

STATEMENT BY MR. NIRUPAM SEN, PERMANENT REPRESENTATIVE, ON
AGENDA ITEM 78: RESPONSIBILITY OF STATES FOR INTERNATIONALLY
WRONGFUL ACTS AT THE SIXTH COMMITTEE OF THE 62ND SESSION OF THE
UNITED NATIONS GENERAL ASSMEBLY ON OCTOEBR 23, 2007

We thank the Secretary General for his useful Report containing compilation of cases in which international courts, tribunals and other bodies have referred in their decisions to the International Law Commission's State responsibility articles and commentaries, including the draft articles provisionally adopted from 1973 to 1996.

We also take this opportunity to acknowledge once again the excellent work done by the International Law Commission on the Draft articles on responsibility of States for internationally wrongful acts. We wish to express our appreciation to Mr. James Crawford, the Special Rapporteur on State Responsibility for enabling 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 the other four Special Rapporteurs for their notable contribution to the subject of State Responsibility.

We have commented on the various aspects of the law of State Responsibility at each stage of the development of the Draft Articles. The draft articles have several merits. They are concise and the concepts involved have been made less complicated for application. Some of the most difficult articles have been refashioned and they exhibit sensitivity to the needs of States in difficult circumstances.

The Draft Articles no longer provide for the concept of State crimes. The Commission has brought in its place the concept of serious breach of an

obligation arising under a peremptory norm of general international law. The commentary to this article gives several illustrations of such norms. The complexity of the concept of countermeasures and synergies between the countermeasures section and provisions on attribution of state conduct, the timing of an international law breach, circumstances precluding wrongfulness, the remedies available for injuries and standing to invoke responsibility, all merit a mention as some of these articles incorporate what has been termed as constructive ambiguities.

Mr. Chairman,

Some speakers have argued in favour of a Convention or at least a Resolution. The argument regarding not taking any steps that could unravel the careful balance in the text should make us cautious on both these ideas. Additionally, it is worth recalling that there are now only six from the original twelve crimes that had been identified and included in the draft Code and the concept of crimes has been replaced by serious breach of obligation. It also needs to be remembered that colonialism and serious harm to the environment were also listed in draft Article 19 on State Responsibility adopted in the first reading by the ILC. It was argued by developed countries that these were only of historical relevance. The current relevance of the latter is becoming more acute by the day as we are seeing in the UN and shall see at Bali. After the warmth of debate on State crimes, it was a little anti-climactic that we ended with *jus cogens* and *erga omnes*. In the case of such peremptory general international law obligations, these are not very different from those applicable to other serious breaches except for the obligation to bring the breach to an end. But this was a natural and reasonable conclusion and hence we can see that the careful balance we have referred to is a delicate balance reached with difficulty and demanding future caution.

Mr. Chairman,

The international structure is still decentralized and we cannot rush ahead of institutional developments and the development of the international legal system without risking counterproductive effects. Jennings had spoken of the "inadequacy of the international legal system" and said that we should not float on "flights of erroneous fancy from the Nuremberg Tribunal" and delude ourselves that we "are developing international law". Therefore, Mr. Chairman, we are of the view that at this stage it will be prudent to maintain the careful balances in the text that the ILC struggled for years to achieve. A subject that took more than forty years to fructify would best serve the needs of international community, to quote from David Caron, only if "it is weighed, interpreted and applied with much care". In this regard, for the present, we are happy to note

the reception of the ILC's articles on State Responsibility into international law through State practice, decisions of courts and tribunals and writings of jurists.

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