restitution. It has been variously defined as re-establishing the situation that existed prior to the occurrence of the wrongful act in order to bring the relationship between the parties to its original State as well as establishment or re-establishment of the system that would exist, or would have existed if the wrongful act had not been committed. The Commission, has opted for the purely restitutive concept of restitution in kind which, aside from being the most widely accepted has the advantage of being confined to the assessment of a factual situation involving no theoretical reconstruction of what the situation would have been if the wrongful act had not been Committed. The Commission opted for the restructure definition of restitution in kind bearing in mind that it had in paragraph 1 of article 6 *bis* spelt out the entitlement of the injured State, in any event, to "full reparation" for the injury sustained as a result of an internationally wrongful act. It would have been observed that the above mentioned provision clarifies further that restitution in kind compensation are susceptible of combined application. To sum up, the Commission is of the view that restitution should be limited to restoration of the *Status quo ante*—which can be clearly determined—without prejudice to possible compensation for *lucrum cessans.*

Compensation, the main and central remedy resorted to following an internationally wrongful act is the subject matter of draft article 8. Article 8 as provisionally adopted reads as under :

> "The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
>
> For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

To begin with it needs to be recalled that compensation is not the only mode of reparation consisting in the payment of money—nominal damages or damages reflecting the gravity of the infringment are also of a pecuniary nature. The latter, however, perform an afflictive function which is alien to compensation even though a measure of retribution is present in any form of reparation. This distinction between payment of moneys by way of compensation and payment of money for afflictive purposes is generally recongnised.

Paragraph 1 of article 8 as adopted incorporates three elements in relation to compensation. These are (i) the concept of entitlement; (ii) the requirement of a casual link and (iii) the relationship between compensation and restitution in

kind. As to the first, like all other provisions on reparation, article 8 is couched in terms of *entitlement* of the injured State and makes the discharge of the duty of compensation conditional upon a corresponding claim on the parts of the injured State.

Draft Article 10 on satisfaction as adopted at the forty-fifth session reads :

1. "The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following :

   (a) an apology;

   (b) nominal damages;

   (c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

   (d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which impair the dignity of the State which has committeed the internationally wrongful act.

The term "satisfaction" is employed in article 10 in a technical international sense as distinguished from the broader non-technical sense in which it is merely a synonym for reparation. Although satisfaction has been claimed for various types of injurious behaviour including insults to the symbols of the State such as the national flag, violations of sovereignty or territorial integrity, attacks on ships or aircraft, ill-treatment of , or attacks against heads of State or Government or diplomatic or consular representatives or other diplomatically protected persons and violations of the premises of Embassies or Consulates (as well as the residences of members of foreign diplomatic missions). Claims for Satisfaction have also been put forward by the State in cases where the victims of an internationally wrongful act were private citizens of the foreign State.

Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy. It is also identified by the typical forms it assumes, of which *paragraph* 2 of article 10 provides a non-exhaustive list. "Apology", mentioned in subparagaraph (a) encompasses regrets, excuses, saluting the flag, etc. It is mentioned by many writers and occupies a significant

place in international jurisprudence. Examples are the "I'm Along" Kellet and "Rainbow Warrior"cases. In diplomatic practice, insults to the symbols of the State or Government, attacks against diplomatic or consular representatives or other diplomatically protected agents, or against private citizens of a foreign State have often led to apologies or expressions of regret, as have also attacks on diplomatic and consular premises or on ships. Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely requests for apologies or offers thereof seem to have increased in importance and frequency.

Another form of satisfaction, dealt with in *subparagraph* (b) of paragraph 2, is that of nominal damages through the payment of symbolic sums. Several examples are to be found in international jurisprudence.

Article 10 *bis* on assurances and guarantees of non-repetition provides :

"The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assuraces or guarantees of non-repetiton of the wrongful act."

The consequences of an internationally wrongful act may include guarantees against its repetition. This particular consequence is however generally dealt with in the framework of satisfaction or other forms of reparation. All remedies—whether afflictive or compensatory—are themselves more or less directly useful in avoiding repetition of a wrongful act and that satisfaction in particular can have such a preventive function, especially in two of its forms, namely damages reflecting the gravity of the infringement, dealt with in paragraph 1 (c) of article 10 and disciplinary action against, or punishment of, officials responsible for the wrongful act, dealt with in paragraph 1 (d) of the same article. Yet assurances and guarantees of non-repetition perform a distinct and autonomous function. Unlike other forms of reparation which seek to re-establish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function. They furthermore pre-suppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which, in the view of the Commission, should not be automatically avialable to every injured State, particulary in the light of the broad meaning of that term under article 5 of Part Two of the draft.

A request for safeguards against repetition suggests that the injured State is seeking to obtain from the offender something additional to and different from mere reparation, the re-establishment of the pre-existing situation being considered insufficient.

B. Draft Code of Crimes Against the Peace and Security of Mankind: The Establishment of an International Criminal Court

PART I

By resolution 47/33, the General Assembly had taken note with appreciation of Chapter II of the report of the International Law Commission (A/47/10), entitled "Draft Code of Crimes against the peace and security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international Criminal jurisdiction. It had also requested the Commission to continue its work on the question of undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth Session.

Recommendations of the Working Group of 1992

In the report of the Working Group of 1992, the view expressed was that the most appropriate manner to establish an international criminal court would be by means of a treaty agreed to by the States parties, which would contain the Court's statute. The approach recommended by the Working Group was flexible in that it had envisaged a court which would not be a full-time body but an established structure to be called into operation if and when required, according to a procedure determined by its statute. In the first phase of its operation at least, the court should not be a standing full-time body. As regards the composition of the Court and the appointment of its members, the Working Group's suggestion was that each State party to the statute would nominate, for a prescribed term, one qualified person to act as a judge of the Court. On the question of the nature and modalities of acceptance of the jurisdiction of the envisaged Court, the Working Group's suggestion was that the envisaged Court, should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute would be obliged to accept *ipso facto* and without further agreement, nor exclusive jurisdiction, in the sense of a jurisdiction excluding the concurrent jurisdiction of States in criminal cases. The Working Group had suggested that the jurisdiction of the envisaged court should be based on specified existing

international treaties in force creating crimes of an international character, including the Code of Crimes after its adoption and entry into force. On the question of personal jurisdiction, the Working Group had stated that "in the first phase of its operations, at least, a court should exercise jurisdiction only over private persons, as distinct from States". As far as the relationship between the statute of the envisaged court and the Code of Crimes, the Working Group's recommendation was that, when drafting the statute of the envisaged court, the possibility should be left open that a State could become a party to the statute without thereby becoming a party to the Code of Crimes. Furthermore, the statute of the Court and the Code of Crimes might constitute separate instruments, with the providing the court's subject-matter, jurisdiction encompassed in crimes covered by the Code in addition to those covered by other instruments. The report of the Working Group on the desirability and feasibility of establishing an international criminal court was considered by the Sixth Committee as very valuable and comprehensive and offered an excellent basis for further work on the topic.

Eleventh Report of the Special Rapporteur

Reference may now be made to the eleventh report of the Special Rapporteur for the topic(A/CN.4/449), which concerned the draft statute of an international criminal Court, and to the written comments received from Member States submitted with reference to General Assembly resolution 47/33 (A/CN.4/452). Relevent material will also be found in the compilation of replies from Governments concerning the first reading of the Code of Crimes against the Peace and Security of Mankind (A/CN.4/448 Add.1). In addition, reference could also be made to the documents distributed further to Security Council resolution 808/1993 and to the report of the Secretary-General (S/25704). At the Forty-fifth Session of the ILC Mr.Thiam (Special Rapporteur), introducing his eleventh report, explained that he had already submitted at least three reports on specific aspects of the question of an international criminal Court, but they had been of an exploratory nature and had been designed to keep interest in the matter alive.

The acting Chairman, speaking on behalf of the Commission, drew the attention of the members of the Commission to the most important development since the previous session, namely, the discussion of the Commission's report by the Sixth Committee of the General Assembly. He stated that the sections of the report on the project for an international criminal court had aroused the greatest interest among delegations, some of which had been of the opinion that the drafting process could be completed within one year, while others had taken a more cautious view that Governments had to be able to give indepth consideration to all the implications of the establishment of such a Court. He classified that a clear-cut majority had been in favour of de-linking the International Criminal

Court and the Code of Crimes against the Peace and Security of Mankind, although it had been generally accepted that, once completed, the Code should be one of the instruments to be applied by the Court. Because of the principle *nullum crimen sine lege-lex* being understood as written law—the Court should not be called upon to base its decisions on rules of customary law. With regard to jurisdiction *ratione personae*, the proposition that the jurisdiction of the Court should apply only to individuals, and not to States, had received unchallenged support.

It will be useful here to recall that, in a carefully drafted resolution, the General Assembly had given the Commission a clear mandate, expressed in paragraph 6 of its resolution.

It provides that the General Assembly :

> "*Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an Intenational Criminal Court as a matter of priority as from its next session, beginning with an examination of the issues identifies in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session."

The draft statute had been distributed well in advance. In view of the urgency of the matter, Mr. Thiam (Special Rapporteur) focused on certain general points.

Main Features of the draft statute

The main characteristics of the draft were, *first*, its realiam, in that it tried mostly to savour the spirit and approach of the Commission which had opted for an organ with structures that were adaptable, not permanent, and of modest cost. Fot this purpose, the draft does not cover all the organs usually to be found in criminal jurisdictions. For instance, there is no investigation organ functioning separately from the individual organ. The draft intoduced a system in which the proceedings are instituted by the Court itself, i.e. by the judicial organ, most often in the course of the hearing. Thus so far as prosecution is concerned, this draft does not propose to establish a department headed by a public prosecutor assisted by a whole army of officers which the functioning of such an organ implies. It advocates a flexible solution, i.e. leaving prosecution in the hands of the complainant State. The draft took account of the existence of other bodies. That would certainly meet with the approval of those who have always maintained that it was not possible to disregard, in particular, State sovereignty.

It will be borne in mind that the jurisdiction of the Court is not exclusive, but concurrent, each State being capable either to judge itself or to relegate a defendant to the Court. This choice seems to have won the support of the majority in the Commission. Moreover, jurisdiction depends on the consent of the two States; the complainant State and the State of the territory of the Crime. The draft is flexible, for it did not make referral of a case to the proposed court mandatory but left it to the discretion of States. It also proposes a body of modest proportions, easy and inexpensive to run—features the Commisson had always wanted to see incorporated in a draft statute.

Main parts of the Draft

The draft is divided into three main parts, a general part and two other parts dealing with organization and functioning, on the one hand and procedure on the other. The general part addresses itself to two questions—the jurisdiction of the Court and applicable law. Under the draft Statute, the Court would not have exclusive jurisdiction. The idea of exclusive jurisdiction has not received broad support. The court's jurisdiction would also be subject to the agreement of the States most directly concerned—the state on whose territory the alleged crime had been committed, and the State of which the perpetrator of all alleged crime was a national. Those two States are the most important, but the possibility that the agreement of other States might be required could also be considered. Jurisdiction would also be limited to individuals. The Court would not have the mandate to try international organizations or States.

The States whose agreement would be required were confined to two broad groups, once under internal law, jurisdiction in criminal proceedings was governed by two principles, neither of which could be excluded since they were essential for the proper fuctioning of the Court. The principles in question were territorial jurisdiction and personal jurisdiction. Personal jurisdiction is designed for instances in which, as sometimes happens, a State, deeming that its fundamental interests or those of its nationals were at stake, in a given case, decides that it should try the case. Personal jurisdiction would allow it to do so. The draft could not exclude one of the two approaches. For this reason, jurisdiction is conferred both to the State in whose territory the crime is committed and the State of which the perpetrator is a national. The draft therefore proposes that, until States adopt an international criminal code, offences within the jurisdiction of the Court should be defined by agreements between State concerned. Any State may also, at the time of its accession to the statute of the Court or at any time, define the crimes over which it recognizes the jurisdiction of the Court. Similar approach which seems more flexible, was proposed in the draft statute of the International Association for Penal Law, adopted in Paris on 16 January 1928 and revised in 1946.

Applicable Law

So far as the applicable law is concerned, the recommendations of the Commission's Working Group, whose view it was that such law could derive only from international conventions and agreements, had been followed by the Special Rapporteur. The proposed Court, therefore, would try only such crimes as were defined in those instruments. The matter had given rise to lengthy debate in the Commission, but the prevailing—and , in the opinion of Special Rapporteur, the realistic—view that the applicable law should be limited to international conventions and agreements. Some members, however expressed the view that both custom and general principles of law could in certain cases also constitute a source of applicable law. Consequently in the draft articles those notions have been placed between brackets to enable the Working Group to review the matter. Nor, incidentally, was case-law to be disregarded, for it was difficult to see how a Court could be prevented from applying its own case-law.

Organization and Functioning of the Court

The organisation and functioning of the Court is governed by two principles: (a) the permanent nature of the jurisdiction of the Court; (b) the non-permanent functioning of all its organs. Two factors have to be reconciled : the Court must have permanent jurisdiction over a number of matters still to be determined, but it should not operate on a full-time basis. The present draft is an attempt to carry out these two aspects, while responding to Commission's concern that a small inexpensive body should be established. So far as the actual composition of the Court is concerned, the judges would not be elected, as is the general rule in international organizations, but would be appointed by their respective States of origin. The Secretary-General of the United Nations would then prepare a list in alphabetical order of the judges so appointed. They would not work full-time, but would be designated to try specific cases on given days. This approach received serious criticism in the Commission.

Composition of a Chamber of the Court

It is necessary for composition of a chamber of a Court, since it is not feasible for all the judges appointed by States parties to sit in the plenary of the court at the same time. Therefore, the Special Rapporteur proposed that a chamber should be composed of nine judges, though the number could be higher or smaller. Such judges would be selected by the President of the Court from the list prepared by the Secretary-General of the United Nations whenever a case was referred to the Court.

In making his selection the President would have to take account of certain criteria in order to guarantee objectivity in the composition of the chamber. A