(ii) Decisions of the Thirty-third Session Agenda Item : Work of the International Law Commission

Adopted on January, 21, 1994

The Asian-African Legal Consultative Committee at its Thirty-third Session

Having taken note with appreciation of the report of the Secretary-General on the work of the ILC at its Forty-fifth Session, (Doc.No. AALCC/XXXIII/Tokyo/94/1).

Having heard the comprehensive statement of the Vice Chairman of the International Law Commission;

1. *Expresses* its felicitations to the International Law Commission on the achievements of its Forty-fifth Session;

2. *Acknowledges and appreciates* the contributions of the Chairman of the International Law Commission Ambassador Julio Barboza, and the Vice Chairman Prof. Mr. V.S. Vereshchetin and thanks them for the lucid and succinct report that has been presented by the Vice Chairman on behalf of the Commission's Chairman;

3. *Expresses* its appreciation to the Secretary-General for his report on the work of the International Law Commission at its Forty-fifth Session, and particularly

the progress made on the question of the Establishment of an International Criminal court;

4. *Requests* the Secretary-General to bring to the attention of the International Law Commission the views expressed on different items on its agenda including ideas concerning non-navigational uses of international watercourses during the Thirty-third Session of the AALCC; and

5. *Decides* to inscribe on the agenda of the Thirty-fourth Session of the Committee an item entitled "The Report on the work of the International Law Commission at its Forty-sixth Session".

(iii) Secretariat Brief: Report on the Work of the International Law Commission at its Forty-fifth Session

A. STATE RESPONSIBILITY

At its forty-fifth session the International Law Commission had before it the fifth Report of the Special Rapporteur, Mr. Gaetano Arangio Ruiz.[1] The Report comprised two chapters which were addressed to "Part Three of the Draft Articles on State Responsibility and Dispute Settlement Procedures" and "The Consequences of the so-called International Crimes of States."

Introducing his report the Special Rapporteur recalled that the Commission had in 1985-86 considered, and subsequently referred to the Drafting Committee, dispute settlement provisions proposed by the then Special Rapporteur Mr. Willhem Riphagen. Those provisions had envisaged that the parties to a dispute would seek a solution "through the means" indicated in Articles 33 of the Charter of the United Nations". The recourse to dispute settlement mechanisms and procedures was, of course, to be without prejudice to any rights and obligations, regarding settlement of disputes, that might be in force between the parties. Failing a solution under Article 33 of the Charter of the United Nations, draft article 4 proposed by the former Special Rapporteur, had envisaged three kinds of procedures viz. (a) that any dispute arising with regard to the prohibition of countermeasures which involved the violation of a rule of *jus-cogens* could be submitted unilaterally by either party to the International Court of Justice;

1. See A/CN.4/453 and Add 1 and Add 1. Corr.1; and A/CN.4/453 Add 2 and 3.

(b) unilateral application to the Court in the case of any dispute concerning the "additional rights and obligations" envisaged as the special consequences of crimes as distinct from the consequences of delicts; and (c) resort to a conciliation procedure with regard to the more general category of disputes concerning the application of interpretation of the provisions of part Two (of the draft articles) relating to countermeasures.[2]

While recognising the general support for these proposals, as evidenced by the Commission's debates, Mr. Arangio Ruiz, the present Special Rapporteur believed that in order to remedy the drawbacks identified during the debate more effective dispute settlement provisions needed to be included as an integral part of the proposed convention.

The Special Rapporteur further explained that he was not advancing any suggestions with regard to what had been termed "additional rights and obligations" attaching to the internationally wrongful acts contemplated in article 19 of the Part One of the draft articles and had therefore, for the present, not concerned himself with the dispute settlement provisions covering crimes. He clarified that the proposals set forth in the present (fifth report) were mainly concerned with the dispute settlement in respect of category of disputes concerning the application of interpretation of the provisions relating to the regime of countermeasures.

In the opinion of the Special Rapporteur the general support, both within the Commission and the Sixth Committee for the solution offered by the conciliation procedure in respect of category of disputes concerning the application or interpretation of the provisions relating to countermeasures, had stemmed from the notion that any settlement provision of the draft articles should be of such a nature as not to directly affect the right or *faculte* of the injured State to resort to countermeasures. It was also based on the view that the conciliation procedure introduced in Part Three as proposed by the former Rapporteur Mr. Riphagen, ought to become operative on a unilateral initiative, only when a countermeasure had been adopted and the target State had raised objection thereto. The general agreement that the mandate of the conciliation commission should be confined to any given controversial issue relating to the lawfulness of the countermeasure in question is particularly significant. According to the earlier proposals, as accepted by the Commission the conciliation commission should deal with any question of fact or law that might be relevant under the proposed Convention on State Responsibility.

There had also been general agreement in the Commission, the Rapporteur stated, though some dissension had been heard, on the possibility of unilateral application for judicial settlement by the International Court of Justice of any

2. For detail see *yearbook of the ILC* 1986 Vol. II (Part I).

dispute as to whether or not a particular countermeasure was in conformity with a peremptory norm of international law.

With regard to the most frequent hypothesis, namely, one involving any other question arising under the law of State responsibility between the injured State and the wrong-doing State following the adoption of a countermeasure, the Commission had shown itself to be generally satisfied with the proposed conciliation procedure. It had not contemplated either arbitration or judicial settlement—the only procedures that would lead to a legally binding settlement. In practical terms, the only defence against abusive and unjustified countermeasures was, according to the Commission's decision to refer Part Three as proposed by Mr. Riphagen to the Drafting Committee, a non-binding report by a conciliation Commission.

The very definite drawbacks of having to rely on unilateral countermeasures to secure compliance with international obligations had been stressed in both the third and the fourth reports and also in a number of statements made in the Commission in 1991 and 1992. Indeed, at the Commission's previous session, some members had even questioned the desirability of including provisions that would codify a legal regime of unilateral countermeasures. His immediate response had been that the way to remedy the drawbacks of countermeasures was not for the Commission to close its eyes to a practice of customary law which in fact called for express regulation through the codification and progressive development of international law. The remedy was to adopt in Part Three more advanced, more effective dispute settlement provisions so as to ensure that impartial third-party procedures could always be available in the event of unjustified, disproportionate or otherwise non-lawful countermeasures.

In the Rapporteur's opinion the problem to be resolved in Part Three was different in that it concerned, the settlement obligations to be set forth anew by way of a "general compromissory clause" of the draft articles themselves. Such settleement obligations would be created by Part Three of the draft articles and eventually by Part Three of a future convention on State responsibility. The procedures would complement, supercede or tighten up any obligations otherwise existing between the injured State and the wrongdoing State in any given case of an alleged breach of international law. With regard to such obligations, two kinds of solution were theoretically conceivable. One was described as a maximalist or ideal solution, the other as being a minimalist one.

The theoretically ideal solution would eliminate or reduce the difficulties inherent in relying in on any more or less effective dispute settlement arrangements existing between the parties, or which the parties might conclude in a given case. The way to attain that objective would be to replace provision which merely

referred to dispute settlement obligations deriving from sources other than a convention on State responsibility, as was the case with article 12, paragraph (1) (a), by provisions directly setting forth the obligation to exhaust given third party settlement procedures as a condition of resort to countermeasures.[3]

Recognizing that such a solution might not be acceptable to the majority of members of the Commission the Special Rapporteur did not propose any draft articles embodying it, unless the debate revealed that the maximalist approach would meet with the Commission's approval. He also proposed (i) to leave draft article 12, paragraph (1) (a), unaltered as a provision referring to, and not creating, settlement obligations; and (ii) to strengthen in Part Three the non-binding conciliation procedure proposed in 1985-1986 by adding arbitration and judicial settlement procedure without, however, directly affecting the injured State's prerogative to take countermeasures.[4]

That prerogative, would, as it were, exist only in the mind of the injured State, which would know in advance that resort to a countermeasure exposed it to the risk of third party verification of the lawfulness of its reaction. The theoretically ideal solution in the course of the debate of the Commission, was firmly rejected by the majority of the members of the Commission.

As to the solution recommended in the Fifth report, namely a three-step third party dispute settlement procedure which would come into play only after a countermeasure had been resorted to by an injured State allegedly in conformity with draft articles 11 and 12 of Part Two and after a dispute had arisen with regard to its justification and lawfulness,he referred members to the draft articles set out in section 6 of the report. The three steps of the proposed procedure—conciliation, arbitration, and judicial settlement—were described in paragraphs 62 to 69 *bis* of the report.

According to that solution (as embodied in proposed draft articles 1-6 and the Annex thereto), if a dispute arose between the parties following adoption of a countermeasure by the allegedly injured State and a protest or other form of reaction by the allegedly wrongdoing State, and if such a dispute was not disposed of, either party would be entitled to initiate unilaterally a conciliation procedure within a given period, either party would be entitled to initiate unilaterally an arbitral procedure. A third step before the ICJ was proposed in case of *exces de pouvoir* by the arbitral tribunal and on other hypotheses. The Special Rapporteur pointed out that although in principle three steps were provided for, it would presumably not be frequent that they will be all used in every case. The dispute could well be settled during and following the conciliation procedure, namely as

3. See A/CN.4/450 para 61(c)
4. *Ibid* para 76.

one step. Arbitration would come into play only in case of failure of conciliation; and the procedure before the ICJ, in its turn, would only come into play in case the arbitral proceedings failed or the arbitral award was contested for *excess do pouvoir* or violation of fundamental rules of arbitral procedure.

The proposed system had three essential features which should be emphasized. The main feature was that, failing an agreed settlement between the parties at any stage, the system would—without sigificantly hampering the parties choices as to other possible settlement procedures—lead to a binding settlement. The second essential feature of the proposed solution, was that the settlement procedures to be included in the draft articles would not be of such a nature as to curtail directly, in any significant measure, the injured State's prerogative to resort to countermeasures against a State which it believed had acted in breach of one of its rights. The lawfulness of the resort to countermeasures remained, subject to such basic conditions as the existence of a wrongful act, its attribution to a given State and the other conditions and limitations laid down in draft articles 11 to 14 of Part Two.

The "triggering mechanism" of the settlement obligations developing on the parties under proposed Part Three would neither be an alleged breach of a primary or secondary rule nor a dispute that might arise from the contested allegation of such a breach; it could only be a dispute arising from contested resort to a countermeasure by an allegedly injured State or, possibly, resort to a counter-reprisal by the opposite side. The first-instance evaluation of the existence of such a dispute, and consequently of the triggering conditions, would be made by the proposed conciliation commission. The recommended system afforded the advantage that resort to a third-party procedure by an allegedly wrong-doing State which had been the target of a countermeasure would not follow upon a mere objection to an intended and notified countermeasures: it could take place only after the countermeasure had actually been put into effect.

Although as already stated, the mechanism would not directly preclude resort to countermeasures by an injured State at its own risk, the availability of the system was designed to have a sobering effect on an injured State's decision to resort to countermeasures. At the same time, it would not be the kind of system for suspending unilateral action that was found in other drafts, such as the draft articles on the law of the non-navigational uses of international watercourses. Within the framework of the dispute settlement system proposed for the present topic, the countermeasure would not be suspended at all, except by an order of a third-party body after the initiation of a settlement procedure. The only disincentive would be, in the mind of the injured or allegedly injured State, which, it was to be hoped, would be induced to exercise the highest circumspection in weighing up the necessity for, and lawfulness of, any countermeasure envisaged.

Section 5 of Chapter I of the Fifth Report briefly reviews the policy which had thus far prevailed in the Commission with regard to the dispute settlement provisions of its drafts. The review was followed by an illustration of some of the new trends which were discernible in the more promising attitudes of States in the aftermath of the end of cold war confrontation and in terms of the United Nations Decade of International Law, than the attitudes manifested by the same States in the relatively recent past. Section 5 also emphasized the need for the Commission to view the elaboration of Part Three of the draft as a valuable opportunity seriously to advance the cause of the rule of law in the inter-state system. By adopting a suitably effective settlement system in the draft, the Commission would serve two vital purposes. The first and immediate purpose was to add a correction to the rudimentary system of unilateral reactions represented by countermeasures, however, strictly they were regulated. The commission should feel bound to make an indispensable contribution to cutting down the inequitable consequences of inequalities among the members of the inter-state system, which term more accurately reflected the current reality than did the term "international community".

The second equally important reason for adopting Part Three was to help bridge a striking legal gap: the absence of real procedural obligations for States in the matter of dispute settlement.

The Special Rapporteur urged that the Commission must stop assuming that State would not approve more advance commitments or make use of procedures for the settlement of disputes. He said that the Commission must indicate to the Governments, which it served *uti universi*, as a whole (and probably with their peoples), but not *uti singuli*, what it considered to be the minimalist requirements, and it should let Governments take responsibility for accepting or rejecting them.

In summing up the Special Rapporteur did not propose any draft articles relating to the dispute settlement procedures relating to crimes of States. During the debate in the Commission the majority of members emphasized the desirability of creating effective dispute settlement procedures in particular compulsory procedures, as one of the measures for controlling unilateral reactions to wrongful acts (countermeasures). The arguments advanced in this regard were threefold viz (i) the post cold war international political climate and the increasing willingness of States to submit disputes to third party mechanisms for resolution thereof: (ii) the role of the International Law Commission in the progressive development and codification of International Law and (iii) the need to protect weak States from abuses, on the part of powerful States, of the right to unilateral measures. The Secretariat of the Asian-African Legal Consultative Committee recognises the merits of disputes settlement procedures and endorses the efforts

of the members of the Commission to foster third party dispute settlement procedures during the United Nations Decade of International Law.

Although the three step dispute settlement system which the Special Rapporteur had proposed viz. conciliation, arbitration and judicial settlement, received significant support, some members of the Commission were not convinced of the merits of the proposal. The view was expressed, for instance, that even though the:

> "Special Rapporteur presented his position as being minimalist, he was actually proposing a revolution. States that would ratify such an instrument would be bound to accept conciliation, and the conciliation commission would have a number of decision-making powers; if conciliation failed, arbitration would be compulsory, and if the arbitral tribunal in turn failed to issue an award was not respected, the International Court of Justice would then be competent. All that would cause a great upheaval in the international legal order."

It was stated that the proposed mechanism was intended to apply only to the settlement of all disputes concerning State Responsibility. But since all internationally wrongful acts engaged a State's Responsibility all legal disputes States raised the question of State Responsibility. Therefore, if the Special Rapporteur's proposed mechanism were adopted all disputes would become justiciable.

One member has suggested that there should be separate regimes for the evaluation of the lawfulness of counter-measures and the settlement of disputes relating to the interpretation or application of the future convention. This approach, it was argued had a two-fold advantage in that; it would allow an impartial decision to be taken rapidly on the admissibility of countermeasures, something which would be both in the interest of the wrondoing State, which might be affected by unjustified countermeasures, and in the interest of the injured State, which would thus be assured of not subsequently being penalized for having acted *ultra vires*. Secondly recourse to settlement procedures in the event of dispute relating to the application or interpretation of the future convention would be available even in the absence of countermeasures. The member suggested a distinction between disputes concerning the lawfulness of countermeasures, disputes related to crimes and other disputes.

The view was also expressed that under contemporary International Law the freedom of States to choose the means of dispute settlement was well-established, as well as the obligation to settle disputes peacefully. The proposed three-step system it was argued would be too rigid and would undermine such freedom of choice. The restrictive approach proposed by the Rapporteur it was felt was likely

to give rise to strong opposition from states. In the opinion of that member the proposed system went beyond progressive development of international law, and sovereign States were unlikely to subscribe to it.

Several members while admitting the utility of a compulsory hierarchical settlement regime advocated reducing the system to its two main stages viz. arbitration and/or judicial settlement. Some members favoured a greater use of the International Court of Justice, in particularly the Chamber system request for advisory opinions. One member expressed the view that it would be unfortunate if the Commission were to rule out any possibility of International Court of Justice serving as a third party adjudicator''. The Secretariat of the Asian-African Legal Consultative Committee concurs with this view and strongly recommends a wider use of the World Court in the proposed dispute settlement system. A wider use of the International Court of Justice in matters relating to or arising out of State responsibility needs to be given consideration in light of the observation made in the Commission that the topic of State Responsibility covered the whole spectrum of international law and that any settlement provision in respect of State Responsibility would affect both the primary and secondary obligations of States regardless of the subject matter.

With regard to the first level of the proposed system namely conciliation, the view was expressed that the provisions of the proposed articles could be interpreted to mean that the procedure was applicable only in the case of counter-measures and not of State responsibility in general. It was also observed that the proposed conciliation procedure was compulsory for all disputes when amicable settlement procedures had been exhausted and the conciliation commission could order, the suspension of countermeasures or any provisional measures of protection. Some members however pointed out that the compulsory or binding features of the proposed procedure was not yet established in general international law.

Another member observed with regard to the successive steps of conciliation arbitration and judicial settlement that conciliation was hardly practised in Africa, which had long recourse to the political settlement of disputes at inter-State conferences. He emphasized however, that this did not mean that an organized conciliation system was unthinkable, but that it would have to be established with a degree of caution. In his view, the functions of the conciliation commission might be too hybrid in nature and encompass both conciliation and arbitration. One member pointed out that conciliation had keen successfully used in distributing the joint assets of the East African Community upon its dissolution. The Secretariat of the AALCC supports the role of conciliation in the dispute settlement practice of States which needs to be given serious consideration.

It was also suggested that conciliation involved aspects of negotiation,

ecouraging dialogue and inquiry and providing information as to the merits of the positions taken by the parties, resulting in a settlement corresponding to what each party deserved, not what it claimed. Although the proposed conciliation procedures were described as being binding, they nevertheless retained the distinctive feature of conciliation, namely the development of proposals. According to this view the report also seemed to suggest that the proposed regime would be binding only when certain measures had been taken, whereas arbitration and judicial settlement procedures applied to the entire spectrum of State Responsibility.

As mentioned above, Chapter II of the Fifth report dealt with the consequences of the so-called international "crimes" of States. Due to lack of time, however the Commission was unable to consider Chapter II at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce this chapter, in order to expedite work on the topic at the next session. In introducing Chapter II the Special Rapporteur drew attention the question of the consequences of international crimes of States. The historical survey of this question provided the starting point for identifying the issues related to the problematic aspects of a possible Special regime of responsibility of "Crimes"and "International Crimainal Liability" of States of individuals or of both respectively.

The Special Rapporteur observed that according to article 19 of Part One of the draft articles, crimes consisted of seroius breaches of *erga omnes* obligations designed to safeguard the fundamental interests of the international community as a whole. That did not imply, however, that all breaches of *erga omnes* obligations were to be considered as crimes. The basic problem was to assess to the extent to which the breach seriously prejudiced an interest common to all States and affected the complex responsibility relationship which arose even in the presence of "ordinary" *erga omnes* breaches.

The Special Rapporteur felt that the best approach was to distinguish between the objective and subjective aspects of the issue. From an objective viewpoint, the question was the fashion in which the severity of the breach in question aggravated the content and reduced the limits of the consequences—substantive and instrumental—that characterized an "ordinary" *erga omnes* breach, namely a delict. From a subjective viewpoint, the question was whether or not the fundamental importance of the rule breached gave rise to any changes in the otherwise inorganic and not "institutionally" coordinated multilateral relations that normally arose in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrong doing state and all other States or among the multiplicity of injured States themselves.

Dealing with the substantive consequences, namely cessation and reparation, he said with regard to cessation that crimes did not present any special character

in comparison with "ordinarily" wrongful acts, whether *erga omnes*, or not because the obligation of cessation was not susceptible of a "qualitative" aggravation, attenuation or modification; and second, what was involved, even in the case of delicts, was an obligation incumbent on the responsible State even in the absence of any demand on the part of the injured State or States.

The Special Rapporteur considered the issue of reparation *lato sensu*, which encompassed *restitutio*, compensation, satisfaction and guarantees of non-repetition, to be more complex that the issue of cessation. From an objective standpoint, some of the forms of reparation, especially *restitutio* and satisfaction, were subject, in the case of delicts, to certain limits. Thus it had to be determined whether, in consequence of a crime, such limits were subject to derogation and, to the extent thereof.

As to the subjective aspect, the Special Rapporteur noted that, unlike the case of cessation, the forms of reparation were covered by obligations which the responsible State was required to perform only upon demand by the injured party. Since a crime always involved a plurality of States and possibly, in many cases, States less directly injured than a "principle victim", it must be asked whether, in the current state of international law, each of those States was entitled to claim reparation *uti singulus* or whether the *lex lata* required some mandatory form of coordination among all the injured States.

Apropos the "instrumental" aspects of the possible special consequences of crimes, the Special Rapporteur observed that the Commission needed to provide clear definitions for some of the requirements traditionally considered to be conditions of self-defence, namely, immediacy, necessity and proportionality, the first two of which were often overlooked. It would also have to clarify under what circumstances and preconditions the rights of "collective" self-defence included the use of armed force against an aggressor by States other than the main target of the aggression.

The Special Rapporteur drew attention to another problematic aspect of resort to force in response to a crime, namely whether armed countermeasures were admissible when they were intended not to bring about the cessation of a crime in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition.

The Special Rapporteur considered the extent to which the function and competence of the various organs of the United Nations were or should be made legally suitable for the implementation of consequences of international crimes. Three specific questions dealt with in this regard were : (i) *de lege lata*, whether the existing powers of United Nations organs, such as the General Assembly, the Security Council and the International Court of Justice, included the determination

of the existence the attribution and the consequences of the wrongful acts contemplated in article 19; (ii) *de lege ferenda*, whether and in what sense the existing powers of those organs should be legally adapted to those specific tasks; and (iii) of what extent the powers of United Nations organs affected or should affect the *facultes*, the rights or the obligations of States to react to the internationally wrongful acts in question, either in the sense of substituting for individual reaction, or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

As regards the first question the Rapporteur found that the International Court of Justice was the only existing permanent body which possessed the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act, including possibly a crime of State. It was the function of the Court "to decide in accordance with Intenational Law" and its pronouncements possessed "binding force between the parties" to the dispute. Those two features of the Court's function, as well as its composition, made it in principle more suitable than any other United Nations organs to rule on the existence and legal consequences of an internationally wrongful act.

With regard to the third issue, namely the relationship between the reaction of the organized community through international bodies such as United Nations organs and the individual reaction of States, he observed that the possibilty of the organized community adopting measures against a criminal State posed the problem of harmonizing the exercise of that competence with the carrying out of those measures which the injured State or States might still be entitled to adopt unilaterally, as indicated by the examples discussed in his report.

The Special Rapporteur believed that the most important questions with regard to the consequences of international crimes were those which affected the role of the organized international community and, in particular, that of United Nations organs. He observed in this regard that were it not for article 19, the Commission's work on international responsibility might seem, to an observer, to be based upon an implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a penal responsibility of individuals on the other. The Code of Crimes against the Peace and Security of Mankind was based on the assumption that the Code would cover only crimes of individuals, though the individuals in question would have close ties with the State. According to this dichotomy, individuals, would be amenable to criminal justice, but States would not. Although it could be argued that article 19 should be deleted as an illogical and contradictory element, the Special Rapporteur said that he could not subscribe unconditionally either to the notion that criminal responsibility would be incompatible with the nature of the State under existing International Law, or

to the view that the international responsibility of the State was confined *de lege lata* within a strict analogy with civil responsibility under municipal law.

The first and main cause of the alleged incompatibility was the maxim *societas delinquere non potest*. In the view of the Spectal Rapporteur, that maxim was surely justified for juridical persons of municipal law, but it was doubtful whether it was justified for States as international persons. Although States were collective entities, they were not quite the same thing, *vis-a-vis* international law, as the *personnes morales* of municipal law. On the contrary, they seemed to present the features—from the viewpoint of international law—of merely factual collective entities. That obvious truth, concealed by the rudimentary notion of juridical persons themselves as "factual" collective "entities" found recognition in the commonly held view that international law was the law of the often very seriously punitive.

He pointed out that States seemed bound to remain, under an international law which was inter-State law, essentially factual not juridical collective entities. As such, there remained not only unlawful acts of any kind-notably the so-called "crimes "as so-called "delicits"—but equally susceptible of reactions quite comparable, to those which are met by individuals found guilty of crimes in national societies. The Special Rapporteur drew attention to the crucial problem of distinguishing the consequences of an international State crime for the State itself—and possibly the State's rulers, on the one hand, and the consequences for the State's people, on the other.

Another problem is that of State fault. In this regard, the Special Rapporteur requested the members of the Commission to consider, as "material legislators", whether the kind of breaches contemplated in article 19 could be dealt with without taking account of the importance of such a crucial element as willful intent *(dolus)*....

The last problem which he called attention to concerned article 19 itself. In this regard he asked whether it was appropriate to elaborate a dichotomy between "crimes" and "delicts" if there existed substantial or signficant differences in the manner in which the various specific types of crime were dealt with. He asked whether, it would be preferable to distinguish aggression from other crimes. Pointing out that the list of wrongful acts constituting crimes contained in article 19 dated back to 1976 he asked whether those acts were still the best examples of the wrongful acts which the international community as a whole considered as "crimes of States or whether that list should be "updated". The formulation of the general notion of crimes in article 19, with wording characterized by certain elements rendered it difficult to classify a breach as a crime or a delict and hence

so ascertain which unlawful acts now came, or should come, under a regime of "aggravated" responsibility?

The Commission at its forty-fifth session provisionally adopted the text of seven draft articles viz. paragraph 2 of Article 1 and articles 6, 6 *bis*, 7, 8, 10, and 10 together with commentaries thereto. It may be useful to set out the provisions thereof.

Paragraph 2 of Article 1 as provisionally adopted by the Commission stipulates that the legal consequences (of internationally wrongful acts) are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

The commentary thereto emphasised that paragraph 2 of Article 1 states the rule that where as a result of an internationally wrongful act a new set of relations is established between another State and the injured State the previous relationship does not *ipso facto* disappear and that even if the author State complies with its secondary obligation it is not relieved of its duty to perform the obligation which it has breached. Paragraph 2 is of the nature of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation of the eleven articles which the Commission has till date provisionally adopted Article 1 together with the following four viz, draft articles 2 to 5 are as yet untitled.

Article 6 on cessation of wrongful conduct as provisionally adopted reads :

> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct without prejudice to the responsibility it has already incurred.

This provision is the first of a series of provisions dealing with the new relations which arise from an international delict between the author State and the injured State, Their new relations involve *inter alia* (i) new obligations of another State and corresponding entitlements of the injured State which are dealt with in articles 6 to 10 *bis* and (ii) new rights of the injured State or States such as the right to take countermeasures which is currently under consideration.

The new obligations of another State consist in the redressal of the situation stemming from the breach of a primary obligation, that is to say, an obligation embodied in a primary rule. The obligation to make reparation is the most frequently invoked of the new obligations and is dealt with in article 6 *bis*. The obligation to make reparations may be discharged in a number of forms as stipulated in articles 7, 8, 10 and 10 *bis*. These articles must therefore be read

together. A primary exigency in eliminating the consequences of a wrongful act is to ensure its cessation i.e. discontinuance of the specific conduct which is in violation of the obligation breached. This provision thus emphasizes and incorporates the importance of cessation.

The Commission has taken the view that cessation falls within the grey area of the "primary" and "secondary" rules in as much as it operates in concretizing the primary obligation, the infringement of which is in progress and affects the quantity and quality of reparation and the modalities and conditions of the measures to which the injured State or States or an international institution may resort to in order to secure reparation.

Among the reasons for devoting an entire article to cessation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation such as *restitutio in integrum*. The difficulties which may normally prevent or hinder restitution in kind are not such as to affect the obligation to cease the wrongful conduct.

Article 6 *bis* entitled Reparation provides:-

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, as provided in articles 7, 8, 10 and 10 *bis*, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the willful act or omission of :

   (a) the injured state; or

   (b) a national of that state on whose behalf the claim is brought which contributed to the damage.

3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

This formulation is based *inter alia* on the widely shared view that a State discharges the reponsibility incumbent on it for breach of an international obligation by giving reparation for the injury or harm caused. The term "reparation", is generic and describe the various methods available to a State for discharging or releasing itself from such responsibility and, is employed in Article 36 paragraph 2 of the Statute of the International Court of Justice.

It would have been observed that while article 6 stipulates an obligation for

the State which commits an internationally wrongful act the present Article 6 *bis* provide for a right of the injured State taking cognizance of the fact that it is a decision of the latter i.e. the injured State that sets a secondary set of legal relations into motion. Thus paragraph 1 expressly provides that a State which commits an internationally wrongful act is under an obligation to provide full reparation for the injury sustained as a result of the internationally wrongful act. The injury may be the result of concomitant factors among which the wrongful act plays a decisive but not an exclusive role. In such cases, to hold the author State liable for reparation of all the injury would be neither equitable nor in conformity with the proper application of the causal link theory which is extensively dealt with in the commentary to article 8. Among the various factors which may combine with the wrongful act to produce the injury, paragraph 2 singles out the negligence or the willful act or omission of the injured State which contributed to the damage (subparagraph (a)) and the negligence or the willful act or omission of a national or the injured State on whose behalf the claim is brought which contributed to the damage (subparagraph (b)). States may bring such claims on behalf of their nationals, namely natural or juridical persons, both of which are covered by the term "national". This factor is widely recognized both in doctrine and in practice as relevant to the determination of reparation.

Article 7 on *Restitution in kind* as provisionally adopted reads :-

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind :

   (a) is not materially impossible;

   (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

   (c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

   (d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

It may be recalled that in Article 6 *bis* restitution in kind was the first of the methods of reparations listed as being available to a State injured by an internationally wrongful act. There is, however, no accepted definition of