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Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

Topic:

State responsibility

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(c) *The wrongdoer State/"non-directly" injured State relationship*

154. Turning to the relationship between the author of a crime (an *erga omnes* violation by definition), on the one hand, and the "non-directly" injured States—*ut singuli*—on the other hand, the writers who have dealt with the matter, like the Commission, unanimously hold the view that the "special" aspect which most distinguishes the consequences of crimes from "ordinary" wrongful acts lies primarily in the regime governing this relationship.

155. With regard to the "substantive" consequences, no appreciable objections are found in the literature to the idea that, in the case of crimes, any State other than the State author of the wrongful act would be entitled to claim cessation and reparation *lato sensu*.[242] This right seems to exist even in the absence of any prior intervention by international bodies which are to some degree representative.

156. The positions of writers on the *faculté* of "non-directly" injured States to resort unilaterally to countermeasures are more varied. According to some, this right or *faculté* may be considered to be admissible *de lege lata* in general international law and indeed it constitutes the most certain of the distinctive features of the regime of international crimes of States.[243] Others take a more cautious approach, stressing that the *faculté* of States in general and of each State *ut singuli* does not arise automatically from the commission of a crime. It only comes about either subsidiarily, so to speak, that is to say where there is no possibility of intervention by the "organized international community" or where that "community" remains out of the picture owing to an impasse in its decision-making mechanisms,[244] or by way of "solidarity" with the principal victim of the crime (if there is one), which would have to have made a prior request for the help of other States.[245] Some writers, especially Italians, are of the opinion that unilateral countermeasures by any State "not directly" injured are admissible with regard to certain wrongful acts, but not with regard to the entire category of breaches contemplated in article 19 of part 1 of the Commission's draft. According to these writers, the only countermeasures admissible *de lege lata* in the situation under discussion would be collective self-defence against aggression and unarmed intervention in favour of peoples whose aspirations to independence are forcibly repressed by "alien domination".[246] A number of writers consider, on the contrary, that "blanket" resort to unilateral countermeasures is inadmissible (or should be prohibited) even in response to an international crime, save in the case of aggression. Otherwise there would be a risk of justifying any and all abuses and arriving at a situation of anarchy and *bellum omnium contra omnes*.[247] The sole exception to this prohibition would be precisely the case of aggression, in reaction to which not only the use of force by way of self-defence, but also particularly severe and immediate unilateral measures on the part of all States, would be admissible.[248]

157. The writers who accept resort to unilateral countermeasures on the part of any "non-directly" injured State do not go much beyond that generality. They do not make any more significant contributions regarding the legal regime that might govern such countermeasures (possibly a different regime of countermeasures from the one that may be adopted for a mere delict).[249] The only point on which the majority of the writers in question insist is that it would not be lawful for "non-directly" injured States to pursue punitive aims through such measures, that is to say aims other than the cessation of the wrongful act or reparation *lato sensu*.[250]

158. Moving from the area of rights/*facultés* to that of the possible obligations under general international law of "non-directly" injured States, a high degree of consensus seems to exist in the literature, in the sense that such obli-

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[242] Including Graefrath, loc. cit., p. 165; Abi Saab, "The concept of 'international crimes' and its place in contemporary international law", especially p. 149; Jiménez de Aréchaga, "Crimes of States, *jus standi*, and third States", especially p. 255; and Hutchinson, "Solidarity and breaches of multilateral treaties", especially p. 197.

[243] Though with a variety of nuances, this seems to be the position, for example, of Lattanzi, op. cit., p. 533; Dominicé, "Legal questions relating to the consequences of international crimes", especially p. 262; and Dinstein, loc. cit., especially p. 19.

[244] Abi Saab, loc. cit., especially p. 150; Sinclair, "State crimes implementation problems: who reacts?", *International Crimes of State*..., p. 257; Spinedi, loc. cit., p. 133; Hutchinson, loc. cit., pp. 212-213; Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, p. 171 and pp. 205-206.

[245] Cardona Llorèns, loc. cit., especially p. 322; Mohr, "The ILC's distinction between 'international crimes' and 'international delicts' and its implications", especially pp. 131-132; Hofmann, loc. cit., especially pp. 226-228; Hailbronner, loc. cit. and de Hoogh, loc. cit., especially p. 213.

[246] Thus, for example, Cassese ("Remarks on the present legal regulation of crimes of States") and Conforti ("Il tema di responsibilità degli Stati per crimini internazionali"), especially pp. 108-110.

[247] Marek, "Criminalizing State responsibility", especially p. 481; Graefrath, loc. cit., p. 167; Dupuy, loc. cit., pp. 177-179, and "Observations sur le 'crime international de l'État' ", RGDIP (1980), especially pp. 483-484; Jiménez de Aréchaga, loc. cit.; Elias, "Introduction to the debate", especially p. 193; Elagab, *The Legality of Non-forcible Counter-Measures in International Law*, p. 59; Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", especially p. 280; and Ten Napel, "The concept of international crimes of States: walking the line between progressive development and disintegration of the international legal order", especially pp. 165-166.

[248] In this connection see, for example, Hofmann, loc. cit., especially p. 229, and Graefrath, loc. cit., especially p. 166, where the reference is "to the sequestration or confiscation of property of the aggressor or its nationals situated abroad, the suspension of all bilateral treaties with the aggressor State, the punishment of its leaders for the crime against peace".

[249] With regard to what are referred to as preconditions, Sicilianos affirms that immediate countermeasures may be adopted provided that the criminal behaviour is still in progress and there is a situation of emergency (op. cit., p. 206). As for the limits, Mohr considers that States not directly injured may react, by virtue of the proportionality/reciprocity principle, only by countermeasures proportional to the injury sustained as a result of the crime (loc. cit., p. 137). Finally, according to Lattanzi, the regime of countermeasures in question does not differ substantially from that which governs the measures that may be adopted by a State directly injured by a crime (op. cit., p. 533).

[250] Particularly explicit in this respect are Mohr, loc. cit., especially p. 139; Dominicé, "The need to abolish the concept of punishment", pp. 257-258; Sicilianos, op. cit., pp. 52-54; Graefrath and Mohr, loc. cit., pp. 133 and 139; and, among those who deny the admissibility of the countermeasures in question altogether, Marek, loc. cit., p. 463. Less categorical positions are taken however by Spinedi, loc. cit., pp. 28 et seq. and Zemanek, "The unilateral enforcement of international obligations", especially pp. 37-38. Lattanzi (op. cit., p. 533) accepts a function that is afflictive and not only "executive-reparative" in the countermeasures of States "indirectly injured" by a crime.

gations are to be considered a typical, and "special", consequence of international crimes.[251] Reference is made in particular to the obligations of "non-recognition" and "solidarity" mentioned by Mr. Riphagen in article 14, paragraph 2, of part 2 of the draft. Of these, it is especially the obligation not to recognize as "legal" (meaning, presumably, as producing legal effects at the international level and in the respective national systems) any acts performed by the wrongdoing State in respect of the "control of the situation" created by the crime that is deemed by most writers to be a "special" consequence *de lege lata* of crimes as opposed to delicts.[252] It is less easy, on the contrary, to find writers who explicitly accept the conclusion that general international law actually provides for "positive obligations of solidarity" incumbent on all States "not directly" injured by a crime, requiring each such State to participate in the adoption of measures (possibly as decided by an international body) that are designed to help the "most directly" injured State or to restore legality.[253]

(d) *The role of the "organized international community"*

159. Finally, it is essential to take a close look at the positions taken by writers regarding the legal situation of States other than the author of the crime, considered *ut universi*. This refers to the possibility for the "organized international community" to deal with the various issues and implications of international responsibility for "crime". Here, too, a fairly wide range of positions is to be found.

160. At one end of the spectrum are the writers who feel that competence belongs, *de lege lata*, exclusively to United Nations organs. They are obviously thinking particularly of the Security Council, the body empowered to take coercive action under Chapter VII of the Charter to implement any measures required by an international crime of a State.[254] In the opinion of those writers, the hypothesis of "threat to the peace" provided for in Article 39 of the Charter in fact allows for a sufficiently broad interpretation to enable the Council to cover the acts defined as "international crimes".[255] Clearly, once it was accepted that the "specificity" of the regime of crimes lay in the competence of the Security Council under the Charter, the obligation for every State to give effect to any "sanctions" decided by that organ would follow as a matter of course.[256]

161. Not too far from that position are those writers who, unlike the ones just mentioned, do not consider the system of Chapter VII of the Charter at present suited to the implementation of the "special" regime of responsibility for all crimes (but rather consider it applicable only to aggression and crimes constituting a breach of the peace or a threat to the peace), yet similarly wish to see provision made for such implementation by the United Nations security system. This should be achieved, in their view, by progressive development (*lex ferenda*). That system is the only one, in their opinion, that might "ensure the minimum guarantees of objectivity which ought to inspire a regime of responsibility for crime of a general character".[257]

162. Other writers, starting from an analogous reading of Chapter VII of the Charter (from the perspective of responsibility), arrive at a different, more "restrictive", conclusion whereby the category of crimes should be limited to those wrongful acts that constitute a breach of, or a threat to, the peace, so as to place the concept of responsibility for crime on a firmer legal footing, without at the same time improperly broadening the scope of the Charter's security system".[258]

163. Close to this view, but more clearly defined, is the opinion according to which competence for imposing

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[251] Simma observes in fact that "the majority of observers, following the bilateralist way of thinking, would probably agree that the very idea of obligations on the part of 'third' States in case of a violation of international law is a remarkable innovation, not to speak of the substance of such solidarity" ("International crimes: injury and countermeasures: comments on part 2 of the ILC work on State responsibility"), especially p. 305.

[252] Including Cardona Llorèns, loc. cit., especially pp. 312 et seq.; Abi Saab, loc. cit., especially p. 149; and Graefrath, loc. cit., especially p. 168, who calls attention to various signs that point in this direction (the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 138 above), the Definition of Aggression (General Assembly resolution 3314 (XXIX), annex), United Nations resolutions on Southern Rhodesia, the South African presence in Namibia, the creation of Bantustans by South Africa and the Israeli-occupied territories); Dupuy, loc. cit. (see footnote 234 above), especially p. 181; Jiménez de Aréchaga, loc. cit., especially pp. 255-256; Conforti, loc. cit. especially pp. 108-109, who, however, confines this "special" legal consequence solely to the hypotheses of aggression and violation of "external" self-determination; Frowein, "Collective enforcement of international obligations", especially p. 77; Graefrath and Mohr, loc. cit., especially pp. 110 and 114.

[253] See, for example, the reservations of Sicilianos, op. cit, p. 171, and Hailbronner, loc. cit., pp. 11-15, according to whom, *de lege lata*, there does not exist any obligation of "active solidarity", but only, if anything, the obligation not to interfere with any action undertaken by the "organized international community".

[254] Graefrath, loc. cit., especially pp. 164-168.

[255] Ibid., p. 164. According to Graefrath, "An international crime, being a serious violation of an international obligation essential for the protection of fundamental interests of the international community by definition is an international affair which establishes the jurisdiction of the United Nations." (ibid.). And again: "States have authorized the Security Council to determine the existence of an international crime . . . to decide upon measures necessary to stop the continuation of the wrongful conduct and to enforce universal respect for the observance of those international obligations which are fundamental for the maintenance of international peace" (ibid., p. 167).

[256] Ibid., p. 167.

[257] Conforti, loc. cit., especially p. 107. Along the same lines, Jiménez de Aréchaga, loc. cit.

[258] Starace, "La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale". *Collected Courses . . . 1976-V*, pp. 294 et seq. Along the same lines, see Quigley, "The International Law Commission's crime-delict distinction: a toothless tiger?", especially pp. 137 and 133 et seq. and Dupuy, "Observations sur la pratique récente des 'sanctions' de l'illicite". According to the latter, it would not be appropriate, in particular, to provide in the Commission's draft for a regime of responsibility for the crime of aggression that was different—alternative or subsidiary—from the mechanism established in Chapter VII of the Charter of the United Nations and the related competence of the Security Council, all the more so if, on the basis of such a different regime, resort to unilateral countermeasures was admissible. For Dupuy there is a fear that this substitution of action will lead to a weakening of the prestige and authority of the world organization, whose incapacity to keep the peace would thus be underlined by the unsupervised, albeit generous, actions of certain States. The very basis of the notion of crime, which aims above all at ensuring respect for obligations essential to the international commu-

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