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 or restitution in kind which, aside from being confined to the assessment of a factual situation involves no theoretical reconstruction of what the situation would have been if the wrongful act had not been committed. It would have been observed that this provision clarifies further that restitution in kind and 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 44. Article 44 as adopted stipulates that 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. 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 infringement 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 recognized.

Paragraph 1, as adopted, incorporates three elements in relation to compensation. These are (i) the concept of entitlement, (ii) the requirement of a causal link, and (iii) the relationship between compensation and restitution in kind. As to the first , like all other provisions on reparation, this provision 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.

Paragraph 2 of the draft article 44 then goes on to provide that compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Draft Article 45 on satisfaction provides that 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. Paragraph 2 then 5 clarifies that 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. Paragraph 3 of the draft article stipulates that the right of the injured State to obtain satisfaction does not justify demands which impair the dignity of the State which has committed the internationally wrongful act.

The term "satisfaction" is employed 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 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 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 draft article 45 provides a non-exhaustive list. "Apology", mentioned in sub paragraph (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 Alone" and "Rainbow Warrior" cases. In diplomatic practice, insults to the symbols of the State or Governments, 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 therof seem to have increased in importance and frequency.

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

Draft Article 46 on Assurances and guarantees of non-repitition entitles the injured State to obtain, where appropriate, from the State which has committed an international wrongful act assurances or guarantees of non-repetition of the wrongful act.

The consequences of an internationally wrongful act include guarantees against its repetition. This particular consequence is however generally dealt with in the framework of satisfaction of other form 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 2(c) of article draft 45 and disciplinary action against, or punishment of, official responsible for the wrongful act dealt with in paragraph 2(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 restore status quo ante, they are future-oriented. They thus have a preventive rather than remedial function. Furthermore, they presuppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which, should not be automatically available to every injured State, particularly in the light of the broad meaning of that term under Part Two of the draft articles.

Chapter III of Part Two of the draft articles on Counter Measures deals with such issues as conditions relating to resort to countermeasures proportionality and prohibited counter measures. The four draft articles comprising this part deal with not only the most difficult but also controversial aspect of the whole regime of State Responsibility.

The basic notion of countermeasures is the entitlement of the injured State not to comply with one or more of its obligations towards the wrongdoing State. The fundamental pre-requisite for any lawful countermeasure - unilateral reaction - is the existence of an internationally wrongful act infringing a right of the consequently injured State. An injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment.

The right of an injured State to resort to countermeasures is circumscribed by the permissible functions or aims to be achieved by such measures. In practice injured State resorting to countermeasures may seek the cessation of the wrongful conduct, in the case of a continuing wrongful act; reparation in a broad sense, inclusive of satisfaction, as well as guarantees of non-repetition.

The text on countermeasures by an injured State had been provisionally adopted at the 40th Session. The text of draft article 47 as adopted at the 48th Session stipulates that as long as the State which has committed an international wrongful act has not complied with the provisions of draft articles 41 to 46 (relating to the rights of the injured State and the obligations of the State which has committed an international wrongful act) the injured State is entitled to take countermeasures. Subject to the conditions and restrictions set forth in draft articles 48, 49 and 50, not to comply with its obligations towards that wrongdoing State in order to induce it to comply with its obligations stipulated in draft articles 41 to 46. Paragraph 2 of the draft article 47, provides that where a countermeasure against a wrongdoing State involves a breach of an obligation towards a third State, such a breach cannot be justified as against that third State.

In defining the essential elements of the notion of countermeasures draft article 47 circumscribes the entitlement of the injured State to take countermeasures in 3 respects viz. (i) it requires the failure of the wrongdoing State to comply with its objections; (ii) it subjects the injured State's entitlement to take countermeasures to the conditions and restrictions set forth in the draft articles; and (iii) it requires that resort to countermeasures be necessary "to induce it (the wrongdoing State) to comply with its obligations."

The entitlement of the injured State to resort to countermeasures as specified in draft article 47 is subject to certain "conditions, qualifications and exclusion, which are spelt out in the following three articles." Certain Conditions relating to the settlement of the dispute apply to lawful measures are the subject matter of draft article 48. The basic requirement that countermeasures must always be proportionate is spelt out in draft article 49. Finally, the kinds of conduct that are entirely excluded from the realm of countermeasures is dealt with in draft article 50.

Draft article 48 on the Conditions relating to resort to Countermeasures stipulates that an injured State shall, prior to taking countermeasures, fulfill its obligations to negotiate provided for in the draft articles. It is further provided that the obligation to negotiate is without prejudice to the taking, by the injured State, of interim measures of Protection which otherwise comply with the requirements of this Chapter and which are necessary to preserve its legal position pending the outcome of the negotiations provided for in draft article 54.

Thus, Paragraph 2 of draft article 48 makes it clear that existing third party dispute settlement mechanisms remain in force notwithstanding a dispute which has given rise to countermeasures and that the injured State itself must continue to comply with its obligations in relation to dispute settlement. Paragraph 2 of draft article 48 then goes on to refer to dispute settlement obligations arising under Part Three of the present draft articles. Thus reference has particular significance to disputes arising in the context of countermeasures since under draft article 56(2) where a dispute "arises between States Parties to the present articles one of which has taken countermeasures against the other', the allegedly

wrongdoing State - i.e. the State which is the subject of the countermeasures - may at any time unilaterally submit the dispute to an arbitral tribunal to be constituted in accordance with Annex 11.

Draft article 49 lays down the rule of proportionality by stipulating that a countermeasures "shall not be out of proportion" to the relevant criteria. It adopts a "negative" formulation, as used, in the Naulilaa and Air Services awards, but does not specify the degree of proportionality or the extent to which a countermeasure might be disproportionate. While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the use of expressions such as "manifestly disproportionate" could have the effect of introducing an element of certainty and subjectivity in the construction and application of the principle. A countermeasure which is disproportionate, no matter what the extent, should be prohibited to avoid giving the injured State too much leeway that might lead to abuse. The Commission has opted for a flexible interpretation of the principle of proportionality.

The rule of proportionality set forth in draft article 49 requires that a specific countermeasure be proportional first to the degree of Gravity of the wrongful act and second to the effects of that wrongful act on the injured State. The use of the word "degree" in the formulation of the first criterion indicates that the text encompasses wrongful acts of varying degree of gravity. It would be insufficient, however, to limit the test of proportionality to a simple comparison between the countermeasure and the wrongful act because the effects of a wrongful act on the injured State are not necessarily in proportion to the degree of gravity of the wrongful act.

Proportionality is concerned with the relationship between the alleged wrongful act and the countermeasure. It is not to be measured, on the basis of the aptness of the reaction to attain a particular aim. The purpose of countermeasures, namely to induce the wrongdoing State to comply with its obligations under draft articles 41 to 46 could be of relevance in deciding whether and to what extent a countermeasure is lawful. That issue, however, is different from that of proportionality.

An injured State is precluded from resorting to certain types of conduct by way of countermeasures. The notion of prohibited countermeasures is the result of the continuing validity of certain general restrictions on the freedom of States notwithstanding the special character of the relationship between the injured State and the wrongdoing State. Subparagraphs (a) to (c) of draft article 50 identify the broad areas where non-compliance with applicable norms by way of countermeasures is impermissible and circumscribe the limitations on the measures available to an injured State with respect to each of these areas. Although some of the prohibited countermeasures addressed in subparagraphs (a) to (d) are covered by peremptory norms referred to in subparagraph (e), it was considered preferable to deal with them separately in view of the importance acquired, in particular, in contemporary international society by the prohibition of the use of force and the protection of human rights.

The prohibition of the threat or use of force by way of countermeasures is set foth in subparagraph (a). This prohibition is defined in terms of a general reference to the Charter. The Commission was of the view that a specific reference to Article 2, paragraph 4 would not accurately reflect the scope of the prohibition of the threat or use of force since the Charter permits the use of force as authorized by the United Nations as well as in the exercise of the right of individual or collective selfdefence. The Commission opted for a general reference to the Charter as one source, but not the exclusive source, of the prohibition in question which is also part of general international law and has been characterized by the International Court of Justice as a norm of customary international law.

Subparagraph (b) of draft article 50 restricts the extent to which an injured State may resort to economic or political coercion by way of countermeasures. A great variety of forms of economic or political measures are frequently resorted to and are considered admissible as counter measures against internationally wrongful acts. Their admissibility, however, it not totally exempt from restriction since extreme economic or political measures may have consequences as serious as those arising from the use of armed force.

Subparagraph (c) limits the extent to which an injured State may resort, by way of countermeasures, to conduct that is contrary to diplomatic or consular law While an injured State may resort to countermeasures affecting its diplomatic relations with the wrongdoing State, including declarations of persona non grata , the termination or suspension of diplomatic relations and the recalling of ambassadors, not all forms of countermeasures relating to diplomatic law or affecting diplomatic relations are considered unlawful.

Subparagraph (d) of draft article 50 prohibits the resort, by way of countermeasures, to conduct in derogation from basic human rights.This prohibition is dictated by fundamental humanitarian considerations.

Subparagraph (e) of draft article 50 concerns the general restriction on the right of an injured State to resort to countermeasures resulting from the legal necessity to comply with a peremptory norm of international Law. The Commission has implicitly recognized the existence of this restriction in Part One, firstly, by including among the circumstances precluding wrongfilness the fact that "the act constitutes a measures legitimate under international law ... in consequence of an internationally wrongful act" (article 30); secondly, when it stressed the inviolability of peremptory norms even when there is the consent of the State favour of which the infringed obligation exists (article 29, paragraph 2); and thirdly, in case of State of necessity (article 33, paragraph 2(a)) This is consistent with the Vienna Convention on the Law of Treaties which recognized the unique character of a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."

Finally, Chapter IV of Part Two of the draft articles entitled "International Crimes" address such vital issues as the consequences of an international crime; specific consequences; and obligations for all States.

Draft article 51 on Consequences of an international crime is essentially a chapeau to Chapter IV as it stipulates that an international crime entails all the legal consequences of any other international wrongful

act and such further consequences are set out in draft articles 52 and 53. The additional consequences relate to (i) the relationship between the wrong doing State and each injured State; and (ii) the minimum collective consequences.

Draft article 52 addressed to specific consequences provides that an injured States entitlement to obtain restitution in kind or to obtain satisfaction is not subject to limitations or restrictions set out in the relevant provisions of draft articles 43 (restitution in kind) and 45 (satisfaction) where an internationally wrongful act of a State is an international crime. The Commission,believes that the two limitations on the entitlement of an injured State obtain restitution in kind ought not to apply in the case of a crime.

It may be recalled that draft article 43(c) limits the entitlement to restitution where the wrong doing State can show that to grant restitution - as contradistinguished from compensation would impose on the Wrong doing State a burden disproportionate to the benefit secured by the injured State in obtaing restitution. The Commission believes that this limitation ought to be removed in the case of a crime. In the opinion of the Commission restitution is "esseatially the restoration of the legal situation as it existed to prior to the Wrogful act" and a wrongdoing State ought never to be able to retain the fruits of its crime, or benefit from a wrongdoing that is criminal, however painful or burdensome restoration might be". It was empasized in this regard that in removing this limitation the Commission was not eliminating proportionality which pervades the general field of remedies.

The second limitation set out in dratf article 43(a) excludes 'restitution where this would seriously jeopardize the political independance or economic stability' of the wrongdoing State. The commission didnot believe it to be a valid reason for defining restitution when the wrongdoing State is required to give up the result of a crime.

Apropos the exclusion of demands of satisfaction which would "impair the dignity of the wrongdoing State" set out in draft article 45(3) the Commission took the view that by reason of its crime the wrongdoing State had itself forfeited its dignity. It noted that the limitation in paragraph

2(c) of draft article 45 would, however, remain so that a claim for damages would have to be proportionate to the gravity of the crime.

Draft article 53 on obligations for all States entails both negative and positive "obligations on all States. In the former category as set out is sub-paragraphs (a) and (b) and the obligations of non-recognition and non obligation from assisting the wrongdoing States. Subparagraphs (c) and (d) of draft article 53 incorporate the positive obligations to cooperate with other States "in carrying out their obligations under subparagraphs (a) and (b)' and "in the application of measures designed to eliminate the consequences of the crime."

In as much as the involvement of all States is believed to reflect the interest of all States in the prevention and suppression of all international crimes which by definition impair fundamental interests of the international community the obligations imposed by draft article 53 rest on the assumption of international solidarity in the face of an International crime.

Part Three: Settlement of Disputes

It will be recalled that the former Special Rapporteur Mr. Roberto Ago in his fiftlf report presented in 1984 had submitted that the Commission should give its consideration at an early stage to the possible content of Part Three of the draft articles concerning "Implementation of State Responsibility" would influence the way in which Part Two would be elaborated. He had expressed doubts as to whether States would be willing to accept the rules elaborated in Part One of the draft articles as binding upon them if there were no guarantees for an impartial assessment of the facts and the interpretation or application of the primary rules. Several members of the Commission had stressed the link between Parts Two and Three and emphasized the relevance of "Implementation provisions" in the elaboration of Part 2 of the draft articles or at least in respect of some of the articles.

During its 47th Session the Commission adopted a set of 7 draft articles and two annex thereto. The seven draft articles and the Annex

are addressed to the Settlement of Disputes and now form Part Three of the proposed instrument on State Responsibility. It may be recalled that the present Special Rapporteur, Mr. Arangio Ruiz, had in his fifth report presented to the ILC at its 45th Session proposed general compromissory clauses" of the future convention on State Responsibility. The settlement obligation procedures proposed, it was then stated, would complement, supersede or tighten up any obligations otherwise existing between the insured State and the wrongdoing state in any given case of an alleged breach of international law. The proposed draft articles 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 lawfllilness. The three steps of the dispute settlement procedure then proposed were conciliation, arbitration and judicial settlement. Subsequently, the Drafting Committee added Negotiation and Good Offices and Mediation to the dispute settlement procedure proposed by the Special Rapporteur.

Draft Article 54 on Negotiation stipulated that in the event of a dis ute, regarding the interpretation or application of the present articles,, arising between two or more States, they shall upon the request of any of them to seek to settle it amicably by negotiation. It may be stated that negotiation is a flexible means of peaceflil 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 displite 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 appropriate. 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 Vieiina 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.

Draft Article 55 on Good Offices and Mediation envisages the role of the 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 by stated that although Article 33 paragraph 1 of the Charter of the United Nations does not specifically mentioned good offices as a means of pacific settlement of disputes the Manila Declaration on the Peaceful Settlement of International. Disputes, 1982 placed good offices on an equal footing with the other peaceful methods enumerated in Article 33 of the Charter.

Draft Article 56 on Conciliation is in essence based on the formulation proposed by the Rapporteur Mr. Ruiz 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 articles on State Responsibility is addressed to the issue relating to the appointment of a five member conciliation commission, its rules of procedure, method of work, and decision making.

Draft article 57 enunciates the Task of the Conciliation Commission including the elucidation of the question 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.

Draft article 58 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 11 on the Arbitral Tribunal provides for the establishment of a five member arbitral tribunal, its rules of procedure, decision making and related matters.

Draft Article 58 must be read together with draft article 59 which deals with the Terms of Reference of the 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 parties written and oral pleadings and submission.

Finally, draft article 60 provides that where the Validity of an Arbitral Award is challenged by a party to the dispute and if within 3 months the date of the award the parties have not agreed on tribunal, the ICJ is competent to confirm the validity of the award or declare its total or partial nullity. It is also provided that the issue or dispute left unresolved by the nullification of the award at the request of any party be submitted to a new arbitration in conformity with Annex II of the draft articles.

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

Introduction

The Commission adopted 20 articles on the Draft Code of Crimes against the Peace and Security of Mankind ('Draft Code' hereinafter) upon the completion of second reading. The adopted Draft Code is in two parts. Part I deals with General Provisions which *inter alia* outline the Scope and Application, Individual Responsibility, Punishment, Responsibility of the Superior, Establishment of Jurisdiction, Obligation to extradite or prosecute, Judicial guarantees, non bis in idem and non-retroactivity. Part II, on the other hand, deals with the substantive aspects i.e. the definitions of crimes against the peace and security of mankind. The following crimes have been defined in the Draft Code: (a) Crime of Aggression; (b)Crime of Genocide; (c) Crimes against Humanity; (d) Crimes against UN and Associated Personnel; and (e) War Crimes.

The Drafting Committee on second reading of the Draft Code held 23 meetings beginning from 7 May 1996. The Drafting Committee[3], it may be recalled, had provisionally completed last year the second reading of articles 1, 2, 4 to 6 bis, 8 to 13, 15 and 19. Furthermore, it may also be recalled that the ILC had taken no action on these articles, instead it sought to defer its consideration to the present Session. However, while introducing the Drafting Committee's Report in the last Session, the then Chairman (Mr. Yankov) had indicated that the report was of a tentative character and that some of the articles provisionally adopted at that time might need to be looked at again or modified in the light of the definition of crimes. Accordingly, the Drafting Committee in the course of the second reading of the draft provisions modified the text of some of the articles as adopted in 1995.

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[3] The Drafting Committee on the Draft Code of Crimes Against the Peace and Security of Mankind comprised :- Mr. Doudou Thiam (Special Rapporteur), Mr. Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Qizhi He, Mr. Mochtar Kusum-Atmadja, Mr. Vaclav Mikulka, Mr. Robert Rosenstock, Mr. John de Saram, Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Chusei Yamada, Mr. Alexander Yankov, and Mr. Igaor Ivanovich Iukashuk.