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Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

Topic:

State responsibility

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STATE RESPONSIBILITY

[Agenda item 2]

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NOTE

Multilateral conventions cited in the present report

Convention for the Peaceful Resolution of International Conflicts (The Hague, 29 July 1899 and 18 October 1907)

American Treaty on Pacific Settlement (Pact of Bogotá) (Bogotá, 30 April 1948)

Convention for the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)

European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) (Rome, 4 November 1950)

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)

Vienna Convention on the Representation of States in their Relation with International Organizations of a Universal Character (Vienna, 14 March 1975)

United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)

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Introduction

1. The present report consists of two chapters, the first of which addresses the subject matter of part 3 of the draft articles on State responsibility (Implementation) while the second deals with the consequences of so-called international crimes of States under article 19 of part 1 of the draft articles.[1] Chapter I also contains the text of proposed draft articles and an annex on the settlement of disputes. For the reasons indicated at the beginning of that chapter, chapter II does not contain any draft articles.

2. Although the subject matters of chapters I and II are discussed separately, it will be shown that the extent to which dispute settlement procedures are available and the chances of dealing effectively with the consequences of crimes are more closely interrelated than may appear at first sight.

CHAPTER I

I. PART 3 OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY: DISPUTE SETTLEMENT PROCEDURES

3. Section A of this chapter contains a summary of the proposals made by the previous Special Rapporteur, Mr. Willem Riphagen, in 1985 and 1986 relating to the settlement of disputes, including draft articles 3 to 5 of part 3,[2] and of the debates in the Commission and in the Sixth Committee thereon.[3] Section B analyses the features of countermeasures as an indispensable means of implementation of State responsibility, on the basis of the important debates on the subject held in the Commission and in the Sixth Committee from 1984 to 1986[4] and in 1991[5] and 1992.[6] Section C sets forth the consequences to be drawn from the nature of countermeasures and the statements on the subject made in the course of the debates for the purposes of the choices that the

[1] For the texts of articles I to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 et seq.

[2] For his general comments on the proposed part 3, see his sixth report (*Yearbook ... 1985*, vol. II (Part One), pp. 15-19, document A/CN.4/389); for texts of draft articles 1 to 5 and the annex of part 3, see *Yearbook ... 1986*, vol. II (Part Two), pp. 35-36, footnote 86. The annex is also reproduced in footnote 167 below.

[3] For summaries of the Commission's discussions, see *Yearbook ... 1985*, vol. II (Part Two), paras. 108-163 and *Yearbook ... 1986*, vol. II (Part Two), paras. 40-65. For detailed comments, see *Yearbook ... 1985*, vol. I, 1890th-1902nd meetings and *Yearbook ... 1986*, vol. I, 1952nd-1956th meetings. For summaries of the discussions in the Sixth Committee, see topical summaries (A/CN.4/L.389), sect. G and C, respectively.

[4] For summaries of the Commission's discussions in 1984, see Yearbook ... 1984, vol. II (Part Two), paras. 344-380. For detailed comments, see *Yearbook ... 1984*, vol. I, 1858th, 1860th-1861st and 1865th-1867th meetings. For a summary of the discussions in the Sixth Committee, see the relevant topical summary (A/CN.4/L.369), sect. D. For 1985 and 1986, see footnote 2 above.

[5] For summaries of the Commission's discussions, see *Yearbook ... 1991*, vol. II (Part Two), paras. 302-322. For detailed comments, see *Yearbook ... 1991*, vol. 1, 2238th meeting. For a summary of the discussions in the Sixth Committee, see the relevant topical summary (A/CN.4/L.456), sect. E.

[6] For summaries of the Commission's discussions, see *Yearbook ... 1992*, vol. II (Part Two), paras. 105-276. For detailed comments, see *Yearbook ... 1992*, vol. I, 2265th-2267th, 2273rd-2280th, 2283rd, and 2289th meetings. For a summary of the discussions in the Sixth Committee, see "Topical summary ... of the discussions ... on the report of the Commission during the forty-sixth session of the General Assembly" (A/CN.4/L.469, sect. F).

Commission is called upon to make with regard to the dispute settlement provisions of part 3 of the draft. Section D describes the solutions recommended in the light of the positive impact they could have on the regime of countermeasures and the proper implementation of the law of State responsibility in general. Section E discusses the Commission's practice with regard to the dispute settlement provisions to be embodied in its draft in the light of the requirements of the progressive development of the law in the area of State responsibility. Section F contains the proposed draft articles of part 3 and the annex thereto.

A. The draft articles on dispute settlement discussed in the Commission at its thirty-sixth and thirty-seventh sessions and in the Sixth Committee at the fortieth and forty-first sessions of the General Assembly

1. MR. RIPHAGEN'S PROPOSALS

4. The dispute settlement provisions proposed by the former Special Rapporteur[7] were designed to come into operation at the phase where, in the words of his draft article 3 of part 3, objection had been raised against measures taken or intended to be taken under the articles of part 2 providing for the right of an allegedly injured State to resort to countermeasures (namely his draft articles 8 and 9 of part 2[8]).

5. Under paragraph 1 of Mr. Riphagen's proposed draft article 3,

> 1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

Under paragraph 2, however,

> 2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

In case no solution could be reached on the basis of the procedures referred to in article 3, three kinds of procedures were envisaged under article 4 (*a*), (*b*) and (*c*).

6. Article 4 (*a*) provided that disputes concerning the interpretation or application of the provision of part 2 prohibiting countermeasures consisting in the violation of an obligation deriving from a "peremptory norm of general international law" (art. 12)[9] could be submitted unilaterally by any one of the parties to ICJ for a decision.

7. Article 4 (*b*) provided for the same possibility in relation to disputes concerning the "additional rights and obligations" envisaged as consequences of international crimes of States by the relevant provision of part 2 (art. 14).

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[7] See footnote 2 above.
[8] For text of articles 6 to 16, see *Yearbook ... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.
[9] Ibid.

8. Article 4 (*c*) dealt with the more general category of disputes concerning the application or interpretation of the provisions of part 2 relating to the regime of countermeasures (arts. 9-13). As regards these disputes, either party was entitled under article 4 (*c*) to resort to a conciliation procedure—provided for in an annex to the articles—by submitting a request to that effect to the Secretary-General of the United Nations.

9. Since, for the reasons indicated on many occasions, the time is not yet ripe to make definitive suggestions to the Commission relating to what Riphagen in his article 4 (*b*) calls "additional rights and obligations" attaching to the internationally wrongful acts contemplated in article 19 of part 1 of the draft articles, for the time being, this report will not concern itself with the provision of article 4 (*b*).

2. THE DEBATES IN THE COMMISSION AND IN THE SIXTH COMMITTEE

10. The comments of the members of the Commission and those made in the Sixth Committee on the proposals referred to above may be classified under five headings according to whether they relate to:

(a) The general, preliminary problem of whether dispute settlement provisions should be included in the draft;

(b) The relationship between the dispute settlement procedures to be provided for in the draft and any dispute settlement arrangements in force between the parties;

(c) The nature of the settlement procedures according to:

(i) the stage of implementation of the responsibility relationship at which the said procedures should come into play;
(ii) the extent to which resort thereto should be compulsory;
(iii) the binding or non-binding nature of their outcome;

(d) The provisions of the draft (substantive or instrumental) to which the envisaged procedures should apply;

(e) The question of reservations.

(a) *The general problem*

11. To the general preliminary question of whether dispute settlement provisions should be included in the draft, some members gave an affirmative answer.[10]

12. Some members pointed out that a convention on State responsibility would be incomplete and ineffective without a compulsory procedure for the settlement of certain disputes.[11] Others thought that the absence of a compulsory dispute settlement

[10] Mr. McCaffrey (*Yearbook ... 1985*, vol. I, 1892nd meeting); Mr. Al-Qaysi (ibid., 1899th meeting); Mr. Yankov (ibid.); and Mr. El Rasheed Mohamed Ahmed (ibid., 1900th meeting).

[11] Mr. Calero Rodrigues (ibid., 1892nd meeting); Mr. Huang (ibid., 1894th meeting); and Mr. Mahiou (ibid., 1897th meeting).

procedure in the convention would be unacceptable to Governments.[12] One way or another, a careful balance would clearly have to be struck between the necessity
... on the one hand, to prevent nullification or diminution of the purpose and effectiveness of the future convention through lack of effective procedures for dispute settlement, and, on the other hand, to avoid reducing the acceptability of the future convention by making the dispute settlement regime too rigid.[13]
Others affirmed, on the contrary, that the former Special Rapporteur's proposals with respect to part 3 would inevitably provoke disagreement within the Commission and observed that in the case of the Vienna Convention on the Law of Treaties, the Commission had left the delicate matter of the inclusion of a dispute settlement procedure to the plenipotentiary conference.[14]

13. During the corresponding debate in the Sixth Committee, Brazil characterized the drafting of part 3 as a delicate task and only reluctantly agreed that a part 3 would be necessary.[15] Cyprus,[16] the Federal Republic of Germany,[17] Greece,[18] Jamaica,[19] Kenya,[20] New Zealand,[21] Nigeria,[22] Somalia,[23] Spain[24] and Tunisia[25] supported the incorporation of mandatory dispute settlement procedures. Australia,[26] China,[27] Ethiopia[28] and Morocco[29] held that caution should be exercised when drafting part 3 in view of the reluctance of States to submit to compulsory third-party settlement procedures.

(b) *Relationship between the proposed procedures and any dispute settlement arrangements in force between the parties*

14. With regard to the relationship between the dispute settlement procedures to be provided for in the draft and any dispute settlement arrangements in force between the parties (art. 3, para. 2 of Riphagen's draft), one member emphasized that article 3 should make it clear that priority was to be given to procedures in force between parties

[12] Sir Ian Sinclair (ibid., 1895th meeting). Mr. Arangio-Ruiz (ibid., 1900th meeting, para. 24), observed that some States would support a draft without a compulsory dispute settlement procedure, while others "would be reluctant to accept any codification or progressive development of the law in such a sensitive area without an adequate system of implementation and peaceful settlement". He, therefore, held that the Special Rapporteur should draft articles based on section B of his sixth report.

[13] Mr. Huang (ibid., 1894th meeting, para. 84). Similarly, Mr. Calero Rodrigues (ibid., 1892nd meeting, para. 46).

[14] Mr. Reuter (ibid., 1891st meeting).

[15] *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 23rd meeting, para. 80.

[16] Ibid., 24th meeting, para. 13.

[17] Ibid., 24th meeting, paras. 31 and 32.

[18] Ibid., 25th meeting, paras. 39-40.

[19] Ibid., 26th meeting, paras. 36 and 37.

[20] Ibid., 27th meeting, para. 16.

[21] Ibid., 31st meeting, para. 8.

[22] Ibid., 32nd meeting, para. 70.

[23] Ibid., 33rd meeting, para. 6.

[24] Ibid., 35th meeting, para. 45.

[25] Ibid., 36th meeting, para. 15.

[26] Ibid., 27th meeting, para. 57.

[27] Ibid., 30th meeting, para. 79.

[28] Ibid., 31st meeting, para. 24.

[29] Ibid., 36th meeting, para. 27.

to a dispute.[30] Some other members thought that the provision in paragraph 2 of article 3 should also qualify article 4.[31]

(c) *Nature of the settlement procedures*

15. A distinction needs to be drawn between various aspects of the nature of the settlement procedures that have been addressed by members of the Commission.

16. One concerns the stage at which the envisaged settlement procedures relating to the implementation of the responsibility relationship should come into play.[32] According to one member, the scope of the reference in draft article 3 to the application of the optional procedures provided for in Article 33 of the Charter of the United Nations should have been wider;[33] it could encompass for instance articles 10 to 13 of part 2 of the draft[34] or the whole of part 3.[35] Some other members held furthermore that reference should also have been made to article 8 of part 2,[36] or even to articles 6 and 7 thereof.[37]

17. Another aspect concerns the extent to which resort to the procedures envisaged should be compulsory. Riphagen, in both his sixth and seventh reports, had expressed the intention to seek inspiration from the relevant provisions on settlement procedures contained in other conventions.[38] Some members welcomed this suggestion.[39] The

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[30] Mr. Ogiso (*Yearbook ... 1986*, vol. I, 1954th meeting).

[31] Sir Ian Sinclair (ibid., 1953rd meeting). According to him, in other words, the clause of article 3, paragraph 2 (which preserves the dispute settlement rights and obligations in force between the parties), should apply not only to the provision of article 3, paragraph 1 (means of settlement indicated in Article 33 of the Charter), but also to the rights and obligations provided for under article 4 (*a*), (*b*) and (*c*). Mr. Lacleta Muñoz (ibid., 1954th meeting) stressed that "Nothing should be allowed to prevent disputes from being unilaterally submitted to ICJ" as provided for in article 4 (*a*) and (*b*).

A similar view was expressed by Riphagen in his sixth report (*Yearbook ... 1985*, vol. II (Part One)), (see footnote 2 above), paras. 16-18, considering that provisions of part 2 also have such a residual character. This opinion was shared, in particular, by Sir Ian Sinclair (ibid., vol. I, 1895th meeting).

[32] McCaffrey considered this issue was of fundamental importance with respect to the question of the interrelationship between the various parts of the draft articles (*Yearbook ... 1986*, vol. I, 1953rd meeting).

[33] Mr. Yankov (ibid., 1954th meeting).

[34] Mr. Jagota (ibid, 1955th meeting).

[35] Mr. Koroma (ibid.).

[36] Mr. Reuter (ibid., 1953rd meeting); Mr. Ogiso (ibid. 1954th meeting); Mr. Yankov (ibid.); Mr. Jagota (ibid., 1955th meeting); and Mr. Razafindralambo (ibid., 1956th meeting).

[37] Mr. Ogiso (ibid., 1954th meeting); and Mr. Yankov (ibid.).

[38] These views are developed particularly in Mr. Riphagen's sixth report dealing with the content, forms and degrees of international responsibility (part 2 of the draft articles); and "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*Yearbook ... 1985*, vol. II (Part One), p. 3, document A/CN.4/389), paras. 9-11 and 13. An explicit reference to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties (arts. 65-66) is contained in the commentaries to articles 3 and 4 in his seventh report (*Yearbook ... 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1), pp. 4-5.

[39] Mr. Huang (*Yearbook ... 1985*, vol. I, 1894th meeting, para. 8); Mr. Koroma (ibid., 1900th meeting, para. 49); and Mr. Jagota (ibid., 1901st meeting, para. 19) agreed that use should be made of existing codification instruments. According to Mr. Huang, however, "no particular model should be adopted to the exclusion of others". Other members indicated more directly that the Special Rapporteur was correct to proceed on the basis of an analogy with the Vienna Convention on the Law of Treaties,

approach taken in his sixth report was widely approved,[40] although a few members stressed that States could be reluctant to include a compulsory dispute settlement procedure in part 3 of the draft.[41] Some members, on the other hand, were utterly opposed to the introduction of a compulsory procedure for the settlement of disputes.[42] It should in any case be stressed that, in view of the reluctance of States to be bound by third-party settlement procedures, the mere reference in article 3, paragraph 1, of part 3 of the draft to Article 33 of the Charter of the United Nations was welcomed by various members of the Commission.[43] With regard to the "substance" of the mechanism proposed by the former Special Rapporteur, one member of the Commission considered his proposals with respect to ordinary internationally wrongful acts to be broadly acceptable.[44]

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for instance Mr. Sucharitkul (ibid,. 1890th meeting); Mr. Calero Rodrigues (ibid., 1892nd meeting); and Mr. Razafindralambo (ibid., 1898th meeting).

[40] Mr. Reuter (ibid., 1891st meeting); Mr. Calero Rodrigues (ibid., 1892nd meeting); Mr. Sinclair (ibid., 1895th meeting); Mr. Barboza (ibid., 1897th meeting); Mr. Mahiou (ibid.); and Mr. Lacleta Muñoz (ibid., 1899th meeting).

[41] Mr. Calero Rodrigues (ibid., 1892nd meeting); Mr. Huang (ibid., 1894th meeting); Mr. Mahiou (ibid., 1897th meeting); and Mr. Arangio-Ruiz (ibid., 1900th meeting).

[42] Mr. Flitan (ibid., 1893rd meeting); Mr. Balanda (ibid., 1894th meeting); and Mr. Njenga (ibid., 1896th meeting). Mr. Flitan expressed concern that such an approach would jeopardize the future convention and felt that in view of the importance of the draft articles to the international community it would be wiser to display moderation with regard to the implementation of international responsibility. Mr. Balanda held that although a roof to the project in the form of a dispute settlement procedure would be necessary, ad hoc arrangements were probably better since "States were more and more mistrustful of compulsory jurisdiction as such, so that rather than suggest too binding a mechanism, it would be better to suggest a flexible system that would encourage the States parties to the dispute to come together in order to seek a solution".

[43] Including Mr. Calero Rodrigues (*Yearbook ... 1986*, vol. I, 1953rd meeting); Sir Ian Sinclair (ibid.); Mr. Sucharitkul (ibid., 1954th meeting); Mr. Huang (ibid.); Mr. Francis (ibid., 1955th meeting); and Mr. Jacovides (ibid.). Mr. Sucharitkul pointed out that the means of peaceful settlement enumerated in Article 33 of the Charter were not limitative and that use could also be made of "good offices". Mr. Huang thought that, in conformity with State practice, direct negotiations should be emphasized; Mr. Arangio-Ruiz (ibid., 1966th meeting), held that it was possible to state in article 3 or in the commentary thereto which of the means of settlement provided in Article 33 were considered to be the most appropriate.

[44] Mr. McCaffrey (ibid., 1953rd meeting). Mr. Tomuschat (ibid., 1955th meeting), on the other hand, observed that the possibility unilaterally to set in motion the compulsory conciliation procedure would result in a metamorphosis in international law; the question was whether it would be acceptable to States. He and Mr. Malek agreed that it was important not to lose sight of what could reasonably be achieved. Mr. Malek (ibid., 1952nd meeting) added that the many inquiry and conciliation structures set up outside the framework of the United Nations were rarely used as States preferred to submit their disputes to the principal organs of global or regional organizations so as to be able to win public support for their case. In his sixth report, Mr. Riphagen had expressed the view that the alleged injured State "cannot force the alleged author State to submit to a dispute settlement procedure concerning the alleged breach, which may or may not be agreed between them ... only the alleged author State should be empowered to set into motion the procedure of dispute settlement to be provided for in part 3 of the draft articles" (*Yearbook ... 1985*, vol. II (Part One)) (see footnote 2 above), para. 20). This is contrary to the approach reflected in article 42 and articles 65 and 66 of the Vienna Convention on the Law of Treaties pursuant to which both parties to the dispute may set in motion the dispute settlement procedure provided for in the Convention. Mr. Calero Rodrigues (ibid., vol. I, 1892nd meeting) specifically approved of the approach taken by the Special Rapporteur, which placed the author State in the position of having to take the initiative of applying the compulsory conciliation procedure. With regard to the same aspect, Mr. Tomuschat (ibid., 1955th meeting) held that, insofar as such a restrictive interpretation was possible of article 4 (*a*) and (*b*), an unwarranted imbalance would result (because of the fact that only the alleged author State could file an application with the Court) which could moreover, "place ICJ in a very embarrassing situation".

18. During the debate in the Sixth Committee, States also expressed their position on the matter. Some[45] supported the inclusion of mandatory dispute settlement procedures—particularly with regard to the sensitive aspects of the draft which could hardly be left to the judgement of Member States themselves—even though the question was asked whether such systems would best serve the interests of the international community.[46] Other States were more reserved. They insisted that caution should be exercised in the drafting of part 3 in view of the reluctance of States to submit to compulsory third-party settlement procedures.[47] In the opinion of many other States, the general orientation and the provisions of article 4 in particular were unacceptable as they did not respect the principle of freedom of choice concerning the means of dispute settlement.[48]

19. Another subject of discussion in the Commission has been whether the outcome of the dispute settlement procedures should be binding or non-binding. The proposal to give limited compulsory jurisdiction to ICJ to determine whether there was a rule of *jus cogens* applicable to the breach in question (article 4 (*a*)) or whether an international crime had been committed (article 4 (*b*))[49] provoked a variety of reactions in the Commission. Some members supported the compulsory jurisdiction of ICJ as

[45] Including Austria (*Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 33rd meeting, para. 55); Cyprus (ibid., 32nd meeting, para. 16); the Federal Republic of Germany (ibid., 24th meeting, para. 13); Greece (ibid., 25th meeting, paras. 39-40); Jamaica (ibid., 24th meeting, para. 32); Kenya (ibid., 36th meeting, para. 15); Nigeria (ibid., 26th meeting, paras. 36-37); Spain (ibid., 32nd meeting, para. 70); Somalia (ibid., 35th meeting, para. 45); and Tunisia (ibid., 33rd meeting, para. 6).

[46] German Democratic Republic (ibid., 25th meeting, para. 21); Hungary (ibid., 30th meeting, paras. 21-22); and Jamaica (ibid., 24th meeting, para. 32) held that settlement procedures should not be limited to those which were compulsory but that room should be made for negotiated settlement, for instance.

[47] This opinion was shared by Australia (ibid., 31st meeting, para. 24); China (ibid., 30th meeting, para. 79); Ethiopia (ibid., 27th meeting, para. 57); and Morocco (ibid., 36th meeting, para. 27). During the debates relating to the proposals worked out in Mr. Riphagen's seventh report (see footnote 39 above), Morocco (*Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 36th meeting, para. 31) and New Zealand (ibid., 44th meeting, para. 52) agreed with compulsory conciliation.

[48] Hungary (ibid., 34th meeting, para. 34) pointed out that many States had neither ratified the Vienna Convention on the Law of Treaties, nor accepted the optional clause of Article 36, paragraph 2, of the Court's Statute. See also Bahrain (ibid., 38th meeting, para. 66); Bulgaria (ibid., paras. 87-89), China (ibid., 39th meeting, para. 28); Czechoslovakia (ibid., 34th meeting, para. 47); Ethiopia (ibid., 38th meeting, para. 22); France (ibid., 41st meeting, para. 43); the German Democratic Republic (ibid., 36th meeting, paras. 37, 40 and 41); Israel (ibid., 41st meeting, para. 9); Kuwait (ibid., 43rd meeting, para. 34); Morocco (ibid., 38th meeting, para. 31); Romania (ibid., 36th meeting, para. 73); the Ukrainian Soviet Socialist Republic (ibid., 37th meeting, para. 60); and Venezuela (ibid., 43rd meeting, para. 16). Iraq held that compulsory conciliation was not always an effective means (ibid., 34th meeting, para. 60).

[49] The approach taken by Mr. Riphagen (*Yearbook ... 1986*, vol. 1, 1952nd and 1956th meetings) resembles the suggestion made by Mr. McCaffrey (ibid., 1953rd meeting) who, while not convinced of the merit of compulsory jurisdiction of the Court said that he would prefer it to be "limited to determining whether a rule of *jus cogens* or an international crime was involved in a dispute". Mr. Tomuschat (ibid., 1955th meeting, para. 28) noted that the comparison made with the Vienna Convention on the Law of Treaties was not completely justified as the scope of the Court's jurisdiction in the matter of State responsibility would be wider than under the Vienna Convention and would encompass disputes relating to *jus cogens* or international crimes in their entirety and with all the legal implications. Mr. Koroma (ibid.) favoured referral of all cases involving an alleged international crime or breach of a rule of *jus cogens* to ICJ.

provided in article 4 (*a*) and (*b*).[50] It was argued in this connection that as a result of the changes in its composition, the Court had shed its conservative image and had become more acceptable to a larger number of States.[51]

20. One member considered that giving jurisdiction to ICJ was obviously the ideal solution,[52] while another favoured compulsory jurisdiction with respect to article 4 (*a*) only.[53] Some members thought that

> ... the fact that compulsory dispute settlement machinery applicable to the interpretation and application of the draft articles in parts 1 and 2 would inevitably cover a very wide area should not deter the Commission from attempting to devise such machinery.[54]

A few members preferred not to refer to the rules of *jus cogens* at all, but agreed that, if article 4 (*a*) was retained, the decision on the content of *jus cogens* was indeed to be made by ICJ.[55] Others considered that the proposal in article 4 (*a*) was a good one, but at variance with practice in view of the limited number of States that had accepted the optional clause under Article 36, paragraph 2, of the ICJ Statute.[56]

21. As regards the submission of disputes concerning the application or interpretation of provisions relating to *jus cogens* and international crimes, some members wondered why article 4, unlike the corresponding provisions of the Vienna Convention on the Law of Treaties on which it was based, did not contemplate the possibility of submitting such disputes to arbitration by common consent.[57] This question was viewed as calling for clarification for two reasons: it was noted, first, that although the Vienna Convention allowed for resort to arbitration, the reference to the compulsory jurisdiction of ICJ had apparently so far prevented many developing countries from ratifying that Convention.[58] Secondly, although article 3, paragraph 1, of part 3 referred to Article 33 of the Charter (which covers judicial settlement), article 4 provided for the jurisdiction of ICJ and made no mention of arbitration.[59] One member, on the other hand, felt that the Special Rapporteur had rightly refrained from envisaging the possibility of arbitration in article 4 (*a*) and (*b*)[60] inasmuch as, from the perspective of jurisprudential development, "adjudication by ICJ would produce a more consistent development".[61] Mr. Riphagen explained that while, with respect to *jus cogens*, international crimes and the application of the Charter, the rules of part 3 were not residual, the compulsory jurisdiction of ICJ was limited.[62] He

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[50] Mr. Arangio-Ruiz (ibid., 1952nd and 1955th meetings, para. 12); Mr. Calero Rodrigues (ibid., 1953rd meeting); Mr. Lacleta Muñoz (ibid., 1954th meeting); Mr. Tomuschat (ibid., 1955th meeting); Mr. Koroma (ibid.); Mr. Francis (ibid.); and Mr. Jacovides (ibid.).

[51] Mr. Arangio-Ruiz (ibid., 1952nd meeting).

[52] Mr. Thiam (ibid., 1956th meeting).

[53] Mr. Sucharitkul (ibid., 1954th meeting).

[54] Sir Ian Sinclair (*Yearbook ... 1985*, vol. I, 1895th meeting). Along the same lines, Mr. Jacovides (*Yearbook ... 1986*, vol. I, 1955th meeting).

[55] Mr. Ogiso (ibid., 1954th meeting).

[56] Mr. Huang (ibid.); and Mr. Díaz-González (ibid.). Similarly, but in respect of article 4 as a whole, Mr. Malek (ibid., 1952nd meeting).

[57] Mr. Malek (ibid.); Mr. Ogiso (ibid., 1954th meeting); Mr. Razafindralambo (ibid., 1956th meeting); and Mr. Yankov (ibid., 1959th meeting).

[58] Mr. Razafindralambo (ibid., 1956th meeting).

[59] Ibid.

[60] Mr. Francis (ibid., 1955th meeting).

[61] Ibid. See also Mr. Riphagen (ibid., 1956th meeting).

[62] Ibid.

then said, rather confusingly, that under article 3, paragraph 1, parties were of course free to submit the dispute to arbitration.[63]

22. In the Sixth Committee, many States[64] had supported the compulsory jurisdiction of ICJ with respect to disputes regarding *jus cogens* and international crimes. For other disputes, they favoured a reference to the flexible enumeration of means of settlement contained in Article 33 of the Charter and, in addition, compulsory conciliation. Italy held that article 4 (*a*) and (*b*) should provide for the possibility of arbitration,[65] while Cyprus would have preferred all disputes falling within article 4 to be settled through a dispute settlement system entailing a binding decision by ICJ or by an international criminal court.[66]

23. Another technical aspect on which Commission members raised doubts concerns the period of 12 months provided for in article 4, which some[67] considered to be too long.

(d) *Provisions of the draft to which the procedures envisaged should apply*

24. Another issue was to identify the provisions (substantive or instrumental) of the draft the application or interpretation of which should be governed by the procedures envisaged. Some members[68] during the debate on the sixth report expressed concern at Mr. Riphagen's statement that the establishment of a separate system for the settlement of disputes

... would amount to the creation of a multilateral compulsory dispute-settlement procedure relating to all (primary) obligations, present and future, under international law, of States becoming parties to the future convention on State responsibility.[69]

Other members were of the view that the application of part 3 of the draft as it now stood appeared to be limited to part 2, instead of covering part 1 as well.[70]

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[63] Ibid.

[64] Including Argentina (*Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 40th meeting, para. 27); Brazil (ibid., 34th meeting, para. 11); Canada (ibid., 40th meeting, para. 39); Chile (ibid., 43rd meeting, para. 62); Denmark (ibid., 36th meeting, para. 66); the Federal Republic of Germany (ibid., para. 57); Greece (ibid., 42nd meeting, para. 36); Ireland (ibid., 32nd meeting, paras. 8-9); Italy (ibid., para. 21); Madagascar (ibid., 30th meeting, paras. 41-42); Sierra Leone (ibid., 27th meeting, para. 90); and the Sudan (ibid., 40th meeting, para. 41).

[65] Ibid., 32nd meeting, para. 21.

[66] Ibid., 37th meeting, para. 11.

[67] Including Mr. Flitan (*Yearbook ... 1986*, vol. 1, 1952nd meeting, para. 20) and Mr. McCaffrey (ibid., 1953rd meeting). Some, including, Mr. Ogiso (ibid., 1954th meeting) and Mr. Roukounas (ibid., 1956th meeting), considered that the determination of that period depended on the type of settlement mechanism used. Mr. Flitan (ibid., 1952nd meeting) stressed the necessity of a provision covering cases of special urgency and some members proposed to replace the words "twelve months" by "reasonable period of time", in particular Mr. Jagota (ibid., 1955th meeting) and Mr. Balanda (ibid.).

[68] Mr. Calero Rodrigues (*Yearbook ... 1985*, vol. I, 1892nd meeting).

[69] Ibid., vol. II (Part One) (see footnote 2 above), para. 8.

[70] Including Sir Ian Sinclair (*Yearbook ... 1986*, vol. I, 1952nd meeting; ibid., 1953rd meeting); Mr. Arangio-Ruiz (ibid., 1952nd meeting); Mr. McCaffrey (ibid., 1953rd meeting); and Mr. Thiam (ibid., 1956th meeting). Mr. Razafindralambo (ibid.), thought it logical to infer that the three parts formed a coherent whole. He nevertheless indicated that he would appreciate a clearer reference in part 3 to part 1. The Special Rapporteur (ibid., 1952nd meeting) made it clear that the three parts of

(e) *The question of reservations*

25. As regards draft article 5, some members commented on the admissibility of reservations relating to part 3 of the draft.[71] While one member considered the provision of draft article 5 excluding reservations to be acceptable, except in relation to the application of draft article 4 (*c*) to disputes concerning countermeasures where the right allegedly infringed by such countermeasures arises solely from a treaty concluded before the entry into force of the convention, other members[72] found that the rule of non-retroactivity in draft article 5 was unduly restrictive.[73] Still others[74] were not convinced of the usefulness of draft article 5 and felt it preferable to keep the matter entirely open.

26. In the course of the debate in the Sixth Committee, most States[75] advocated a more flexible approach to the question of reservations. For one State,[76] article 5 was acceptable, while for others, the question ought to be left to the future diplomatic conference.[77]

3. CONCLUSION

27. On the whole, during the discussions in 1985 and 1986 the Commission seemed to be satisfied with the general dispute settlement system resulting from the provisions of the relevant draft articles proposed by Mr. Riphagen for part 3, notably the combined effect of article 3, paragraph 1, and article 4 (*c*) as proposed in 1986; and, of course, article 3, paragraph 2.

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the draft were interdependent. He further stated (ibid., 1956th meeting) that "in any attempt to apply the provisions of part 2, it was impossible to get away from the application of the provisions of part 1".

[71] Sir Ian Sinclair (*Yearbook ... 1985*, vol. I, 1895th meeting) held that the Special Rapporteur should, in working out the details, include "some kind of temporal limitation to exclude disputes relating to acts or facts which might have occurred prior to the proposed convention's entry into force".

[72] Including Mr. Sucharitkul (*Yearbook ... 1986*, vol. I, 1954th meeting) and Mr. Lacleta Muñoz (ibid.). Although Mr. Reuter and Mr. Ogiso viewed article 5 as acceptable in general and Mr. Jacovides was also inclined to accept it, they all noted—as did others—that the crucial question of reservations could in accordance with tradition be dealt with in a future diplomatic conference. On this point, see Mr. Reuter (ibid., 1953rd meeting); Mr. Lacleta Muñoz (ibid., 1954th meeting); Mr. Ogiso (ibid.); Mr. Yankov (ibid.); Mr. Tomuschat (ibid., 1955th meeting); Mr. Jacovides (ibid.); and Mr. Razafindralambo (ibid., 1956th meeting). While Mr. Malek agreed with Mr. Yankov that the possibility of reservations to part 3 would make the convention a lot more acceptable to States, he disagreed with Mr. Yankov's inclination to accept reservations to the future convention. He observed in particular (ibid., 1952nd meeting) that, as of June 1985, the Vienna Convention on the Law of Treaties had only been ratified by 46 States, 10 of which had formulated reservations or objections to the dispute settlement procedure. For Mr. Yankov (ibid., 1954th meeting, paras. 39-41), acceptance of reservations to the future convention was in conformity with the Vienna Convention as well as with articles 297-298 of the Convention on the Law of the Sea concerning limitations on and exceptions to compulsory procedures entailing binding decisions.

[73] Including Mr. Tomuschat (ibid., 1955th meeting). Mr. Jagota (ibid.), who proposed to provide simply that reservations would be allowed in case of disputes arising after the entry into force of the future convention. It is not entirely clear, however, whether this approach would be less restrictive.

[74] Including Mr. Calero Rodrigues (ibid., 1953rd meeting) and Mr. Francis (ibid., 1955th meeting).

[75] Including China (*Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 39th meeting, para. 28). Austria held that States could not be prevented from making reservations with respect to article 4 (*a*) and (*b*) (ibid., para. 24).

[76] Cyprus (ibid., 37th meeting, para. 10).

[77] Ethiopia (ibid., 38th meeting, para. 23).

28. It is felt that the Commission should carefully reconsider the whole matter. It should do so particularly in the light of the need to mitigate the negative effects of countermeasures denounced in the third[78] and fourth[79] reports and articulately stressed in the Sixth Committee debate of 1992 (paras. 30-35 below). A number of elements, including the better prospects for dispute settlement opened up by recent—and not so recent—developments and attitudes, seem to indicate that a more elaborate solution is both necessary and possible. Serious consideration should also be given to the desirability of a body such as the Commission seizing the opportunity to make a significant contribution, in accordance with the letter and spirit of General Assembly resolution 44/23 on the United Nations Decade of International Law, to the progressive development of a vital area of international law that hitherto does not appear to have received adequate attention in the codification process.

B. Dispute settlement in part 3 of the draft

1. THE PROBLEMATIC FEATURES OF UNILATERAL REACTIONS

29. The inclusion in part 3 of the draft of elaborate dispute settlement procedures is highly advisable in view of the nature of the measures envisaged in part 2 of the draft articles as remedies (*facultés*) open to an injured State. As noted in the previous reports (see, for example, paras. 2-6 of the third report),[80] countermeasures are the most difficult and controversial aspect of the whole regime of State responsibility. In addition to the fact that every State in principle considers itself entitled to be the judge of its own rights, subject only to the possibility of agreed negotiated or third-party settlement, the consequence of the need to ensure compliance with legal obligations in an inter-State system lacking any organic structure is to introduce the further potentially arbitrary element represented by the injured State's *faculté*, to resort to unilateral measures which are tantamount to actual, if lawful, non-compliance with one or more of its obligations towards the alleged wrongdoer. It is because of this very serious drawback, further aggravated by the fact that not all States are equally able to adjust to such a rudimentary system, that any recognition of this *faculté*, in the draft—as may be warranted by long-standing custom—must be accompanied by as many stringent conditions and limitations as are compatible with the effectiveness of the reaction to an internationally wrongful act.

30. It is obvious, however, that whatever conditions and restrictions are imposed on the practice of countermeasures, such measures will always, by their very nature, suffer from a basic flaw, namely that the assessment, on the one hand, of the right that has been infringed and, on the other hand, of the legality of the reaction—a reaction which in turn can provoke a further unilateral reaction (the so-called counter-reprisals) from the alleged wrongdoer—is unilateral. Being potentially flawed in all circumstances, even where the States involved enjoy comparable power or means, the remedy of countermeasures may lead to intolerably unjust results when applied between States of unequal strength or means. It is essentially because of those negative effects that doubts arise as to the desirability of providing for a legal regime of countermeasures within the framework of a

[78] *Yearbook ... 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1.
[79] *Yearbook ... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3.
[80] See footnote 78 above.

codification project. While there may be sufficient evidence that the practice of countermeasures, whatever its limits, is recognized under customary international law, no responsible "legislator" can avoid the temptation either expressly to rule out the practice of countermeasures as illegal (as a matter of progressive development) or at least to keep silent on that practice so as not explicitly to legitimize it.

31. Considerations such as those were obviously at the root of the strong reservations to which the inclusion in the draft of a legal regime of countermeasures has given rise, first at the Commission's forty-fourth session and later—more pointedly—in the Sixth Committee of the General Assembly at its forty-seventh session. As one of the representatives to the Sixth Committee remarked,

> Several members of the Commission ... were not convinced that countermeasures were an appropriate means of coercing a State alleged to have committed an internationally wrongful act to go to dispute settlement or to acknowledge its wrong and make amends.[81]

The reservations expressed in both bodies in 1992 were significantly more forceful (especially in the Sixth Committee) than those that had been formulated in the Commission debates of 1984,[82] 1985[83] and 1986[84] and in the corresponding debates in the Sixth Committee[85] on Riphagen's proposed draft articles on countermeasures. Some of the statements made in the course of the Sixth Committee debates are worth recalling.[86]

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[81] *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 27th meeting, para. 1.

[82] See footnote 4 above.

[83] See footnote 3 above.

[84] Ibid.

[85] *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 33rd-47th meetings; ibid., *Fortieth Session, Sixth Committee*, 23rd-35th meetings; and ibid., *Forty-first Session, Sixth Committee*, 27th-34th and 36th-44th meetings. See also footnotes 3 and 4 above.

[86] It is also worth noting that the latter reservations had themselves been more articulate than those made in the late 1970s when countermeasures were included among the circumstances excluding wrongfulness (art. 30 of part 1) (see footnote 81 above).

For example, concerns and doubts were expressed with regard to countermeasures in the course of the debate on Mr. Ago's eighth report (*Yearbook ... 1979*, vol. II, Part One, p. 3, document A/CN.4/318 and Add.1-4). These related mainly to the prohibition of armed reprisals (Njenga, ibid., vol. I, 1544th meeting); the necessity of distinguishing unilateral reactions from sanctions imposed by international institutions (Mr. Francis, ibid., 1545th meeting); and the necessity to avoid abuse by strong States to the detriment of the weak (Mr. Tabibi, ibid., paras. 11-12). As confirmed by the relevant topical summary (A/CN.4/L.311), very few doubts were expressed in the course of the debate in the Sixth Committee of the General Assembly at its thirty-fourth session on article 30 with regard to the legitimacy of unilateral reactions accompanied by precise limitations and conditions. This was surely due, in part, to the fact that the regime of countermeasures was only to be dealt with at a later stage within the framework of part 3 of the draft. The debate obviously became richer in 1984-1986, following the submission of Riphagen's draft articles 8-10 of part 2. In the Commission, the question was raised whether resort to countermeasures would be lawful in the absence of a previous objective determination of the existence of an internationally wrongful act. The answer was that the draft articles, as proposed, provided that, unless a possibility existed of prior resort to dispute settlement mechanisms already in existence between the parties, there would necessarily have to be a "provisional" unilateral determination on the part of the injured State and that adequate consideration of the problem of dispute settlement would be taken up at a later stage within the framework of part 3 (*Yearbook ... 1984*, vol. II (Part Two), p. 103, paras. 365-366). Much more significant were the 1984 and 1985 debates in the Sixth Committee. See paras. 37 et seq. below.

2. THE 1992 DEBATES ON COUNTERMEASURES IN THE COMMISSION AND IN THE SIXTH COMMITTEE

32. Some States observed, in the first place, that in the absence of a mechanism for the impartial and rapid determination of the existence of an internationally wrongful act, the injured State had to be granted an exclusive right to determine the existence of a wrongful act—which opened the door to unilateral acts, many of which would be based on subjective decisions, and to abuses with serious consequences for the peace and happiness of peoples. The remark was also made that leaving it to the victim State to assess the gravity of the prejudice and to determine if all available settlement procedures had been exhausted meant that neither the impartiality nor the lawfulness of the decisions to be taken could be guaranteed.[87] It was further noted in this connection that the notion that the injured party should take the law into its own hands represented a lower stage in the evolution of legal techniques and implied an admission that the international legal order was inadequate. Concern was also expressed that the concept of countermeasures seemed antithetical to fundamental principles of international law.[88]

33. A number of representatives—echoing the identical concerns expressed in the third[89] and fourth[90] reports—stressed that, States being unequal in size, wealth and strength, a regime of countermeasures, far from affording equal protection to all States, would place powerful or rich countries at an advantage in the exercise of reprisals against the wrongdoing States and would lead to abuse of the weaker States. This fear, it was stated, was rooted in history as well as in the more recent experience of developing countries, for which countermeasures were frequently synonymous with aggression, intervention and gunboat diplomacy. Against this background the question was asked whether an attempt at codification of the subject might not tend to legitimize countermeasures as an instrument par excellence of the hegemonic activities of certain Powers.[91]

34. The desirability of including in the draft a legal regime of countermeasures was further questioned on the ground that, far from constituting a remedy intended to encourage the wrongdoing State to return to the path of legality, countermeasures were likely merely to inflame relations between the parties to the conflict, thereby rendering them even more intransigent.[92] This remark echoes in part Mr. Riphagen's concern that resort to countermeasures on the part of an allegedly injured State might result in an escalation of countermeasures.

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[87] Belarus (*Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 27th meeting, paras. 80 and 83); Cuba (ibid., 29th meeting, para. 60); Romania (ibid., para. 24); and Russian Federation (ibid., 28th meeting, para. 106).

[88] Brazil (ibid., 25th meeting, para. 39). In a similar vein, Sri Lanka (ibid., 27th meeting, para. 6).

[89] See footnote 79 above.

[90] See footnote 80 above.

[91] Along the same lines, Algeria (ibid., 29th meeting, para. 70); Brazil (ibid., 25th meeting, para. 39); China (ibid., 29th meeting, para. 58); Indonesia (ibid., 28th meeting, para. 65); Morocco (ibid., 25th meeting, para. 85); and Sri Lanka (ibid., 27th meeting, para. 6). This concern does not seem to be significantly diminished by the consideration put forward by Spain (ibid., 26th meeting, para. 74) "that while powerful and developed States are undeniably in a better position than weak States to adopt countermeasures, it had to be borne in mind that countermeasures could also be applied between States of comparable strength".

[92] Islamic Republic of Iran (ibid., 25th meeting, para. 61) and Switzerland (ibid., 25th meeting, para. 93).

35. The view was also expressed that any legal regime of countermeasures would inevitably involve intricate qualifications and limitations, and that further complexities would arise in defining the circumstances in which countermeasures would be permissible should more than one State consider itself to have been injured. In such cases, the question of who the injured States were, the extent of their entitlement to resort to countermeasures and the proportionality of the countermeasures, viewed not only individually but also collectively, would be difficult to answer with precision.[93] It was added, in the same context, that the issue of countermeasures that would not be permissible under any circumstances came perilously close to touching upon some of the fundamental provisions of the Charter of the United Nations set forth, for example, in Article 2, paragraph 4, and Articles 51, 41 and 42.[94]

36. From a very different angle, the desirability of providing for a legal regime of countermeasures seems to have been put in question by the remark that countermeasures, which in some respects constitute means of enforcement, do not fall "precisely within the scope of the question of State responsibility even if they are linked to it".[95] Concern was expressed from the same source that, by broadening the subject, the Commission might be tempted to raise problems regarding the interpretation of specific treaties which should remain outside the scope of its study and find itself addressing particularly sensitive issues going beyond the limits which it had set itself, by dealing with primary rules—in particular the definition of the areas in which countermeasures should be prohibited.[96]

37. It is worth stressing in particular that a few representatives said that they found it difficult to endorse the notion that the way to deal with the consequences of a wrongful act was to commit another wrongful act, particularly as cases of non-observance by States of their international obligations were, for the most part, not deliberate, but due to genuine oversights, misunderstandings or differences of opinion. Furthermore, it was observed, countermeasures were not the only means of enforcing international law where an obligation under international public law had been breached and the margin for lawful resort thereto had been narrowed by the emergence of more suitable methods and procedures tailored to the special needs of certain groups of States.[97] There was no elaboration, however, as to the nature of the "tailor-made

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[93] Sri Lanka (ibid., 27th meeting, para. 4).

[94] Sri Lanka (ibid.).

[95] France (ibid., 26th meeting, para. 5).

[96] Ibid.

[97] Uruguay (ibid., para. 20). Among such methods and procedures, some representatives singled out those relating to the peaceful settlement of disputes. One representative observed in this connection that it might be possible to expand existing dispute settlement procedures to include additional and innovative ones so as to ensure that a State believed to be in breach of an international obligation did not evade settlement of the differences which had arisen (Sri Lanka, ibid., para. 3); see also Russian Federation (ibid., 28th meeting, para. 106) and Switzerland (ibid., 25th meeting, para. 92). In this connection, reference was made to existing conventions in the environmental and other fields which included provisions on the monitoring of the fulfilment of treaty obligations by States parties. The concept of interim measures of protection might also be developed to ensure that a State was in a position to preserve its interests against the consequences of a wrongful act by another State until such time as the differences that had arisen were resolved (Sri Lanka, 27th meeting, para. 7). Attention was also drawn to the possibilities for effective bilateral or multilateral diplomatic protests, as well as for measures of retortion not amounting to a breach of an international obligation, which, it was stated, were not inconsiderable and, if resorted to, were likely to prove effective (France, ibid., 26th meeting, para. 7)). Emphasis was furthermore placed on the opportunities offered by collective mechanisms for the prevention and redress of internationally wrongful acts. One representative said in this connection

procedures" or of the small groups of States involved in any really effective settlement arrangements.

38. Despite the reported perplexities, most representatives in the Sixth Committee seem to have concurred with the majority of the Commission that countermeasures had a place in any legal regime of State responsibility.[98] Unilateral measures were recognized to be a reflection of the imperfect structure of international society, which had not yet succeeded in establishing an effective centralized system of law enforcement,[99] with the result that countermeasures to confront internationally wrongful acts would continue to be needed for a long time to come.[100] Hence the necessity, stressed by almost all speakers in the Sixth Committee, of carefully studying the conditions and limitations to be placed on the scope of unilateral enforcement action.[101]

3. THE 1984 AND 1985 DEBATES ON THE SUBJECT

39. Although less articulate than those of 1992, the comments put forward in the Sixth Committee in 1984 and 1985 at the thirty-ninth and fortieth sessions of the General Assembly should not be overlooked. According to the topical summary of 1984 (A/CN.4/L.382),

> Some representatives expressed the view that the subject of reprisals should be approached with great caution and maximum safeguards because of abuses that had occurred. The view was expressed that reprisals should not be dealt with in

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that at a time when processes of disintegration were impeding the harmonious development of the inter national community, it was important to refrain from granting a legally superior standing to reprisals which were unilaterally decided upon and to establish instead a common legal standard which would serve as a framework for the collective action undertaken by the community of nations on the basis of the Charter of the United Nations and other universally recognized instruments, with a view to preventing and eliminating the consequences of internationally wrongful acts (Russian Federation, ibid., 28th meeting, para. 107).

[98] See the statements of Belarus (ibid., 27th meeting, para. 81); Brazil (ibid., 25th meeting, para. 39); Islamic Republic of Iran (ibid., para. 62); and Spain (ibid., 26th meeting, para. 74).

[99] See the statements of Azerbaijan (ibid., 27th meeting, para. 33); Belarus (ibid., para. 80); Czechoslovakia (ibid., 25th meeting, para. 44); Denmark on behalf of the Nordic countries (ibid., para. 32); Ecuador (ibid., 30th meeting, para. 49); Egypt (ibid., para. 30); Islamic Republic of Iran (ibid., 25th meeting, para. 62); Italy (ibid., 29th meeting, para. 47); and Poland (ibid., 28th meeting, para. 78).

[100] See the statements of Austria (ibid., 26th meeting, para. 47); China (ibid., 25th meeting, para. 24); Ecuador (ibid., 30th meeting, para. 49); Hungary (ibid., 28th meeting, para. 100); Islamic Republic of Iran (ibid., 25th meeting, para. 62); Italy (ibid., 27th meeting, para. 47); Japan (ibid., 26th meeting, para. 31); Jordan (ibid., 28th meeting, para. 41); Spain (ibid., 26th meeting, para. 75); and Thailand (ibid., 27th meeting, para. 26).

[101] With a few differences of emphasis, this view was universally shared, except by those who believed (as noted in para. 34 above) that the regime of countermeasures was not to be considered as part of the topic of State responsibility. See, for instance, the statements of Algeria (ibid., 29th meeting, paras. 70-71); Austria (ibid., 26th meeting, para. 47); Bahrain (ibid., para. 19); Belarus (ibid., 27th meeting, para. 80); Brazil (ibid., 25th meeting, para. 39); China (ibid., 27th meeting, para. 24); Cyprus (ibid., 21st meeting, paras. 81 and 89-90); Denmark on behalf of the Nordic countries (ibid., 25th meeting, para. 32); Egypt (ibid., 30th meeting, para. 30); India (ibid., 25th meeting, paras. 72-73 and 76); Italy (ibid., 29th meeting, para. 47); Japan (ibid., 26th meeting, paras. 31-32); Jordan (ibid., 28th meeting, para. 41); Pakistan (ibid., 29th meeting, para. 62); Slovenia (ibid., 26th meeting, para. 37); Spain (ibid., paras. 75 and 76); Switzerland (ibid., 25th meeting, para. 93); Thailand (ibid., 27th meeting, paras. 27-28); Tunisia (ibid., 30th meeting, para. 45); United States of America (ibid., 27th meeting, para. 37); and Venezuela (ibid., para. 89).

the articles. Application of the provisions of draft article 9 could create serious uncertainty in international relations. There was a need, it was said, *to consider its replacement by peaceful means of settlement.* The view was expressed that *third-party compulsory settlement of disputes was essential for the application of the provisions of draft article 9.** The provisions of draft article 9 might, otherwise, lead to intolerable situations* involving uses of reprisal which had, hitherto, been inadmissible. (Para. 520.)

[...]

It seemed to one representative that some clarification was required in draft article 10 which seemed to imply that reprisals should be viewed as an extreme measure of coercion applicable *only after all international procedures for peaceful settlement of disputes available* to the injured State *had been exhausted.** It seemed necessary to clarify whether draft article 10 would be applicable to situations whose urgency made use of peaceful settlement procedures impracticable; and as to how draft article 10 would be applicable when a State alleged to have committed an internationally wrongful act did not consider the act wrongful and denied the existence of a dispute. (Para. 526.)

...

The question was raised by one representative as to why paragraph 2 (*b*) of draft article 10 referred, exceptionally, to a "State alleged to have committed the internationally wrongful act". He wondered whether the divergence in terminology was intentional, and noted *that compulsory third-party settlement of disputes seemed essential to implementation of the draft articles.** (Para. 529.)

40. A very careful treatment of the whole matter— countermeasures and dispute settlement—was again urged by representatives in the Sixth Committee in 1985.[102] The views expressed may be summarized as follows: (*a*) the legitimization of countermeasures might lead to abuse and injustice; (*b*) a rigid, strict regime should be envisaged for unilateral countermeasures (with only a few speakers contending that such measures should be ruled out altogether); (*c*) dispute settlement procedures would significantly contribute to reducing the risk of abuse and injustice (with a few speakers going so far as to suggest that such procedures should be an alternative to unilateral reactions). At the same time concern was expressed that an obligation of prior exhaustion of dispute settlement procedures might unjustly paralyse the allegedly injured State to the advantage of the alleged wrongdoing State. On the whole, the 1984 and 1985 debates of the Sixth Committee clearly reveal doubts with regard to the legitimization of countermeasures. Those doubts are, however, far less pronounced and systematic and less widely shared.

4. CONCLUSION

41. Reverting to the 1992 debates, account should be taken of the differences which manifested themselves on the question of whether the legal regime of countermeasures should be viewed as a matter of mere codification or of progressive development.[103] Those differences had less to do with substance than with the angle from which the matter was approached. From the viewpoint of the general principle of the past and present admissibility of unilateral reactions, there seemed to be no doubt that countermeasures were firmly grounded in customary international law. From the viewpoint of the regulation of unilateral reactions, the area was rightly viewed as also requiring progressive development. In the words of one representative,

It was not possible to rest content with a ... systematization of the existing rules ... for fear of *perpetuating a discredited order.** On the contrary, [one] must depart from ... precedents and *embark*

[102] See footnote 3 above.

[103] Denmark on behalf of the Nordic countries (ibid., 25th meeting, para. 32).

*more resolutely on the road to renewal, while working for the progressive development of international law with a view to limiting recourse to countermeasures.**[104]

42. The Sixth Committee thus seems to have recognized that:

(a) At least in the long run, countermeasures should be replaced by means more consonant with an adequate rule of law;

(b) Resort to countermeasures should be limited; and

(c) Most important, the safeguards against abuse of unilateral reactions should be strengthened.

C. Dispute settlement provisions as an element of the draft on State responsibility

1. An adequate dispute settlement system as an indispensable complement to a regime governing unilateral reactions

43. The negative effects of countermeasures, which members of the Commission and representatives in the Sixth Committee were almost unanimous in denouncing are not only very real but extremely serious. They are serious enough to justify, to some extent, the attitude of those—be they Government officials or scholars—who suggest that countermeasures should have no place in a codification exercise, even for the purpose of subjecting them to conditions and limitations.[105] It must be realized, however, that there

[104] Islamic Republic of Iran (ibid., para. 63). Along the same lines, Chile (ibid., 24th meeting, para. 42); China (ibid., 25th meeting, para. 23); Czechoslovakia (ibid., para. 45); Sri Lanka (ibid., 27th meeting, para. 1); and Thailand (ibid., para. 29).

[105] This understandable attitude has a precedent in the history of the Commission itself. In the 1960s, when the Commission discussed the draft articles on the law of treaties, the question arose whether the rule *inadimplenti non est adimplendum* should extend or not to the violation, by way of reaction to the breach of a given treaty, to treaties other than the infringed treaty itself (the matter is dealt with, *inter alia*, by Forlati Picchio, *La sanzione nel diritto internazionale*, Padua, 1974, pp. 81-85 et seq.). At that time the issue was whether the measures of suspension to be envisaged in what was to become article 60 of the Vienna Convention should be extended by the Convention (beyond the strict rule *inadimplenti non est adimplendum*) to the rules of other treaties or to rules of customary international law. The view that rightly or wrongly prevailed in the Commission was that the draft on the law of treaties should not envisage any suspension (by way of unilateral reaction) either of other treaties or of customary law. This conclusion, however, was not based on any denial of the *faculté* of a State to react to a treaty violation by not complying with an obligation deriving from a different treaty or from a rule of customary law—a *faculté* the existence of which no one seemed to contest under general international law. If the view prevailed that the draft on the law of treaties should confine itself to the hypothesis of a reaction consisting in a violation of the same treaty (if not of the same rule), it was because of the reluctance of the Commission to touch upon the *faculté* of reprisals or countermeasures—a right which the Commission preferred not to address in the article concerned.

As the then Special Rapporteur, Sir Humphrey Waldock, indicated in his second report on the law of treaties (*Yearbook ... 1963*, vol. II, p. 26, document A/CN.4/156 and Add.1-3), concerning what was then article 20 (Termination or suspension of a treaty following upon its breach):

"Paragraph 3 sets out the rights of the innocent party in case of a material breach of a bilateral treaty. These are to abrogate the whole treaty or suspend its whole operation or, alternatively, to terminate or suspend the operation only of the provision which has been broken by the defaulting party. The latter right, like the former, is an application of the principle *inadimplenti non est adimplendum*, endorsed by Judge Anzilotti in the *Diversion of Water from the River Meuse* case. Admittedly, it may

is not a single flaw among those denounced which could not be corrected by providing for an adequate dispute settlement system.

44. It is indeed perfectly true that countermeasures are not an "appropriate means of coercing a State ... to go to dispute settlement or to acknowledge its wrong and make amends".[106] Countermeasures are, however, one of the means, and the only way to overcome their drawbacks is precisely to persuade Governments to agree to go to dispute settlement, more specifically to submit to one or more forms of third-party settlement, either as a substitute for countermeasures or, at least, as a method of evaluating the admissibility and the lawfulness of any unilateral measures to which resort is had.

45. Similar considerations apply to the other negative effects of countermeasures (paras. 32-37 above). The inclusion in the draft of an adequate and reasonably effective dispute settlement system would decisively help minimize or eliminate:

(a) The major drawback represented by the fact that a regime of unilateral reaction by the injured State would place "powerful or rich countries at an advantage" to the detriment of weaker States (para. 33 above);

(b) The danger that countermeasures may inflame relations between the parties, thereby rendering them more intransigent (para. 34 above).

More effective availability of third-party settlement procedures, to the extent that it proved feasible, could not but reduce the imbalance deriving from the factual inequalities among States and provide the parties with an opportunity to "cool off".

46. There is no doubt that adequate dispute settlement procedures would also contribute decisively to making the practice of countermeasures—which admittedly reflected "a lower stage in the evolution of legal techniques and implied an admission that the international legal order was inadequate" (para. 32 above)—more compatible (or less incompatible) with the rule of law in inter-State relations. If objection was raised to resort by one party to countermeasures, it would open the way to a third-party settlement procedure which would have a deterrent effect on both reaction- and counter-reaction-prone States. This would, if not guarantee, at least strengthen the primacy of the rule of law.

47. It also goes without saying that more effective availability of third-party settlement procedures would render largely moot the question of whether countermeasures would in practice be a sufficiently well-understood and clear procedure to be endorsed as an accepted coercive legal procedure, considering that they are subject to intricate qualifications and limitations (para. 33 above). Issues that States either unilaterally or bilaterally proved unable to elucidate by themselves would be settled by conciliators and arbitrators.

48. The need to strengthen existing dispute settlement procedures in connection with the regime of countermeasures was stressed by many speakers in the course of the

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also be put upon the basis of a right to take non-forcible reprisals and upon that basis it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken but of some other provision of special concern to the defaulting party. The terms of paragraph 2 are not intended to exclude whatever other rights may accrue to the innocent party by way of reprisal; but it is thought better not to introduce the law of reprisals, as such, into the present article." (Ibid., p. 76, para. 14 of the commentary.)

[106] See footnote 81 above.

1992 debate on the Commission's report in the Sixth Committee.[107] Only a small minority expressed the view that the draft should not deal with dispute settlement.[108]

49. The debates in the Commission and in the Sixth Committee on draft article 12, paragraph 1 (*a*), as proposed in the fourth report,[109] confirmed that greater availability of adequate settlement procedures would be an essential means of minimizing the negative effects of unilateral measures. Most members and representatives expressed themselves in favour of that provision. Particularly noteworthy were the positive reactions of Chile, the Islamic Republic of Iran, Poland, Switzerland and Venezuela. The representatives who took the opposite view were concerned either by the requirement to exhaust *all* settlement procedures—some of which, like negotiation, could be protracted, dragging on for years, during which it would be unfair to oblige the injured State to refrain from taking countermeasures—or by the multiplicity of existing procedures, as listed, for example, in Article 33 of the Charter of the United Nations. In the absence of any indication of an order of priority this process too could go on for years.

50. It should be noted, however, that it is precisely the dangers mentioned in paragraph 49 above that would be the corollary of inadequate dispute settlement obligations. Draft article 12, paragraph 1 (*a*), would indeed be very likely to have objectionable effects on account of the abuses to which the principle of "freedom of choice" under Article 33 of the Charter opens the door. But it is precisely in order to avoid this pitfall that effective third-party settlement procedures should be envisaged in part 3 of the draft. The acceptance of such procedures—with the possibility of unilateral resort to a third party by the alleged wrongdoing State following the adoption of countermeasures by the allegedly injured State—would leave no latitude to take advantage of the loose "free choice" principle and would make it difficult for a recalcitrant wrongdoing State to escape its obligations by resorting to protracted inconclusive negotiations or other time-consuming procedures. This solution, referred to in section D below (especially paras. 64 et seq.), would also meet the concern expressed in the Sixth Committee by a number of representatives (including those of Austria, Belarus, Jordan and Morocco) that the exhaustion of settlement procedures should be a "parallel" obligation rather than a condition that has to be met *before* resorting to countermeasures. As will be shown in section D, this is precisely one of the features of the proposed solution. Once this solution was accepted in part 3, draft article 12, paragraph 1 (*a*), of part 2 would have to be amended accordingly.

51. It follows that an essential element of the regulation of countermeasures is precisely the inclusion of a set of effective dispute settlement provisions in part 3, as was pointed out during the debate at the previous session.[110] The rules on the conditions and limitations by which resort to countermeasures is governed are clearly intended to confirm the lawfulness of unilateral reaction, while circumscribing that *faculté*, within

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[107] See especially the statements of Belarus (*Official Records of the General Assembly. Forty-seventh Session, Sixth Committee*, 27th meeting, para. 80); Denmark on behalf of the Nordic countries (ibid., 25th meeting, paras. 32 and 33); Egypt (ibid., 30th meeting, para. 31); Japan (ibid., 26th meeting, para. 31); Jordan (ibid., 28th meeting, para. 42); Russian Federation (ibid., 28th meeting, para. 106); Slovenia (ibid., 26th meeting, para. 38; Sri Lanka (ibid., 27th meeting, para. 7); and Switzerland (ibid., 25th meeting, para. 92).

[108] Italy (ibid., 29th meeting, para. 46) and the United States of America (ibid., 27th meeting, para. 37).

[109] For text, see *Yearbook ... 1992*, vol. II (Part Two), p. 27, footnote 61.

[110] See Arangio-Ruiz (*Yearbook ... 1992*, vol. I, 2267th and 2283rd meetings).

bounds that are both acceptable and indispensable. One of the limitations under draft article 12, paragraph 1 (*a*), as proposed in the fourth report is precisely the condition of the prior exhaustion of dispute settlement procedures "available" to the parties under instruments other than the draft itself. The function of part 3 should precisely be to ensure that adequate dispute settlement procedures are fully "available", at a stage which will be determined more clearly later (see section D below, especially paras. 62 and 75-77), even where such procedures are unavailable, or not fully available, under any dispute settlement arrangement in force between the parties. A sufficient degree of availability of dispute settlement procedures would adequately balance the inclusion in the draft of a legal regime of unilateral measures. It would supplement the mere regulation of resort to such measures either by providing a more reliable and effective alternative to the use of countermeasures or by acting as a deterrent to the abuse of countermeasures.

2. FURTHER REASONS FOR INCLUDING AN EFFECTIVE DISPUTE SETTLEMENT SYSTEM IN THE DRAFT

52. Effective dispute settlement provisions would be helpful in many respects.

53. First, they would serve the interest of justice by reducing the risk of resort to unjustified or otherwise unlawful countermeasures on the part of allegedly injured States. Such a result would of course disappoint the minority of representatives who understandably (but perhaps too "conservatively") object to the idea of codifying the law of countermeasures, not because they question the legitimacy of unilateral measures but because they are reluctant to see limits and conditions imposed on the *faculté* of States to resort to reprisals. The inclusion of dispute settlement provisions, far from going in the direction of that minority, would, on the contrary, in the fairest way possible, meet the concerns of the great majority of Commission members and representatives in the Sixth Committee. As already recalled, the reference here is to those who questioned, if not the legitimacy of countermeasures under existing international law, at least the desirability of devising, by way of codification and progressive development of the law, a legal regime of countermeasures which, however strict, could be seen as perpetuating methods incompatible with justice and the sovereign equality of States. Reference is also made principally to all those who denounced the negative effects of a regime of unilateral measures and called for them to be minimized in a manner more compatible with the rule of law in the inter-State system. As noted at the Commission's forty-fourth session, in response to such objections, strict regulation of countermeasures is in any case essential to the implementation of international law, but the inclusion in the draft of an effective system of dispute settlement would provide an equally indispensable way of correcting the inevitable shortcomings of an implementation system which is bound to rely for some time to come upon unilateral reactions to the breach of international obligations.

54. Secondly, an effective dispute settlement system, as well as reducing friction and conflicts between allegedly injured and alleged wrongdoing States, could not but bring about more balanced and equitable settlements between the parties involved. Solutions reached through conciliation, fact-finding, arbitration or judicial settlement would, in all likelihood, on the whole be more just—or less unjust—than those reached by mere resort to unilateral coercive measures.

55. Thirdly, the improvements that an effective system of dispute settlement would bring about for both potential victims and potential wrongdoers should not be overlooked.[111]

56. As a potential victim of breaches of the law, any law-abiding State has an interest in finding in the draft on international responsibility, in parallel with, and as a complement to, the rules on its *faculté*, to resort to countermeasures, dispute settlement provisions that would at least reduce the need to rely exclusively—as an *ultima ratio*—upon its own capacity to resort to effective unilateral reaction, a course of action which, even if available, may well prove to be costly and of uncertain efficacy.[112]

57. As a potential wrongdoer, any State should in turn welcome the presence in the draft of dispute settlement provisions that would allow it better to defend itself before an effective third-party forum—by challenging the admissibility or the legality of a countermeasure directed against it—rather than being forced to accept the unilateral determination and action of one or more allegedly injured States and being reduced to its own, possibly limited, capacity to react.

58. Both as a potential victim and as a potential wrongdoer, any law-abiding State should also consider that, armed reprisals having been rightly outlawed, the measures that are still permissible are mainly economic in nature. Considering the current high degree of economic interdependence of States and of peoples, the adoption of any economic countermeasure is likely to have adverse repercussions not just on the wrongdoing State's economy—*and* on its people—but also on the economy and the people of the injured State itself. As a result, an injured State will often find it hard to respond adequately to the infringement of one of its rights by resorting to an economic measure, to which there may be no alternative. Situations of that kind might become extremely serious for an injured State that is in a difficult economic situation. The possibility has in fact been noted in the literature that economic dependence—which is not necessarily limited to unequal parties—may become a "deterrent" to the adoption of measures against internationally wrongful acts.[113] An effective settlement system seems to be the only reasonable remedy, not just in the interest of States but, first and foremost, that of their peoples.[114]

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[111] It is not so unrealistic to hope that the adoption of effective third-party settlement procedures could lead to conciliation or arbitration gradually replacing the unilateral reprisals which remain the rule whenever issues of State responsibility are not settled by an early agreement.

[112] See paragraph 58 below.

[113] See, for example, Hofmann, "Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 45 (1985), p. 229:

> There is no question that the danger of abuse is implicit in the right to unilaterally take non-violent reprisals which, according to this, attaches to every State; however, that danger is already much reduced by the strict requirements imposed by general international law with respect to the admissibility and type of reprisals. Moreover, the risk of rash reprisals is also likely to be diminished by the fact that reprisals will mainly take the form of the breaking off or restriction of trade relations and as such will also entail loss for the State that takes them.

[114] It is worth recalling in this respect that, in the course of the 1978 Montreux CSCE Meeting on Dispute Settlement, one of the main arguments advanced by certain delegations against proposals on third-party settlement procedures (as distinguished from the most rudimentary forms of consultation) between CSCE participating States, was that only the Governments "of the people" were properly qualified to determine and protect the interests of their respective peoples. "Neutral" or third-party arbitrators or conciliators, even if chosen by the litigating Governments, could not be trusted. Nowadays, CSCE Governments seem to be more judicious.

59. The above considerations should be viewed as all the more cogent given that the nature of the procedures to be adopted, namely conciliation, fact-finding and arbitration—with judicial settlement as a last resort for special problems (paras. 69-71 below)—would be such that both parties to the dispute would participate in the designation of the members of the "third-party" body. It follows that the third party would unquestionably be less partial than the other State which is a party to the dispute.

60. It is likely that an effective dispute settlement system would also have the following beneficial effects:

(a) In the case of a plurality of injured States it would:

(i) reduce the difficulties inherent in that plurality and in the possible diversity and irreconcilability of the substantive claims of the various injured States;

(ii) make it less difficult to muster and possibly coordinate a collective response (by way of countermeasures or otherwise) on the part of various States equally or unequally affected by the breach, notably in case of violation of international obligations in the area of human rights and environmental protection;

(b) In the case of a plurality of wrongdoing States, it would reduce the inherent difficulties of determining each State's liability;

(c) Finally, in the case of breaches consisting of the violation of a multilateral treaty, it would make it less difficult to harmonize the interests, attitudes and conduct of the various States parties to the treaty.

Points (*a*), (*b*) and (*c*) will be discussed in further detail at a later stage.

61. What is equally important, is that an effective dispute settlement system would in the future be likely to re duce, where the most serious breaches are concerned (whether they are called "crimes" or just "grave delicts"), the need to rely exclusively for the establishment of the wrongdoing State's liability on options which do not seem to be entirely in conformity with the exigencies of progressive development of the law in this sensitive area. One option seems to be reliance on the action of a few, generally Western, States able and willing to react to the breach of the supposedly *erga omnes* rule: a reaction which though it is "concerted" and may be justified, is no less unilateral and "uncontrolled" for all that. The other option is represented by political bodies. The action of these bodies has so far proved to be not only indispensable but basically beneficial and, in any case, more "controlled", thanks to the existence of a worldwide or regional constituent instrument. However, when political bodies are not paralysed for lack of the required majority, they are likely to be unduly influenced by power politics; and, as they have to respond to any situation, they may be led to extend their action beyond the scope of the mandate entrusted to them. The strengthening of third-party settlement procedures in the area of State responsibility would relieve political organs of that part of the burden which is more appropriately dealt with by judicial bodies. This matter will be dealt with later in the framework of the discussion of the consequences of international "crimes" of States as contemplated in draft article 19 of part 1 (see chap. II below).

D. Recommended solutions

1. INTRODUCTION

62. For the compelling reasons set forth in the preceding sections, the Commission should take a step forward from the solutions it has envisaged so far. In order to mitigate the negative effects of unilateral countermeasures adequately, as discussed in section C, it would be totally insufficient merely to provide that in the event that resort to a countermeasure gives rise to an objection, the matter would be referred to a conciliation commission. Although a pronouncement by such a body could certainly be helpful in bringing about an agreed settlement of the dispute between an allegedly injured and an alleged wrongdoing State, the non-binding character of the outcome of conciliation renders such a procedure inadequate for the purpose of remedying the negative effects of unilateral countermeasures. The addition of more advanced third-party procedures to the solution contained in draft article 4 (*c*) as submitted by Mr. Riphagen—leaving aside for the time being subparagraphs (*a*) and (*b*) of that article—would be a decided improvement.

63. A preliminary point to be considered, however, is the different ways in which settlement procedures (and related obligations of contracting parties) should come into play for the purposes of implementation of a State responsibility convention. The reference here is mainly to the way in which settlement obligations are presently contemplated in article 12, paragraph 1 (*a*), as proposed in the fourth report, on the one hand, and the way those obligations should be envisaged within part 3 and possibly in article 12, paragraph 1 (*a*), itself, on the other hand. Reference is made in particular to the various ways in which settlement obligations could affect the injured State's *faculté* to resort to countermeasures.

64. In requiring the injured State to refrain from resorting to countermeasures prior to the exhaustion of "available" settlement procedures, draft article 12, paragraph 1 (*a*), refers only to such settlement procedures as the parties may resort to under international rules *other* than those directly provided for in a State responsibility convention. Indeed, article 12, paragraph 1 (*a*), does not impose upon the injured State any *given* settlement procedure as a condition for resort to countermeasures. It merely requires the exhaustion of such procedures as are "available" to the injured State based on legal obligations pre-dating the dispute or agreed to thereafter. Everything depends, therefore, on what the situation is or may become between an allegedly injured State and an alleged wrongdoing State with regard to the means of dispute settlement.

65. It is evident that the settlement procedures in question range from the most rudimentary forms of negotiation/consultation (possibly assisted by good offices or mediation) to conciliation, arbitration, judicial settlement, regional arrangements, and procedures under Chapter VI of the Charter of the United Nations. Clearly the multiplicity of means listed in Article 33 of the Charter, combined with the "freedom of choice" rule, would make it very difficult to determine which means of settlement—particularly *effective* means—are available *in concreto* to any injured State vis-à-vis any wrongdoing State at a given time and with regard to the infringement of specific primary or secondary obligations. To get a clearer picture, it is necessary, of course, to move away from multilateral systems or treaties into the more specific bilateral instruments—dispute settlement treaties and arbitration

clauses—in force between given States. Even here, however, there are many varying degrees of "availability". The treaties or treaty clauses establishing settlement obligations differ very considerably (*ratione personae*, *ratione materiae and ratione temporis*) according to whether they contemplate procedures that may be set in motion by unilateral initiative (the maximum option in terms of "availability") or procedures which would instead require the conclusion of a special agreement (*compromis*) in each specific case once the dispute has arisen. To assess "availability" in the latter case is far from simple, even with regard to a given pair of injured/wrong doing States. Much would also depend upon the *inclination* of each State to resort to conciliation, arbitration or judicial settlement, once a specific dispute has arisen, if no prior provision has been made for automatic unilateral initiative. Considering the variables involved (*ratione personae*, *ratione materiae* and *ratione temporis*), only a highly gifted mathematician—if not a magician—would be willing to try to determine with any approximation the degree of "availability" of settlement procedures between any conceivable pair of States at any given time.

66. In other words, in laying down the indispensable "exhaustion requirement", of draft article 12, paragraph 1 (*a*), it only refers to means of settlement and does not directly prescribe such means. This precludes the possibility of using that article to determine how the "exhaustion requirement" should be met by a State, as a potential injured State, in its relationships with other States, as potential wrongdoing States. Only in each specific case is it possible to determine whether any effective settlement procedures are or were "available" which would bar the injured State under a provision such as draft article 12, paragraph 1 (*a*), from resorting to a countermeasure. Even the kind of countermeasure in question may have an important bearing on the issue. Thus, only in each particular case, by taking into account the multilateral or bilateral instruments in force and the actual "inclination" of the alleged wrongdoing State—not to mention the allegedly injured State itself—is it possible to determine whether the latter State has complied with the "exhaustion requirement".[115] A rather clear-cut situation would be one in which the injured State can avail itself of a jurisdictional link providing for the possibility of a unilateral application to ICJ. In such a case, it should be relatively easy to see that the injured State could not lawfully resort to countermeasures unless it had obtained from the Court either an order of interim measures or a judgment on the merits, with which the wrongdoing State has failed to comply. Even then, however, exceptions would have to be allowed if an urgent measure of protection was essential to save human life or suffering or to avoid otherwise irreparable damage.

67. Of course, there is a "legislative" way to reduce the variables, the freedom of choice, the consequential uncertainties and the further consequential risks that countermeasures may be abused—such abuse being especially, although not exclusively, to the detriment of the weak and to the advantage of the powerful. The way to attain this objective would be to replace provisions which merely refer to dispute settlement

[115] All that can be said in general is that in most cases the first (and perhaps the only) means of settlement available is likely to be negotiation/consultation. In some cases there may be forms of conciliation or arbitration of varying degrees of sophistication, but only infrequently will implementation by unilateral initiative be possible. Only in very rare cases will compulsory judicial settlement be available under Article 36, paragraph 2, of the 1CJ Statute or equivalent instruments providing for a unilateral application to the Court. Except in the infrequent or rare situations described, most cases would still involve, at least initially, a unilateral assessment of the requirements of "availability" and "exhaustion".

obligations deriving from sources *other* than a State responsibility convention, as in the case of article 12, paragraph 1 (*a*), by provisions *directly* setting forth the obligation to exhaust *given* procedures as a condition for resort to countermeasures.[116] The more sophisticated the procedures adopted by the Commission, the more substantial the progressive development in the area of both State responsibility and dispute settlement will be. The injured State's "right" to make a unilateral assessment and its *faculté* to resort to countermeasures would be reduced in direct proportion to the degree of effectiveness of the procedures expressly provided for in a State responsibility convention.

68. The solution suggested in the preceding paragraph certainly represents the most realistic approach to attaining as far as possible the goal of the *theoretically ideal solution.* This would obviously involve introducing into the draft articles—either in part 3 or in part 2 itself—a structured system of third-party settlement procedures which, failing agreement, would ultimately lead to a binding third-party pronouncement. *At the same time* draft article 12, paragraph 1 (*a*) of part 2 would need to be amended so as to *make the lawfulness of any resort to countermeasures conditional upon the existence of such a binding third-party pronouncement*—except in the case of the interim measures of protection or cautionary measures envisaged in paragraph 2 of that draft article. Within such a system, countermeasures in the sense of draft article 11[117] could be lawfully resorted to by State A against State B, for the exclusive or almost exclusive purpose of coercing a supposedly recalcitrant State B into complying with an arbitral award or an ICJ judgment which found State B to be in breach of one or more of its primary or secondary obligations towards State A. Although, even then, in the absence of adequate institutional arrangements, countermeasures would still be the main instrument for ensuring compliance, resort to countermeasures would only *follow* a binding third-party pronouncement. Justice and equality would surely be better safeguarded. If the Commission so desired, the necessary draft articles to make such a breakthrough in the development of international law possible could readily be submitted.[118]

69. In preparing the present report, it had been felt that the solution considered in the preceding paragraph might not find favour with the majority of the Commission. While not excluding any step of progressive development in that direction, if the Commission were inclined to accept it, a solution had been envisaged that was less bold, although bolder than the one proposed in 1986.[119] The proposed solution, as explained in subsection D.2 below, is:

(a) To leave draft article 12, paragraph 1 (*a*), as it stands, namely as a provision referring to settlement obligations *not creating them*;

(b) To strengthen the proposed non-binding conciliation procedure in part 3 as submitted by the previous Special Rapporteur in 1986, by adding arbitration and judicial settlement procedures without directly affecting the prerogative of the injured State to take countermeasures. This prerogative would be affected, as explained in

[116] For example, an obligation could be placed upon the allegedly injured State to propose a binding or non-binding third-party settlement procedure and also to submit its claim to the third party once the alleged wrongdoing State has agreed to such a procedure.

[117] See footnote 109 above.

[118] Very regrettably, the conditions for such a development are unlikely to occur either during the current United Nations Decade of International Law or at any time in the foreseeable future.

[119] See Mr. Riphagen's seventh report (footnote 38 above).

paragraph 86 below, only "in the mind", so to speak, of the injured State, in the sense that that State would know that resort to a countermeasure exposes it to the risk of third-party verification of the lawfulness of its reaction.

However, any step that members of the Commission might suggest in the direction of the more advanced kinds of solutions envisaged in the two previous paragraphs would be welcome.

2. THE PROPOSED THREE-STEP DISPUTE SETTLEMENT SYSTEM

70. The solution recommended for the consideration of the Commission consists of a binding third-party dispute settlement procedure which would come into play only after a countermeasure had been resorted to, allegedly in conformity with draft articles 11 and 12 of part 2, and a dispute arose with regard to its justification and legality. The following is a description of the three-step dispute settlement system resulting from the six draft articles proposed for part 3 and the annex thereto.[120]

(a) *The first step: conciliation*

71. The first step should be a conciliation procedure similar to that envisaged in the 1986 proposal. Either party in the responsibility relationship, or alleged relationship, would be entitled to resort to such a procedure following the adoption of a countermeasure on the part of an allegedly injured State and in the presence of two primary and two secondary conditions. The primary conditions are that (*a*) a countermeasure has been resorted to by an allegedly injured State and (*b*) that a dispute has arisen following a protest or other reaction on the part of the alleged wrongdoing State. The secondary conditions are that the dispute is neither settled within four months from the date when the countermeasure was put into effect, nor submitted within the same period to a binding third-party settlement procedure.[121]

72. The conciliation commission would be set up on the unilateral initiative of either party in conformity with the provisions of an annex, similar in part to the one proposed in 1986 by Riphagen.[122] In addition to the usual role of conciliation commissions, and without prejudice to the merely recommendatory nature of any final report to be issued, the conciliation commission would, in particular, perform the following tasks, on the basis of draft article 2 of part 3 (see section F, paragraph 106 below):

(a) Determine, including, when necessary, by fact-finding *in loco*, any question of fact or law which may be of relevance under any of the provisions of the draft articles on State responsibility;

(b) Order the suspension of any countermeasures resorted to by either party;

(c) Order interim measures of protection.

[120] For the texts of the draft articles, see section F.

[121] Binding third-party settlement procedures would include an arbitral tribunal or ICJ.

[122] See his seventh report (footnote 38 above), p. 3, and footnote 167 below.

(b) *The second step: arbitration*

73. Arbitration is to be envisaged in certain circumstances, according to draft article 3, namely, either:

(a) In the case where the setting up or the functioning of the conciliation commission within three months from either party's application for conciliation has been prevented by any obstacle; or

(b) In the case where, following the commission's report, no settlement has been reached between the parties within four months from the final report of the conciliation commission.

74. The arbitral tribunal would be appointed in conformity with the provisions of the annex. It would be called upon to decide, with binding effect, issues of fact or law which may be of relevance under any of the provisions of the draft articles on State responsibility within either ten months of the date of its establishment or six months of the date of completion of the parties' written and oral submissions. The tribunal should be empowered a fortiori to exercise the functions expressly attributed to the conciliation commission under draft article 4 (see paragraph 72 above).

(c) *The third step: judicial settlement*

75. Subject to any further possibilities to be considered in connection with the regime of wrongful acts defined as so-called international crimes of States in article 19 of part 1, judicial settlement should only be envisaged as a last resort in specific cases under draft article 5. Two of these cases would be:

(a) The failure, for whatever reason, to meet the obligation to set up the arbitral tribunal, unless the dispute is settled by other means within six months of such failure;

(b) The failure of the arbitral tribunal to meet the obligation to issue an award within the prescribed time limit of either ten or six months.

In such cases, either party could unilaterally submit the matter to ICJ.

76. The competence of ICJ should also be envisaged in the case of an *excès de pouvoir* or the violation of a fundamental principle of arbitral procedure by the arbitral tribunal. Under article 6 either party would be entitled to refer such cases to ICJ by unilateral application.

77. Like the arbitral tribunal, ICJ should also be empowered, with regard to the case, to exercise any of the functions envisaged for the conciliation commission in paragraph 72 above, which, although not necessarily contemplated therein, are not incompatible with the Court's Statute.

78. The time limits suggested at each of the three steps, as described above, are merely tentative.

3. MAIN FEATURES OF THE PROPOSED SOLUTION: THIRD-PARTY SETTLEMENT PROCEDURES AS A REMEDY FOR THE NEGATIVE EFFECTS OF THE PRESENT INEVITABLE SYSTEM OF UNILATERAL REACTION

79. The proposed system for dispute settlement is characterized by three essential features.

80. The main feature of the system is that, failing an agreed settlement at any stage, it would lead to a binding settlement of the dispute without significantly hindering the parties' freedom of choice with regard to other possible settlement procedures. Indeed, two limitations are placed on their choice of settlement procedures. The first is that a unilateral application for conciliation under the conditions set forth in paragraph 71 above may be made if the dispute which has arisen following resort to a countermeasure is not settled or has not been submitted to a binding third-party procedure within four months from the date when the countermeasure was put into effect. This deadline may be shorter than, and in that sense contrast with, any longer time limit which is envisaged in an agreement or arrangement in force between the parties. It is felt, however, that the presence in the draft articles of a stricter rule, that is to say, one providing for a shorter deadline for the dispute to be settled or submitted to a third-party procedure, represents a reasonable, and hence acceptable, limitation of the otherwise excessively broad "free choice" rule of Article 33 of the Charter.[123]

81. A second limitation on the parties' freedom of choice would reside, of course, in the very fact of envisaging a specific conciliation procedure, namely one which may be initiated in conformity with draft article 1 of part 3 and the annex thereto, as proposed. This may not necessarily be in conformity with any standing or ad hoc arrangement between the parties. Under any such arrangement, either party may be entitled, for example, to resort to a conciliation commission of a different kind, set up in a different way or endowed with different powers. Here again, the feeling is that the rule proposed for part 3 of the draft articles should prevail over any less stringent rule which may be in force between the parties. This would better ensure the effective implementation of the articles on State responsibility.

82. The second essential feature of the proposed solution, and surely the most important in assessing its feasibility, is the fact that the settlement procedures to be included in the draft articles would not be such as directly to curtail to any significant extent the injured State's faculté, to resort to countermeasures against a State which it believes to be in breach of one of its rights. The lawfulness of resort to countermeasures continues to depend, of course, on such basic conditions as the existence of an internationally wrongful act, the attribution of the act to a given State and the other conditions and limitations laid down in draft articles 11 to 14 of part 2. The evaluation as to the existence of the necessary conditions and the conformity of a proposed countermeasure with the conditions and limitations set forth in draft articles 11 to 14 would in principle remain a prerogative to be exercised unilaterally by the injured State itself, albeit at its own risk and subject to any agreement to the contrary in force between the parties. The inclusion of the proposed three-step binding third-party settlement provisions as part 3 of the draft articles would not directly affect the prerogative or *faculté*,

[123] A discrepancy of this kind may occur, for example, between the provision being proposed and the conciliation procedure provided for in the Vienna Convention on the Law of Treaties.

exercised by the injured State when it decides to resort to countermeasures. The proposed settlement procedures would simply be activated once the injured State has made its determination. The purpose of the procedures would be to settle, in the timely and effective fashion described above, any differences between the parties in the responsibility relationship, including of course any questions of fact or law which may be relevant under any of the articles on State responsibility.

83. The latter point should be stressed to avoid any possible misunderstanding. The "triggering mechanism" (*mécanisme déclencheur*) of the settlement obligations to which the parties would be subject under the proposed part 3 is neither an alleged breach of a primary or secondary rule of customary or treaty law nor the dispute that may arise when the alleged breach is contested. It is only the dispute arising when resort to a countermeasure on the part of an allegedly injured State—or possibly resort to a counter-reprisal from the opposite side—is contested that triggers the dispute settlement system. In the first instance, the evaluation of the existence of such a dispute, and consequently of the conditions triggering the procedures, will of course be made by the conciliation commission.

84. There is no need to expand on the obvious difference between the "triggering mechanism" represented by a dispute in the current proposal, on the one hand, and that represented by an "objection" in the 1986 proposal, on the other hand. The "dispute" is believed to provide a less problematic and, in a sense, more objective datum that has been widely and authoritatively explored in the theory and practice of international law. It will be readily apparent that the recommended system presents an advantage over the 1986 proposal. Resort to a third-party procedure by an alleged wrongdoing State which is the target of a countermeasure would not follow simply from an objection to an intended and notified countermeasure. The third-party procedure could only be set in motion once the actual countermeasure had been put into effect. "Conservatives" should be satisfied that, while certainly more advanced and more effective in curbing abuses of countermeasures, the proposed solution would in its operation be more respectful of the customary practices they seem so anxious to preserve.

85. Another noteworthy feature would be the role to be played by the proposed dispute settlement mechanism within the framework of the State responsibility relationship. Although, as explained above, this mechanism would not directly preclude resort to countermeasures by an injured State at its own risk, the availability of the system should have a sobering effect on an injured State's decision to resort to countermeasures. However, it would not be the kind of system for suspending unilateral action (*dispositif de freinage de l'action unilatérale*) that is found in other Commission drafts.[124] Under the draft articles on the law of the non-navigational uses of international watercourses, for example, the implementation of a project on the part of a State may have to be suspended while a given consultation and/or conciliation procedure is pursued.[125] Within the framework of the proposed dispute settlement system for the draft articles on State responsibility, the countermeasure would not be suspended at all, except by an order of a third-party body after the-initiation of a settlement procedure. The only disincentive for resort to a countermeasure that the proposed system would bring about would operate in the mind, so to speak, of the injured or allegedly injured State, whose authorities would, it is

[124] Cf. Sir Humphrey Waldock, second report (see footnote 105 above).
[125] *Yearbook ... 1991*, vol. II (Part Two), p. 68, art. 17.

hoped, be induced to exercise greater circumspection in weighing the conditions and limitations of a possible countermeasure.

E. The Commission's approach to dispute settlement

1. THE PRACTICE OF THE COMMISSION CONCERNING THE INCLUSION OF ARBITRATION CLAUSES IN ITS DRAFTS

86. The Commission has not contributed very significantly to the development of the law of dispute settlement. With a few exceptions, the great majority of the codification drafts produced so far by the Commission contain imperfect arbitration clauses providing, at best, for binding recourse to non-binding conciliation—in addition to negotiation and a general reference to Article 33 of the Charter. Stricter, more advanced commitments, which are usually relegated to an annex or a protocol, together with conciliation provisions, are made subject to the separate acceptance or reservation of the contracting States.[126]

87. The most significant exception seems to be the Commission's draft articles on the law of treaties.[127] The other exceptions are the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[128] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[129] Mention

[126] It has also been noted that in only two cases have the arbitration clauses in question provided the basis for the competence of ICJ and in no case have they led to any arbitral procedure (see Coussirat-Coustère, "Le règlement des différends dans l'oeuvre de la Commission du droit international: vers une codification progressive?" *Per spectives du droit international et européen. Recueil d'études à la mémoire de Gilbert Apollis*, 1992, pp. 29-46).

[127] Article 66 of the Vienna Convention on the Law of Treaties, provides not only for compulsory resort to judicial settlement before ICJ for any dispute concerning the application or the interpretation of articles 53 or 64 that is not settled by a commonly accepted arbitration, but also compulsory resort to a conciliation procedure. Although the implementation of the latter procedure is laid down in an annex, judicial settlement and conciliation are both clearly envisaged in article 66 as an integral, non-optional, automatically operative part of the Convention's procedural system which has to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. The area of controversy covered by article 66 is, however, a rather narrow one. On the interesting history of this provision see, *inter alia*, Kearney, and Dalton, "The treaty on treaties", AJIL, 1970, pp. 545-555; Dupuy, "Codification et règlement des différends: les débats de Vienne sur les procédures de règlement", AFD1, 1969, pp. 70-91; Deleau, "Les positions françaises à la Conférence de Vienne sur le droit des traités", ibid., pp. 20-23; Nahlik, "La Conférence de Vienne sur le droit des traités: une vue d'ensemble", ibid., pp. 42 et seq.

[128] Article 84 provides as follows:

"If a dispute between two or more States parties arises out of the application or interpretation of the present Convention, consultations between them shall be held upon the request of any of them. At the request of any of the parties to the dispute, the Organization or the conference shall be invited to join in the consultations."

Article 85, paragraph 1, provides as follows:

"If the dispute is not disposed of as a result of the consultations referred to in article 84 within one month from the date of their inception, any State participating in the consultations may bring the dispute before a conciliation commission constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations."

[129] Articles 65-66 of this Convention are very similar to articles 65-66 of the Vienna Convention on the Law of Treaties. The main original feature of the dispute settlement system of the former is the advisory opinion procedure contemplated in article 66, para. 2 (*b*) and (*e*).

should also be made of the draft articles on the law of the non-navigational uses of international watercourses[130] and of the draft articles on the jurisdictional immunities of States and their property.[131] Although in those two cases, the Special Rapporteurs suggested a more progressive line,[132] they were not followed by the Commission, whose attitude towards dispute settlement provisions remains very guarded.[133]

88. The Commission's general reluctance to consider bolder provisions in the area of dispute settlement in previous drafts seems to have been largely based on the following factors:

(a) The view of numerous members of the Commission that Governments would not accept any substantial obligations in the area of dispute settlement;

(b) A restrictive understanding of the Commission's task in the sense that the mandate to undertake the codification of a topic does not extend beyond the drafting of the substantive rules relating to the subject, and thus any dispute settlement provisions are to be considered at the diplomatic conference or, at most, during the very last stage of the drafting, in the form of an annex;[134]

(c) The view that in any case the rules on dispute settlement really belong to a different, and in a sense separate, area of law, namely the law of procedure, which should be dealt with separately on its particular merits;

(d) The view that the addition of ad hoc dispute settlement rules to a draft would complicate the substantive issues and reduce the chances of the results of the codification process receiving the approval of a sufficient number of Governments;

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[130] The procedures which were envisaged by the successive Special Rapporteurs were a combination of negotiation, fact-finding and conciliation at the request of one of the parties. Failing conciliation, provision was made for non-compulsory resort to arbitration or judicial settlement: see Schwebel's third report (*Yearbook ... 1982*, vol. II (Part One), p. 65, document A/CN.4/348), paras. 472-498; and Evensen's first report (*Yearbook ... 1983*, vol. II (Part One), p. 155, document A/CN.4/367), paras. 200-231.

[131] Sucharitkul, eighth report (*Yearbook ... 1986*, vol. II (Part One), pp. 32 et seq., document A/CN.4/396), paras. 43-48. In addition to negotiation, consultation and agreed arbitration or judicial settlement, the Special Rapporteur envisaged the possibility of a unilateral request for a conciliation procedure (arts. 29-33). Draft article 31 contained an optional clause under which any signatory State could declare its acceptance of the compulsory jurisdiction of ICJ for any dispute not settled under the means indicated in articles 29-30.

[132] Another example of this trend, although unconnected with the Commission, is the United Nations Convention on the Law of the Sea, part XV of which sets up an elaborate non-optional third-party settlement system. See especially Richardson, "Dispute settlement under the Convention on the Law of the Sea: a flexible and comprehensive extension of the rule of law to ocean space"; *Contemporary Issues in International Law, Essays in Honour of L. B. Sohn*, 1984, pp. 149 et seq. and Jacovides, "Peaceful settlement of disputes in ocean conflicts : does UNCLOS III point the way?", ibid. Oda expressed a not very optimistic view in his article entitled "Some reflections on the dispute settlement clauses in the United Nations Convention on the Law of the Sea", *Essay in International Law in Honour of Judge Manfred Lachs.* See also *A Handbook on the New Law of the Sea*, R. J. Dupuy and D. Vignes, eds. (Académie de droit international de La Haye, Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster), vol. I (1991), pp. 777 *et seq.* and vol. 2 (1991), pp. 1333 et seq.

[133] See especially Coussirat-Coustère, loc. cit.

[134] A typical example is the request that the Commission has repeatedly addressed to the General Assembly in recent years for authorization to study and prepare a draft statute for an international court of criminal jurisdiction, in connection with the draft Code of Crimes against the Peace and Security of Mankind. Although it was obvious, as stated repeatedly by a few members, that an international criminal court would be an essential element for the proper implementation of the Code, this has been taken up rather reluctantly, as evidenced by paragraph 6 of General Assembly resolution 47/33 of 1992, and far too late.

(e) The limited success of the Commission's efforts from 1949 to 1958 on the topic of arbitral procedure;[135]

(f) The concern, with specific reference to State responsibility, that the inclusion in the draft of advanced dispute settlement obligations, notably compulsory and binding third-party settlement procedures, would affect the violation of virtually any primary international obligation, regardless of the subject matter. This, it is suggested, would make the adoption of a draft on State responsibility more difficult.

2. RECENT DEVELOPMENTS REGARDING DISPUTE SETTLEMENT PROCEDURES AS EVIDENCE OF A NEW TREND

89. The Commission should not be discouraged by any of these general or specific factors. Without doubt, States are generally reluctant to accept advanced dispute settlement commitments, particularly with regard to binding third-party procedures.[136] The history of the law of dispute settlement records a considerable number of failures, notably the failure to establish a real permanent court in 1907 and the failure to achieve a general compulsory jurisdiction for legal disputes, as considered during the drafting of the Statute of PCIJ in 1919-1920. The implementation of the settlement provisions of the Covenant of the League of Nations, namely Articles 12 to 15 thereof, and of the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949, were marked by only a few successes.

90. The adoption of the Charter of the United Nations, Chapter VI of which is mainly concerned with political (and "dangerous") disputes, did not represent any significant progress in the area of settlement procedures for legal disputes. While the roles of the Security Council and of the General Assembly remain political in nature even for legal disputes,[137] the main procedures for the settlement of such disputes (arbitration, judicial settlement and fact-finding) appear to be buried, so to speak, under the "free choice" principle in Article 33. There have been no improvements in this situation, despite the efforts of some delegations during the drafting of the relevant parts of the Declaration on Principles of International Law concerning Friendly Relations and

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[135] While the Commission had recommended, in 1953, that a convention should be concluded on the basis of its draft articles on the subject (*Yearbook ... 1953*, p. 208, para. 57), the General Assembly first invited the Commission, on the basis of comments from Governments, to reconsider the draft and report again (resolution 989 (X), para. 2). When the Commission recommended that the resulting Model Rules on Arbitral Procedure should be adopted, together with its report, by resolution (*Yearbook ... 1958*, vol. II, p. 83, document A/3859, chap. 11, para. 22), the Assembly declined to take the recommended action. It merely took note of the Commission's report and brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use to the extent appropriate in drawing up arbitration commitments (resolution 1262 (XIII), para. 3). According to Rosenne ("The International Law Commission", *British Year Book of International Law*, vol. 36, pp. 150-151), there were three reasons for this outcome, namely (*a*) the boldness of the Commission's approach in basing the draft on a concept of judicial instead of diplomatic arbitration; (*b*) a feeling that the draft relied too heavily on progressive development, and (*c*) the fact that the political climate of the United Nations was not ready for a further extension of the judicial settlement of disputes in place of diplomacy. It is impossible to grasp, however, the meaning of the expression "diplomatic arbitration".

[136] See especially Franck, *The Structure of Impartiality: Examining the Riddle of One Law in a Fragmented World*, pp. 46 et seq. and *passim*; and Lee, "A case for facilitation in the settlement of disputes", *German Yearbook of International Law*, vol. 34 (1991).

[137] See, for example, Bowett, "Contemporary developments in legal techniques in the settlement of disputes", *Collected Courses ... 1983-II*, vol. 180.

Cooperation among States in accordance with the Charter of the United Nations[138] in which peaceful settlement was very poorly dealt with,[139] and Principle V of the Final Act of the Conference on Security and Cooperation in Europe,[140] a particular disappointment

[138] General Assembly resolution 2625 (XXV). See mainly the proposal submitted by Dahomey, Italy, Japan, Madagascar and the Netherlands, the third paragraph of which states as follows:

"3. In order to ensure the more effective application of the foregoing principle:

"(*a*) Legal disputes should as a general rule be referred by the parties to the International Court of Justice, and in particular States should endeavour to accept the jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 2, of the Statute of the Court.

"(*b*) General multilateral agreements, concluded under the auspices of the United Nations, should provide that disputes relating to the interpretation or application of the agreement, and which the parties have not been able to settle by negotiation, or any other peaceful means, may be referred on the application of any party to the International Court of Justice or to an arbitral tribunal, the members of which are appointed by the parties, or, failing such appointment, by an appropriate organ of the United Nations.

"(*c*) Members of the United Nations and United Nations organs should continue their efforts in the field of codification and progressive development of international law with a view to strengthening the legal basis of the judicial settlement of disputes.

"(*d*) The competent organs of the United Nations should avail themselves more fully of the powers and functions conferred upon them by the Charter in the field of peaceful settlement, with a view to ensuring that all disputes are settled by peaceful means in such a manner that not only international peace and security but also justice is preserved." (*Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018), pp. 59-60).

[139] For example, with regard to General Assembly resolution 2625 (XXV), see the paper submitted by the representative of Italy to the 1970 session of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States. In his opinion, the declaration that was being drafted was seriously weakened by the total disregard of the Committee's majority for the institutional aspects of the principles. In a document reproduced in the Committee's report to the General Assembly (ibid., p. 55) he stressed that:

"Among the seven Principles, some may be, or appear to be, *merely normative* in character, while the content of other principles is obviously normative *and* organizational at the same time. In any case, the organizational element could not be overlooked in the last quarter of our century without seriously prejudicing the impact of the normative content of the principles and perhaps their very *existence*.

[...]

"... it would be dangerous to overlook the essential organizational aspects of the prohibition of the threat or use of force, of the principle of non-intervention, *or of the principle of the peaceful settlement of international disputes*.* Not only the effective realization and general impact of these principles but their very existence and development depend in a high degree upon the procedure, instruments and machineries through which the rules stemming from those principles and inspired thereby are applied or enforced in inter-State relations."

As regards, more specifically, the settlement of disputes, the same representative stated that he had frequently indicated the serious difficulties which, in his opinion, were inherent in the current wording of that principle (see, for example, *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 939th meeting, para. 10 and ibid., *Twenty-fourth Session, Sixth Committee*, 1162nd meeting, para. 45). As recorded in the above-mentioned report of the Special Committee, he maintained that:

"... the existing formulation 'reduces, in wording as well as concepts, the impact of Chapter VI of the Charter' and 'simply disregards whole articles or paragraphs of Chapter VI, not to mention the Statute of the International Court of Justice' and other international instruments" (ibid., *Twenty-fifth Session, Supplement No. 18* (A/8018), p. 59),

and he again drew the attention of the Committee to the proposal Italy had submitted together with Dahomey, Japan, Madagascar and the Netherlands (see footnote 138 above), adding that, failing acceptance of that proposal,

"[w]ere the draft Declaration to maintain such a gap, serious damage might result in the progressive development of the law of peaceful settlement" (ibid. p. 60).

[140] Signed at Helsinki on 1 August 1975.

in the light of the articulate and highly meritorious proposal submitted to that Conference by the Government of Switzerland.[141]

91. In recent years, there have been a number of encouraging developments, some of which were noted in the third[142] and fourth reports.[143] The Manila Declaration on the Peaceful Settlement of International Disputes[144] represents a significant general policy development. Despite the fact that it takes the form of a resolution and that its provisions have a programmatic rather than an operative function, that document contains two elements that the Commission should not overlook in the present context. The first is the recommendation contained in section I, paragraph 9, to the effect that States should

> ... consider concluding agreements for the peaceful settlement of disputes among them

and, more specifically,

> ... should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation and application thereof.

Although this provision may appear obvious to the ordinary person, it represents a considerable development if it is considered that nothing of the kind is to be found in either the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[145] or Principle V of the Helsinki Final Act of the Conference on Security and Cooperation in Europe.[146] The second equally significant element is the related provision contained in section I, paragraph 11, which states that

> States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.

It was high time that an international body denounced, at least by implication, the almost total ineffectiveness of the numerous arbitration, conciliation and/or judicial settlement treaties, the texts of which are compiled, together with a few less ineffectual instruments, in three well-known volumes.[147] Further significant elements are to be found in section II, paragraph 5 (*b*), of the Manila Declaration, according to which it is desirable that States:

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[141] See, in particular, Bindschedler, in "La Conférence sur la sécurité en Europe et le règlement pacifique des différends". For the Swiss proposal, see Caflisch in "La pratique suisse en matière de droit international public 1972", *Annuaire suisse de droit international*, vol. XXIX (1973), especially pp. 373-377.

[142] *Yearbook ... 1991*, vol. II (Part One) (see footnote 78 above), paras. 52-62.

[143] *Yearbook ... 1992*, vol. II (Part One) (see footnote 79 above), paras. 35-40.

[144] General Assembly resolution 37/10, annex.

[145] See footnote 139 above.

[146] See footnote 140 above.

[147] Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes: Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (United Nations publication, Sales No. 1949.V.3); and *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962* (United Nations publication, Sales No. 66.V.5).

(i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

(ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

(iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice.

This paragraph also provides that

Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

Again, no such wording is to be found in the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations or in the Final Act of the Conference on Security and Cooperation in Europe.

92. A similar trend emerges from the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field[148] and the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security.[149]

93. A recent noteworthy development is the new Convention on Conciliation and Arbitration prepared by the Conference on Security and Cooperation in Europe. Even more remarkable are the practical steps that a number of Eastern European States have been taking in order radically to reverse their formerly less than progressive policies in this area.[150] Reference is made, in particular, to the acceptance by the former Soviet Union of the jurisdiction of ICJ with regard to a number of international human rights instruments and the acceptance by the former Czechoslovakia and by Hungary of the judicial and conciliation procedures envisaged in article 66 of the Vienna Convention on the Law of Treaties. The increasingly favourable attitude towards providing for dispute settlement by ICJ is another important sign of a new trend. Developments such as these indicate that the factor described in paragraph 88 (*a*) above should not be overemphasized.

94. The factors set forth in paragraphs 88 (*b*), (*c*) and (*d*) above are highly questionable. As regards the factor mentioned in paragraph 86 (*b*), the Commission should remember that it has been entrusted by the General Assembly with the technical task of preparing the legal materials necessary for the implementation of Article 13, paragraph 1 (*a*) of the Charter. Once the parent body has made its political choice by entrusting the Commission with the preparation of a draft, it is for the Commission to decide *ad referendum*, on the basis of its technical expertise, the exact scope of the task to be performed in order properly to serve the United Nations and its membership. In the case of the preparation of a draft statute for an international criminal court referred to

[148] General Assembly resolution 43/51, annex.
[149] General Assembly resolution 46/59, annex.
[150] See footnote 114 above.

above,[151] the Commission's hesitation as to its competence resulted not only in unfortunate delays but also in a highly regrettable waste of resources. The Organization had to address itself to Member States for expertise that should otherwise have come from the Commission. Furthermore, it was necessary to resort to an ad hoc formula—hardly a commendable solution in the area of criminal law.

95. With regard to the factors listed in paragraphs 88 (*c*) and (*d*), there is nothing in the distinction between substance and procedure that would require that they be dealt with separately in all circumstances either in national or international law. As regards international law, in fact the opposite seems to be true. The general dispute settlement instruments, whether bilateral or multilateral, as noted above, have not proved to be very effective. They are interesting materials for study and for teaching the various mechanisms and procedures, and combinations thereof, for settling disputes, but they are not the most frequently used in practice by litigating States. The same must be said of the Commission's technically praiseworthy Model Rules on Arbitral Procedure which are nothing more than a model for States to use once they have decided to resort to arbitration. The more useful dispute settlement mechanisms are those commonly referred to by lawyers as "arbitration clauses", namely the settlement clauses attached to specific international treaties (including an increasing number of multilateral treaties), which provide means of settlement for any dispute arising out of the application or interpretation of the treaty. These are precisely the kind of settlement mechanisms which the General Assembly in the Manila Declaration[152] encouraged States to adopt and which are sometimes, and should be more frequently, embodied in the draft codification conventions that it is the Commission's task to recommend, through its parent body, to the community of States.

3. PART 3 OF THE DRAFT ON STATE RESPONSIBILITY AS A MATTER OF PROGRESSIVE DEVELOPMENT OF THE LAW OF DISPUTE SETTLEMENT

96. Coming now to the reluctance of States as regards this specific topic (see para. 88 (*f*) above), the inclusion of dispute settlement provisions is considered to be particularly appropriate for the draft on State responsibility. Unlike most codification conventions, the draft is already to include a number of important articles on other than substantive matters, for instance, the articles presented at the forty-fourth session[153] on the conditions and limitations on lawful resort to countermeasures as a reaction against an internationally wrongful act and the uncooperative attitude of the wrongdoing State, which are presently before the Drafting Committee. *Mutatis mutandis*, these provisions are instrumental in nature and perform the same kind of function as is intended for the rules providing for dispute settlement procedures in part 3. Thus, the presence in the draft of a part 3 including specific dispute settlement articles seems to be perfectly consistent with the nature of some of the key provisions of part 2 of the draft articles.

[151] See footnote 134 above.

[152] See footnote 144 above.

[153] Articles 11-14. For texts, see *Yearbook ... 1992*, vol. II (Part Two), pp. 25 et seq., footnotes 56, 61, 67 and 69.

97. It is true, of course, as noted *inter plurimos* by Mr. Riphagen, that the inclusion of dispute settlement provisions in a draft concerning the consequences of the infringement of international obligations would cover a wide range of matters by providing that States would be duty-bound to submit to binding third-party procedures, the initiation of which would depend on a unilateral decision of either party. This is not, however, as insurmountable an obstacle as it may seem at first sight. Two main considerations should be kept in mind.

98. First of all, the disputes that would be covered by this procedure are as follows:

(a) Legal disputes involving the interpretation or application of any of the articles on State responsibility: a very broad but not unlimited area;

(b) Legal disputes, as described in (*a*) above, arising as a consequence of countermeasures or counter-reprisals resorted to by parties in an international responsibility relationship.

99. Secondly, and most important, the draft on State responsibility already implies—since the draft articles proposed at the forty-fourth session have been referred to the Drafting Committee[154]—that any State as a prospective wrongdoer may be subject to unilateral initiatives which are certainly less palatable than the unilateral initiation of a third-party conciliation, arbitration or judicial settlement procedure. Even assuming that States, in the midst of the United Nations Decade of International Law, would view third-party settlement obligations as an intolerable burden, the Commission should at least invite them to consider further whether allowing a general prerogative (*faculté*) of resort to countermeasures without an adequate check would not be even more intolerable.

100. There is yet another general reason for the Commission to include more advanced dispute settlement provisions in the draft on State responsibility. The Commission's hesitation in proposing more decisive steps towards a third-party dispute settlement system, irrespective of the possible reluctance of States to accept it, is no doubt understandable in view of the broad scope of the draft. However, this very factor should serve as an encouragement to the Commission seriously to consider including such a system in the current draft, for two good reasons. First of all, the Commission would thus bring an essential *correctif* to the most unpalatable features of countermeasures, that being the only equitable and effective way to ensure that an injured State, however powerful, complies with all the conditions and limitations which the draft places on its *faculté* of unilateral reaction. Secondly, the inclusion of an effective dispute settlement system in the draft would necessarily enhance the observance of any rule of international law, including any past or future codification convention.

101. Experience shows that the documents on dispute settlement most commonly referred to, such as Chapter VI of the Charter of the United Nations, the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[155] or even the Manila Declaration,[156] as well as the Charter of OAS,[157] the Pact of Bogotá[158] and the Charter of

[154] Ibid., para. 119.
[155] See footnote 138 above.
[156] See footnote 144 above.

the Organization of African Unity and the Protocol thereto,[159] are too vague to provide any effective protection against infringements of international obligations. There is therefore not much point in undertaking any further efforts towards progressive development of dispute settlement procedures of a general character in the light of the numerous ineffective general dispute settlement treaties. It would be more appropriate in the context of the draft on State responsibility to engage in a substantial progressive development of dispute settlement procedures by providing for a more effective arbitration clause. It would indeed be very difficult to imagine a better opportunity to take a step forward in the form of a positive development in the law of dispute settlement than the occasion offered by the adoption of a draft convention which, while regulating the present system of unilateral reaction, and thus expressly sanctioning a practice of customary law involving many negative aspects, would at the same time set in place adequate controls over the *faculté* of resort to countermeasures—a *faculté*, which would otherwise inevitably expose the weak and vulnerable, namely the great majority of the members of the inter-State system, to the risks deriving from the factual inequalities of States.

102. In short, the draft on State responsibility provides an excellent opportunity for the United Nations to make a significant contribution to the development of the law of dispute settlement. It is submitted, with respect, that it would be a grave error for the Commission to miss such an opportunity. It is further hoped that an improvement in the area of dispute settlement procedures will considerably enhance the prospects for real progress in terms of the implementation of article 19 of part 1 of the draft articles.

103. The inclination therefore is to believe that the Commission should reverse its tendency to interpret its competence narrowly with respect to dispute settlement procedures and to overemphasize the reluctance on the part of Governments to accept more advanced dispute settlement commitments. It is opined that the Commission should consider the matter in as innovative a spirit as possible and address it with full confidence in its technical skills and expertise. In this connection, the attention of Governments should be drawn to the advantages a well-conceived set of draft articles for part 3 would bring to the development of the rule of law in the inter-State system.

104. Of course, the effort of the Commission with regard to dispute settlement must go beyond its codification function, which is generally understood to consist in

> ... the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.[160]

The task to be performed is instead one of progressive development, as envisaged in Article 13, paragraph 1 (*a*), of the Charter and in articles 1 and 15 to 24 of the Commission's statute. In accordance with the relevant provision of the statute, this task entails

> ... the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.[161]

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[157] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p.3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324).

[158] American Treaty on Pacific Settlement (ibid., vol. 30, p. 55).

[159] Ibid., vol. 479, p. 39.

[160] Article 15 of the statute of the International Law Commission.

Certainly, progressive development, originally distinguished from strict codification in the statute (and in the *travaux préparatoires*), was rightly considered by the Commission to be just one of the two inseparable aspects of codification in a broad sense. But the "early abandonment"[162] of the distinction and the notion that the two aspects of the Commission's task are merged, so to speak, in the concept of codification *lato sensu* do not mean the Commission's role in the area of progressive development is diminished. On the contrary, this role is far more important than the mere "formulation and systematization" of existing rules.[163] The "early abandonment" of the distinction between the two functions was merely prompted by the fact that, in many areas, it is difficult—and furthermore not essential—to distinguish between these two aspects of the Commission's work. Moreover, while certain areas call for only strict codification in a narrow sense, that is to say enhancing the certainty of the law by detailing it and writing it down, other areas of international relations call for the drafting of new rules by way of progressive development. It is clear that dispute settlement is precisely one of the latter areas in which it is imperative for the Commission to carry out that creative work with the necessary determination.[164]

105. In submitting to the General Assembly the result of its effort, the Commission should not hesitate to call the attention of Member States to the indisputable fact that

> The failure of the international community to develop a third-party law-making [i.e., for our purposes, adjudication] comparable to that of the national community may well prove to be the fatal error of our civilization.[165]

The proposals contained here are far less ambitious and do not even attempt to fill such a gap. They do not suggest the establishment of machinery for the creation of new law. They only advocate the establishment of the machinery that is strictly essential to correct those aspects of the existing system of unilateral countermeasures that cause the greatest concern, simply by applying existing law. International lawyers, in particular, should play a more active role in promoting such a development. They cannot escape that

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[161] Ibid.

[162] Sinclair, *The International Law Commission: Hersch Lauterpacht Memorial Lectures*, p. 46 and *passim*.

[163] It might be possible to agree with Brierly's view, as quoted by Briggs (*The International Law Commission*, pp. 131-132), that "codification [in a narrow sense], is, or should be a *scientific* task ... of ascertaining and declaring the law which already exists, and which is binding on States whether they approve its content in every detail or not. It is true that it must necessarily involve the correction of the small inconsistencies in the existing rules ... and the filling of lacunae ..., and the distinction between legislation and codification [in a narrow sense] can, therefore, not be a strictly scientific one. Nonetheless the distinction is correct in a broad sense; the main purpose of codification [in a narrow sense] is not to find rules which are acceptable to the parties, which is inevitably the first consideration in a convention, but to state what the rules already are".

The most significant part of the Commission's task is therefore progressive development. The pre-eminence of the development of the law seems to be recognized also by Jennings, "The progressive development of international law and its codification", *British Year Book of International Law*, vol. 24.

[164] On the role of the Commission with regard to progressive development, especially from the viewpoint of the exigencies of the "third world", see "The International Law Commission: the Need for a New Direction" (United Nations Institute for Training and Research, *Policy and Efficacy Studies No. I*, 1981); and Franck and El Baradei, in "The codification and progressive development of international law: a UNITAR study on the role and use of the ILC", AJIL, vol. 76 (1982).

[165] Franck (see note 136 above). The author's reflections on the bloodshed caused by the wars of the twentieth century apply with equal force to the negative consequences of the practice of any kind of unilateral coercive measures.

responsibility by resorting to the outdated argument that Governments will not accept more adequate settlement commitments. Let Governments take responsibility for accepting or rejecting them.[166]

F. Draft articles and annex

106. The Special Rapporteur hereby proposes the following draft articles of part 3 and of the annex thereto:

Part 3

Article 1. Conciliation

If a dispute, which has arisen following the adoption by the allegedly injured State of any countermeasures against the alleged lawbreaking State, has not been settled by one of the means referred to in article 12, paragraph 1 (*a*), or has not been submitted to a binding third-party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a conciliation commission in conformity with the procedure indicated in the annex to the present articles.

Article 2. Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:

(*a*) examine any question of fact or law which may be relevant for the settlement of the dispute under any part of the present articles;

(*b*) where appropriate, order, with binding effect:

(i) the cessation of any measures taken by either party against the other;

(ii) any provisional measures of protection it deems necessary;

(*c*) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

[166] It is perhaps appropriate to recall that the most vigorous (and justified) criticisms of countermeasures referred to in the preceding sections of the present report came from those who participated in the debate in the Sixth Committee at the forty-seventh session of the General Assembly in 1992. Their voice is particularly authoritative, first because of their political role as Government representatives and secondly on account of their expertise in international law. Those representatives expressed the views of Governments, the very same entities that drafted and adopted the Manila Declaration, and to whom it is addressed. It must be stressed that the negative effects of countermeasures that they denounced are additional arguments in favour of implementing the Manila Declaration.

2. Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations.

Article 3. Arbitration

Failing the establishment of the Conciliation Commission provided for in article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an arbitral tribunal to be constituted in conformity with the provisions of the annex to the present articles.

Article 4. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be of relevance under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the annex to the present articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the parties' written and oral pleadings and submissions] [its appointment].

2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

Article 5. Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

(*a*) by either party:

(i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in article 4, if the dispute is not settled by negotiation within six months of such failure;

(ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in article 4;

(c) by the party against which any measures have been taken in violation of an arbitral decision.

Article 6. **Excès de pouvoir** *or violation of fundamental principles of arbitral procedure*

Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with *excès de pouvoir* or departing from fundamental principles of arbitral procedure.

Annex

Article 1. Composition of the Conciliation Commission[167]

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

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[167] The provisions of the draft annex proposed by Mr. Riphagen corresponding to articles 1 and 2 above read as follows:

"1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

"2. When a request has been made to the Secretary-General under article 4 (*c*) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows: "The State or States constituting one of the parties to the dispute shall appoint:

"(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

"(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

"The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within 60 days following the date on which the Secretary-General receives the request.

"The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

"If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

"Any vacancy shall be filled in the manner prescribed for the initial appointment.

"3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

"4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

"5. The Conciliation Commission shall decide its own procedure. The Commission with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

"6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

"7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

"8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

"9. The fees and expenses of the Commission shall be borne by the parties to the dispute."

The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third States. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

If the appointment of the commissioners to be designated jointly is not made within the period for making the necessary appointments, the appointment shall be entrusted to a third State chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President.

If no agreement is reached on either of these procedures, each party shall designate a different State, and the appointment shall be made in concert by the States thus chosen.

If, within a period of three months, the two States have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

In the absence of agreement to the contrary between the parties, the Commission shall meet at the seat of the United Nations or at some other place selected by its President.

The Conciliation Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to inquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention for the Pacific Settlement of International Disputes of 1907.

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all members are present.

Article 2. Task of the Conciliation Commission

1. The tasks of the Conciliation Commission shall be to elucidate the question in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings, the Commission shall draw up a *procès-verbal* stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the *procès-verbal* of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

4. The Commission's *procès-verbal* shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

Article 3. Composition of the Arbitral Tribunal

1. The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third States. They must be of different nationalities and must not be habitually resident in the territory nor in the service of the parties.

2. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third State, chosen by agreement between the parties, shall be requested to make the necessary appointments.

3. If no agreement is reached on this point, each party shall designate a different State, and the appointments shall be made in concert by the States thus chosen.

4. If, within a period of three months, the two States so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a national of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

5. Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

6. The parties shall draw up a special agreement determining the subject of the dispute and the details of the procedure.

7. In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention of 1907 for the Pacific Settlement of International Disputes shall apply so far as is necessary.

8. Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by either party.

9. If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply, subject to the present articles, the rules in regard to the substance of the dispute enumerated in article 38 of the

Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono.*

107. The content of the articles and the annex are explained in paragraphs 62 to 85 above.

108. Further articles may be required to complete part 3 of the draft in order to deal with whatever procedures may be contemplated with respect to the instrumental (procedural) consequences of those internationally wrongful acts qualified as "crimes" under article 19 of part 1 as adopted on first reading.

CHAPTER II

II. THE CONSEQUENCES OF SO-CALLED INTERNATIONAL CRIMES OF STATES (ARTICLE 19 OF PART 1 of the draft articles)

PRELIMINARY REMARKS

109. While recognizing that the consequences of the wrongful acts qualified as crimes of States under article 19 of part 1 of the draft articles[168] are no longer the *terra incognita* they certainly were at the outset, it is still not possible to reach any conclusions on any of the difficult aspects of the matter. This applies to the determination both of the existing legal situation and of the possible lines of progressive development of the law. The best service that can be rendered to the Commission, for the time being, is to try to identify and explore issues for further discussion. Only on the basis of the guidance offered by an adequate and significant debate in the Commission and in the Sixth Committee will it be possible, after further thought, to submit for the next session tentative suggestions and, possibly, draft provisions.

110. Reference is made, of course, to the determination of the consequences, *de lege lata* or *de lege ferenda*, of the wrongful acts in question, for which a merely terminological distinction has been made since 1976 between international crimes and other internationally unlawful acts (delicts). Although the specific matter of the distinct consequences of "crimes" has been addressed in the Commission and in the Sixth Committee not infrequently since 1976, notably within the framework of the debate on Mr. Riphagen's draft articles 14 and 15 of part 2 and draft article 4 (*b*) of part 3, it was not dealt with conclusively by either body. The Commission in particular has not gone beyond the mere referral of those draft articles to the Drafting Committee, which did not act upon them. Despite the valuable proposals and debates of 1985 and 1986, the legal consequences of international "crimes" of States have been dealt with mainly in the remarkable, albeit not very conspicuous, literature on the subject. When article 19 of part 1 was adopted those consequences were deliberately, though perhaps not prudently, left aside, to be taken up later.

111. In view of its indicated purpose, the present chapter first contains, in section A, a review of the opinions which have been expressed so far on the consequences of

[168] See footnote 1 above.

international "crimes" of States in the Commission, in the Sixth Committee and in the literature. Section B is devoted to a tentative identification of the main substantive and procedural issues which confront the Commission in determining the consequences of such wrongful acts from the viewpoint of both *lex lata* and *lex ferenda*. By way of conclusion, section C contains equally tentative considerations on the merits of the theoretically conceivable alternative solutions to the issues identified which appear to be most important for the Commission to consider. It goes without saying that even the list of issues is anything but exhaustive. Any additions that members of the Commission or of the Sixth Committee may wish to make in order to provide further guidance would be most welcome.

A. Problems raised by the "special regime" of crimes in the Commission's work on State responsibility, as identified by the Commission, by the Sixth Committee and in the literature

1. INTRODUCTION

112. At its twenty-eighth session in 1976, the Commission, welcoming the proposals of the then Special Rapporteur, Mr. Roberto Ago, adopted on first reading a provision—article 19 of part 1[169] of the draft—intended to single out from among internationally wrongful acts a "special" class of breaches referred to as "international crimes".

113. The reasons and practical considerations that led the Special Rapporteur and the Commission to draw a distinction between "crimes" and simple "delicts" are amply illustrated in the documents relating to the work of that session of the Commission, and the reader is therefore simply referred to them.[170] In any event, it should be pointed out that what the Commission meant by "crimes", as the term is used in article 19, were those acts which the "international community as a whole" considers to be serious breaches of obligations essential for the protection of fundamental interests of that community. The Commission went on to provide a non-exhaustive list of examples of wrongful acts which, under international law as it stood in 1976, would constitute "crimes" within the meaning indicated: aggression, as a serious breach of an obligation of essential importance for the maintenance of international peace and security (para. 3 (*a*)); the establishment or maintenance by force of colonial domination as a serious breach of an obligation of essential importance for safeguarding the right of self-determination of peoples (para. 3 (*b*)); slavery, genocide and apartheid, as serious breaches on a widespread scale of obligations of essential importance for safeguarding the human being (para. 3 (*c*)); and massive pollution of the atmosphere or the seas, as a serious breach of an obligation of essential importance for the safeguarding and preservation of the human environment (para. 3 (*d*)).

[169] See *Yearbook ... 1976*, vol. II (Part Two), p. 95.

[170] See Mr. Ago's fifth report (ibid., (Part One), p. 3, document A/CN.4/291 and Add.1-2, paras. 79-154), and the Commission's commentary to article 19 (ibid., (Part Two), pp. 96-122). For a very valuable analysis of the notion of crime and its consequences as discussed and developed by the Commission, see Spinedi, "International crimes of State: The legislative history".

114. As pointed out by the Commission from the outset, the distinction between "delicts" and "crimes" would have not only a descriptive but also, and especially, a normative value. This distinction, in other words, was included in the draft because it involved a differentiation of "regimes of responsibility". Responsibility for "crimes" would entail legal consequences different (at least in part) from, and more severe than, those entailed by responsibility for "delicts".[171]

115. In the pages which follow an attempt will be made to analyse: (*a*) how this "special" regime of "responsibility for crimes" was gradually constructed by the Commission during the course of its work; (*b*) the reactions of the Sixth Committee of the General Assembly to the views put forward in the Commission; and (*c*) the views of scholars concerning the content to be given to any provisions of the draft relating to the consequences of international crimes of States.

2. THE "SPECIAL" CONSEQUENCES OF CRIMES IN THE WORK OF THE COMMISSION

(a) *The first references to the question*

116. The idea of differentiating between regimes of responsibility according to the type of wrongful act committed came up very early in the Commission's work. Its chief protagonist was Mr. Roberto Ago, who, as far back as the debates at the twenty-first session in 1969, insisted on the need to take into account the difference between two classes of wrongful acts. In a first class he included less serious breaches, which would give rise primarily to the obligation of the responsible State to make reparation *lato sensu*, and only in certain cases—such as the failure to perform that obligation—to the applicability of "sanctions" against that State. In the second class he placed the more serious breaches, with regard to which the threat of "sanctions" would be admissible from the outset—a threat, however, which in such cases would be independent of the outcome of the contentious procedure on reparation.[172] The proposal was favourably received by the Commission and a number of members even contributed to its more precise formulation. Mr. Ushakov, for example, in addition to warning that the admissibility of "sanctions" of a military nature could be spoken of only in the case of wrongful acts that violated or threatened international peace and security, stressed above all, the aspect of the *faculté* of reaction to the wrongful act, noting that in the case of violations of fundamental interests of the inter national community, such *faculté* would also concern subjects other than the "principal victim" of the wrongful act.[173] With regard to this latter point, other members of the Commission took a positive attitude, observing, how ever, that States "not especially affected" by the violation would be entitled to react not *ut singuli* but *ut universi*, or in other words, in implementation of a decision taken collectively by authorities [*sic*] representing "the international community as a whole".[174]

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[171] See, in this connection, the Commission's commentary to article 19 (*Yearbook ... 1976*, vol. II (Part Two), pp. 116-118), especially paragraphs 51-54.

[172] *Yearbook ... 1969*, vol. I, 1036th meeting, paras. 15-26, and *Yearbook ... 1970*, vol. I, 1074th meeting.

[173] *Yearbook ... 1969*, vol. I, 1012th meeting.

[174] Mr. Sette Câmara (*Yearbook ... 1970*, 1075th meeting, vol. I); Mr. Yasseen (ibid., 1076th meeting); Mr. Ustor (ibid., 1079th meeting); Mr. Ago (ibid., 1074th meeting). See also *Yearbook ... 1970*, vol. II, p. 177, document A/CN.4/233, paras. 22-25.

117. As may be seen, right from the start, two lines began to take shape along which the theme of responsibility for particularly serious wrongful acts was to develop: (*a*) the "substance" of the consequences, which would be more severe than for other breaches; and (*b*) the kind of reaction, which, in the case of wrongful acts affecting fundamental interests of the international community, might be described as, "diffuse", or downright universal.

118. On the basis of the positive responses obtained in the preliminary debate, the Special Rapporteur formally proposed to set apart in the draft articles a category of more serious wrongful acts—which could be qualified as "crimes"—to which a "special" regime of responsibility would attach.[175] This proposal met with the approval of the vast majority of Commission members;[176] so much so that in 1976, following the discussion of Mr. Ago's fifth report (devoted precisely to the differentiation between wrongful acts according to the subject matter of the obligation breached and the notion of "international crime" of the State),[177] draft article 19 was adopted on first reading.[178]

(b) *The commentary to article 19*

119. The Commission's commentary to article 19,[179] in line with Mr. Ago's fifth report, deals primarily with the grounds for the division of internationally wrongful acts into two distinct conceptual categories ("delicts" and "crimes"), leaving the problem of the special consequences of the latter to part 2 of the draft. However, traces can also be found in that commentary of at least three general indications regarding the "special" regime of responsibility which characterizes "crimes" according to the Commission:

(a) First of all, it is affirmed that the distinction between different regimes of responsibility is one that is currently in force in general international law. The effort to be made by the Commission must therefore consist in the codification of *lex lata* rather than in an elaboration *de lege ferenda*;[180]

(b) In the second place, even though several different hypotheses—such as aggression, colonial domination or massive pollution—have been included in the same provision by way of example, that does not mean that they all entail the same consequences: rather, the regime of "aggravated" responsibility would vary according to the crime;[181]

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[175] *Yearbook ... 1973*, vol. II, p. 172, para. 51.

[176] The only voice decidedly against was that of Mr. Reuter (ibid., vol. I, 1202nd meeting, paras. 34-37).

[177] *Yearbook ... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2, especially paras. 79-155.

[178] Ibid., vol. II (Part Two), pp. 95-122. Reservations concerning the article were expressed only by Mr. Kearney, Mr. Tsuruoka and Mr. Reuter (*Yearbook ... 1976*, vol. I, 1362nd meeting, paras. 23-24 and 1363rd meeting, paras. 33-37; 1375th meeting, paras. 1-4, and 1402nd meeting, paras. 61-64, respectively). However, as Spinedi observes, "They did not dispute the fact that contemporary international law attached, to certain particularly serious wrongful acts, different consequences from those arising from all other wrongful acts. They only doubted the usefulness of dealing with these special responsibility rules in the draft articles the Commission was engaged in drafting". (loc. cit., p. 22).

[179] *Yearbook ... 1976*, vol. II (Part Two), pp. 96-122.

[180] Ibid., para. (54) of the commentary on article 19.

[181] Ibid., para. (53). In this connection it should be noted, however, that the Commission saw fit to refine the Special Rapporteur's proposal, which made a distinction between breaches of obligations

(c) Thirdly, the Commission forewarned that the codification of the regime of responsibility could not in any way derogate from the provisions of the Charter concerning

> ... certain acts which it particularly sets out to prevent and punish. (...) In so far as certain provisions of the Charter are now an integral part of general international law on the subject with which the Commission is concerned, they will be logically and faithfully reflected in its work. Otherwise, precisely because of their "special" nature and also because of the provisions of Article 103, the provisions of the Charter would always prevail over those of a general codification convention.[182]

(c) *The debate on draft article 19*

120. Further elements concerning the substance of the "special" consequences of crimes can be inferred from the debate that took place among the members of the Commission on Mr. Ago's fifth report.

121. For example, the Special Rapporteur stated that, in his opinion, in the case of a crime, the State which was the victim of the breach might, in addition to demanding reparation *lato sensu*, also apply "sanctions" against the wrongdoing State. This would imply resorting to reprisals not only functionally related to the performance of the primary obligation breached or to reparation, but also to a merely "afflictive aim", although the latter might involve the use of force only in specific cases.[183] Other members of the Commission, too, referred to the possibility of applying "sanctions" (in addition, obviously, to claiming reparation) in the case of crimes, though they did not clarify what exactly they meant by "sanctions".[184] In this connection, the sole point on which there was broad agreement seems to have been that only in the case of aggression, and hence by way of self-defence, would unilaterally decided armed measures be deemed admissible.[185] It must be borne in mind, however, that even earlier, in the commentary to article 1 of part 1, the Commission as a whole had expressed itself as follows on the meaning to be attributed to the term "sanctions":

> The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation.[186]

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essential to the maintenance of international peace and security and other crimes, with only the former entailing "extreme measures of coercion and sanctions" (ibid., vol. II (Part One) (see footnote 177 above), para. 150).

[182] Ibid., vol. II (Part Two), commentary to article 19, para. (55).

[183] Ibid., (Part One) (see footnote 170 above), paras. 80 et seq. In this connection, however, see the position expressed by Mr. Ago in his third report (*Yearbook ... 1971*, vol. II (Part One), p. 199 et seq., document A/CN. 4/246 and Add.1-3), paras. 32 et seq.

[184] Mr. Bedjaoui (*Yearbook ... 1976*, vol. I, 1362nd meeting); Mr. Yasseen (ibid., 1372nd meeting); Mr. Hambro (ibid.); Mr. Sette Câmara (ibid., 1373rd meeting); Mr. Martinez Moreno (ibid.); Mr. Ramangasoavina (ibid., 1374th meeting); Mr. Bilge (ibid., 1376th meeting); and Mr. Castañeda (ibid., 1402nd meeting).

[185] Significant remarks were made on this point by Mr. Kearney (ibid., 1374th meeting) and Mr. Castañeda (ibid., 1402nd meeting).

[186] *Yearbook ... 1973*, vol. II, p. 175, para. (5) of the commentary to article 1.

122. As to the extent of the right to react (with measures not involving armed force), some members viewed it as broad enough, in the case of crimes, to permit the adoption of measures by each and every State, even in the absence of any decision by an international body,[187] while others maintained that collective or generalized measures, even not involving the use of armed force, were allowable only if previously authorized and supervised by a competent international organ, and more specifically, by the Security Council.[188] It should also be pointed out that many members of the Commission did not hesitate to consider some of the measures provided by the Charter of the United Nations as being precisely among the most typical "widespread and multilateral" sanctions that might be imposed in the case of crimes: either "social" measures like expulsion of Members of the United Nations or suspension of their rights and privileges, or, in the case of aggression, measures under Chapter VII.[189]

(d) *The commentary to articles 30 and 34*

123. On the two main aspects of the "special" regime of "responsibility for crimes" (greater severity of consequences and diffusion of the *faculté* of reaction), the Commission also expressed itself on the occasion of the adoption on first reading of draft articles 30 and 34 respectively, concerning "countermeasures" and "self-defence" as circumstances excluding wrongfulness.

124. In the commentary to article 30, it is affirmed, for example, that countermeasures may be meant not only to "secure performance", but also to "inflict punishment".[190] In response to certain wrongful acts or in the presence of certain circumstances—which the commentary, however, does not specify—the countermeasure would not merely have the function of obtaining cessation or reparation *lato sensu.* It might also have an independent purpose and might therefore be adopted at the same time that claims were put forward for cessation or reparation, or even after the close of the contentious proceedings on reparation. Concerning the substance of the countermeasures, the point was made that, outside the case of self-defence, no wrongful act could warrant resort to unilateral measures involving the use of armed force.

125. In paragraph (22) of the same commentary it is further pointed out that by virtue of a decision of a competent international body condemning a serious breach of a fundamental obligation, resort to countermeasures would be possible also on the part of "non-directly" injured States. There could also be a derogation from such general rules or principles as prior demand for reparation, proportionality and prohibition of armed

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[187] Mr. Ushakov (*Yearbook ... 1969*, vol. I, 1012th meeting, para. 38); Mr. Ago (*Yearbook ... 1976*, vol. I, 1363rd meeting); Mr. Quentin-Baxter (ibid., 1375th meeting); Mr. Bedjaoui (ibid.); and Mr. Castañeda (ibid., 1402nd meeting).

[188] Thus, explicitly, Mr. Sette Câmara (*Yearbook ... 1976*, vol. I, 1373rd meeting), and, implicitly, Mr. Kearney, who contrasted such unilateral action with the system established in the Charter to safeguard international peace and security (ibid., 1374th meeting).

[189] Mr. Ago (ibid., 1371st, 1372nd and 1376th meetings;); Mr. Yasseen (ibid., 1372nd meeting); Mr. Sette Câmara (ibid., 1373rd meeting); Mr. Vallat (ibid.); Mr. Martinez Moreno (ibid.); Mr. Ramangasoavina (1374th meeting); Mr. Kearney (ibid.); Mr. Tsuruoka (ibid., 1375th meeting); Mr. Rossides (ibid.); Mr. Ustor (ibid.); Mr. El-Erian (ibid., 1376th meeting); and Mr. Bilge (ibid.). Only Mr. Reuter and Mr. Castañeda expressed doubts as to the correctness of considering measures under Chapter VII as forms of international responsibility (ibid., 1402nd meeting).

[190] *Yearbook ... 1979*, vol. II (Part Two), p. 116, para. (3) of the commentary.

reprisals. Nothing is said, however, of the possibility of countermeasures adopted by "indirectly" injured States *ut singuli.*

126. With regard to draft article 34, some members of the Commission observed that resort to measures involving armed force by way of self-defence might be justified not only in the event of an armed attack, but also in response to other wrongful acts consisting in breaches less serious than the unlawful use of force.[191] As has been pointed out,[192] this would suggest that the idea was largely shared within the Commission that a certain type of wrongful act (aggression and, according to the less "restrictive" opinions, any serious breach of the prohibition against the use of force) might entail a consequence (resort to armed force by way of self-defence) distinct from, and graver than the consequences common to other internationally wrongful acts.

(e) *Recapitulation*

127. The inferences that may be drawn from the work of the Commission on part 1 of the draft may be summarized as follows:

(a) According to the Commission, general international law already provides for a different regime of responsibility for the kind of wrongful acts indicated in draft article 19;

(b) Such a regime is not always the same, but varies according to the crime, though it is distinguished from the regime of delicts by certain general characteristics;

(c) Among crimes, only armed aggression (or, according to some, serious violation of the prohibition of the threat or use of force) justifies unilateral armed reactions by way of individual or collective self-defence, as provided for under general international law and recognized in Article 51 of the Charter of the United Nations;

(d) A crime justifies the adoption of countermeasures (even for purposes other than purely securing execution or reparation, though this is not explicitly indicated as a distinctive feature of "responsibility for crimes" alone) not only on the part of the State, if any, primarily injured by the breach, but also of any other State in any way injured by the wrongful act;

(e) While there is no unanimity concerning the possibility for "non-directly" injured States to react *ut singuli* to a crime by means of unilateral measures, there does seem to be agreement within the Commission that the reaction of such States may be very severe (in derogation, for example, from the principles of prior demand for reparation, proportionality and the prohibition on armed countermeasures) if it follows a decision of a collective body competent to deal with the situation created by the crime;

(f) The measures originating in a "collective source" that might be adopted as sanctions against a crime, as distinct from a delict, include, according to the majority of the Commission, the suspension of membership in the United Nations or expulsion of Members from the Organization under Articles 5 and 6 of the Charter, as well as such measures as the Security Council may determine under Chapter VII.

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[191] Mr. Reuter (*Yearbook ... 1980*, vol. I, 1620th meeting); Mr. Diaz González (1627th meeting, pp. 220-221); Mr. Pinto (ibid.); and Mr. Tabibi (ibid., 1628th meeting).

[192] Spinedi, loc. cit., pp. 42 et seq., especially p. 43.

(f) *The 1984 and 1985 proposals*

128. In his reports on part 2 of the draft, Mr. Riphagen expresses views which, in many respects, are in line with the conclusions just summarized, especially for the proposition that

> ... the international crimes listed (as possible examples) in paragraph 3 of the draft article [19] cannot each entail the same new legal relationships.[193]

While recognizing that different crimes have different consequences, Mr. Riphagen still tries to ascertain the "elements of special legal consequences common to all international crimes"[194] and generally distinguish the regime of crimes from that of delicts.

129. As regards the obligations of the wrongdoing State (which may roughly be identified with the "substantive" consequences, to use the current terminology), Mr. Riphagen does not appear to consider the regime of "responsibility for crimes" as differing from that of delicts. The obligations to put an end to the breach, to provide *restitutio in integrum* or compensation and to provide appropriate guarantees against repetition fall, according to Riphagen, on the author State, as a result of the commission of any internationally wrongful act, whether "delict" or "crime".[195] Other members of the Commission, moreover, seem to have been in agreement with this view.[196]

130. As regards the "instrumental" consequences for the "directly" injured State, however, only in the case of aggression do they differ from those generally stemming from "ordinary" wrongful acts, according to Mr. Riphagen. In that case, in addition to the fact that resort to armed force in self-defence is justifiable, the countermeasures that might be adopted by the injured State are in fact limited only by the principle of proportionality and respect for *jus cogens*, "subject to the application of the United Nations machinery for the maintenance of international peace and security",[197] of course. In the case of crimes other than aggression, however, the regime of countermeasures that might be adopted by the injured State does not differ, according to Mr. Riphagen, from the regime of any other internationally wrongful act.[198] As for the other members of the Commission, they agreed that an armed reaction by the "directly" injured State was

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[193] Preliminary report (*Yearbook ... 1980*, vol. II (Part One), p. 129, document A/CN.4/330), para. 98 *in fine*.

[194] Fourth report (*Yearbook ... 1983*, vol. II (Part One), p. 11, document A/CN.4/366 and Add.l), para. 58.

[195] Preliminary report (*Yearbook ... 1980*, vol. II (Part One) (see footnote 193 above)), paras. 30-40; and second report (*Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344, paras. 99-104).

[196] As Spinedi notes, "in considering the special forms of responsibility for international crimes, [the members of the Commission] do not refer to the new obligations of the State author of the wrongful act" (loc. cit., p. 93).

[197] Fourth report (*Yearbook ... 1983*, vol. II (Part One) (see footnote 194 above)), para. 55.

[198] Ibid., paras. 53-54.

admissible only by way of self-defence in the event of aggression.[199] They do not seem, however, to have taken any kind of stand on the difference between the regime of countermeasures available to such a State in the case of other crimes and the regime of countermeasures in the case of delicts.

131. Particular attention was paid by Mr. Riphagen to the features of "responsibility for crimes" from the standpoint of the "non-directly" injured States. In keeping with the position taken by the Commission during work on part 1 of the draft, Mr. Riphagen affirms in particular that every crime gives rise to responsibility *erga omnes*, that is to say, with respect to all States other than the author of the wrongful act.[200] However, the position of this plurality of States in the responsibility relationship would not be the same as that of a State which is the "principal victim" of a crime: according to Mr. Riphagen, the legal situation of "non-directly" injured States would include (*a*) the right to demand cessation, reparation and guarantees against repetition; (*b*) the obligation not to help the author of the breach to maintain the situation created by the crime; (*c*) the right to engage in behaviour, vis-à-vis the author of the crime, which would otherwise be prohibited or in breach of the principle of non-intervention in internal affairs, it being understood, however, that this right would not be unconditional and would only last until the competent United Nations organ takes a decision regarding sanctions against the crime; and (*d*) the obligation to carry out the measures decided by United Nations bodies as sanctions against the crime, bodies being the competent "authority" for dealing with the consequences of a crime, even if it does not involve a threat to international peace or security.[201]

132. The regime just described would undergo a change—in the direction of greater severity—in the presence of a crime of aggression. In this case, every State (other than the author of the wrongful act) has the same rights as the "principal victim" of the crime. In particular, force could be resorted to by way of individual or collective self-defence. What is more, the reference to the United Nations system would be more precise: every State would in fact be obliged to carry out such "sanctions" as may be decided by the Security Council on the basis of Chapter VII of the Charter.[202]

133. It must be added, however, that the position of Mr. Riphagen on the legal status of the regime he describes, or of any other regime of "responsibility for crimes" differs considerably from that adopted by the Commission in its commentary to article 19. According to him, the regime described, except for the special consequences of aggression, would not correspond to the present state of international law (*lex lata*). Its adoption would be a matter of progressive development.[203]

134. Mr. Riphagen embodied his proposals in draft articles 5 (*e*), 14 and 15, presented to the Commission in 1984.[204] Those provisions read as follows:

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[199] According to Spinedi, "this is apparent from the fact that it was only in connection with the consequences of aggression that ILC members discussed, in 1982 and 1983, if they had to deal with self-defense in the draft articles" (loc. cit, p. 94, note 312).

[200] Fourth report (*Yearbook ... 1983*, vol. II (Part One) (see footnote 194 above)), para. 59.

[201] Ibid.

[202] Ibid.

[203] Ibid.

[204] He had initially presented a very similar provision in draft article 6 as contained in his third report (*Yearbook ... 1982*, vol. II (Part One), p. 48, document A/CN.4/354 and Add.1-2, para. 150). The article, which appears on p. 48 of the report, read as follows:

Article 5

For the purposes of the present articles, '"injured State" means:
[…]

(e) if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every State:

(*a*) not to recognize as legal the situation created by such crime; and

(*b*) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(*c*) to join the other States in affording mutual assistance in carrying out the obligations under subparagraphs (*a*) and (*b*).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

"Article 6

"1. An international wrongful act of a State, which constitutes an international crime, entails an obligation for every State:

"(*a*) not to recognize as legal the situation created by such act; and

"(*b*) not to render aid or assistance to the author State in maintaining the situation created by such act; and

"(*c*) to join other States in affording mutual assistance in carrying out the obligations under (*a*) and (*b*).

"2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

"3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail."

Article 15

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.[205]

(g) *The Commission's debate on the 1984 and 1985 proposals*

135. Although they were referred to the Drafting Committee, Mr. Riphagen's proposals had not been the subject of a particularly thorough debate. From the general tone of members' comments, it is apparent, in particular, that though those proposals may well have been considered a good starting point for the drafting of the regime of crimes, they were still in need of major modification and greater elaboration.[206] Regarding some points, however, a few more specific indications can perhaps be deduced.

136. For example, an objection shared by a number of members was that Mr. Riphagen's proposal did not sufficiently differentiate between the position of "non-directly" injured States and that of the State that was the "principal victim" of the breach. If, in the case of a crime, every State automatically had the same rights as those enjoyed by a State "directly" injured by a mere delict (as art. 14, para. 1, seems to imply), then, in the case of a crime, every State would be entitled not only to receive pecuniary compensation, but even to adopt the same countermeasures as the "directly" injured State. This, to a number of members, appeared pernicious as far as a just, peaceful and orderly conduct of international relations was concerned.[207] To this objection, Mr. Riphagen replied that the "active" situation of a State "not directly" injured by a crime would depend on the type of injury actually sustained. For example, pecuniary compensation might be claimed only if the State in question had actually been materially damaged by the international crime.[208] The same would apply to countermeasures, in the sense that a

> State which is considered to be an injured State only by virtue of article 5, subparagraph (*e*), enjoys this status as a member of the international community as a whole and should exercise its new rights and perform its new obligations within the framework of the organized community of States.[209]

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[205] *Yearbook ... 1984*, vol. II (Part One), p. 1, document A/CN.4/380, sect. II.

[206] See the statements made by Mr. Malek (*Yearbook ... 1982*, vol. I, 1732nd meeting), Sir Ian Sinclair (ibid., 1733rd meeting); Mr. Ni (ibid.), Mr. Jagota (ibid.); Mr. Barboza (ibid.); Mr. Lacleta Muñoz (ibid.); and Mr. Razafindralambo (ibid.). Mr. Riphagen had admitted, moreover, that it had not been his intention to include in his provisions an exhaustive list of the consequences of crimes, but only to furnish a basis for further drafting by the Commission. The "minimal" and "open" character of the regime outlined by Mr. Riphagen is clearly reflected in the text of draft article 14, paragraph 1, where it is provided that any further "special" consequence of a crime might in any event be established by the international community as a whole.

[207] See in this connection the statements made by Sir Ian Sinclair (*Yearbook ... 1984*, vol. I, 1865th meeting); Mr. Quentin-Baxter (ibid.); and Mr. McCaffrey (ibid., 1866th meeting).

[208] Ibid., 1867th meeting.

[209] Sixth report (*Yearbook ... 1985*, vol. II (Part One)) see footnote 2 above), of the commentary to article 14, para. 10.

Therefore, in the absence of, and prior to, any collective decision taken "within the framework of the organized community of States", a State injured only within the meaning of article 5, subparagraph (*e*), could resort *ut singuli*, according to Mr. Riphagen, solely to the measures of non-recognition and solidarity provided for in article 14, paragraph 2.[210]

137. A further observation is in order here. Without any objections on the part of other members of the Commission and in fact in line with the opinion that had been expressed by some of them,[211] Mr. Riphagen tended to eliminate from the concept of international responsibility, and especially from the aims legitimately pursuable through countermeasures, any punitive aspect, or, if preferred, any aspect other than those relating to the performance of the obligation breached and the reparation for damage.[212] This would apply even in the case of crimes, at least as far as the countermeasures that might be adopted by States *ut singuli* were concerned.[213] However, Mr. Riphagen does not explicitly dismiss the punitive aspect in respect of possible "sanctions" imposed pursuant to collective decisions taken by competent international bodies.

138. A final remark may be made with regard to the role to be assigned to the procedures and measures already provided for in the Charter of the United Nations. The prevailing opinion among Commission members seems to favour explicitly including in the regime which is to govern crimes the application of those measures that are admissible or actually imposed under the Charter, based on the specific features of the case: essentially measures of self-defence in the case of aggression and the procedures for the maintenance of international peace and security provided for in the Charter.[214]

(h) *Recapitulation of the Commission's positions*

139. At this point an attempt will be made to recapitulate the conclusions on which the Commission seems to have reached some measure of agreement with regard to the "special" regime of international crimes of States, following its work on part 1 of the draft and its consideration of Mr. Riphagen's proposals:

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[210] Ibid., paragraph (6). This position of Mr. Riphagen had already appeared quite clearly in his third report (*Yearbook ... 1982*, vol. II (Part One)) (see footnote 204 above), paras. 95-96 and 136-143. In this connection, see also Spinedi, loc. cit., p. 124).

[211] Mr. Reuter (*Yearbook ... 1976*, vol. I, 1402nd meeting, *Yearbook ... 1981*, vol. I, 1666th meeting and *Yearbook ... 1982*, vol. I, 1731st meeting) and Mr. Schwebel (*Yearbook ... 1980*, vol. I, 1601st meeting).

[212] Second report (*Yearbook ... 1981*, vol. II (Part One) (see footnote 195 above), para. 35. See also Mr. Riphagen's statement at the 1759th meeting of the Commission (*Yearbook ... 1983*, vol. I).

[213] Third report (*Yearbook ... 1982*, vol. II (Part One) (see footnote 204 above), para. 140.

[214] See the statements by Mr. Evensen (*Yearbook ... 1982*, vol. I, 1733rd meeting, para. 17); Mr. Ushakov (ibid., 1736th meeting, para. 33; 1737th meeting, paras. 25-26); Mr. Yankov (ibid., para. 12); Mr. Flitan (*Yearbook ... 1983*, vol. I, 1773rd meeting); Mr. Al-Qaysi (ibid., 1775th meeting et seq.); Mr. Balanda (ibid., 1776th meeting); Mr. Jagota (ibid., 1777th meeting; Mr. Koroma (ibid.); Mr. Barboza (ibid.); and Mr. McCaffrey (ibid.). Doubts regarding the legal correctness and the political appropriateness of referring to the machinery provided by the Charter for the maintenance of international peace and security were expressed by Mr. Reuter (*Yearbook ... 1984*, vol. I, 1861st meeting) and Mr. Malek (ibid., 1866th meeting).

(a) From the position taken expressly by the Special Rapporteur, to which other members of the Commission did not object, it seems to emerge that the task would be not so much to codify the possible (and confused) *lex lata* on the subject as to specify, by way of progressive development, the agreed minimum threshold at which it would be appropriate to increase the severity of the consequences of crimes as compared with those of delicts;

(b) Such a minimum is not to be found in the legal situation of the State that is the "principal victim" of the breach (if there is one): the rights and *facultés* of such a State are no different—except quantitatively in relation to the seriousness of the injury—from those it would enjoy as principally injured party in respect of any internationally wrongful act;

(c) The legal situation of "indirectly" injured States, considered from the viewpoint of their reaction *ut singuli*, does take on a "special character", however. Unlike the situation of States "indirectly" injured by a delict, the situation of States "indirectly" injured by a crime would be characterized by a necessary minimum threshold. That threshold would no doubt involve the obligations of "non-recognition" and "non-collaboration" with the author of the "crime", as indicated by Mr. Riphagen; but in view of the widespread dissatisfaction within the Commission at the perfunctoriness of this indication, it would presumably involve some other obligations as well. There also seems to be agreement that the legal involvement of the States in question should not go so far as to justify the unilateral adoption by one or more of them of punitive measures against the author of the wrongful act;

(d) The restrictions on the possibility of individual States *ut singuli* imposing sanctions against a crime would be narrowed in the event of a collective decision by an authority representative of "the international community as a whole". In that case any "non-directly" injured State might be authorized or even obliged to adopt, vis-à-vis the wrongdoer, the measures decided upon by the "organized international community"—such measures possibly being more severe than would otherwise be permitted;

(e) A hypothetical case—and one considered to be of central importance by the majority of the Commission—in which the phenomenon referred to in (*d*) above may well occur—would be that of measures decided collectively by the competent organs of the United Nations on the occasion of breaches calling for the operation of specific procedures provided for in the Charter;

(f) A departure from this "minimum" general regime would be made in the case of aggression, the only crime that justifies a unilateral armed reaction by way of collective self-defence on the part of any State other than the aggressor. This crime also authorizes any State to resort to non-armed countermeasures which are less strictly circumscribed (substantially or procedurally) than those attaching to other wrongful acts. The only restrictions applicable would be proportionality and the prohibition on breaches of *jus cogens* obligations. All these measures (self-defence and "aggravated" countermeasures) would be subject to the procedures prescribed in Chapter VII of the Charter for the maintenance of international peace and security.

3. REACTIONS OF STATES IN THE SIXTH COMMITTEE

(a) *The problem of criminal liability*

140. Turning to the reactions in the Sixth Committee at the time of the adoption of article 19 of part 1 of the draft, the majority of States, especially those of the "socialist countries" and the "developing world", agreed with the Commission's choice. Only a few Western States, including Australia,[215] France,[216] Greece,[217] Portugal,[218] Sweden[219] and the United States of America[220] were decidedly opposed. The recurrent criticism in their positions related essentially to the risk of "criminalization" of State behaviour, which they felt to be inherent in the distinction proposed by the Commission. According to them, at that stage there was no parallel in international law to the forms of responsibility for which provision was made by the criminal law of States. There was not at present a generally accepted international body at the inter-State level which could be considered sufficiently representative and impartial to be entrusted with the function of deciding upon punitive sanctions. Furthermore, "criminalizing" State behaviour would mean raising the possibility of collective criminal liability to the level of a rule of law—a development which would be incompatible with juridical civilization. The Commission's draft ought to have dealt solely with the aspects of State responsibility relating to reparation and not with sanctions. Sanctions, if any, would have to be decided at the political level, not in connection with the determination of responsibility for international wrongful acts.[221]

141. Opposition to punitive measures, understood as measures corresponding to the forms of criminal responsibility provided for in national legal systems, was also expressed by another, mostly European, group of States. While accepting in principle the distinction proposed, those States reserved their opinion for the time when the Commission would define the consequences of crimes.[222] It must be stressed, however, that such reservations were made by States which nevertheless came out in favour of a "special" regime of "responsibility for crimes". For those States, the consequences of

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[215] *Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 27th meeting, paras. 17-20, and subsequently ibid., *Thirty-eighth session, Sixth Committee*, 50th meeting, paras. 53-55.

[216] Ibid., *Thirty-first Session, Sixth Committee*, 26th meeting, para. 4, and subsequently ibid., *Thirty-eighth session, Sixth Committee*, 41st meeting, para. 26.

[217] Ibid., *Thirty-first Session, Sixth Committee*, 23rd meeting, paras. 11-12.

[218] Ibid., para. 17.

[219] The position of Sweden is to be found primarily in a written commentary on the Commission's draft (*Yearbook ... 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1-4, p. 77).

[220] *Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 17th meeting, paras. 8-12; ibid., *Thirty-third Session*, 40th meeting, para. 2, and subsequently ibid., *Thirty-eighth Session, Sixth Committee*, 47th meeting, para. 67.

[221] The latter observation was made only by Greece (see footnote 217 above).

[222] Austria (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 20th meeting, para. 2 and ibid., *Thirty-eighth Session, Sixth Committee*, 41st meeting, para. 41); Denmark (ibid., *Thirty-first Session, Sixth Committee*, 19th meeting, para. 5); Federal Republic of Germany (ibid., 24th meeting, para. 73; and *Yearbook ... 1981*, vol. II (Part One) (see footnote 219 above), p. 75); Japan (ibid., 21st meeting, para. 8); and Spain (ibid., *Thirty-eighth Session*, 54th meeting, para. 35).

crimes should in no way include forms of criminal or punitive responsibility which, in addition to being contrary to the principle of the sovereign equality of international persons, would favour the imperialistic claims of States capable of imposing "punitive sanctions".[223]

142. To conclude on this point, it should be noted that quite a few of the States that had initially opposed or seriously questioned the idea of "responsibility for crimes", when commenting on the proposals subsequently advanced by Mr. Riphagen, displayed a less hostile attitude towards the possibility of identifying a "special" regime for the consequences of particularly serious wrongful acts. This was presumably due to the mild, non-punitive character of those proposals.[224]

(b) *The "substantive" consequences of crimes*

143. Moving away from the debate on the admissibility of "criminal" responsibility of States, not much was said in the Sixth Committee about the "special features" characterizing, *de lege lata* or *de lege ferenda*, the regime covering the kind of wrongful acts contemplated in article 19.[225]

(c) *Faculté of reaction*

144. As regards the *faculté* of reaction, only two States had doubts that the commission of a crime or, in any event, of a serious breach of rules designed to safeguard the interests of the international community as a whole, generated an *erga omnes* responsibility. Few, however, took a stand on the question whether such responsibility implied that any State, even if only "indirectly" injured, could resort

[223] Bulgaria (ibid., 52nd meeting, para. 57); German Democratic Republic (ibid., *Thirty-fifth Session, Sixth Committee*, 49th meeting, para. 15 and ibid., *Thirty-eighth Session*, 36th meeting, para. 67); Hungary (ibid., 53rd meeting, para. 22); Poland (ibid., para. 33); Ukrainian Soviet Socialist Republic (ibid., 50th meeting, para. 24); and Union of Soviet Socialist Republics (ibid., 53rd meeting, para. 43).

[224] See, for example, the position taken by Greece (ibid., *Thirty-seventh Session, Sixth Committee*, 40th meeting, para. 47); Japan (ibid., 46th meeting, para. 19); Australia (ibid., 48th meeting, para. 9); Sweden (ibid., 41st meeting, para. 12); and the United States of America (ibid., 52nd meeting, paras. 22-23).

[225] It may be useful, however, to recall the stands taken on this point by Bulgaria, the Federal Republic of Germany and the United States of America. The opinion of the first, for example, was that in the case of a crime, the injured State might immediately adopt countermeasures without awaiting the negative outcome of a prior demand for reparation (ibid., *Thirty-sixth Session, Sixth Committee*, 51st meeting, para. 6). According to the Federal Republic of Germany, however, it would be necessary, even in the case of a crime, to exhaust the available means of peaceful settlement before legitimately resorting to any unilateral measure (ibid., *Thirty-eighth Session, Sixth Committee*, 39th meeting, para. 7). As for the United States (which, it should be recalled, was opposed to the distinction), it suggested that if provision was indeed necessary in the draft, by way of progressive development, for "special" consequences in the case of particularly serious wrongful acts, then mention should have been made of the obligation of the responsible State to pay "exemplary" or "punitive" damages (ibid., *Thirty-first Session, Sixth Committee*, 17th meeting, para. 12).

unilaterally to countermeasures.[226] No significant comments were made on Riphagen's proposal regarding the "minimal" obligations of general law ("non-recognition" and "solidarity") that would be incumbent on all States other than the wrongdoing State in case of an international crime.[227] However, widespread dissatisfaction was expressed, as it was also in the Sixth Committee, with the idea of reducing the "specificity" of crimes to such "minimal" obligations without properly developing the regime of the obligations of the wrongdoing State and the rights of the "directly" injured State.

(d) *The role of the "organized international community"*

145. Still on the subject of the *faculté* of reaction, a number of States did not hesitate to espouse the position of the Commission that a typical consequence of a crime should be the adoption of measures by all States *ut universi*, namely within the framework of the "organized international community". This position rested, as noted, on the obvious underlying reference to cases calling for the application of measures provided for in the Charter of the United Nations, in particular those of Chapter VII. Some States, however, deemed that mentioning such measures in the draft would be inappropriate. This was either because their application was already governed by the Charter and, what is more, from a perspective different from that of the consequences of wrongful acts,[228] or because of the risk of broadening the power of United Nations bodies, notably of the Security Council, to impose sanctions beyond the limits laid down for them by the Charter. That was considered to be a very serious risk, especially in view of the fact that the United Nations bodies involved would be the political organs, which constitutionally are unsuited to making an impartial juridical assessment of the cases concerned.[229]

146. Finally, widespread agreement was discernible in the Sixth Committee to consider both individual and collective self-defence in response to aggression as the "special" consequence of a wrongful act that would permit unilateral resort to armed force, even by "non-directly" injured States. Some delegations, however, had doubts as to the appropriateness of regulating such a case in the draft, inasmuch as it was already governed by the Charter of the United Nations.[230]

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[226] Some expressed a favourable opinion, though in somewhat general terms: Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part One) (see footnote 219 above), p. 75); Indonesia (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 30th meeting, para. 33) and Sri Lanka (ibid., 31st meeting, para. 15).

[227] Only Algeria and Romania (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 35 and ibid., 49th meeting, para. 9 respectively) were decidedly in favour, though they tended to stress the need to develop and specify the scope of such obligations.

[228] France (ibid., *Thirty-first Session, Sixth Committee*, 26th meeting, para. 5); and Greece (ibid., 23rd meeting, paras. 11-12).

[229] Australia (ibid., 27th meeting, para. 20); Japan (ibid., 21st meeting, para. 8); and Spain (*Yearbook ... 1982*, vol. 11 (Part One), p. 15, document A/CN.4/351 and Add.1-3, especially p. 17).

[230] Australia (*Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 50th meeting, para. 42); Federal Republic of Germany (ibid., 39th meeting, para. 3); and the United States of America (ibid., 41st meeting, para. 4).

(e) *Recapitulation of Sixth Committee positions*

147. The scanty guidelines emerging from the Sixth Committee debates may be summarized as follows:

(a) There seems to be a broad consensus that responsibility for serious breaches of obligations of fundamental importance to the international community should somehow be distinguished from the consequences of any "ordinary" internationally wrongful act. A considerable part of the international community, however, evinces a certain hesitation when it comes to using the notion of "responsibility for crime" to characterize such a regime;

(b) There is also broad agreement that any "special" regime of crimes should be devoid of any punitive connotation, in the sense that not even in the case of crime should punitive measures be left to the unilateral discretion of the injured parties, especially not to "non-directly" injured States;

(c) There is a vague tendency, however, to consider the "specificity" of the consequences of crimes as deriving not so much from the existence of the general obligations of "non-recognition" and "solidarity" incumbent upon all States, as from a greater severity of the "substantive" obligations of the wrongdoing State and of the "instrumental" rights of the State (if any) "directly" injured by the breach.

(d) The conviction is prevalent that, in the case of crimes, *erga omnes* responsibility amounts essentially to the possibility for the "organized international community" to authorize or even oblige any State, by virtue of decisions taken by "competent" organs, to adopt "sanctions"—even severe ones—against the wrongdoer. Examples are the procedures and measures to address certain situations laid down by the Charter of the United Nations. There is however no unanimity among the members of the Sixth Committee regarding the appropriateness of explicitly referring to such procedures or measures in the draft;

(e) Aggression is distinguished from all the other crimes. It is deemed to be the only wrongful act that would permit a unilateral armed reaction by way of self-defence on the part of "non-directly" injured States as well as on the part of the victim State or States.

4. SCHOLARLY VIEWS

(a) *Introduction*

148. While the Commission's proposals concerning the regime of crimes have not reached an advanced stage of drafting, they have elicited comments from numerous scholars. In this subsection an attempt will be made to present the doctrinal trends relating to the present state of international law with regard to the "special" consequences of crimes and the possible lines along which it may develop in the future.[231] The first subject

[231] The following analysis relates to the observations of scholars regarding the manner in which the consequences of crimes should be dealt with in the Commission's draft. It does not, however, cover the literature on specific crimes, such as aggression, genocide or apartheid, or the

will be the relationship between the State which is the "principal victim" of the crime and the wrongdoing State to see whether, according to scholars, it differs from the relationship between an injured State and a wrongdoing State in the case of an "ordinary" wrongful act.

(b) *The wrongdoer State/victim State relationship*

149. Not many writers consider the "specificity" of the regime of crimes to be manifest in such a relationship. Among those who express any views on this point, only a few deal with the "substantive" obligations incumbent on the wrongdoing State vis-à-vis the "directly" injured State. As has been seen, this aspect has not been given much attention in the work of the Commission either. As regards reparation *lato sensu*, one writer stresses, for example, that in the case of a crime, unlike that of a delict, no derogation should be admissible from the obligation of restitution in kind insofar as "inalienable" interests covered by cogent rules are involved (between injured State and wrongdoer).[232] Another writer stresses that, in the case of a crime, even after making reparation, the wrongdoing State would still be subject to the obligation to provide the necessary guarantees against repetition.[233]

150. With regard to the "instrumental" consequences, scholars are divided concerning the conditions of lawful resort to countermeasures by the "directly" injured State. Whereas, according to some writers, even in the case of crimes the right of the injured State to resort to countermeasures arises only after unsuccessful demands for cessation/reparation have been made and the available means of settlement have been tried,[234] others believe that the injured State may immediately resort[235] to at least those countermeasures which appear to be reasonably necessary to bring about the cessation of wrongful conduct that is in progress.[236]

151. A broader agreement exists with respect to the limits to the exercise of countermeasures on the part of the injured State. Most commentators are of the opinion that the proportionality limitation[237] and/or the *jus cogens* limitation[238] apply also in the case of crimes.

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typical and possibly "special" consequences of such crimes that may be inferred from State practice or that of international organizations, or from the related instruments.

[232] Graefrath, "International crimes—a specific regime of international responsibility of States and its legal consequences", especially p. 165. On Graefrath's point, it should be emphasized that the prohibition against "substituting" by covenant a pecuniary compensation for *restitutio* when this would jeopardize legally inalienable interests has already been stressed by the present writer even with regard to consequences of "delicts"; indeed, the possibility that failure to make *restitutio* might violate such interests may occur even in consequence of wrongful acts *minoris generis* as compared with a crime. The only question to be resolved might then be that of the exception of excessive onerousness as set forth in draft article 7, para. 1 (*c*), of part 2 (see *Yearbook ... 1989*, vol. II (Part Two), pp. 72-73, para. 230).

[233] Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, pp. 530-531.

[234] Dupuy, "Implications of the institutionalization of international crimes of States", especially p. 180; Carella, *La responsabilità dello Stato per crimini internazionali*, pp. 134 and 143.

[235] Lattanzi, op. cit., p. 530; Hofmann, loc. cit., pp. 221-222.

[236] Graefrath, loc. cit., p. 165.

[237] Carella, op. cit., pp. 143-144; Hailbronner, "Sanctions and third parties and the concept of international public order", especially p. 4; Dinstein, "The *erga omnes* applicability of human rights", especially p. 19; Graefrath and Mohr, "Legal consequences of an act of aggression; the case of the Iraqi invasion and occupation of Kuwait", especially pp. 133-136. Lattanzi, according to whom, in the case

152. A broad consensus also exists on the function of the countermeasures taken by the injured State. Indeed, while no one questions that they might be adopted to bring about cessation of "criminal" conduct or, by way of an *extrema ratio*, to guarantee reparation *lato sensu*, nearly all rule out the possibility of their being used for purely punitive purposes.[239]

153. Lastly, it is hardly necessary to recall that the vast majority of writers consider the crime of aggression as an exception to the general regime, at least to the extent that the "directly" injured State is entitled to adopt measures involving the use of force by way of self-defence.[240] It must be noted, however, that a significant number of writers even extend the legitimacy of the use of force by the "victim of a breach" to cases of reaction to the coercive imposition of colonial domination (or "alien domination"), namely in favour of the people under such domination.[241]

(c) *The wrongdoer State/"non-directly" injured State relationship*

154. Turning to the relationship between the author of a crime (an *erga omnes* violation by definition), on the one hand, and the "non-directly" injured States—*ut singuli*—on the other hand, the writers who have dealt with the matter, like the Commission, unanimously hold the view that the "special" aspect which most distinguishes the consequences of crimes from "ordinary" wrongful acts lies primarily in the regime governing this relationship.

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of reaction to crimes, the question of proportionality cannot arise (op. cit., p. 531), takes the opposite view.

[238] Dinstein, loc. cit., especially pp. 19-20; Graefrath and Mohr, loc. cit., especially p. 136; Oellers-Frahm, "Comment: The *erga omnes* applicability of human rights", especially p. 36; de Hoogh, "The relationship between *jus cogens*, obligations *erga omnes* and international crimes: peremptory norms in perspective", especially p. 201. See also Cardona Llorèns, "La responsabilidad internacional por violacion grave de obligaciones esenciales por la salvaguardia de intereses fundamentals de la comunidad internacional (el 'crimen internacional')", p. 326.

[239] The positions taken, among others, by Cardona Llorèns, loc. cit., pp. 325-332; Graefrath, loc. cit., and Dupuy, loc. cit., p. 180, are very clear in this respect. A quite different opinion is expressed by Spinedi ("Contribution à l'étude de la distinction entre crimes et délits internationaux", especially pp. 35-42), according to whom countermeasures/reprisals are always recognized in international law as having a function that is primarily punitive, i.e. does not conform strictly to an executive-reparatory function; and this can obviously not fail to apply to the measures that might be taken by a State against which an international crime had been perpetrated.

[240] For the bibliography on this "special" consequence of aggression and on the various ways in which it is interpreted, see third report (*Yearbook ... 1991*, vol. II (Part One) (footnote 78 above)), para. 9, footnote 7, and paras. 97-102; and fourth report (*Yearbook ... 1992*, vol. II (Part One) (footnote 79 above)), paras. 58-69.

[241] The literature on the subject is abundant. See, *inter alia*, Higgins, *The Development of International Law through the Political Order of the United Nations*, pp. 103 et seq.; Cassese, "Political self-determination. Old concepts and new developments"; Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale*, pp. 98 et seq.; Ben Salah, "Autodétermination des peuples: les deux niveaux"; and White, "Self-determination: time for a re-assessment", especially p. 151. Reference should also be made to the *travaux préparatoires* of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 138 above), and to the commentaries on the relevant part of that Decla ration.

155. With regard to the "substantive" consequences, no appreciable objections are found in the literature to the idea that, in the case of crimes, any State other than the State author of the wrongful act would be entitled to claim cessation and reparation *lato sensu.*[242] This right seems to exist even in the absence of any prior intervention by international bodies which are to some degree representative.

156. The positions of writers on the *faculté* of "non-directly" injured States to resort unilaterally to countermeasures are more varied. According to some, this right or *faculté* may be considered to be admissible *de lege lata* in general international law and indeed it constitutes the most certain of the distinctive features of the regime of international crimes of States.[243] Others take a more cautious approach, stressing that the *faculté* of States in general and of each State *ut singuli* does not arise automatically from the commission of a crime. It only comes about either subsidiarily, so to speak, that is to say where there is no possibility of intervention by the "organized international community" or where that "community" remains out of the picture owing to an impasse in its decision-making mechanisms,[244] or by way of "solidarity" with the principal victim of the crime (if there is one), which would have to have made a prior request for the help of other States.[245] Some writers, especially Italians, are of the opinion that unilateral countermeasures by any State "not directly" injured are admissible with regard to certain wrongful acts, but not with regard to the entire category of breaches contemplated in article 19 of part 1 of the Commission's draft. According to these writers, the only countermeasures admissible *de lege lata* in the situation under discussion would be collective self-defence against aggression and unarmed intervention in favour of peoples whose aspirations to independence are forcibly repressed by "alien domination".[246] A number of writers consider, on the contrary, that "blanket" resort to unilateral countermeasures is inadmissible (or should be prohibited) even in response to an international crime, save in the case of aggression. Otherwise there would be a risk of justifying any and all abuses and arriving at a situation of anarchy and *bellum omnium contra omnes.*[247] The sole exception to this prohibition would be precisely the case of aggression, in reaction to which not only the use of force by way of self-defence, but also

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[242] Including Graefrath, loc. cit., p. 165; Abi Saab, "The concept of 'international crimes' and its place in contemporary international law", especially p. 149; Jiménez de Aréchaga, "Crimes of States, *jus standi,* and third States", especially p. 255; and Hutchinson, "Solidarity and breaches of multilateral treaties", especially p. 197.

[243] Though with a variety of nuances, this seems to be the position, for example, of Lattanzi, op. cit., p. 533; Dominicé, "Legal questions relating to the consequences of international crimes", especially p. 262; and Dinstein, loc. cit., especially p. 19.

[244] Abi Saab, loc. cit., especially p. 150; Sinclair, "State crimes implementation problems: who reacts?", *International Crimes of State …*, p. 257; Spinedi, loc. cit., p. 133; Hutchinson, loc. cit., pp. 212-213; Sicilianos, *Les réactions décentralisées à l'illicite: des con tre-mesures à la légitime défense,* p. 171 and pp. 205-206.

[245] Cardona Llorèns, loc. cit., especially p. 322; Mohr, "The ILC's distinction between 'international crimes' and 'international delicts' and its implications", especially pp. 131-132; Hofmann, loc. cit., especially pp. 226-228; Hailbronner, loc. cit. and de Hoogh, loc. cit., especially p. 213.

[246] Thus, for example, Cassese ("Remarks on the present legal regulation of crimes of States") and Conforti ("Il tema di responsibilità degli Stati per crimini internazionali"), especially pp. 108-110.

[247] Marek, "Criminalizing State responsibility", especially p. 481; Graefrath, loc. cit., p. 167; Dupuy, loc. cit., pp. 177-179, and "Observations sur le 'crime international de l'État'", RGDIP (1980), especially pp. 483-484; Jiménez de Aréchaga, loc. cit.; Elias, "Introduction to the debate", especially p. 193; Elagab, *The Legality of Non-forcible Counter-Measures in International Law,* p. 59; Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", especially p. 280; and Ten Napel, "The concept of international crimes of States: walking the line between progressive development and disintegration of the international legal order", especially pp. 165-166.

particularly severe and immediate unilateral measures on the part of all States, would be admissible.[248]

157. The writers who accept resort to unilateral countermeasures on the part of any "non-directly" injured State do not go much beyond that generality. They do not make any more significant contributions regarding the legal regime that might govern such countermeasures (possibly a different regime of countermeasures from the one that may be adopted for a mere delict).[249] The only point on which the majority of the writers in question insist is that it would not be lawful for "non-directly" injured States to pursue punitive aims through such measures, that is to say aims other than the cessation of the wrongful act or reparation *lato sensu*.[250]

158. Moving from the area of rights/*facultés* to that of the possible obligations under general international law of "non-directly" injured States, a high degree of consensus seems to exist in the literature, in the sense that such obligations are to be considered a typical, and "special", consequence of international crimes.[251] Reference is made in particular to the obligations of "non-recognition" and "solidarity" mentioned by Mr. Riphagen in article 14, paragraph 2, of part 2 of the draft. Of these, it is especially the obligation not to recognize as "legal" (meaning, presumably, as producing legal effects at the international level and in the respective national systems) any acts performed by the wrongdoing State in respect of the "control of the situation" created by the crime that is deemed by most writers to be a "special" consequence *de lege lata* of crimes as opposed to delicts.[252] It is less easy, on the contrary, to find writers who explicitly accept

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[248] In this connection see, for example, Hofmann, loc. cit., especially p. 229, and Graefrath, loc. cit., especially p. 166, where the reference is "to the sequestration or confiscation of property of the aggressor or its nationals situated abroad, the suspension of all bilateral treaties with the aggressor State, the punishment of its leaders for the crime against peace".

[249] With regard to what are referred to as preconditions, Sicilianos affirms that immediate countermeasures may be adopted provided that the criminal behaviour is still in progress and there is a situation of emergency (op. cit., p. 206). As for the limits, Mohr considers that States not directly injured may react, by virtue of the proportionality/reciprocity principle, only by countermeasures proportional to the injury sustained as a result of the crime (loc. cit., p. 137). Finally, according to Lattanzi, the regime of countermeasures in question does not differ substantially from that which governs the measures that may be adopted by a State directly injured by a crime (op. cit., p. 533).

[250] Particularly explicit in this respect are Mohr, loc. cit., especially p. 139; Dominicé, "The need to abolish the concept of punishment", pp. 257-258; Sicilianos, op. cit., pp. 52-54; Graefrath and Mohr, loc. cit., pp. 133 and 139; and, among those who deny the admissibility of the countermeasures in question altogether, Marek, loc. cit., p. 463. Less categorical positions are taken however by Spinedi, loc. cit., pp. 28 et seq. and Zemanek, "The unilateral enforcement of international obligations", especially pp. 37-38. Lattanzi (op. cit., p. 533) accepts a function that is afflictive and not only "executive-reparative" in the countermeasures of States "indirectly injured" by a crime.

[251] Simma observes in fact that "the majority of observers, following the bilateralist way of thinking, would probably agree that the very idea of obligations on the part of 'third' States in case of a violation of international law is a remarkable innovation, not to speak of the substance of such solidarity" ("International crimes: injury and countermeasures: comments on part 2 of the ILC work on State responsibility"), especially p. 305.

[252] Including Cardona Llorèns, loc. cit., especially pp. 312 et seq.; Abi Saab, loc. cit., especially p. 149; and Graefrath, loc. cit., especially p. 168, who calls attention to various signs that point in this direction (the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 138 above), the Definition of Aggression (General Assembly resolution 3314 (XXIX), annex), United Nations resolutions on Southern Rhodesia, the South African presence in Namibia, the creation of Bantustans by South Africa and the Israeli-occupied territories); Dupuy, loc. cit. (see footnote 234 above), especially p. 181; Jiménez de Aréchaga, loc. cit., especially pp. 255-256; Conforti, loc. cit. especially pp. 108-109, who, however, confines this "special" legal consequence solely to the hypotheses of aggression and violation of "external" self-

the conclusion that general international law actually provides for "positive obligations of solidarity" incumbent on all States "not directly" injured by a crime, requiring each such State to participate in the adoption of measures (possibly as decided by an international body) that are designed to help the "most directly" injured State or to restore legality.[253]

(d) *The role of the "organized international community"*

159. Finally, it is essential to take a close look at the positions taken by writers regarding the legal situation of States other than the author of the crime, considered *ut universi*. This refers to the possibility for the "organized international community" to deal with the various issues and implications of international responsibility for "crime". Here, too, a fairly wide range of positions is to be found.

160. At one end of the spectrum are the writers who feel that competence belongs, *de lege lata*, exclusively to United Nations organs. They are obviously thinking particularly of the Security Council, the body empowered to take coercive action under Chapter VII of the Charter to implement any measures required by an international crime of a State.[254] In the opinion of those writers, the hypothesis of "threat to the peace" provided for in Article 39 of the Charter in fact allows for a sufficiently broad interpretation to enable the Council to cover the acts defined as "international crimes".[255] Clearly, once it was accepted that the "specificity" of the regime of crimes lay in the competence of the Security Council under the Charter, the obligation for every State to give effect to any "sanctions" decided by that organ would follow as a matter of course.[256]

161. Not too far from that position are those writers who, unlike the ones just mentioned, do not consider the system of Chapter VII of the Charter at present suited to the implementation of the "special" regime of responsibility for all crimes (but rather consider it applicable only to aggression and crimes constituting a breach of the peace or a threat to the peace), yet similarly wish to see provision made for such implementation by the United Nations security system. This should be achieved, in their view, by progressive development (*lex ferenda*). That system is the only one, in their opinion, that might "ensure the minimum guarantees of objectivity which ought to inspire a regime of responsibility for crime of a general character".[257]

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determination; Frowein, "Collective enforcement of international obligations", especially p. 77; Graefrath and Mohr, loc. cit., especially pp. 110 and 114.

[253] See, for example, the reservations of Sicilianos, op. cit, p. 171, and Hailbronner, loc. cit., pp. 11-15, according to whom, *de lege lata*, there does not exist any obligation of "active solidarity", but only, if anything, the obligation not to interfere with any action undertaken by the "organized international community".

[254] Graefrath, loc. cit., especially pp. 164-168.

[255] Ibid., p. 164. According to Graefrath, "An international crime, being a serious violation of an international obligation essential for the protection of fundamental interests of the international community by definition is an international affair which establishes the jurisdiction of the United Nations." (ibid.). And again; "States have authorized the Security Council to determine the existence of an international crime ... to decide upon measures necessary to stop the continuation of the wrongful conduct and to enforce universal respect for the observance of those international obligations which are fundamental for the maintenance of international peace" (ibid., p. 167).

[256] Ibid., p. 167.

[257] Conforti, loc. cit., especially p. 107. Along the same lines, Jiménez de Aréchaga, loc. cit.

162. Other writers, starting from an analogous reading of Chapter VII of the Charter (from the perspective of responsibility), arrive at a different, more "restrictive", conclusion whereby the category of crimes should be limited to those wrongful acts that constitute a breach of, or a threat to, the peace, so as to place the concept of responsibility for crime on a firmer legal footing, without at the same time improperly broadening the scope of the Charter's security system".[258]

163. Close to this view, but more clearly defined, is the opinion according to which competence for imposing "sanctions" in response to crimes, at least those involving a threat to the peace, does indeed belong to the international community as "organized" within the United Nations, and specifically to the Security Council. However, it would belong "primarily" but not "exclusively" to the United Nations. The possibility would still remain for States *ut singuli* legitimately to resort to peaceful countermeasures against the author of a crime if United Nations reaction was blocked or proved to be ineffectual.[259] The switch to this "secondary" unilateral competence would be viewed somewhat favourably, according to some writers, if the competent organs of the United Nations—albeit "incapable" of acting—issued even a simple "verbal" condemnation of the crime, as a guarantee of the legitimacy of measures that States *ut singuli* might wish to take.[260]

164. The tendency to disengage, as far as possible, the imposition of "sanctions" against crimes from the Chapter VII security system and from an "exclusive competence" of the Security Council—often viewed as prone to immobilization[261] and

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[258] Starace, "La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale". *Collected Courses ... 1976-V*, pp. 294 et seq. Along the same lines, see Quigley, "The International Law Commission's crime-delict distinction: a toothless tiger?", especially pp. 137 and 133 et seq. and Dupuy, "Observations sur la pratique récente des 'sanctions' de l'illicite". According to the latter, it would not be appropriate, in particular, to provide in the Commission's draft for a regime of responsibility for the crime of aggression that was different—alternative or subsidiary—from the mechanism established in Chapter VII of the Charter of the United Nations and the related competence of the Security Council, all the more so if, on the basis of such a different regime, resort to unilateral countermeasures was admissible. For Dupuy there is a fear that this substitution of action will lead to a weakening of the prestige and authority of the world organization, whose incapacity to keep the peace would thus be underlined by the unsupervised, albeit generous, actions of certain States. The very basis of the notion of crime, which aims above all at ensuring respect for obligations essential to the international community as a whole, all too often risks becoming a convenient excuse for the initiatives of States who will seek in the concept of a "*carte blanche* for public order"—a justification for actions taken in furtherance of their own foreign policy goals. After all, whatever might be the good faith of the States applying the sanctions, it will be all the easier for the States they are aimed at to oppose actions that are not under United Nations aegis. And here the question arises whether the very institutionalization of crime might not harbour the seeds of international anarchy.

[259] Hofmann, loc. cit., especially p. 226; Mohr, loc. cit., especially pp. 131-132 and p. 138; Sinclair, loc. cit., especially p. 257; Dominicé, "Legal questions ...", loc. cit., especially pp. 262-263; Sicilianos, op. cit., especially p. 171 and pp. 206-213.

[260] Hutchinson, loc. cit., especially p. 203; Sicilianos, op. cit., p. 213; Quigley, loc. cit., especially pp. 144 and 150. A "primary" but not "exclusive" competence of the United Nations is indicated also by Oellers-Frahm, according to whom it would still not be legitimate for States *ut singuli* to intervene "ancillarily", but rather for "regional organizations" such as OAS or the European Community: if even these regional bodies proved unable to decide on the application of collective "sanctions", that would mean that, a fortiori, no agreement existed within the international community for the adoption of unilateral measures on the part of individual States either, and such measures could therefore not be deemed admissible (loc. cit., especially pp. 34-35).

[261] In this regard, see for example the doubts expressed by Simma, *loc. cit.*, especially pp. 312-313.

"political manipulation",[262] is manifest also in the suggestions of those writers who tend to favour some role for ICJ in the matter. Such a role is conceived either in the form of competence of the Court with respect to disputes relating to an international crime[263] or of an *ex post facto* verification of the "legitimacy" of the threatened sanctions.[264]

165. Lastly, and in a position almost diametrically opposed to that discussed in paragraph 160 above, mention must be made of the writers for whom neither the United Nations (and in particular the Security Council) nor any other international organization has any competence, *de lege lata* and in the sphere of general law, be it exclusive or primary, to regulate the reactions of States "not directly" injured by a crime. According to this view, such States thus retain full possession *ut singuli* of the right to react, if need be, by means of countermeasures against a State that has committed a serious breach of obligations intended to safeguard the fundamental interests of the international community. It must be added, however, that the same writers usually also express the wish for the matter to be taken care of through progressive development, namely by attributing the requisite functions and powers to appropriate international institutions not necessarily identifiable with any particular organ of the United Nations.[265]

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[262] Including Dominicé, loc. cit., especially pp. 262-263; Hutchinson, loc. cit., especially pp. 210-211; and also Leben: "Les contre-mesures étatiques et les réactions à l'illicite dans la société internationale", p. 28.

[263] Torres Bernardez, "Problems and issues raised by crimes of States: An overview", loc. cit., especially pp. 278-279; and Quigley, loc. cit., especially pp. 128-129.

[264] Hutchinson, *loc. cit.* p. 211; and Dupuy, loc. cit. (footnote 234 above), especially pp. 182-183, who calls for a mechanism by which the General Assembly would decide on the basis of a qualified majority whether to request the Security Council to intervene in order to apply a "sanction" in response to a crime; the Council would decide the measures to be taken, also by a qualified majority and with the exclusion of the right of veto; finally, to complete the whole process, a procedure for settling differences would be indispensable. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and article XII of the International Convention on the Suppression and Punishment of the Crime of Apartheid could be taken as a basis here. However, a comparison of these two provisions shows that the first allows unilateral resort to ICJ while the second seems to maintain the requirement for a consensual approach. The writer stresses the importance of the options offered (ibid., especially p. 183). Without explicitly referring to ICJ, Elias, too, stresses the appropriateness of providing "judicial channels" in the regime of responsibility to be proposed for crimes in the following terms:

"... it cannot be forgotten that a judicial solution has in practice a limited ambit in which to operate and that international judicial process remains in principle voluntary. But it is against this background that the significance emerges of the development, in contemporary international law, of procedures whereby the application of the law is entrusted to third parties and not only to the State or States immediately concerned. That development is but the vehicle for making manifestly evident the exigencies of the international community, the general concerns and interests of that collective and interdependent entity which is the international community of today" (loc. cit., especially p. 193). Simma is more sceptical when, commenting on Mr. Riphagen's proposals, he makes the following remarks:

"... the link between Article 14 and the procedural safeguard of compulsory jurisdiction of the International Court of Justice proposed in 1986 will not stand the test of political realities. Such third-party adjudication certainly is to be welcomed, some would even say, to be regarded as an indispensable corollary of the acceptance of 'international crimes'. But let us be realistic: the idea that a significant part of United Nations Member States would be prepared to involve the Court in the issues listed in Article 19 is simply utopian" (loc. cit., especially p. 307).

Graefrath is decidedly opposed to recognizing an international court as an appropriate body to deal with crimes (loc. cit., especially pp. 168-169).

[265] Abi-Saab, loc. cit., especially pp. 148-149; Hailbronner, loc. cit., especially pp. 9-10; Klein, "Sanctions by international organizations and economic communities"; de Hoogh, loc. cit., especially pp. 207-211; and, similarly, Simma, "Grundfragen der Staatenverant-wortlichkeit in der Arbeit der International Law Commission", especially p. 402. To these should be added the writers

166. The literature is very scarce on the possible delimitation of the scope of the "sanctions" that the "organized international community" may apply in case of a crime. Some, for example, stress that measures decided by United Nations organs cannot in any event have a punitive function.[266] Others are concerned at the possibility of collective measures whose implementation might ultimately be prejudicial to the interests of "innocent" States, in which case provision would have to be made for an obligation of "solidarity". Provision should be made by means of compensation machinery for equitable distribution of the burden borne by States as a result of the operation of "sanctions".[267] It is sometimes recalled that the severity of the reaction of the "organized international community" should be commensurate with the gravity of the crime— particularly so in the case of aggression.[268]

B. Problematic aspects of a possible "special regime" of responsibility for crimes

1. INTRODUCTION

167. Having summarized the main positions expressed in the Commission, in the Sixth Committee and in the relevant literature concerning the provision of regulations to govern the consequences of crimes, this section will attempt to identify the principal issues that would have to be resolved in codifying the subject. Only when the Commission has provided guidance on these issues will it be possible, on the basis of a more thorough examination of both practice and scholarship, to propose a solution for the regime of crimes for its consideration.

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who came out even more decidedly in favour of the possibility for States "not directly" injured to resort *uti singuli* to countermeasures against a State guilty of an international crime (see footnote 238 above).

[266] Dupuy, loc. cit. (footnote 234 above), especially p. 184; Cardona Llorèns, loc. cit., especially pp. 331-333, who refers primarily, however, to the possibility of applying "sanctions" like expulsion or suspension from an international organization as a consequence of a crime.

[267] Hailbronner, loc. cit., especially pp. 12-15; Doehring, "Die Selbstdurchsetzung völkerrechtlicher Verpflichtungen", especially p. 50; Delbrück, "International economic sanctions and third States", especially pp. 92-93 and 96-98. According to these writers, the measures in question are entirely forbidden, even if decided by the "organized international community", if they are prejudicial to "vital" or "essential" interests of "innocent" States.

[268] Here reference is made not so much to collective measures involving the use of armed force, as provided by Chapter VII of the Charter (and more specifically Article 42), which may, by general admission, be implemented against an aggressor State, as to another particularly severe type of "sanction" (or rather, perhaps, "guarantee of non-repetition"). According to some, if understood correctly, the "organized international community" might certainly apply sanctions of this type in the case of aggression, but not always in the case of other international crimes. According to Graefrath and Mohr, for instance,

"Another specific legal consequence in case of international crimes are the possible limitations of the exercise of sovereign rights to ensure non-repetition of the crime. After the Second World War, these limitations took the form of provisions on demilitarization, establishment of demilitarized zones, prohibition of certain weapons, in particular weapons of mass destruction, and certain types of missiles. Very similar provisions, or at least the same approach, can be found in Security Council resolution 687 (1991)." In particular, the verification procedures instituted by virtue of that resolution

"... go far beyond what has until now been applied by IAEA or what was foreseen in the draft convention against chemical weapons. The control and verification procedures are clearly part of the sanctions and the legal consequences applied by the Security Council *to ensure non-repetition of the aggression.** They can be understood as a limitation on the exercise of sovereign rights and justified as *a legal consequence in case of a crime of aggression**" (loc. cit., especially pp. 127-128).

168. As can be seen from article 19 of part 1 and article 5, paragraph 3, of part 2 of the draft as adopted on first reading and related commentaries,[269] crimes consist in serious breaches of *erga omnes* obligations designed to safeguard fundamental interests of the international community as a whole. The basic problem, therefore, is to assess to what extent the breach, seriously prejudices an interest common to all States affects the complex responsibility relationship which, as explained in the previous report,[270] arises even in the presence of "ordinary" *erga omnes* breaches.

169. A convenient approach is to distinguish an "objective" and a "subjective" viewpoint. The questions to be answered are:

(a) From the objective viewpoint, whether and in what way the severity of the breaches in question aggravates the content and reduces the limits of the substantive and instrumental consequences that characterize an "ordinary" *erga omnes* breach; and

(b) From the subjective viewpoint, whether or not the fundamental importance of the breached rule involves any changes in the otherwise unorganized and institutionally uncoordinated multilateral relations that normally arise in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrongdoing State and all other States or among the plurality of injured States themselves.

170. The presentation of each of the specific problems posed by the consequences of crimes will be based on these two sets of fundamental questions. Following the customary order what are termed the "substantive" consequences will be discussed first.

2. SUBSTANTIVE CONSEQUENCES

171. As far as cessation of the breach is concerned, crimes do not seem to present any special characteristics in comparison with "ordinary" wrongful acts (whether or not *erga omnes*).[271] This is understandable considering, first, that the content of the obligation of cessation cannot qualitatively assume greater or lesser gravity or otherwise be modified (objective aspect); and, secondly, that even in the case of delicts, what is involved is an obligation incumbent upon the responsible State even in the absence of any demand on the part of the injured State or States (subjective aspect).

172. Practice demonstrates that not only is a State which is perpetrating a crime obliged to cease its "criminal" conduct forthwith, but that there are a variety of manners in which one or more injured parties may demand cessation without the lawfulness of such demands being contested, except, of course, by the wrongdoing State.

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[269] Mr. Ago, fifth report (*Yearbook ... 1976*, vol. II, Part One (see footnote 177 above), paras. 75-154); report of the Commission on the work of its twenty-eighth session (ibid., vol. II (Part Two), pp. 95 et seq.); Mr. Riphagen, sixth report (*Yearbook ... 1985*, vol. II (Part One) (see footnote 2 above), pp. 5-8, art. 5 and commentary thereto); report of the Commission on the work of its thirty-seventh session (ibid., vol. II (Part Two), pp. 25 et seq).

[270] Fourth report of the Special Rapporteur (*Yearbook ... 1992*, vol. II (Part One)) (see footnote 79 above), paras. 127-151.

[271] See Arangio-Ruiz, preliminary report of the Special Rapporteur (*Yearbook ... 1988*, vol. II (Part One)), pp. 12 et seq., document A/CN.4/416 and Add.l, paras. 29-63); and his fourth report (*Yearbook ... 1992*, vol. II (Part One)) (see footnote 79 above), paras. 127-151.

173. By way of example, what took place in two clear-cut cases of international crimes of States, that is to say, the apartheid regime in South Africa and the invasion of Kuwait, may be recalled. Concerning the first, the demand that South Africa should put an end to its policy of systematic outrage against human rights came not only from international multilateral bodies, such as the United Nations Security Council, the General Assembly and the Economic and Social Council,[272] but also from States *ut singuli*.

174. The well-known applications made to ICJ by Ethiopia and Liberia against South Africa as administrator of Namibia (South West Africa) are examples. Both States called for an end to the practice of apartheid.[273]

175. In the case of Kuwait, virtually immediate demands for the withdrawal of Iraqi troops were lodged both by international organizations[274] and individual States.[275]

176. The same thing happened, moreover, in respect of Israeli operations against Lebanon.[276]

177. The question of what countermeasures may be adopted, and by whom, in order to obtain cessation by a State that does not comply spontaneously with cessation demands is far less self-evident. This point, however, more properly relates to the "instrumental" aspects of responsibility discussed in subsection 3 below.

178. Moving to reparation *lato sensu*, including *restitutio*, compensation, satisfaction and guarantees of non-repetition, the matter becomes more complex. A number of problems arise here in connection with both the objective and the subjective aspects.

179. Regarding the objective aspect, some of the forms of reparation, especially *restitutio* and satisfaction, are subject to certain limits in the case of mere delicts. It is therefore necessary to see whether, as a consequence of a crime, all or any such limits are subject to derogation and, if so, to what extent. In other words, it must be determined

[272] Suffice it to recall the various resolutions in which these organs have called upon South Africa to put an end to apartheid, especially (but not solely) within the framework of the procedure instituted for "gross violations" of human rights by Economic and Social Council resolution 1503 (XLVIII) or, for example, Security Council resolutions 181 (1963) of 7 August 1963, 182 (1963) of 4 December 1963 and 418 (1977) of 4 November 1977.

[273] Points 3 and 4 of the submissions presented by the two Applicant States on 19 May 1965 (*South West Africa (Ethiopia* v. *South Africa: Liberia* v. *South Africa), Second Phase, I.C.J. Reports 1966*, p. 12).

[274] Immediate demands for the withdrawal of Iraqi troops were made not only by the Security Council (resolution 660 (1990) of 2 August 1990), but also by the Council of the League of Arab States, which met in Cairo on 2 August 1990 (document S/21434 of 3 August 1990), and by the member States of the European Community (statement of 4 August 1990, document A/45/383-S/21444 of 6 August 1990).

[275] Such demands were also put forth, especially, by France (French Foreign Ministry communiqué of 2 August 1990, in AFDI, vol. XXVI (1990), p. 1041) and by Switzerland (note verbale of 22 August 1990 from the Chargé d'affaires of the Permanent Observer Mission of Switzerland to the United Nations, addressed to the Secretary-General (document S/21585 of 22 August 1990)).

[276] Demands for cessation have in fact been made both by the Security Council (especially, in resolutions 313 (1972) of 28 February 1972, 332 (1973) of 21 April 1973, 501 (1982) of 25 February 1982, 508 (1982) of 5 June 1982, 520 (1982) of 17 September 1982, 583 (1986) of 18 April 1986, 586 (1986) of 18 July 1986 and 587 (1986) of 23 September 1986) and by individual States (France, "Pratique française de droit international", AFDI, vol. XXVIII (1982), pp. 1050-1051; and the United Kingdom of Great Britain and Northern Ireland, "United Kingdom Materials of International Law", BYBIL, vol. 53, p. 534).

whether, in the case of crimes, the "substantive" obligations are more burdensome for the wrongdoing State than in the case of "ordinary" breaches.

180. A first possible derogation pertains to the excessive onerousness limitation for *restitutio*. One example that comes to mind is the great efforts South Africa has been making for some time now through its internal legal system to comply with its international obligation to eliminate the effects of the previous regime of total apartheid. Yet, the reaction of the international community is still circumspect. A number of States have decided to lift sanctions gradually and re-establish diplomatic relations only when the promised legislation is effectively passed; and they still reserve the right to assess its practical implications.

181. A second derogation might concern the prohibition of "punitive damages", of humiliating demands or of demands affecting matters generally considered to pertain to the freedom of States. There is, for example, the case of Israel, which obtained an indemnity of 3.45 billion deutsche mark from the Federal Republic of Germany by way of atonement for the Nazi persecution of Jews; the territorial amputations imposed upon Germany and Italy at the end of the Second World War, together with the elimination of any remnants of their totalitarian regimes; or, more recently, the obligations imposed on Iraq by Security Council resolution 687 (1991) of 3 April 1991, relating to the destruction of armaments and the demarcation of the borders with Kuwait.

182. A third derogation might concern demands for satisfaction or guarantees against repetition which have a major impact in an area under the domestic jurisdiction of the wrongdoing State. Examples are some of the obligations imposed upon Iraq concerning the destruction, under international control, of armaments and the institution and enforcement of no-fly zones *et similia.*

183. On the subjective side, it should be borne in mind that the substantive consequences are covered by obligations which the responsible State is required to perform only at the demand of the injured party, unlike in the case of cessation. No problem arises, obviously, with regard to the demands of the State, if any, which is the "principal victim". Indeed, if the crime was directed specifically against one or more particular States (as, for example, in the case of aggression), they would unquestionably be entitled to demand compliance with the "substantive" obligations.

184. Since, however, a crime always involves, additionally or solely, States "less directly" injured than a "principal victim", the question arises whether in the current state of international law each of those States is entitled to claim reparation *ut singuli* or whether, on the contrary, some mandatory form of coordination is required among all the injured States (to be effected, presumably, by means of institutionalized procedures), as an expression, so to speak, of the will of the "international community" or of the "organized international community". Regarding the performance of such an obligation, international practice offers examples of demands presented by individual States (other than the "principal victim", if any, of the breach) as well as by worldwide or regional international bodies.

185. Examples are the demands for *restitutio* made by France[277] and by the Council of Europe on the occasion of the Soviet intervention in Afghanistan;[278] the demand for

[277] AFDI, vol. XXIX (1983), p. 907.

restitutio addressed to Portugal by the Security Council on the occasion of numerous armed raids carried out by that State against Zambia;[279] the demand for damages addressed to South Africa by the Commission on Human Rights on behalf of Namibians who were imprisoned or missing, of their families and of the future independent Government of Namibia;[280] the demands for compensation from Israel made in favour of Iraq by the Security Council[281] and the General Assembly[282] in connection with the Israeli bombing of the Osiraq nuclear power plant; the demand addressed to Iraq by the League of Arab States to compensate the State of Kuwait for the damage caused by the Iraqi invasion;[283] and the demand for guarantees of non-repetition addressed by the Security Council to the Libyan Arab Jamahiriya in relation to the direct and indirect involvement of that country in terrorist activities.[284]

186. Combining the subjective with the objective aspects, the question also arises whether in the case of crimes the limits referred to above may under certain circumstances be overstepped, either by a claim lodged in any manner by any injured State *ut singuli* or only by claims preceded by some form of coordination/concerted action on the part of all the injured States. Such concerted action could perhaps be taken as evidence of the will of the "international community as a whole".

187. Once the *lex lata* on all these points has been clarified,[285] it should be possible to assess whether and to what extent it would be appropriate to provide *correctifs*, or radical innovations, by way of progressive development.

3. INSTRUMENTAL CONSEQUENCES: MEASURES INVOLVING THE USE OF FORCE

188. Turning now to what are termed the "instrumental" aspects of international liability for State crimes, namely to the measures that may be adopted in response to a crime, the discussion will begin with the most serious of those measures: those involving the use of force. The prime case is that of self-defence. This does not mean, of course, reopening the discussion on the admissibility of force as a means of self-defence—a problem on which the Commission has already expressed its views in the past.[286]

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[278] BYB1L, vol. 52 (1981), p. 511.

[279] Security Council resolution 281 (1970) of 9 June 1970.

[280] Commission on Human Rights resolution 1987/8 (*Official Records of the Economic and Social Council, Forty-third Session, Supplement No. 5* (E/1987/18-E/1987/60)).

[281] Security Council resolution 487 (1981) of 19 June 1981.

[282] General Assembly resolutions 36/27 and 41/12.

[283] Resolution 5041, adopted on 31 August 1990 by the Council of the League of Arab States, at its extraordinary session.

[284] Security Council resolution 748 (1992) of 30 November 1992 (especially para. 2).

[285] As will be explained in connection with the "instrumental" aspects (see point 3 below), the determination of *lex lata* might indeed pose particular problems when it comes to weighing the legitimacy of intervention by international bodies in the "management" of the consequences of certain crimes of States, in the light of general and treaty law in force.

[286] See addendum to Mr. Ago's eighth report (*Yearbook ... 1980*, vol. II (Part One), pp.51 et seq., document A/CN.4/318/Add.5-7, paras. 82-124; the Commission's commentary to article 34 of part 1 of the draft articles (*Yearbook ... 1980*, vol. II (Part Two)), pp. 52-61; the third report of the Special Rapporteur (*Yearbook ... 1991*, vol. II (Part One)) (see footnote 78 above), paras. 97-102; and his fourth report (*Yearbook ... 1992*, vol. II (Part One)) (see footnote 79 above), paras. 58-69.

The concern here is with the legitimacy of the use of force by way of reaction to a crime, notably a crime of aggression.

189. Above all, the Commission would need to clarify the content of a number of requirements traditionally considered to be conditions of self-defence, particularly immediacy, necessity and proportionality.

190. It would also have to be made clear on what terms the right of "collective" self-defence includes resort to armed force against an "aggressor" by States other than the main target of the aggression: whether, for example, such resort is legitimate only when expressly requested by the target State, whether a presumption of that State's consent suffices, or whether, in such situations, the reaction of "third" States may follow "automatically", so to speak.

191. It would be useful for the Commission to adopt a position on this series of problems even if it preferred not to lay down express provisions but rather simply to refer to the "inherent right of individual or collective self-defence": a commentary on the meaning of such "inherent right" would in fact prevent dangerous misunderstandings.

192. However, the problem of resort to force in response to an international crime is not solely a question of self-defence against armed attack. It is also a question of the admissibility of armed measures in order to bring about the cessation of crimes other than aggression. In this case, too, the problem presents above all an objective aspect. This consists in establishing whether resort to force in order to obtain cessation is or is not admissible in circumstances other than those justifying self-defence. Were it found to be admissible, it would remain to be determined, first, whether resort to force would be subject to limits and conditions; and, secondly, whether force would be admissible in response to any and every type of crime or only to certain types.

193. Among the problems which must be considered in this context are, on the one hand, those of armed support to peoples oppressed by "alien domination" or, more generally, by regimes committing grave violations of the principle of self-determination;[287] and, on the other, armed intervention against a State responsible for large-scale violations of "fundamental" human rights or the perpetration of genocide or violent forms of "ethnic cleansing".[288]

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[287] See in this connection, General Assembly resolution 3070 (XXVIII), paras. 2 and 3, and Security Council resolution 424 (1978). See also the ICJ judgment in the case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), which affirms the legitimacy of armed assistance to opposition movements in the case of civil wars, though it makes no pronouncement on assistance to national liberation movements (*I.C.J. Reports 1986*, p. 108, para. 206).

[288] It should be noted that some scholars believe that, in addition to self-defence, only humanitarian intervention would justify resort to armed force. The practice of some States seems to indicate, however, that humanitarian reasons have been adduced by the intervening State, not in isolation but in conjunction with self-defence from an armed attack. It may be useful to recall the reasons adduced by India to justify intervention in Bangladesh in 1971 (*Official Records of the Security Council, Twenty-sixth Year*, 1606th meeting, paras. 158-163). On this case see Lillich, *International Human Rights: Problems of Law, Policy, and Practice*, II, pp. 565 et seq. Another instance is the invasion of Democratic Kampuchea by Viet Nam in 1978. According to one commentator, "Viet Nam never claimed to have given military help to the rebels, nor to have intervened to re-establish human rights in Kampuchea" (Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, p. 99); see the Vietnamese statement before the Security Council in *Official Records of the Security Council, Thirty-fourth Year*, 2108th meeting, paras. 126-7

194. With regard to such cases, if the use of armed force is deemed to be admissible *de lege lata* or desirable *de lege ferenda*, the question arises in either case whether this would constitute the "typical" sanction in reaction to a crime (i.e. a reaction against the wrongdoing State under the law of State responsibility), or whether it would correspond to some other *ratio.* An example is the *ratio* underlying the reaction to circumstances resulting from "state of necessity" or "distress". Such circumstances do indeed preclude wrongfulness but, unlike self-defence, they do not authorize a direct reaction against the perpetrator of a particularly serious international breach. Such instances would fall outside the scope of the specific regime of responsibility for crimes.

195. Another problematic aspect of resort to force by way of reaction to a crime—again from the objective standpoint—is the question whether armed countermeasures are admissible when they are intended not to bring about the cessation of a crime currently in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition.

196. Reference is made, for example, to the *debellatio* of a State that started a war of aggression, to the imposition by the victorious Powers of a military occupation on its territory or to any other "sanctions" imposed by force of arms on a State required to reverse all the consequences of the crime.[289] Are measures of that kind at present legitimate? If so, may they follow upon any crime, or are they permissible only by way of reaction to a certain type of crime, specifically a war of aggression?

4. THE PROBLEM OF THE *FACULTE* OF REACTION: SUBJECTIVE-INSTITUTIONAL ASPECTS

197. Even more important—and more difficult—are the problems arising with regard to the "subjective" aspects of the instrumental consequences of crimes involving armed force. They relate essentially to the *faculté* to adopt armed measures, be they in response to aggression or possibly to crimes other than aggression.

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and 135-6. According to Ronzitti (*op. cit*., pp. 102 et seq.), humanitarian reasons would not have been invoked to justify the Tanzanian intervention in Uganda in 1979. The only justification on that occasion would have been self-defence against an armed attack (op. cit.). For other comments on the same case see Lillich, op. cit., pp. 74 et seq.

[289] The situation of Germany at the conclusion of the Second World War may be of interest in this connection. Kelsen ("The legal status of Germany according to the Declaration of Berlin", p. 518) states that

"... the legal status of Germany is not that of 'belligerent occupation' in accordance with Articles 42 to 56 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 1907".

However, it may be useful to define that status (see especially, in this connection, Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality*, pp. 602 et seq.). What is of interest for the present purposes is that the occupation of Germany was intended, among other things, to guarantee a complete change of political system as well as to preclude the possibility of German industry endangering international peace in the future.

Turning to a more recent case, the possibility of force being used to guarantee the disarmament obligations imposed upon Iraq by Security Council resolution 687 (1991) of 3 April 1991, seems to be contemplated by paragraph 33 of that resolution (which makes the ceasefire conditional on Iraqi acceptance of the terms imposed) and by paragraph 34 (which provides that the Council "remains seized of the case" and may decide "such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area").

198. The problem might be stated roughly in the following terms: does the admissibility of armed measures vary according to whether they are taken by one or more injured States *ut singuli* or by the community of States *ut universi*? In other words, might such measures be considered inadmissible if resorted to unilaterally by one or a small group of injured States, but legitimate if they were the expression of a "common will" of the international community (or of the "organized international community")?

199. This is obviously a problem central to the entire regime of crimes, and not just to the regime of armed measures aimed at cessation. It arises, as already mentioned, in connection with a number of "substantive" consequences and affects all the "instrumental" consequences whenever the regime of international crimes of States possibly involves the competence of the "international community as a whole" (or of the "organized international community").

200. Widening the analysis from the particular area of armed measures considered so far to the broader area of countermeasures in general, an attempt should now be made to identify the various facets of this "subjective-institutional" problem.

201. Practice offers more than one example of injured States dealing with the consequences of a very serious breach—especially one still in progress—not in an "unorganized" fashion (*ut singuli*) but through the intervention of an international body belonging to a "system" of which the wrongdoing State is also a member. This is especially true of the organs of the United Nations, and of the Security Council in particular, with regard to the adoption of measures. This report will deal only briefly with examples from a body of practice that will be examined in greater depth in the next report, when—thanks to the guidance expected from the Commission—an attempt will be made to provide answers to the problems presented here.

202. Suffice it to refer, for the present purposes, to the following cases of "organized" reaction to very serious breaches:

(a) Adoption of armed measures: Security Council resolution 221 (1966) of 9 April 1966, granting consent for the use of force by the United Kingdom to render effective the embargo against Southern Rhodesia; Security Council resolutions 665 (1990) and 678 (1990), of 25 August and 29 November 1990 respectively, whereby consent was given for the use of force against Iraq as "aggressor" vis-à-vis Kuwait;

(b) Adoption of measures not involving the use of force: Security Council resolutions 180 (1963) and 183 (1963) of 31 July and 11 December 1963, urging the implementation of an arms embargo against Portugal on account of its repressive policy towards its colonies; Security Council resolutions 232 (1966) of 16 December 1966 and 253 (1968) of 29 May 1968, establishing an economic embargo against Southern Rhodesia; Security Council resolution 418 (1977) of 4 November 1977, establishing an arms embargo against South Africa by reason of its apartheid policy; Security Council resolution 748 (1992) of 31 March 1992, imposing an arms embargo and an aerial communications blockade against the Libyan Arab Jamahiriya on account of its involvement in terrorist activities; and Security Council resolution 757 (1992) of 30 May 1992, deciding on a series of economic measures against the Federal Republic of Yugoslavia (Serbia and Montenegro).

203. From a number of quarters, precedents of the kind recalled in paragraph 202 above are invoked, as noted, in support of the notion that the competence to adopt sanctions against particularly serious internationally wrongful acts does not, and should not, lie with States *ut singuli*. It would or should rather lie—*de lege lata* and/or *de lege ferenda*—with the "organized international community" as represented by the United Nations, and specifically by the Security Council as the United Nations organ endowed with the greatest powers of action.[290]

204. A considered juridical answer to this question for purposes of codification and/or progressive development of the legal consequences of international crimes of States as defined in article 19 of part 1 would require an analysis of problems at the very apex of the international legal system. (The reference to a considered *juridical* answer is, of course, to distinguish it from the mere recording of what may have occurred so far with regard to given acts or situations.) These problems range from the nature of the international community and the inter-State system and the concept of the "organized international community" to the nature of the United Nations and the functions and powers of its organs. It is mainly because of the difficulty and great sensitivity of issues of such legal and political magnitude and the inability to solve them on the "simplistic" basis of identifying law with fact that this report deliberately refrains from presenting any proposals on the consequences of international crimes of States without guidance from the Commission. Indeed, for the moment, in this area more than in any other, the best that can be done is to identify the main issues on which the debate should focus.

205. Leaving aside for the moment the more general problems, the central issue is whether and to what extent the various functions and powers of United Nations organs in the areas of international law covered by article 19 of part 1 are (*de lege lata*) or should be (*de lege ferenda*) adapted juridically to implement the consequences of international "crimes" of States. Only after solving such a set of problems would it be possible to determine:

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[290] For the relevant literature see footnotes 254-268 above. In the Commission this view was shared by Mr. Ago (*Yearbook ... 1976*, vol. I, 1371st meeting, paras. 24-26, 1372nd meeting, paras. 40-45, 1376th meeting, paras. 29-33); Mr. Yasseen (ibid., 1372nd meeting, paras. 16-19); Mr. Sette Câmara (ibid., 1373rd meeting, paras. 7-10); Mr. Vallat (ibid., paras. 14-16); Mr. Martinez Moreno (ibid., paras. 23-35); Mr. Ramangasoavina (ibid., 1374th meeting, paras. 24-26); Mr. Kearney (ibid., paras. 29-39); Mr. Tsuruoka (ibid., 1-4); Mr. Rossides (ibid., paras. 27-34); Mr. Ustor (ibid., paras. 40-44); Mr. El-Erian (ibid., 1376th meeting, paras. 1-13); and Mr. Bilge (ibid., paras. 14-18). See also more recent statements on this matter in the Commission (Mr. Evensen (*Yearbook ... 1982*, vol. I, 1733rd meeting, para. 17); Mr. Ushakov (ibid., 1736th meeting, paras. 33-35 and 1737th meeting, paras. 25-26); Mr. Yankov (ibid., 1737th meeting, para. 12); Mr. Flitan (*Yearbook ... 1983*, vol. I, 1773rd meeting, paras. 2 et seq.); Mr. Al-Qaysi (ibid., 1775th meeting, paras. 1-6); Mr. Balanda (ibid., 1775th meeting, paras. 17 et seq.); Mr. Jagota (ibid., 1777th meeting, paras. 1 et seq.); Mr. Koroma (ibid., paras. 19-21); Mr. Barboza (ibid., para. 47); and Mr. McCaffrey (ibid., 1779th meeting, para. 27).

Doubts regarding the legal correctness and the political appropriateness of relying upon the machinery provided by the Charter for the maintenance of international peace and security were expressed by Mr. Castañeda (*Yearbook ... 1976*, vol. I, 1402nd meeting, para. 27); Mr. Reuter (ibid., para. 63 and *Yearbook ... 1984*, vol. I, 1861st meeting, para. 9), and Mr. Malek (ibid., 1866th meeting, para. 13). Among States a similar view was expressed by Japan (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 21st meeting, para. 8); Australia (ibid., 27th meeting, para. 20); and Spain (*Yearbook ... 1982*, vol. II (Part One)), p. 15. document A/CN.4/351 and Add.1-3, para. 4 (*a*)).

(a) De lege lata, whether and to what extent the existing functions and powers of United Nations organs (or any one of them, such as the General Assembly, Security Council, ICJ, etc.) are adequate to deal with internationally wrongful acts of the kind contemplated in article 19 of part 1, that is to say, to determine the existence, attribution and consequences of such wrongful acts;

(b) De lege ferenda, whether and in what sense the existing powers and functions of those organs should be adapted juridically to such specific tasks as determining the existence, attribution, and consequences of the internationally wrongful acts in question;

(c) De lege lata and/or *de lege ferenda*, more particularly, to what extent the above functions and powers of United Nations organs affect or should affect the *facultés*, rights or obligations of States to react to any of the internationally wrongful acts in question, in the sense of either substituting for individual reactions or legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

206. As regards the first question (para. 205 (*a*) above) it must be determined whether the competence of United Nations organs (or any one of them) to deal with the wrongful acts contemplated in article 19 of part 1 may be drawn from the Charter of the United Nations or any supervening rule of customary international law. It must be stressed, however, that the question is not simply whether United Nations organs have in fact taken some action (decision, recommendation or more concrete measures) with regard to State conduct of the kind indicated in article 19, paragraph 3. It is whether, *de lege lata*, any United Nations organs have, *as a matter of law* (written or unwritten), exercised the specific function of determining that such conduct occurred and that it constituted a crime on the part of one or more given States, and of determining the liability of the State(s) concerned and applying sanctions or contributing to the application thereof. Only on this basis could it be ascertained whether a legally organized reaction to international crimes of States is provided *de lege lata*, namely by the present structures of the "organized international community".

207. If the various kinds of international crimes contemplated in article 19, paragraphs 3 (*a*), (*b*), (*c*) and (*d*) are combined with the functions and powers of United Nations organs, it is difficult to answer the first question. Considering the purpose of the present subsection, only a few examples will be selected from what would otherwise be a longer list.

208. *Ratione materiae*, the General Assembly—the most representative body of the inter-State system—is surely, under the Charter, the competent organ for the promotion and protection of human rights and self-determination of peoples.[291] At the same time, the

[291] Under Article 13, paragraph 1 (*b*), of the Charter,

"1. The General Assembly shall initiate studies and make recommendations for the purpose of:

…

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Article 55, read in connection with Article 60 of the Charter, vests in the General Assembly the major responsibility for the discharge of the functions of the Organization in the area of international economic and social cooperation,

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...".

General Assembly is not endowed by the Charter with the type of powers which would enable it to produce an adequate reaction to violations of human rights and self-determination of peoples of the kind contemplated in article 19, paragraphs 3 (*b*), (*c*) and (*d*). In these areas the Assembly can only promote the adoption of non-binding instruments, create subsidiary bodies, and, more generally, address recommendations to States collectively or individually. At most, it can recommend to the Security Council an "intervention" on the basis of Chapter VII.

209. It would seem, therefore, that with regard, *inter alia*, to wrongful acts of the kind contemplated in article 19, paragraphs 3 (*b*), (*c*) and (*d*), the Assembly cannot go beyond non-binding declarations of unlawfulness and attribution and non-binding recommendations of reaction by States or by the Security Council.[292] For the moment, the crime contemplated in paragraph 3 (*a*) of article 19 is left aside: obviously this is a matter where the main competence does not lie with the General Assembly.

210. The Security Council, for its part, is competent *ratione materiae* for the maintenance of international peace and security and its powers under Chapter VII and Articles 24 and 25 of the Charter do indeed *in principle* enable it to provide, directly or indirectly—but *tendan-ciellement* always effectively—for an adequate reaction in the form of economic, political or military measures, first and foremost against that most serious attempt against peace which is defined in article 19, paragraph 3 (*a*), as the "crime" of aggression. Secondly, the Council may react by means of such measures against any other of the "crimes" envisaged in paragraphs 3 (*b*), (*c*) and (*d*) of article 19 which, though they may lie *ratione materiae* within the competence of the General Assembly, may come under the Council's powers whenever they fall within one of the categories covered by Article 39 of the Charter, namely when they represent a threat to the peace, breach of the peace or an act of aggression.

211. No lawyer could fail to note, however, that the Security Council has discretionary power to assess any situation involving a threat to the peace, a breach of the peace or an act of aggression, with a view to maintaining or restoring international peace and security. The Council has neither the constitutional function nor the technical means to determine, on the basis of law, the existence, attribution or consequences of any wrongful act, whether "delict" or "crime". Its discretionary competence to decide whether one of those situations exists is in principle confined to the purposes of Articles 39 et seq. of Chapter VII of the Charter. That Chapter and the other relevant Charter provisions do not seem to cover the assessment of responsibility, except for the determination of the existence and attribution of an act of aggression.

212. The above consideration, however, does not dispose entirely of the issue of the Council's competence. Although that body has not been entrusted by the drafters of the Charter with the task of determining, attributing and applying sanctions in response to the serious breaches in question, the situation at present may be different. The question may indeed be asked, in particular, whether recent practice does not demonstrate an

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On the leading role of the General Assembly in these matters see, *inter alia, Die Charta der Vereinten Nationen* (B. Simma, ed.), p. 319; Goodrich, Hambro, Simons, *Charter of the United Nations: Commentary and Documents*, pp. 453 et seq. and Guarino, *Auto-determinazi-one dei popoli e diritto internazionale.*

[292] It is doubtful that any contrary inference could be drawn from such well-known episodes as the revocation of the South West Africa (Namibia) mandate or General Assembly resolution 377 (V) on "Uniting for Peace".

evolution in the scope of the Council's competence, precisely with regard to the "organized reaction" to certain types of particularly serious internationally wrongful acts, since the stalemate which previously characterized its functioning was broken. Some recent Security Council resolutions do not seem to be easily justifiable on the basis of the powers expressly vested in it by the Charter. These resolutions include, in particular, resolution 687 (1991) of 3 April 1991, at least that part which imposes reparations on Iraq for "war damage" and establishes the modalities according to which they are to be assessed and paid; resolution 748 (1992) of 31 March 1992 in which the well-known requirements of Article 39 are interpreted so broadly as to allow measures to be taken against the Libyan Arab Jamahiriya for its failure, in substance, to extradite the alleged perpetrators of a terrorist act; and resolution 808 (1993) of 22 February 1993 on the establishment of an ad hoc international tribunal for the prosecution and trial of crimes committed by members of the various factions presently in conflict in the territories of the former Republic of Yugoslavia.[293]

213. In order to affirm that the practice in question did or does contribute to the creation or consolidation of the Council's competence in the area of State responsibility for crimes (a conclusion which would be problematic), convincing arguments need to be produced to the effect that it is a "juridically decisive" practice. It is necessary notably to prove that this practice is a law-making practice either under the Charter system (so-called United Nations law) or under general international law. It needs to be proved precisely that the practice would constitute, so to speak, either a "concrete" application of the "implied powers" doctrine to the Council's action, or the material expression of an "instant" customary rule of some degree, or a tacit agreement accepted or adopted by the members of the United Nations, which may, as such, derogate from the written provisions of the Charter. In the latter case, it should be possible, of course, to indicate and demonstrate the precise content assumed by such a rule in derogation from the Charter.

214. The only existing permanent body which, in principle, possesses the competence and technical means to determine the existence, attribution and consequences of an internationally wrongful act—including possibly a crime of State—is ICJ. It is indeed the function of the Court "to decide in accordance with international law" (Art. 38, para. 1, of the Statute); and its pronouncements—concerning, in the present case, the existence and legal consequences of an internationally wrongful act—possess "binding force ... between the parties" to the dispute (Art. 59). These two features of the Court's function—not to mention its composition—would surely make the Court more suitable for the purpose than other United Nations organs. There are, however, two sets of major difficulties deriving, *inter alia*, from other features of the ICJ system as at present constituted.

[293] Scholars have already turned their attention to the study of this recent practice of the Security Council. Mention may be made, in particular, of Cotterau, "De la responsabilité de l'Irak selon la résolution 687 du Conseil de Sécurité"; Maranhu, "The implementation of disarmament and arms control obligations imposed upon Iraq by the Security Council"; Weller, "The Lockerbie case: a premature end to the 'new world order'?"; Tomuschat, "The Lockerbie case before the International Court of Justice"; Reisman, "The constitutional crisis of the United Nations"; Bedjaoui, "Du contrôle de légalité des actes du Conseil de Sécurité"; Gaia, "Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial: A propos des rapports entre maintien de la paix et crimes internationaux de Etats". See also *The Future of International Law Enforcement: New Scenarios—New Law?, Proceedings of an International Symposium of the Kiel Institute of International Law, March 25 to 27, 1992* (Delbrück, ed.), containing a debate on writings by Reisman, Farer, Rubin and Schreuer.

215. The first set of difficulties derives from the essentially voluntary nature of any State's submission to the exercise of the Court's functions, such submission being a *direct* consequence of adherence to the Statute for only marginal purposes (such as the determination of preliminary issues). For the Court to be entitled to exercise its jurisdiction with regard to a crime, its competence would have to derive from a prior acceptance by the alleged wrongdoer of the Court's jurisdiction, in such terms as to allow one or more injured States—including probably the so-called indirectly injured States—unilaterally to summon the alleged wrongdoer before the Tribunal. This would be conditional either on the acceptance by *all States* of the so-called optional clause of Article 36, paragraph 2, of the Statute or on the injured State or States initiating the action being parties, together with the alleged wrongdoer, to otherwise subjectively limited bilateral instruments which envisage the possibility of unilateral application. The only other way to empower the Court to make a ruling would be through the ad hoc acceptance of its jurisdiction by the alleged wrongdoer itself, which is improbable.

216. A second set of difficulties (the list is confined to those that are most easily apparent) concerns the almost total absence, alongside ICJ, so to speak, of organs juridically empowered to:

(a) Investigate the facts in the presence of which the existence of an internationally wrongful act and its attribution could be preliminarily ascertained;

(b) Play the role of "public prosecutor" in bringing the case to Court; and

(c) Determine the "sanctions" and impose the implementation of the Court's supposed "penalty" (except for the Security Council's function under Article 94 of the Charter).

217. In particular, the implementation of the Court's ruling on a State's liability would escape any control, so to speak, of the Court itself. Any "sanction" other than the mere identification of the breach and its attribution would thus have to be determined and applied either by the injured party or parties or be left to the discretionary action of other United Nations bodies.

218. The final question is whether and in what sense the existing functions and powers of United Nations organs should or could be juridically adapted to such specific tasks as determining the existence, attribution and consequences of international crimes of States (see paragraph 202 (*b*) above). Although this is the issue on which guidance from the Commission is most anxiously awaited, a few suggestions will be made as to the possible greater involvement of the Security Council in the "organized reaction" to State crimes.

219. As everybody knows, the Security Council is an organ with a restricted membership, in which some members enjoy a privileged status for the purpose of collective action. A question that naturally arises—if it is true that the "international community as a whole" has competence to impose sanctions in response to State crimes—is whether the Security Council, as at present constituted and functioning, is truly capable of giving expression, through its deliberations, to the "will" of that community?

220. The Security Council is a political body entrusted with the essentially political function of maintaining peace. This entails a number of consequences which may be summarized as follows:

(a) The Council operates on a highly discretionary basis. It acts neither necessarily nor regularly in all situations that would seemingly call for the exercise of its competence. It operates on the contrary in a selective manner;

(b) The Council is not bound to use uniform criteria in situations which may seem to be quite similar. Consequently, crimes of the same kind and gravity may be dealt with differently or not at all;

(c) The very nature of the Council's determinations seems to exclude any duty on its part to substantiate its decisions, its action or its inaction. The discretionary and possibly arbitrary character of its choices is thus aggravated by the fact that the lack of substantiation precludes present or future verification of the legitimacy of its choices.

221. These problematic features are perhaps acceptable—although not unreservedly—as the unavoidable drawbacks of the prevention and repression of aggression and other serious breaches of the peace. In such instances, where a timely reaction is indispensable, it is possible to sacrifice, to some degree, the objective assessment of any guilt and liability to the compelling need to safeguard the peace, reduce bloodshed and destruction and maintain a minimum degree of order. This comes very close to the *vim vi repellere* function which is typical of self-defence and, for want of a better solution, it is acceptable for a political body's *vis* to be deployed without the guarantees of a judicial process, which is inevitably problematic and mainly too slow.

222. Be that as it may with regard to aggression, the propriety of over-reliance on political bodies for the implementation of liability for State crimes becomes highly questionable with regard to the other instances contemplated in article 19, paragraph 3. Wrongful acts of the kind described in paragraphs 3 (*b*), (*c*) and (*d*) should be handled by judicial means—at least *de lege ferenda.* The history of national criminal law shows that once the repression of criminal offences is entrusted to organs that are centralized to some degree, the action of those organs is almost invariably characterized by such features as:

(a) Submission to the rule of law, procedural as well as substantive, no ad hoc criminal law provisions or extraordinary or "special" tribunals normally being tolerated in a civilized society;

(b) Regular, continuous and systematic conduct of criminal prosecutions and trials as evidenced primarily by the mandatory nature of the action of criminal law institutions;

(c) Impartiality—or "non-selectivity"—of such action with regard to the rulings of criminal courts and also, primarily, with regard to the investigation and prosecution of any known crime.

223. For the reasons set forth above, the nature of the Security Council's action—given the relevant features and mode of action of that organ—does not seem to be such as to meet the elementary, but fundamental, requirements of criminal justice referred to above. Were the Commission to suggest in its draft—*de lege ferenda*—that the task of implementing the international community's "organized reaction" to crimes of States should, in the main, remain with the Security Council, it would have

to devise ways and means of reducing the serious gaps represented by the factors mentioned.[294]

224. A further matter on which guidance from the Commission is desirable relates to the kind of dispute settlement provisions to be included in part 3 of the draft in order to cover controversies arising in connection with a State crime. This matter, dealt with in article 4 (*b*) of part 3 as proposed by Mr. Riphagen in 1985-1986,[295] is not covered by the draft articles of part 3 (and annex thereto) proposed in paragraph 106 above. The Commission should consider the possibility of improving Mr. Riphagen's proposals.

225. A last issue (identified in paragraph 205 (*c*) above) is the relationship between the reaction of the "organized community" through international bodies, on the one hand, and the individual reactions of States, on the other hand. Indeed, the recognition *de lege lata* or proposed recognition *de lege ferenda* of the competence of the "organized community" to adopt measures against a "criminal" State poses the problem of harmonizing the exercise of that competence with the carrying out of those measures (be they many or few, armed or non-armed) which all or certain injured States might still be entitled to adopt unilaterally (*uti singuli* or through regional arrangements) against any given crime. Leaving aside well-known cases of aggression (and consequent self-defence), there have been more than a few cases in which both "institutionalized" measures (originating in worldwide or regional organizations) and unilateral measures have been adopted (not always in an orderly fashion) on the decision of individual States or groups of States in reaction to the same crime. Two examples will suffice: one concerns the sanctions against South Africa,[296] and the other the measures taken against the Federal Republic of Yugoslavia (Serbia and Montenegro) on the decision of the Security Council (resolutions 757 (1992) and 781 (1992) of 30 May and 9 October 1992, respectively)

[294] A number of *correctifs* to the current decision-making procedures of the Security Council, with particular reference to its role in the "organized reaction" against major breaches, are being envisaged by some of the commentators cited (but see also the less recent proposals put forward by the writers cited in footnotes 263 and 264 above. Some writers propose, for example, resort to *avis préventifs* of ICJ prior to Security Council action (Simma, *The Future of International Law Enforcement: New Scenarios—New Law?, Proceedings of an International Symposium of the Kiel Institute of International Law, March 25 to 27, 1992*, p. 145, and Klein, "Paralleles Tätigwerden von Sicherheitsrat und Internationalen Gerichtshof bei friedensbedrohenden Streitigkeiten", pp. 481 et seq.) A more substantial contribution by ICJ for the control of legality of the Security Council action (by broadening the Court's competence either *ratione personae* or *ratione materiae* is suggested also by Bedjaoui, loc. cit., pp. 88 et seq. Other writers instead propose a more incisive role for the General Assembly, for instance, Rezek, in a speech delivered on 2 July 1991 at the eleventh Gilberto Amado Memorial Lecture, on the theme of "International law, diplomacy and the United Nations at the end of the twentieth century" and Reisman, loc. cit. The latter proposes the setting up of an ad hoc committee of the Assembly.

[295] See footnote 2 above.

[296] Numerous States and international organizations adopted economic measures against that country during the 1980s in reaction to its policy of apartheid (see, for example, the measures decided by the European Community, in ILM, vol. XXIV (1985), p. 1479; those of Canada, France, Israel, Japan, Kenya, the Scandinavian countries, the United Kingdom of Great Britain and Northern Ireland and the United States of America, RGDIP, "Chronique...", vol. LXXX (1986), pp. 173 et seq., and ibid., vol. LXXXI (1987), pp. 587 et seq., especially pp. 916-917). The Security Council, in resolution 569 (1985) of 26 July 1985, took the opportunity to praise "Those States which have already adopted voluntary measures against the Pretoria Government", urged them to adopt new provisions, and invited those which had not yet done so to follow their example.

and other bodies and, individually, by some States.[297] Such cases also raise multiple and difficult issues.

5. MEASURES NOT INVOLVING FORCE: THE PROBLEM OF ATTENUATING THE LIMITS ON RESORT TO COUNTERMEASURES

226. Resort to measures short of force in reaction to a crime, unlike the adoption of measures involving force, does not give rise to questions of admissibility, such questions being generally settled in the affirmative with respect to any *erga omnes* breach. Rather, the problem which arises here is the possibility of *more serious aggravation* measures being taken by way of reaction to crimes as compared to delicts. Such measures may result from the removal or the attenuation of the conditions or limitations circumscribing resort to countermeasures in reaction to ordinary wrongful acts (delicts). Reference is made here to both "substantive" and "procedural" conditions and limitations.

227. Regarding the "procedural" limits—namely the conditions of the type described or implied in articles 11 and 12 of part 2 of the draft as proposed in 1992[298]—the question arises in particular whether or not in the case of crimes resort to countermeasures is or should be admissible even in the absence of prior notification and prior to the implementation of available dispute settlement procedures. It may, indeed, be asked whether for crimes, in contrast to "ordinary" breaches, there should still be a need to fulfil such preliminary requirements, as some seem to feel.[299] A recent case of the truly sudden adoption of measures occurred following the invasion of Kuwait by Iraq. No fewer than 15 States, in fact, adopted economic measures on their own a few days after the invasion, before any attempt was made to resolve the question through dispute settlement machinery. Those measures even preceded the adoption of measures by the Security Council itself.[300]

228. A first question here is whether the presumed "special" regime of crimes is not in reality ascribable either to the particular nature of the measures envisaged—for example, "interim measures" or any other measures admissible even for mere delicts as long as they are compatible with the simultaneous or subsequent resort to amicable settlement procedures[301]—or to the particular situation brought about by the breach in the particular case—for example, a state of necessity or situation of distress—that is to say, circumstances precluding lawfulness, regardless of the existence of a crime or even of a delict.

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[297] Regarding the measures adopted by the London stage of the International Conference on the former Yugoslavia (26-27 August 1992), see ILM, vol. XXXI (1992), pp. 1539 et seq. Mention must be made in this connection of paragraph 4 of Security Council resolution 770 (1992) in which the Council requested States to report to the Secretary-General on measures they are taking in coordination with the United Nations to implement the resolution.

[298] See footnote 153 above.

[299] On this question, see paragraph (3) of the commentary to article 30 of part 1 of the draft (*Yearbook ... 1979*, vol. II (Part Two), p. 116). See also the authors cited in footnotes 234-236 and 248-249 above).

[300] See *The Kuwait Crisis: Sanctions and their Economic Consequences*, D. L. Bethlehem, ed. (Part One), *Cambridge International Document Series*, vol. 2, 1991, p. xxxiii.

[301] See draft article 12, para. 2 (*b*) and (*c*) (Fourth report, *Yearbook ... 1992*, vol. II (Part One) (footnote 79 above), para. 52).

229. Secondly, if resort to countermeasures in the case of a crime was found to be subject to attenuated or minimal "procedural" conditions, it would also be necessary to determine whether this applies to any type or only to certain types of crimes: for example, those "which have a continuing character" and are still in progress or which violate principles essential to the maintenance of international peace and security.

230. As regards the "substantive" limitations, they may conceivably be attenuated with regard to the admissibility of:

(a) Extreme measures of an economic or political nature;
(b) Measures affecting the independence, sovereignty or domestic jurisdiction of the wrongdoer;
(c) Measures affecting "third" States;
(d) "Punitive" measures.

A brief illustration of these four possibilities is set out below.

231. As regards point (*a*), coercive measures of an economic or political nature could be one important case where attenuated limits might apply. If it is true that it is not permissible to resort to measures of economic strangulation in respect of a State that has committed a mere delict, is it equally true in respect of a State that has committed a crime, especially if it does not desist from the unlawful conduct?

232. International practice is not wanting in indications that bespeak a more severe configuration of economic measures in the case of crimes. Suffice it to recall Security Council resolutions 661 (1990), 665 (1990) and 670 (1990) of 6 and 25 August and 25 September 1990, respectively, relating to severe economic measures against Iraq, and resolutions 713 (1991), 757 (1992) and 787 (1992) of 25 September 1991, 30 May and 16 November 1992, respectively, relating to economic measures against the Federal Republic of Yugoslavia (Serbia and Montenegro).

233. With respect to point (*b*), another example of attenuated limits might concern the prohibition of measures affecting the independence, sovereignty or domestic jurisdiction of the wrongdoing State. Examples could be forms of direct interference in the target State's trade relations and the submission to the jurisdiction *ratione personae* [of the injured State] of responsible officials of the target State, who would otherwise be protected by immunity.

234. In the latter case, the problem would obviously be linked to that of individual responsibility for war crimes, crimes against peace and crimes against humanity. From the standpoint of this report, however, it is simply necessary to ascertain whether the prosecution of individual perpetrators by States injured by an international crime can also properly be considered a lawful form of sanction against the wrongdoing State.[302]

[302] This might be a case of the exercise of jurisdiction that would otherwise be "inadmissible" with respect to an official who was the actual perpetrator of conduct that constituted (or contributed towards constituting) an international crime of State. Pointers along these lines might be found, on the one hand, in the recent jurisprudence of the United States courts (from the *Filartiga* v. *Pena-Irala* case (see *Federal Reporter, Second Series*, St. Paul., Minn., vol. 630, 1981, pp. 876 et seq.) though this relates to civil jurisdiction, and, on the other, in the provision of obligations—primary obligations—to punish (or extradite) individuals responsible for wrongdoing contemplated by important treaties, for instance, in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide,

235. As regards point (*c*), a further possibility relates to the admissibility of measures prejudicial to the rights of States other than the wrongdoing State. As proposed in draft article 14, paragraph 1 (*b*) (iv),[303] the legitimacy of countermeasures against a wrongdoer in the case of delicts does not extend to countermeasures involving third States. Can that limit be overstepped in reacting to a crime? It is indeed quite possible that, owing to the economic interdependence of States, the adoption of collective measures may be detrimental not only to the wrongdoing State but also to States having no connection with the commission of the crime. Can such a consideration prevent the adoption of measures? Or, does it simply, as some maintain, call for simultaneous or subsequent measures of "solidarity" vis-à-vis the affected "innocent" States?

236. The question has been raised more than once before in the Security Council: in the case of Southern Rhodesia, for example, when the United States of America recalled that the imposition of an embargo must not affect the rights of neighbouring States;[304] and more recently, when China abstained from voting in favour of resolution 757 (1992) of 30 May 1992 (calling for an economic embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro)) because it deemed the adoption of economic measures inappropriate owing to their possible repercussions on third States.[305] Security Council resolution 253 (1968) of 29 May 1992, toughening the embargo against Southern Rhodesia, and resolution 748 (1992) of 31 March 1992, whereby the Council adopted economic measures against the Libyan Arab Jamahiriya for involvement in international terrorist activities, moreover, seem to speak in favour of some sort of protection of the interests of "innocent" States.[306] The problem of the effects of economic sanctions on third States also arose in connection with the freezing by the United States of Iranian assets deposited with foreign branches of United States banks.[307]

237. Regarding point (*d*), attenuated limits are also conceivable with respect to the "functional" aspect of the measures in question. While it is true that in the case of less serious wrongdoings, any "punitive" aim plays a minor role as it is subsumed by the "substantive" content of responsibility (cessation, reparation *lato sensu*, guarantees of

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article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Regarding prosecution in the case of individual responsibility for violations of international humanitarian law, attention should also be called to Security Council resolution 808 (1993) of 22 February 1993. After recalling its previous request for cessation ("that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law"), the Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".

[303] See fourth report of the Special Rapporteur (*Yearbook ... 1992*, vol. II (Part One)) (footnote 79 above), p. 35.

[304] The representative of the United States of America was referring in particular to Zambia (see *Official Records of the Security Council, Twenty-first Year,* 1267th meeting, para. 71).

[305] See document S/PV.3082 of 30 May 1992, pp. 8-10.

[306] On Security Council resolution 748 (1992) and the Lockerbie case see, particularly, Graefrath, "Leave to the Court what Belongs to the Court: The Libyan case"; Arcari, "Le risoluzioni 731 e 738 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace", pp. 932 et seq.; Tomuschat, loc. cit.; Sciso, "Può la Corte internazionale di Giustizia rilevare l'invalidità di una decisione del Consiglio di sicurezza?"; and Bedjaoui, loc. cit., especially p. 106.

[307] See, ILM, vol. XX, No. 2 (1981), pp. 414 et seq., pp. 769 et seq. and pp. 923 et seq.

non-repetition), is it not possible that the measures adopted against the perpetrator of a "crime" may have more than a strictly reparatory function?—as practice seems to suggest in some cases, in particular, but not only, in the case of aggression.

238. It is hardly necessary to recall, for example, how, once the invasion of Kuwait by Iraq had been brought to an end and hostilities suspended, the United States several times threatened and actually took action against Iraq in order to make it comply with the obligations of guarantee and reparation imposed by Security Council resolution 687 (1991) of 3 April 1991. The severity of such armed measures would be difficult to understand from the mere perspective of performance of the specific obligations imposed upon Iraq or of proportionality with (presumed) non-performance.[308] It should be borne in mind, however, that the Security Council itself had decided in resolution 687 (1991) "to remain seized of the matter", so as to be able to take such further steps as may be required for the implementation of the resolution and to ensure peace and security in the area.

239. In addition to the "objective" aspect considered so far for non-armed as well as armed measures, the "subjective" aspect, most notably the "institutional" aspect, must be addressed. The only way this problem differs from that posed by armed reactions lies perhaps in the less dangerous character of the measures involved and, consequently, in the lesser concern over the risk of abuse or *of ultra vires* actions, be it in the unilateral response of the injured States or the response of organs supposedly representing a "common will" of States or of the international community.

240. Without again developing this point in detail, it is recalled that such "subjective-institutional" questions with regard to non-armed measures might roughly be formulated in the following terms:

(a) First of all, does the possible attenuation of the limits on resort to "peaceful" countermeasures apply only to the "principal victim" of a crime (if any), or would it benefit all States injured in any way? Or does not (*de lege lata*) or should not (*de lege ferenda*) the entire handling of any countermeasures in the case of crimes lie rather with the "organized international community"?

(b) If such "collective" competence exists—or ought to be provided for—in respect also of measures not involving the use of armed force, would it be an "exclusive" or only a "primary" competence?

(c) In the latter hypothesis, in what manner would the "collective" competence be coordinated with the residual *faculté* of unilateral action on the part of individual injured States (or groups of injured States)?

(d) Lastly, through which "collective" or "institutional" procedures would the "common will" of States appropriately be expressed?

6. THE PROBLEM OF AN "OBLIGATION TO REACT" ON THE PART OF INJURED STATES

241. A last set of problems is that of the possible duty (as distinguished from the *faculté*) of injured States to take measures against the perpetrator of an international

[308] See, for example, President Bush's statement reported in the *United States Department of State Dispatch: Bureau of Public Affairs*, vol. 2, No. 39, 30 September 1991, p. 718.

crime. The reference here is to the kinds of obligations singled out by Mr. Riphagen,[309] the foremost among them being the obligation not to recognize as "legal and valid" the acts of the wrongdoing State pertaining to the commission of the breach or the follow-up thereto.

242. International practice shows that States often feel the requirement not to recognize the legal effects of situations produced by a wrongful act, especially an act of aggression. Without going too far back in time, mention may be made of the provision of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[310] that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal", a principle subsequently reiterated by the General Assembly in the Definition of Aggression.[311] The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations[312] may also be recalled. Another example is provided by the repeated declarations of illegality both by States and international organs, concerning Israeli "governmental measures" in respect of the occupied territories and the city of Jerusalem.[313] Under the heading of consequences of aggression, the statements of non-recognition of the legal effects of the annexation of Kuwait by Iraq may be recalled, in particular Security Council resolutions 661 (1990), 662 (1990) and 670 (1990) of 6 and 9 August and 25 September 1990, and the positions taken by the Organization of the Islamic Conference,[314] the League of Arab States,[315] and European Community.[316]

243. Regarding breaches other than aggression, reference should be made to Security Council resolution 217 (1965) of 20 November 1965, calling upon States not to recognize the "illegal authority" of the racist settler minority in Southern Rhodesia; Security Council resolution 264 (1969) of 20 March 1969 on actions of South Africa

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[309] See the sixth report of Mr. Riphagen (*Yearbook ... 1985*, vol. II (Part One) (footnote 2 above)), p. 13, especially article 14 and the commentary thereto.

[310] See footnote 138 above.

[311] See footnote 252 above.

[312] General Assembly resolution 42/22, annex.

[313] See, on the Arab and Palestinian territories occupied in 1967, Security Council resolutions 242 (1967) and 465 (1980) of 22 November 1967 and 1 March 1980, respectively; on the status of Jerusalem, Security Council resolution 478 (1980) of 20 August 1980, General Assembly resolution 35/169 E, the statement by Switzerland (Caflisch. "La pratique suisse en matière de droit international public 1980", *Annuaire suisse du droit international*, 1981, especially p. 277) and the declaration of the nine European Community member countries (*Bulletin of the European Communities*, vol. 13, No. 6, 1980, p. 10); on the occupied territories in the Golan Heights, see Security Council resolution 497 (1981) of 17 December 1981, General Assembly resolution ES-9/1, the statement of the Belgian representative to the General Assembly on behalf of the European Community (*Official Records of the General Assembly, Ninth emergency special session, Plenary meetings*, 5th Meeting, paras. 22-33), the relevant statements of the British Foreign Minister (BYBIL, 1983, vol. 53, pp. 532 et seq.), and of the Permanent Representative of France to the Security Council (*Official Records of the Security Council, Thirty-sixth Year*, 2317th meeting, paras. 88 to 92) and resolution 1990/3 of the Commission on Human Rights.

[314] Communiqué of the Nineteenth Ministerial Conference of the Organization of the Islamic Conference of 4 August 1990 (see document S/21448 of 10 August 1990).

[315] Resolution adopted by the extraordinary Arab summit held in Cairo on 10 August 1990 (see document S/21500 of 13 August 1990).

[316] Statement of 4 August 1990 on the invasion of Kuwait by Iraq, issued by the 12 member States of the European Community (see document A/45/383-S/21444 of 6 August 1990, annex); and statement of the extraordinary session held in Brussels (see document A/45/409-S/21502 of 13 August 1990, annex).

in Namibia; and General Assembly resolution 47/20 of 23 November 1992, adopted subsequent to the attempted illegal replacement of the constitutional President of Haiti, which "[r]eaffirms as unacceptable any entity resulting from that illegal situation".

244. In addition to the duty of non-recognition, mention is also made of the less clearly delineated obligation not to help or support the wrongdoing State in maintaining the situation created by the unlawful act. International practice does show signs of the possible existence of an *opinio juris* in favour of a duty of States not to assist a wrongdoing State in enjoying or preserving any advantages resulting from acts of aggression and other major breaches.

245. Examples are Security Council resolution 269 (1969) of 12 August 1969, which "calls upon all States to refrain from all dealings with the Government of South Africa purporting to act on behalf of the Territory of Namibia"; the Council's call to all States in resolution 465 (1980) of 1 March 1980 "not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories"; and the more peremptory proclamation of the General Assembly that "international responsibility" would be incurred by "any party or parties that supplied Israel with arms or economic aid that augmented its war potential".[317] Worth noting in connection with the same situation are the statements of the League of Arab States,[318] the Non-Aligned Movement[319] and of OAU.[320]

246. Another significant case is that of the military and financial support provided by the United States of America to South Africa in its aggression against, and occupation of, part of the territory of Angola. In addition to the individual protests on the part of Angola, Cuba and the Soviet Union,[321] there is also the reprobation of the General Assembly, which affirms the view that the occupation of southern Angola by the racist regime was in large part facilitated by the policies pursued by the United States Administration in the region, especially its support for the armed criminal bandits of the União Nacional para a Independência Total de Angola and its policies of "constructive engagement" and "linkage".[322]

Recent confirmation of a possible *opinio juris* on the "duty not to assist" is to be found in the reiteration of the obligation of non-assistance to Iraq by Security Council resolution 661 (1990) of 6 August 1990 and the decision of the Government of the Czech and Slovak Federal Republic (taken on 3 August 1990, prior to the adoption of that resolution) to suspend "all supplies of military character to the Republic of Iraq". At the same time, it stopped "delivering also all other items that could be used by Iraq for military purposes".[323]

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[317] General Assembly resolution 38/180 E.

[318] Resolution of the Council of the League of Arab States of 11 June 1981.

[319] Communiqué transmitted to the United Nations on 16 June 1981 (document S/14544 of 16 June 1981, annex).

[320] The Council of Ministers of OAU recently requested the United States of America to do everything possible to prevent the settlements of migrant Jews in the occupied Palestinian and Arab territories (resolution 1277 (LII), 3-7 July 1990).

[321] See document A/41/218-S/17921 of 14 March 1986 (annex) and S/17931 of 20 March 1986 (annex).

[322] General Assembly resolution 4I/35 A, para. 12.

[323] See *The Kuwait Crisis: Sanctions and their Economic Consequences* (footnote 300 above), p. 101.

247. Attention should also be called to the increasingly pronounced trend in recent years in the European Community to suspend economic cooperation agreements in the case of serious and persistent violations of human and peoples' rights.[324]

248. General mention is also made of the obligations of States not to interfere with the response to a crime on the part of the "international community as a whole" and to carry out such decisions as may be adopted by that community in connection with the imposition of sanctions against a crime.

249. Two questions should not be overlooked in considering such obligations by way of codification or progressive development:

(a) First, it should be ascertained whether States adopt such behaviour in compliance with a "special" obligation to react to a crime or merely in the exercise of their *faculté* to apply countermeasures of a similar or identical nature or content against the wrongdoing State;

(b) Secondly, to the extent that such behaviour is found (or made) to be the result of an obligation, it should be clarified whether the obligation is provided for under the general law of State responsibility as a response to a State crime or is only indirectly related to the occurrence of a wrongful act. The obligation may derive, in the latter case, from "primary" rules establishing obligations of institutionalized or non-institutionalized cooperation among the States involved, obligations in the absence of which the occurrence of the crime would not lead to collective or concerted action.

C. International criminal liability of States, individuals or both?

250. Were it not for the presence of article 19 in part 1, it might be assumed that the Commission's work on international responsibility is based upon an implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a criminal responsibility of individuals, on the other. Despite the relativity of the distinction between "civil" and "criminal" responsibility,[325] this would seem roughly to correspond to the scope of the draft articles on State responsibility (article 19 of part 1 excepted), on the one hand, and the draft Code of Crimes against the Peace and Security of Mankind, on the other hand. States would only incur civil liability for the breach of their obligations under the law to be codified and developed by the draft articles on State responsibility. Criminal liability would only fall on individuals under the draft Code, either by virtue of international rules directly applicable to individuals or of rules to be grafted by States onto their legal systems as a part of uniform criminal law.[326]

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[324] See the Council of Europe resolution of 28 November 1991 (*Bulletin of the European Communities*, vol. 24, No. 11, p. 124). See also the resolution of the ACP-CEE Joint Assembly suspending aid and forms of cooperation vis-à-vis Haiti, and the European Parliament resolution of 22 January 1993 in which the same measure was requested with respect to Equatorial Guinea.

[325] Learned and thought-provoking discussions of this relativity (in municipal and international law) are to be found in the remarkable works of Spinedi, mainly in her thorough presentation in "International Crimes of State: The Legislative History" (footnote 170 above) and more particularly in her "Contribution à l'étude de la distinction entre crimes et délits internationaux" (footnote 239 above) especially pp. 19 et seq. and 28 et seq.

[326] After an initial phase of indecision as to whether States themselves could be held liable for the crimes contemplated by the draft Code of Crimes against the Peace and the Security of Mankind,

While individuals are unquestionably amenable in principle to criminal justice, States would seem to be in a different situation. Any kind of liability of States would seem to be excluded in principle (except under article 19) from punitive sanctions either simply because of their collective nature (*societas delinquere non potest*), because they are not subject to punishment, or because criminal liability would be incompatible with the majesty of a sovereign State.[327] The liability of States under the draft articles on State responsibility is indeed understood by the majority of Commission members at present as being strictly confined to the obligation to make reparation, no punitive function being implied.[328] Within the framework of State responsibility, draft article 19 may thus be viewed as inconsistent.[329]

251. It is not possible to share unconditionally either the view that States would, by nature, not be subject to criminal responsibility under present international law or the view—which only partly overlaps it—according to which international State responsibility would be confined *de lege lata* within the narrow analogy with the *responsabilité civile* (civil liability) of national law. Despite the *prima facie* exclusivity of the municipal civil law analogy, State responsibility under international law also presents analogies with municipal criminal law. But before turning to that, the first point, namely the alleged incompatibility of criminal responsibility with the general nature of the State, will first be discussed.

252. The principal cause of the alleged incompatibility is the maxim *societas delinquere non potest.* This maxim is certainly justified, to some extent in the case of juridical persons under municipal law and of the State itself as a *personne morale* of national law. It is very doubtful, however, that it is justified in the case of entities such as States as "international persons". For entities such as these, the maxim is as untenable in theory as it is in practice. In theory, the reason why *societas delinquere non potest* resides

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the work on this draft has for some time now been based on the clear assumption that the Code will only cover crimes of individuals, albeit mainly, if not exclusively (considering the nature of the offences contemplated), those occupying positions of responsibility within the State structure.

[327] The maxim *societas delinquere non potest* was evoked by a considerable number of States opposing the adoption of article 19 of part 1. For Austria,

"There could be no doubt that the Commission was suggesting a radical change in the basic concept of State responsibility by introducing the notion of 'international crime', whereas under contemporary international law that notion had been reserved exclusively for individual penal responsibility. Legal doctrine had long ago rejected the idea of collective guilt and collective punishment. It would be unfortunate if there were a revival of that obsolete idea, as a result of establishing the international criminal liability of States" (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 20th meeting, para. 2).

France held that

"to establish a new type of State responsibility would be to establish a sort of collective criminal responsibility, which was contrary to the modern penal law" (ibid., 26th meeting, para. 7). According to Israel,

"to introduce the notion of an international crime for which the State would be accountable would be a retrograde step and a breach of the time-honoured maxim *impossibile est quod societas delinquat*" (ibid., 28th meeting, para. 17).

A more nuanced view of the undesirability of criminalizing States was held by the United States (ibid., 17th meeting, paras. 8-12); Japan (ibid., 21st meeting, para. 8); Portugal (ibid., 23rd meeting, para 17); the Federal Republic of Germany (ibid., 24th meeting, para. 71); and Australia (ibid., 27th meeting, para 20).

[328] Somewhat contradictorily, a punitive function would have to be excluded (in the form of punitive damages or otherwise) even from such forms of reparation with the obvious character of sanctions as the various kinds of satisfaction and guarantees of non-repetition.

[329] Cf. Spinedi, loc. cit. (footnote 230 above), especially pp. 9-19.

essentially in the "collective", abstract, legal nature of juridical persons as opposed to the physical unity of natural persons. Both as a collective entity and as an instrument of legal relations among natural persons, the juridical person—for example, a private company—is to some extent not subject to penalty, either because it cannot be the subject of physical penalties or because criminal responsibility is attached to its representatives or members. This difficulty, however, is surely not an absolute one, and there are instances of criminal liability of corporations. However, it is more difficult to conceive of the criminal responsibility of a State as a juridical person of national law. The reasons are too obvious to expand on them here.

253. States as international persons, however, are a different matter. Although they present themselves as collective entities, they are not quite the same thing vis-à-vis international law as the *personnes morales* of municipal law. On the contrary, from the viewpoint of international law they seem to present the features of merely factual collective entities.[330] This obvious truth, though concealed by the rudimentary notion of juridical persons themselves as factual collective entities, finds its most obvious manifestation in the commonly held view that international law is the law of the inter-State system and not the law of a world federal State.

254. Coming now to the second cause of alleged incompatibility, however firm the belief that the liability of States which the draft is intended to cover does not go beyond the strict area of reparation, State practice shows that the entities participating in international relations are quite capable of criminal behaviour of the most serious kind. In the words of Drost (a strong opponent, at the same time, of any 'criminalization' of States), "[U]ndoubtedly, the 'criminal' State is far more dangerous than the criminal person by reason of its collective power".[331] The study of international relations—whether from the viewpoint of politics, morality or law—also shows that just as such entities may act wrongfully towards one another, so also they may not infrequently be treated as wrongdoers by their peers, the treatment being implicitly or explicitly—and often very seriously—punitive.[332] In addition to the maxim *societas delinquere non potest*, it is important not to be misled by the consideration that States under international law, unlike individuals under municipal law, are not subject to institutions such as public prosecutors and criminal courts. Of course, the persistently non-institutionalized structure of the inter-State system ordinarily confines the responsibility relationship between injured State and wrongdoing State within a bilateral, purely horizontal relationship, no part normally being played by any third party or, less still, any authority. It follows that any

[330] Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", Appendix, pp. 629 et seq., especially para. 123; "State fault and the forms and degrees of international responsibility: questions of attribution and relevance", especially pp. 29-31; and "Le domaine réservé—L'organisation internationale et le rapport entre droit international et droit interne: Cours général de droit international public", especially pp. 439 et seq., especially pp. 443-446.

[331] Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, vol. I, p. 294. After a strongly argued plea against any idea of criminal liability of States—a plea based essentially upon the maxim *societas delinquere non potest*—he admits however that "criminal" States are actually the target of "political" measures (which he distinguishes from legal penalties), which it is very difficult not to recognize as comprising many forms of severe punishment. Drost's list is reproduced in paragraph 255 below, and again considered in paragraph 262 (*c*). But Drost is just one example among many.

[332] See Drost (op. cit.). Even Graefrath and Mohr, loc. cit., who also oppose the possibility of inflicting punitive sanctions on States, nonetheless accept the legitimacy of measures which are severely punitive in substance.

reaction to an internationally wrongful act remains in principle a matter of choice for the injured party, whatever the risks such a choice may entail. It is for the injured party to claim cessation, reparation and/or satisfaction and to resort to reprisals in order to pursue such ends. Liability for internationally wrongful acts would thus seem prima facie to fit exclusively within the civil liability, private law model of municipal law systems. However, despite this prima facie evaluation, it is not difficult to realize, by digging beneath the surface of the "injured State/wrongdoer State relationship", that the content of that relationship is not purely "civil" or "reparatory"—even assuming an absolute distinction could be made with criminal responsibility. Even in the case of the most ordinary wrongful acts (other than those contemplated in article 19 of part 1), the absence of a punitive element is only apparent.

255. In the most ordinary cases of internationally wrongful conduct, the penalty is either implicit in the fact of ceasing the unlawful conduct and making reparation by restitution in kind or compensation, or visible in that typically inter-State remedy which is known as "satisfaction". In the most serious cases, such as those calling for particularly severe economic or political reprisals or an outright military reaction, followed by a peace settlement on terms of varying severity, the punitive intent pursued and achieved by the injured States is manifest. Suffice it to refer again to Drost, who candidly singles out the various forms of "political" measures (against States), which he distinguishes from "legal penalties" (against individual leaders), as follows:

> These political measures, twice collective in being collectively determined and enjoined as well as collectively borne and endured, take on all sorts of forms, ways and means: territorial transfer; military occupation; dismantling of industries; migration of inhabitants; reparation payments in money, goods or services; sequestration or confiscation of assets; armaments control; demilitarization; governmental supervision; together with many other international measures including the two general categories of economic and military sanctions ...[333]

This writer seems not to suspect that most of the measures he lists not only include quite "civil" remedies but are all likely to affect—some of them most dramatically—the very peoples he rightly wants to spare from sanctions by confining the "legal penalties" to the leaders. For more on this point, see paragraph 266 below.

256. The fact that numerous scholars and diplomats specializing in international law prefer to conceal such obvious truths under a fig leaf by omitting any reference to a punitive connotation of international responsibility or by suggesting an explicit mention that the only function of countermeasures is to secure reparation, does not alter the hard realities of the inter-State system. It is indeed recognized by the most respected authorities that international liability presents civil *and criminal* elements, the prevalence of one or the other depending upon the objective and subjective features and circumstances of each particular case. In the most serious cases, the so-called civil element is subsumed by the criminal element, while, in the most common, minor breaches, the reverse is true. In any case, the presence of a covert or overt criminal element is not excluded by the fact that the sanction is inflicted not by an institution but by the injured party or is even self-inflicted by the wrongdoing State.[334] The extension to

[333] Drost, op. cit., pp. 296-297.

[334] That the absence of an institution is not the decisive factor is also shown by the fact that in national legal systems the institution is present in the implementation not only of criminal but also of a civil liability. Were the absence of a "superior" body so decisive as to exclude any form of international criminal liability (as the proponents of the view under discussion seem to believe), it would have to be

sovereign States of the maxim *societas delinquere non potest* is no closer to the truth in practice than it is in theory.

257. A staunch critic of the idea underlying article 19 of part 1 of the draft could of course contend—not without some justification—that if the maxim *societas delinquere non potest* is incompatible with the *present* features of sovereign States and of the inter-State system, it might well become compatible with the features which that system may, it is hoped, present in the near or more distant future. That critic could contend in particular that if States are at present not *societates* or *personnes morales* in the proper sense of the term, they would inevitably have to become *societates* or *personnes morales* in a proper sense within a *genuine*, organized legal community of mankind. States would then be no different, in essence, from the subdivisions of a decentralized federation. They would thus have become *legal* subdivisions of the legal community of mankind and, as such, be less (or not at all) subject to criminal responsibility and only subject to "civil"—merely reparatory—liability. Within such a framework, criminal liability could only be attributable to the leaders, officials, and representatives of the State, not to the State as an institution.[335]

258. To the extent that such a scenario may be assumed to be a valid prediction, the same staunch opponent to the idea embodied in article 19 could further contend that the right way for the Commission to proceed would be precisely to maintain the distinction alluded to in paragraph 250 above, namely the distinction between a code of crimes against the peace and security of mankind covering exclusively the criminal liability of individuals, on the one hand, and the draft articles on State responsibility envisaging a merely civil liability of States, on the other hand. According to the same "staunch opponent", this "civil" liability of States should be codified and developed by a convention on State responsibility which would not include article 19 of part 1. According to that same opponent, this would be the way to harmonize the Commission's current draft with the direction the progressive development of the international system will presumably take towards the "ultimate" goal—to use Lorimer's adjective[336]—of establishing a more centralized (or less decentralized) organized community of mankind.

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accepted that the same gap exists with respect to any form of international (civil) liability, and, for that matter, with respect to any other aspect of international legal relations.

[335] Curiously, the very opposite seems to have been suggested by some writers. See Schwarzenberger ("The problem of an international criminal law". *International Criminal Law*, especially pp. 35-36), according to whom

"In such a situation, an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these States. In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be a war under another name. Thus, proposals for a universal international criminal law fall into the category of the one-way pattern of the reorganization of the international society. With other schemes of this type they share the deficiency of taking for granted an essential condition of their realization, a sine qua non which cannot be easily attained: the transformation of the present system of world power politics in disguise into at least a world federation. If, and when, the swords of war are taken from their present guardians, then, and only then, will the international community be strong enough to wield the sword of universal criminal justice".

Cf., however, Dahm, *Völkerrecht*, pp. 265-266 and pp. 270-271; and Spinedi, loc. cit., especially p. 31.

[336] Lorimer, *Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*, vol. II, pp. 183 et seq.

259. It seems equally evident, however, that the establishment of such a legal community is far from being just around the corner. The ideal would be the establishment of a really interindividual legal community of mankind, legally organized under appropriately representative institutions, in a sense encompassing the States themselves as equally representative legal institutions of the respective national communities. States would thus become to some degree less dissimilar, as noted in paragraph 257 above, from the subdivisions of a democratically organized federal State. But a development such as this would presuppose nothing less than the political and legal integration of all peoples into one people in a process comparable, to some degree at least, to that which took place in the United States of America with the establishment of the federal Constitution—a process which is still far from having even been started among the peoples of the 12 member States of the European Community, and one which would take many generations, if not centuries.

260. The inevitable consequence is that, for good or ill, mankind will remain, for a long time to come, in that state of non-integration which is, at the same time, the main cause and effect of what sociologists and lawyers call, in a technical sense, the inter-State system.

261. Within such a system, States seem bound to remain, whether they like it or not, under an international law which is inter-State law, not the law of the international community of mankind. Within the inter-State system and under its law—international rather than supranational—States remain essentially factual rather than juridical collective entities. As such, they still have the ability to commit unlawful acts of any kind—notably "crimes" as well as "delicts"—and remain equally subject to reactions entirely comparable *mutatis mutandis* to those faced by individuals found guilty of crimes in national societies.

262. Much has rightly been written in condemnation of "collective" responsibility.[337] This is indeed a decidedly primitive, rudimentary institution. It would be difficult however to escape the following obvious facts:

(a) The inter-State system, from the standpoint of legal development, is at a stage which—though far from primitive, given that it has existed for centuries—presents rudimentary aspects which it would be dangerous to ignore;

(b) One such aspect is that, together with what may be termed "ordinary" or "civil" wrongful acts, States also commit wrongful acts which, owing to their gravity, may definitely be described as "criminal" in the normal sense of this term;

(c) Another aspect is that States respond to such grave wrongful acts, for example to aggression, with forms of reaction which even as strong an opponent of the criminal liability of States as Drost admits to be so severe and numerous as those mentioned in paragraph 254 above. As Drost himself classifies these forms of reaction (which he calls "political" measures to distinguish them from "individual penalties"), they

> ... may be territorial, demographic and strategic; industrial, commercial and financial; even cultural, social and educational; last but not least technological and ideological.[338]

[337] See, for example, Kelsen, *Pure Theory of Law*, pp. 121-122, and pp. 324 et seq.
[338] Drost, op. cit., pp. 296-297.

It is really hard to believe that measures of such tremendous import are not *mutatis mutandis* abundantly similar in their effects to the penalties of national criminal law.

263. In conclusion, it would seem that at least for some time, and probably a long time, to come, lawful reactions to the kind of wrongful acts contemplated in article 19 of part I of the draft should be available. The Commission should therefore provide follow-up provisions to article 19 in parts 2 and 3.

264. However, the problems to be solved, *de lege lata* or *de lege ferenda*, seem to be even more difficult than those pertaining to collective security, which have not yet been resolved satisfactorily. This is especially true of those problems related to the present structure of the so-called organized international community.

265. A number of the issues involved—*de lege lata* or *de lege ferenda*—have been summarily and tentatively evoked above; others have not. Subject to any further additions and corrections the Commission may wish to make, before closing for this year, three more issues need to be raised.

266. One crucial problem is that of distinguishing the consequences of an international State crime for the State itself—and possibly for its leaders, on the one hand, and the consequences for the people, on the other. Drost's study represents a very useful term of comparison: that writer (a not very consistent opponent of the "criminalization" of States, as has been shown) very rightly stresses the moral and political necessity of separating the political measures against the wrongdoing State from the individual penalties against its leaders, the former measures being of such a nature as to spare (not to hit) the "innocent" population of the "criminal" State. This viewpoint merits wholehearted agreement. Considering however the kinds of measures Drost himself seems so liberally to accept (see paragraph 255 above)—measures which seem to go well beyond those contemplated in Articles 41 and 42 of the Charter of the United Nations—it is not easy to make the distinction. This is especially true of the economic and peace-settlement measures (in the case of aggression), some of which seem to hit the people directly. And there is also a further question that neither the sociologist, the lawyer, nor the moralist should ignore (although Drost seems to ignore it totally). Can it be assumed in any circumstances that the people are totally exempt from guilt—and from liability—for an act of aggression committed by an obviously despotic regime of a dictator who they enthusiastically applauded before, during and after the act?

267. The second problem is that of State fault. Should or should not the Commission reconsider that matter, which it set aside (unconvincingly) with regard to "ordinary" wrongful acts? Is it possible to deal, as "material legislators", with the kind of breaches contemplated in article 19 of part 1 without taking account of the importance of such a crucial element as wilful intent?

268. The last problem to which it is essential to call the Commission's attention is article 19 of part 1 itself. The seriously problematic features of this formulation will be left aside—though Mr. Ago's original version of 1976 perhaps posed less difficult problems. Those features, not the least of which is the unclear nature of the provision as compared with the "secondary" character of the other articles of the draft, could be reconsidered by the Commission on second reading.

269. Suffice it to refer, for the present purposes, to substantive questions such as the following:

(a) If there are substantial or, in any event, significant differences in the manner in which the various specific types of crime are dealt with (e.g. aggression, slavery, pollution), is it in fact appropriate to establish a dichotomy only between "crimes" on the one hand and "delicts" on the other? Would it not be preferable, for example, to distinguish aggression from other crimes? Or to make several subordinate distinctions, so as to avoid placing on the same footing specific acts that are obviously quite remote from one another and would or should entail equally different forms of responsibility?;

(b) The exemplary list of wrongful acts constituting crimes which is contained in article 19 of part 1 dates back to 1976. Does that list still best exemplify the wrongful acts which even today the international community as a whole considers, or would do well to consider, as "crimes of States"? In other words, could not that list of examples, if indeed it is desirable to maintain such a list, be "updated"?

(c) In examining practice, it is often difficult to distinguish crimes from delicts, especially where very serious delicts are involved. Might not the reason lie partly in the manner in which the general notion of crime contained in article 19 is formulated? The wording is characterized by certain elements that perhaps make it difficult to classify a breach as belonging either to the category of crimes or to that of delicts and hence to ascertain which unlawful acts now come, or ought to be placed, under a regime of "aggravated" responsibility. Consider, for example, the element of "recognition by the international community as a whole", or that of "seriousness", both of which are left equally imprecise;

(d) If it is true that a certain gradation exists from "ordinary" violations to "international crimes", especially from the point of view of the regime of responsibility which they entail, is it in fact proper to make a clear-cut terminological distinction between "crimes" and "delicts"?