Agenda item 162: Report of the International Law Commission on the work of its fifty third session - State Responsibility

Statement by Dr. P. S. Rao, Additional Secretary (L&T), Ministry of External Affairs on November 1, 2001

Mr. Chairman,

Allow me at the outset to extend to you our hearty felicitations on your election as Chairman of the Sixth Committee. Our felicitations are also due to other Members of the Bureau. It is with great pleasure we acknowledge the excellent work done by the International Law Commission this year which completed its second reading on the Draft articles on responsibility of States for internationally wrongful acts. Every member of the Commission contributed effectively towards this end and we sincerely appreciate the same. In particular we wish to congratulate the Chairman of the ILC, Mr. Peter Kabatsi for his qualities of leadership and wisdom which guided the work of the ILC this year. To Mr. James Crawford, the Special Rapporteur on State Responsibility goes our high praise for he enabled the Commission to complete the second reading in just four years, while the first reading in comparison took more than forty years. We are equally grateful to Garcia Amador, Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz who served the Commission in the past with distinction and notable contribution to the subject of State Responsibility as Special Rapporteurs.

We have been commenting on the various aspects of the law of State Responsibility each year and at each stage of the development of the Draft Articles. Accordingly, it is with pleasure that we welcome the Draft Articles as a whole which deserve careful and in-depth consideration. It is a matter of satisfaction to note that the current set of draft articles finalised by the Commission took into consideration recent relevant case law of the International Court of Justice and other tribunals and legal bodies, together with the jurisprudence of the human rights courts and committees. A successful integration of the trends and decisions necessarily involved careful craftsmanship and time-consuming work.

The draft articles now finalised have several merits. They are trimmed and the concepts involved are made less complicated for application. Some of the most difficult articles have been refashioned and they exhibit sensitivity to the needs of the people of States in difficult circumstances. The draft articles over a period of time also dealt with some of the most complicated and controversial subjects of international law. Mention may be made of at least some: the distinction between composite and individual wrongful acts, the continuing and completed wrongful acts, the exhaustion of local remedies, details of which are still the subject of discussion in the Commission under the topic of 'diplomatic protection', the concept of State crimes, circumstances precluding wrongful acts, particularly compliance with obligations arising under peremptory norms of general international law or *jus cogens*, the concept of countermeasures, the relationship between the draft articles and rules specially agreed upon by States, *lex specialis*, in respect of specific aspects or areas of international law, for example, those relating to the law of human rights,

international trade law or environment, law of the sea, and the primacy of obligations under the Charter of the United Nations.

In addition, the Draft Articles no longer provide for the concept of State crimes. But its deletion does not leave any gap as the Commission now has brought in in its place the concept of serious breach of an obligation arising under a peremptory norm of general international law (Article 40). A breach of such an obligation is serious according to article 40(2) if it involves a gross or systematic failure by the responsible State to fulfil the obligation. In this connection, the general commentary under Chapter III and to Article 40 is worth noting for its explanation of the concept of serious breaches and for providing some useful examples of peremptory norms of general international law. However, the Commission rightly noted that it is not appropriate to set out examples of such norms in the text of Article 40 itself anymore than it was in the text of Article 53 of the Vienna Convention on the Law of Treaties. In this connection, mention was made of prohibition of aggression, slavery and slave trade, genocide, and racial discrimination and apartheid, which were mentioned in the commentary to Article 53 of the Vienna Convention. In addition, the Commission's commentary notes that the prohibition against torture, and certain basic rules of international humanitarian law have justifiably acquired the status of a peremptory norm. Finally, the Commission also mentions in its commentary the obligation to respect the right of self-determination as one that deserves mention as an example of a peremptory norm. We appreciate the guidance given by the Commission in illustrating the concept of serious breaches contained in Article 40. It may however be noted that it is our view that the right of self determination essentially involved the right of people to seek independence from colonial rule and that no right of secession is authorised in the exercise of this right in the post-colonial era.

Mr. Chairman,

Moving further, we may note that the earlier concept of differently injured States, which was not well developed, was not pursued. However, the limits within which a State other than the injured State could invoke the responsibility of a State are now identified (Article 48). Such States could only seek cessation of the wrongful act and performance of the obligation, in the interest of the injured State or the beneficiaries of the obligation breached. The case of the plurality of injured States is also separately covered. However, each injured State is entitled to recover by way of compensation only that much of the damage that it itself suffered and no more (Article 47).

In respect of countermeasures, Article 49 states the objective involved which is to induce a State to comply with the obligation and not to punish or seek vengeance. They should also be reversible as far as possible after the cessation of the wrongful act and necessary reparation is made. Article 50 refers to obligations with which the State taking countermeasures should comply: that is, obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations, protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, and other obligations under peremptory norms. In addition, the State taking countermeasures is also required to honour any obligations it has under applicable dispute settlement procedures in force between it and the responsible State; and to respect the inviolability of the diplomatic or consular

agents, premises, archives and documents. In addition, under Article 51, countermeasures taken must be proportional to the injury suffered taking into account the gravity of the wrongful act and the rights in question.

For lack of sufficient consensus, the draft articles concerning countermeasures do not specify the need to seek resolution of the dispute by peaceful means as a precondition for invoking countermeasures. However, Article 52(3)(b) provides for suspension of the countermeasures already taken if the dispute is pending before a court or a tribunal which has the authority to make decisions binding on the parties. Similarly, in such circumstances countermeasures may not be taken at all.

The draft articles categorized under Part Two and Part Three may be viewed more as a progressive development of international law than as a measure of codification. This is particularly so in the case of Chapter III of Part Two and Part Three. Another feature in the draft articles is that they do not deal with countermeasures involving use of force but only with non-forcible countermeasures. Further, the Commission rightly did not provide for the concept of punitive damages, as it does not have any support in practice. The consequences of State responsibility are in our view, clearly elaborated and explained. Except for the obligation of cessation, these consequences like compensation, satisfaction, and interest are essentially options available to States and they are at liberty to indicate the manner and the method of settlement of claims involved. It may also be noted that the concept of integrated obligations is referred to in article 49(1) (a). This is a concept referred to in the Vienna Convention on Law of Treaties as applicable in the case of a special category of treaties, like the one governing Antarctica. It is assumed that these obligations would rarely come into play.

It is clear that the draft articles address only secondary rules of State responsibility. These would come into play only in case an internationally wrongful act as defined by a primary rule is committed. In this connection we may note in parenthesis that international law is still striving to achieve the type of universality that is essential. Accordingly, sufficient progress must be made on several themes: the right to development, transfer of technology on fair and equitable basis, more equitable regime to govern world trade and intellectual property rights, and establishment of a more universally accepted system of international criminal justice, designation of conduct involving the use of weapons of mass destruction and nuclear weapons as a war crime, and inclusion of the offence of terrorism as a crime against humanity. Under the circumstances, concepts of *jus cogens*, *erga omnes* obligations and the concern for serious breaches of obligations of a peremptory norm under general international law may remain distant focal points for the majority of States to rally around. On the other hand, there is a fear that these concepts could be used by more powerful States to justify debilitating sanctions against less powerful and weak and poor nations which might aggravate their sense of deprivation and injustice.

In conclusion, we support the view, endorsed by the Commission, that given the complexity of issues covered and the delicate balance that is achieved on the total package in the first instance, the General Assembly should express its appreciation to the International Law Commission (ILC) for the job well done and take note of these

Draft Articles. After leaving sufficient time for study and reflection on the Draft Articles, States may consider adopting them in a suitable form.

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