the abject failure of the system of maintenance of peace which remained largely ineffective; but also in the context of a normative center the UN fell very short of expectations. The very process of progressive codification, while scoring some important successes, still remains an exceptional and marginal law-making process.

The scientific community was slowly, and perhaps painfully, to rediscover that the inbuilt tensions and contradictions of international law were not swept away but simply swept under the carpet.

As a constitutional text of higher law, the Charter had the *inevitable* fate of all such constitutional texts: clay in the hands of the interpreters; a manipulable text, the result of a compromise which bred as much conflict as it did consensus; and when interpretative consensus was achieved, this was at a level of vagueness which could satisfy opposing notions. (The indeterminacy of interpretation is clearer in the international legal order, which does not enjoy the determinacy fiction generated by fully fledged, compulsory court systems typical of domestic law.)

The ideological cleavage, in reality, was simply to explain a series of statal *voltes-face* depending on the composition of international organs. Faith in the UN and its organs depended on the numeric composition of various bodies.

The "New Sources" were to occupy an increasing number of volumes of academic literature, but for their part, States — of all persuasions — were retracting increasingly to old models of State Practice and away from notions of, say, soft law. (Even the practice of Treaty Law can no longer be explained exclusively by reference to the Vienna Convention!)

And then, in the interpretation of State Practice, the age-old dilemma of interpreting practice as norm-setting or violative was to emerge with particular acuteness.

The list could be continued, but these phenomena are so well known as to obviate any further examples, save perhaps to mention one final factor in the process of disillusionment. The new reality was to be particularly cruel and unpleasant as almost anything in the past: hegemonic behavior of the Super Powers, new forms of Colonialism and oppression by the First and Second Worlds and a growing impatience with a Third World, the internal excesses of which began to overshadow its own past sufferings — even if this remains in many quarters a taboo subject.

It is not surprising that the decline led to a certain loss of the old faith in the system; it is equally not surprising that literature has begun to resonate with self-reflective disillusionment coming from both right and left.

It is possible — in my view — to relate these phenomena to the debate about Crimes of State. It is a debate in which the major exponents represent the principal figures of the "heroic period" and their disciples. In some sense, both sides are motivated by the above-mentioned disillusionment.

For the supporters of the concept, with the Prophetic *Weltanschauung,* the creation of the new category of wrongful acts is a reaction to this decline. It is an attempt to breathe new life into the Charter System where the old mechanisms have failed. (Could there be a stronger prohibition of, say, armed aggression than that found in the Charter, save by making it a Crime?) It is an attempt to resolve (the unresolvable) contradictions of the Charter without touching the original text. It also represents — to some, at least — a harking back to natural law or at least to some form of neo-natural law which

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would seem to offer an Archimedian point in the extreme relativism which has reemerged in international legal scholarship.

For those opposed to Draft Article 19, with the Judge type *Weltanschauung,* the creation of the new category replicates everything that was wrong and bad with the Charter System. It seeks to create a "higher higher" law which will have the same shortcomings as existing formulations — vague, overly open-textured and open to excessive manipulation. The fact that the ILC in its commentary often utilizes a *"renvoi"* to the Charter both exemplifies this fact and, in the eyes of the detractors, ridicules the exercise. The procedural guarantees which the proponents insist on — for example, the need for collective decision making to legitimate third-party reaction toward the perpetrator of a crime — suffer from the same shortcoming: the subjection to the (inevitable) manipulation of collective decision making.

The *Prophets,* imbued with the grand deductive vision, see the new category as a means to arrest a process of decline. The *Judges,* suppressing the grand vision for an inductive view of reality, see the new category as an instrument for exacerbating this decline.

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Prophets and Judges: Two Legal Strategies

I come now to my third and final explanation of the division between proponents and opponents of Crimes of State.

The two reactions to the concept of Crimes examined above may in fact represent two different visions as regards the meaning of law itself and its evolution. While I certainly do not propose to enter a jurisprudential analysis, it may be profitable to touch some of its outer contours.

In order to explain these visions I must make two digressions quite removed from international law in general and Crimes of State in particular.

The first digression is to what must be the single most important normative text in Western civilization and possibly in our entire civilization. I refer to Chapter 20 of the Book of Exodus. (All citations are to the King James Version.)

It is in this Chapter that we find the Decalogue: The Ten Commandments. The text is well known to all of us, or at least was well known in our childhood and youth. To bring out my point I wish to compare Chapter 20 to Chapter 21, a far less known text.

In Chapter 20 we find the following:

> *And God spake all these words, saying,*
> *Thou shalt have no other gods before me*
> . . .
> *Thou shalt not kill*
> . . .
> *Thou shalt not steal*

This is the language of the Prophets, spoken through Moses to the Children of Israel. The text is majestic and impressive; the context is solemn. The style is imperative. But we may still ask: Are the Commandments Law? And are the Commandments effective?

I cannot here give replies to these basic jurisprudential and sociological issues. I plan to use the text merely as a hanger for far less august and more banal affirmations.

But in order to make these affirmations I must turn to Chapter 21 — coming immediately after the Ten Commandments.

The Text begins:

Now these are the judgments which thou shalt set before them

Note that here the text speaks of judgments. What are these judgments? I shall give only a few examples from the long list contained in Chapter 21 and the following ten chapters.

He that sacrificeth unto any god, save unto the Lord only, he shall be utterly destroyed

He that smiteth a man, so that he die, shall be surely put to death

If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox and four sheep for a sheep

It will be immediately seen that I have chosen the Judgments corresponding to the previous three examples from the Commandments: The monotheistic affirmation, the prohibition of murder and the prohibition of theft.

Again the questions may be asked: Are these judgments laws? Are the judgments effective?

As stated, I wish to avoid substantial jurisprudential and sociological analysis. Still, it is clear that the two texts, the Prophetic and the Judgmental, represent different normative models.

The Prophetic model is closer to our notion of natural law. The quality of the norm as a binding law, if at all, derives from its source. Its majestic, laconic and imperative nature imbues it with a moral force which transcends peoples and generations.

The Judgmental model is closer to our notion of positive law, a precise legal text which is clearly to form part of a living legal system. Which of the models is more effective?

The Prophets will point to the timelessness of the Commandments, which have outlived the archaic judgments in the succeeding chapters. Who remembers Chapters 21 to 31? And yet the Commandments are indelibly written in our civilization — religious and secular.

The Judges will remind us that less than forty days after receiving the Ten Commandments in direct revelation, when Moses had returned to the mountain to receive the rudiments of the legal system — the Judgments — the Children of Israel abandoned the majestic words and violated their very essence — they built themselves the famous (or infamous) Golden Calf.

Even the direct word of the Deity, in the absence of a workable legal system, had little effect.

But we are still to define with greater precision the crucial differentiating factor between the Prophetic language of the Commandments and the Judgmental language of the subsequent norms. For it is this difference which will have a bearing on the discussion of Article 19 as a legal strategy.

In order to understand the differences, I must digress yet again. A fundamental legal text, albeit of a different order than the previous ones, which many students studying law in England, as I did, will meet in their first year, is called *Remedies in English Law* by Professor Lawson. Lawson writes: "At an early stage in his legal education the student encounters the Latin maxim *ubi ius ibi remedium;* where there's a right there's a remedy. To which the realist replies: *ubi remedium ibi ius;* where there's a remedy there's a right. And indeed a claim that cannot be enforced no lawyer can consider a right."

This, for me, is the fundamental difference between the Commandments and the Judgments. The Commandments are devoid of remedies; they are normative statements and claims with great authority, but lack a regime of responsibility. The Judgments, by contrast, are part of a legal matrix which is operational.

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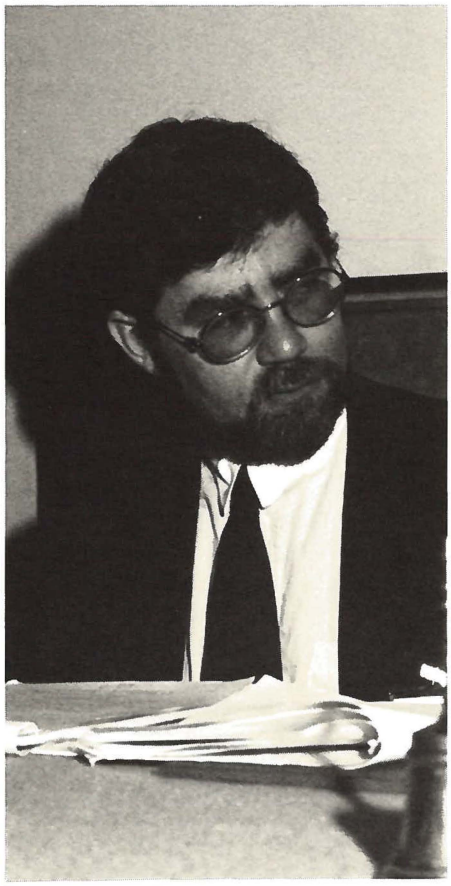

Joseph Weiler is Professor of Law at Michigan Law School and at the European University Institute, Florence. He has held visiting appointments at, among others, All Souls College, Oxford, The Hebrew University, Jerusalem and the Max Planck Institute for International Law, Heidelberg. His main interests are in the fields of European Community Law, Public International Law and Comparative Law. He is the author of several books, among them ***Il Sistema Comunitario Europeo*** *and* ***Israel and the Creation of a Palestinian State.*** *He is co-editor of the multi-volume comparative law series* ***Integration Through Law: Europe and the American Federal Experience.*** *In 1989 he served as consultant to the European Parliament and was one of the principal draftsmen of the European Community Declaration of Human Rights.*

In Lawson's deceptively simple phrases lies, in my view, yet another important way of articulating the cleavage between those who accept and those who reject the current formulation of Article 19.

I believe that everyone accepts the nexus between *ius* and *remedium*. This includes both supporters of, and objectors to, the concept of Crimes of State. But, to return to Lawson's formulation, the question is: *Who are the true realists?* Those who, as Lawson would have us believe, would insist on a full remedy before the assertion of the new norm, or those who would assert the norm and await the evolution of the full remedy?

For what it comes down to is really a question of priorities. Even the most ardent supporters of Article 19 would not contemplate its adoption and *nothing more.* Clearly the consequences of the concept in a differentiated regime of responsibility must be worked out — indeed, a task on which the International Law Commission and the new Special Rapporteur are expending much energy. But to the supporters of the concept, a regime encapsulating the consequences need not attain the completeness and the tightness of, say, a municipal code. The very acceptance of the concept of a Crime of State, "let loose" in the evolving international legal order and its law-making processes, will, according to this prophetic vision, generate and prod the international community to evolve, flesh out and perfect whatever rudimentary regime of consequences is initially worked out.

In other words, for the supporters of the concept, in terms of legal evolution, the *ius* may precede the *remedium*. The absence of a fully fledged system of remedies for the commission of Crimes of State should not be an obstacle to accepting the normative imperative.

Thus, many scholars who support Article 19 find themselves increasingly pushed into a posture of neo-naturalism, whereby basic norms of justice (with all the difficulties of determining these, without reverting to consensualism) must have a fundamental place in any construct of international law. Support of the concept is an expression of this trend. It is interesting since the concept does not formally depart from a positivist model: The proposers do after all stipulate the consensus of the international community as a whole in the creation of the Crime as well as in its effects. But the "higher" status of a Crime as an international norm would assimilate it to a quasi-natural law position.

By contrast, those who oppose the concept of Crimes of State regard the full and meticulous elaboration of the consequent regimes of responsibility a *conditio sine qua non* for acceptance of Article 19.

The skeptics view with alarm the creation of a legal norm for which there is no clear remedy. For them, Crimes of State raise the spectre of the Golden Calf. A norm without a remedy, which is embraced precisely because it has no remedy; because it cannot be enforced; because it is destined to remain — like *ius cogens* — at best a dead letter, at worst another source of normative abuse of the international system. This position is the rejection not only of neo-naturalism, but also of fuzzy positivism. For the opposers, the Judges, the bedrock of legality and the legal system rests not on statements and declarations of states accepting grand principles, nor even, perhaps, in solemn treaties which are then immediately violated, but in state practice following those principles. And for the skeptics, this state practice will simply *not be able to emerge* if the permissive consequences of putative criminal behavior are not clearly set out in advance. The hallmark of the legal norm is its self-sufficiency in legal terms: *ubi remedium — ibi ius.*

The eventual outcome of the debate on State Responsibility and Crimes of State will be an important indicator of the future orientation of the international legal system.