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**Eighth report on State Responsibility, by Mr. Gaetano Arangio-Ruiz,
Special Rapporteur**

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STATE RESPONSIBILITY

[Agenda item 2]

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* Incorporating document A/CN.4/476/ Corr. 1.

Introduction

1. The object of the present report is to address a few issues to which the Special Rapporteur hopes the Commission will give some further thought before completing, as planned, the first reading of the draft articles.¹ The issues in question, some of which are interrelated, concern only parts two and three of the draft. The main issues among these relate to matters that the Commission will consider in the course of its forty-eighth session—in plenary, in the Drafting Committee, or in both—with regard to the legal regime of the consequences of the internationally wrongful acts singled out as crimes in article 19 of part one of the draft articles as adopted on first reading.

CHAPTER I

I. PROBLEMS RELATING TO THE REGIME OF INTERNATIONALLY WRONGFUL ACTS SINGLED OUT AS CRIMES IN ARTICLE 19 OF PART ONE OF THE DRAFT ARTICLES

2. Although this is neither the place nor the time to resume the 1995 debate on the crucial problem of internationally wrongful acts as distinguished from delicts in article 19 of part one as adopted on first reading, a few clarifications seem indispensable. These clarifications focus on: (a) the fate of article 19 of part one and of the distinction between “delicts” and “crimes” within the framework of the first reading phase; and (b) the substantive as well as the procedural, institutional consequences of crimes in the light of the 1995 debate.

A. The fate of draft article 19 of part one

3. The Special Rapporteur believes that draft article 19 of part one as adopted in 1976 should remain what it is, namely, an integral part of the first reading of the draft articles that the Commission intends to complete in the forty-eighth session.

4. First, this is the clear decision which emerged, at the forty-seventh session, from two informal consultations and decisively from two formal votes. A clear majority of the Commission adopted that view. Secondly, the proposal made in the Sixth Committee of the General Assembly to include in the Assembly’s instructions to the Commission a mandate to postpone until the second reading consideration of the consequences of the wrongful acts in question did not meet with the Sixth Committee’s approval. The proposed draft paragraph that would have reduced article 19 of part one to the status of a “dead branch” during the whole period between the first and second readings of the draft articles was thus rejected by the Assembly.

5. It follows that a serious effort should be made by the Commission, at its forty-eighth session, to cover, by adequate provisions in parts two and three, the consequences of international crimes of States. The fate of draft article 19 and of the distinction between “delicts” and “crimes” should be decided, in the Special Rapporteur’s view, only after the membership of the United Nations has expressed itself in its comments on completion of the first reading of the entire set of draft articles.

¹ For the text of parts one to three of the draft articles, see *Yearbook ... 1996*, vol. II (Part Two), pp. 58–65.

6. The Special Rapporteur is of course aware that draft article 19 as adopted is far from perfect. The original drawbacks noted since the outset by a number of commentators are even more perceptible at present after 20 years, especially when dealing with the difficult problem of the consequences of the breaches in question. They are likely to be even more clearly perceptible by the time the second reading has been undertaken. None of those drawbacks, however, would warrant a virtual rejection of the article at the present stage or justify a hasty, superficial treatment of the consequences of the grave internationally wrongful acts in question.

7. Having first done his best to explore the matter thoroughly and then to comply, by means of his seventh report,² with the mandate received from the Commission in 1994, the Special Rapporteur has little to add to the merits of the distinction or to the terminological issue of whether the term “crime” is justified or appropriate.

8. Irrespective of the terminological issue, with regard to which the Drafting Committee may try to find, if it is really necessary, a temporary solution in 1996, the practice of States shows clearly that internationally wrongful acts of a very serious nature and dimension meet with severe reactions on the part of States acting individually or collectively. No obstacle can be found either in the maxim *societas delinquere non potest* or in the consideration that to label the conduct of a State as criminal would involve the people of that State. Both objections are dealt with in the Special Rapporteur’s sixth³ and seventh reports and the report of the Commission to the General Assembly on the work of its forty-seventh session.⁴ In both documents, due account is taken of the distinction between the State as currently personified by its rulers, on the one hand, and the State’s population, on the other hand.

B. The special and additional substantive consequences of crimes

1. A GENERAL POINT

9. Irrespective of the solution that will be adopted with regard to the terms to be used, the forty-seventh session’s debate on the special or additional consequences of the internationally wrongful acts in question shows that the 1995 proposals concerning those consequences “met”—to use the terms of the Commission’s report on its forty-seventh session—“with a wide measure of support” and “gave rise”, at the same time, “to reservations”.⁵

10. It should be noted, however, that support came not just from members in favour but, despite their “reservations”, also from members opposed to draft article 19 of part one. No one contested, in other words, the fact that most modifications proposed in draft articles 15 to 18 for the purpose of adapting to crimes the provisions

² *Yearbook ... 1995*, vol. II (Part One), p. 3, document A/CN.4/469 and Add.1 and 2.

³ *Yearbook ... 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1-3.

⁴ See *Yearbook ... 1995*, vol. II (Part Two), pp. 48–49, paras. 261 and 263. As stated by a number of members, “it was preferable to designate a specific conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship rather than to leave the whole area unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition. It was mentioned, in this connection, that some States had been subjected to penal consequences, sometimes exceeding those usually attached to crimes, without their actions being designated as crimes”.

⁵ *Ibid.*, p. 52, para. 284.

relating to delicts, should be embodied in the draft articles in any event in order to cover the consequences of the most serious among internationally wrongful acts, whatever their denomination.⁶

2. DRAFT ARTICLE 16 AS PROPOSED

11. Apart from the general objection to the real or assumed punitive connotation of some of the consequences envisaged in draft article 16—an objection obviously connected with the general conceptual and terminological issue that has been set aside (paras. 39 and 42-46 below)—a number of specific reservations were expressed.

12. One reservation related to the distinction between political independence (namely, independent international statehood) and political regime for the purposes of the mitigation of the obligation of restitution in kind.⁷ Concern was expressed that that mitigation should apply not only to the need for safeguarding that State's independent statehood but also to the safeguard of its political regime. In the Special Rapporteur's view, the extension of the mitigation to the political regime, for example, of an aggressor State or of a State in grave breach of obligations relating to human rights or self-determination, might practically amount to a condonement of the breach. A strong demand for a change of political regime might well prove to be an essential requirement not only as a matter of reparation but also as a guarantee of non-repetition. The Drafting Committee would be well advised to give further thought to the matter before rejecting the proposed distinction between independent statehood and political regime for the purposes of restitution in kind.

13. Remarks on draft article 16 were also addressed with regard to the issue of territorial integrity, the preservation of which was indicated in that draft article as a cause of mitigation of the wrongdoing State's obligation to provide restitution in kind.⁸

14. While most of the speakers agreed with the Special Rapporteur's suggested inclusion of the safeguard of territorial integrity (together with the preservation of independent statehood and the population's vital needs) among the mitigating factors, and while several members concurred in the doubt expressed in that respect by the Special Rapporteur as to whether any exceptions should be considered, some members questioned the Commission's competence "to ask that kind of question".⁹ Unaware of any limitation of the Commission's competence to discuss and express its views on any issue which may be of relevance for the proper performance of its role in the progressive development and codification of international law and the law of State responsibility in particular, the Special Rapporteur is of the view that the Drafting Committee should give some thought to the matter. No doubt, territorial integrity should in principle not be put in jeopardy by the implementation of the obligation to provide restitution in kind. Which exceptions, if any, should be envisaged and of what kind (the only point of doubt raised by the Special Rapporteur) should be the task of the Drafting Committee to explore to the best of its ability in 1996.

⁶ Ibid., pp. 51–55, paras. 282–305. This conclusion emerges clearly.

⁷ See *Yearbook ... 1995*, vol. II (Part Two), p. 52, para. 289.

⁸ Ibid., pp. 52–53, para. 291.

⁹ Ibid.

15. In 1995 during the debate, several members expressed reservations over the view that article 8 of part two on compensation did not call for any adaptation in its application to crimes. The Special Rapporteur is hardly able to understand that philosophy. To say that a mitigation of the compensation obligation would be imposed—as explained in the above-mentioned report of the Commission¹⁰—by the difficulty of implementing such an obligation in the case of “major disasters like the Second World War” seems to imply that States responsible for a disaster of such terrible gravity should be treated less severely than a State responsible for a minor breach of a commercial treaty! Of course there should be limits. But the only conceivable mitigation should be, in the Special Rapporteur’s view, an express or implied extension of the provision safeguarding the vital (physical and moral) needs of the wrongdoing State’s population to the duty to provide compensation for crime.

16. Considering guarantees of non-repetition, the Special Rapporteur is puzzled by the reservations expressed by some members relating to the proposed waiver of the mitigation of that obligation which is based (for the case of delicts) upon respect for the dignity of the wrongdoing State. While unnecessary wanton humiliations of the wrongdoing State would surely be inappropriate, the Special Rapporteur finds it difficult to see—for example—how a State guilty of a crime such as a deliberate armed attack and invasion, or deliberate, systematic, massive violations of human rights or self-determination, should not be required to offer guarantees that, while preserving its independent statehood and territorial integrity, could be viewed as incompatible with such a formal attribute of a State as its “dignity”. The main consideration should be the effectiveness of the guarantees to be demanded, rather than a “dignity” which the law-breaker itself is offending in the first place.

17. Similar considerations apply to the preoccupations expressed by some members with regard to the protection of the sovereignty and liberty of the wrongdoing State. Again, all depends on the nature of the crime and the kinds of guarantees to be sought in order to avert repetition. For example, could a demand to hand over the responsible government officials for trial before a (lawfully established) international tribunal be resisted as contrary to the wrongdoing State’s sovereignty and liberty?¹¹

3. DRAFT ARTICLE 17 AS PROPOSED

18. Doubts were expressed with regard to the admissibility of dealing with countermeasures in reaction to crimes. Such doubts were based on the consideration that such measures would legitimize “power play and coercive measures” and let the claimant State acquire “the status of a judge in its own cause” rather than “promoting the equity and justice essential for a new world order”. The same speakers emphasized instead “the need for a careful structuring of the restraints in the interests of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice”.¹² These remarks are puzzling for two reasons. First, they seem to question, not only any

¹⁰ Ibid., p. 53, para. 293.

¹¹ It should not be overlooked that an excess of guarantees in favour of the wrongdoing State would jeopardize the attainment of the very purpose of the rule on guarantees of non-repetition. Moreover, this might encourage arbitrary action, including unlawful military action, by single Powers.

¹² *Yearbook ... 1995*, vol. II (Part Two), p. 53, para. 298.

attempt at regulation of the additional consequences of crimes or major breaches otherwise designated, but also any regulation whatsoever of the reaction to internationally wrongful acts of any kind.

19. Secondly, the above-mentioned remarks seem to overlook the fact that, in dealing with the instrumental consequences of crimes, draft article 17 expressly provides (as draft article 16 does for the substantive consequences) that the injured State's entitlement to resort to countermeasures "is subject to the condition set forth in paragraph 5 of [draft] article 19", as proposed. The envisaged condition is an ICJ decision that a crime has been or is being committed. Consequently, draft article 17, far from legitimizing "power play" or the acquisition by a claimant State of the "status of a judge in its own cause", does attempt, whatever the merits of the whole scheme proposed, to promote at least more "equity and justice essential for a new world order" than would be done by a system controlled exclusively by the States themselves (or some of them) or by a restricted and selective political body (paras. 31 and 39-41 below).

20. The Special Rapporteur finds equally hard to understand the gist of the paragraph with regard to draft article 17, paragraph 2, in the report of the Commission.¹³ What, if not resort to urgent, interim measures as are required to protect its rights etc., should an injured State do while waiting for any decision to come from some international body (possibly judicial)? How do the "difficulties inherent in that concept" (of interim measures) impose the rejection of the proposed provision of draft article 17? Is it not obvious that, if anything serious has to be done by the Drafting Committee in 1996 concerning the consequences of the most grave internationally wrongful acts, it would be for that Committee to see, also in the light of the remarks on interim measures made further on in the present report, whether and in what terms the difficulties inherent in the concept of interim measures should be resolved? Does the fact that the exercise was not made in connection with delicts prevent the Commission from doing something on the subject?¹⁴

21. The remarks made with regard to draft article 17, paragraph 3, of the report of the Commission¹⁵ will be addressed further on.

4. DRAFT ARTICLE 18 AS PROPOSED

22. The first observation, in the report of the Commission to the General Assembly on the work of its forty-seventh session,¹⁶ that in some of the provisions of draft article 18 care should be taken to distinguish the rights of the State whose individual rights were violated from the rights of other States, seems justified. The 1996 Drafting Committee should be so advised.

23. On the other hand, the Special Rapporteur is puzzled by the second general remark, according to which "some of the wording [of draft article 18] had more to do

¹³ *Ibid.*, para. 299.

¹⁴ The Special Rapporteur cannot but wonder how the preoccupation about the difficulty of defining urgent interim measures (in order, supposedly, to prevent abuse) logically coexists with the preoccupation, expressed with respect to other provisions, that the requirement of a prior ICJ decision would have an adverse effect on the effectiveness and promptness of the reaction.

¹⁵ *Yearbook ... 1995*, vol. II (Part Two), p. 54, para. 300.

¹⁶ *Ibid.*, para. 301.

with the rules on the maintenance of international peace and security than with the law of State responsibility”. Considering the degree of gravity of crimes, the most serious of which is aggression, this statement is what the French call a *lapalissade* (truism).

24. The Commission’s task is precisely to distinguish, despite any degree of interrelation, what belongs to the law of State responsibility from what belongs to the law of collective security. This is also true for delicts although it is more so for crimes. The Special Rapporteur pointed out this problem of distinction but little has been done in that respect during the debate at the forty-seventh session. The main contributions (although not the majority of them) made on the subject in the course of that debate were those of the members who, instead of trying to find a demarcation line, preferred simply to absorb the law of responsibility into the law of collective security by subjecting the former to the latter *in toto*. Almost no attention was paid to the questions raised since 1992 by the Special Rapporteur with regard to article 4 of part two as adopted on first reading or to a comparison between that article and draft article 20 as proposed in his seventh report¹⁷ (see paragraphs 42-46 below).

C. The institutional aspects of the legal regime of crimes

25. The arguments against the institutional consequences scheme embodied in draft article 19 as proposed in the seventh report must be distinguished according to whether they consist of *de lege lata* or *de lege ferenda* objections.¹⁸

26. Although the distinction between *de lege lata* and *de lege ferenda* objections should not be understood or applied too strictly in the work of a body which, like the Commission, is entrusted with both progressive development and codification—the first task being inevitably preponderant in determining a possible legal regime for the consequences of crimes—the Special Rapporteur will try to deal with the above two sets of objections separately.

1. *DE LEGE LATA* OBJECTIONS

27. With regard to the objection based upon Article 12 of the Charter of the United Nations and the alleged “risk of conflicts” between the General Assembly and the Security Council, the task entrusted by the scheme to both organs does not seem to be of such a nature as to increase significantly the possibility of divergence between the two bodies.

28. First, it must be stressed again that Article 12 of the Charter has so frequently been ignored or otherwise circumvented by the General Assembly that many commentators believe that it has become obsolete. The only clear demarcation line is that which precludes the Assembly from interfering in the exercise of the Security Council’s functions under the Charter: and that line would not necessarily be crossed by the fact that, while the Council is dealing with a dispute, the Assembly adopts a recommendation acknowledging the existence of sufficient concern over a situation allegedly amounting to an international crime. Such a recommendation would operate as a condition triggering (under the future convention on State responsibility) the

¹⁷ See footnote 2 above.

¹⁸ *Yearbook ... 1995*, vol. II (Part Two), pp. 55–56, para. 307.

possibility for the allegation to be brought to ICJ either by injured States or by the alleged wrongdoer. As regards in particular the subsequent effect of the Assembly's preliminary resolution—as well as that of a similar resolution by the Council—that effect would follow from the future convention on State responsibility and not from the Charter: there is nothing in the Charter preventing States from attributing certain effects, by treaty, to a resolution of the Assembly or of the Council, including an effect such as the jurisdiction of ICJ in certain cases.

29. The only hypothesis in which serious conflict could arise would be if the Security Council had made a finding under Article 39 of the Charter and acted accordingly under Chapter VII. However, apart from the fact that the proposed scheme does safeguard, by means of draft article 20, the Council's functions relating to the maintenance of international peace and security—the latter functions prevail to the extent to which they do pertain to that area—it does not seem that, even in such a case, the possibility of General Assembly pronouncements about the seriousness of an allegation of crime could significantly increase the risk of conflict. Considering that the scheme only provides for the consequences of crimes (as envisaged in the provisions of draft articles 15 to 18) and not for Council security measures and that the ICJ procedure could be triggered (by virtue of the future convention) by a resolution of *either* body, no increase in the risk of *conflits de compétence* (overlapping jurisdictions) seems to be likely to arise from the scheme.

30. Assuming that the Security Council had made a finding of aggression under article 39 and were acting accordingly under Chapter VII of the Charter, it could either decide that there was serious ground for a crime allegation, or that there was no such ground. If the General Assembly, in its turn, also adopted a decision along the same lines, the crime procedure could be followed without interfering with the Council's security measures thanks to the proviso contained in draft article 20 (paras. 44–46 below).

31. Conflict would be even less likely in the case of crimes other than those partly coinciding with the hypothesis involving Article 39 of the Charter. In areas such as human rights, self determination or environment violations, the competence of the General Assembly seems to the Special Rapporteur more probable—*de lege lata*—than that of the Security Council. It is difficult to see, therefore, with regard to the violations in such areas, why the attribution to the Assembly under the proposed scheme (as an alternative to the Council) of a role of preliminary finding should be inconsistent with Article 12 or otherwise increase the risk of conflict between the two bodies. The Special Rapporteur is assuming, of course, that both the Assembly and the Council would maintain their action within the limits of their respective spheres of competence.

32. It is of course quite possible that the risk of conflict is perhaps being unconsciously magnified, in the minds of some of the critics of the proposed scheme, by their view that all or most crimes qualify as situations under Article 39 of the Charter (especially as threats to the peace). Crimes should thus fall, in their opinion quite naturally, in the sphere of action of the Security Council. But that is *lex ferenda*, not *lex lata* of State responsibility.

33. A second objection *de lege lata*, seems to point to the fact that the Security Council could not legitimately proceed to the preliminary finding envisaged in the

proposed scheme—i.e. the “*crimen fumus resolvit*”—because that body is only empowered, under the Charter of the United Nations (Arts. 34 and 39), to determine threats to the peace, breaches of the peace or acts of aggression. But it is easy to see that a number of international instruments, in a sense confer on the Security Council, *extra ordinem* or additional functions: such functions obviously pertain to the relations among the States participating in each instrument. Consequently, nothing more than that would be achieved by a future convention on State responsibility under the proposed scheme.

34. With regard to the third set of objections, a few remarks are necessary about the contested majority requirements set forth in draft article 19, paragraph 2. In the Special Rapporteur’s view, the fact that the General Assembly is empowered to determine, under Article 18 of the Charter, matters requiring a two-thirds majority would not constitute a legal obstacle in the case that a convention, conferring a certain function upon the Assembly (under the practice just evoked in the preceding paragraph), also indicated the majority required for the performance of that function. Were that majority not attained, it would simply have to be concluded that the preliminary finding condition had not materialized. In any event, the Special Rapporteur finds it hard to admit that the Assembly would have any difficulty in accepting the notion that a *crimen fumus resolvit*, so to speak, should be adopted by a two-thirds majority.

35. The question is of course less simple for the Security Council because it is complicated, to some extent, by the distinction between Chapters VI and VII of the Charter and between disputes and situations. On the first issue, a distinction must again be found, as already pointed out, between the role that the Council would perform under the proposed scheme and the role it performs anyway under Chapter VII. In the Special Rapporteur’s view, the role envisaged in the scheme would fall under Chapter VI. In addition, and as in the case of the General Assembly, this function could be conferred on the Council by an international instrument—a convention on State responsibility—*other* than the Charter. No legal obstacle should exist to such an instrument—an instrument which develops and codifies the law of State responsibility and not the law of collective security—requiring, in addition to a certain majority, the abstention of “a party to a dispute”.

36. With regard to the second issue—the dispute/situation distinction—the answer to the objection is, first, that the situation in which a State is accused of a crime by other States surely qualifies more as a dispute than as a mere situation. Secondly, the obligation to abstain would constitute once more a question pertaining to the law of State responsibility as codified in an ad hoc convention and not a matter governed by the Charter. No legal obstacle can be found in the Charter to such an instrument attributing given legal consequences (such as the triggering of the legal possibility of resorting to ICJ) to a resolution adopted by the Security Council by a determined majority and an equally determined number of abstentions.

37. Another objection was that a decision according to which a State would be subjected to ICJ jurisdiction would “necessarily” fall under Chapter VII of the Charter of the United Nations and therefore be subject to the veto. The answer to that argument is, again, that ICJ jurisdiction would be imposed on States neither by the Security Council’s nor by the General Assembly’s *crimen fumus resolvit*. It would derive from the convention developing and codifying the law of State responsibility

and not from the collective security law of the Charter with regard to which the convention on State responsibility does not and should not include any provisions.

38. The objection that a permanent member of the Security Council could not legitimately bind itself not to use the so-called “veto power” might not be groundless, to some extent, as a matter of Charter law. It might also be contended that the veto power is attributed to given member States not just in their interest but also in the interest of the other members. The objection would not be valid in the crimes context, however, because it is based on the above-mentioned, unjustified confusion between the law of collective security as embodied in the Charter of the United Nations, on the one hand, and the law of State responsibility, on the other hand. The law of State responsibility could quite legitimately provide—and a convention on the subject would legitimately provide—for the waiver by given States, for the sake of justice and equality in the area of State responsibility, of their “veto power”. The Charter embodies, and is based upon, principles of justice and equality. The fact that a derogation from the equality of States was rightly considered to be necessary for the maintenance of international peace and security—namely for the purposes of the law of collective security—does not imply that States should be unequal in an area which is covered by the law of State responsibility.

2. *DE LEGE FERENDA OBJECTIONS*

39. As regards the allegedly “cumbersome” nature of the institutional scheme proposed, it is quite obvious that the conditions to be envisaged for the triggering of the consequences of crimes should be stricter than those envisaged for the consequences of delicts. One reason is the higher degree of severity of the substantive and procedural consequences to be attached to crimes as compared to those to be attached to delicts. It is natural that the former should be subject—except, of course, those urgent interim measures that the critics seem to ignore—to stricter “collective” or “community” control. The alleged “response paralysis” would not affect urgent measures anyway.

40. Considering the gravity of the breach alleged by the accuser(s) and the interest of all States—whether prospective victims or prospective accused—that the determination of existence/attribution of a crime be made by the most objective procedure available at the current stage of international “institutional law”, the possibility that States might accept ICJ compulsory jurisdiction for the purpose of such a determination does not appear to be so problematic as to justify a reluctance, on the part of the Commission, to include the requirement in question in draft articles intended for the progressive development and codification of the law of State responsibility.

41. As regards the undesirable “practical effects” for the injured States or the wrongdoing State (*scilicet*, allegedly injured and allegedly wrongdoing State(s)), the Special Rapporteur believes that the “practical effects” of the proposed scheme should be considered not in the absolute but in comparison with the alternative solution or solutions. Indeed, the alternative to the “cumbersome procedure” proposed by the Special Rapporteur in his seventh report is represented either by unilateral and possibly arbitrary action by single, allegedly injured, States or groups thereof, or by merely political decisions by a political body and the action it may authorize. In either case there is a high risk of arbitrariness and selectivity, whether individual or

collective, on the part of the “strong” States. The “cumbersome procedure” proposed presents at least a higher degree of objective evaluation and *crimen fumus resolvit* by (a) extending the competence of political evaluation to a more representative—and by definition more objective—General Assembly; and (b) adding, more significantly, a technical pronouncement such as the judicial decision of ICJ.

**D. Conclusions: draft article 4 as adopted by
the Commission and draft article 20 as proposed by
the Special Rapporteur in his seventh report**

42. As is explained in the seventh report,¹⁹ the Special Rapporteur believes that the legal consequences of international crimes of States, as well as the consequences of any internationally wrongful act, pertain to the law of State responsibility. Considering, however, that some of the wrongful acts qualified as crimes in article 19 of part one as adopted on first reading may coincide, to a certain extent, with one of the situations contemplated in Article 39 of the Charter of the United Nations, it is possible for problems of demarcation to arise. The Special Rapporteur is referring particularly, although not exclusively, to the demarcation line between any institutional procedures envisaged for the triggering of the consequences of crimes, on the one hand, and the Charter procedures relating to the maintenance of international peace and security (particularly, but not exclusively, those of Chapter VII of the Charter) on the other hand. The possibility of problems of this kind arising should not lead to the conclusion, however, that the law of State responsibility should, for instance, “give way” or be set aside, by subjecting any of the substantive or procedural consequences of a crime exclusively to the law of collective security.

43. The problem of the coexistence of the law of State responsibility with the law of collective security was not adequately discussed, although it was not ignored, during the debate on the consequences of crimes in 1995. All members, no doubt, perceived the existence of the problem. The members who addressed the matter explicitly did so, if the Special Rapporteur understood correctly, in two ways. A number of them indicated—and rightly so—that some of the provisions of the proposed draft articles (15 to 19) also touched upon matters relating to the maintenance of international peace and security. Some members stressed instead—quite drastically—that the whole matter of crimes should simply be left to the care of the Security Council acting under its powers relating to the maintenance of international peace and security. Considering that, in their view, most, if not all, crimes would constitute at least threats to the peace, no provision needed to be included for crimes in a convention on State responsibility. Despite the fact that most members of the Commission did not seem to share this view, the debate did not do justice, in the Special Rapporteur’s opinion, to the importance of the issue.

44. In conformity with his opinion that the legal consequences of crimes are part of the law of State responsibility and should be treated as such in the draft articles (*de lege ferenda* or *de lege lata*, according to the case), the Special Rapporteur had proposed a draft article 20 in 1995.²⁰ That article was intended to ensure that neither the provisions of draft articles 15 to 18 nor those of draft article 19 would interfere unduly either with the measures decided upon by the Security Council in the exercise

¹⁹ See footnote 2 above.

²⁰ Ibid.

of its functions under the relevant provisions of the Charter of the United Nations or with the inherent right of self-defence as provided for in Article 51 of the Charter. It was also intended, at the same time, to make clear that, to the extent that the law of State responsibility would “be subject” to any decisions or measures of the Security Council (or, for that matter, the General Assembly), such decisions or measures would be maintained within the limits set by the relevant provisions of the Charter.

45. In the pursuit of the above-mentioned purpose—and in its formulation—draft article 20, as proposed, differs from article 4 of part two as adopted on first reading by the Commission on the basis of the proposal of the previous Special Rapporteur. That provision seems to proclaim in such terms a precedence of the law of collective security over the articles on State responsibility so as to open the way, for the purposes of the legal consequences of internationally wrongful acts (and apparently not just crimes) to a sort of subordination of the law of State responsibility to the action of political bodies.

46. Considering the great importance of the subject matter, the Special Rapporteur is confident that in 1996 the Drafting Committee shall look into it as thoroughly as it deserves. The Commission would be ill-advised, in his opinion, if it maintained draft article 4 as it stands. Regardless of the extent to which the Drafting Committee or the Commission itself will ultimately be disposed to accept the Special Rapporteur’s proposed draft articles 15 to 20, a provision such as the one embodied in the said article 4 would seriously affect the distinction between the law of collective security and the law of State responsibility and gravely undermine the impact of the latter.²¹ The preservation of the distinction is a vital element—*de lege lata* as well as *de lege ferenda*—of the existence, the effectiveness and the future development of the law of State responsibility. The Drafting Committee, to which draft articles 15 to 20 were referred in 1995, should not fail to address the matter to the extent and depth necessary to maintain and clarify the distinction. In the opinion of the Special Rapporteur, it would not be prudent for a body of lawyers like ICJ to suggest that the validity or application of the articles that they adopt would be subject to decisions or any other action of political bodies—be it the Security Council or the General Assembly—except to the extent strictly necessary for the maintenance of international peace and security. A provision such as draft article 4 of part two, as adopted, would not only undermine the effectiveness of the law of State responsibility as indicated above. It would also constitute a major factor encouraging political bodies to broaden the sphere of their functions and competence on the basis of questionable doctrines of evolutionary interpretation, implied powers and/or federal analogies in the Charter of the United Nations. Draft article 20, in the Special Rapporteur’s view, is more prudently formulated in that respect: and the involvement of ICJ, which is provided for in the proposed draft article 19, should help to ensure some judicial control of the respect of the demarcation between the law of international security and the law of State responsibility.²²

²¹ The Special Rapporteur has been contesting the wording of draft article 4 since at least 1992 (*Yearbook ... 1992*, vol. I, 2277th meeting, p. 150; and *ibid.*, vol. II (Part Two), pp. 38–39, paras. 261–266). See also *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2, pp. 21–22, paras. 95–99 (and footnote 51), and pp. 28–29, paras. 137–139.

²² The opinion that more room should be made for the role of ICJ in the area of State responsibility (including particularly those areas which are close to that of the maintenance of peace and security) is being shared increasingly by international legal scholars.

CHAPTER II

II. OTHER ISSUES TO WHICH THE SPECIAL RAPPORTEUR DEEMS IT NECESSARY TO CALL THE ATTENTION OF THE COMMISSION IN VIEW OF THE COMPLETION OF THE FIRST READING OF THE DRAFT ARTICLES

Introduction

47. The issues of parts two and three of the draft articles other than the regime of crimes, to which the Special Rapporteur believes that further thought should be given by the Commission (in plenary and/or in the Drafting Committee) are the following:

(a) The role of fault in the determination of the consequences of an internationally wrongful act (“delict” or “crime”), particularly with regard to satisfaction;

(b) The dispute settlement provisions of parts two and three; and

(c) The factors to be considered for the purpose of assessing proportionality of countermeasures (in connection with “crimes” as well as “delicts”).

The said issues are dealt with in that order in the following sections.

A. The role of fault in general and in connection with satisfaction

48. In the opinion of the Special Rapporteur—as well as in the opinion of other scholars—the problem of fault has not been dealt with satisfactorily, if at all, in part one of the draft articles. It is therefore to be hoped that the matter will be taken up again, in part one, on second reading.

49. Be it as it may, however, regarding the question whether fault should or should not be dealt with in part one and in what terms, the Special Rapporteur believes that fault should be expressly recognized as a factor in the determination of various consequences of internationally wrongful acts, namely in part two of the draft articles. As indicated in the second report of the Special Rapporteur, although the literature is not very rich on the subject, significant doctrinal authority is available.²³

50. As regards the practice, while the impact of fault is only infrequently acknowledged with regard to compensation,²⁴ it emerges quite clearly—as is explained in the second report—with regard to satisfaction. That impact is particularly significant regarding both (a) the role of satisfaction as a complement to pecuniary compensation or other forms of reparation; and (b) the kinds and number of forms of satisfaction claimed or obtained.²⁵

51. It will be recalled that an express reference to wilful intent or negligence was contained in the draft article on satisfaction proposed in the second report (para. 55 below).

52. The necessity to take account of the fault in the determination of the degree of the wrongdoing State’s liability is enhanced by the fact that the *chapeau* provision on reparation (in general)—draft article 6 *bis*—as adopted by the Commission on first

²³ *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, p. 49, footnote 407.

²⁴ *Ibid.*, p. 53, para. 182, and p. 50, footnotes 409–412.

²⁵ *Ibid.*, p. 31, footnote 252; p. 32, footnotes 257 and 261–262; p. 34, paras. 113 et seq.; and pp. 38–40, paras. 126–134.

reading, does contemplate the consequences of the fault of the injured State or its national.²⁶

53. It is hardly necessary to stress that the relevance of fault is even higher with regard to the case of the internationally wrongful acts singled out as “crimes” in draft article 19 of part one as adopted on first reading. It would be difficult to contest that that particularly grave degree of fault which is generally known as wilful intent or *dolus* is an essential element of any one of the four kinds of crimes indicated in paragraph 3 of draft article 19 of part one, or any analogously grave acts, whatever their denomination.

54. In conclusion, draft articles which would not take due account of the impact of fault in the determination of the consequences of internationally wrongful acts—whether “delicts” or “crimes”—would simply overlook an important element of the *de lege lata* and *de lege ferenda* regime of State responsibility. The Special Rapporteur’s position on the subject of fault—and the acknowledgement of the soundness of that position by a number of members—were well reflected in the Commission’s report on its forty-second session.²⁷

55. Partly interrelated with the relevance of fault in determining the consequences of internationally wrongful acts is the nature of the remedy—typical of inter-State relations—which goes under the name of satisfaction. In article 10 on satisfaction, as adopted in 1993, the Commission eliminated, together with the proposed reference to negligence and wilful intent contained in the Special Rapporteur’s proposal on the subject,²⁸ the punitive connotation of that remedy which was also present in the proposed draft article 10.²⁹ The Special Rapporteur believes that the reality of international relations indicates that the legal consequences of internationally wrongful acts are neither purely reparatory nor purely punitive. The two functions are inherent in different degrees—although in forms not easily comparable to the functions of any similar remedies of national law—in the various forms of reparation. As regards satisfaction in particular, it seems to constitute—although in the *very relative* sense explained in the second report—the form of reparation in which the punitive element is relatively more pronounced.³⁰ The omission of any trace of that element obscures, in the Special Rapporteur’s view, not only the fact that States seek and obtain satisfaction for purposes other than strict reparation, but also the very distinctive feature of satisfaction as opposed to restitution in kind and compensation. The availability of a more precisely defined remedy of satisfaction would help, in the view of the Special Rapporteur, to reduce the temptation of States, and especially of strong States, to resort to forms of punitive action frequently including, under the guise of self-defence, armed reprisals. Examples are too well known and need not be mentioned at the present stage.

²⁶ Considering that the *chapeau* provision of draft article 6 *bis* (on reparation in general) also covers satisfaction, the express mention of the injured State’s (and its national’s) fault inevitably aggravates the undesirable effect of the omission of any reference to fault in the provision of draft article 10 on satisfaction (para. 55 below).

²⁷ *Yearbook ... 1990*, vol. II (Part Two), pp. 81–82, paras. 408–412.

²⁸ Draft art. 10, para. 2 (see *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, p. 56).

²⁹ *Ibid.*, para. 1.

³⁰ *Ibid.*, pp. 31–42, paras. 106–145, especially paras. 136–145. See, in particular, page 41, para. 143, footnote 347.

B. The dispute settlement provisions of parts two and three of the draft articles³¹

1. GENERAL

56. The Special Rapporteur feels duty-bound to reiterate, at the present stage, his position with regard to the relationship between dispute settlement obligations, on the one hand, and the right of an allegedly injured State to resort to countermeasures against an allegedly wrongdoing State, on the other hand. As explained in his reports and in a number of oral statements, the generally recognized existence, in customary international law, of the right of the injured State to resort to countermeasures against the wrongdoing State is *per se* not sufficient to justify the inclusion of such a right in a codification convention on State responsibility without adequate guarantees against abuse. It is indisputable—as the relevant debates in the Commission and the General Assembly abundantly confirm—that the traditional, current regime of countermeasures leaves much to be desired because it lends itself to abuse.

57. The rules of proportionality and the rules prohibiting given kinds of countermeasures—rules frequently in-fringed—are not sufficient to ensure that allegedly injured States refrain from resorting abusively to reprisals against an allegedly wrongdoing State.³² It would therefore be improper for a body dedicated to the progressive development (more than just codification) of international law not to propose, in addition to the said rules, appropriate legal defences against any possible abuse. Such defences can only be found in adequate dispute settlement procedures.

58. It is unnecessary to reiterate here the distinction between pre-countermeasure and post-countermeasure dispute settlement obligations, and the Special Rapporteur's proposals relating to the former (draft art. 12 of part two) or to the latter (draft arts. 1 to 7 of part three).³³

59. With regard to both pre-countermeasure and post-countermeasure dispute settlement obligations, the Special Rapporteur believes that, in reviewing the matter of dispute settlement within the framework of the draft articles on State responsibility—a review that the 1996 session should do its best to accomplish—the Drafting Committee would be well advised if it re-examined article 12 and the relevant provisions of part three in close conjunction. It is the Special Rapporteur's view that the difficulties which have prevented the adoption of more satisfactory solutions in both areas are due in great part to the fact that draft article 12 was considered by the 1993 and 1994 Drafting Committees prior to, and separately from, the relevant draft articles of part three. It will be recalled that this opinion was repeatedly expressed, at the time, by Mr. Calero-Rodrigues and the Special Rapporteur.

³¹ See footnote 1 above.

³² The use of prohibited armed reprisals under the pretence of self-defence is only one of the major examples of such infringements, particularly on the part of strong States.

³³ Following further consideration, the Special Rapporteur believes that the annexes to draft articles 1 to 7 (as proposed in 1992–1993) left much to be desired and should have been entirely reformulated (as the Drafting Committee has felicitously done). Their defective formulation was the result of inadvertence.

60. In proceeding along the lines indicated in the preceding paragraph, in 1996 the Drafting Committee would be in a better position to review the formulation of both sets of dispute settlement obligations in the light of their interrelation. In so doing, the Drafting Committee would be enabled to adjust more adequately the provisions in question with a view to strengthening both the defences against abuse of countermeasures and the law of dispute settlement. The Commission should realize that the necessity of strengthening those defences within the context of draft articles codifying for the first time the unwritten law of unilateral enforcement of international obligations, offers a most appropriate—and, in a sense, unique— opportunity to take a few valuable steps forward in the inter-national law of dispute settlement, the development of which is characterized by an abundance of lip service which is inversely proportional to the number of really effective, “hard law” obligations assumed by States.

2. PRE -COUNTERMEASURE SETTLEMENT OBLIGATIONS:
ARTICLE 12 OF PART TWO

61. With regard to draft article 12 as adopted in 1993 and provisionally confirmed, *faute de mieux*, in 1994, the Special Rapporteur confines himself to listing, as briefly as possible, the main shortcomings of that formulation.

62. First, the formulation in question almost totally fails to counterbalance the legitimation of unilateral countermeasures by adequately strict obligations of prior recourse to amicable dispute settlement means. On the contrary, an allegedly injured State: (a) would remain free, under the future convention, to initiate countermeasures *prior* to recourse to any amicable settlement procedure; (b) would only be obliged to have recourse (at any time it may choose) to such procedures as are envisaged by a “relevant” treaty (see paragraph 66 below); (c) the obligation thus circumscribed would be further narrowed down if the future convention on State responsibility were to confine it to such means as third-party procedures or, worse, to binding third-party procedures; (d) the formulation in question completely ignores the problem of prior and timely communication, by the injured State, of its intention to resort to countermeasures.³⁴

63. Secondly—and not less importantly—by not condemning resort to countermeasures prior to recourse to dispute settlement means to which any participating States may be bound to have recourse under instruments other than the convention on State responsibility—the only function that the Special Rapporteur assigned to the requirement of prior recourse—the 1993 and 1994 Drafting Committee’s formulation might have a negative impact on the dispute settlement obligations deriving from those instruments. Although they would not be totally annulled, dispute settlement obligations could lose in credibility and effectiveness. Inevitably involved, in any event, in the mere fact of not imposing recourse to amicable means *prior* to countermeasures, the jeopardy of the said dispute settlement obligations would be further aggravated, first by the “relevant” treaties clause and secondly, by the exclusion, under the formulation, of some dispute settlement means.

³⁴ This requirement was set forth in paragraph 1 (b) of the Special Rapporteur’s draft article 12 (see *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3, p. 22). According to the Drafting Committee’s formulation, the injured State would instead be relieved of any burden of prior notification of countermeasures (thus no chance of timely “repentance” being left for a law-breaker).

64. The negative impact of the provision in question upon existing dispute settlement obligations seems to be more serious than it may appear. Of course, it can be argued that the fact that a convention on State responsibility did not impose prior recourse to dispute settlement means provided for by instruments in force between the parties—as would be the case under the Drafting Committee’s formulation of article 12, paragraph 1(a), adopted in 1993—would not affect the validity of the parties’ obligations under such instruments. It could be argued, for example, that since armed reprisals are prohibited—a rule that the convention could not fail to codify³⁵—the countermeasures to which an injured State could lawfully resort would not contravene the general (and practically universal) obligation to settle disputes by peaceful means as embodied in Article 2, paragraph 3, of the Charter of the United Nations. Undoubtedly, lawful countermeasures are in principle bound to be “peaceful” by virtue of the prohibition of armed reprisals. The Special Rapporteur wonders, however, whether such a consideration dispels all doubts. Letting aside the question of the extent to which countermeasures would be compatible with that further requirement (of the same provision of Article 2, paragraph 3, of the Charter) that “international peace and security, and justice, are not endangered”,³⁶ the liberalization of countermeasures embodied in 1993 in the Drafting Committee’s formulation of article 12, paragraph 1 (a), would not be easy to reconcile with some of the existing dispute settlement obligations. The Special Rapporteur refers, for example, to such obligations as those spelled out in Article 33 of the Charter and those deriving, for any parties in a (real or alleged) responsibility relationship, from bilateral dispute settlement treaties or compromissory clauses. As regards the general Charter obligation, as spelled out in Article 2, paragraph 3, it is difficult to accept the notion that resort to a countermeasure *before* seeking a solution by one of the means listed in Article 33, paragraph 1, is compatible *de lege lata*, and should continue to be compatible *de lege ferenda* with that Charter provision.³⁷

65. The loss of credibility and effectiveness might affect even more seriously, in particular, treaties and compromissory clauses providing for the arbitration of legal disputes not settled by diplomacy (although one can hardly accept the notion that countermeasures qualify as part of diplomacy). A similarly negative effect would be created by the admissibility of prior recourse to countermeasures on the credibility and effectiveness of a jurisdictional link between the parties, deriving from their recognition “as compulsory *ipso facto* and without special agreement” of the “jurisdiction of the Court [ICJ] in all legal disputes concerning”: either “the existence of any fact which, if established, would constitute a breach of an international obligation”, or “the nature or extent of the reparation to be made for the breach of an international obligation”.³⁸

³⁵ See, for example, article 14 as proposed in 1992 and adopted by the Drafting Committee in 1993 (*Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 35, and *Yearbook ... 1993*, vol. I, 2318th meeting, pp. 140-141).

³⁶ This point was covered in the Special Rapporteur’s draft article 12, paragraph 3 (see *Yearbook ... 1992*, vol. II (Part One), document A.CN.4/444 and Add.1–3, p. 22).

³⁷ No one could seriously argue that since Article 33, paragraph 1, refers to disputes “the continuance of which is likely to endanger the maintenance of international peace and security”, many disputes arising in the area of State responsibility would not be of such a nature as to fall under the general obligation in question.

³⁸ Art. 36, para. 2, of the ICJ Statute.

66. It should not be overlooked either that by referring to “relevant” treaties only, paragraph 1 (a) of the Drafting Committee’s draft article 12 of 1993 would put into question—if it ever became law—the credibility and effectiveness of more than just a part of the existing and future *conventional* instruments of amicable dispute settlement. It would also cast an “authoritative” doubt over any existing rules of *general* international law in the area. Assuming, for example, that paragraph 3 of Article 2 of the Charter had become a principle of customary international law, would the survival and further development of such a principle not be affected by the provision of a codification convention authorizing any allegedly injured State to resort to countermeasures *ipso facto*, namely without any prior attempt at an amicable settlement? Does that principle have the merely negative function of condemning non-peaceful means? Does it not also contain—as the Special Rapporteur is inclined to believe—positive guidelines of a general scope with regard to the primacy of amicable means as well as “justice” and “international law”? Would an authorized disregard of available amicable means—means spelled out in the Charter itself—not affect the degree of justice of a solution? Assuming further that the survival of the general principle in question was not jeopardized, would paragraph 1 (a) of the text under review not jeopardize its further development?

67. The shortcomings of the “suspended” formulation of draft article 12 of part two are probably due, in addition to the great difficulty of the subject and the lack of available time, to the fact that that article was prepared prior to the consideration by the Drafting Committee of the proposals concerning the post-countermeasure dispute settlement provisions, namely, the provisions of part three of the draft articles. Debated in plenary at the same session of the Commission, the latter provisions were referred to the Committee rather late in that session, at a time when it was already debating draft article 12.

68. A further point that should not be overlooked in reviewing the subject matter at the forty-eighth session is the relationship between majority and minority views within the Drafting Committee. As clearly stated in 1993 in the report of the Chairman of the Committee, the majority of the Committee (as well as, the Special Rapporteur believes, the majority of the Commission) had pronounced itself in favour of the principle that prior recourse to dispute settlement means should be indicated in article 12 as a condition of lawful resort to countermeasures. It is to be wondered, therefore, how it happened that that majority’s position was not reflected in the formulation of the article. One explanation might be that the open-ended composition of the Committee, combined perhaps with the casual absence of some members, brought about a result in obvious contrast with the recognized majority view. The planning group should perhaps review, in the light of that experience, the drafting methods of the Commission.

3. POST-COUNTERMEASURE DISPUTE SETTLEMENT OBLIGATIONS (PART THREE)³⁹

69. With regard to post-countermeasure dispute settlement procedures, the Special Rapporteur finds somewhat satisfactory the provision of paragraph 2 of draft article 5 of part three as adopted on first reading at the forty-seventh session. By providing for a compulsory arbitration (on unilateral initiative) of any dispute arising following the

³⁹ See footnote 1 above.

adoption of countermeasures, that paragraph practically coincides with the second of the procedures that the Special Rapporteur had proposed in his draft of part three of the articles. The Special Rapporteur regrets, at the same time, that the same course was not adopted with regard to the first of the procedures that he had proposed, namely conciliation.

70. The said “loss” from the Special Rapporteur’s point of view is not adequately compensated by articles 1–5, paragraph 1, of the adopted text of part three, to the extent that those provisions only envisage procedures which are neither really compulsory nor all-binding. Most of those provisions do nothing more than suggest to the parties to resort to settlement procedures that, in any event, they are perfectly free to use, regardless of any mention thereof in an international instrument such as a future convention on State responsibility.

71. The adopted system could be improved significantly in two ways.

72. One way would be to turn the conciliation procedure envisaged in article 4, as adopted, into a compulsory procedure to which the injured State should be bound to submit prior to adopting countermeasures. The Special Rapporteur suggests, *mutatis mutandis*, a system similar to that of the 1969 Vienna Convention⁴⁰ (arts. 65 and 66). The condition of prior resort to conciliation would not apply, of course, to urgent, provisional measures.

73. Another way would be to add to the article on conciliation, as adopted, a paragraph similar, *mutatis mutandis*, to paragraph 2 of article 5. In other words, where countermeasures had been resorted to by an allegedly injured State, the target State would be entitled to promote conciliation by unilateral initiative.

4. ISSUES OF INTERIM PROTECTIVE MEASURES

74. Something more needs to be said at this stage— mainly but not exclusively within the framework of the pre-countermeasure dispute settlement problem—on the role that may or should be played by urgent protective measures. One must distinguish, in this respect, between provisional measures indicated or ordered by a third-party body and provisional measures taken by the injured State unilaterally. The Special Rapporteur is concerned here with the latter.⁴¹

75. As regards unilateral interim protective measures, resort thereto by the injured State is contemplated in the Special Rapporteur’s 1992 draft article 12 as an exception to that State’s obligation of prior recourse to available dispute settlement means. The injured State’s right to adopt unilateral interim measures was restrictively qualified—

⁴⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (United Nations, *Treaty Series*, vol. 1155, p. 331).

⁴¹ As regards the former, the general rules on the subject are the well-known Article 41 of the ICJ Statute and Article 40 of the Charter of the United Nations, both provisions using the expression “provisional measures”. In the Special Rapporteur’s proposals, interim measures by a third-party procedure were envisaged mainly in part three, namely, within the framework of post-countermeasure dispute settlement obligations. Under the proposed draft articles of that part, the third party called to operate with regard to a post-countermeasure dispute should be empowered, by the future convention, to order provisional measures. This would apply to the conciliation commission as well as to the arbitral tribunal or ICJ. Third-party indications or orders of interim measures were also considered, together with unilateral interim measures, in the 1992 proposal for article 12, paragraphs 2 (a) and (b).

under paragraph 2 (a) and (b) of the above-mentioned article—by two conditions. One condition was that the object of the measures should be the protective purpose which is inherent in the concept of interim measures. This requirement would be met, for example, by a freezing—as distinguished from confiscation and disposal—of a part of the allegedly wrongdoing State’s assets; or by a partial suspension of the injured State’s obligations relating to customs duties or import quotas in favour of the allegedly law-breaking State. The second requirement was that the injured State’s right to adopt interim measures could only be exercised temporarily, namely “until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure”.⁴²

76. Considering that the concept of interim measures of protection might prove to be too broad and imprecise—as rightly (although inconsequentially) pointed out by some members of the Commission in 1992 in the course of the debate—for the injured State’s right not to be abused, some further precision could have been spelled out in the paragraph by the Drafting Committee. One of the main hypotheses—but not the only one—where the adoption of interim measures would be justified would be, of course, that of a continuing breach.

77. Much as the future convention on State responsibility may ultimately succeed in defining interim measures and the conditions under which they may be lawfully resorted to, a high degree of discretionary appreciation would inevitably remain with the injured State. Three factors, however, should help to ensure a reasonable measure of restraint on the part of the injured State’s authorities. One factor should be an accurate, bona fide appreciation, by the injured State, of the alleged wrongdoer’s response to its demand for cessation/reparation. This criterion was expressed more than once, with regard to any kind of countermeasures, in the Special Rapporteur’s 1992 proposals. It was inherent in the general concept of “adequate response” from the allegedly law-breaking State (in draft article 11); and it also appeared in draft article 12, paragraph 2 (a), in the condition of good faith (on the part of that same State) in the choice and implementation of available settlement procedures. A second factor could have been—always within the framework of the 1992 proposals—the condemnation, in draft article 12, paragraph 3, of any measure (including an interim measure) “not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered”.⁴³ The third and most important factor would have been represented, within the framework of the said 1992 proposals, by the post-countermeasure dispute settlement system of part three of the draft articles. Any third-party body called upon to deal with the dispute under that part three (conciliation commission, arbitral tribunal or ICJ) should of course be empowered not only to order interim measures but also to suspend any measures previously taken by the allegedly injured State.

78. The 1993 and 1994 formulation of draft article 12 does not take any account of urgent interim, provisional measures. The fact that interim measures were not taken into consideration is, in the Special Rapporteur’s view, to be regretted. In resuming the elaboration of the 1993–1994 formulation of article 12, the Drafting Committee should in 1996, in the Special Rapporteur’s view, take due account of the fact that if interim protective measures were exempted—as suggested—from the requirement of

⁴² *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 22, para. 52.

⁴³ *Ibid.*

prior resort to dispute settlement means, that requirement would be far less restrictive of the prerogative of unilateral reaction than had been described by some participants in the debate on draft article 12 in the plenary, as well as in the Drafting Committee in 1992–1994. More considerate thought should be given, therefore, to the role of interim protective measures in the law of State responsibility. To dismiss the matter on the simple argument that interim measures are hard to define would not be appropriate, in the Special Rapporteur’s view.

79. There is much, in international law, which is vague or hard to define and can only be specified by the practice of States and international tribunals. In any case, the vagueness of the concept of urgent, interim protective measures was hardly a good argument against the prior resort to amicable means requirement that was being proposed. The vaguer the concept, the less severe would be the restriction of the allegedly injured States’ discretionary choice to resort to countermeasures. It is to be hoped that the matter will not be dropped again in 1996.

C. Proportionality

80. As indicated in his seventh report, the Special Rapporteur feels uneasy about the formulation of article 13 as adopted on first reading. While fully sharing responsibility for the presence, in that article, of a part of the reference to “the effects thereof on the injured State”,⁴⁴ the Special Rapporteur feels that the Commission should give more thought to that sentence and possibly cross it out.

81. As explained in the same report,⁴⁵ the degree of gravity of an internationally wrongful act—whether “delict” or “crime”—depends on a number of factors or elements to the variety of which the exclusive mention of the effects—and particularly of the effects upon the injured State—does anything but justice. Is it appropriate to limit oneself to the effects—and to the effects upon the injured State(s)—while leaving out such elements as: the importance of the breached rule; the possible presence of fault in any one of its various degrees (ranging from *culpa levissima* to wilful intent or *dolus*); and the effects upon the “protected object” such as human beings, groups, peoples or the environment? By singling out only the effects upon the injured State, does one not send to the interpreter (and States in the first place) a misleading message that may affect the proper evaluation of the degree of gravity for the purpose of verifying proportionality?

82. This preoccupation arises in particular with regard to *erga omnes* “delicts” and with regard to all “crimes”. In both areas there is far more than one injured State. Even more pointedly the problem arises in the case of “delicts” or “crimes” committed to the detriment of “protected objects” (human beings, groups, peoples or the environment) where an effect upon one or more injured State(s) may well be non-existent or very difficult to determine. The Special Rapporteur trusts that more thought will be given at some stage to the considerations developed in his seventh report.⁴⁶ The 1995 debate concentrated so much—and rightly so—on the crucial issue of the consequences of the internationally wrongful acts singled out as “crimes” in

⁴⁴ *Yearbook... 1995*, vol. II p. 13, (Part One), document A/CN.4/469 and Add.1–2, p. 13, para.

46.

⁴⁵ *Ibid.*, pp.13–14, paras. 47–54.

⁴⁶ *Ibid.*, paras. 50–54.

article 19 of part one that this important point on article 13 was not given all the consideration that, in the Special Rapporteur's view, it deserves.

83. That the above-mentioned points had not been the object of sufficient consideration seems to be confirmed by the fact that the arguments against the proposed deletion of the clause "the effects ... on the injured State" were only those summed up in 1995 in the report of the Commission to the General Assembly.⁴⁷ After erroneously reducing the criticized deletion proposal to "the case of crimes", that paragraph reads:

... It was emphasized that there were precedents which militated in favour of the retention of the clause in the case of delicts, such as the *case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*,⁴⁸ and that the lack of precedent in relation to "crimes"—a newly invented concept—in itself indicated a dearth of interest on the part of States.

84. Apart from the fact that the deletion was being proposed by the Special Rapporteur for both delicts and crimes, these arguments are beside the point. They seem to disregard completely: (a) the fact that the deletion was intended not to suppress the factor of gravity represented by the effect on the injured State but merely to avoid, by stressing that factor alone, neglecting a number of objective and subjective factors, the latter including *culpa* and *dolus* especially; (b) the fact that one of the main purposes of the proposed deletion was to take account particularly of *erga omnes* delicts as well as of all crimes, a hypothesis of which the *Air Service Agreement* case could hardly be considered as an example; (c) the fact that another major purpose of the proposed deletion was to deal with the case of delicts or crimes the victim of which was not—or not so much—the injured State(s) but some "protected object", such as the law-breaking State's own population or some common object or concern of all States.

⁴⁷ Ibid., vol. II (Part Two), p. 54, para. 300.

⁴⁸ UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 417.