

(ii) **Secretariat Study: Report of the International Law Commission on the Work of its Fiftieth Session**

**Long-term Programme of Work of the Commission**

It will be recalled that a Planning Group established by the Commission for the Forty-ninth Session<sup>1</sup> had considered the Work Programme of the Commission for the present quinquennium had taken the view that substantial progress should be made on those topics on which substantive work had already been undertaken and that it would be desirable to complete the first or the second reading, as the case may be, of those topics within the present quinquennium. It had invited the Working Groups on the respective topics to consider the matter and to make recommendations.

The Planning Group had established a Working Group on the Long Term Programme of Work<sup>2</sup> to consider the topics which may be taken up by the Commission beyond the present quinquennium. The Working Group while emphasizing the role of the General Assembly in the selection of topics recommended that the selection of topics particularly within the Commission should be guided by the following criteria:-

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<sup>1</sup> The Planning Group was composed of Mr. J. Baeba Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. L. Illueca, Mr. J. Kataka, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepulveda, Mr. B. Simma, Mr. D. Thiam and Mr. Z. Galicki (ex-officio member).

<sup>2</sup> The Working Group on the long-term programme of work established at the Forty-ninth Session of the Commission was composed of Mr. I.V. Lakashuk (Chairman); Mr. J. Baena Soares; Mr. Ian Brownlie; Mr. C. Dugard; Mr. L. Ferrari Bravo; Mr. R. Goco; Mr. Qizhi He; Mr. A. Pellet; Mr. B. Simma; Mr. Chusei Yamada and Mr. Z. Galiki (ex officio member).

- (a) that the topic should reflect the requirements of States in respect of the progressive development and codification of international law;
- (b) that the topic is sufficiently advanced in stages in terms of State practice to permit progressive development and codification;
- (c) that the topic is concrete and feasible for progressive development and codification.

It had also proposed that the Commission should not restrict itself to traditional topics but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. While a process for the selection of topics within the Commission was outlined the selection of topics, on the basis of the above mentioned criteria, would be made at the fiftieth session of the Commission and the selected topics will be presented to the fifty third session of the General Assembly, in 1998, together with an indication of how the Commission intends to proceed with the study of each topic.

The Commission at its Fiftieth Session has identified "The Law of Environment" as one of the topics which the Commission could consider in the future.

All the items currently on the agenda of the Commission are of immense interest to the Asian African Legal Consultative Committee. The Committee had organized, within the administrative arrangements of its 37<sup>th</sup> session, a Special Meeting on the Reservations to Treaties. A report on the special meeting convened in New Delhi in April 1998 to consider the Preliminary Conclusions on 'Reservations to Normative Multilateral Treaties', Including Human Rights Treaties adopted by the International Law Commission at its forty ninth session was thereafter submitted to the Commission at its recently concluded fiftieth session.

The item Law of Environment that the Commission proposes to take up for progressive development and codification is also of great interest to the Committee. The item is proposed to be considered in the course of the meeting of the Legal Advisers of Member States to be convened at the United Nations headquarters in New York during the fifty third session of the General Assembly. The item is also likely to be debated at a special meeting to be convened within the administrative arrangements of the 38<sup>th</sup> Session of the Committee scheduled to be held in Accra, Ghana, in early 1999.

### I. State Responsibility

It will be recalled that the General Assembly at its fifty-first session had by its Resolution 51/163 drawn the attention of the Governments to the importance, for the International Law Commission, of having their views on the draft articles on State Responsibility adopted on first reading by the Commission at its forty-eight session, and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission.

The Commission at its Forty-ninth session decided to establish a Working Group. The Working Group on State Responsibility, *inter alia*, proposed that the Commission appoint a Special Rapporteur for the topic and the Commission accordingly appointed Mr. James Richard Crawford, Special Rapporteur for the topic.

At its fifty-second session the General Assembly recommended that the International Law Commission continue its work on the topics in its current programme, including State Responsibility. At its fiftieth session the Commission had before it the comments and observations received from Governments on the draft articles provisionally adopted by the Commission on first reading.<sup>3</sup> Also before the Commission was

<sup>3</sup> A/CN.4/488 and Add. 1 and 2.

the first report of the Special Rapporteur, Mr. James Crawford.<sup>4</sup> The report was divided into two parts and dealt with general issues relating to the draft articles, the distinction between "crimes" and "delictual" responsibility. It also dealt with draft articles 1 to 15 of Part One of the draft articles as adopted on first reading.

Presenting his Report the Special Rapporteur identified five general issues relating to the draft articles viz. (i) the distinction between primary and secondary rules of state responsibility; (ii) the scope of the draft articles; (iii) the inclusion of the detailed provisions on counter measures and dispute settlement; (iv) the relationship between the draft articles and other rules of international law; and (v) the eventual form of the draft articles.

In presenting these issues the Special Rapporteur recalled that the distinction between the primary and secondary rules of state responsibility had formed the basis of the Commission's work since 1963. He recalled in this regard that "it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper". The purpose of the secondary rule was to lay down the framework within which the primary rules would have effect in so far as situations of breach were concerned. Although it was a coherent distinction it was nevertheless sometimes difficult to draw. He accordingly suggested that the Commission's aim should be to lay down the general framework within which the primary substantive rules of international law would operate in the context of State responsibility.

As to the scope of the draft articles the Special Rapporteur suggested three matters that in his opinion required elaboration. These were (i) reparation, particularly the

<sup>4</sup> A/CN.4/490 and Add. 1 - 6.

payment of interest; (ii) *erga omnes* obligations, which were presently dealt with in draft article 40, paragraph 3; and (iii) responsibility arising from joint action of States or what is known in some legal systems as joint and several liability. Although some draft articles dealt with the issue they did so somewhat haphazardly. During the debate on the issue of this scope of the draft articles it was suggested that "State Responsibility Under International Law" would perhaps be more juridically precise and emphasize the international law element of his responsibility.

With regard to the inclusion of detailed provisions on counter measures and dispute settlement the Special Rapporteur, Mr. James Crawford, noted down that some governments had expressed concerns regarding the inclusion of the detailed provisions on counter measures in part Two and on dispute settlement in Part Three of the draft articles and that the Commission would consider these issues at a later stage.

Apropos, the relationship between the draft articles and other rules of international law he noted that some Governments believed that the draft articles didn't fully reflect their residual character and had therefore suggested that draft article 37 on *lex specialis* be made into a general principle. The proposal seemed valid, except possibly as to issues of responsibility arising out of obligations of a *jus cogens* character. The Rapporteur had accordingly proposed that the Commission discuss the draft articles on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

As regards the eventual form of the draft articles the Special Rapporteur observed that the Commission had not generally decided this issue until it had completed consideration of matter. On the other hand in certain other topics such as Reservations to Treaties and Succession in respect to nationality the decision had been made earlier. The draft articles on state responsibility had been drafted as a

neutral set of articles that were not designed either as a convention or a declaration. Recognizing that the dispute settlement issues relating to counter measures in Part two could be considered independently of the question of the form of the draft article, he felt, would need to take a position on this question when considering the dispute settlement provisions in Part Three which could be included in a Convention but not a Declaration.

In the First Part of the Report which addressed the issue of the distinction between "crimes" and "delictual" responsibility,<sup>5</sup> the Special Rapporteur indicated that draft article 19 (1) indicated the irrelevance of the subject matter of the obligation in determining the existence of a breach of a wrongful act. While this proposition was already clear from draft article 1, draft article 19 (4) defined an international delict as anything that was not a 'crime'. Draft Article 19 (2) defined an international crime as an internationally wrongful act which resulted from by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach was recognized as a crime by the community as a whole. Paragraph 2 of draft article 19 was thus problematic.

Draft Article 19 (3) in the opinion of the Special Rapporteur was defective for seven reasons which included (i) it failed to define crimes; (ii) its obscurity made it impossible to know what, if anything was a crime; (iii) because it was merely indicative; (iv) it was not exclusive; (v) it subjected the notion of crimes to numerous qualifications; (vi) it provided a series of examples which, because of those qualifications, were not examples at all; and (vii) it contradicted paragraph 2 by introducing a new criterion of the seriousness of the breach.

The Special Rapporteur's examination of the treatment of State crimes in the draft articles as adopted on first reading also included the comments of governments on state crimes:

<sup>5</sup> See A/CN.4/Add.1-3.

the existing international law on the criminal responsibility of states; and the relations between the international criminal responsibility of states and certain cognate concepts. He drew attention to five possible approaches for dealing with international crimes of states. The approaches to international crime of States proposed by the Special Rapporteur included (a) the approach embodied in the present draft articles; (b) the replacement by the concept of "exceptionally serious wrongful acts"; (c) a full-scale regime of State criminal responsibility to be elaborated in the draft articles; (d) the rejection of the concept of State criminal responsibility; and (e) the exclusion of the notion of criminal responsibility of States from the draft articles, without prejudice to the general scope of the draft articles and the possible further elaboration of the concept of "state crimes" in another text. The approach of separating the question of the criminal responsibility of states from the questions relating to the general law of obligations addressed in draft articles, while recognizing the possible existence of crimes and the corresponding need to elaborate appropriate procedures for the international community to follow in responding thereto would, the Special Rapporteur said, be consistent with all legal systems which treated criminal responsibility separately. It would also facilitate the elaboration of the special procedure required by international standards of due process.

The Commission at its fiftieth session established a Working Group to assist the special Rapporteur in the consideration of various issues during the Second Reading of the draft articles.

As mentioned earlier the International Law Commission adopted a set of 10 articles relating to Chapter One entitled General Principles and Chapter Two on Acts of State under International Law. The following section sets out brief notes and comments on the draft articles adopted at the fiftieth session.

Part One of the draft articles as adopted, on first reading together with commentaries thereto, in 1980 is in principle

divided into five chapters. Chapter 1 entitled General Principles comprised 4 articles devoted to the definition of a set fundamental principle of the draft articles "origin of State responsibility" be replaced by "basis of responsibility" sense the term origin was somewhat unusual and had a broader connotation than merely an inquiry into the issues of responsibility.

Of the four draft articles adopted on first reading in 1980 the Special Rapporteur was of the opinion that the provisions of draft Article 2, entitled "possibility that every state maybe held to have committed an internationally wrongful act", were a complete truism which had never been denied. Its denial would amount to a denial of the principle of equality of states and, indeed, of the whole system of international law. Besides its provisions dealt not with the topic of international responsibility but rather with the possibility of such responsibility. Accordingly, draft article 2 on the Possibility that every State may be held to have committed an internationally wrongful act has been deleted.

Draft article 1 on "Responsibility of a State for its internationally wrongful acts" stipulates that every internationally wrongful act of a State entails the international responsibility of that State. The provision is intended to cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from an act of commission or omission. There was no general requirement of fault or damage for a state to incur responsibility for an internationally wrongful act. This provision is intended to cover all internationally wrongful conduct constituting a breach of an international obligation whether arising from act of commission or omission or failure to act.

Draft 3 entitled "Elements of an internationally wrongful act of State" provides that there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

Draft article 4 on the "Characterization of an act of a State as internationally wrongful is governed by international law and such characterization is not affected by the characterization of the same act as lawful by internal law. The characterization of an act as unlawful is an autonomous function of international law not contingent on characterization by national law and unaffected by the characterization of the same act as lawful under national law. This, however, does not mean that internal law is irrelevant to the characterization of conduct as unlawful. The characterization of an act as unlawful is an autonomous function of international law not contingent on characterization by national law and unaffected by the characterization of the same act as lawful under national law.

The Special Rapporteur has proposed that consideration be given to changing the order of the draft articles such that draft article 3 would precede draft article 1.

Chapter Two of Part One of the draft articles on the **Act of State under International Law** as adopted on first reading in 1980 is concerned with the subjective element of the internationally wrongful act, and the provisions of draft articles 5 to 15 are addressed to the determination of the conditions in which particular conduct must be considered as an "Act of State" under international law. The Special Rapporteur observed that chapter two of the draft articles defined the conditions in which conduct was attributable to a state under international law and that the provisions of the draft article in this Part must be considered in the context of draft article 3 which set forth the two essential conditions for step responsibility viz. (i) an act of commission which is attributable to a State; and (ii) a breach of an international obligation of that State. Chapter Two of the draft articles dealt with the first of these conditions. In this part of the draft articles the Special Rapporteur has proposed the deletion of the text of draft articles 6 and 11 to 14.

Draft article 5 addresses the question of the "Attribution to the State of the conduct of its organs". Paragraph 1 of the