State responsibility

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ILC Draft Articles on. Australian Views.

Following are extracts from statements by the Legal Adviser, Mr E Lauterpacht QC, in the Sixth Committee of the United Nations General Assembly at its 31st and 32nd Sessions on the draft articles prepared by the International Law Commission on State Responsibility.[29]

At the 31st Session he said:

> The time of the Commission on the subject this year—consisting of 21 out of 54 open meetings—has been devoted wholly to four draft articles. In assessing the role of these articles in the process of codifying and progressively developing the law of State Responsibility, we must recall the overall perspective into which they fit. The Commission has had the topic of State Responsibility on its agenda for 13 years, though discussions of draft articles have taken place only in the years 1973, 74, 75 and 76. In these years the ground covered has consisted of Chapters I, II and III of Part 1. This leaves for future consideration two more chapters of Part 1, plus the whole of Part 2 and the possibility of a Part 3. At the pace at which the Commission is now proceeding, it is evident that the completion of the Commission's initial survey of the whole subject is still some, if not many, years distant. Looking at the situation from the detached vantage point of those who are not directly involved in the Commission's work, my Delegation finds itself asking whether, in these circumstances, there is scope for drawing a distinction between essential and less essential provisions.
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> The articles adopted this year deal with four matters. First, Article 16 defines a breach of an international obligation. Second, Article 17 asserts that the origin of an international obligation (a) does not prevent a breach of an international obligation from being a wrongful act and (b) does not affect the international responsibility arising from that breach. Third, Article 18 elaborates in some detail the temporal element in the operation of the law. Finally, Article 19 propounds the distinction between international delict and international crime.
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> With the highest respect to the Commission, my Delegation believes one may question whether these four articles are essential to the codification and progressive development of the law relating to State Responsibility. We ask the question because we fear that the better may become the enemy of the good; and that a concern to spell out fully every detail of the law of State Responsibility may lead to so extended an operation that either it will never be completed or, if completed, it may contain so much debatable material as significantly

29. Texts supplied by the Department of Foreign Affairs, Canberra.

to impair the general acceptability of the final product, whatever form it may take.

Let us look more closely at the articles in question. First, Article 16. This declares that a breach of an obligation consists of conduct which is not in conformity with that obligation. It is difficult to see this provision as other than a statement of the obvious. Indeed, even the Commission, in paragraph 2 of the Commentary on the Article, concedes the essentially formal character of the provision. No suggestion is made that there is any legal doubt regarding this single point. However, the Commentary is then expanded by four paragraphs which treat as if it were non-controversial a substantive point for which this is not really the proper place. This substantive point is that of international responsibility for breaches of contracts concluded between States and foreign persons. My Delegation would not wish to consider so important an element as this in the codification of the law of State Responsibility in isolation from other aspects of wrongful acts by States. For that reason, beyond expressing general hesitation about the views expressed in the Commentary, I shall not say more about that topic at this time. For immediate purposes, all that I ought to point out now is that the Commentary on Article 16 contains nothing which suggests a real need for the inclusion of the Article; and yet it occupies three pages of the Report.

The same is true of the content of Article 17, which deals with the irrelevance of the origin of the international obligation breached. Again, it is really a non-question. Once more, the Commission has recognised this. Paragraph 8 of the Commentary points out that 'international jurisprudence has not often had occasion to consider explicitly the question whether the formal origin of the international obligation breached by an act of the State has a bearing on the characterisation of that act as intentionally wrongful'. Indeed, that is the case. And one is left asking whether the decisions in any of the cases which are mentioned in the relevant paragraphs of the commentary would in any way have been affected if Article 17 in its present form had at the material time stood as part of established international law. Yet 18 pages of the Report are devoted to the point, as were three meetings of the Commission.

Let us look next at Article 18. This deals with the temporal element—the requirement that an obligation be in force at the time that its content is relevant to the coming into existence of the responsibility of a State. In itself, this point requires no more restatement than did the previous two. One may perhaps accept that there is room for debate on the content of paragraph 2, which deals with the effect of subsequent peremptory norms of international law. But the effect of *jus cogens* in this particular connection has not as yet formed part of State experience and the prospects of its doing so in the future are slight. In short, its practical importance is either nil or limited. And, as for the treatment in paragraphs 3, 4 and 5 of continuing acts,

composite acts and complex acts, we are here in precisely the area in which we can rely on States and the judiciary to use their powers of logic and common sense. Yet the Commission develops the paragraphs of this Article in a Commentary of 19 pages to which it devoted five meetings.

Before I turn to a comment upon the fourth of these provisions, namely Article 19, I should emphasise that these observations are not simply an extension of the plea which my Delegation made last year for economy. While we obviously must be concerned to prevent waste, the problem of which I am speaking now is not exclusively a financial one. Ambassador Baroody wisely reminded us the other day that we ought not to be concerned about a few hundred thousand dollars here or there when all the world spends such vast amounts on armaments. And, as I have already been at pains to stress, and repeat again, the issue is not one of the scholarly value of the Commission's work. This is beyond question. The problem is one of human limitation—human frailty, if you will. Time is not unlimited—not because time is expensive but because life is not endless. The longer the period over which we stretch the process of the codification and progressive development of any subject, the less likely we are to achieve a successful conclusion. This is partly because the personnel involved may change; partly because it becomes difficult to see the subject as a whole, and consequently because the mind cannot suitably relate one topic to another.

This said, I can turn to the fourth article on State Responsibility, namely, Article 19. This develops the distinction between international delicts and international crimes. My main concern with this Article is not that there is anything immediately and obviously wrong in theory with distinguishing between crime and delict. My concern is that the degree of attention which is being devoted to it here is premature and inappropriate. The examination of the subject is necessarily incomplete. And the six meetings of the Commission and the 66 pages of Report devoted to the subject have the effect of diverting the attention of the Commission and of States from more urgent and practical aspects of State Responsibility.

All of us here have some understanding of the traditional ambit of the concept of State Responsibility. By training and experience, we have come to associate the subject with the delictual responsibility of the State. We are, of course, aware of the important development of the concept of individual responsibility for criminal acts in the international sphere. We are acquainted also with the discussion surrounding the identification of 'interest' (in the technical sense) in the pursuit of international remedies.

But still we are bound to test the Commission's present proposals by posing one basic question: what is the purpose of establishing the distinction between crime and delict in the terms which the Commission now seeks to press on us? And this controlling question

cannot be answered until we are able satisfactorily to deal with the following question: what is the consequence of identifying a particular act or omission as an international crime rather than as an international delict? What social purpose (and in speaking of 'social purpose' I mean 'purpose in terms of our international society') is achieved by treating an act as a crime rather than as a delict?

In the sphere of national law we are accustomed to the idea that the criminal law, while existing (in the words of the Commission) to protect fundamental interests of the Community, also possesses the following characteristics. First, it reflects to a large degree the prevailing moral views of the society in which it operates. Second, its sanction is markedly different from the sanction for delict. Crime carries with it the notion of punishment rather than of reparation. Thirdly, the concept of crime covers a wide range of human behaviour and thus seems to control a significant proportion of the daily conduct of those who are subject to it.

The translation of these elements into the international sphere is far from easy.

First of all, we have the difficulty of identifying the views of the international community in a sufficiently objective manner to identify with confidence those acts which do, and those which do not, offend the moral sense of our society. This is the sphere into which the Commission has entered in paragraph 3 of Article 12. The Commission has pointed to some of the kinds of act which may (let us note the 'may') constitute crimes. It has mentioned aggression, denial of the right of self-determination, the practices of slavery, genocide and *apartheid* and finally 'massive pollution of the atmosphere or seas'. But are these really the most morally offensive acts in our present community? If we are to have a concept of State crime, would it not have been more down to earth if some reference had been made to the violation of the standards of humanitarian conduct in time of hostilities or to failure to comply with standards of conduct prescribed in the fundamental United Nations Conventions on Human Rights—such as, to take but one example, widespread use of torture? We must, in fact, recognise that in the international community it will be difficult, if not impossible, to secure agreement on the definition of morally reprehensible conduct. Any significant attempt to determine what prohibited acts are criminal and what are not is bound to lead to the conclusion that some are not criminal; and every time that we, the community, concluded that a particular line of conduct, though prohibited, was not criminal, we would, by the mere making of the contrast, weaken the value of the prohibition of the conduct deemed not to be criminal.

And what, we must ask ourselves, would we be getting in exchange? What would be the consequences of the commission of an international crime? In answering this further question, we must recall one basic element in the Commission's approach to the subject. The

Commission has concerned itself only with the responsibility of States for the commission of crimes. It has not concerned itself with the responsibility of individuals. At least with individuals, with natural persons, we are acquainted with the concept of personal sanctions: of corporal punishment, imprisonment and even execution. But those punishments are inapplicable to States. Or are we now to contemplate the introduction of a concept of imposed national death? In truth, the range of sanctions available against States involves either pecuniary payment or internationally controlled sanctions of an economic or even forcible character. In so far as the Commission's proposals carry with them the idea that a State may attract international reaction for, say, significant violation of domestic human rights, the limitation thus placed upon absolute concepts of sovereignty is to be welcomed. But in practice it is difficult to see what moral or social purpose is achieved by imposing upon a State a fine for committing, say, genocide or *apartheid*. Is the conscience of mankind to be salved by treating these matters on the same plane as the sale of adulterated milk?

There is a further difficulty. In the national sphere the application of the criminal law is basically under the control of the judiciary, which applies objective criteria in an established and reasonably predictable manner. In the scheme apparently implicit in what the Commission now proposes—as was indicated in the highly informative speech of my very learned friend Ambassador Sette-Camara—criminal sanctions might in large measure be in the hands of political organs of the United Nations. This notion is not likely to commend itself to many of us in this Committee—if only because there is little point in refining the content of the law if it is then to be applied by organs in which legal considerations often play only a secondary and subordinate role.

These reactions to the Commission's proposals may be seen as being rather negative in character. In a sense this is so. One reason for this is that we are being invited to consider the matter on such an incomplete basis. In a significant sentence in paragraph 53 of the Commentary on Article 19, the Commission said that it 'felt it must resist the temptation to give any insight as yet even in the commentary to the present article, into what it thinks should be the regime of responsibility applicable to the most serious internationally wrongful acts, namely those that it has decided to call "international crimes"'. And later in the same paragraph the Commission even went so far as to say that the distinction which it now seeks to draw between international crime and international delict 'by no means implies—quite the contrary'—that when the Commission moves on in its work 'it will conclude that a uniform regime of responsibility exists for the more serious internationally wrongful acts and another regime for others'.

The use of language of this nature—and the need to make reserva-

tions of such width—suggests that in this Article the Commission has embarked on a subject which should not have been presented for public scrutiny until the Commission had examined it comprehensively and was in a position to prepare an intergrated set of articles which could then be examined as a whole. If the wish of the Commission was to keep open the possibility that a distinction might be needed between traditional concepts of delict and evolving concepts of crime, this could have been quickly and simply done in a few words of reservation in an uncontroversial draft article and a page or two of uncontroversial explanation. As it is, the Commission is in effect inviting this Committee to approve a basic distinction of some assumed importance without either this Committee, or the Commission itself, having had an opportunity fully to assess the implications of the proposal. I venture to suggest that the time has not yet come for this Committee to express any approval of the Commission's treatment of this matter and that it would be wrong for us to do so.

There is another point which must be made in connection with the commentary of the Commission on this Article. In extending the discussion of State Responsibility in this way, the Commission has adopted methods of argument upon which my Delegation is forced to express considerable reservation. This is not the moment to enter into close scrutiny of the actual technique of reasoning adopted in the Commission's comments. But I feel bound to observe that, in expounding the existence of a particular rule of law, that is, stating the law *de lege lata,* the Commission appears to have been led into adopting the technique of placing one thin argument upon another, apparently on the assumption that propositions which are not individually persuasive may, if sufficiently repeated in a variety of ways, assume the dimensions of law. If one were to seek a single word to describe this process, it might be 'lamination'. No doubt such a process has its value in the plywood industry, but to use this word here in fact endows the process as used by the Commission with a persuasive quality which it does not possess. Whether it can, to good long-term effect, be carried into the production of rules of international law is an entirely different question. My Delegation would wish to emphasise that silence by us or by others on this point in this debate should not be construed as subscription to the mode of identifying an existing rule of law employed in this part of the Commentary.

Mr Chairman, I return to the question from which I started: Is it not possible in the work of the Commission on the subject of State Responsibility to distinguish between the essential and the inessential? There is a central core in the traditional area of State Responsibilty which, as this Committee has determined, is urgently in need of codification and, perhaps, of progressive development. It does no harm to descend from the esoteric to the elementary and to recall the subject-matter of this core—such familiar and friendly items as (1)

nationality of claims, (2) exhaustion of local remedies, including the place of the Calvo clause, (3) the allied concepts of non-discrimination and the minimum standard, (4) the role of waiver by injured nationals, (5) responsibility for breach of State contracts, (6) exceptional factors which may affect liability, such as *force majeure, ordre public*, or considerations of national security, and (7) the consequences of wrongful acts, including the calculation of damages and the extent to which such acts may lead to valid legal effects. These are some of the central elements which we commonly associate with the law of State Responsibility. These are the questions which are practical, relevant and ripe for codification. Until we reach them we are merely nibbling at the fringes of the subject; and when we do reach them we shall find that they are both difficult and time-consuming. That, however, is no reason for putting them off. My Delegation would respectfully urge the Commission to concentrate its attention on those essential problems, leaving for a later date when the Commission's agenda is less heavily burdened, if that should ever be the case, the development in a single comprehensive exposition of the distinction between international delicts and international crimes.

Mr Chairman, though I have spent quite a lot of time on the chapter on State Responsibilty and, in particular, on Article 19, my reason for doing so will, I believe, be well understood. My concern, as I said earlier, is that the relationship between this Committee and the International Law Commission should not be seen as purely formal. Items on the agenda of the Commission are in fact the subject of a trilateral consideration—by the Commission, by States collectively in this Committee and by States individually. The fact that much that is said in this Committee can be expressed in individual written communications by States does not replace the need for discussion in this Committee. And, since individual contributions to the discussion cannot, if they are not to be superficial, range over every topic, it is desirable that they focus on some particular issue which raises questions of method and approach. Hence my concentration on Chapter III and especially Article 19. This concentration must not in any way be seen as suggesting any lack of importance in the chapters on the Most Favoured Nation Clause, State Succession in Respect of Matters Other than Treaties and the Non-navigational Uses of International Watercourses. Even so, I am aware that there is much more that could be said in elaboration of the position that my Delegation has taken and that those who read our statement may identify some restraint in our approval of the Commission's work this year. In a sense, this is true. But I am sure that the members of the Commission do not desire fulsome or uncritical praise. As they will appreciate, our observations are intended only to be constructive. If it has not been possible fully to accept the elaboration or reasoning of the Commission's comment on Article 19, it is not because there is any

wish on our part to impede the work of the Commission. Rather the reverse. Our remarks stem from a devotion to the Commission collectively and a respect of the members individually—of which those who know Australia's established position in these matters, and my own personal views, will be well aware. More than that, our observations flow from a profound concern with the nature and future of the international legislative process. We wish the Commission's work to proceed rapidly and effectively, dealing with matters where the product of the Commission's labour will have some specific and identifiable effect; and, conversely, leaving aside the pursuit of the marginal, the unreal or the unattainable. We are, moreover, acutely conscious of the delicacy of the choice which the Commission must make between, on the one hand, unadventurous restatement and, on the other, the blazing of an innovative, forward-looking and educational trail.

At the 32nd Session Mr Lauterpacht said:

My Delegation hopes that it is not incorrect in its understanding that the main function of the distinction drawn in Articles 20 and 21 between obligations 'of means' and obligations 'of result' is to identify those obligations to which the rule of exhaustion of local remedies applies. If we were to observe that the distinction appears to us to be more theoretical and recondite than seems necessary in a codification of the law of State Responsibility, we would be in danger of repeating much of what we said last year, and there seems little point in doing that. On the other hand, we consider that for a matter which occupies so large a place in international practice and jurisprudence, the substantive rule relating to the need to exhaust local remedies is stated at too abstract a level of generality. While it is true that the basic proposition stated in such broad terms in Article 22 is followed by an elaborate discussion of pertinent authority, that discussion serves only to highlight the lack of detail in the stated rule. Naturally, we note with respect the statement by the Commission in paragraph 60 of Chapter II that it had taken the view that the text adopted should be confined to a general statement on the exhaustion of local remedies. But we observe that no reasons are given for this conclusion, which is far from being one of self-evident validity. When we recall the Commission's statement in paragraph 17 of Chapter II of the Report that the draft articles under study 'are cast in such a form that they can be used as the basis for concluding a convention if it is so decided', we are led to the view that the work of expressing in the form of articles the solutions to the manifold problem of exhaustion of local remedies could be taken further. This should be preferred to the pursuit of some of the more theoretical aspects of the subject.

My Delegation attaches great importance to Article 22 because, of the articles so far elaborated by the Commission on State Responsi-

bility, this Article is the one with the most obvious and immediate practical impact. That is not to say that other articles, principally those in Chapter II on the attribution of conduct to the State, are lacking in value. Far from it. But we made our views on Chapter III clear last year; and we feel that when the Commission does reach topics of immediate and real practicality, it should deal with them in suitable detail.

And, it should be added, valuable though the Commentaries are as an academic exposition of some of the underlying theoretical considerations, they have left unprobed at least one of the more delicate and difficult problems which call for solution. The omission which particularly comes to mind relates to one aspect of the identification of situations where the rule is that remedies need not be exhausted because there are no remedies to exhaust. The problem is approached in the comments contained in paragraphs 47-51 of Chapter II. But the question which is not expressly covered is whether a remedy can be deemed unreal (and therefore as not requiring exhaustion) solely on the basis of an opinion of a local lawyer. Obviously, it would not be reasonable to expect the Commentary to cover every single problem that can arise. However, the problem provides a test of the adequacy of the wording of Article 22. The only relevant words there are: ' . . . if the aliens concerned have exhausted the effective local remedies available . . .'. In short, the process of codification of the rule on the exhaustion of local remedies appears to have stopped short at the addition of the adjective 'effective' to the restatement of a rule the existence of which has never been in doubt.

Another aspect of the problem which is left unresolved by the generality of the formula in Article 22 is whether a remedy is 'effective' if its operation is affected by unreasonable delay in the dispensation of justice. Some indication of a possible answer to this question may be found in Article 41(1)(C) of the UN Covenant on Civil and Political Rights and Article 14(7)(A) of the International Convention on the Elimination of All Forms of Racial Discrimination. Both these Articles, while requiring the exhaustion of legal remedies, provide for an exception 'where the application of the remedies is unreasonably prolonged'.

My Delegation earnestly hopes that the Commission will be able, when it returns to the second reading of the Article on legal remedies, to grapple in greater detail with the expression in codified form (as opposed to elaboration in the commentaries) of some of the detailed aspects of its application.

State responsibility

Diplomatic protection. Dual nationality. Military service for Australian citizens of Greek origin.

On 17 November 1976 the Minister representing the Minister for Foreign

Affairs in reply to a request for further information concerning the obligation of Australian citizens of Greek origin to do military service in Greece read the following reply in the Senate:[30]

> Australia is party to the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.[31] Article 4 of that Convention provides that a state may not afford diplomatic protection to one of its nationals against a state whose nationality such a person also possesses. The Australian Embassy gave what consular assistance it was able to give to the person concerned.
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> Persons of Greek descent who become Australian citizens through a period of residence or are born in Australia do not normally lose their claim to Greek citizenship. While resident outside Greece they are exempted from the military service obligations applicable to residents of Greece and for visits can obtain exemptions . . .

State responsibility

Diplomatic protest. Appropriateness of. Citizenship criterion. Torture of Sheila Cassidy.

On 2 March 1976 the Minister representing the Minister for Foreign Affairs was asked the following question upon notice in the Senate:

> Did the Australian Government join forces with the British Government in lodging a protest with the Chilean Government over the torture inflicted on Sydney doctor, Sheila Cassidy, by Chilean secret police?

The Foreign Minister provided the following answer:[32]

> No. Although Dr Cassidy spent ten years in Australia a couple of decades ago and completed her first medical degree here, she is not a citizen of Australia but of the United Kingdom. It was therefore appropriate for her case to be taken up with the Chilean authorities by the Embassy of the country of her nationality.
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> The Government condemns torture under any circumstances whether of an Australian or citizen of any other country.

30. S Deb 1976, vol 70, 2030.
31. 179 LNTS 89.
32. S Deb 1976, vol 67, 348.