5. *Requests* the Secretary-General to bring to the attention of the International Law Commission at its Forty-Eighth Session the views expressed on related items during its Thirty-Fifth Session;

6. *Further requests* the Secretary-General to convey to the International Law Commission its earnest expectation on the completion of the formulation of the draft articles on the 'Code of Crimes Against the Peace and Security of Mankind" and the first reading of the draft articles on "State Responsibility" at its session in 1996;

7. *Also Requests* the Secretary-General to convey to the International Law Commission the Committee's appreciation on the commencement of its work on the topics "The Law and Practice Relating to Reservations to Treaties" and "State Succession and its Impact on the Nationality of Natural and Legal Persons".

8. *Also Requests* the Secretary-General to convey to the International Law Commission and the UN General Assembly its interest that the Commission include in its agenda the topic "Diplomatic Protection" and initiate a feasibility study on a topic concerning the law of environment[1] as suggested by the Commission at its Forty-Seventh Session; and

9. Decides to inscribe on the agenda of its Thirty-sixth session an item entitled "The Report on the Work of the International Law Commission at its Forty-eighth Session".

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

I. STATE RESPONSIBILITY

The International Law Commission at its forty-seventh session had before it the seventh report of the Special Rapporteur, Mr Gaetano Arangio Ruiz[1] That report dealt with the legal consequences of internationally wrongful acts characterized as crimes of States in Article 19 of Part One of the draft articles as adopted on first reading. The second chapter of the seventh report of the Special Rapporteur dealt with a few outstanding issues relating to regime of countermeasures. Included in the report were six draft articles relating to the consequences of internationally wrongful acts characterized as international crime of states in Article 19 of Part One of the draft articles.

Legal Consequences of International Crimes

The Special Rapporteur Mr. Gaetano Arangio Ruiz, observed that in dealing with the legal consequences of international crimes of States, the Commission is faced *inter alia* with two sets of problems. One of these is the identification of the "Special" or "supplementary" consequences of the internationally wrongful acts in question as compared to the internationally wrongful acts (generally referred to as international delicts). This he defined as being the normative aspect of the consequences of international crimes of states. The institutiional aspect of the problem was the identification of the entity or entities which are or should be called upon in a measure to decide, to determine and/or implement the special or supplementary questions.

1. See A/CN. 4/469 and Add 1 and 2.

(a) Special or Supplementary Consequences

The Special Rapporteur is of the view that the relevant articles of Part Two viz. articles 6 to 10 bis and 11 to 14 have been formulated in such terms as to cover the consequences of virtually any wrongful act regardless of its categorization under article 19. This in his opinion applies both to the substantive (articles 6 to 10 bis) and instrumental (articles 11 to 14) consequences. However, none of these articles refers to one or the other of the two categories of breaches establishes in article 19 because having agreed that the problem of the special or supplementary consequences of crimes should be approached in the final stages of the elaboration of Part Two of the draft, the Commission had covered the essential consequences of delicts in articles 6 to 14. It has kept in abeyance the special or supplementary consequences of crimes. This has left open two issues viz. whether and to what extent any of the consequences of internationally wrongful acts contemplated in articles 6 to 14 extends to crimes and whether any such consequences should be modified—either by way of strengthening the position of the injured states or by way of aggravating the position of the wrongdoing state. The other issue that needed to be addressed was whether any further consequences are or should be attached to crimes over and above those contemplated in articles 6 to 14. The Special Rapporteur has proposed the following text of draft article 15 on the supplementary consequences:

> "Without prejudice (in addition) to the legal consequences entailed by an international delict under articles 6 to 14 of the present part, an international crime as defined in article 19 of Part one entails the special or supplementary consequences set forth in articles 16 to 19 below."

(i) Reparation

The above cited formulation of article 15 seeks to cover both the active and the passive aspects of the responsibility relationship and is the introductory provision of the special regime of governing the substantive consequences of international crime of states. It may be recalled that the general substantive consequences of an internationally wrongful act is reparation in the broadest sense of the term, extending to cessation, and inclusive of restitution in kind, compensation, satisfaction and guarantees of non-repetition. Since an obligation to provide reparation is in principle a consequence of any internationally wrongful act regardless of its gravity it is indubitable that such an obligation is also incumbent upon any state which has committed a crime. Any such state would be subject to the general duty of cessation/reparation set forth in articles 6 (cessation of

wrongful conduct) and 6 bis (reparation) of Part Two as hitherto adopted. Paragraph 7 of article 16 proposed by the Special Rapporteur sets out the general obligations of cessation and reparation in the following terms:-

> "Where an internationally wrongful act of a state is an international crime, every state is entitled, subject to the conditions set forth in paragraph 5 of article 19 below, to demand that the state which is committing or has committed the crime should cease its wronful conduct and provide full reparation in conformity with articles 6 to 10 bis as modified by paragraphs 2 and 3 below."

(ii) Restitution

As regards the question of restitution in kind as adopted to crimes the Special Rapporteur was of the view that the mitigation of obligation to provide restitution in kind set forth in subparagraph (d) of article 7 (Restitution in kind) should be inapplicable in the case of a crime, except where full compliance with that obligation would jeopardize: (a) the existence of the wrongdoing state as a sovereign and independent member of the international community or its territorial integrity; or (b) the vital needs of its population in a broad sense viz. the essential requirements of a physical or moral nature for the survival of the population. The proposed formulation of paragraph 2 of article 16 reads:

> "The right of every injured state to obtain restitution in kind as provided in article 7 shall not be subject to the limitations set forth in subparagraphs (c) and (d) of paragraph 1 of the said article except where restitution in kind would jeopardize the existence of the wrongdoing state as an independent member of the international community, its territorial integrity or the vital needs of its people."

(iii) Satisfaction and Guarantees of Non-Repetition

The Special Rapporteur also reviewed in connection with crimes another rule on reparation viz. satisfaction—a remedy closely interrelated and frequently confused with the guarantees of non-repetition contemplated in article 10 bis. It may be recalled in this regard that paragraph 3 of article 10 (Satisfaction) rules out any demand that "would impair the dignity of the wrongdoing state". The purpose is to exclude compliance demands which would affect not just the dignity but the existence and the sovereignty of the wrongdoing state, viz. its independence, liberty or its form of governments. The Special Rapporteur has argued that although it is expressed only with regard to satisfaction in a narrow sense, this restriction is presumably applicable also to the guarantees of non-repetition. In his opinion, in both areas a differentiation between international crimes of states and

delict is called for and he accordingly deems it inappropriate to extend the benefit of that safeguard to a state which is the author of a crime. He accordingly proposed that demands of satisfaction and guarantees of non-repetition be subjected to restrictions similar to those imposed in the case of demands of restitution in kind. The text of paragraph 3 of article 16 proposed by the Special Rapporteur reads:

> "Subject to the preservation of its existence as an independent member of the international community and to the safeguarding of its territorial integrity and the vital needs of its people a State which has committed an international crime is not entitled to benefit from any limitations of its obligation to provide satisfaction and guarantees of non-repetition as envisaged in articles 10 and 10 bis, relating to the respect of its dignity or from any rules or principles of international law relating to the protection of its sovereignty and liberty".

Thus the restrictions which such demands of satisfaction and guarantee of non-repetition could reasonably be subjected to are those which could be indispensable for the safeguard of (a) the continued existence of the wrongdoing state as a sovereign and independent member of the international community and its territorial integrity and (b) the vital needs of the wrongdoer's population.

(b) Institutional Consequences of Crimes

As regards the institutional consequences of crimes, the Special Rapporteur emphasized that regardless of any specific provisions these consequences were aggravated by the fact that in any case of a crime all states were entitled to react by adopting countermeasures against the wrongdoing states. Combined with the aggravations of substantive consequences provided for in subparagraphs (c) and (d) of draft article 7 (Restitution in Kind) and paragraph 3 of draft article 10 (Satisfaction), as adopted, and the condemnation that would follow a crime the weight of the countermeasures which a "criminal" state could expect was considerably increased. It was suggested that as in the event of substantive consequences the provision dealing with countermeasures against crimes should open with a chapeau echoing the general proviso concerning delict. The Special Rapporteur accordingly proposed that paragraph 1 of draft article 17 set forth the general principle that any state injured by an international crime of a state whose demands are not met with an adequate response on the part of the state which has committed, or is committing, the crime is entitled to resort to countermeasures under the conditions and subject to limitations specified in subsequent provisions. Considering that

draft article 11 addressed to countermeasures by an injured state had "only been tentatively adopted" at the forty-sixth session of the Commission. It is hoped that the proposed formulation of paragraph 1 of draft article 17 could be reviewed taking into account the specificity of crimes in respect of the (i) response from the wrongdoing state and (ii) the function of countermeasures.

Interim Measures

The adaptation to crimes of the provisions relating to prior communications (Article 12) and recourse to available means of dispute settlement would not pose serious difficulties in itself and the gravity of crimes would justify the setting aside of the requirements of prior summation or prior resort to available means of dispute settlement. On the other hand the requirement of a prior announcement by an international body as a prerequisite for lawful reaction on the part of any one of the States injured by a crime did pose some problems. It would appear reasonable to assume that although prior to such pronouncement the States injured by a crime were entitled to full countermeasures they (the injured State) were nevertheless entitled to resort to such urgent interim measures as were required to protect their rights or limit the damage caused by the crime, reference was made in this regard to measures aimed at securing immediate access to the victims for purposes of rescue and/or aid or preventing the containment of genocide, measures concerning anti-pollution, humanitarian convoys and the like. The proposed paragraph 2 of article 17 accordingly reads:

> The condition set forth in paragraph 5 of article 19 below does not apply to such urgent, interim measures as are required to protect the rights of an injured State or to limit the damage caused by the international crime.

Proportionality

On the question of proportionality the Special Rapporteur said that he had, after reconsidering the 1993 formulation of draft article 13, had doubts about the clause according to which proportionality would be measured not only in relation to "the gravity of the internationally wrongful act" but also to "the effects thereof on the injured state." He clarified that he had initially been prompted by the difficulty of applying such a criterion to countermeasures against the author of a state crime and he now entertained doubts as to implications of the clause in relation to delict. He therefore recommended that the Commission give consideration to the proposition that the gravity of an internationally wrongful act should be determined by reference to a number of factors including (i) the objective importance

and subjective scope of the breached rule; (ii) the dimension of the infringement; (iii) the subjective element, inclusive of the degree of involvement of the wrongdoing state's orgnaizational structure and of the degree of fault and (iv) the effects of the breach upon both the injured state and "object of protection" afforded by the infringed rule. That consideration should, in the opinion of the Special Rapporteur, lead to the deletion of the reference to effects not only for crimes but also of delict. In addition to the impropriety of emphasizing one element of gravity to the detriment of other equally relevant factors, delicts, if they were *erga omnes* breaches could also effect all states. He stated that of the abovementioned factors the element of fault, which had so far been neglected, would assume crucial importance in case of crimes. In view of this he proposed the following formulation of rule relating to proportionality to be included as paragraph 3 of draft article 17:

> The requirement of proportionality set forth in article 13 shall apply to countermeasures taken by any State so that such measures shall not be out of proportion to the gravity of the international crime.

Other Consequences of Crimes

On the matter of other consequences of crimes the Special Rapporteur proposed that two further sets of provisions be added to the regime envisaged in the draft article. One set of provisions should specify that the State which has committed or is committing a crime should not be entitled to oppose fact finding operations and control mission in its territory for the verification of compliance with the obligations of cessation and reparation. A second set of provisions was in the opinion of the Special Rapporteur required to cover a special obligations of *omnes* to injured States, thus broadening the scope of the proposals advanced. "The overall object of such obligations would be to ensure consistency, solidarity or cooperation among states in condemning the crime, censuring the conduct of the law breaking state and otherwise reacting thereto." The proposed formulation of draft article 18 reads as under:

1. Where an internationally wrongful act is an international crime, all States shall, subject to the condition set forth in paragraph 5 of article 19 below:

   (a) refrain from recognizing as legal or valid, under international or national law, the situation created by the international crime;

   (b) abstain from any act or omission which may assist the wrongdoing State in maintaining the said situation;

   (c) assist each other in carrying out their obligations under subparagraphs (a) and (b) and, in so far as possible coordinate their respective reactions through available international bodies or ad hoc arrangements;

   (d) refrain from hindering in any way, by act or omission, the exercise of the rights or powers provided for in articles 16 and 17;

   (e) fully implement the *aut dedere aut judicare*, with respect to any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto;

   (f) take part, jointly or individually, in any lawful measures decided or recommended by any international organization of which they are members against the State which has committed or is committing the international crime;

   (g) facilitate, by all possible means, the adoption and implementation of any lawful measures intended to remedy any emergency situations caused by the international crime.

2. Subject to the conditions set forth in paragraph 5 of article 19 below, the State which has committed or is committing an international crime shall not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation.

Role of International Institutions

As regards the indispensable role of international institutions the Special Rapporteur said that he had in his fifth report discussed some of the institutional problems which could arise in connection with the implementation of the rules relating to international crimes of States.[2] The significance of the role of the international institutions it may be recalled had been acknowledged by almost all members of the Commission in the course of last year's debate. In his opinion the question was not whether any institutions should be involved but rather the extent of the involvement of the existing institutions and whether any new institutions need to be envisaged for that indispensable task.

Practice of the United Nations

The Special Rapporteur observed in this regard that important instances of "institutional reaction to gross violations of international obligations akin

2. See A/CN. 4/453, Add 3.

to those which would be condemned as crimes under article 19 can be found in the practice of the United Nations General Assembly and Security Council". It was stated in this regard that in referring to such instances both the merits of the United Nations reactions in each particular case as well as the precise legal qualification of each case from the viewpoint of state responsibility had deliberately been left aside. It was pointed out that apart from the fact that the only bodies involved had been political organs the relevant resolutions were not intended either by the General Assembly or the Security Council to be specific reactions to breaches of the kind defined as crimes in article 19 of Part One. Although theoretically a future convention on state responsibility may entrust to international organizations the whole range of actions necessary for the implementation of the legal consequences of crimes the report merely advocated an approach whereby such bodies would be required to take a decision on the crucial aspect of the existence of an international crime and attribution to one or more states. It is generally agreed such determination would be the minimum indispensable for avoiding arbitrary or discordant determination and consequent conflicts among states injured by an alleged crime.

The report explored the possibility of entrusting the determination in question solely to one of the principal organs of the United Nations—the General Assembly, the Security Council or the International Court of Justice. As regards the General Assembly it was stated that although it was relatively more representative in character and had a broad scope of competence encompassing all areas of international relations and law within which the four categories or kinds of breaches contemplated in Article 19 of Part One of the draft articles would fall, the General Assembly lacked the power to make binding legal determinations in the area of state responsibility. The Security Council on the other hand, it was pointed out, could take binding decisions in the area of international peace and security but it was not empowered to deal with other areas referred to Article 19 of Part One. Besides the Security Council was neither representative nor technically competent to deal with legal issues of State responsibility. Furthermore the Security Council like the General Assembly is essentially a political organ and it does not seem to be in consonance with conception of justice to entrust either of those two bodies with exclusive role of assessing issues of state responsibility. Finally, as regards the International Court of Justice it was stated that it had a threefold advantage of (i) possessing the necessary technical capacity, (ii) being reasonably representative and (iii) handing out its judgements with the reasons therefor both in fact and law. A pronouncement of the Court, however, could not be envisaged in the absence of a public prosecutor institution functioning parallel with the Court as there would be no way of "Security" or "Fettering" out accusations

that were not substantiated. Once the Court is vested with compulsory jurisdiction over issues involving crimes it would be very difficult to prevent any State from bringing to the Court any other issues of State responsibility even if they involved mere delict. Mr. Ruiz therefore recommended that the three organs continue taking any decision concerning the existence or attribution of a crime, each bringing into play the role that matched its characteristics. This approach was reflected in the following formulations of draft article 19:

1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the United Nations Charter.

2. If the General Assembly or the Security Council resolves by a qualified majority of the Members present and voting that the allegation is sufficiently substantiated as to justify the grave concern of the international community, any Member State of the United Nations Party to the present Convention, including the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgment whether the alleged international crime has been or is being committed by the accused State.

3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-thirds majority of the members present and voting, and in the Security Council, nine members present and voting including permanent members, provided that any members directly concerned shall abstain from voting.

4. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any Member State of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in articles 16, 17 and 18 of the present Part.

Procedure

The Special Rapporteur was of the view that the procedure in the Court should involve a judgement rather than an advisory opinion because the Court's pronouncement in an advisory case is normally intended to give guidance on an issue for the addressee ultimately to act upon. Besides, it does not involve full-fledged contentious proceedings between litigant

states. It was recalled that the Court's pronouncement in a contentious case normally settles the issue or issues in the sense that it decides the merits of a dispute in its entirety—thus operating, as the decisive utterance on issue or issues at stance. Addressing himself to the question of regime applicable when a case was brought before the ICJ not on the basis of jurisdictional link created by the proposed Convention on state responsibility but on that of relevant provisions of such instruments as the Conventions on Genocide, Racial Discrimination, Discrimination against Women, Torture, all of which provided for the jurisdiction of the Court on the basis of a unilateral application the Special Rapporteur proposed the following formulation of paragraph 4 of article 19 of Part Two.

5. In any case where the International Court of Justice is exercising its competence in a dispute between two or more Member States of the United Nations Parties to the present Convention, on the basis of a title of jurisdiction other than paragraph 2 of the present article, with regard to the existence of an international crime of State, any other Member State of the United Nations which is a party to the present Convention shall be entitled to joint, by unilateral application, the proceedings of the Court for the purpose of paragraph 5 of the present article.

Characteristics of Internationally Wrongful Acts Classified as Crimes

Summing up the characteristics of internationally wrongful acts classed as crimes in article 19 of Part One of the draft, the Special Rapporteur emphasized that such acts: (i) infringed *erga omnes* rules, possibly *jus cogens* rules, (ii) injured all states; (iii) justified a generalized demand for cessation/reparation; and (iv) possibly justified a generalized reaction by States or international bodies. The concept of a generalized reaction, underlying article 19 of Part One and ushered in by article 5 of Part Two (which entitled all States to demand cessation/reparation and resort to countermeasures), was viable only if the future convention made such a reaction subject to measures of control and that was precisely the purpose of articles 15 to 20 that he had proposed. Attention was drawn to the fact that the two-phase procedure provided for in article 19 would not involve any modification of the Charter or the Statute of the Court. Nor would it affect the political role assigned by the Charter to the Security Council—and the General Assembly, in the maintenance of international peace and security a field in which the decision would finally lie with the Security Council alone in the field of State responsibility, including cases of very serious violations of fundamental international obligations. The action of the injured States would be subordinate to a prior decision by the Court. As to the Security Council and the General Assembly, for which paragraph 3 of article 19

sought to ensure impartiality as far as was possible, the role assigned to them by paragraph 2 of the same article fell under Chapter VI. The Special Rapporteur emphasized in this connection that the Council's powers in the maintenance of international peace and security, as well as the right to self-defence provided for in Article 51 of the Charter, were duly preserved in draft article 20 which reads:

The provisions of the articles of the present Part are without prejudice to:

(i) any measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter;

(ii) the inherent right of self-defence as provided in Article 51 of the Charter.

At its forty-seventh session, the Commission after due deliberation on the report of the Special Rapporteur referred the abovementioned formulations to the Drafting Committee.

Draft Articles Adopted During the Forty-Seventh Session

During the forty-seventh session the Drafting Committee adopted a set of seven draft articles and an annex thereto. The seven draft articles and the Annex are addressed to the Settlement of Disputes and are to form Part III of the proposed instrument on State Respnsibility. It may be recalled that the Special Rapporteur had in his fifth report presented to the International Law Commission at its forty-fifth session proposed "general compromissory clauses" of the future convention on State Responsibility.[3] The Settlement obligation procedures proposed in the fifth report, it was then stated, would complement, supersede 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. It will be recalled that the draft articles proposed by the Special Rapporteur had envisaged a three-step third party dispute settlement procedure which would come into play after a countermeasure had been resorted to by an injured state and a dispute had arisen with regard to its justification and lawfulness. The three steps of the dispute settlement procedure then proposed were conciliation, arbitration and judicial settlement.

The draft articles adopted by the Drafting Committee at the recently concluded forty-seventh session have added Negotiation and Good offices

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

and Mediation to the dispute settlement procedure proposed by the Special Rapporteur.

Negotiations

Draft article 1 on negotiation stipulates that in the event of a dispute, regarding the interpretation or application of the present articles, between two or more states, they shall upon the request of any of them seek to settle it amicably by negotiation. It may be stated that negotiation is a flexible means of peaceful settlement of dispute and can be applied to all kinds of disputes whether political, legal or technical. In the present instance the recourse to negotiations is restricted somewhat to the interpretation and application by the proposed articles to state responsibility. Negotiation has the advantage that it involves only the parties to the dispute and they can monitor the entire phase of the process from its initiation to its conclusion and conduct them in the fashion they deem to be most apropriate. A number of international instruments including the Antarctic Treaty, 1959, the Agreement Governing the Activities of States on the moon and other Celestial Bodies, 1979, the United Nations Convention on the Law of the Sea, 1982 and the Vienna Convention on the Law of Treaties Between States and International Organizations and/or between International Organizations 1986 place on the States Parties thereto an obligation to carry out negotiations, consultations or exchange of views whenever a controversy arises in connection with the treaty concerned.

Good Offices and Mediation

Draft article 2 on Good Offices and Mediation envisages the role of a third state and provides that any other state party to the present articles not being a party to the dispute may upon its own initiative or at the request of any party to dispute tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute. As for good offices it may be stated that although Article 37 paragraph 1 of the Charter of the United Nations does not specifically mention it as a means of pacific settlement of disputes, the Manila Declaration of the Peaceful Settlement of International Disputes, 1982 placed good offices on an equal footing with the other peaceful methods enumerated in Article 33.

Conciliation

Draft Article 3 on conciliation is in essence based on the formulation proposed by the Special Rapporteur in his fifth report. The draft article as adopted by the Drafting Committee stipulates that if three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted any party to the dispute may submit it to the conciliation in conformity with the

procedure set out in the Annex. It would have been observed that the conciliation provision is linked to negotiations and the latter are a precondition for initiating conciliation. It may be stated that Article 1 of the Annex to the draft articles (The Conciliation Commission) of Part three of the proposed conclusion on State responsibility is addressed to the issues relating to the appointment of a five-member conciliation commission, its rules procedure method of work and decision-making.

Task of Conciliation Commission

Draft article 4 enunciates the task of the conciliation commission including the elucidation of the questions in dispute and with that objective the collection of all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to settlements.

Arbitration

Draft article 5 on arbitration is based on the proposal advanced by the Special Rapporteur in his fifth report and provides that failing the establishment of the conciliation commission or failing an agreed settlement within six months following the report of the commission the parties to the dispute may by agreement submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex. Article 2 of the Annex on The Arbitral Tribunal provides for the establishment of a five-member arbitral tribunal, its rules of procedure, decision-making and related matters.

Terms of Reference of the Arbitral Tribunal

Draft article 5 must be read together with draft article 6 which deals with the terms of reference of the Arbitral Tribunal viz. to decide with binding effect any issues of fact or law which may be in dispute between the parties. The tribunal is to submit its decision to the parties within six months from the date of completion of the parties written and oral pleadings and submission.

Validity of an Arbitral Award

Finally draft article 7 on judicial settlement provides that where the validity of an arbitral award is challenged by a party to the dispute and if within 3 months of the date of the award the parties have not agreed on another tribunal, the International Court of Justice is competent to conform the validity of the award or declare its total or partial nullity. It is also provided that the issues in dispute left unresolved by the nullification of the award may at the request of any party be submitted to a new arbitration in conformity with article 6.

II. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Introduction

The International Law Commission ('ILC' hereinafter) continued at its forty-seventh session the second reading of the articles concerning the Draft Code of Crimes Against the Peace and Security on Mankind ('Draft Code' hereinafter). The ILC undertook to consider draft article 15 and onwards. The ILC had before it the Thirteenth Report on the Draft Code prepared by the Special Rapporteur, Doudou Thiam (A/CN.4/466, 24 March 1995). This Report was prepared for the second reading of the Draft Code and focussed on the crimes against the peace and security of mankind contained in Part II. Part II, as adopted on first reading, included the following 12 crimes : aggression (art. 15), threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), genocide (art. 19), apartheid (art 20), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), recruitment, use, financing and training of mercenaries (art. 23) international terrorism (art. 24), illicit traffic in narcotic drugs (art. 25), and wilful and severe damage to the environment (art. 26).

It may be recalled that the Special Rapporteur had indicated in the twelfth report (A/CN.4/460) the intention to limit the list of crimes to be considered during the second reading of the Code to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. Accordingly, the Special Rapporteur had omitted from his thirteenth report 6 of the 12 crimes included on first reading, namely, the threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18) apartheid (art. 20), the recruitment, use, financing and training of mercenaries (art. 23), and wilful and severe damage to the environment (art. 26), in response to the strong opposition, criticisms or reservations of several Governments with respect to those crimes.

Special Rapporteur's Thirteenth Report :

The scope of the thirteenth report was limited to the discussion of the following six crimes against the peace and security of mankind, namely, aggression (art. 15), genocide (art. 19), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), international terrorism (art. 24) and illicit traffic in narcotic drugs (art. 25). While introducing this report, the Special Rapporteur indicated the substantive scope of the report as limited to "first, on the content *ratione materiae* of the draft articles; and second, on more specific changes in either the

substance or the form of the articles." He also referred to the divergence of opinions within the ILC "between the maximalist trend, favouring the incorporation of a great number of offences, and the minimalist trend favouring the narrowest possible scope of the Code." So, with a view to harmonize these two approaches the Special Rapporteur tried to restrict the content *ratione materiae* of the draft code to six crimes whose designation as crimes against the peace and security of mankind could hardly be disputed. In the ensuing discussion, we may, first briefly consider the main features of the thirteenth report of the Special Rapporteur.

The basic thrust of the thirteenth report as announced by the Special Rapporteur was to "limit the list of crimes to offences whose categorization as crimes against the peace and security of mankind was hard to challenge". While attempting this, he noted, that the diversity of legal systems complicated the task of defining an international offence. He also noted that draft articles relating to the threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18) and wilful and severe damage to the environment (art. 26), were met with strong opposition on the part of several Governments, So, he believed that the ILC should beat a retreat on these draft articles and abandon them for the time being. He pointed out that "there was little support for the draft articles on the threat of aggression and intervention because Governments found them vague and imprecise." And as regards the draft articles relating to colonial domination and wilful damage to environment they were also equally unpopular with the Governments. He, however, supported the idea of retaining provisions relating to "international terrorism and illicit traffic in narcotic drugs" in one form or the other. Considering these, the Special Rapporteur sought to limit the offences to six crimes, namely Aggression, Genocide, Crimes against mankind, War crimes, International terrorism and Illicit traffic in narcotic drugs.

The Special Rapporteur also noted that Governments did not respond to the request that they propose a penalty for each crime. He also referred to a proposal that instead of fixing a penalty for each offence, a scale of penalties should simply be established, leaving it upto the courts concerned to determine the applicable penalty in each case. According to him, all the offences covered in the Code were considered to be extremely serious and it would be difficult, in the Code, to stipulate different penalties for offences which were uniformly considered to be extremely serious. He also referred to the method followed by the charters or statutes of international criminal courts. According to the Charter of the Nuremberg International Military Tribunal (art. 27), "The Tribunal shall have the right to impose upon a Defendant on conviction, death or such other punishment as shall

be determined by it to be just". The International Military Tribunal for the Far East (art. 16) also provided the identical provision. However, the Statute of the International Criminal Tribunal for the former Yugoslavia provided (art. 24): "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."

The draft Statute for an International Criminal Court, the Special Rapporteur noted, provided a flexible approach in imposing penalties (art. 47). It provided for both "the life imprisonment, or imprisonment for a specified number of years or a fine. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court was to have regard to the penalties provided for by the law of (a) the State of which the convicted person was a national; (b) the State where the crime was committed; and (c) the State which had custody of and jurisdiction over the accused. In the view of the Special Rapporteur, the above formulation as enunciated in the Statute of the ICC could be considered for determining the clauses on penalties. Further, he also noted that the ILC, given the silence of Governments on the matter of applicable penalties, could now choose which course to follow.

As noted above, the Special Rapporteur considered primarily in his report the formulation of the draft articles relating to the following specific six crimes against the peace and security of mankind namely aggression, genocide, systematic or mass violations of human rights, crimes against humanity, exceptionally serious war crimes and international terrorism.

A. Aggression

According to the Special Rapporteur, considering the numerous criticisms by Governments levelled against the definition of 'Aggression' (article 15), it was a difficult task to conclusively agree on the final outline of the definition of aggression. Accordingly, he put the question : "Is a legal definition of the concept of aggression possible?" The Governments had generally criticised the definition of the aggression on the ground that its contents mostly related to the realm of politics rather than to law. He also noted the difficulties faced by the previous Special Rapporteur, Mr. Jean Spiropoulos who stated in 1951 that : "the notion of aggression is a notion *per se*, a primary notion, which, by its very essence, is not susceptible of definition... A 'legal' definition of aggression would be an *artificial construction* which, applied to concrete cases, could easily lead to conclusions which might be contrary to the 'natural' notion of aggression..." While

noting the various efforts made to define 'aggression', he found them culminated in General Assembly resolution 3314 (XXIX) of 14 December 1974 adopted without a vote.

In these circumstances, he noted, the ILC had three options: one, it could refer to aggression without defining it; second, it could limit itself to a general definition or; third, it could accompany the general definition by a non-limitative enumeration. Recognizing the impossibility of enumerating all acts that would constitute aggression, the Special Rapporteur proposed the following general definition:

> "2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."

B. Genocide

As regards the definition of "genocide", the Special Rapporteur considered it preferable to stay close to the Genocide Convention. According to him, genocide was the only crime on which the international community was in very broad agreement. So, he proposed the following new text : "...2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such by : (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group and (e) forcibly transferring children of one group to another group."

C. Crimes Against Humanity

While proposing a new text for the definition of "Crimes against humanity", the Special Rapporteur noted that it would be impossible to provide a complete list of acts constituting such crimes. Considering the various international legal instruments, such as the international criminal tribunals (Nuremburg, Tokyo and as recently as former Yugoslavia in 1991) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment he proposed the following new text:

> "A crime against humanity means the systematic commission of any of the following acts:
> wilful killing

Torture i.e., intentionally-inflicting on a person pain or acute physical or mental suffering for the purposes of, *inter alia*, obtaining information